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CRIMINAL LAW AND PROCEDURE

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The decisions in this section reflect the increased attention afforded procedural safeguards. The stimulation for this interest is partly due to the decisions of the United States Supreme Court broadening the protection of procedural rights under the fourteenth amendment. In part it is attributable to the growing realization that the brute force of the police combined with the severe sanctions of the criminal law can produce irrevocable harm to the citizenry if used improperly.

The recent decisions failed to raise important substantive issues. *State v. Fleming*[1] involved a conspiracy prosecution for a scheme to defraud an insurance company by speculating in life insurance. The beneficiaries did not have an insurable interest and the persons insured were unaware of the policies. The defendant acted as intermediary. The South Carolina Supreme Court had no difficulty in rejecting the contention that the evidence was insufficient to establish defendant's guilt. An interesting point, not fully explored by the opinion, is that the conspirational objective was seemingly not a crime. The South Carolina law on this issue clearly embraces the view that for conspiracy the acts contemplated need not constitute a criminal offense.[2] However, this doctrine has recently been seriously questioned.[3] It places within the ambit of criminality virtually all combinations to commit civil wrongs, regardless of how petty. This vague standard for conspiracy conflicts with the requirement that criminal behavior must be defined with some certainty. The legislature should reconsider this potentially dangerous threat to freedom.

Search and Seizures

In *State v. Morris*[4] one of the defendants claimed that evidence was obtained by illegal search and seizure in two instances. Prior to his arrest for murder a policeman inquired as to the where-

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1. 243 S.C. 265, 133 S.E.2d 800 (1963).

2. This recognition is expressed in statute, S.C. CODE ANN. § 16-550 (1962), and court decision, State v. Davis, 88 S.C. 229, 70 S.E. 811 (1911).

3. "But it is true that most provisions fail to provide a sufficiently definite standard of conduct to have any place in a penal code." MODEL PENAL CODE § 10.3 (Tent. Draft No. 10, 1960).

4. 243 S.C. 225, 133 S.E.2d 744 (1963).

abouts of his pistol and the defendant voluntarily surrendered the weapon. The court noted that such a request, leading to a voluntarily relinquishing of evidence by a suspect, is not an illegal search. After the defendant's arrest, police officers went to his home and requested his wife to turn over an insurance policy which the defendant had previously taken out on the victim's life. Without objection the wife surrendered the policy to the officers.

A wife may not consent to a search of the husband's property during his absence. The consent must be made by the man or head of the premises sought to be searched.[5] The court circumvented this difficulty by finding that the evidence was not obtained by a search and seizure. "A search ordinarily implies a quest by an officer of the law and a seizure contemplates a forceful dispossession of the owner."[6]

Assistance of Counsel

At what stage of the proceedings the accused is entitled to the assistance of counsel continues to confront the court. In *Moorer v. State*[7] and *State v. White*[8] the defendant contended that due process required that counsel be furnished for the preliminary hearing, relying upon the principle that the accused is entitled to counsel at the first critical stage of the proceedings.[9] In *White* the court stated:

> In South Carolina, the Preliminary Hearing serves the purpose of determining whether the State can show probable cause and such hearing can only be requested by one charged with crime, and he is not permitted to plead or even make a sworn statement. If he chooses to make an unsworn statement, he may do so; but it can in nowise be used against him thereafter. The burden being upon the State to show probable cause, the defendant is not permitted to offer any evidence but may cross-examine the State's witnesses fully and such evidence is not admissible in any subsequent proceedings.[10]

5. VARON, SEARCHES, SEIZURES AND IMMUNITIES, 430-34 (1961).
6. 243 S.C. 225, 235, 133 S.E.2d 744, 748-49 (1963).
7. 244 S.C. 102, 138 S.E.2d 713 (1964).
8. 243 S.C. 238, 133 S.E.2d 320 (1963).
9. The Supreme Court considers arraignment a critical stage since the defendant must be plead. See White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961).
10. State v. White, 243 S.C. 238, 242, 133 S.E.2d 320, 321 (1963).

