South Carolina Law Review

Volume 60
Issue 5 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 6

Summer 2009

Reconciling the South Carolina Death Penalty Statute with the Sixth Amendment

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RECONCILING THE SOUTH CAROLINA DEATH PENALTY STATUTE WITH THE SIXTH AMENDMENT

I. INTRODUCTION

Capital punishment cases, more than any other, require the intense protection of a defendant's constitutional rights. Such intense protection is required because they "involve[] an awesome decision: the determination of when the State should deliberately take the life of a particular human being."[1] The legal system must protect individual constitutional rights to prevent the State from abusing this incredible power. Furthermore, the nature of the death penalty itself makes it imperative that defendants receive the fullest extent of constitutional protections possible.[2] By its very nature, "[t]he death penalty is a uniquely final, irreversible form of punishment."[3] Once the State carries out a death sentence, it becomes impossible to compensate the victim or to otherwise rectify the sentence if the State imposed it erroneously. Therefore, when defendants are on trial for their lives, the legal system must strive to ensure that their constitutional rights are protected.

South Carolina's death penalty statute, South Carolina Code section 16-3-20, denies defendants who plead guilty to murder the option of a jury trial to determine the existence of any aggravating circumstances that could make them eligible for the death penalty.[4] This effectively denies defendants an important constitutional right under the Sixth Amendment.[5] Defendants have a right for a jury to determine the existence of any facts, except for prior convictions, that can enhance their sentences "beyond the . . . statutory maximum" that would otherwise be imposed if the facts did not exist.[6] This includes the right for a jury to determine the existence of any aggravating circumstances that could subject a defendant to the death penalty as opposed to life imprisonment, the statutory maximum sentence for murder absent any aggravating circumstances.[7] Even when defendants plead guilty to murder, they retain this right to a jury trial at the sentencing phase to determine the existence of any aggravating circumstances that they did not admit and that could enhance their punishment from life imprisonment to death.[8]

In light of recent decisions from the United States Supreme Court, the South Carolina death penalty statute, section 16-3-20, is unconstitutional because it

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1. F. Patrick Hubbard et al., *A "Meaningful" Basis for the Death Penalty: The Practice, Constitutionality, and Justice of Capital Punishment in South Carolina*, 34 S.C. L. REV. 391, 414 (1982).
2. *See* LINDA E. CARTER ET AL., UNDERSTANDING CAPITAL PUNISHMENT LAW 19 (2d ed. 2008).
3. Hubbard et al., *supra* note 1, at 582.
4. S.C. CODE ANN. § 16-3-20(B) (2003).
5. *See* discussion *infra* Part III.A–B.
6. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).
7. *See* Ring v. Arizona, 536 U.S. 584, 609 (2002).
8. *See* Blakely v. Washington, 542 U.S. 296, 303–04 (2004).

denies defendants who plead guilty to murder of their right for a jury to determine the existence of any aggravating circumstances that could enhance their maximum punishment from life imprisonment to death.[9] For section 16-3-20 to be constitutionally acceptable, the legislature needs to amend the law to allow the trial judge to impanel a jury at the sentencing phase to determine the existence of aggravating circumstances.[10] At the same time, however, any amendment needs to take into consideration evidentiary issues that could arise in a separate sentencing phase to determine the existence of aggravating circumstances.[11] The State has an interest in ensuring that jurors contemplating a sentence of death have all the necessary evidence in front of them. This requires that the State be able to present some evidence of the murder to satisfy juror expectations even if the defendant pleaded guilty. Therefore, at the sentencing phase, the State must be able to present evidence that is relevant to a sentence of death and not just evidence that is relevant to the existence of aggravating circumstances.

Mississippi's death penalty statute provides a good model for amendment because it provides defendants who plead guilty to murder the option of a jury trial at the sentencing phase, and it also allows for the admission of all evidence relevant to sentencing, not just evidence relevant to the existence of aggravating circumstances.[12] Allowing the admission of all evidence relevant to sentencing enables the State to present evidence necessary for a jury to determine whether to sentence the defendant to death. This includes evidence of the murder that is not otherwise relevant to the existence of aggravating circumstances, but that a jury would expect to hear before sentencing a defendant to death. Under this model, the trial judge would maintain discretion in determining how much of that evidence should be admitted.

This Comment is intended to serve a practical, as well as an academic, purpose. It is meant to encourage the judiciary in South Carolina to recognize that defendants are being denied an important constitutional right in the most serious cases—capital punishment cases. Moreover, it is intended to alert lawmakers to an unconstitutional statute and to provide them with a basis for amending it. Finally, this Comment provides attorneys with the information necessary to advocate for their clients who are denied this right. Part II discusses the relevant procedure and history of section 16-3-20. It focuses on how courts dealt with defendants who pleaded guilty in capital cases before the United States Supreme Court interpreted a Sixth Amendment right for a jury to determine the existence of aggravating circumstances. Part III then examines how recent decisions by the United States Supreme Court rendered the statute unconstitutional. Moreover, it discusses subsequent attempts by the South

9. *See* discussion *infra* Part III.B.
10. *See* discussion *infra* Part IV.D.
11. *See* discussion *infra* Part IV.D.
12. *See* MISS. CODE ANN. § 99-19-101 (2007).

Carolina Supreme Court to deal with the issue, why these decisions are in error, and correspondingly, why the issue is not settled. Part IV analyzes different approaches to curing the constitutional defects of the statute. It then proposes how best to amend the statute to make it constitutionally acceptable while also considering evidentiary problems that could arise. This involves allowing for trial courts to impanel a jury at the sentencing proceeding and allowing for the admission of all evidence relevant to a sentence of death. Part V concludes by calling on the legislature to take a proactive approach in amending the statute rather than waiting for a court-ordered mandate. It also challenges the judiciary to uphold its responsibility of ensuring that defendants in capital cases enjoy the fullest extent of constitutional protections.

II. THE PROCEDURE AND HISTORY OF SECTION 16-3-20

A. Procedure

Section 16-3-20 creates a bifurcated scheme for capital punishment cases where there is a guilt phase and a sentencing phase.[13] First, at the guilt phase, the trier of fact must determine whether the defendant committed murder.[14] If the trier of fact finds the defendant guilty of murder, then there is a sentencing phase to determine the severity of the defendant's punishment.[15] The statute requires that twenty-four hours pass between the end of the guilt phase and the beginning of the sentencing phase, unless the defendant waives this requirement.[16]

Before a defendant may be sentenced to death under section 16-3-20, the trier of fact at the sentencing proceeding must first find the existence of at least one "aggravating circumstance."[17] To illustrate, aggravating circumstances include murder committed during criminal sexual conduct, kidnapping, burglary, or physical torture; prior convictions for murder; and the murder of a law enforcement officer.[18] Upon finding the existence of at least one aggravating circumstance, the defendant may be sentenced to death.[19] If no aggravating circumstance is found, however, then the maximum sentence that may be imposed is life imprisonment.[20] At the sentencing proceeding, the prosecution

13. *See* Hubbard et al., *supra* note 1, at 401.

14. *Id.* at 397.

15. *Id.*

16. *See* S.C. CODE ANN. § 16-3-20(B) (2003) ("The proceeding must be conducted . . . as soon as practicable after the lapse of twenty-four hours unless waived by the defendant.").

17. *Id.*

18. *Id.* § 16-3-20(C)(a). Section 16-3-20(C)(a) provides a complete list of aggravating circumstances.

19. *See id.* § 16-3-20(B).

