

CHIEF JUSTICE JEAN HOFER TOAL OF THE SOUTH
CAROLINA SUPREME JUDICIAL COURT: VOTING PATTERNS
IN DIVIDED CRIMINAL CASES

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I. INTRODUCTION

Former United States Circuit Judge Karen J. Williams of the Fourth Circuit once stated, “Jean Toal has to be recognized as the most important female in the last century in the State of South Carolina.”¹ From being the first woman in many fields² to witnessing social changes occurring in South Carolina during her career path,³ Chief Justice Jean Hofer Toal has not only served as a role model for women lawyers, but has become an influential and productive member of South Carolina’s Supreme Court. While addressing issues in “virtually every area of the law,” Chief Justice Toal has written many opinions that have become precedential in South Carolina regarding both civil and criminal matters.⁴

Over a decade ago, when facing re-election as a justice on South Carolina’s Supreme Court, Chief Justice Toal was attacked as being a judge who was too “soft on crime.”⁵ This study illustrates Chief

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¹ Selma Moidel Smith, *Honors to Her Honor: Chief Justice Jean Hofer Toal*, 15 EXPERIENCE 22, 22 (2004), available at <http://www.law.stanford.edu/library/womenslegalhistory/articles/Smith-Toal.pdf>.

² “She became the first woman to sit on the [South Carolina Supreme Court] . . . [and] the first woman to serve as [C]hief [J]ustice of South Carolina.” *Id.* See also *infra* Part II. D.

³ *Conversations: Chief Justice, Jean Toal*, MIDLANDSBIZ, <http://www.midlandsbiz.com/news/conversations/1078/> (last visited May 6, 2011) [hereinafter MIDLANDSBIZ]. Chief Justice Toal explains the segregation of the licensing and social bar when she graduated, witnessing the effect of *Brown v. Board of Education*, the 1964 Civil Rights Act, the Voting Rights Act of 1967, South Carolina’s ratification of the 19th Amendment, and the decision in *Edwards v. South Carolina* (establishing the First Amendment rights of demonstrators). *Id.*

⁴ Smith, *supra* note 1, at 23.

⁵ John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 474 (1999) (citation omitted).

Justice Toal's voting approach in divided criminal cases, during her eleven year tenure as Chief Justice, in which she sided with the prosecution. The study also examines the rate at which her colleagues have agreed with her in these cases, and the rate at which trends exists in Chief Justice Toal's agreement with her colleagues as well. Although there have been changes to the composition of the court in the last decade, the cases analyzed in this study are inclusive of those in which justices no longer on the bench, and those who served as acting justices, participated.

The breakdown of this study is as follows: Part II provides general background information on South Carolina's Supreme Court. It briefly explains the selection process of the justices for the court, the jurisdiction of the court, the court's remaining functions, and the current composition of the court—with the focus on Chief Justice Toal's background and responsibilities as Chief Justice. Part III explains the particular methodology used in this study, and the reasoning behind using such a methodology. In accordance with various analyses performed in this study, Part III also emphasizes the distinct selection of certain cases, and the method used in collecting data relevant to the various analyses. Part IV focuses on Chief Justice Toal's pro-prosecution voting approach seen in divided criminal cases in which she authored an opinion. Part V then examines the rate at which her colleagues, throughout her tenure as Chief Justice, have agreed with her, both overall and in relation to her pro-prosecution opinions, in divided criminal cases. Part VI of the study explores the rate at which this trend has extended to Chief Justice Toal's voting in divided criminal cases in which she has not authored an opinion. Part VII then shifts the study into exploring how Chief Justice Toal has sided with the prosecution in issues raised on appeal, and whether a trend exists specific to these issues. Part VIII offers some concluding remarks as to the overall data analyzed, voting patterns and trends observed, and their application to the court today. Appendix A provides a compendium of the cases used for analysis in Parts IV, V, and VII. Appendix B provides a deconstructed analysis of the agreement rate by year used for Part V. Appendix C contains a list of cases used for Part VI's analysis.

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II. SOUTH CAROLINA'S SUPREME COURT

A. Generally

The South Carolina Supreme Court is the highest court in South Carolina, consisting of one chief justice and four associate justices.⁶ The court is currently located in Columbia, South Carolina.⁷ Justices of the court hear arguments, study case records, and review briefs filed by the parties. Each individual justice is assigned a number of cases for which he or she prepares an opinion.⁸ The opinions are then considered by the remaining justices who will either agree or disagree. Those who disagree with the majority often file a dissenting opinion, which is published alongside the holding of the court.⁹

The court maintains both original and appellate jurisdiction.¹⁰ In its appellate capacity, the Supreme Court attends to cases on writ of certiorari from the court of appeals, and seven specific classes of appeals directly from the circuit and family courts within the exclusive jurisdiction of the court.¹¹ These cases cover a variety of issues: death sentences; appeals from circuit courts setting public utility rates; the constitutionality of state law or local ordinances; state or local bonds or other indebtedness; elections; the limiting of grand jury investigations; and appeals of family court orders related to abortion by a minor.¹² Furthermore, the Supreme Court is also responsible for promulgating rules governing all the courts of the state, bar admissions, and discipline of lawyers and judges.¹³

⁶ S.C. CODE ANN. § 14-3-10 (2010).

⁷ *S.C. Supreme Court: Location Map—Supreme Court Building*, S.C. JUD. DEP'T, <http://www.judicial.state.sc.us/gmaps/supremeMap.cfm> (last visited May 6, 2011).

⁸ *S.C. Supreme Court: Supreme Court History*, S.C. JUD. DEP'T, <http://www.judicial.state.sc.us/supreme/history.cfm> (last visited May 6, 2011).

⁹ *Id.*

¹⁰ “The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warrant, prohibition, certiorari, habeas corpus and other remedial and original writs.” S.C. CODE ANN. § 14-3-310; *see also S.C. Supreme Court: Supreme Court*, S.C. JUD. DEP'T, <http://www.judicial.state.sc.us/supreme> (last visited May 6, 2011) [hereinafter *South Carolina Supreme Court*].

¹¹ S.C. CODE ANN. §§ 14-3-320; 14-3-330. *See* LEAGUE OF WOMEN VOTERS OF S.C., JUDICIAL SELECTION IN SOUTH CAROLINA—THE PROCESS 1 (2010), http://lwvsc.org/files/judicial_selection_process_1_.pdf [hereinafter *THE PROCESS*]; *see also S.C. Supreme Court*, *supra* note 10.

¹² *The Process*, *supra* note 11.

¹³ S.C. CODE ANN. § 14-3-640; *see also S.C. Supreme Court*, *supra* note 10.

B. Election Process

Similar to states such as Connecticut and Virginia, the selection of the judiciary remains primarily a legislative function.¹⁴ Justices of the South Carolina Supreme Court are each elected to ten-year terms by the General Assembly.¹⁵ “Prior to 1997, the South Carolina General Assembly had statutory authority to elect and re-elect the state’s judges and justices.”¹⁶ The qualifications of all applicants were reviewed by a joint committee.¹⁷ However, this approach raised many concerns and problems, such as the lack of guidance as to the qualifications required and the committee’s inability to remove an applicant’s name from further consideration.¹⁸ Today, however, the candidates are first screened by the Judicial Merit Selection Commission prior to being presented for election by the General Assembly.¹⁹ The terms are staggered so that every two years, one member of the court is elected.²⁰

¹⁴ Such legislative function is also seen in various states, including Virginia and Connecticut. *THE PROCESS*, *supra* note 11, at 5.

¹⁵ S.C. CODE ANN. § 14-3-10.

¹⁶ Kimberly C. Petillo, Comment, *The Untouchables: The Impact of South Carolina’s New Judicial Selection System on the South Carolina Supreme Court, 1997–2003*, 67 *ALB. L. REV.* 937, 938 (2004) (citing S.C. CODE ANN. § 2-19-10 (1986)).

¹⁷ *Id.* at 938–39.

¹⁸ *See id.* at 939 (“[U]nqualified applicants remained eligible for appointment. This process at times resulted in unqualified applicants being elected to the bench because members of the General Assembly—provided with little external guidance on the qualifications of the candidate—often elected sitting or former legislators, with whom they had experience.”) (citing Martin Scott Driggers, Note, *South Carolina’s Experiment: Legislative Control of Judicial Merit Selection*, 49 *S.C. L. REV.* 1217, 1227 (1998)).

¹⁹ S.C. CONST. Art. V § 27. In response to the concerns regarding the influence of legislators over the selection of the judiciary, the purpose of the Merit Selection Commission is to serve as “an independent body which would act as a check and balance on the legislature” that first screens the candidates and then recommends three candidates to the General Assembly. *THE PROCESS*, *supra* note 11, at 3. The General Assembly is required to elect judiciary “from among the nominees of the Commission.” *Id.* However, the use of the Merit Selection Commission as a check and balance remains questionable. For example, the Commission consists of ten members. “Five members are appointed by [the] Speaker of the House, and of these three members must be serving members of the General Assembly and two members must be selected from the general public.” *Id.* at 6 (citing S.C. CONST. Art. V § 27). The other five members are appointed by the Chairman of the Senate Judiciary Committee, three of which must be serving members of the General Assembly. S.C. CODE ANN. § 2-19-10. Thus, considering the significant overlap of the members of the Merit Selection Commission and the General Assembly—members who will essentially vote twice as “qualifiers” and “selectors”—South Carolina relies heavily on the legislature in the selection of the judiciary in both roles. *See THE PROCESS*, *supra* note 11, at 3–4. This “highlights the lack of a check and balance on the legislature’s power in the implementation of the selection process.” *Id.* at 4.

²⁰ “They shall be so classified that one of them shall go out of office every two years.” S.C. CODE ANN. § 14-3-10.

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Moreover, there is no limit to the number of terms that a justice may be reelected.²¹

C. Today's Court Membership

Today's court membership includes Chief Justice Toal, Justice Costa M. Pleicones, Justice Donald W. Beatty, Justice John W. Kittredge, and Justice Kaye G. Hearn.²² Chief Justice Toal began her career on the Supreme Court as an associate justice on March 17, 1988, and was installed as Chief Justice on March 23, 2000 for the remainder of her predecessor's term.²³ She was then reelected in February 2004, and was installed as Chief Justice in June 2004.²⁴ Justice Pleicones served as a circuit court judge from July 1991 to March 2000, and assumed his present position as an associate justice on March 23, 2000; he was elected to a second term in February 2006, which will expire on July 31, 2016.²⁵ Justice Beatty assumed his present position as an associate justice in 2007 following his election to the Circuit Court in 1995, and Court of Appeals in 2003.²⁶ Justice Kittredge was first elected to the South

²¹ *S.C. Supreme Court*, *supra* note 10.

²² *Id.*

²³ *S.C. Supreme Court: Chief Justice Jean Hofer Toal*, S.C. JUD. DEP'T, <http://www.judicial.state.sc.us/supreme/displayJustice.cfm?judgeID=1118> (last visited May 6, 2011) [hereinafter *Chief Justice Jean H. Toal*]. Toal was elected to complete the remaining four years of the term of her predecessor, Chief Justice Ernest Finney, Jr., who retired in 2000. Smith, *supra* note 1, at 1.

²⁴ *Chief Justice Jean H. Toal*, *supra* note 23.