Further, it "may be waived by failure to request same in writing 10 days before court."[11] From this the court held that the preliminary hearing is not a critical stage.

The court's position is questionable. Since the preliminary hearing may be waived, a decision must be made whether the hearing would be advantageous to the accused. This is the type of decision that requires the training of the defense counsel. Further, the cross-examination of the state's witnesses at the hearing again requires the lawyer's skill to be fully advantageous to the accused.

A less important point raised in *Moorer* was that the defendant did not have counsel present during the arraignment. The accused was arraigned again in the presence of his counsel two days after the first arraignment. The court held that the second arraignment cured any defects in the first.[12]

Continuance

In *State v. Kirby*[13] a motion for continuance was made alleging the key witness for the defense was in the military service, thus temporarily unavailable. An affidavit was presented by the defense counsel stating what the witness would testify to if present. The lower court overruled the motion but allowed the affidavit to be read to the jury. The court affirmed restating the time-worn principle that a decision by the lower court regarding continuance will not be disturbed without a clear showing of abuse of discretion.

In *State v. Young*[14] the lower court granted several continuances relying upon the defense counsel's contention that the defendant was physically unable to stand trial. It then made an examination of the defendant's condition during which several doctors testified that the accused was able to stand trial without danger. The denial, based upon the doctor's testimony, of a motion for another continuance was affirmed. Again the court declared that clear abuse of discretion must be shown, but this was buttressed by several earlier cases upholding the refusal to continue a case because of the defendant's physical condition.

11. *Ibid.*
12. Moorer v. State, 244 S.C. 102, 138 S.E.2d 713 (1964).
13. 244 S.C. 67, 135 S.E.2d 361 (1964).
14. 243 S.C. 187, 133 S.E.2d 210 (1963).

In a third case, *State v. Black*,[15] a continuance was requested because the most experienced defense counsel was not physically able to fully participate in the trial. The fact his participation was limited due to illness was undenied. The court again noted that abuse of discretion to the prejudice of the accused must be shown. However, the court reversed the refusal of the motion and granted a new trial. Undoubtedly, this result accords with enlightened law. Unfortunately, the court unduly limited its decision with the ambiguous statement: "While it is *extremely doubtful* that the refusal of the motion for a continuance constituted an abuse of discretion in this case, we have concluded, *in favorem vitae*, that the circumstances warrant a new trial"[16] [Emphasis added.] This suggests either that the refusal of a continuance when the defense counsel is ill does constitute an abuse of discretion, or that the court will on occasion ignore the rule it has consistently stated to be the law.

Indictment—Venue

An indictment for murder must allege the place of the commission of the crime.[17] The purpose of this requirement is to etstablish jurisdiction of the court and to inform the accused of the county in which he is charged.[18] In a 1929 case, *State v. Platt*,[19] the indictment alleged that the deceased was assaulted and died in Marion County when the uncontradicted proof indicated he was assaulted in Marion County but died in Florence County. Even though the assault constituted sufficient contact for jurisdiction and venue,[20] the court held the indictment was at fatal variance with the proof. In a later case the court, over a strong dissent, impliedly rejected this principle without discussing the *Platt* case.[21] In *State v. Bostick*[22] the issue was again before the court affording an excellent opportunity for clarification. Unfortunately the *Bostick* case merely adds to the confusion. Again the court ignored the *Platt* case, placing emphasis on the statute establishing jurisdiction in the county where the assault occurred. This suggests that unnecessary allegations as

15. 243 S.C. 42, 132 S.E.2d 5 (1963).
16. *Id.* at 45, 132 S.E.2d at 6.
17. S.C. CODE ANN. § 17-403 (1962).
18. State v. McIntire, 221 S.C. 504, 71 S.E.2d 410 (1952).
19. 154 S.C. 1, 151 S.E. 206 (1929).
20. S.C. CODE ANN. §§ 17-454, -456 (1962).
21. State v. Gantt, 223 S.C. 431, 76 S.E.2d 674 (1953).
22. 243 S.C. 14, 131 S.E.2d 841 (1963).

to place of death will be treated as irrelevant surplus. However, the court then viewed the evidence as establishing beyond conflict that the assault and death took place as the indictment alleged. Whether the prosecution was required to prove the allegations is left unanswered. The only obviously safe course open to the solicitor is to allege simply the place of the assault if there is some question about the place of death.

