South Carolina Law Review

Volume 19
Issue 4 *Survey of South Carolina Law 1967*

Article 5

1967

Criminal Law and Procedure

Robert L. Wynn III

CRIMINAL LAW AND PROCEDURE

There were no dramatic changes in the criminal law and procedure area during the last survey period as a result of South Carolina Supreme Court decisions. The United States Supreme Court, however, had a banner year and "legislated" more procedural rules for the states in order to safeguard the constitutional rights of an accused individual. The Court, in landmark cases decided that: coercion will be found where an arresting officer, advising an accused of his constitutional rights, at the same time warns the accused of a penalty for not talking;[1] the sixth amendment right to a speedy trial is applicable in state cases through the fourteenth amendment;[2] sex offenders may not be given what amounts to an indeterminate sentence under the guise of treatment in a proceeding where constitutional rights are not afforded;[3] juvenile delinquency proceedings which may lead to incarceration must follow procedural due process;[4] counsel must be present at post-indictment lineups,[5] but need not be present when an accused is asked to give a sample of his handwriting.[6]

The Court, in other cases, held that the recidivist statutes are constitutional,[7] but that anti-miscegenation laws are in violation of equal protection and due process.[8]

I. Criminal Procedure

A. Right to Counsel

In *Myers v. State*[9] the court discussed at length the adequacy of counsel issue. The defendant and a co-defendant had been convicted of violating the safecracking statute and sentenced to life imprisonment. The case reached the supreme court after denial of a writ of habeas corpus. Conceding on appeal that counsel at the lower court trial was representing both defendants,

1. Spevack v. Klein, 385 U.S. 511 (1967); Garrity v. New Jersey, 385 U.S. 493 (1967).
2. Klopfer v. North Carolina, 87 S. Ct. 988 (1967).
3. Sprecht v. Patterson, 385 U.S. 968 (1967).
4. *In re* Gault, 87 S. Ct. 1428 (1967).
5. United States v. Wade, 87 S. Ct. 1926 (1967).
6. Gilbert v. California, 87 S. Ct. 1951 (1967).
7. Spencer v. Texas, 385 U.S. 554 (1967).
8. Loving v. Virginia, 87 S. Ct. 1817 (1967). *See* Comment, 19 S.C.L. Rev. 253 (1967).
9. 248 S.C. 539, 151 S.E.2d 665 (1966).

the appellant argued that such representation amounted to inadequate representation in violation of his constitutional rights.

The defendant alleged that there was a conflict of interests between the two defendants, that compulsory process was not used by counsel to obtain defense witnesses, and that counsel neglected to let the defendant testify at the trial in his own behalf. The court found none of the charges meritorious and pointed out that, though mere perfunctory representation does not satisfy the rights of the accused,[10]

> the quality of the service rendered by counsel meets all requirements of due process when counsel is a member in good standing of the Bar, gives his client his complete loyalty, serves him in good faith to the best of his ability, and, his service is of such character as to preserve the essential integrity of the proceedings as a trial in a court of justice. He is not required to be infallible, nor to do the impossible, since the defendant is entitled to a fair trial and not a perfect one or a perfect result.[11]

Adequacy of counsel was again the issue before the court in *McCrary v. State*.[12] There the court found the defendant adequately represented by counsel even though: counsel did not seek a directed verdict of acquittal at the end of state's evidence; counsel agreed to consolidate two indictments for related offenses into one trial; and counsel elected not to present any evidence for the defense but to rely solely on argument. The court found that the defendant had been represented by an experienced trial lawyer who performed in good faith to the end that the accused would receive a fair trial.

B. Arrest and Search and Seizure

In *State v. Thomas*,[13] an appeal from a conviction for rape, the court reaffirmed the principle that an arrest may be made without a warrant provided the arresting officer has reason to believe a felony has been committed and that the person arrested

10. Turner v. Maryland, 303 F.2d 507 (4th Cir. 1962).
11. Myers v. State, 248 S.C. 539, 542, 151 S.E.2d 665, 666 (1966), *quoting from* Tillman v. State, 244 S.C. 259, 264, 136 S.E.2d 300, 303 (1964).
12. 249 S.C. 14, 152 S.E.2d 235 (1967).
13. 248 S.C. 573, 151 S.E.2d 855 (1966).

committed it.[14] A legal search may follow if incident to the arrest.