²⁵ *S.C. Supreme Court: Justice Costa M. Pleicones*, S.C. JUD. DEP'T, <http://www.judicial.state.sc.us/supreme/displayJustice.cfm?judgeID=1127> (last visited May 6, 2011). J. Pleicones attended University of South Carolina of Law and received his J.D. in 1968. *Id.* Following law school, he served as an enlisted member and as an officer in the Judge Advocate's General Corps of the U.S. Army, practiced as a public defender for Richland County, South Carolina, and entered into private practice with Lewis, Babcock, Pleicones and Hawkins. *Id.* While in private practice, Pleicones also served as a municipal judge for the City of Columbia and as County Attorney for Richland County prior to being elected Resident Circuit Court Judge for the 5th Judicial Circuit. *Id.*

²⁶ *S.C. Supreme Court: Justice Donald W. Beatty*, S.C. JUD. DEP'T, <http://www.judicial.state.sc.us/supreme/displayJustice.cfm?judgeID=1134> (last visited May 6, 2011). Justice Beatty received his J.D. from the University of South Carolina School of Law. *Id.* Following law school, he established his legal career in community service, public service, and leadership. *Id.* He began by working for the Neighborhood Legal Assistance Program in order to assist those who were not able to afford legal representation. *Id.* Soon after, he established a private practice in Spartanburg, South Carolina. *Id.* He was then elected to Spartanburg City Council, "later moving to the state level with his election to the House of Representatives." *Id.* He also served as a member of the Medical Military, Public and Municipal affairs Committee, the Judiciary Committee, and Chairman and Chairmen-elect of the South Carolina Legislative Black Caucus. *Id.* Beatty currently remains dedicated to community service. He served on the Piedmont Legal Services Board of Directors,

Carolina Family Court bench in 1991, to the Circuit Court bench in 1996, to the Court of Appeals in 2003, and to his current position on the Supreme Court in 2008.²⁷ Justice Hearn was elected to the South Carolina Court of Appeals in 1995; she became Chief Judge of the South Carolina Court of Appeals in 1999, and was elected to the Supreme Court in May 2009.²⁸

D. Chief Justice Jean H. Toal

The road to the state supreme court was an eventful one. It began in her senior year as a philosophy major at Agnes Scott College in Atlanta. “When I was home for Thanksgiving, an old friend of my family’s, Judge Louis Rosen, encouraged me to attend law school and become a lawyer.” He had researched the course offerings at her college and found a reciprocal constitutional law class at neighboring Emory University being offered the following quarter. When Toal told her guidance counselor about her potential interest in law school and the course at Emory, “she discouraged me from the legal profession, stating that the profession was not open to women. I enrolled in the law course that winter, and the rest is history.”²⁹

Spartanburg Residential Development Corporation, Southside Neighborhood Association Partnerships, and BB&T Advisory Board, BMW Minority Advisory. *Id.*

²⁷ *S.C. Supreme Court: Justice John W. Kittredge*, S.C. JUD. DEP’T, <http://www.judicial.state.sc.us/supreme/displayJustice.cfm?judgeID=1136> (last visited May 6, 2011). Justice Kittredge received his J.D. from the University of South Carolina School of Law in 1982. *Id.* His legal career began as a law clerk to The Honorable William W. Wilkins, Jr. and he practiced privately in Wilkins, Nelson, and Kittredge. *Id.* Akin to Justice Beatty, Justice Kittredge remained involved in community and state service through the Governor’s Committee on Crime and Delinquency, and Governor’s Juvenile Justice Task Force. *Id.* He served as Vice-President of the Greenville Technical College Foundation, Chairman of City of Greenville Civil Service Commission, President of Greenville Country Crime Stoppers, and member of Board of Directors of Child Evangelism Fellowship. *Id.*

²⁸ *S.C. Supreme Court: Justice Kaye G. Hearn*, S.C. JUD. DEP’T, <http://www.judicial.state.sc.us/supreme/displayJustice.cfm?judgeID=1139> (last visited May 6, 2011). Justice Hearn received her J.D. from the University of South Carolina School of Law and then began her legal career as a law clerk. *Id.* Following her clerkship, she practiced privately with Stevens, Stevens, Thomas, Hearn & Hearn in Loris, South Carolina. *Id.* In 1998, Justice Hearn received an L.L.M. from the University of Virginia’s Graduate Program for Judges while serving on the bench of South Carolina Court of Appeals. *Id.* She served as President of the Council of Chief Judges of the Intermediate Court of Appeals from 2005–2006. *Id.* Currently, Hearn is a member of the University of South Carolina Law School’s Partnership Board and the Charleston School of Law Board of Advisors. *Id.* She is also a Visiting Professor at the Charleston School of Law, teaching a class on appellate advocacy. *Id.*

²⁹ Smith, *supra* note 1, at 1. Chief Justice Toal states that the two main influences in her life that caused her to pursue law were her “sensitivity to black/white issues” and the conversation she had with the Judge Rosen. See Midlandsbiz, *supra* note 3. In fact, Chief

Chief Justice Toal earned a bachelor of arts in philosophy from Agnes Scott College³⁰ and juris doctor from the University of South Carolina School of Law.³¹ Prior to her election to the Supreme Court, Chief Justice Toal was a litigator in private practice and was involved extensively in public service.³² In 1975, Chief Justice Toal began her service in the South Carolina House of Representatives.³³ She ultimately served for thirteen years,³⁴ in which “[s]he was the first woman in South Carolina to chair a standing committee of the House of Representatives[;] [s]he [also] served as Chairman of the House Rules Committee and Chairman of the Constitutional Laws Subcommittee of the House Judiciary Committee.”³⁵ Her twenty years as a practicing attorney included both plaintiff and defense work, criminal trial work, and constitutional litigation, as well as appearing in all levels of trial and appellate courts in South Carolina.³⁶ Her legislative service also addressed an assortment of “complex legislation,” including fields of “constitutional law, utilities regulation, criminal law, structure of local government, budgetary

Justice Toal has strong sentiments regarding the importance of mentoring. *See* Smith, *supra* note 1, at 6 (“When I think back over all the years, what I have been most grateful for is all the mentoring I received. It made all the difference for me. That is the most important contribution senior lawyers can make to the newer lawyers, starting with the youngest members of the profession. This how we ensure the passing on of our most basic professional principles and the rule of law.”).

³⁰ Smith, *supra* note 1, at 1. During college, Chief Justice Toal was a member of the Judicial Council. *Id.* “She earned the Hayes Debate Trophy, capping her victory in high school as the state’s first women debate champion.” *Id.* at 1–2.

³¹ Chief Justice Toal was only one of four women students out of her class of two hundred students. *Id.* At 2. She met and married her husband Bill Toal while enrolled in law school. *Id.* “I enjoyed the intellectual and analytical challenge of the study of law, and by my third year, I was the managing editor of the South Carolina Law Review.” *Id.* Toal and her husband were the only couple to serve as managing editor and editor of the law review together. *Id.*

³² Chief Justice Toal practiced as an associate with Haynsworth Law Firm in Greenville, South Carolina and as an associate and partner with Belser, Baker, Barwick, Ravenal, Toal & Bender in Columbia, South Carolina. *Chief Justice Jean H. Toal, supra* note 23.

³³ *See* Smith, *supra* note 1, at 23.

³⁴ C.J. Toal was re-elected six times. *Id.* As a member, she remained dedicated to women’s rights. *Id.* at 25 (“I floor-led and sponsored various bills and resolutions to improve the conditions for women in South Carolina including a Joint Resolution to ratify the Equal Rights Amendment to the U.S. Constitution, which after an intensely divisive six-year debate, was never approved.”).

³⁵ *See Chief Justice Jean H. Toal, supra* note 23. Chief Justice Toal has stated that, “[i]n many instances I had a primary role in drafting legislation and presenting it to subcommittee, full committee and House membership. I was generally regarded as an expert on constitutional law and state finances.” Smith, *supra* note 1, at 23. Additionally, “[she] floor-led many rules changes which modernized the operation of the House, eliminated filibuster, and shortened the legislative session during my six-year tenure as chair of the House Rules Committee.” *Id.*

³⁶ *Chief Justice Jean H. Toal, supra* note 23.

matters, structure of the judicial system, banking and finance legislation, corporate law, torts claims, workers' compensation, freedom of information act[,] and environmental law."³⁷

During her initial years on the court, "Toal carried out a number of special projects assigned to her by the incumbent chief justices."³⁸ For example, from 1989 to 1991, she supervised the Supreme Court Building Renovation Project;³⁹ from 1992 to 1994 she chaired the state Juvenile Justice Task Force; and from 1993 to 1994, she served on the task force on rules of evidence "that resulted in South Carolina's becoming the 36th state to adopt a form of the Federal Rules of Evidence."⁴⁰ Furthermore, Chief Justice Toal has become chief advocate for South Carolina's Judicial Automation Project.⁴¹

Chief Justice Toal is a member of the Richland County, South Carolina, and American Bar Associations, the South Carolina Women Lawyers Association, the National Association of Women Judges, and the John Belton O'Neal Inn of Court. She serves on the Board of Trustees of the American Inns of Court Foundation, is Past President of the Conference of Chief Justices, and is Past Chair of the Board of Directors of the National Center for State Courts.⁴²

³⁷ *Id.*

³⁸ Smith, *supra* note 1, at 23.

³⁹ *Id.* ("[S]he made presentations to obtain funding by the legislature, attended construction team meeting with the contractors and architect, and made daily site inspections for 13 months.")

⁴⁰ *Id.*

⁴¹ Through her leadership, "technology initiatives are being integrated into the eight levels of the South Carolina court system." *Chief Justice Jean H. Toal, supra* note 23. Some of these projects include "high-speed network connectivity to all 46 county courthouses and an on-line, statewide case management system." *Id.* She also decided to convert data into digital format. *Id.* As a result, C.J. Toal has been recognized as one of the 2002's "Top 25 Doers, Dreamers & Drivers" of technology in government." *Id.* Moreover, she was also recognized by the Center for Digital Government in 2002 for her leadership in technology. Smith, *supra* note 1, at 24. In addition to such recognition, she gave the keynote address, in October 2003, for the Court Technology Conference held by the National Center for State Courts. *Id.* She stated, "[i]n my one-hour presentation, I told the South Carolina story with great pride as a model for other states." *Id.* Chief Justice Toal's technological improvements have improved judicial economy "despite a reduction in funding and personnel." *Id.*

⁴² *Chief Justice Jean H. Toal, supra* note 23; see also *Welcome to SCWLA, S.C. WOMEN LAW. ASS'N*, <http://www.scwla.org/> (last visited May 7, 2011) ("The mission of the South Carolina Women Lawyers Association (SCWLA) is to enhance the status, influence and effectiveness of women lawyers in the State of South Carolina."); *Who We Are, NAT'L ASS'N OF WOMEN JUDGES*, http://www.nawj.org/who_we_are.asp (last visited May 7, 2011) ("an organization dedicated to diversity and the following ideals: ensuring equal justice and access to the courts for all including women, youth, the elderly, minorities, the underprivileged, and people with disabilities; providing judicial education on cutting-edge issues of importance; developing judicial leaders; increasing the number of women on the bench in order for the judiciary to more accurately reflect the role of women in a democratic society; and improving the administration of justice to provide gender-fair decisions for both male and female

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As a result of such involvement, in conjunction with her ambitious legal career, Chief Justice Toal has received numerous prestigious awards, including the South Carolina Trial Lawyers Outstanding Contribution to Justice Award, and the Margaret Brent Women Lawyers of Achievement Award.⁴³

Chief Justice Toal is not only the first woman to serve as a Justice on the Supreme Court, but is also “the first native Columbian and first Roman Catholic to serve on South Carolina’s highest court.”⁴⁴ As Chief Justice, she faced not only judicial responsibilities, but also administrative responsibilities. She has stated that

South Carolina has a strong Chief Justice system. As one of five judges on the highest court in the state, I take my full and equal share of cases. As CEO of the court system, I am also responsible for the budget and court administration (assignment of judges, court reporters, and law clerks, etc.). 60% of my time is spent as a judge; 40% as CEO. It can be a somewhat daunting job because of all of the administrative components.⁴⁵

litigants”); *History of the John Belton O’Neill Inn*, AM. INNS OF CT., <http://www.innsocourt.org/Content/InnContent.aspx?Id=5411> (last visited May 7, 2011) (providing a historical description of John Belton O’Neill and the chapter’s formation); *General Information*, AM. INNS OF CT., <http://innsocourt.org/Content/Default.aspx?Id=2> (last visited May 7, 2011) (“[AIC] is an amalgam of judges, lawyers, and in some cases, law professors and law students” who meet to discuss matters of ethics, skills, and professionalism of the bench and bar.); *CCJ Mission Statement*, CONF. OF CHIEF JUSTS., <http://ccj.ncsc.dni.us/mission.html> (last visited May 7, 2011) (“The mission of the Conference of Chief Justices is to improve the administration of justice in the states, commonwealths and territories of the United States.”); *About Us*, NATL. CTR. FOR ST. CTS., <http://www.ncsc.org/about-us.aspx> (last visited May 7, 2011) (“The National Center for State Courts is an independent, nonprofit court improvement organization” that serves as an authoritative source for state courts; some of their services include research, information services, education, and consulting.).

⁴³ *Chief Justice Jean H. Toal*, *supra* note 23. Chief Justice Toal received the latter award in 2004 from the American Bar Association’s Commission on Women in the Profession. *Id.* The award is named after the first woman lawyer in the U.S., and “is given annually to five women who have achieved professional excellence in their field and have actively advanced the status of women within the legal community.” *Id.*

⁴⁴ *Id.*

⁴⁵ MIDLANDZBIZ, *supra* note 3.

III. METHODOLOGY

The study is limited to divided decisions in criminal cases. However, the approach varies for each distinct analysis.⁴⁶ The reasoning behind limiting studies such as this to divided decisions is to readily distinguish the way a particular justice, or the court in general, votes on issues that allow differing judicial perspectives.⁴⁷ “Unlike unanimous decisions, divided decisions reflect the ‘unique values and beliefs’ of individual justices and ‘offer an opportunity to delve into [their] individual judicial philosophies.’”⁴⁸ Thus, focusing on select divided cases allows one to observe the way in which a particular justice decides a case with facts that have the potential for differing outcomes in respect to the particular issues raised on appeal.⁴⁹ In other words, focusing on unanimous decisions does not exemplify the varying perspectives and approaches that a particular justice may take when the entire court is in agreement.