20. *Id.*

must prove the existence of an aggravating circumstance beyond a reasonable doubt.[21]

The nature of the proceeding at the guilt phase determines who will be the trier of fact at the sentencing proceeding.[22] If a jury convicts the defendant of murder at the guilt phase, then the same jury must determine the existence of any aggravating circumstances at the sentencing phase.[23] However, if the defendant pleads guilty to murder at the guilt phase, then section 16-3-20 requires that the trial judge conduct the sentencing phase.[24] The statute mandates that "if the defendant pleaded guilty, the sentencing proceeding *must* be conducted before the judge."[25] In *State v. Truesdale*,[26] the South Carolina Supreme Court held that "section 16-3-20(B) . . . requires sentencing by the trial judge, not a jury, when . . . the defendant has entered a guilty plea."[27] Therefore, when defendants plead guilty to murder in South Carolina, they automatically waive their right for a jury to determine the existence of any aggravating circumstances at the sentencing phase.[28] Instead, they must submit themselves to the mercy of the trial judge.[29] This is crucial because the trier of fact at the sentencing phase decides the existence of any aggravating circumstances that could result in a death sentence.[30]

B. History

Section 16-3-20 went into effect in 1977.[31] The General Assembly enacted this legislation in response to the South Carolina Supreme Court's pronouncement that the previous death penalty statute was unconstitutional in *State v. Rumsey*.[32] In *Rumsey*, the court determined that the previous death penalty statute was unconstitutional because it imposed a mandatory death sentence for certain offenses and did not allow for any discretion on the part of

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21. *See* Hubbard et al., *supra* note 1, at 416 (citing S.C. CODE ANN. § 16-3-20(C) (Supp. 1981)); *see also* S.C. CODE ANN. § 16-3-20 (2003) (providing that aggravating circumstances can increase the maximum penalty for murder from life imprisonment to death and the jury must find them to exist beyond a reasonable doubt); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

22. *See* § 16-3-20(B).

23. *Id.*

24. *Id.*

25. *Id.* (emphasis added).

26. 278 S.C. 368, 296 S.E.2d 528 (1982).

27. *Id.* at 369, 296 S.E.2d at 529 (citing State v. Patterson, 278 S.C. 319, 322, 295 S.E.2d 264, 266 (1982)).

28. *See* Hubbard et al., *supra* note 1, at 411.

29. *See id.*

30. *See* § 16-3-20(B).

31. *See* Hubbard et al., *supra* note 1, at 396.

32. *Id.* (citing State v. Rumsey, 267 S.C. 236, 239, 226 S.E.2d 894, 895 (1976)).

the sentencing entity to impose a lesser sentence.[33] The General Assembly subsequently passed section 16-3-20 to cure these defects.[34] While section 16-3-20 allows for the imposition of the death penalty if the trier of fact finds any aggravating circumstances, it does not require the death penalty; instead, the trier of fact maintains discretion to sentence the defendant to life imprisonment.[35]

State and federal courts soon had to determine the constitutionality of the provision in section 16-3-20 that requires the trial court to conduct the sentencing phase alone when the defendant pleads guilty to murder.[36] A little less than two years after the legislature enacted section 16-3-20, the South Carolina Supreme Court affirmed its constitutionality.[37] In *State v. Shaw*, the defendant pleaded guilty to murder, conspiracy, rape, kidnapping, and armed robbery.[38] The trial judge conducted the sentencing proceeding alone and sentenced the defendant to death.[39] The court examined the procedures set forth in section 16-3-20, including the requirement that the trial judge conduct the sentencing proceeding alone after a guilty plea, and determined that they were constitutional.[40] It reasoned that the procedures set forth in section 16-3-20 were "constitutionally indistinguishable" from the procedures declared constitutional by the United States Supreme Court in *Gregg v. Georgia*.[41]

After considering the defendant's petition for habeas corpus relief, the United States Court of Appeals for the Fourth Circuit affirmed the South Carolina Supreme Court's decision.[42] At the Fourth Circuit, the defendant specifically asserted that section 16-3-20 denied him a constitutional right to a jury trial at the sentencing phase after he pleaded guilty.[43] He argued that section 16-3-20 violated the Constitution because it denied defendants who plead guilty to murder a constitutional right to a jury trial at the sentencing phase.[44] The Fourth Circuit dismissed this argument, simply stating that "[t]he Constitution does not give state criminal defendants the right to jury sentencing."[45] In

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33. *Rumsey*, 267 S.C. at 239, 226 S.E.2d at 895.

34. *See* Hubbard et al., *supra* note 1, at 396–97.

35. *See* § 16-3-20(B).

36. *See* Roach v. Martin, 757 F.2d 1463, 1481 (4th Cir. 1985); Shaw v. Martin, 733 F.2d 304, 317 (4th Cir. 1984); State v. Patterson, 278 S.C. 319, 321, 295 S.E.2d 264, 265 (1982), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991).

37. State v. Shaw, 273 S.C. 194, 211, 255 S.E.2d 799, 807 (1979), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991).

38. *Id.* at 198–99, 255 S.E.2d at 801.

39. *Id.* at 199, 255 S.E.2d at 801.

40. *Id.* at 199–203, 255 S.E.2d at 802–04.

41. *Id.* at 203, 255 S.E.2d at 803–04 (citing Gregg v. Georgia, 428 U.S. 153, 164–65, 207 (1976) (upholding Georgia's bifurcated death penalty scheme that required the fact finder to find the existence of at least one statutorily enumerated aggravated circumstance before it sentenced the defendant to death)).

42. Shaw v. Martin, 733 F.2d 304, 306 (4th Cir. 1984).

43. *Id.* at 317.

44. *Id.*

45. *Id.*

addition, the defendant argued that the statute violated the Equal Protection Clause because it provided different jury trial rights at the sentencing proceeding to those who pleaded guilty to murder than it did to those convicted by a jury.[46] The statute denies a jury trial at the sentencing proceeding to defendants who plead guilty to murder, but it provides one to defendants convicted of murder by a jury.[47] The Fourth Circuit dismissed this argument as well, noting the historical tradition of allowing the states to split sentencing responsibilities between the judge and the jury.[48]

A year later, the Fourth Circuit revisited the issue in *Roach v. Martin*.[49] *Roach* arose from the same set of facts as *Shaw*.[50] The defendant pleaded guilty to murder, armed robbery, kidnapping, and criminal sexual conduct.[51] Sitting without a jury, the trial judge heard evidence of aggravating and mitigating circumstances and sentenced the defendant to death.[52] At the Fourth Circuit, the defendant insisted that the denial of a jury trial at the sentencing phase denied him his rights under the Sixth, Eighth, and Fourteenth Amendments.[53] Citing its recent decision in *Shaw*, the court reiterated that "'[t]he Constitution does not give state criminal defendants the right to jury sentencing.'"[54] The Fourth Circuit rejected the argument that the statute violated the Sixth Amendment by denying a jury trial at the sentencing proceeding to defendants who plead guilty to murder.[55]

In *State v. Patterson*,[56] the South Carolina Supreme Court held that section 16-3-20 prevents defendants who plead guilty to murder from receiving a jury trial at the sentencing phase.[57] *Patterson* involved a defendant who pleaded guilty to murder and armed robbery on the condition that he would retain a jury trial at the sentencing phase.[58] The State objected to this condition and maintained that "there is no constitutional right to jury determination of sentence and [section 16-3-20] does not offer a defendant that option."[59] Nevertheless, the trial court allowed for a jury trial at the sentencing phase, and the jury sentenced the defendant to death.[60] In overturning the trial court's decision, the supreme court determined that the statute requires that the trial judge conduct the

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46. *Id.*
47. *Id.* at 317 & n.16 (citing S.C. CODE ANN § 16-3-20 (2003)).
48. *Id.* (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 22 (1973)).
49. 757 F.2d 1463, 1481 (4th Cir. 1985).
50. *Id.* at 1467–68.
51. *Id.* at 1467.
52. *Id.* at 1468–69.
53. *Id.* at 1481.
54. *Id.* (quoting Shaw v. Martin, 733 F.2d 304, 317 (4th Cir. 1984)).
55. *Id.*
56. 278 S.C. 319, 295 S.E.2d 264 (1982), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991).
57. *Id.* at 321–22, 295 S.E.2d at 265–66.
58. *Id.* at 321, 295 S.E.2d at 265.
59. *Id.*
60. *Id.*

sentencing phase alone after a defendant pleads guilty.[61] Relying on *Shaw*, the court affirmed the constitutionality of this requirement.[62] Finally, the court held that the guilty plea was invalid because it was conditioned on a jury trial at the sentencing phase and the statute prohibited this condition.[63]

