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O'DELL V. NETHERLAND 117 S. Ct. 1969 (1997) United States-Supreme Court

O'DELL V. NETHERLAND

117 S. Ct. 1969 (1997)
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FACTS

Helen Schartner was beaten and strangled to death sometime between when she left a Virginia Beach nightclub the evening of February 5, 1985,[1] and when her body was discovered in a field across from the nightclub the afternoon of February 6, 1985.[2] Largely due to physical evidence, Joseph O'Dell was charged with the capital murder of Helen Schartner,[3] and on October 10, 1986, was found guilty by a jury. At the sentencing phase, the prosecution proceeded under both the vileness and future dangerousness aggravators[4] and introduced evidence of O'Dell's prior crimes. O'Dell sought an instruction informing the jury that he was ineligible for parole if sentenced to life in prison, but the trial judge denied the instruction. The jury found both aggravators and sentenced O'Dell to death.[5]

The Supreme Court of Virginia affirmed the conviction and the sentence,[6] and the United States Supreme Court denied certiorari.[7] O'Dell's state habeas petition was unsuccessful, and the United States Supreme Court again denied certiorari.[8]

In O'Dell's petition for federal habeas, he alleged both that he was innocent and that his death sentence was defective because he was not allowed to inform the jury of his parole ineligibility. The United States District Court for the Eastern District of Virginia rejected the first claim but accepted the second based on *Simmons v. South Carolina.*[9] In that case, the United States Supreme Court held that "where the defendant's future dangerousness is at issue, and state law prohibits defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible."[10] The district court held that *Simmons* was not a new rule under *Teague v. Lane*,[11] and thus that the *Simmons* rule applied to O'Dell's case, entitling O'Dell to a new sentencing hearing.[12] The United States Court of Appeals for the Fourth Circuit, sitting *en banc* held that the *Simmons* rule was in fact a new rule when it was announced in 1994.[13] The United States Supreme Court granted certiorari on this issue.[14]

HOLDING

In a five to four decision, Justice Thomas, writing for the Court, held that *Simmons* was a new rule under *Teague* and therefore was inapplicable to O'Dell's case.[15] Furthermore, the Court held that O'Dell's case did not fit into either of the two narrow exceptions to the *Teague* rule.[16]

ANALYSIS/APPLICATION IN VIRGINIA

I. *Simmons* Is Not Applicable to *O'Dell*

A. The *Teague* Rule Explained

Justice Thomas began by defining what is meant by a "new" rule under *Teague*. "'A holding constitutes a "new" rule within the meaning of *Teague* if it "breaks new ground," "imposes a new obligation on the States or the Federal Government," or was not "*dictated* by precedent existing at the time the defendant's conviction became final."'"[17] The Court continued by stating that "[a]t bottom, however, the *Teague* doctrine 'validates reasonable, good-faith interpretations of existing precedents . . . .'"[18]

Next, Justice Thomas explained the three steps to the *Teague* inquiry. First, the date on which defendant's conviction became final must be ascertained. If that date is earlier than the date of the holding establishing the rule sought to be applied by defendant, the second step of the inquiry must be applied. In the second step, the court examines whether "'a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.'"[19] If not, then the rule is new and generally not applied retroactively. The third step is a determination of whether the rule falls into one of the two exceptions to the *Teague* rule, so that even if the rule is declared new, it may be applied retroactively to the defendant. First, if the rule "forbid[s] criminal punishment of certain primary conduct [or prohibits] a certain category of punishment for a class of defendants because of their status or offense"[20] it is applied retroactively even if new. And second, the rule will be applied retroactively if is a "'watershed rule[] of criminal

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[1] *O'Dell v. Netherland*, 117 S. Ct. 1969, 1971 (1997).

[2] *O'Dell v. Netherland*, 95 F.3d 1214, 1218 (4th Cir. 1996).

[3] Va. Code § 18.2-31 (e) (1985) (the willful, deliberate, and premeditated killing of a person during the commission of, or subsequent to, rape).