State v. Swilling[15] reached a like result on similar facts. In addition, the court there found that the failure to take defendant before a magistrate after his arrest without a warrant for eleven days would not require reversal unless such action deprived the defendant of a fair trial. The defendant's charges that the police misconduct deprived him of his right to bail and thus to prepare an adequate defense were held groundless since release under bail is not a matter of right and since the record showed that he had easy access to the names of witnesses to his crime.

C. Solicitor and Judge

In *State v. Parker*[16] the court held that the decision of the circuit court concerning the credibility and weight of newly discovered evidence offered on a motion for a new trial would not be disturbed unless there was a showing of abuse of discretion or error of law.

The defendants in *State v. Wells*[17] were convicted of conspiracy to commit abortion and appealed for a new trial on the ground of new evidence. Again the court noted the discretion of the trial court in such matters and held that a movant for a new trial based on after-acquired evidence would have to show that such evidence

> (1) is such as would probably change the result if a new trial is had; (2) has been discovered since the trial; (3) could not by the exercise of due diligence have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching.[18]

No abuse of discretion or error of law was found in the lower court's denial of the motion.[19]

14. S.C. CODE ANN. § 17-251 (1962). From the undisputed trial court record it was found that the assailant's identity was known to the prosecutrix and that this information was communicated to her rescuer who told the arresting police.

15. No. 18664 (S.C., June 8, 1967).

16. 153 S.E.2d 183 (S.C. 1967).

17. 153 S.E.2d 904 (S.C. 1967). The evidence consisted of an affidavit to the effect that the defendant gave the victim of the abortion her money back after he discovered she wanted an abortion, and that the victim was trying to get even with the defendant.

18. *Id.* at 911.

19. The court found that the evidence probably would not have changed the result if a new trial were had and that it was actually only cumulative and impeaching.

In *State v. Squires*[20] the defendants were indicted for burglary, armed robbery, housebreaking and larceny. They pleaded guilty to burglary and were convicted, but the trial court was reversed and ordered to grant a new trial after a successful petition of habeas corpus charged that the petitioners had been without the benefit of counsel when their pleas of guilty were entered. The second trial found the defendants guilty, from which verdict the defendants appealed.

In the course of the second trial one of the defendants tried to explain that the solicitor had threatened him with life imprisonment if he did not plead guilty at the first trial. The solicitor, in argument to the jury, responded, "If you believe I told them that, I hope you will turn them loose."[21] The defendants, on appeal, asserted that the objection made to strike the statement should not have been refused since it allowed the solicitor, who was not a witness, to challenge the veracity of the defendant. The supreme court felt that the trial judge must be left alone to conclude whether such situations are prejudicial, since he is there and is in a better position to observe "the context in which the language is used, the manner, tone of voice, and bearing of counsel."[22] Finding no abuse of this wide discretion left to the trial judge, the court rejected the argument of prejudice.

In *State v. Leiderman*[23] another party had raped the prosecutrix in a cabin owned by the defendant and located near his place of business. Leiderman denied touching the prosecutrix and any participation in the crime, and an important issue was whether he was, in the eyes of the law, aiding and abetting. The court found prejudicial error in the trial judge's failure to reply to the jury's request for further instructions regarding the legal principles of accessoral responsibility.

The question of whether a trial judge has a duty to question one accused of murder to determine if he understands the consequences of his guilty plea before the court receives such was answered in the negative, at least where it is evident to the court that he has already been appraised of this fact. The record in *Thompson v. State*[24] indicated that at the trial the defendant's

20. 248 S.C. 239, 149 S.E.2d 601 (1966).
21. *Id.* at 246, 149 S.E.2d at 604.
22. *Id.*
23. 249 S.C. 61, 152 S.E.2d 354 (1967).
24. 248 S.C. 475, 151 S.E.2d 221 (1966).