Likewise, in *Walton v. Arizona*,[64] the United States Supreme Court explicitly rejected the argument that defendants maintain a right for a jury to determine the existence of any aggravating circumstances that could make them eligible for the death penalty.[65] In *Walton*, a jury found the defendant guilty of first degree murder, and pursuant to an Arizona statute the trial judge conducted a separate sentencing proceeding without a jury to determine the existence of any aggravating circumstances.[66] At the proceeding, the judge found two aggravating circumstances and sentenced the defendant to death.[67] The defendant challenged the Arizona statute, which required the trial judge to conduct the sentencing proceeding without a jury, on the basis that it violated his Sixth Amendment rights.[68] More specifically, the defendant argued that "every finding of fact underlying the sentencing decision must be made by a jury, not by a judge."[69] The Court rejected this argument, holding that defendants do not have a Sixth Amendment right for a jury to determine the existence of aggravating circumstances that could make them eligible for the death penalty.[70]

Very soon after the passage of section 16-3-20, federal and state courts affirmed its constitutionality and rejected the argument that defendants maintain a Sixth Amendment right at the sentencing phase after they plead guilty to murder at the guilt phase.[71] Moreover, as late as 1990, the United States Supreme Court rejected the argument that defendants have a right under the Sixth Amendment for a jury to determine the existence of aggravating circumstances that could make them eligible for the death penalty.[72] Thus, as the twentieth century drew to an end, the constitutionality of section 16-3-20 seemed safe.

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61. *Id.*

62. *Id.* n.1 (citing Shaw v. State, 273 S.C. 194, 211, 255 S.E.2d 799, 807 (1979) *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991)).

63. *Id.* at 322, 295 S.E.2d at 266.

64. 497 U.S. 639, 649 (1990), *overruled by* Ring v. Arizona, 536 U.S. 584, 609 (2002).

65. *Id.* at 648–49.

66. *Id.* at 645.

67. *Id.*

68. *See id.* at 647.

69. *Id.*

70. *Id.* at 648–49.

71. *See* Roach v. Martin, 757 F.2d 1463, 1481 (4th Cir. 1985); Shaw v. Martin, 733 F.2d 304, 317 (4th Cir. 1984); State v. Patterson, 278 S.C. 319, 321 n.1, 295 S.E.2d 264, 265 n.1 (1982), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991).

72. Walton v. Arizona, 497 U.S. 639, 649 (1990), *overruled by* Ring v. Arizona, 536 U.S. 584, 609 (2002).

III. THE UNCONSTITUTIONALITY OF SECTION 16-3-20

The landscape changed in 2000 when the United States Supreme Court handed down *Apprendi v. New Jersey*.[73] *Apprendi* immediately put the constitutionality of section 16-3-20 in jeopardy, and in subsequent years, the Court decided a series of cases that sealed the statute's fate. The Court established that criminal defendants in capital punishment cases maintain a Sixth Amendment right for a jury to determine the existence of aggravating circumstances that could make them eligible for the death penalty even when they plead guilty to murder at the guilt phase.[74] Section 16-3-20 violates this Sixth Amendment right by denying defendants who plead guilty to murder the option for a jury to determine the existence of aggravating circumstances that could increase their punishment from life imprisonment to the death penalty.[75]

A. Reinterpreting the Sixth Amendment: Establishing the Right for a Jury to Determine Sentence-Enhancing Facts Following a Guilty Plea

In *Apprendi*, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[76] Police had arrested the defendant in *Apprendi* for firing shots "into the home of an African-American family that had recently moved into a previously all-white neighborhood."[77] Following the arrest, the defendant made a statement that he fired the shots into the home because the family was African-American.[78] The defendant pleaded guilty to "two counts . . . of . . . possession of a firearm for an unlawful purpose" as well as "one count . . . of . . . unlawful possession of an antipersonnel bomb."[79] Each count of possession of a firearm for an unlawful purpose carried a potential maximum sentence of ten years.[80] However, a New Jersey hate crime statute allowed the trial judge to extend the maximum punishment for possession of a firearm for an unlawful purpose to twenty years if the judge found that the "'defendant in

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73. 530 U.S. 466 (2000).

74. *Compare* Blakely v. Washington, 542 U.S. 296, 303–04, 313 (2004) (establishing that defendants who plead guilty have a Sixth Amendment right to insist for a jury to determine sentence-enhancing facts that they did not admit), *with* Ring v. Arizona, 536 U.S. 584, 609 (2002) (establishing that aggravating circumstances making defendants eligible for the death penalty are sentence-enhancing facts subject to Sixth Amendment requirements), *and Apprendi*, 530 U.S. at 490 (holding that defendants have a Sixth Amendment right for a jury to find the existence of all facts that can increase their sentences "beyond the prescribed statutory maximum," except for prior convictions).

75. *See* S.C. CODE ANN. § 16-3-20(B) (2003).

76. 530 U.S. at 490.

77. *Id.* at 469.

78. *Id.* (quoting State v. Apprendi, 731 A.2d 485, 486 (N.J. 1999)).

79. *Id.* at 469–70.

80. *Id.* at 470 (citing N.J. STAT. ANN. § 2C:43-6(a)(2) (West 1995)).

committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'"[81] After accepting the guilty plea, the trial judge conducted an evidentiary hearing to determine whether the defendant committed the offense as a hate crime.[82] The trial judge, sitting without a jury, found that the defendant committed the offense as a hate crime.[83] Accordingly, he extended the sentence for one count of possession of a firearm for an unlawful purpose from the otherwise maximum sentence of ten years to twelve years.[84]

The United States Supreme Court found the hate crime statute unconstitutional because it denied defendants the right for a jury to determine all facts that contribute to their sentences.[85] The Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[86] This right for a jury to determine the existence of facts that can enhance a sentence beyond the statutory maximum is rooted in the Sixth Amendment.[87] The Court reasoned that defendants retain the same "procedural safeguards" in the determination of facts that can extend punishment for an offense as they do in the determination of facts concerning whether to impose punishment in the first place.[88] Therefore, it was unconstitutional for the trial court to deny the defendant the procedural safeguard of a jury trial when determining whether the defendant committed the offense as a hate crime because that determination could extend the maximum punishment that he faced.[89]

Two years later, the Court extended this right to defendants in capital punishment cases, holding that they have a Sixth Amendment right for a jury to determine the existence of any aggravating circumstances that could increase their punishment from life imprisonment to death.[90] In *Ring v. Arizona*,[91] a jury convicted the defendant of first degree murder.[92] Under Arizona law, the court could sentence the defendant to death only if an aggravating circumstance accompanied the murder.[93] In the absence of an aggravating circumstance, however, the maximum punishment that the court could impose on the defendant

81. *Id.* at 468–69 (quoting N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999–2000)).
82. *Id.* at 470.
83. *See id.* at 471.
84. *Id.*
85. *Id.* at 490–92.
86. *Id.* at 490.
87. *Id.* at 476 (quoting Jones v. United States, 526 U.S. 227, 243 n.6 (1999)).
88. *See id.*
89. *See id.* at 491–92.
90. Ring v. Arizona, 536 U.S. 584, 609 (2002).
91. *Id.* at 584.
92. *Id.* at 591.
93. *Id.* at 593 (citing ARIZ. REV. STAT. ANN. § 13-703(F) (Supp. 2001)).

was life imprisonment.[94] The statute required the trial judge to conduct a hearing without a jury to determine the existence of any aggravating circumstances.[95] Accordingly, the trial judge found the existence of two aggravating circumstances: the defendant committed murder for pecuniary gain and the murder was "especially heinous, cruel or depraved."[96] The trial judge sentenced the defendant to death.[97]

Despite having earlier upheld Arizona's death penalty statute in *Walton v. Arizona*,[98] the Court found the Arizona statute unconstitutional because it denied the defendant a jury trial to determine the existence of aggravating circumstances that could make him eligible for the death penalty.[99] The Court noted that "*Walton* and *Apprendi* are irreconcilable," and accordingly, it overruled *Walton*.[100] In light of *Apprendi*'s reasoning, the Court recognized that it would be illogical to provide a right for a jury to determine the existence of facts that could increase a defendant's sentence by two years, but not provide the same right for a jury to determine the existence of facts that could increase a defendant's sentence to death.[101] Therefore, it held that the Sixth Amendment provides defendants convicted of murder the right for a jury to determine the existence of any aggravating circumstances that could make them eligible for the death penalty.[102] Since the maximum punishment that the defendant faced in the absence of an aggravating circumstance was life imprisonment, the Arizona statute violated the Sixth Amendment by requiring the trial judge to determine the existence of any aggravating circumstances that could enhance the defendant's punishment to death.[103]

Immediately, *Apprendi* and *Ring* posed a threat to states that required the trial judge to determine the existence of any aggravating circumstances after a defendant pleaded guilty.[104] States sought to distinguish this requirement from *Ring* by insisting that when defendants plead guilty to murder at the guilt phase,

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94. *Id.* at 592 (citing ARIZ. REV. STAT. ANN. § 13-1105(C) (2001)).