[4] Va. Code § 19.2-264.4 (1985) (In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.)

[5] *O'Dell*, 117 S. Ct. at 1972.

[6] *O'Dell v. Commonwealth*, 234 Va. 672, 364 S.E.2d 491 (1988).

[7] *O'Dell v. Virginia*, 488 U.S. 871 (1988).

[8] *O'Dell v. Thompson*, 502 U.S. 995 (1991).

[9] 512 U.S. 154 (1994).

[10] *Simmons*, 512 U.S. at 156.

[11] 489 U.S. 288 (1989).

[12] *O'Dell v. Netherland*, 95 F.3d 1214, 1218 (4th Cir. 1996).

[13] *Id.*

[14] *O'Dell v. Netherland*, 117 S. Ct. 1969, 1972 (1997).

[15] *Id.* at 1971.

[16] *Id.* at 1978.

[17] *Id.* at 1973 (quoting *Graham v. Collins*, 506 U.S. 461, 467 (1993) (quoting *Teague*, 489 U.S. at 301)) (emphasis in original).

[18] *O'Dell*, 117 S. Ct. at 1973 (quoting *Butler v. McKellar*, 494 U.S. 407, 414 (1990)).

[19] *Id.* at 1973 (quoting *Lambrix v. Singletary*, 117 S. Ct. 1517, 1524 (1997) (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990)) (alterations in *Lambrix*).

[20] *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989).

procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'"[21]

In applying the *Teague* rule to *Simmons*, the Court urged that "[t]he array of views expressed in *Simmons* itself suggests that the rule announced there was, in light of this Court's precedent, 'susceptible to debate among reasonable minds.'"[22] Presumably Justice Thomas was implying that the "array of views" in *Simmons* demonstrated that *Simmons* was a new rule. It is not necessary to examine the Court's logic here, because the basis of the assumption itself is factually suspect. Justice Blackmun's plurality of four in *Simmons*, relying on *Gardner v. Florida*[23] and *Skipper v. South Carolina*,[24] concluded that "[b]ecause truthful information of parole ineligibility allows the defendant to 'deny or explain' the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention...."[25] This is remarkably similar to the language used in the Justice O'Connor's three-justice concurrence: "'When the State seeks to show the defendant's future dangerousness,' the defendant 'should be allowed to bring his parole ineligibility to the jury's attention.'"[26] On this crucial point of *Simmons* seven justices were essentially of one mind, leaving the reader of the opinion in *O'Dell* to wonder about the "array of views"[27] Justice Thomas found in *Simmons*. The similarity of the plurality and concurrence does not imply susceptibility to "debate among reasonable minds"[28] so much as it implies the expression of a widely accepted legal notion.

B. *Gardner* and *Skipper*

The Court then considered O'Dell's assertion that *Gardner* and *Skipper*, the decisions upon which the *Simmons* Court relied, establish that *Simmons* was the law of the land as early as 1977, eleven years before O'Dell's conviction became final. In *Gardner*, the Court concluded that defendant "was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain."[29] The logical application to O'Dell is that he was denied the right to deny or explain, by introduction of the fact of his parole ineligibility, the prosecution's assertion of his future dangerousness. Justice Thomas, however, chose to read the holding in *Gardner* very narrowly: that the Eighth Amendment was violated by the prosecution's introduction of secret evidence.[30] Justice Thomas, stating that "[p]etitioner points to no secret evidence," relied on this narrow reading of *Gardner* to conclude that *Gardner* does not imply that the rule of *Simmons* was required by the Constitution before O'Dell's conviction became final.[31]

Justice Thomas used the same technique to distinguish *Skipper*. There, the Court concluded that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under *Eddings*... such evidence may not be excluded from the sentencer's consideration."[32] Like *Gardner*, the Court's holding in *Skipper* is obviously applicable to O'Dell's case; O'Dell was not eligible for parole, and so being incarcerated for his lifetime, he would have posed no danger to the public if spared by the sentencing jury.