retained counsel had entered into negotiations with the solicitor since a case against Thompson was apparently fairly well established. The defendant was counseled about the situation and upon this advice entered a plea of guilty of murder with recommendation for mercy. He was present in court when the judge accepted his plea, when the jury foreman was asked to sign a consent verdict as pleaded for, and when the judge pronounced the mandatory life sentence. He made no objection. The court held that the accused was sufficiently aware of the consequences of his guilty plea and that the trial judge's failure to admonish the accused as to such consequences was not prejudicial error nor was it a denial of due process.[25]

Another contention of the appellant was that his guilty plea was not voluntary since it was a result of his counsel's advice that if he did not so plead he would get the electric chair. The court pointed out that it was the duty of legal counsel in capital cases to apprise their clients of the possibility of a death sentence, and that such suggestions do not constitute coercion such as to make a guilty plea to a lesser offense not voluntary. The court seemingly disregarded the difference between the suggestions that the defendant "*would* get the chair" and "*could* get the chair."

In *State v. Cannon*[26] the defendant's conviction for rape was overturned by the South Carolina Supreme Court and remanded because the lower court erred in its failure to determine whether a confession was voluntary before submitting the question to the jury. At the trial a search warrant used by officers in the search of appellant's home was ruled invalid, and articles taken were excluded from evidence in accordance with *Mapp*.[27] But the trial court record and other evidence showed conflict as to whether or not articles taken from the defendant's home by virtue of the invalid warrant were used to elicit an illegal confession. The court noted that if the evidence had been so used, the confession would have to be excluded also as a fruit of the illegality.[28] Since it was apparent from the record that the trial judge had not made any reliable initial determination on the

25. This is the minority approach, and it is mildly rebuked in Comment, 19 S.C.L. REV. 261 (1967). The federal view is also to the contrary. FED. R. CRIM. P. 11. *See* Note, 18 S.C.L. REV. 668 (1966).

26. 248 S.C. 506, 151 S.E.2d 752 (1966).

27. Mapp v. Ohio, 367 U.S. 643 (1961).

28. *See* Fahy v. Connecticut, 375 U.S. 85 (1963); Wong Sun v. United States, 371 U.S. 471 (1963); Mapp v. Ohio, 363 U.S. 643 (1961).

issue of voluntariness before submitting the confession to the jury, the supreme court held that a determination on this issue would have to be made by the lower court. The court followed the *Jackson v. Denno*[29] decision, which held that a tribunal other than the jury, charged with deciding innocence or guilt, must make the initial determination of the voluntariness of a confession. The court did not order a new trial because in its opinion neither the Constitution nor *Jackson* required one if, in a collateral proceeding, the appellant's confession was determined to be voluntary.

A federal court in *Moorer v. South Carolina*[30] ordered a new trial where the lower court had failed to give the jury or itself an opportunity to determine the voluntariness of a confession made after arrest and alluded to at the trial even though the contents were not disclosed.

A statement by the trial judge that defense counsel "better let him [the defendant] go on the stand" was held to have been a mere suggestion rather than a command that the defendants testify against themselves in *State v. Johnson*.[31]

The defendants in *State v. Squires*[32] utilized the *Escobedo*[33] rationale and charged that the trial court committed reversible error in admitting into evidence a confession rendered while defendants were without the benefit of counsel. The court felt the exception without merit since *Squires* preceded[34] *Escobedo*, and *Johnson*[35] had restricted *Escobedo* to a prospective application.

D. Indictments

In the companion cases of *Dukes v. State*[36] and *Owen v. State*[37] the appellants pleaded guilty to an indictment captioned "Indictment for Highway Robbery and Larceny," which offense carries a maximum sentence of ten years.[38] The trial court had

29. 378 U.S. 368 (1964).
30. 368 F.2d 458 (4th Cir. 1966).
31. 249 S.C. 1, 152 S.E.2d 669 (1967).
32. 248 S.C. 239, 149 S.E.2d 601 (1966).
33. Escobedo v. Illinois, 378 U.S. 478 (1964).
34. The confessions were made in 1959 and admitted into evidence at a 1963 trial. *Escobedo* was not handed down until 1964.
35. Johnson v. New Jersey, 384 U.S. 719 (1966).
36. 248 S.C. 227, 149 S.E.2d 598 (1966).
37. 248 S.C. 233, 149 S.E.2d 600 (1966).
38. S.C. CODE ANN. § 17-552 (1962).