95. *Id.* (quoting ARIZ. REV. STAT. ANN. § 13-703(C) (Supp. 2001)).

96. *Id.* at 594–95.

97. *Id.* at 595.

98. Walton v. Arizona, 497 U.S. 639, 649 (1990), *overruled by* Ring v. Arizona, 536 U.S. 584, 609 (2002).

99. *Ring*, 536 U.S. at 609.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 588–89. The Arizona legislature has since amended its death penalty statute to provide for the trier of fact to determine the existence of aggravating circumstances at the sentencing proceeding. ARIZ. REV. STAT. ANN. § 13-703.01(C) (Supp. 2008). The trier of fact must be a jury unless both the State and the defendant waive a jury trial. *Id.* § 13-703.01(S).

104. *See, e.g.*, Moore v. State, 771 N.E.2d 46, 48–49 (Ind. 2002) (involving a challenge to Indiana's death penalty procedure where the trial judge determined the existence of aggravating circumstances after the defendant pleaded guilty to murder).

they simultaneously waive their right to a jury trial at the sentencing phase.[105] For example, the Indiana Supreme Court applied this line of reasoning in *Moore v. State*.[106] In *Moore*, the defendant pleaded guilty to three counts of murder.[107] After the trial court sentenced him to death, he appealed on the basis that the Indiana statute denied him his Sixth Amendment right for a jury to determine the existence of any aggravating circumstances that could warrant the death penalty.[108] The Indiana Supreme Court rejected this argument because "[the defendant's] plea of guilty forfeited any such claimed entitlement."[109] It reasoned that this was especially true because the trial court advised the defendant that he would forfeit his right to a jury trial at the sentencing phase if he pleaded guilty to murder.[110]

In 2004, however, the United States Supreme Court held that defendants do not automatically forfeit their right for a jury to determine facts that could enhance their punishment when they plead guilty to an underlying offense but not the sentence-enhancing facts.[111] In *Blakely v. Washington*,[112] the defendant pleaded guilty to "second-degree kidnaping involving domestic violence and use of a firearm."[113] His guilty plea only contained facts admitting the elements of that offense.[114] The maximum sentence that he faced under the facts admitted in his guilty plea was fifty-three months.[115] A Washington statute, however, allowed for trial judges to impose an "exceptional sentence" beyond the statutory maximum if they found any aggravating factors that warranted an extended sentence.[116] Under this statute, the trial judge determined that the defendant committed the crime with "deliberate cruelty."[117] Therefore, the trial judge "imposed an exceptional sentence of 90 months[, which was] 37 months beyond the standard maximum."[118] Following an objection, the trial judge conducted a bench hearing where he made thirty-two findings of fact to support his exceptional sentence.[119] The defendant appealed on the basis that "this sentencing procedure deprived him of his federal constitutional right to have a jury determine . . . all facts legally essential to his sentence."[120]

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105. *See, e.g., id.* at 49 (holding that the defendant forfeited his right for a jury to determine the existence of aggravating circumstances after he pleaded guilty).
106. *Id.*
107. *Id.* at 48.
108. *Id.* at 49.
109. *Id.*
110. *Id.* (quoting Moore v. State, 479 N.E.2d 1264, 1268 (Ind. 1985)).
111. *See* Blakely v. Washington, 542 U.S. 296, 313 (2004).
112. *Id.* at 296.
113. *Id.* at 298–99.
114. *Id.* at 299.
115. *Id.* at 298.
116. *Id.* at 299 (citing WASH. REV. CODE ANN. § 9.94A.120(2) (West 2000)).
117. *Id.* at 300.
118. *Id.*
119. *Id.* at 300–01.
120. *Id.* at 301.

The Court overturned this sentencing procedure, holding that defendants who plead guilty retain a Sixth Amendment right for a jury to determine all facts to which they did not admit and that could extend their sentences beyond the statutory maximum provided under the facts that they admitted.[121] The Court clarified that the "statutory maximum" for a crime is based "solely on . . . the facts reflected in the jury verdict or admitted by the defendant."[122] The statutory maximum is the maximum sentence that the judge "may impose without any additional findings" outside of the facts contained in the jury verdict or the guilty plea.[123] The Court made clear, however, that its ruling does not prevent defendants from waiving their right for a jury to determine facts that could enhance their sentences.[124] It maintained that "[w]hen a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding."[125] However, while defendants are free to waive their right for a jury to determine facts that could enhance their sentences, they cannot be denied their constitutional right to demand such a jury trial.[126] When defendants plead guilty to an offense, they waive their right to a jury trial for the facts that they admit, but they retain the right to insist that a jury examine facts that they did not admit and that could enhance their sentences beyond the statutory maximum.[127]

B. The Constitutional Defects of Section 16-3-20

Section 16-3-20 violates the Sixth Amendment because it denies defendants who plead guilty to murder the right for a jury to determine the existence of any aggravating circumstances that could warrant the death penalty. The Sixth Amendment provides criminal defendants with the right for a jury to determine any facts that could increase their sentences beyond the statutory maximum otherwise required for an offense in the absence of those facts.[128] The statutory maximum for an offense is the maximum sentence allowed under "the facts reflected in the jury verdict or admitted by the defendant."[129] Under section 16-3-20, the maximum sentence allowed for murder in the absence of any aggravating circumstances is life imprisonment.[130] Aggravating circumstances, therefore, are facts that can increase this maximum sentence from life imprisonment to death.[131] Since these facts can increase the statutory maximum sentence for

121. *Id.* at 303–04.
122. *Id.* at 303 (emphasis omitted).
123. *Id.* at 303–04 (emphasis omitted).
124. *Id.* at 310.
125. *Id.*
126. *See id.* at 313.
127. *Id.* at 303–04, 313.
128. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).
129. Blakely v. Washington, 542 U.S. 296, 303 (2004) (emphasis omitted).
130. S.C. CODE ANN. § 16-3-20(B) (2003).
131. *See id.*

murder, defendants have a Sixth Amendment right for a jury to determine the existence of such facts.

When a defendant pleads guilty to murder, section 16-3-20 requires the trial judge to determine the existence of aggravating circumstances and does not provide the defendant with the option of insisting on a jury trial.[132] If the defendant does not admit any aggravating circumstances in the guilty plea or consent to the judicial fact-finding, then the trial judge must engage in judicial fact-finding to determine their existence.[133] Section 16-3-20 does not provide defendants who plead guilty to murder with the option of insisting on a jury trial at the sentencing proceeding.[134] Essentially, when defendants plead guilty to murder, section 16-3-20 requires automatic forfeiture of their Sixth Amendment right for a jury to determine the existence of any aggravating circumstances.[135]

While *Blakely* held that defendants can voluntarily waive their right for a jury to determine sentence-enhancing facts by consenting to the judicial fact-finding or admitting the aggravating circumstances, the holding made it clear that denying this right altogether violates the Sixth Amendment.[136] Because section 16-3-20 denies defendants the right to insist that a jury determine the existence of aggravating circumstances after they plead guilty to murder, even when they do not admit the aggravating circumstances or voluntarily consent to the judicial fact-finding, the statute violates the Sixth Amendment.