It is interesting to note that only a decade before the decision in *O'Dell*, the Court had sufficient confidence in the *Gardner* decision to quote it in support of its decision in *Skipper*. The *Skipper* Court "cited the Due Process Clause, stating that '[w]here the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty' due process required that 'a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain."'"[33] In the instant case, however, Justice Thomas chose to distinguish *Skipper* in much the same manner in which he distinguished *Gardner*, by a hyper-narrow reading of the case. *Skipper* was distinguished based on the fact that the evidence sought to be introduced by the defendant, that he had previously behaved well in prison, was historical in nature. Because the information O'Dell sought to introduce concerned the future rather than the past, Justice Thomas found *Skipper* inapplicable.[34]

C. *Ramos* and *Caldwell*

By classifying the communication to a sentencing jury of a defendant's parole ineligibility as "postsentencing legal eventualities,"[35] Justice Thomas was able to invoke *California v. Ramos*[36] and *Caldwell v. Mississippi*[37] for the proposition that the law regarding such "eventualities" was not well settled before O'Dell's conviction became final. In *Ramos*, the Court upheld an instruction which informed the jury of the California Governor's ability to commute a life sentence. The *Ramos* Court emphasized, however, that the decision did not "override the contrary judgment of [other] state legislatures that capital sentencing juries in their states should not be permitted to consider the governor's power to commute a sentence."[38] In *Caldwell*, where the Court held that a trial judge had improperly allowed the jury to believe that their sentencing decision was not final because of procedural reviews, the *O'Dell* Court stated that "sentencing juries were not to be given information about postsentencing appellate proceedings."[39] Justice Thomas quotes the concurrence in *Caldwell* for the proposition that: "A state [can] choose whether or not to 'instruc[t] the jurors on the sentencing procedure, including the existence and limited nature of appellate review,' so long as any information it chose to provide was accurate."[40]

If informing juries of a capital defendants' parole ineligibility can be described as a "postsentencing legal eventualit[y],"[41] then the *Ramos* and *Caldwell* decisions describe a legal landscape where a jurist would be significantly confused about whether to so inform juries. Thus, before *Simmons*, a judge who chose not to inform a jury could not be labeled as acting objectively unreasonably. This logic is flawed.

A capital defendant's parole ineligibility is more than a postsentencing legal event (if indeed it can be described as such at all). It is relevant evidence in the sentencing of a capital defendant who the Commonwealth claims presents a future danger. If a defendant will never leave prison, that defendant cannot present a future danger to the public. A capital defendant's parole ineligibility also goes to the very

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[21] *O'Dell*, 117 S. Ct. at 1973 (quoting *Graham*, 506 U.S. at 478 (quoting *Teague*, 489 U.S. at 311)).

[22] *Id.* at 1975 (quoting *Butler*, 494 U.S. at 415).

[23] 430 U.S. 349 (1977).

[24] 476 U.S. 1 (1986).

[25] *Simmons v. South Carolina*, 512 U.S. 154, 169 (1984).

[26] *O'Dell*, 117 S. Ct. at 1974 (quoting *Simmons*, 512 U.S. at 177).

[27] *Id.* at 1975.

[28] *Id.*

[29] *Gardner v. Florida*, 430 U.S. 349, 362 (1977).

[30] *O'Dell*, 117 S. Ct. at 1975-76.

[31] *Id.* at 1976.

[32] *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (citing *Eddings v. Oklahoma*, 455 U.S. 104 (1982)).

[33] *O'Dell*, 117 S. Ct. at 1975 (quoting *Skipper*, 476 U.S. at 5, n. 1 (quoting *Gardner*, 430 U.S. at 362)).

[34] *Id.* at 1976.

[35] *Id.* at 1978.

[36] 463 U.S. 992 (1983).