sentenced the defendants to twenty-five years of hard labor. Upon a remand and resentencing order the lower court was requested to construe the indictment and resentence accordingly. The lower court viewed the plain words of the indictment as charging the defendants with armed robbery (which carries a maximum sentence of twenty-five years)[39] rather than highway robbery and reinstated the twenty-five year sentence. On appeal this decision was affirmed. The court regarded the caption as mere surplusage, pointing out that the indictment plainly stated on its face that it charged "robbery while armed with a pistol." Furthermore, any objection to such surplusage, defect, or ambiguity surrounding the indictment was waived by the failure to question it by way of demurrer or motion to quash as the statutes demand.[40]

In *Grady v. State*[41] the defendant pleaded guilty to an indictment containing on its face five counts, the fourth of which was for safecracking. Upon his plea of guilty, the court sentenced the defendant to fourteen years on count four coupled with concurrent one year sentences on the other four counts. The petitioner, on appeal, contended that since the caption on the back of the indictment listed possession of burglary tools as the fourth count, and a fourteen year sentence exceeded the maximum punishment permissible by statute for this offense, the defendant should be freed. The lower court rejected defendant's habeas corpus petition and the supreme court dismissed his appeal. The court cited *Dukes* and *Owens* in holding that "the plain language of an indictment is not to be ignored merely because its caption does not precisely conform with the wording on its face."[42]

State v. Squires[43] held it was not improper for the trial judge in a new trial to allow a copy of the original indictment to go to the jury where every effort was made by the judge to avoid any possible prejudice to the defendants who had pleaded guilty to one of the charges in the four-count indictment.[44] The defendants, the court said, were not entitled to re-indictment.

In *State v. Sheppard*[45] the defendant was indicted for driving "while under the influence of intoxicating liquor and drugs" in

39. S.C. CODE ANN. §§ 16-145, 16-333 (1962).
40. S.C. CODE ANN. § 17-409 (1962).
41. 248 S.C. 522, 151 S.E.2d 670 (1966).
42. *Id.* at 525, 151 S.E.2d at 671.
43. 248 S.C. 239, 149 S.E.2d 601 (1966).
44. The jury was instructed to disregard the pleas of the defendants entered on the original indictment.
45. 248 S.C. 464, 150 S.E.2d 916 (1966).

violation of a state statute.[46] The circuit court quashed the indictment since it charged two separate offenses in the same count, *i.e.*, (1) driving under the influence of intoxicating liquor and (2) driving under the influence of drugs. The supreme court reversed and remanded for trial observing that the proscribed conduct under the statute was the operation of a motor vehicle by one who is under the influence of liquor *or* drugs. An indictment charging an accused in conjunctive terms with more than one offense, the court explained, is not duplicitous.

In *Allen v. MacDougall*[47] an indictment which charged the defendant and another with housebreaking, larceny, and safecracking was held not defective though the defendant's name did not appear on it when drawn, since testimony had revealed that his name was added before it was submitted to the grand jury.

McCrary v. State[48] held that timely objection and a showing of prejudice are necessary for a successful motion for a separation of a consolidated indictment.

E. Habeas Corpus

Carroll v. MacDougall[49] involved an appeal from an order of the circuit court dismissing a writ of habeas corpus. There an illiterate twenty-five-year-old laborer alleged that he believed he was entering a plea of guilty to manslaughter rather than a plea of guilty to murder with recommendation of mercy. The supreme court held that since the unchallenged transcript of the proceedings refuted the claims of the petitioner, the former court's action denying the writ must be affirmed.