*C. South Carolina's Failed Attempts to Deal with the Issue Post-*Blakely

On three occasions since *Blakely*, the South Carolina Supreme Court has been presented with the issue concerning the denial of the right for a jury to determine the existence of aggravating circumstances when defendants plead guilty to murder.[137] None of the decisions have reached a satisfactory result. In *State v. Downs*,[138] the defendant admitted raping and killing a six-year-old boy and pleaded guilty to the charges of "murder, kidnapping, and first-degree criminal sexual conduct with a minor."[139] Before accepting the guilty plea, the trial court asked the defendant if he "wanted to impanel a jury, admit guilt, and ask the jury to decide the sentence."[140] The trial court further warned the defendant that by pleading guilty, he would forfeit his right to a jury trial at both

132. *See id.*
133. *See id.*
134. *See id.*
135. *See id.*
136. *See* Blakely v. Washington, 542 U.S. 296, 310, 313 (2004).
137. *See* State v. Crisp, 362 S.C. 412, 417, 608 S.E.2d 429, 432 (2005); State v. Wood, 362 S.C. 135, 143, 607 S.E.2d 57, 61 (2004); State v. Downs, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004).
138. 361 S.C. 141, 604 S.E.2d 377 (2004).
139. *Id.* at 143, 604 S.E.2d at 378.
140. *Id.* at 144, 604 S.E.2d at 379.

the guilt and sentencing phases.[141] The defendant still insisted that he wanted to plead guilty, and the court accepted his guilty plea.[142] At the sentencing phase, the trial court found three aggravating circumstances: the defendant committed criminal sexual conduct along with the murder, the defendant committed the murder during the course of a kidnapping, and the defendant murdered a child eleven-years-old or younger.[143] As a result, the "court sentenced [the defendant] to death."[144] The defendant appealed, arguing that the sentencing procedure used by the court violated the Supreme Court's holding in *Ring*.[145]

The South Carolina Supreme Court upheld the sentencing procedure set forth in section 16-3-20, ruling that it does not violate any right to a jury trial.[146] The court distinguished the procedure set forth in section 16-3-20 from the Arizona procedure invalidated by *Ring*.[147] It reasoned that whereas the Arizona procedure in *Ring* required a judge to determine the existence of any aggravating circumstances after a jury convicted the defendant of murder, section 16-3-20 allows for a jury to determine their existence after it convicts the defendant of murder.[148] Furthermore, the court held that "*Ring* did not involve jury-trial waivers and is not implicated when a defendant pleads guilty."[149] The court noted that the defendant knew that he would forfeit his right to a jury trial at sentencing by pleading guilty, but he proceeded to plead guilty anyway.[150] At no point in its reasoning, however, did the court mention, much less analyze, *Blakely*.

Shortly thereafter, the South Carolina Supreme Court revisited the issue in *State v. Wood*.[151] In *Wood*, a jury convicted the defendant of murdering a police officer, and the defendant was sentenced to death.[152] On appeal, the defendant argued that section 16-3-20 violates *Ring* because it denies defendants who plead guilty to murder the right to a jury trial at the sentencing phase.[153] The court affirmed its previous decision in *Downs*.[154] It again reasoned that "*Ring* did not involve jury-trial waivers and is not implicated when a defendant pleads guilty."[155]

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141. *Id.*
142. *Id.*
143. *Id.* at 143, 604 S.E.2d at 378.
144. *Id.*
145. *Id.* at 146, 604 S.E.2d at 380 (discussing S.C. CODE ANN. § 16-3-20(B) (2003); Ring v. Arizona, 536 U.S. 584 (2002)).
146. *Id.* at 147, 604 S.E.2d at 380.
147. *Id.* at 146, 604 S.E.2d at 380.
148. *Id.*
149. *Id.*
150. *Id.* at 147, 604 S.E.2d at 380.
151. 362 S.C. 135, 143, 607 S.E.2d 57, 61 (2004).
152. *Id.* at 137, 607 S.E.2d at 58.
153. *Id.* at 143, 607 S.E.2d at 61.
154. *Id.*
155. *Id.*

Finally, in *State v. Crisp*,[156] the South Carolina Supreme Court once again reaffirmed its decision in *Downs* and upheld the constitutionality of section 16-3-20.[157] In *Crisp*, the defendant pleaded guilty to murdering one victim and assaulting another.[158] Immediately after the defendant entered these guilty pleas, the "State officially served notice of [its] intent to seek the death penalty in connection with the murder of [a third victim]."[159] The aggravating circumstances that the State sought to prove were "[the] prior conviction of murder and physical torture."[160] The defendant pleaded guilty to murdering the third victim, and the trial judge conducted the sentencing hearing without a jury and sentenced the defendant to death.[161] On appeal, the defendant argued that section 16-3-20 violated the rule set forth in *Ring*.[162]

The court reiterated its holding in *Downs*, upholding the constitutionality of section 16-3-20.[163] Nonetheless, the court did state that it "granted [the defendant's] motion to argue against the precedent of *Downs*."[164] In attempting to distinguish its case from *Downs*, the defendant's counsel set forth three distinctions: the defendant "sought a life sentence"; the defendant "exhibited remorse for his crimes"; and the defendant "offered a reason for his actions . . . that he murdered [the victims] . . . because he believed they were drug dealers who intended to harm his family."[165] The court noted that these distinctions did not pertain to the issue of whether the procedure in section 16-3-20 unconstitutionally denied the defendant a jury trial right.[166] Therefore, it rejected the defendant's contentions that section 16-3-20 was unconstitutional and reaffirmed its holding in *Downs*.[167]

Despite the holdings in *Downs*, *Wood*, and *Crisp*, the issue concerning section 16-3-20's constitutionality when a defendant pleads guilty has not been satisfactorily resolved. In fact, the South Carolina Supreme Court demonstrated that the issue was still open by explicitly allowing the defendant in *Crisp* to challenge the precedent set forth in *Downs*,[168] despite having affirmed the *Downs* holding less than a year earlier.[169] To declare section 16-3-20 unconstitutional, the court would have to overrule its sweeping language in *Downs* which upheld the constitutionality of section 16-3-20. The court should overrule its decision in

156. 362 S.C. 412, 608 S.E.2d 429 (2005).
157. *Id.* at 419, 608 S.E.2d at 433.
158. *Id.* at 413, 608 S.E.2d at 430.
159. *Id.* at 413–14, 608 S.E.2d at 430.
160. *Id.* at 414, 608 S.E.2d at 430.
161. *Id.*
162. *Id.* at 417, 608 S.E.2d at 432.
163. *Id.* at 417–18, 608 S.E.2d at 432–33 (citing State v. Downs, 361 S.C. 141, 146–47, 604 S.E.2d 377, 380 (2004)).
164. *Id.* at 418, 608 S.E.2d at 433.
165. *Id.*
166. *Id.* at 418–19, 608 S.E.2d at 433.
167. *Id.* at 419, 608 S.E.2d at 433.
168. *Id.* at 418, 608 S.E.2d at 433.
169. State v. Wood, 362 S.C. 135, 143, 607 S.E.2d 57, 61 (2004).

Downs for several reasons, not the least of which is because its implications are at odds with the United States Supreme Court's holding in *Blakely*. While the conclusion in *Downs* was not necessarily incorrect, the court's reasoning is problematic because it is overinclusive and fails to recognize *Blakely*, which should have been crucial to the analysis.

The South Carolina Supreme Court's conclusion in *Downs* was not incorrect. In *Blakely*, the Court established that defendants could waive their right for a jury to determine aggravating circumstances when they admit those facts in their guilty pleas.[170] Falling within this exception, in *Downs*, the defendant admitted the aggravating circumstances in his guilty plea.[171] Therefore, the defendant properly waived his right to a jury trial at the sentencing phase under the rule established in *Blakely*, and the trial judge was not required to engage in any judicial fact-finding outside of the facts admitted in the guilty plea.[172] Furthermore, in *Downs*, the defendant voluntarily and explicitly waived his right to a jury trial at the sentencing phase.[173] Again, *Blakely* established that defendants could voluntarily waive their constitutional right for a jury to determine any facts that could enhance their sentence beyond the statutory maximum.[174] On these bases alone, the court could have upheld the defendant's death sentence without addressing the constitutionality of section 16-3-20.