[37] 472 U.S. 320 (1985).

[38] *Ramos*, 463 U.S. at 1013.

[39] *O'Dell*, 117 S. Ct. at 1977.

[40] *Id.* at 1977 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 342 (1985) (O'Connor, J., concurring)).

[41] *Id.* at 1978.

nature of the sentence which the jury must deliberate. If jury members do not understand the basic nature of one of the sentences from which they must choose, they cannot make a reasoned decision. It is the very heart of due process that the juries be informed of all relevant information.[42]

Ramos and *Caldwell* are simply misapplied in *O'Dell*. Justice Thomas' dubious reasoning in this case leads him to stretch *Ramos* and *Caldwell* to a subject to which they only tangentially apply, while at the same time overly confining *Gardner* and *Skipper*, two decisions which are dispositive of whether the *Simmons* rule was "dictated by precedent existing at the time [O'Dell's] conviction became final."[43] We have only to look to the *Simmons* decision itself for language, brushed aside by Justice Thomas in a footnote,[44] which indicates that *Simmons* was in fact dictated by precedent existing at the time O'Dell's conviction became final. The *Simmons* Court plainly and simply stated that the "principle announced in *Gardner* was reaffirmed in *Skipper*, and **it compels our decision today.**"[45]

D. Exceptions to *Teague* Rule

O'Dell contended that even if the rule of *Simmons* was in fact new, it should nevertheless be applied retroactively because it qualified under the second exception to the *Teague* rule for "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[46] Justice Thomas quickly dismissed this, pointing out the contrast between the *Simmons* rule and that of *Gideon v. Wainwright*,[47] a case previously cited by the Court as an example of a watershed rule.[48] Unlike the "sweeping rule of *Gideon* . . . the narrow right of rebuttal that *Simmons* affords to defendants in a limited class of capital cases has hardly 'alter[ed] our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding."[49]

II. Navigating *Teague* in a Post-*Simmons* World

Justice Thomas clearly established that the petitioner carries the burden of demonstrating that a rule is not new under *Teague*. "Before a state prisoner may upset his state conviction or sentence on federal collateral review, he must demonstrate as a threshold matter that the court-made rule of which he seeks benefit is not 'new.'"[50] A rule is not new if the trial judge "would have felt compelled by existing precedent to conclude that the rule [defendant] seeks was required by the Constitution."[51] A rule is not new if it was "dictated by precedent existing at the time the defendant's conviction became final."[52] Justice Thomas reasoned that a rule is not new if it can be said that the "state court, at the time the conviction or sentence became final, would have acted **objectively unreasonably** by not extending the relief later sought" on collateral review.[53]

Defense counsel who wish to show that it was objectively unreasonable for a trial judge to deny relief later sought in a habeas petition must examine the legal landscape at the time of the denial. This entails discovering all the precedent that is pertinent to the rule in question, distinguishing those decisions that did not apply the rule and making the most of those that did. A reading of *O'Dell* implies that it is unlikely that a court already hostile to retroactive application of a particular rule can be convinced otherwise; nonetheless, it is worth the effort in the defense of one against whom the ultimate punishment is sought.

The first exception to the *Teague* rule is fairly clear. The rule in question must either "place 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'"[54] or it must prohibit "a certain category of punishment for a class of defendants because of their status or offense."[55] If the rule in question brings about one of the above it will be applied retroactively on collateral review; if it does not, it will not be applied retroactively.