The criminal cases gathered for this study were collected through the use of South Carolina’s court system’s website⁵⁰ and through the use of certain terms and connectors on Westlaw’s online database.⁵¹ Due to the all-encompassing nature of these searches, only criminal cases that addressed the defendant’s arrest, detention, interrogation, trial, counsel effectiveness, conviction, and sentencing and punishment were collected; counsel effectiveness includes post-conviction relief matters.⁵² Thus, cases that addressed other

⁴⁶ The approach taken for each part of the study is explained in depth below and in each section.

⁴⁷ Kevin Blackwell, Comment, *Shipping Up to Boston: The Voting of the Massachusetts Supreme Judicial Court in Non-Unanimous Criminal Cases from 2001–2008*, 72 ALB. L. REV. 673, 677 (2009) (citing James W. Barr, Comment, *Pennsylvania Supreme Court: The More Things Change, the More They Stay the Same*, 70 ALB. L. REV. 1093, 1095 (2007)).

⁴⁸ *Id.* (quoting Vincent Martin Bonventre & Amanda Hiller, *Public Law at the New York Court of Appeals: An Update on Developments, 2000*, 64 ALB. L. REV. 1355, 1380 (2001)).

⁴⁹ See Blackwell, *supra* note 47, at 677–78 (discussing how judges’ opinions in non-unanimous cases demonstrate how they may feel about issues).

⁵⁰ See generally, *S.C. Judicial Department: Supreme Court Published Opinions*, S.C. JUD. DEP’T, <http://www.judicial.state.sc.us/opinions/indexSCPUB.cfm> (last visited May 7, 2011) (providing an archive of opinions dating back as far as 1997).

⁵¹ Terms and connectors used for Chief Justice Toal’s majority opinions in database SCCJ-CS: ju(toal) & co(high) & da(aft 2000) % ‘office of disciplinary counsel’; concurring: toal /s concur! & co(high) & da(aft 2000) % ‘office of disciplinary counsel’; dissenting: toal /s dissent! & co(high) & da(aft 2000) % ‘office of disciplinary counsel’.

⁵² See *e.g.*, *Vazquez v. State*, 698 S.E.2d 561, 565 (S.C. 2010) (determining whether counsel was deficient in failing to object to “Golden Rule” argument and whether closing arguments prejudiced the petitioner); *Miller v. State*, 665 S.E.2d 596, 596 (S.C. 2008) (“In this case, the post-conviction relief (PCR) court found trial counsel was not ineffective in establishing Bruce Randall Miller’s defense of third-party guilt for the charge of armed robbery.”).

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matters not concerning the defendant's rights or proceedings have been excluded.⁵³ Moreover, cases regarding disciplinary action towards an attorney or magistrate have also been excluded.⁵⁴

For Part IV, in collecting divided criminal cases in which Chief Justice Toal authored an opinion in her capacity as Chief Justice, only those in which she authored a majority, concurrence, dissenting, or concurring-in-part and dissenting-in-part opinion have been gathered.⁵⁵ This initial approach is taken in order to first determine the rate at which Chief Justice Toal sides with either the prosecution or defendant in these criminal cases. Cases were then categorized by year and examined for the existence of voting trends.⁵⁶ Once voting patterns were observed, the remainder of the study was tailored to an examination of that particular trend. The main thrust of this study is on the rate at which Chief Justice Toal has sided in favor of the prosecution.⁵⁷

In Part V, the agreement rates of other justices were tabulated in respect to Chief Justice Toal's overall opinion in divided cases, and were further tailored to Chief Justice Toal's pro-prosecution voting approach in cases that ultimately found for the defendant.⁵⁸ Agreement rates were determined by the number of times a justice agreed with Chief Justice Toal's pro-prosecution approach divided by the overall number of times the justice participated in cases in which she authored an opinion.⁵⁹ Furthermore, agreement rates have also been determined respective to majority, concurring, and dissenting opinions.⁶⁰ Ultimately, results have been multiplied by one hundred to yield a percentage.⁶¹

Unlike Part IV, which analyzes divided criminal decisions in which Chief Justice Toal has not authored an opinion, Part VI shifts

⁵³ See e.g., *Hendrix v. Taylor*, 579 S.E.2d 320, 322 (S.C. 2003) (regarding appellant, convicted of third-degree sexual assault, registering as sex-offender); *In re Allen*, 568 S.E.2d 354, 355 (S.C. 2002) (determining whether South Carolina's Sexually Violent Predator Act is unconstitutional).

⁵⁴ See *In re Love*, 702 S.E.2d 115, 115 (S.C. 2010) (involving judicial disciplinary matter in which respondent admitted misconduct and consented to public reprimand); *In re Wild*, 701 S.E.2d 742, 742 (S.C. 2010) (suspending respondent's law license where respondent plead guilty to aggravated battery).

⁵⁵ See *infra* Part IV, Appendix A.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See *infra* Part V, Appendix A, Appendix B.

⁵⁹ See *infra* Part V, Appendix A (listing the cases and justices in agreement), Appendix B (providing a yearly distribution of overall agreement rates).

⁶⁰ See *infra* Part V Table 4.

⁶¹ *Id.*

the focus onto those cases in which Chief Justice Toal has participated, but for which she did not author an opinion. Rather, cases in which another justice has authored either the majority, dissenting, concurring, concurring-in-part and dissenting-in-part opinion, that emphasizes a different outcome compared to another participating justice in that particular case, have been included.⁶² In simpler terms, cases include those that either have the majority or dissenting justices siding with the prosecution, and either the majority or dissenting justices siding with the defendant.⁶³ This approach is taken to determine whether Chief Justice Toal's pro-prosecution trend extends to decisions she has not authored. Next, akin to Part V, the agreement rate of Chief Justice Toal, in relation to other justices' opinions, is tabulated.⁶⁴

Furthermore, for the purpose of categorizing opinions as pro-prosecution or pro-defendant, in decisions where multiple issues were raised and the court decided both in favor of the defendant and in favor of the plaintiff, or the separate opinion written by the justice was in favor of both prosecution and the defendant, the opinion ultimately was categorized as pro-defendant if the case was remanded, defendant's conviction vacated, or a pre-trial order in favor of the defendant was affirmed.⁶⁵ Thus in Part VII, Chief Justice Toal's non-majority opinions⁶⁶ are then dissected in accordance with the multiple issues raised on appeal, and categorized as pro-prosecution and pro-defendant based on the way she decided each issue.⁶⁷ This was analyzed to determine if her approach in finding in favor of the prosecution is specific to certain issues.

⁶² See *infra* Part VI, Appendix C (listing the cases used). This methodology is also discussed further in Part VI.

⁶³ *Id.*

⁶⁴ See *infra* Part VI Table 6.

⁶⁵ See *e.g.*, *State v. Northcutt*, 641 S.E.2d 873, 880, 882 (S.C. 2007) (finding that, although a letter defendant wrote to his wife expressing remorse for the death of victim was admissible, the solicitor's improper comments and action during closing argument of sentencing phase constituted reversible errors that allowed defendant's death sentence to be reversed and remanded; the opinion was categorized as pro-defendant).

⁶⁶ Part VII's focus on only non-majority opinions is a result from previous parts' findings. See *infra* Part VII (focusing only on Chief Justice Toal's non-majority opinions).

⁶⁷ See *infra* Part VII, Appendix A.

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IV. CHIEF JUSTICE TOAL'S PRO-PROSECUTION RATES IN DIVIDED
CRIMINAL CASES

As stated earlier, this part of the study addresses only cases in which Chief Justice Toal authored an opinion in divided criminal cases. Although this analysis reveals that most of Chief Justice Toal's opinions are inherently pro-prosecution, it is crucial to remember that only divided decisions have been examined. Table 1 illustrates the distribution of the various opinions she authored in her capacity as Chief Justice from 2000 to 2010. The cases examined for this study are included in Appendix A.

TABLE 1. DISTRIBUTION OF CHIEF JUSTICE TOAL'S OPINIONS IN
DIVIDED CRIMINAL DECISIONS

Year	Majority ⁶⁸	Dissenting	Concurring	Concurring-in-Part Dissenting-in-Part
2010	6/8	5	1	1
2009	2/10	1	3	1
2008	5/12	5	0	-
2007	2/8	4	-	-
2006	5/9	2	-	-
2005	2/9	-	-	-
2004	3/7	3	0	-
2003	6/11	-	1	-
2002	2/9	-	1	-
2001	2/10	2	-	1
2000 (After 3/23/00)	0/5	1	-	-

Once the cases were analyzed, the first observation relates to Chief Justice Toal's pro-prosecution voting approach in divided cases in which she authored the majority opinion.⁶⁹ This is not only evident in cases in which she authored the majority opinion, but also in her concurring and dissenting opinions as well.⁷⁰ Thus, the

⁶⁸ Under the Majority column, the numerator represents the total number of non-unanimous decisions in which Chief Justice Toal authored the majority opinion, and the denominator represents the total number of cases in which she authored the majority opinion.

⁶⁹ See *infra* Appendix A (listing the non-unanimous cases in which she authored a pro-prosecution majority opinion).

⁷⁰ *Id.*

rate at which she voted pro-prosecution in her majority opinions is compared to her pro-prosecution voting approach in dissenting, concurring, and dissenting-in-part and concurring-in-part opinions. This is all further analyzed in Tables 2 and 3 below.

Table 2 illustrates the pro-prosecution rate for each year that Chief Justice Toal authored a majority opinion. Taking the year 2010 as an example, Chief Justice Toal authored a total of six divided majority opinions.⁷¹ Out of these six opinions, five of the opinions were in favor of the prosecution.⁷² In each year that she has authored such a majority opinion in divided criminal cases,⁷³ her pro-prosecution rate has never fallen below fifty percent.⁷⁴ In fact, in 2005, the rate peaked at one hundred percent.⁷⁵ Overall, her pro-prosecution rate averages at 74.3% in divided criminal cases.⁷⁶

TABLE 2. PRO-PROSECUTION PERCENTAGE IN DIVIDED DECISIONS IN WHICH TOAL AUTHORED THE MAJORITY OPINION

Year	Number of Pro-Prosecution Decisions	Total Divided Cases	Percentage
2010	5	6	83.3%
2009	1	2	50%
2008	4	5	80%
2007	1	2	50%
2006	4	5	80%
2005	2	2	100%
2004	2	3	66.7%
2003	5	6	83.3%
2002	1	2	50%
2001	1	2	50%
2000	-	-	-
Total:	26	35	74.3%

⁷¹ See *infra* Table 2.

⁷² See *infra* Appendix A (listing the cases).

⁷³ Later in the study, regarding agreement rates of justices, it will be seen that most of Chief Justice Toal's majority opinions are non-unanimous as a result of a specific justice dissenting with her pro-prosecution opinion. See *infra* Part V.

⁷⁴ See *infra* Table 2.

⁷⁵ *Id.*

⁷⁶ *Id.*

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Compared to Table 2, however, although the average rate at which Chief Justice Toal voted pro-prosecution in her non-majority opinions remains comparatively similar at 78.1%,⁷⁷ the rates per year differ significantly. With the exception of 2001, 2003, and 2005, Chief Justice Toal voted pro-prosecution at a higher rate in her concurring and dissenting opinions than in her majority opinions.⁷⁸ Moreover, similar to her majority opinions, with the exception of 2001 and 2003, her pro-prosecution rate remains above fifty percent; in fact, it is typically above sixty percent, and frequently at one hundred percent.⁷⁹

Table 3 serves dual purposes in that the figures not only speak for themselves, but justifiable inferences can also be drawn. Table 3 first illustrates Chief Justice Toal's pro-prosecution rate in relation to the rest of her non-majority opinions, not taking into account the way the court ultimately decided. As seen below, 50% of Chief Justice Toal's concurring opinions are pro-prosecution in nature, 87% of her dissenting opinions are pro-prosecution, and 66.7% of her concurring-in-part and dissenting-in-part opinions are pro-prosecution.⁸⁰ Thus, the inference that can be drawn, as a result of these findings looking primarily at her dissenting and concurring-in-part and dissenting-in-part pro-prosecution rate, that Table 3 also represents the rate at which Chief Justice Toal disagrees with the court, specifically cases in which the court has decided in favor of the defendant. Overall, Chief Justice Toal has disagreed with her colleagues and found in favor of the prosecution 84.6% of the time: 87.0% through her dissenting opinions and 66.7% through her concurring-in-part and dissenting-in-part opinions.⁸¹ Moreover, taking the year 2010 as an example, Chief Justice Toal only dissented when the court ultimately found in favor of the defendant.⁸² She dissented a total of five times, and each of these opinions was in favor of the prosecution.⁸³ With the exception of 2001, 2004, and 2009, this 100% dissenting rate in favor of the prosecution exists in all of the years in which she filed a dissenting

⁷⁷ See *infra* Table 3.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See *infra* Appendix A (listing the cases in which the court ultimately found in favor of the defendant in 2010).