Selection of the Jury

Two cases, *Moorer v. State*[23] and *State v. Fleming*,[24] raised the issue whether Negroes had been systematically excluded from the jury in violation of the fourteenth amendment. In South Carolina eligibility for jury service is limited to qualified male electors.[25] *Fleming* illustrates the difficulty. Approximately sixty percent of Clarendon County consists of Negroes, yet of 1200 qualified male electors only about thirty-five are Negroes.[26] In both cases evidence established that usually a few Negroes were selected for jury duty. The court held in both instances that the defendants failed to prove systematic exclusion.

Systematic exclusion on account of color can be established from evidence of factual exclusion.[27] However, where Negro voter registration is disproportionately lower than white registration, factual exclusion becomes legally justified. Increased Negro registration should provide interesting developments in the extent of jury participation by Negroes.

Grand Jury—Jury List

In 1962 *State v. Jackson*[28] held that a grand jury was illegally constituted when it failed to include not less than two from every three qualified electors. *Lollis v. Manning*[29] raised the issue whether defendants previously convicted by a jury drawn from

23. 244 S.C. 102, 135 S.E.2d 713 (1964).

24. 243 S.C. 265, 133 S.E.2d 800 (1963).

25. A jury list limited by state statute to taxpayers was upheld although a higher proportion of white than Negro citizens appeared on the list. Brown v. Allen, 344 U.S. 443 (1953).

26. See 243 S.C. 265, 270, 133 S.E.2d 800, 803 (1963). In *Moorer, supra* note 23, of approximately 3,000 electors, only 250 to 300 were Negro citizens.

27. Norris v. Alabama, 294 U.S. 587 (1935).

28. 240 S.C. 238, 125 S.E.2d 474 (1962). See generally Rogers, *Criminal Law and Procedure, 1962-1963 Survey of S.C. Law*, 16 S.C.L. REV. 67, 70 (1964).

29. 242 S.C. 316, 130 S.E.2d 847 (1963).

an illegally constituted grand jury would be entitled to a writ of habeas corpus. The court denied relief finding a sufficient distinction between timely objection and no objection until after the verdict. The Code provides that no irregularity in the selecting of jurors is sufficient to set aside a conviction unless the defendant was injured by the irregularity or unless objection is made before verdict.[30] The defendants were obviously not prejudiced by the defect; thus if the illegality was a mere irregularity, the failure to timely object amounted to a waiver under the Code. The defendants contended that the illegal grand jury was a jurisdictional defect, thus voiding the proceedings. In rejecting this claim, the court noted that a defect "which does not prevent the presence of twelve competent jurors, by whose votes the indictment is found, and which could have been cured if the attention of the court had been called to it at the time, or promptly remedied by the empaneling of a competent grand jury" is only an irregularity.[31]

Instructions

In *State v. White*[32] the defendant did not testify in his own behalf and the trial judge upon request refused to charge the jury that the failure of an accused to testify could not be considered against him. The judge reasoned that to call attention to the defendant's failure to testify may be more prejudicial than not. This was an issue of first impression, although dictum in a previous case suggested that the instruction should be given if requested.[33]

It is clear the instruction need not be given unless requested.[34] Indeed, the trial judge's belief that the instruction could be prejudicial is correct. However, the court correctly held that the decision, whether under the circumstances of a particular situation the instruction is helpful to the defendant, is best left to the defense counsel.