Instead, the court held that section 16-3-20 does not violate the Sixth Amendment even though it denies defendants who plead guilty the option of a jury trial to determine the existence of aggravating circumstances.[175] This holding is overinclusive because it does not just include the situation presented in *Downs* where the defendant admitted the aggravating circumstances in his guilty plea and explicitly waived his right to a jury trial at sentencing.[176] It also includes situations where a defendant pleads guilty to murder without admitting any aggravating circumstances and where the defendant insists on a jury trial at sentencing.[177] *Blakely* treats these two situations differently.[178] In *Blakely*, the Court made it clear that while defendants can voluntarily waive their right for a jury to determine sentence-enhancing facts, they must at least be provided the option to exercise this right.[179] Section 16-3-20 denies defendants this option by

170. *See* Blakely v. Washington, 542 U.S. 296, 310 (2004).

171. State v. Downs, 361 S.C. 141, 143, 604 S.E.2d 377, 378 (2004).

172. *Compare Blakely*, 542 U.S. at 310 (holding that defendants can waive their right for a jury to determine sentence-enhancing facts by admitting those facts in a guilty plea), *with Downs*, 361 S.C. at 143, 604 S.E.2d at 378 (acknowledging that the defendant admitted the aggravating circumstances in his guilty plea).

173. *Downs*, 361 S.C. at 144, 604 S.E.2d at 379.

174. *Blakely*, 542 U.S. at 310.

175. *Downs*, 361 S.C. at 147, 604 S.E.2d at 380.

176. *See id.*

177. *See id.*

178. *See Blakely*, 542 U.S. at 310, 313.

179. *See id.* at 313.

requiring the trial judge to conduct the sentencing proceeding alone whenever defendants plead guilty to murder.[180] Even if defendants do not admit the aggravating circumstances in their guilty pleas and even if they insist on a jury trial at sentencing, section 16-3-20 requires that the trial judge conduct the sentencing proceeding alone.[181] Therefore, the South Carolina Supreme Court's holding in *Downs* is overinclusive and defies the United States Supreme Court's holding in *Blakely*.

Finally, the decision in *Downs* is problematic because it failed to even mention *Blakely*, much less justify how section 16-3-20 is constitutional in light of it. The United States Supreme Court handed down its decision in *Blakely* nearly two months before the South Carolina Supreme Court heard arguments in *Downs*.[182] Given the timing, it is unclear why the South Carolina Supreme Court failed to address a case that should have been pivotal to its analysis. The failure to discuss *Blakely* calls into question the validity and precedential value of *Downs*. The Colorado Supreme Court recognized this when it noted that "[t]he Supreme Court of South Carolina is the only court to hold post-*Blakely* that a defendant waives his right to jury fact-finding during sentencing by pleading guilty, but its failure to cite *Blakely* suggests those decisions to be in error."[183]

Therefore, South Carolina courts have not yet satisfactorily resolved the issue. The South Carolina Supreme Court's unequivocal reasoning that section 16-3-20 does not violate the Sixth Amendment in *Downs* is problematic because the decision fails to reconcile the statute with *Blakely*. Furthermore, it is untenable because the decision runs directly contrary to the United States Supreme Court's holding in *Blakely*. A proper argument under *Blakely* is likely to reveal the constitutional defects of section 16-3-20 and result in the overruling of *Downs*. Since *Wood* and *Crisp* relied on the reasoning of *Downs*,[184] they, too, would suffer the same fate.

IV. PROPOSAL FOR AMENDMENT

South Carolina's death penalty statute, section 16-3-20, is unconstitutional.[185] As currently written, it denies defendants in capital punishment cases an important constitutional right under the Sixth Amendment.[186] The legislature needs to amend the statute to comply with the constitutional requirements recently articulated by the United States Supreme

180. *See* S.C. CODE ANN. § 16-3-20(B) (2003).

181. *See id.*

182. *See Blakely*, 542 U.S. at 296 (decided on June 24, 2004); *Downs*, 361 S.C. at 141, 604 S.E.2d at 377 (arguments heard on September 21, 2004).

183. People v. Montour, 157 P.3d 489, 498 (Colo. 2007).

184. State v. Crisp, 362 S.C. 412, 417–19, 608 S.E.2d 429, 432–33 (2005); State v. Wood, 362 S.C. 135, 143, 607 S.E.2d 57, 61 (2004).

185. *See* discussion *supra* Part III.B.

186. *See* discussion *supra* Part III.A–B.

Court.[187] Four options are available to accomplish this goal: (1) abolish the death penalty altogether; (2) abandon the bifurcated scheme that separates the sentencing phase from the guilt phase; (3) designate a separate offense of "capital murder" that includes the aggravating circumstances as part of the substantive offense; or (4) amend the statute to allow the trial judge to impanel a jury at the sentencing phase when a defendant pleads guilty to murder. The fourth option, amending the statute to allow the trial judge to impanel a jury at the sentencing phase when a defendant pleads guilty, is the most practical solution. Mississippi's death penalty statute provides a good model for change because it allows for the trial judge to impanel a jury and also ensures the admission of all evidence relevant to sentencing.[188]

A. Option 1: Abolish the Death Penalty

To cure the possibility of any constitutional defect in the death penalty statute, the legislature has the option of abolishing the death penalty in South Carolina altogether. If South Carolina chooses to follow this route, it would not be alone. Fifteen other states have abolished the death penalty.[189] The decision to abolish the death penalty, however, requires a deep philosophical discussion concerning the nature of punishment and the morality of capital punishment.[190] That discussion invites its own body of literature.[191] Instead, this Comment focuses on the more discrete issue of ensuring that a capital defendant's constitutional rights are protected in a state that has made the conscious decision to retain the death penalty.[192] While abolishing the death penalty would certainly cure the constitutional defects, this Comment assumes that because South Carolina has retained the death penalty, it is unlikely to abolish the death penalty altogether.[193] Therefore, this Comment focuses on ensuring that defendants are

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187. *See* discussion *supra* Part III.A.

188. *See* MISS. CODE ANN. § 99-19-101 (2007).

189. *See* Death Penalty Information Center, Facts About the Death Penalty 1 (April 17, 2009), http://www.deathpenaltyinfo.org/FactSheet.pdf.

190. *Compare* Jack Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670, 1676–78 (1986) (arguing that capital punishment does not serve deterrence or retributive theories of punishment), *with* Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1665–69 (1986) (defending capital punishment on the grounds that it serves deterrence and retributive theories of punishment).

191. *See generally* Norman Krivosha et al., *A Historical and Philosophical Look at the Death Penalty—Does It Serve Society's Needs?*, 16 CREIGHTON L. REV. 1 (1982–1983) (providing a philosophical examination of capital punishment); Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2005) (arguing that capital punishment is not morally required); Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005) (arguing that capital punishment is morally required because of its deterrent effect).

192. *See* Hubbard et al., *supra* note 1, at 396–97 (observing that South Carolina enacted the current death penalty statute after the previous one was declared unconstitutional).

193. A Gallup poll taken in 2003 found that almost 70% of Americans were in favor of the death penalty for defendants convicted of murder. Jeffrey M. Jones, *Understanding Americans'*

provided their recognized constitutional rights under the existing scheme and saves the discussion about the validity of the death penalty altogether for another day.

B. Option 2: Abandon the Bifurcated Scheme

Another option available to the legislature is to abolish the bifurcated scheme and have one unitary proceeding where the jury determines both guilt and sentencing. In a unitary scheme, the statute could not deny defendants the right to a jury trial at the sentencing phase because there would be no sentencing phase. This is not necessarily forbidden, as "[t]he Supreme Court has never explicitly held that a bifurcated proceeding is constitutionally required."[194] However, every state that allows for capital punishment uses a bifurcated scheme.[195] The United States Supreme Court has stated that "a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*."[196] In *Furman v. Georgia*,[197] the Court issued a ruling that had the "practical effect of striking down all existing death penalty statutes" on the grounds that the "statutes created a substantial risk that the death penalty would be imposed in an arbitrary and capricious manner."[198] Given the Court's endorsement of the bifurcated procedure as a way of solving the *Furman* problems,[199] it would be unwise to switch to a procedure that could introduce a new host of constitutional problems. Therefore, abolishing the bifurcated scheme and having one proceeding is not the best option.