⁸³ See *infra* Appendix A (listing Chief Justice Toal's dissenting opinions in 2010 that are in favor of the prosecution).

opinion.⁸⁴ Therefore, the findings of this part of the study show the rate at which Chief Justice Toal has disagreed with her fellow justices in favor of the prosecution.⁸⁵

TABLE 3. PRO-PROSECUTION RATE IN TOAL'S OVERALL CONCURRING, DISSENTING, CONCURRING-IN-PART AND DISSENTING-IN-PART OPINIONS⁸⁶

Year	Concurring	Dissenting	Concurring-in-Part/ Dissenting-in-Part	Pro-Prosecution Percentage
2010	1/1	5/5	1/1	7/7 = 100%
2009	1/3	1/1	1/1	3/5 = 60%
2008	-	5/5	-	5/5 = 100%
2007	-	4/4	-	4/4 = 100%
2006	-	2/2	-	2/2 = 100%
2005	-	-	-	-
2004	-	2/3	-	2/3 = 66.7%
2003	0/1	-	-	0/1 = 0%
2002	1/1	-	-	1/1 = 100%
2001	-	0/2	0/1	0/3 = 0%
2000	-	1/1	-	1/1 = 100%
Total:	3/6 = 50%	20/23 = 87.0%	2/3 = 66.7%	25/32 = 78.1%
Overall Disagreement Rate: 22/26 = 84.6%				

⁸⁴ See *infra* Table 3.

⁸⁵ See *infra* Appendix A (providing the distribution of cases and the distribution of justices with whom she has not agreed. This part of the study focuses on cases in which she authored an opinion). Part VI will show how Chief Justice Toal has sided in non-unanimous criminal cases in which she has not authored an opinion and the rate at which she has not agreed with the court siding with the defendant. See *infra* Part VI.

⁸⁶ The numerator represents the total amount of non-majority opinions in which Chief Justice Toal sided with the prosecution and the denominator represents the total number of her non-majority opinions in that category.

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V. RATES IN WHICH OTHER JUSTICES AGREE WITH CHIEF JUSTICE TOAL'S DIVIDED CRIMINAL CASES WHERE CHIEF JUSTICE TOAL HAS AUTHORED AN OPINION⁸⁷

This part of the study first addresses the overall agreement rate of Chief Justice Toal's fellow justices with her opinions in divided criminal cases. Second, this part of the study has then been tailored towards Chief Justice Toal's pro-prosecution opinions, and the rate at which her colleagues have agreed with her in divided criminal cases in which the court has ultimately found for the defendant. The goal is to determine whether any justices are inclined to find in favor of the prosecution alongside Chief Justice Toal in cases that could possibly be decided in favor of the defendant or the prosecution, depending on the judicial interpretation employed. It is imperative to note, however, that the rates in the latter section of this part do not signify each individual's overall pro-prosecution rate—only the pro-prosecution rates relative to those of Chief Justice Toal. Thus, this part of the study illustrates the rate at which Chief Justice Toal has received support for her particular judicial philosophy regarding certain criminal issues on appeal. Additionally, it is important to note that the cases in which an acting justice participated have been included in this analysis. Essentially, this affects the overall agreement rate resulting from the low number of divided cases they have participated in with Chief Justice Toal, in comparison to the other justices of the court.⁸⁸ Furthermore, Tables 4 and 5, provided below, demonstrate the agreement rate of each individual justice, irrespective of the year. Appendix A lists the justices that have participated in these divided criminal cases with Chief Justice Toal. Appendix B contains a deconstruction of the agreement rates per year along with the cases analyzed.

Excluding the acting justices, and with the exception of Justice Hearn, Justice Moore, and Justice Burnett, the justices' overall agreement rate with Chief Justice Toal's opinions remains below fifty percent,⁸⁹ with Justice Pleicones at an incredibly low rate of ten

⁸⁷ Refer to Appendix A and Appendix B for the cases and distribution used for this part of the study. Figure 1 and Table 4 represent the overall agreement rates of the justices with Chief Justice Toal's opinions in non-unanimous cases, irrespective of the outcome of the case. Figure 2 represents the agreement rates of the justices with Chief Justice Toal's pro-prosecution opinion in cases where there court ultimately ruled in favor of the defendant.

⁸⁸ See *infra* Appendix A.

⁸⁹ See *infra* Figure 1, Table 4.

percent.⁹⁰ In fact, Justice Pleicones continues to hold the lowest agreement rate for majority and concurring opinions. His agreement with majority opinions is 11.8%,⁹¹ which, in comparison to the other justices, is extremely low. The remaining justices hold an agreement rate above seventy percent.⁹² This may be demonstrative of vastly differing judicial philosophies between Chief Justice Toal and Justice Pleicones, as well as between Justice Pleicones and the other justices.⁹³

Nonetheless, excluding acting justices, yet including all associate justices that have participated in Chief Justice Toal's divided criminal opinions, Justice Hearn has the highest overall agreement rate with Chief Justice Toal's opinions at sixty percent.⁹⁴ Therefore, Justice Hearn is likely to agree with Chief Justice Toal in nearly two out of three cases in which she authors an opinion. Justice Burnett has the second highest overall agreement rate at 57.5%.⁹⁵ Justice Moore has the third highest overall agreement rate at 55.6%.⁹⁶ Justice Waller's agreement rate of 47.3% is fourth, while Justice Kittredge is fifth with an agreement rate of 41.2%. Justice Beatty is sixth with an agreement rate of 39.3% and Justice Pleicones, as noted earlier, is seventh with an agreement rate of 10%.⁹⁷

⁹⁰ *Id.*

⁹¹ *See infra* Table 4.

⁹² *Id.*

⁹³ This is representative of Justice Pleicones' individual judicial philosophy. Considering most of Chief Justice Toal's majority opinions in divided criminal cases are in favor of the prosecution and Justice Pleicones had dissented to many of these opinions, his dissents are representative of his pro-defendant voting trend. *See generally* Petillo, *supra* note 16, at 956–57 (discussing Justice Pleicones' vocal nature).

⁹⁴ *See infra* Figure 1, Table 4.

⁹⁵ *See infra* Figure 1, Table 4.

⁹⁶ *See infra* Figure 1, Table 4.

⁹⁷ *See infra* Figure 1, Table 4.

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FIGURE 1. OVERALL AGREEMENT RATES OF INDIVIDUAL JUSTICES WITH CHIEF JUSTICE TOAL'S OPINIONS IN DIVIDED CRIMINAL CASES

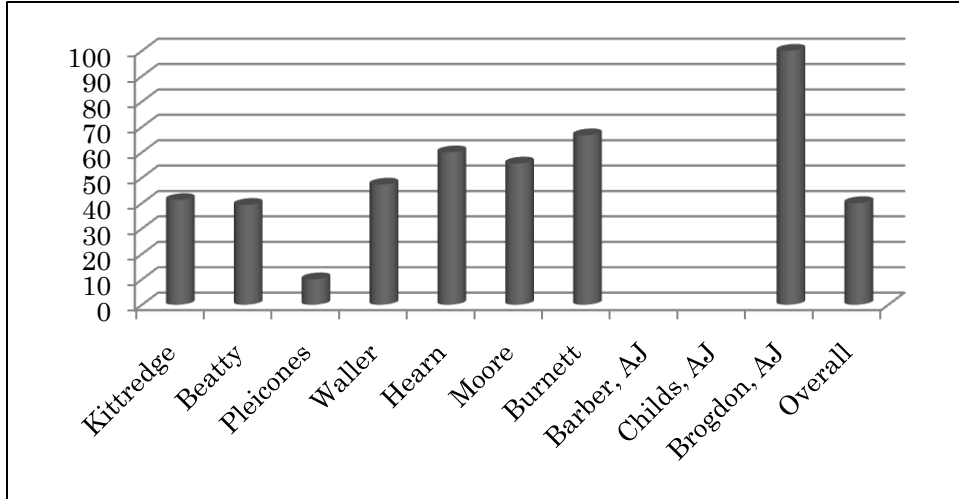


TABLE 4. AGREEMENT RATES OF INDIVIDUAL JUSTICES WITH CHIEF JUSTICE TOAL'S PRO-PROSECUTION OPINIONS IN DIVIDED CRIMINAL CASES⁹⁸

Justice	Majority	%	Concur	%	Dissent	%	C/D	%	Overall 1 %
Kittredge	6/8	75.0	0/3	0	1/5	20	0/1	0	7/17 = 41.2
Beatty	11/13	84.6	0/4	0	0/9	0	0/2	0	11/28 = 39.3
Pleicones	4/34	11.8	1/4	25	1/20	5.0	0/2	0	6/60 = 10
Waller	26/30	86.7	0/5	0	0/18	0	0/2	0	26/55 = 47.3
Hearn	1/1	100	1/1	100	1/3	33.3	-	-	3/5 = 60
Moore	25/28	89.3	0/2	0	0/15	0	-	-	25/45 = 55.6
Burnett	15/21	71.4	0/2	0	4/10	40	-	-	19/33 = 57.5
Barber, A.J.	-	-	-	-	0/1	0	-	-	0/1 = 0
Childs, A.J.	-	-	-	-	0/1	0	-	-	0/1 = 0
Brogdon, A.J.	1/1	100	-	-	-	-	-	-	1/1 = 100
Total:	89/136	65.4	2/21	9.5	7/82	8.5	0/7	0	98/246 = 40

Unlike Figure 1 and Table 4, which take into account the agreement rate of justices who participated in divided criminal cases in which Chief Justice Toal authored an opinion, Figure 2 and this part of the study focus on the agreement rate of the justices with Chief Justice Toal's pro-prosecution opinion in divided criminal cases in which the court ultimately ruled in favor of the defendant. This is analyzed to determine the likelihood of another justice not only agreeing with Chief Justice Toal's reasoning, but also finding

⁹⁸ The numerator signifies the number of times the justice concurred with Chief Justice Toal's opinion. The denominator signifies the total number of cases that the justice participated in which Chief Justice Toal authored such an opinion. Also, cases in which a justice concurred in result only, without an opinion, concurred in part, or concurred in part and in result only have been distributed as not concurring with Toal's majority opinion. See, e.g., *State v. Williams*, 690 S.E.2d 62, 69 (S.C. 2010) (Kittredge, J. concurring in part and concurring in result only in part); *State v. Winkler*, 698 S.E.2d 596, 604 (S.C. 2010) (Pleicones, J. concurring in result only); see also Appendix A.

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in favor of the prosecution in cases that may be decided either way. This is also done to evaluate whether there is a particular justice who is more likely to agree with Chief Justice Toal in comparison to the other justices. It is important to note that acting justices' results have also been included in this part of the study. Their votes are only representative of the small number of cases in which they participated, but their agreement rates affect the overall agreement rates.

As illustrated by Figure 2,⁹⁹ the overall rate of agreement with Chief Justice Toal's pro-prosecution opinions in cases decided in favor of the defendant is fairly low, at twelve percent.¹⁰⁰ Not including the acting justices' agreement rate, the justice with the highest agreement rate is Justice Burnett, at forty percent, having participated in ten cases with Chief Justice Toal.¹⁰¹ Justice Hearn has the second highest agreement rate at thirty-three percent, having participated, however, in only three such cases with Chief Justice Toal; this may or may not be representative of Justice Hearn's agreement rate in general.¹⁰² Similarly, Justice Kittredge only participated in five cases with Chief Justice Toal, and has an agreement rate of twenty percent.¹⁰³ Justice Moore has the fourth highest agreement rate at 11.1%, having participated in eighteen cases with the Chief Justice.¹⁰⁴ Justice Pleicones has the sixth highest, or third lowest agreement rate at 4.5%, having participated in twenty-two cases.¹⁰⁵ This may very well be representative of Justice Pleicones agreement rate, considering his agreements rates displayed in Figure 1 and Table 4. Justice Beatty and Justice Waller both have zero percent agreements rates, having participated in ten and twenty cases, respectively.¹⁰⁶ In sum, across the board, with the exception of Justice Burnett, the justices are unlikely to agree with Chief Justice Toal in her legal reasoning when siding with the prosecution when the court ultimately finds in favor of the defendant.

⁹⁹ Refer to the latter part of Appendix B for some of the numerical figures used in this paragraph. See *infra* Appendix B Table 2.

¹⁰⁰ See *infra* Figure 2, Appendix B Table 2.