The second exception to the *Teague* rule is both more ambiguous and potentially more difficult to invoke. For retroactivity, the second exception demands that the new rule be among the select group of rules "requiring observance of 'those procedures that . . . are 'implicit in the concept of ordered liberty.'"[56] It has also been said by the Court that the rule must be among those "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[57]

These burdens are difficult to meet, as Justice Thomas demonstrates in *O'Dell*. However, the Court's decision in *O'Dell* provides suggestions on how a court might be convinced. Justice Thomas characterizes the rule in *Simmons* as only applying to a "limited class of capital cases," whereas *Gideon*, previously held out by the Court as an example of a watershed rule, was called a "sweeping rule."[58] This suggests that those petitioners who can characterize the sought-after rule as applicable to many individuals and circumstances will have a greater chance of success. Justice Thomas also noted that the *Simmons* rule did not "'alter our understanding of the ' *bedrock procedural elements*' essential to the fairness of a proceeding."[59] Thus a petitioner will be more likely to obtain the desired relief if he or she can demonstrate that the new rule in some way changes accepted legal thought on procedural fairness.

III. A New Angle: Prosecutorial Misconduct

The drafting of habeas petitions is fundamentally different from trial work. It is more of a critical endeavor, examining the trial itself to identify errors injurious to the petitioner. In *O'Dell*, the main habeas

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[42] *See Eddings v. Oklahoma*, 455 U.S. 104 (1982) (holding that sentencing court's conclusion that it could not consider the defendant's turbulent family history as a mitigating factor in deciding punishment was constitutional error).

[43] *See Teague v. Lane*, 489 U.S. 288, 301 (1989).

[44] *O'Dell*, 117 S. Ct. at 1975-76, n. 2.

[45] *Simmons v. South Carolina*, 512 U.S. 154, 164-65 (1994).

[46] *See Graham v. Collins*, 506 U.S. 461, 478 (1993) (quoting *Teague*, 489 U.S. at 311).

[47] 372 U.S. 335 (1963) (holding that all indigent defendants are entitled to court appointed counsel in felony cases).

[48] *See Saffle v. Parks*, 494 U.S. 484 (1990).

[49] *O'Dell v. Netherland*, 117 S. Ct. 1969, 1978 (1997) (quoting *Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (quoting *Teague v. Lane*, 489 U.S. 288, 311 (1994)) (emphasis in original).

[50] *Id.* at 1973.

[51] *Lambrix v. Singletary*, 117 S. Ct. 1517, 1524 (1997) (quoting *Saffle*, 494 U.S. at 488).

[52] *Graham v. Collins*, 506 U.S. 461, 467 (1993) (quoting *Teague*, 489 U.S. at 301) (emphasis in original).

[53] *O'Dell*, 117 S. Ct. at 1973 (emphasis added).

[54] *Teague*, 489 U.S. at 311 (quoting *Mackey v. United States*, 401 U.S. 675, 692 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)).

[55] *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989).

[56] *Teague*, 489 U.S. at 307 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

[57] *Graham v. Collins*, 506 U.S. 461, 478 (1993) (quoting *Teague*, 489 U.S. at 311).

[58] *O'Dell v. Netherland*, 117 S. Ct. 1969, 1978 (1997).

[59] *Id.* at 1978 (emphasis in original).

claims were actual innocence and a due process violation resulting from the trial judge's denial of O'Dell's request to inform the jury of his parole ineligibility, the latter claim receiving the most judicial attention.[60]

If the *Simmons* issue in *O'Dell* is approached from another angle, from the angle of the Commonwealth Attorney's role, a new issue arises. An argument can be made that when the prosecutor proceeded against O'Dell at sentencing under the future dangerousness aggravator, aware that O'Dell was parole ineligible, the prosecutor engaged in prosecutorial misconduct. "In support of his argument to the jury that nothing short of death would be sufficient, the prosecutor emphasized petitioner's misconduct when he was 'outside the prison system.'"[61] In his closing statement at the sentencing hearing, the prosecutor implied that the jury should be concerned about O'Dell being released and posing a danger to the community. He asked "[i]sn't it interesting that he is only able to be outside of the prison system for a matter of months to a year and a half before something has happened again?"[62] His concluding statements reiterated that message:

> [Y]ou may still sentence him to life in prison, but I ask you ladies and gentlemen[,] in a system, in a society that believes in its criminal justice system and its government, what does this mean? ... [A]ll the times he has committed crimes before and been before other juries and judges, no sentence ever meted out to this man has stopped him. Nothing has stopped him, and nothing ever will except the punishment that I now ask you to impose.[63]

There is little room for doubt that the Commonwealth Attorney cavalierly misled and misinformed the jury in *O'Dell*.