Support for the Death Penalty, GALLUP, June 3, 2003, http://www.gallup.com/poll/8557/Understanding-Americans-Support-Death-Penalty.aspx. It also determined that support for the death penalty was higher in the South, finding that about 75% of southern residents support the death penalty. *Id.* For people who identified themselves as Republican, the percentage was higher; the poll found that about 82% of Republicans supported the death penalty. *Id.* Given that South Carolina is southern and currently dominated politically by the Republican Party, these figures suggest that abolishment of the death penalty is unlikely. In an address to law students in 2006, Judge William W. Wilkins, then Chief Judge of the United States Court of Appeals for the Fourth Circuit, acknowledged this when he stated, "No one (in South Carolina) can be elected to statewide office who is opposed to the death penalty." Schuyler Kropf, *Judge Discusses Death Penalty: Law Students Are Told Future Lawyers to Decide Value of Capital Punishment*, POST & COURIER (Charleston, S.C.) Sept. 15, 2006, at 3B.

194. CARTER ET AL., *supra* note 2, at 51.

195. *Id.*

196. Gregg v. Georgia, 428 U.S. 153, 191–92 (1976).

197. 408 U.S. 238 (1972).

198. CARTER ET AL., *supra* note 2, at 44 (citing *Furman*, 408 U.S. at 256–57).

199. *Gregg*, 428 U.S. at 191–92.

C. *Option 3: Designate a Separate Substantive Offense of "Capital Murder"*

Instead of requiring the fact finder to determine the existence of aggravating circumstances at the sentencing phase, the legislature could revise the statute to provide for a separate offense of capital murder. This is the approach that Texas has taken.[200] Under section 19.03 of the Texas Penal Code, Texas designates a separate offense of "capital murder" which requires the jury to find the aggravating circumstances along with the murder at the guilt phase of the trial.[201] Both murder and the aggravating circumstance constitute elements of the substantive offense.[202] For instance, capital murder includes murder "intentionally commit[ted] . . . in the course of committing or attempting to commit kidnapping."[203] At the guilt phase, the jury would determine whether the defendant committed murder as well as kidnapping.[204] Thus, in Texas, facts determining eligibility for the death penalty are found at the guilt phase.[205] The United States Supreme Court has upheld this procedure.[206] In South Carolina, on the other hand, the facts determining eligibility for the death penalty are found at the sentencing phase.[207] At the guilt phase, the fact finder determines whether the defendant committed murder; if the fact finder finds that the defendant committed murder, it then determines at the sentencing phase whether the murder was in conjunction with a kidnapping or other aggravating circumstance.[208] If South Carolina designated a separate offense for capital murder, the issue of whether a defendant maintains a Sixth Amendment right for a jury to determine aggravating circumstances after pleading guilty to murder would not arise. Presumably, defendants would have to plead guilty to capital murder, including the aggravating circumstances, or not plead guilty at all. Unlike the current procedure, the trial judge would not have to engage in judicial fact-finding that could enhance the defendant's sentence to death after he pleads guilty to capital murder.

While creating a substantive offense of capital murder is an option, it is not the best one. Adopting the capital murder scheme would require the South Carolina legislature to completely revamp the current capital punishment procedure that separates the determination of guilt of murder from the determination of the existence of aggravating circumstances. The constitutional defects of section 16-3-20 do not require such drastic action. Instead, the

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200. TEX. PENAL CODE ANN. § 19.03 (Vernon 2003).

201. *Id.*; CARTER ET AL., *supra* note 2, at 99.

202. CARTER ET AL., *supra* note 2, at 99 (citing TEX. PENAL CODE ANN. § 19.03 (Vernon 2007)).

203. TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon 2003).

204. *See* CARTER ET AL., *supra* note 2, at 99.

205. *Id.*

206. *Id.* (citing Jurek v. Texas, 428 U.S. 262, 276 (1976)).

207. *See* S.C. CODE ANN. § 16-3-20(B) (2003).

208. *See id.* § 16-3-20.

legislature can amend section 16-3-20 to comply with the Sixth Amendment by simply changing the statute's language to allow for the trial judge to impanel a jury at the sentencing proceeding after the defendant pleads guilty to murder.

D. Option 4: Amend the Statute to Allow for the Impaneling of a Jury at the Sentencing Proceeding Following a Guilty Plea to Murder

The most practical solution is for the legislature to amend section 16-3-20 to allow for the trial judge to impanel a jury at the sentencing proceeding when a defendant pleads guilty to murder. The constitutional problem with section 16-3-20 is that it denies defendants who plead guilty to murder, but not to any aggravating circumstances, the option of having a jury determine the facts that could increase their punishment from the otherwise maximum sentence of life imprisonment.[209] South Carolina is not alone in that regard; at least seven other states have statutes with the same apparent constitutional defect.[210] South Carolina requires the trial judge to determine the existence of aggravating circumstances by mandating that "if the defendant plead[s] guilty, the sentencing proceeding *must* be conducted before the judge."[211] By rewording this requirement to allow the trial judge to impanel a jury after the defendant pleads guilty, the legislature would fix this unconstitutional provision. Defendants would then have the option of insisting on a jury trial at sentencing,[212] thus satisfying the requirement in *Blakely* that defendants pleading guilty have the option to demand a jury to determine sentence-enhancing facts.[213] This is the

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209. *See* discussion *supra* Part III.B.

210. *See* COLO. REV. STAT. § 18-1.3-1201 (2008), *declared unconstitutional by* People v. Montour, 157 P.3d 489, 506 (Colo. 2007); GA. CODE ANN. § 17-10-32.1 (2008); IND. CODE ANN. § 35-50-2-9 (LexisNexis 2004); MONT. CODE ANN. § 46-18-301 (2007); NEB. REV. STAT. § 29-2520 (1995), *declared unconstitutional on other grounds by* State v. Conover, 703 N.W.2d 898, 904 (Neb. 2005); OKLA. STAT. tit. 21, § 701.10 (2002); WYO. STAT. ANN. § 6-2-102 (2007).

211. S.C. CODE ANN. § 16-3-20(B) (2003) (emphasis added).

212. If defendants choose to waive their Sixth Amendment right for a jury to determine the existence of aggravating circumstances, they do not retain a right for a jury to determine sentencing. The United States Supreme Court has held that "there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed." Spaziano v. Florida, 468 U.S. 447, 465 (1984). While defendants have a Sixth Amendment right for a jury to determine the existence of aggravating circumstances that could make them eligible for the death penalty, Ring v. Arizona, 536 U.S. 584, 609 (2002), they do not have a Sixth Amendment right for a jury to determine the sentence, *Spaziano*, 468 U.S. at 464. Thus, if defendants admit to aggravating circumstances in their guilty pleas or otherwise voluntarily consent to judicial fact-finding, the trial judge, rather than a jury, can determine the sentence without violating the Sixth Amendment. *Compare* Blakely v. Washington, 542 U.S. 296, 310 (2004) (establishing that defendants can waive their Sixth Amendment right for a jury to determine sentence-enhancing facts by admitting the facts in their guilty pleas or by voluntarily consenting to judicial fact-finding), *with Spaziano*, 468 U.S. at 464 (establishing that defendants in a capital case do not have a Sixth Amendment right for a jury to determine the sentence).

213. *Blakely*, 542 U.S. at 313.

approach that at least fifteen other states have taken.[214] South Carolina should follow their lead and amend its statute to allow for the trial judge to impanel a jury at the sentencing phase when the defendant pleads guilty to murder.