¹⁰¹ *Id.*

¹⁰² *Id.*

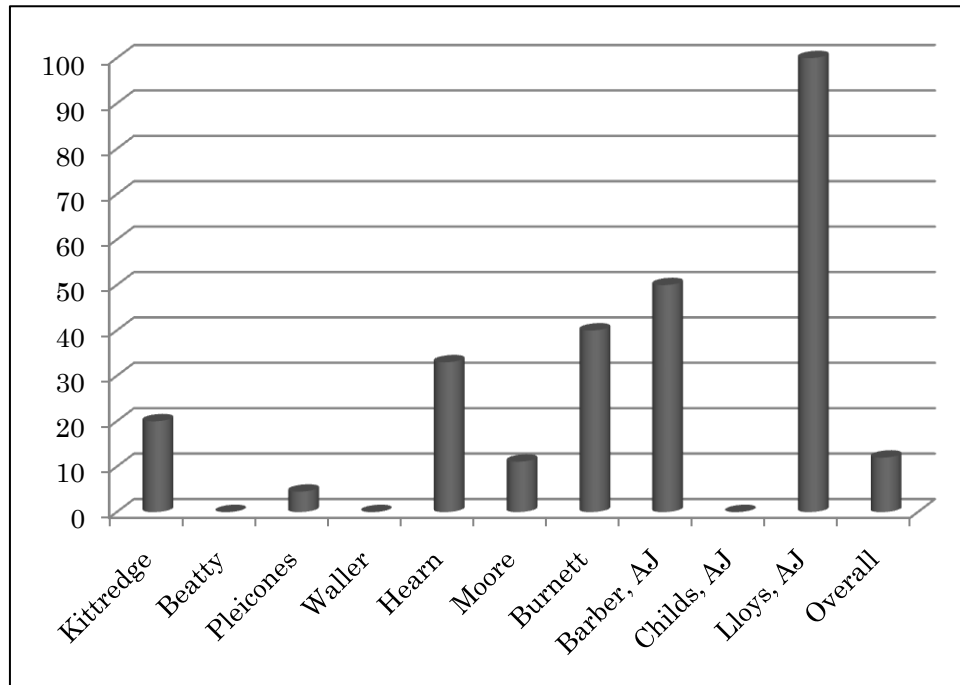
¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

FIGURE 2. JUSTICES' AGREEMENT RATE WITH CHIEF JUSTICE TOAL'S PRO-PROSECUTION OPINIONS IN CASES DECIDED IN FAVOR OF THE DEFENDANT.¹⁰⁷



VI. CHIEF JUSTICE TOAL'S AGREEMENT RATE WITH PRO-PROSECUTION OPINIONS IN DIVIDED CRIMINAL CASES

This part of the study continues to analyze the patterns of Chief Justice Toal's pro-prosecution voting approach in divided criminal cases in which she did not author an opinion.¹⁰⁸ However, the cases analyzed here vary slightly in that only cases in which at least one justice authored a pro-prosecution and one justice authored a pro-defendant opinion have been considered.¹⁰⁹ The reasoning for this approach is to illustrate Chief Justice Toal's pro-prosecution voting approach in a case that may merit a pro-defendant opinion, as

¹⁰⁷ See the latter part of Appendix B for the overall distribution of cases relative to each justice. Refer to Appendix A for the cases, sorted by year, that list which cases were ultimately decided in favor of the defendant, but in which Chief Justice Toal authored a pro-prosecution opinion (dissenting and concurring or dissenting in part opinions).

¹⁰⁸ See *infra* Appendix C.

¹⁰⁹ *Id.*

reasoned and described by a fellow justice.

Figure 3 illustrates Chief Justice Toal's overall agreement rate, whereas Table 5 provides the overall agreement rates, in addition to a breakdown of agreement rates with respect to majority, dissenting, and concurring-in-part and dissenting-in-part pro-prosecution opinions. Although the number of such decisions remains low throughout 2000 to 2010, Chief Justice Toal's agreement rate with pro-prosecution opinions remains high at 76.5%¹¹⁰ in divided criminal cases in which a justice has reasoned in favor of the defendant. Another finding of interest is that, out of the eleven years analyzed, five years resulted in a one hundred percent agreement rate. Moreover, the years that have resulted in one hundred percent are also the last five out of the last six years.¹¹¹ Furthermore, Chief Justice Toal concurred with the pro-prosecution majority opinion ninety-one percent of the time, despite a pro-defendant opinion authored in those decision.¹¹² Similarly, Chief Justice Toal concurred with the pro-prosecution dissenting opinion at a rate of 66.7%, despite a pro-defendant majority opinion.¹¹³ Accordingly, it can be concluded that Chief Justice Toal continues to adhere strictly to her existing pro-prosecution voting approach in deciding criminal cases, despite the majority of other justices finding legal reasoning more favorable for the defendant.

Although it is evident from Part IV of the study that Chief Justice Toal's voting approach is in favor of the prosecution, the findings set out in Figure 3 and Table 5 also reveal Chief Justice Toal's pro-prosecution voting pattern. The question then becomes whether Chief Justice Toal is more likely to agree with a particular justice deciding in favor of the prosecution, or if the justice is irrelevant and Chief Justice Toal adheres to her own pro-prosecution philosophy. It is crucial to keep in mind that the rates in this figure are not representative of Chief Justice Toal's overall agreement rate with the other justices, but only of her agreement rate in relation to pro-prosecution opinions in divided criminal cases in which one justice authored a pro-defendant opinion. Thus, Figure 4 tabulates all of the justices that have delivered pro-prosecution opinions in divided criminal cases.¹¹⁴

¹¹⁰ See *infra* Table 5.

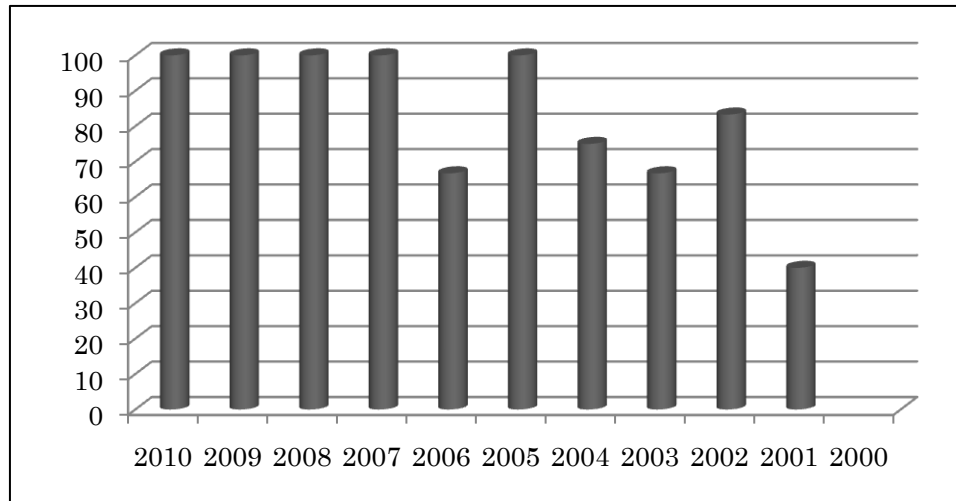
¹¹¹ *Id.*

¹¹² See *infra* Table 5, Appendix C (listing the cases).

¹¹³ *Id.*

¹¹⁴ See Appendix C (listing the distribution of justices in these divided criminal cases).

FIGURE 3. CHIEF JUSTICE TOAL'S OVERALL AGREEMENT RATE WITH PRO-PROSECUTION OPINIONS IN DIVIDED CRIMINAL CASES NOT AUTHORED BY CHIEF JUSTICE TOAL



The findings from Figure 4, not taking into account the acting justices' agreement rate, show that Chief Justice Toal is more likely to concur with Justice Kittredge, Justice Burnett, Justice Waller, and Justice Moore at the rates of 100%, 73.3%, 66.7%, and 100%, respectively.¹¹⁵ However, in accord with Table 6, which breaks down the agreement rates by the type of opinion that the justice authored, Chief Justice Toal is more likely to concur with Justice Burnett's majority pro-prosecution opinions, at one hundred percent,¹¹⁶ than with his dissenting pro-prosecution opinion, at fifty percent.¹¹⁷ In regards to Justice Pleicones, it is evident that Chief Justice Toal is less than likely to concur with his pro-prosecution opinions, rating at 33.3%.¹¹⁸ It is interesting to note, however, that Chief Justice Toal has not concurred with any of Pleicones's majority pro-prosecution opinions. This similar trend has been mirrored in Pleicones's unlikely rate of agreement with Chief Justice Toal, and the overwhelming amount of dissents that Pleicones has filed in Chief Justice Toal's pro-prosecution majority opinions.¹¹⁹

¹¹⁵ See *infra* Figure 4, Table 6.

¹¹⁶ See *infra* Table 6.

¹¹⁷ See *infra* Table 6.

¹¹⁸ See *infra* Table 6.

¹¹⁹ See *supra* Part V.

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TABLE 5. CHIEF JUSTICE TOAL'S AGREEMENT RATE WITH PRO-PROSECUTION OPINIONS NOT AUTHORED BY CHIEF JUSTICE TOAL IN DIVIDED CRIMINAL CASES¹²⁰

Year	Majority	%	Dissent	%	C/D	%	Total
2010	2/2	100	1/1	100	-	-	3/3 = 100
2009	4/4	100	-	-	-	-	4/4 = 100
2008	-	-	1/1	100	-	-	1/1 = 100
2007	1/1	100	-	-	-	-	1/1 = 100
2006	2/2	100	0/1	0	-	-	2/3 = 66.7
2005	3/3	100	-	-	-	-	3/3 = 100
2004	3/3	100	-	-	0/1	0	3/4 = 75
2003	1/2	50	1/1	100	-	-	2/3 = 66.7
2002	3/3	100	2/3	66.7	-	-	5/6 = 83.3
2001	1/3	66.7	1/2	50	0/1	0	2/6 = 33.3
2000	-	-	-	-	-	-	
Total:	20/23	87.0	6/9	66.7	0/2	0	26/34 = 76.5

¹²⁰ The numerator in this chart represents the total number of times Chief Justice Toal has concurred with the opinion in favor of the prosecution. The denominator in this chart represents the total number of opinions authored in that category in favor of the prosecution.

FIGURE 4. CHIEF JUSTICE TOAL'S VOTING APPROACH IN RELATION TO JUSTICES AUTHORIZING PRO-PROSECUTION OPINIONS

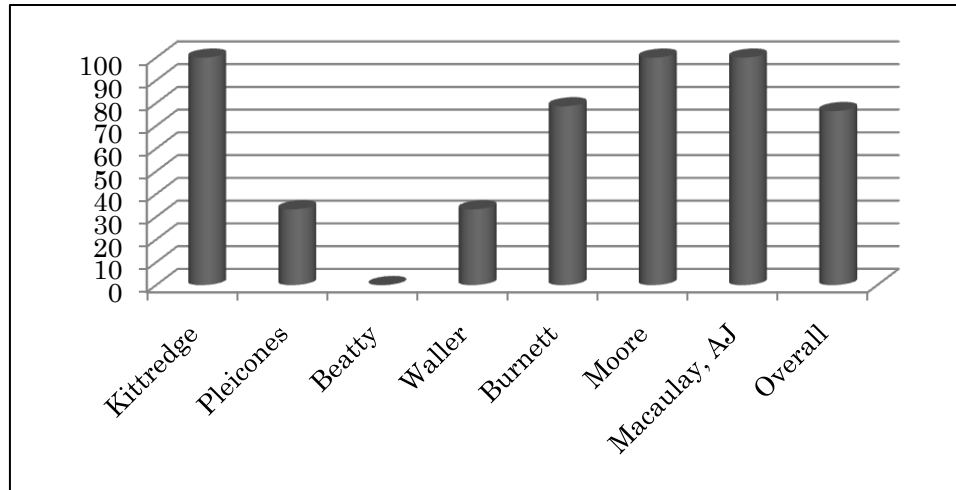


TABLE 6. CHIEF JUSTICE TOAL'S AGREEMENT RATE WITH JUSTICES AUTHORIZING PRO-PROSECUTION OPINIONS IN DIVIDED CRIMINAL CASES¹²¹

Justices	Majority	%	Dissent	%	C/D	%	Total
Kittredge	3/3	100	1/1	100	-	-	4/4 = 100
Pleicones	0/2	0	1/1	100	-	-	1/3 = 33.3
Beatty	-	-	-	-	-	-	-
Waller	4/5	80	-	-	0/1	0	4/6 = 66.7
Burnett	8/8	100	3/6	50	0/1	0	11/15 = 73.3
Moore	4/4	100	1/1	100	-	-	5/5 = 100
Macaulay, AJ	1/1	100	-	-	-	-	1/1 = 100
Total	20/23	87.0	6/9	66.7	0/2	0	26/34 = 76.5

¹²¹ The numerator in this chart represents the number of times Chief Justice Toal has concurred with the justice in that category of opinions that were in favor of the prosecution. The denominator represents the total pro-prosecution opinions in that category that the justice has authored.

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VII. CHIEF JUSTICE TOAL'S PRO-PROSECUTION VOTING APPROACH EXTENDED TO ISSUES RAISED ON APPEAL

This section of the study focuses on Chief Justice Toal's pro-prosecution voting trend in relation to issues raised on appeal.¹²² Up until this point, the approach taken in analyzing the cases was from broad to narrow; in order to distinguish Chief Justice Toal's voting trends, it was essential to begin with all of the cases in which she authored an opinion, narrowing it down to the type of opinion she wrote, and then narrowing it down further to her agreement rate with other justices in divided cases in which she did not author an opinion. At first, all of the divided decisions authored by other justices were gathered, and then the focus was shifted to only those cases that had at least one justice reasoning in favor of the prosecution or in favor of the defendant.