Habeas Corpus

In *Hayes v. State*[35] the defendant appealed the denial of a writ of habeas corpus sought on the grounds that the solicitor

30. S.C. CODE ANN. § 38-214 (1962).
31. Lollis v. Manning, 242 S.C. 316, 320, 130 S.E.2d 847, 849 (1963).
32. 243 S.C. 238, 133 S.E.2d 320 (1963).
33. State v. King, 158 S.C. 251, 155 S.E. 409 (1930).
34. *Ibid.*
35. 242 S.C. 328, 130 S.E.2d 906 (1963).

knowingly used and encouraged false testimony. It was claimed that the testimony of three eye witnesses was so clearly "untrue and obviously prejudicially influenced" that the solicitor must have known of its falsity. The court correctly affirmed the denial pointing out that the allegations were conclusional and amounted to no more than an attack on the credibility of the witnesses.[36] Although the use of knowingly perjured testimony by the prosecuting authorities is a denial of due process,[37] the petition must allege sufficient facts to establish a prima facie case.

A petition for writ of habeas corpus was filed in *Wyatt v. State*[38] alleging a number of conclusions with little factual support. The major contention was that the defendant did not consent to a guilty plea with a recommendation of mercy for the murder of his wife. The court affirmed the lower court's denial, primarily because the trial court closely questioned the defendant about his understanding of the guilty plea. The court also strengthened *Crosby v. State*[39] by implying lack of effective assistance of counsel is a denial of due process, but the defendant must show "counsel's purported representation was such as to make the trial a farce and a mocking of justice."[40]

In *Hayes* and *Wyatt* the court reaffirmed the principle that the sufficiency or insufficiency of the evidence supporting guilt cannot be raised in a habeas corpus proceeding. The sole issue is whether the judgment, under which the petitioner is confined, is void.

Miscellaneous

In several cases[41] the court refused to review allegedly excessive sentences. This view can be justified where pre-sentence investigation places the trial judge in a superior position for evaluation.

The South Carolina Supreme Court held in a prior case that excessive sentences could violate the constitutional provision against cruel and unusual punishment.[42] It ruled unconstitutional a thirty-year sentence for burglary where the jury recommended

36. *Id.* at 330, 130 S.E.2d at 907.
37. Mooney v. Holohan, 294 U.S. 103 (1935).
38. 243 S.C. 197, 133 S.E.2d 120 (1963).
39. 241 S.C. 40, 126 S.E.2d 843 (1963).
40. 243 S.C. 197, 200, 133 S.E.2d 120, 121 (1963).
41. State v. Kirby, 244 S.C. 67, 135 S.E.2d 361 (1964). State v. Bass, 242 S.C. 193, 130 S.E.2d 481 (1963).
42. State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948).

mercy, the defendant had no prior record, and the thirty-year sentence amounted to a life term to the defendant in question.[43] While following a justified limitation on sentencing, the court consistently refuses to substitute appellate for trial court judgment on the issue of punishment.

In *State v. Hyde*[44] the court correctly reaffirmed the view that a person need not own the premises to be guilty of storing whiskey thereon. The court also noted in *Hyde* that the failure of the defense counsel to object to the instructions waived any defects.

The waiver of objections due to actions of the defense counsel was an issue in several other cases. In *State v. McCravy*[45] the court held that where the defendant agreed to be tried upon two separate indictments at the same time he cannot complain of any prejudice resulting to him. In *State v. Chasteen*[46] the court rejected the defendant's claim of prejudicial testimony because the testimony was brought out by his defense counsel. Similarly in *State v. Young*[47] the failure to object to testimony waived any error in its admission. Also in *Young* the court noted that failure to object to the indictment waived any nonjurisdictional defects.

43. *Ibid.*
44. 242 S.C. 372, 131 S.E.2d 96 (1963).
45. 242 S.C. 506, 131 S.E.2d 687 (1963).
46. 242 S.C. 198, 130 S.E.2d 473 (1963).
47. 243 S.C. 187, 133 S.E.2d 210 (1963).