Exactly this kind of misconduct was addressed in *Berger v. United States*.[64] In *Berger*, the Court characterized the prosecutor's argument to the jury as "containing improper insinuations and assertions calculated to mislead the jury."[65] Noting the prosecutor's special relationship to the government, the Court described the prosecutor's proper interest as "not that it shall win a case, but that justice shall be done."[66] The Court observed that the average jury knows of and has confidence in this interest. "Consequently, improper suggestions [and] insinuations ... are apt to carry much weight against the accused when they should properly carry none."[67] The Court went on to state that the proper remedy for such prosecutorial misconduct is a new trial.[68] Under the *Berger* Court's reasoning, there can be little doubt that Joseph O'Dell was entitled to a new sentencing hearing.[69]

Summary and Analysis by:
Craig B. Lane

[60] *Id.* at 1972.
[61] *Id.* at 1979 (Stevens, J., dissenting) (quoting App. 61).
[62] *O'Dell*, 117 S.Ct. at 1979, n. 1 (Stevens, J., dissenting) (quoting App. 61).
[63] *Id.* (Stephens, J., dissenting) (quoting App. 66).
[64] 295 U.S. 78 (1935).
[65] *Berger*, 295 U.S. at 85.
[66] *Id.* at 88.
[67] *Id.*
[68] *Id.* at 89.
[69] Joseph O'Dell was executed on July 23, 1997.

ARNOLD v. EVATT

113 F.3d 1352 (4th Cir. 1997)
United States Court of Appeals, Fourth Circuit

FACTS

On April 12, 1978, a party of four set out on an expedition to find wild mushrooms. The party included cousins John Arnold and John Plath, both in their early twenties, and their girlfriends, eleven-year old Carol Ullman and seventeen-year old Cindy Sheets.[1] During their search, they came upon Betty Gardner, a farm worker, walking along the side of the road.[2] After the party gave Gardner a ride to her brother's home, they refused her request to take her to work. However, based on Arnold's suggestion, the group decided to go back and kill Gardner.[3]

After picking up Gardner, they took her to a remote wooded area near a garbage dump. There, all four in the group, at one time or another, physically assaulted Gardner. She was alternately sexually assaulted, urinated on, stomped, beaten with a belt, hit with a jagged bottle, stabbed with a knife and choked with a garden hose.[4] After dragging Gardner into the woods, Arnold completed the murder by strangling her with the garden hose. In an attempt to misdirect the police, Arnold carved "KKK" into Gardner's body.[5]

A jury found Arnold and Plath guilty of murder and kidnapping, and both were sentenced to death.[6] On appeal, the South Carolina Supreme Court affirmed Arnold's conviction, but remanded the case for resentencing based on improper prosecutorial argument.[7] After the new jury recommended the death penalty, the South Carolina Supreme Court affirmed Arnold's death sentence.[8] The United States Supreme Court denied Arnold's petition for writ of certiorari, but two Justices dissented

[1] *Arnold v. Evatt*, 113 F.3d 1352, 1355 (4th Cir. 1997).
[2] *Arnold*, 113 F.3d at 1355.
[3] According to testimony, Arnold proposed going back to kill Gardner because he "didn't like niggers." *Id.* at 1355.
[4] *Id.* at 1355.
[5] *Id.* at 1355. Law enforcement did not find Gardner's body until Sheets' role in the murder was discovered, and she revealed the location of Gardner's decomposed remains. *Id.*
[6] *Id.* at 1355.
[7] *State v. Plath*, 284 S.E.2d 221 (S.C. 1981).
[8] *State v. Plath*, 313 S.E.2d 619 (S.C. 1984).