For the purposes of this section of the study, the only cases analyzed are Chief Justice Toal's non-majority opinions on specific issues, irrespective of whether the court decided in favor of the prosecution or defendant, or if her opinion is pro-prosecution or pro-defendant in nature. The cases have been dissected according to the number and type of issues raised on appeal in order to address Chief Justice Toal's voting trends relative to these specific issues. This approach was taken for two reasons. As evident in the Table 4 agreement rates,¹²³ there is a great difference between the agreement rate of justices with Chief Justice Toal's non-majority opinions and her majority opinions. Although this is inferable without even having to consult a breakdown of the agreement rates—considering that a majority opinion requires concurrence—the difference observed was that this concurrence was not specific to the same justices. Additionally, as shown by the results of the findings of Table 3, most of Chief Justice Toal's non-majority opinions, with the exception of only a few, are in favor of the prosecution.¹²⁴ What can be concluded from this observation is that the issues, and her reasoning in non-majority opinions, are unique to Chief Justice Toal when she finds in favor of the prosecution, particularly because these decisions ultimately disagree with the majority of her fellow justices. Therefore, her non-majority opinions require some further analysis.

¹²² See *infra* Appendix A (listing the distribution of cases used in this Part).

¹²³ See *supra* Table 4.

¹²⁴ See *supra* Table 3.

Furthermore, up until this point, in opinions addressing multiple issues, the opinions were considered to be pro-defendant in nature if the overall outcome was in favor of the defendant; for example, when a case was remanded.¹²⁵ Considering that many cases involve more than one issue, the likelihood exists that Chief Justice Toal found in favor of the prosecution on one issue, and then in favor of the defendant in another issue raised by the same case. By sorting out the issues in this manner and recording the way she votes in relation to each issue, an attempt at spotting a trend specific to the issues involved can be made.¹²⁶

Considering the findings set forth in Table 3,¹²⁷ it is not surprising that Chief Justice Toal's pro-prosecution rate in relation to issues is high as well, as shown by Table 7. As a result, a specific trend, such as a pro-prosecution voting approach on a particular issue, cannot be readily distinguished. In fact, with the exceptions of 2001 and 2004, Chief Justice Toal's pro-prosecution voting approach towards issues raised on appeal in divided cases remains as high as one hundred percent per year, ranging across pre-trial issues, evidentiary issues, and sentencing and punishment issues.¹²⁸ Taking this into consideration, an attempt can be made to distinguish a certain pattern in her legal reasoning

Essentially, what can be concluded from an analysis of the non-majority opinions in Table 7, is that despite certain review of issues requiring the court to view the facts in favor of the defendant, or requiring the granting of a new trial, Chief Justice Toal's view depends on a stricter standard that justifies her continuing to find in favor of the prosecution regardless of the fact that other justices find in favor of the defendant.¹²⁹ This notion is also extended to her

¹²⁵ See *supra* note 65 and accompanying text..

¹²⁶ See *infra* Appendix A (providing the issues spotted in CJ Toal's non-majority opinions).

¹²⁷ See *infra* Table 3 (referring to Chief Justice Toal's high pro-prosecution rate in dissenting opinions).

¹²⁸ See *infra* Appendix A. Furthermore, the distribution of cases is provided in Table 7.

¹²⁹ See *State v. Smith*, 679 S.E.2d 176 (S.C. 2009) (Toal, C.J., dissenting) (finding in favor of the prosecution). In *Smith*, the court relied on a principle outlined in another case:

When it is made to appear that anything has occurred which may have improperly influenced the action of the jury, the accused *should be granted a new trial*, although he may appear to be ever so guilty, because it may be said that his guilt has not been ascertained in the manner prescribed by law.

Id. at 181 (quoting *State v. Britt*, 111 S.E.2d 669, 685 (S.C. 1959), *overruled on other grounds* by *State v. Torrence*, 406 S.E.2d 315(S.C. 1991)). The Supreme Court of South Carolina ultimately found that the trial court did not abuse its discretion when applying this principle. *Id.* at 181–82. However, it is evident by Chief Justice Toal's dissenting opinion that she adhered to a higher standard. She relied on a stricter principle: “[w]e have said many times that the granting of a mistrial is an extreme measure that should only be taken where an

reasoning displayed in evidentiary issues raised on appeal,¹³⁰ and whether the defendant has been prejudiced as a result of the admissibility of certain evidence. By balancing the prejudicial effect of admitting evidence with the overall evidence in support of the defendant's conviction or guilt, Chief Justice Toal has found in several cases that the latter outweighs the prejudicial effect.¹³¹ This also extends to post-conviction relief decisions,¹³² issues regarding jury instructions,¹³³ constitutional issues,¹³⁴ and sentencing.¹³⁵

incident is so grievous that prejudicial effect can be removed in no other way." *Id.* at 182 (citing *State v. Beckham*, 513 S.E.2d 606, 610 (S.C. 1999)). It can be concluded from the wording used in comparing the principles cited to by the majority and the principle cited by Chief Justice Toal that Chief Justice Toal interprets such appeals at a higher standard than her fellow justices.

¹³⁰ See *State v. Fletcher*, 664 S.E.2d 480, 484–87 (S.C. 2008) (involving the admissibility of prior bad acts). The court stated that "to be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." *Id.* at 483 (citations omitted). Although Chief Justice Toal agrees with this, she continues to assert that the standard used by the majority regarding prior bad acts is "far too narrow." *Id.* at 484–85 (Toal, C.J., dissenting). Chief Justice Toal, also in her reasoning, makes the distinction between child abuse and other crimes and relies on a statute specifically related to child abuse. *Id.*

¹³¹ See *State v. Northcutt*, 641 S.E.2d 873, 882–85 (S.C. 2007) (Toal, C.J., dissenting). Unlike the majority, Chief Justice Toal states that character evidence is admissible in capital sentencing proceedings: "Furthermore, assuming, as the majority seems to, that Rule 403, SCRE, required the trial court to exclude this evidence as substantially more prejudicial than probative, I fail to see how this error prejudiced the Appellant." *Id.* at 882–83. "The majority's finding of prejudice in this case is all the more remarkable given the brutal events which were the subject of this sentencing proceeding" *Id.* at 883. See also *State v. Johnson*, 703 S.E.2d 217, 220–21 (S.C. 2010) (Toal, C.J., dissenting) (arguing that hearsay rules were violated); *State v. Smith*, 679 S.E.2d 176, 182 (S.C. 2009) (Toal, C.J., dissenting) (arguing that, even if the defendant was prejudiced, the prejudice was outweighed by ample evidence in support of the conviction).

¹³² See *Smith v. State*, 689 S.E.2d 629, 633–34 (S.C. 2009) (Toal, C.J., dissenting) (arguing that defendant was not denied ineffective counsel, that "the PCR court correctly found that trial counsel articulated a valid trial strategy," and, even if he did suffer prejudice, it was outweighed by evidence in support of overwhelming guilt); *Council v. State*, 670 S.E.2d 356, 368 (S.C. 2009) (Toal, C.J., dissenting) (arguing that, even if counsel was deficient in performance, the respondent was not prejudiced considering the overwhelming evidence of guilt). In *Council*, Chief Justice Toal further states, "[c]onsidering the overwhelming evidence against Respondent, the violent and brutal nature of this crime, and the fact that the jury found the existence of six aggravating factors beyond a reasonable doubt, in my opinion, it is not reasonably likely that the jury would have returned a different sentence. *Id.* (citing *Jones v. State*, 504 S.E.2d 822, 824 (S.C. 1998)). *But cf.* *Solomon v. State*, 557 S.E.2d 666, 669 (S.C. 2001) (Toal, C.J., dissenting) (arguing that, despite the lack of prejudice, the failure to submit a not guilty verdict form to the jury is a fundamental error that was in violation of Sixth and Fourteenth Amendment rights and, thus, required reversal).

¹³³ See *State v. Lee-Grigg*, 692 S.E.2d 895, 899–00 (S.C. 2010) (Toal, C.J., concurring in part and dissenting in part) (reasoning that although it was error not to charge the jury as to Defendant's character, the error was harmless due to the overwhelming evidence in support of guilt). Toal emphasized that, "[e]ven if the jury were instructed on its use of character evidence, given the uncontroverted evidence presented at trial, the jury would only have

Chief Justice Toal has not only reasoned in favor of the prosecution in balancing prejudice with guilt, but has also interpreted statutes in favor of the prosecution.¹³⁶

reached one logical conclusion—that Lee-Grigg was guilty of forgery.” *Id.* at 900.

¹³⁴ See *State v. Lee*, 653 S.E.2d 259, 262 (S.C. 2007) (Toal, C.J., dissenting) (stating that pre-indictment delay does not violate defendant’s Fifth Amendment due process clause absent a showing of prejudice and that the “State has intentionally delayed the issuance of an indictment in order to gain an unfair tactical advantage”) (citing *Jones v. Angelone*, 94 F.3d 900, 905 (4th Cir. 1996)).

¹³⁵ See *Vasquez v. State*, 698 S.E.2d 561, 571 (S.C. 2010) (Toal, C.J., dissenting) (“I would find any alleged error is unimportant . . . [because] overwhelming evidence of Petitioner’s guilt was established.”); see also *Mahdi v. State*, 678 S.E.2d 807, 809 (S.C. 2009) (Toal, C.J., concurring) (recalling facts to demonstrate the egregious nature of the crimes committed by the defendant).

¹³⁶ See *State v. Covert*, 675 S.E.2d 740, 743–44 (S.C. 2009) (Toal, C.J., concurring) (arguing that Section 17-13-140 of the South Carolina Code does not require a magistrate to sign a warrant, only issue it); *State v. Bixby*, 644 S.E.2d 54, 57 (S.C. 2007) (Toal, C.J., dissenting) (disagreeing with the majority in that a conviction of an accessory before the fact to murder is regarded by law as a conviction of murder, making Section 16-3-20 applicable).

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TABLE 7. CHIEF JUSTICE TOAL'S PRO-PROSECUTION VOTING APPROACH FOR SPECIFIC ISSUES RAISED ON APPEAL IN NON-MAJORITY OPINIONS¹³⁷

Year	Pre-Trial ¹³⁸	Trial ¹³⁹		Const ¹⁴⁰	Sentencing & Punishment ¹⁴¹	Total %
		Evidence	Jury Instructions			
2010	2/2	3/3	1/1	2/2	1/1	9/9 = 100
2009		2/2		2/2	1/1	5/5 = 100
2008		2/2	2/2	2/2		6/6 = 100
2007		1/1		2/2	3/3	6/6 = 100
2006					1/1	1/1 = 100
2005			1/1		1/1	2/2 = 100
2004		1/1	0/1	1/1		2/3 = 66.7
2003						-
2002						-
2001				0/2		0/2 = 0
2000		1/1				1/1 = 100
Total:	2/2= 100	10/10= 100	4/5= 80	9/11= 81.8	7/7= 100	32/35 = 91.4

¹³⁷ This is inclusive of dissenting opinions, concurring opinions, and dissenting in part and concurring in part opinions that Chief Justice Toal authored with and without concurrence from other justices. It is also important to keep in mind that certain cases overlap due to the variety of issues that are addressed on appeal and have therefore been included in more than one column. See *infra* Appendix A. The numerator in this chart represents the number of times Chief Justice Toal voted pro-prosecution. The denominator represents the total dissenting opinion she authored in that field.

¹³⁸ Pre-trial issues under this column include those relating to arrest and custodial interrogation.

¹³⁹ The issues categorized under this column include issues on appeal that deal specifically to the defendant's trial. For example, evidentiary issues (admissibility of statements, sufficiency of evidence, testimony) and jury instructions (including issues addressing whether a lesser charge should have been given to the jury) are included here.

¹⁴⁰ The issues categorized under this column include constitutional issues and rights of the accused, along with post-conviction relief cases that ultimately address the effectiveness of counsel. "The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel." *Vasquez v. State*, 698 S.E.2d 561, 565 (citing U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984); *Lomax v. State*, 665 S.E.2d 164 (2008)).

¹⁴¹ The issues categorized under this column address sentencing and punishment, dealing mostly with issues in capital sentencing.

VII. CONCLUDING REMARKS

In regard to the composition of South Carolina's Supreme Court today, and divided opinions authored by Chief Justice Toal, justices of the court are unlikely to agree with Chief Justice Toal in at least half of her opinions in divided criminal cases: Justice Hearn has the highest agreement rate, at 60%, with Justice Kittredge, Justice Beatty, and Justice Pleicones following with rates of 41.2%, 39.3%, and 10%, respectively.¹⁴² The overall agreement rate of these justices is at 37.6%.¹⁴³

Throughout this study, from analyzing Chief Justice Toal's opinions in divided criminal cases to tabulating her agreement rates in divided criminal cases authored by her fellow justices, and then breaking down her non-majority opinions into the multiple issues addressed on appeal, her inclination, in combination with her unique judicial interpretation, is towards the prosecution. This conclusion is bolstered by the lower agreement rate of her colleagues in her opinions favoring the prosecution, as compared to the high agreement rate with her colleagues in pro-prosecution opinion they have authored, extending especially to dissents. From the cases analyzed and gathered, and then further distributed through an independent yearly analysis, it does not seem that her trend in favoring the prosecution is on the decline. With the exception of the first couple of years that she served as Chief Justice, her pro-prosecution voting approach remains relatively high—reaching one hundred percent in divided criminal cases in certain years.¹⁴⁴ The various analyses performed in this study demonstrate that Chief Justice Toal continues to find in favor of the prosecution.