Along with providing for the impaneling of a jury at the sentencing phase, the legislature should also include a provision that allows for the admission of evidence relevant to a sentence of death at the sentencing phase. Impaneling a jury at the sentencing phase to determine the existence of aggravating circumstances raises an issue concerning what evidence would be admissible. Would only evidence relevant to the existence of aggravating circumstances be admissible at the sentencing proceeding? Since the fact-finding at the sentencing phase is to determine the existence of aggravating circumstances,[215] it is conceivable that the trial judge could limit the admissibility of evidence to evidence only relevant to the existence of aggravating circumstances. Because the defendant pleaded guilty to murder, evidence concerning the murder might be irrelevant. However, the purpose of the sentencing proceeding is not just for the jury to determine the existence of aggravating circumstances, but also for the jury to determine whether to make a recommendation of death after finding the existence of such circumstances.[216] Therefore, the State would want to introduce evidence that is not only relevant to the existence of aggravating circumstances but also relevant to making a recommendation of death.

The State should be able to introduce evidence relevant to a sentence of death during the jury trial at the sentencing proceeding after a defendant pleads guilty to murder, not just evidence relevant to the existence of aggravating circumstances. This would include some evidence of the murder, even though the defendant admitted guilt, because the jury would probably expect to hear such evidence before giving a recommendation of death. In every case, juries create their own expectations about what evidence they should hear.[217] The failure of a party to present expected evidence can cause the jury to draw a "negative inference" through which it punishes that party.[218] Although a party may stipulate to a fact, that stipulation often does not satisfy the jury's expectations to hear that evidence.[219] Moreover, merely informing the jury that

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214. *See* CONN. GEN. STAT. ANN. § 53a–46a (West 2007); DEL. CODE ANN. tit. 11, § 4209 (2007); FLA. STAT. ANN. § 921.141 (West 2006); IDAHO CODE ANN. § 19-2515(5)(c) (2004); 720 ILL. COMP. STAT. ANN. 5/9-1 (West 2002); MD. CODE ANN., CRIM. LAW § 2-303 (LexisNexis 2002); MISS. CODE ANN. § 99-19-101 (2007); NEV. REV. STAT. ANN. § 175.552 (LexisNexis 2006); N.H. REV. STAT. ANN. § 630:5 (LexisNexis 2007); N.M. STAT. ANN. § 31-20A-1 (LexisNexis 2004); N.C. GEN. STAT. § 15A-2001 (2007); OR. REV. STAT. § 163.150 (2007); 42 PA. CONS. STAT. ANN. § 9711 (West 2007); UTAH CODE ANN. § 76-3-207 (2003); WASH. REV. CODE ANN. § 10.95.050 (West 2002).

215. *See* S.C. CODE ANN. § 16-3-20(B) (2003).

216. *See id.* § 16-3-20(B)–(C).

217. Old Chief v. United States, 519 U.S. 172, 188–89 (1997).

218. Stephen A. Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CAL. L. REV. 1011, 1019 (1978).

219. *Old Chief*, 519 U.S. at 188–89.

the defendant admitted a fact does not have the same effect as introducing the evidence establishing that fact to help tell the complete story about what happened.[220] The United States Supreme Court articulated this idea as follows:

> [T]he accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense. A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it.[221]

In a death penalty trial, jury expectations are often extremely high. Because juries are aware that they hold the defendant's life in their hands, they are likely to have very high expectations about what evidence they should hear before recommending a sentence of death. These expectations would probably include some evidence of the murder, even though the defendant pleaded guilty to it. The simple admission of the fact would neither carry the same weight as the evidence of the murder nor tell the complete story about what happened.[222] For the State to be able to present a legitimate case for the death penalty, the defendant should not be able to stipulate away the murder evidence; instead, the State must be able to introduce evidence that is relevant for a jury to sentence the defendant to death, not just evidence relevant to the existence of aggravating circumstances.[223]

Therefore, any amendment to the death penalty statute needs to contain two provisions: it must provide for the impaneling of a jury when the defendant pleads guilty to murder, and it must explicitly allow for the admission of evidence relevant to a sentence of death at the sentencing proceeding. In drafting an amendment, Mississippi's death penalty statute, section 99-19-101, provides a good model.[224] Section 99-19-101 provides for the impaneling of a jury at the sentencing phase when a defendant pleads guilty to a capital offense and allows for the admission of evidence relevant to sentencing:

> [I]f the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose or may be conducted before the trial judge sitting without a jury if both the State of Mississippi and the defendant agree thereto in writing. In the

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220. *Id.* at 188.

221. *Id.* at 189.

222. *See id.* at 188.

223. This provision would merely give the trial court discretion in admitting evidence that is not relevant to the existence of an aggravating circumstance, but is relevant to the sentence of death. The normal limits on the admission of relevant evidence would still apply. For example, the trial court would still be able to exclude relevant evidence when it determined that "its probative value [was] substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." S.C. R. EVID. 403.

224. *See* MISS. CODE ANN. § 99-19-101 (2007).

> proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances.[225]

The South Carolina legislature could adopt this language verbatim and use it to amend section 16-3-20 to make it constitutionally acceptable. This amendment would allow defendants who plead guilty to murder to exercise their Sixth Amendment right for a jury to determine facts that could increase their sentence beyond the statutory maximum of life imprisonment to death. While defendants could exercise this option, they could also choose to waive this right, which is permissible under *Blakely*.[226] Moreover, under this amendment, the State could admit evidence that is relevant to the death sentence and that is necessary to meet the jury's expectations, which would presumably include some evidence of the murder, and not just evidence relevant to the existence of aggravating circumstances. The legislature, therefore, should use the language of the Mississippi statute when amending section 16-3-20 to make it constitutionally acceptable. The amended language in section 16-3-20(B) could read as follows:

> If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose or may be conducted before the trial judge sitting without a jury if both the State of South Carolina and the defendant agree thereto in writing. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentencing, and shall include matters relating to any of the aggravating or mitigating circumstances.

By amending section 16-3-20 with the foregoing language, the legislature would not only provide defendants with their Sixth Amendment right for a jury to determine sentence-enhancing facts, but it would also ensure the State's ability to present the full weight of its case for the death penalty.

V. CONCLUSION

As the law stands in South Carolina, defendants are denied an important constitutional right under the Sixth Amendment in the most serious of cases—capital punishment cases. Even when criminal defendants plead guilty to an offense, the United States Supreme Court has determined that they have a Sixth Amendment right for a jury to determine all facts to which they did not admit and that could extend their sentences beyond the statutory maximum provided under the facts that they admitted.[227] However, the South Carolina death penalty

225. *Id.*
226. Blakely v. Washington, 542 U.S. 296, 310 (2004).
227. *Id.* at 303–04.

statute, section 16-3-20, denies defendants who plead guilty to murder that right by requiring the trial judge to find the existence of aggravating circumstances that could enhance the maximum punishment for murder from life imprisonment to death.[228] In this regard, section 16-3-20 is unconstitutional. Nevertheless, when South Carolina courts have been presented with the issue in the past, they have continued to uphold its constitutionality.[229] Consequently, defendants facing the death penalty continue to be deprived of this important constitutional right.

The law cannot continue to allow this deprivation. The legislature should take a proactive approach to ensure that the citizens they represent enjoy all of their constitutional rights, even in the most unsavory of situations. The legislature can do this by amending the death penalty statute to allow for the trial judge to impanel a jury at the sentencing phase to determine the existence of aggravating circumstances after a defendant pleads guilty to murder. If the legislature fails to uphold this responsibility, the judiciary must protect this individual constitutional right by overturning the provision of the statute when presented with the opportunity. Of course, this also requires attorneys to properly argue the issue on appeal. Until these actors fulfill their obligations, South Carolina will continue to deny criminal defendants in capital punishment cases the fullest extent of their constitutional protections, a situation that should be intolerable.

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228. *See* S.C. CODE ANN. § 16-3-20(B) (2003).

229. State v. Crisp, 362 S.C. 412, 419, 608 S.E.2d 429, 433 (2005); State v. Wood, 362 S.C. 135, 143, 607 S.E.2d 57, 61 (2004); State v. Downs, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004).

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