¹⁴² See *supra* Part IV.

¹⁴³ *Id.*

¹⁴⁴ As stated earlier, it is crucial to keep in mind that the figures derived in this study are from divided criminal cases and therefore are not representative of Chief Justice Toal's overall rates, nor are representative of the other justices' overall agreement rates.

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APPENDIX A: FINDINGS FROM DIVIDED CRIMINAL CASES IN WHICH
CHIEF JUSTICE TOAL HAS AUTHORED AN OPINION¹⁴⁵

Case	Opinion Authored	Issue Involved	Justices Agreeing with Opinion	Justices Disagreeing with Opinion ¹⁴⁶	Result	Toal
State v. Rivera, 699 S.E.2d 157 (S.C. 2010).	M		Kittredge Moore, AJ	Beatty (D) Pleicones (C/D)	Pros.	Pros.
State v. Bixby, 698 S.E.2d 572 (S.C. 2010).	M		Beatty Kittredge	Pleicones(D) Waller (C/D)	Pros.	Pros.
Hutto v. State, 692 S.E.2d 196 (S.C. 2010).	M		Waller Kittredge Moore, AJ	Pleicones (D)	Pros.	Pros.
State v. Williams, 690 S.E.2d 62 (S.C. 2010).	M		Waller Beatty	Pleicones (C) Kittredge (C)	Pros.	Pros.
State v. Winkler, 698 S.E.2d 596 (S.C. 2010).	M		Beatty Kittredge Hearn	Pleicones (C in result only)	Pros.	Pros.
State v. Stahlnecker, 690 S.E.2d 565 (S.C. 2010).	M		Waller Beatty Kittredge	Pleicones (C in result only)	Pros.	Pros.
State v. Johnson, 703 S.E.2d 217 (S.C. 2010).	D	Evid. Const.		Pleicones (M) Beatty Kittredge Hearn	Def.	Pros.
Vasquez v. State, 698 S.E.2d 561 (S.C. 2010).	D	S/P Const.	Hearn	Beatty (M) Kittredge Pleicones (C in result only)	Def.	Pros.
State v. Brannon, 697 S.E.2d 593 (S.C. 2010).	D	Pre-trial	Moore, AJ	Hearn (M) Pleicones Beatty	Def.	Pros.
Smith v. State, 689 S.E.2d 629 (S.C. 2010).	D	Const. Evid.		Kittredge (M) Waller Pleicones Beatty	Def.	Pros.

¹⁴⁵ Used in Parts IV, V, VII of this study.

¹⁴⁶ (M), (D), (C) denotes the type of opinion authored by that justice.

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Case	Opinion Authored	Issue Involved	Justices Agreeing with Opinion	Justices Disagreeing with Opinion ¹⁴⁶	Result	Toal
State v. Navy, 688 S.E.2d 838 (S.C. 2010).	D	Pre-trial Evid.	Kittredge (C in part)	Pleicones (M) Waller Barber III, AJ	Def.	Pros.
State v. Lee-Grigg, 692 S.E.2d 895 (S.C. 2010).	C/D	Jury Inst.	Moore	Pleicones (M) Waller Beatty	Def.	Pros.
State v. Sims, 694 S.E.2d 9 (S.C. 2010).	C		Hearn	Kittredge (M) Pleicones Beatty	Pros.	Pros.
Binney v. State, 683 S.E.2d 478 (S.C. 2009).	M		Waller Beatty Kittredge	Pleicones (D)	Pros.	Pros.
Rolen v. State, 683 S.E.2d 471 (S.C. 2009).	M		Waller Beatty Kittredge	Pleicones (D)	Def.	Def.
State v. Smith, 679 S.E.2d 176 (S.C. 2009).	D	Evid. Const.		Beatty (M) Waller Pleicones Kittredge	Def.	Pros.
Council v. State, 670 S.E.2d 356 (S.C. 2008).	C/D	Const.		Beatty (M) Moore Waller Pleicones	Def.	Pros.
Mahdi v. State, 678 S.E.2d 807 (S.C. 2009).	C	S/P		Pleicones (M) Waller Beatty Kittredge	Pros.	Pros.
State v. Covert, 675 S.E.2d 740 (S.C. 2009).	C	Evid.		Pleicones (M) Waller Beatty Moore, AJ	Def.	Def.
Davie v. State, 675 S.E.2d 416 (S.C. 2009).	C			Beatty (M) Waller Kittredge	Def.	Def.
McKnight v. State, 661 S.E.2d 354 (S.C. 2008).	M		Moore Waller Beatty	Pleicones (C in result only)	Def.	Def.
Speaks v. State 660 S.E.2d 512 (S.C. 2008).	M		Moore Waller Beatty	Pleicones (D)	Pros.	Pros.
James v. State, 659 S.E.2d 148 (S.C. 2008).	M		Moore Waller Beatty	Pleicones (C in result only)	Pros.	Pros.

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Case	Opinion Authored	Issue Involved	Justices Agreeing with Opinion	Justices Disagreeing with Opinion ¹⁴⁶	Result	Toal
State v. Stanko, 658 S.E.2d 94 (S.C. 2008).	M		Moore Waller Beatty	Pleicones (D)	Pros.	Pros.
State v. Morris 656 S.E.2d 359 (S.C. 2008).	M		Moore Waller Beatty	Pleicones (C)	Pros.	Pros.
State v. Fletcher, 664 S.E.2d 480 (S.C. 2008).	D	Evid.		Waller (M) Moore Pleicones Childs, AJ	Def.	Pros.
Miller v. State, 665 S.E.2d 596 (S.C. 2008).	D	Evid. Const.	Pleicones	Beatty (M) Moore Waller	Def.	Pros.
State v. Light, 664 S.E.2d 465 (S.C. 2008).	D	Jury Inst.		Moore (M) Waller Pleicones Beatty	Def.	Pros.
State v. Groome, 664 S.E.2d 460 (S.C. 2008).	D	Const.		Pleicones (M) Moore Waller Beatty	Def.	Pros.
State v. Cottrell, 657 S.E.2d 451 (S.C. 2008).	D	Jury Inst.		Pleicones (M) Moore Waller Beatty	Def.	Pros.
State v. Rye, 651 S.E.2d 321 (S.C. 2007).	M		Pleicones Macaulay, AJ	Moore (D) Burnett	Def.	Def.
State v. Slater, 644 S.E.2d 50 (S.C. 2007).	M		Moore Burnett	Pleicones (C in result only)	Pros.	Pros.
State v. Lee, 653 S.E.2d 259 (S.C. 2007).	D	Const.	Burnett	Pleicones (M) Moore Waller	Def.	Pros.
State v. Bixby, 644 S.E.2d 54 (S.C. 2007).	D	S/P		Moore (M) Waller Burnett Pleicones	Def.	Pros.
State v. Northcutt, 641 S.E.2d 873 (S.C. 2007).	D	Evid. Const. S/P		Burnett (M) Moore Waller Pleicones (C)	Def.	Pros.

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Case	Opinion Authored	Issue Involved	Justices Agreeing with Opinion	Justices Disagreeing with Opinion ¹⁴⁶	Result	Toal
State v. Burkhart, 640 S.E.2d 450 (S.C. 2007).	D	S/P	Burnett	Moore(M) Waller Pleicones (C)	Def.	Pros.
State v. Childers, 645 S.E.2d 233 (S.C. 2007).	C	Jury Inst.		Burnett (M) Waller Pleicones (D) Moore(con with D)	Pros.	Pros.
Watson v. State, 634 S.E.2d 642 (S.C. 2006).	M		Moore Waller Burnett	Pleicones (D)	Pros.	Pros.
State v. Bryant, 633 S.E.2d 152 (S.C. 2006).	M		Moore Pleicones Williams	Burnett (D)	Def.	Def.
State v. Bennett, 632 S.E.2d 281 (S.C. 2006).	M		Moore Waller Burnett	Pleicones (D)	Pros.	Pros.
State v. Hill, 630 S.E.2d 274 (S.C. 2006).	M		Moore Waller Burnett	Pleicones (C)	Pros.	Pros.
Porter v. State, 629 S.E.2d 353 (S.C. 2006).	M		Moore Waller Burnett	Pleicones (D)	Pros.	Pros.
State v. Sowell, 635 S.E.2d 81 (S.C. 2006).	D		Burnett	Waller (M) Moore Pleicones	Def.	Pros.
Hughes v. State, 626 S.E.2d 805 (S.C. 2006).	D	S/P		Burnett (M) Moore Waller Pleicones	Def.	Pros.
State v. Smalls, 613 S.E.2d 754 (S.C. 2005).	M		Moore Waller Burnett	Pleicones (C)	Pros.	Pros.
Winns v. State, 611 S.E.2d 901 (S.C. 2005).	M		Moore Waller Burnett	Pleicones (D)	Pros.	Pros.
State v. Hill, 604 S.E.2d 696 (S.C. 2004).	M		Burnett Brogdon, AJ	Moore (D) Waller (C/D)	Pros.	Pros.

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Case	Opinion Authored	Issue Involved	Justices Agreeing with Opinion	Justices Disagreeing with Opinion ¹⁴⁶	Result	Toal
Huggler v. State, 602 S.E.2d 753 (S.C. 2004).	M		Moore Waller Burnett	Pleicones (C)	Pros.	Pros.
State v. Woody, 596 S.E.2d 907 (S.C. 2004).	M		Moore Peiper, AJ Macaulay, AJ	Pleicones (D)	Def.	Def.
State v. Cherry, 606 S.E.2d 475 (S.C. 2004).	D	Jury Inst.	Lloyd, AJ	Waller (M) Moore Burnett	Pros.	Def.
State v. Arnold, 605 S.E.2d 529 (S.C. 2004).	D	Evid.	Burnett	Moore (M) Waller Pleicones	Def.	Pros.
State v. Smith, 592 S.E.2d 302 (S.C. 2004).	D	Const.		Pleicones (M) Moore Waller Burnett	Def.	Pros.
Payne v. State, 586 S.E.2d 857 (S.C. 2003).	M		Moore Waller	Pleicones (C) Burnett (con w/C)	Pros.	Pros.
Gibson v. State, 586 S.E.2d 119 (S.C. 2003).	M		Moore Waller Burnett	Pleicones (C)	Pros.	Pros.
Todd v. State, 585 S.E.2d 305 (S.C. 2003).	M		Moore Waller Burnett	Pleicones (D)	Pros.	Pros.
State v. Taylor, 589 S.E.2d 1 (S.C. 2003).	M		Moore Waller	Pleicones (C) Burnett (con w/C)	Def.	Def.
Harris v. State, 581 S.E.2d 154 (S.C. 2003).	M		Waller Burnett	Pleicones (con in result only)	Pros.	Pros.
Cutner v. State, 580 S.E.2d 120 (S.C. 2003).	M		Waller Pleicones	Moore (C/D) Burnett (con w/ C/D)	Pros.	Pros.
State v. Lindsey, 583 S.E.2d 740 (S.C. 2003).	C	S/P	Moore Waller Burnett	Pleicones	Def.	Def.

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Case	Opinion Authored	Issue Involved	Justices Agreeing with Opinion	Justices Disagreeing with Opinion ¹⁴⁶	Result	Toal
State v. Burkhart, 565 S.E.2d 298 (S.C. 2002).	M		Moore Waller	Pleicones (C) Burnett (con w/C)	Def.	Def.
State v. White, 560 S.E.2d 420 (S.C. 2002).	M		Moore Burnett Pleicones	Waller (D)	Pros.	Pros.
State v. Wright, 563 S.E.2d 311 (S.C. 2002).	C	Const.	Pleicones	Waller (M) Moore Burnett	Pros.	Pros.
Curtis v. State, 549 S.E.2d 591 (S.C. 2001).	M		Moore Waller Burnett	Pleicones (C in result only)	Pros.	Pros.
State v. Forrester, 541 S.E.2d 837 (S.C. 2001).	M		Moore Waller	Burnett (C/D)	Def.	Def.
Solomon v. State, 557 S.E.2d 666 (S.C. 2001).	D	Const.		Moore(D) Waller Burnett	Pros.	Def.
Bruno v. State, 556 S.E.2d 393 (S.C. 2001).	D	Const.	Pleicones	Waller (M) Moore Burnett	Pros.	Def.
Rollison v. State, 552 S.E.2d 290 (S.C. 2001).	C/D			Pleicones (M) Moore Waller Burnett	Pros.	Def.
State v. Bray, 535 S.E.2d 636 (S.C. 2000).	D	Evid.		Waller (M) Moore Burnett Pleicones	Def.	Pros.

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APPENDIX B. JUSTICES' AGREEMENT RATES WITH CHIEF JUSTICE
TOAL'S OPINIONS IN DIVIDED CRIMINAL CASES¹⁴⁷

TABLE 1: ANNUAL DISTRIBUTION									
2010									
Justice	Majority	%	Concur	%	Dissent	%	C/D	%	Total %
Kittredge	4/6	66.7	0/1	0	1/4	25	-	-	5/11 = 45.5
Beatty	4/6	66.7	0/1	0	0/4	0	0/1	0	4/12 = 33.3
Pleicones	0/6	0	0/1	0	0/5	0	0/1	0	0/13 = 0
Moore	2/2	100	-	-	1/1	100	1/1	100	4/4 = 100
Waller	2/4	50	-	-	0/2	0	0/1	0	2/7 = 28.6
Hearn	1/1	100	1/1	100	1/3	33.3	-	-	3/5 = 60
Barber, AJ	-		-		0/1	0	-	-	0/1 = 0
Total:	13/23	56.5	1/4	25	3/20	15	1/4	25	18/53 = 34

2009									
Justice	Majority	%	Concur	%	Dissent	%	C/D	%	Total %
Kittredge	2/2	100	0/2	0	0/1	0	0/1	0	2/6 = 33.3
Beatty	2/2	100	0/3	0	0/1	0	0/1	0	2/7 = 28.6
Pleicones	0/2	0	0/1	0	0/1	0	0/1	0	0/5 = 0
Waller	2/2	100	0/3	0	0/1	0	0/1	0	2/7 = 28.6
Total:	6/8	75	0/9	0	0/4	0	0/4	0	6/25 = 24

¹⁴⁷ Used in Part V of this study.

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2008										
Justice	Majority	%	Concur	%	Dissent	%	C/D	%	Total	%
Moore	5/5	100	-	-	0/5	0	-	-	5/10 =	50
Beatty	5/5	100	-	-	0/4	0	-	-	5/9 =	55.5
Pleicones	0/5	0	-	-	1/5	25.0	-	-	1/10 =	10
Waller	5/5	100	-	-	0/4	0	-	-	5/9 =	55.5
Childs, AJ	-	-	-	-	0/1	0	-	-	0/1 =	0
Total:	15/20	75	-	-	1/19	5.3	-	-	16/39 =	41

2007										
Justice	Majority	%	Concur	%	Dissent	%	C/D	%	Total	%
Moore	1/2	50	0/1	0	0/4	0	-	-	1/7 =	14.3
Pleicones	1/2	50	0/1	0	0/4	0	-	-	1/7 =	14.3
Waller	-	-	0/1	0	0/4	0	-	-	0/5 =	0
Burnett	1/2	50	0/1	0	2/4	50	-	-	3/7 =	42.9
Total:	3/6	50	0/4	0	2/16	12.5	-	-	5/26 =	19.2

2006										
Justice	Majority	%	Concur	%	Dissent	%	C/D	%	Total	%
Moore	5/5	100	-	-	0/2	0	-	-	5/7 =	71.4
Waller	5/5	100	-	-	0/2	0	-	-	5/7 =	71.4
Burnett	5/5	100	-	-	1/2	50	-	-	6/7 =	85.8
Pleicones	0/5	0	-	-	0/2	0	-	-	0/7 =	0
Total:	15/20	75			1/8	12.5			16/28 =	57.1

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2002									
Justice	Majority	%	Concur	%	Dissent	%	C/D	%	Total %
Moore	2/2	100	0/1	0	-	-	-	-	2/3 = 66.7
Waller	1/2	0	0/1	0	-	-	-	-	1/3 = 33.3
Burnett	1/2	50	0/1	0	-	-	-	-	2/3 = 66.7
Pleicones	1/2	50	1/1	100	-	-	-	-	2/3 = 66.7
Total:	5/8	62.5	1/4	25.0	-	-	-	-	6/12 = 50

2001									
Justice	Majority	%	Concur	%	Dissent	%	C/D	%	Total %
Moore	2/2	100	-	-	-	-	-	-	2/2 = 100
Waller	2/2	100	-	-	-	-	-	-	2/2 = 100
Burnett	1/2	50	-	-	-	-	-	-	1/2 = 50
Pleicones	1/2	50	-	-	-	-	-	-	1/2 = 50
Total:	6/8	75.0	-	-	-	-	-	-	6/8 = 75.0

2000									
Justice	Majority	%	Concur	%	Dissent	%	C/D	%	Total %
Moore	-	-	-	-	0/1	0	-	-	0/1 = 0
Waller	-	-	-	-	0/1	0	-	-	0/1 = 0
Burnett	-	-	-	-	0/1	0	-	-	0/1 = 0
Pleicones	-	-	-	-	0/1	0	-	-	0/1 = 0
Total:	-	-	-	-	0/4	0	-	-	0/4 = 0

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TABLE 2: AGREEMENT RATE WITH CHIEF JUSTICE TOAL'S PRO-PROSECUTION OPINIONS IN DIVIDED CASES RULING IN FAVOR OF DEFENDANT					
Justices	Agreeing	Not Agreeing	Total Cases	Agreement Rate	Total %
Pleicones	1	21	22	1/22	4.5%
Beatty	0	10	10	0/10	0%
Kittredge	1	4	5	1/5	20%
Hearn	1	2	3	1/3	33.3%
Moore	2	16	18	2/18	11.1%
Waller	0	20	20	0/20	0%
Barber, AJ	1	1	2	1/2	50%
Childs, AJ	0	1	1	0/1	0%
Burnett	4	6	10	4/10	40%
Lloyd, AJ	1	0	1	1/1	100%
Total:				11/92	12%

APPENDIX C. FINDINGS FROM DIVIDED CRIMINAL CASES IN WHICH
CHIEF JUSTICE TOAL DID NOT AUTHOR AN OPINION¹⁴⁸

Case	Opinion in Favor of Pros.	Opinion in Favor of Def.	Justices in Favor of Pros.	Justices in Favor of Def.	Result	Toal, CJ
Kolle v. State, 690 S.E.2d 73 (S.C. 2010).	D	M	Kittredge (D) Toal	Beatty (M) Waller Pleicones	Def.	Pros.
State v. Frazier, 689 S.E.2d 610 (S.C. 2010).	M	C/D	Kittredge(M) Waller Toal	Beatty(C/D) Pleicones	Pros.	Pros.
State v. Starnes, 698 S.E.2d 604 (S.C. 2010).	M	D	Kittredge(M) Beatty Hearn Toal	Pleicones(D)	Pros.	Pros.
State v. Douglas, 671 S.E.2d 606 (S.C. 2009).	M	D	Waller(M) Beatty Kittredge Toal	Pleicones(D)	Pros.	Pros.
State v. Wallace, 683 S.E.2d 275 (S.C. 2009).	M	D	Burnett (M) Waller, AJ Beatty Toal	Pleicones (D)	Pros.	Pros.
State v. Hubner, 683 S.E.2d 279 (S.C. 2009).	M	D	Burnett (M) Waller, AJ Beatty Toal	Pleicones (D)	Pros.	Pros.
Bryant v. State, 683 S.E.2d 280 (S.C. 2009).	M	D	Kittredge (M) Pleicones Toal	Beatty (D) Waller	Pros.	Pros.
Miller v. State, 665 S.E.2d 596 (S.C. 2008).	D	M	Pleicones (D) Toal	Beatty (M) Moore Waller	Def.	Pros.
Talley v. State, 640 S.E.2d 878 (S.C. 2007).	M	D	Burnett (M) Moore Waller Toal	Pleicones (D)	Pros.	Pros.

¹⁴⁸ Used in Part VI of the study. Cases gathered in here are those in which Chief Justice Toal did not author an opinion. Rather, these are cases in which she concurred with a prosecution opinion in non-unanimous criminal cases that had at least one justice filing an opinion in favor of the prosecution and at least one justice filing an opinion in favor of the defendant. Therefore, I was able to record the frequency in which Chief Justice Toal voted in favor of the prosecution, despite a possible outcome in favor of the defendant. (M), (D), (C), (C/D) denotes the opinion that justice authored.

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Case	Opinion in Favor of Pros.	Opinion in Favor of Def.	Justices in Favor of Pros.	Justices in Favor of Def.	Result	Toal, CJ
State v. Rayfield, 631 S.E.2d 244 (S.C. 2006).	M	D	Burnett (M) Waller Toal	Pleicones (C/D) Bartlett, AJ	Pros.	Pros.
State v. Pagan, 631 S.E.2d 262 (S.C. 2006).	M	D	Burnett (M) Waller Toal	Moore (D) Pleicones	Pros.	Pros.
State v. Reese, 633 S.E.2d 898 (S.C. 2006).	D	M	Burnett (D)	Moore (M) Waller King, AJ Toal	Def.	Def.
State v. Gentry, 610 S.E.2d 494 (S.C. 2005).	M	D	Moore (M) Waller Burnett Toal	Pleicones (D)	Pros.	Pros.
Garvin v. State, 615 S.E.2d 451 (S.C. 2005).	M	D	Burnett (M) Moore Toal	Waller (D) Pleicones	Pros.	Pros.
State v. Cutro, 618 S.E.2d 890 (S.C. 2005).	M	D	Moore (M) Waller Burnett Toal	Pleicones (D)	Pros.	Pros.
Von Dohlen v. State, 602 S.E.2d 738 (S.C. 2004).	C/D	M	Waller (C/D) Moore (C)	Burnett (M) Pleicones Toal	Def.	Def.
State v. Mills, 602 S.E.2d 750 (S.C. 2004).	M	D	Moore (M) Waller Burnett Toal	Pleicones (D)	Pros.	Pros.
State v. Holmes, 605 S.E.2d 19 (S.C. 2004).	M	D	Moore (M) Kittredge, AJ Waller Toal	Pleicones (D)	Pros.	Pros.
State v. Cabrera-Pena, 605 S.E.2d 522 (S.C. 2004).	M	D	Macaulay, AJ (M) Burnett Toal	Moore (D) Pleicones	Pros.	Pros.
State v. McKnight, 576 S.E.2d 168 (S.C. 2003).	M	D	Waller (M) Burnett Toal	Moore (D) Pleicones	Pros.	Pros.
State v. Foster, 582 S.E.2d 426 (2003).	D	M	Moore (D) Toal	Waller (M) Burnett Pleicones	Def.	Pros.

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Case	Opinion in Favor of Pros.	Opinion in Favor of Def.	Justices in Favor of Pros.	Justices in Favor of Def.	Result	Toal, CJ
State v. Cobb, 584 S.E.2d 371 (S.C. 2003).	M	D	Pleicones (M) Moore Waller	Burnett (D) Toal	Pros.	Def.
Ingle v. State, 560 S.E.2d 401 (S.C. 2002).	D	M	Burnett (D) Toal	Waller (M) Moore Pleicones	Def.	Pros.
State v. Primus, 564 S.E.2d 103 (S.C. 2002).	M	C/D	Burnett (M) Moore Gregory, AJ Toal	Pleicones (C/D)	Pros.	Pros.
Sanchez v. State, 569 S.E.2d 363 (S.C. 2002).	D	M	Burnett (D) Toal	Moore (M) Waller Pleicones	Def.	Pros.
Frasier v. State, 570 S.E.2d 172 (S.C. 2002).	M	D	Burnett (M) Moore Waller Toal	Pleicones (D)	Pros.	Pros.
State v. Harris, 572 S.E.2d 267 (S.C. 2002).	M	C/D	Waller (M) Moore Burnett Toal	Pleicones (C/D)	Pros.	Pros.
State v. Parker, 571 S.E.2d 288 (S.C. 2002).	D	M	Burnett (D)	Moore (M) Waller Pleicones Toal	Def.	Def.
State v. Kelly, 540 S.E.2d 851 (S.C. 2001).	M	C/D	Waller (M) Moore Burnett Toal	Pleicones (C/D)	Pros.	Pros.
State v. Ellis, 547 S.E.2d 490 (S.C. 2001).	C/D	M	Burnett (C/D)	Pleicones (M) Moore Waller Toal	Def.	Def.
State v. Woods, 550 S.E.2d 282 (S.C. 2001).	D	M	Burnett (D)	Pleicones (M) Waller Gregory, AJ Toal	Def.	Def.
Rollison v. State, 552 S.E.2d 290 (S.C. 2001).	M	C/D	Pleicones (M) Moore Waller Burnett	Toal (C/D)	Pros.	Def.
Hughes v. State, 552 S.E.2d 315 (S.C. 2001).	M/C	D	Waller (M) Burnett Pleicones (C)	Moore (D) Toal	Pros.	Def.

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Case	Opinion in Favor of Pros.	Opinion in Favor of Def.	Justices in Favor of Pros.	Justices in Favor of Def.	Result	Toal, CJ
State v. Knoten, 555 S.E.2d 391 (S.C. 2001).	D	M	Burnett (D) Toal	Pleicones (M) Moore Waller	Def.	Pros.