In *Tucker v. State*[50] the supreme court overturned a lower court's order that granted a habeas corpus petition on grounds that the defendant was denied legal counsel. The court found that the unimpeached original trial journal of the case showed petitioner was represented by capable counsel, and held that uncorroborated statements which related to a trial held thirty years before were legally insufficient evidence to bear the burden of proof.[51]

46. S.C. CODE ANN. § 46-343 (1962).
47. 248 S.C. 588, 151 S.E.2d 863 (1966).
48. 249 S.C. 14, 152 S.E.2d 235 (1967).
49. 248 S.C. 141, 149 S.E.2d 343 (1966). In the context of its opinion the court quotes a part of the trial record which demonstrates the manner in which a trial judge may be certain that a defendant fully understands his guilty plea.
50. 248 S.C. 344, 149 S.E.2d 769 (1966).
51. "It is well settled that the burden is upon petitioner in habeas corpus to sustain the allegations of his petition by the greater weight or preponderance of the evidence." *Id.* at 346, 149 S.E.2d at 771.

In *McCrary v. State*[52] a habeas corpus petitioner charged that the trial court's record was insufficient and incorrect and filed an eleven-page document purporting to be an accurate record of the missing proceedings, testimony, objections and statements. The supreme court accepted the court reporter's transcript rather than the petitioner's uncorroborated account of activities of his trial not set on paper until three years later.

McCreight v. MacDougall[53] held that habeas corpus would not lie to test the constitutionality of evidence[54] admitted at the lower court without objection. The defendant was held to have waived objection to any defects in the evidence by his failure to object to its admissibility in the lower court.

In another waiver case, *State v. Murray*,[55] the supreme court cited the *McCreight* case and refused to grant the appellant a new trial where he had failed to object at the prior trial to certain prejudicial testimony[56] which allegedly deprived him of a fair trial.[57]

Allen v. MacDougall[58] found no error where the judge hearing a habeas corpus petition denied a request made during the hearing for a transcript of trial testimony. The court noted that the petition had not asked for the transcript, nor was there anything in the record to indicate it would have been necessary or pertinent, and finally, petitioner elected to have the hearing proceed without it, thereby waiving any right he might have had to require the transcript furnished.

In *Blandshaw v. State*[59] a habeas corpus petitioner, demanding immediate release, appealed from a denial of the writ, charging that he was denied a preliminary hearing, that he was tried

52. 249 S.C. 14, 152 S.E.2d 235 (1967).

53. 248 S.C. 222, 149 S.E.2d 621 (1966).

54. The objectionable evidence consisted of an admission made by the defendant to the arresting officers while he was allegedly illegally detained without a warrant or probable cause and without being advised of his constitutional right to counsel or to remain silent, and the murder weapon which was allegedly obtained after police had illegally searched the defendant's car without a search warrant.

55. 248 S.C. 473, 150 S.E.2d 920 (1966).

56. The testimony alluded to consisted of references to a prior confinement in jail when the defendant's character had not been put in issue and statements made by the defendant to police officers shortly after his arrest which were admitted into evidence without a prior determination of their voluntariness.

57. For a discussion of recent federal cases which try to avoid the harshness of state waiver rules see *Criminal Law and Procedure,* 19 S.C.L. REV. 30, 40-41 (1967).

58. 248 S.C. 588, 151 S.E.2d 863 (1966).

59. 249 S.C. 42, 152 S.E.2d 349 (1967).

under the wrong name, that the solicitor's conduct of the trial was deliberately prejudicial toward him, that the lower court failed to allow his witnesses to testify, and that he was not adequately represented by counsel. The court held that even assuming the truth of the allegations, the appellant would have been entitled only to a new trial and not absolute release as he requested.[60]

In *Wines v. State*[61] the novel question was raised as to whether under existing South Carolina law the State Hospital has authority to confine and treat an ex-convict in the State Penitentiary. The petitioner had completed serving sentence at the penitentiary in May, 1964, and he immediately became a voluntary patient at the State Hospital. After a twenty-one day stay at the hospital, Wines was transferred back to the penitentiary, having been classified as "insane and dangerous." A habeas corpus petition was instituted and rejected. On appeal, the court sidestepped the issue and remanded the cause, without prejudice, for the lower court to determine whether habeas corpus would lie in view of the fact that immediate release was not demanded and also to determine if Wines needed a guardian ad litem.

F. Motions for Change of Venue and Continuance

In *State v. Squires*[62] the supreme court reaffirmed the general rule that a motion for continuance may be denied at the discretion of the trial judge and will not be disturbed on appeal without a clear showing of abuse of such discretion. The court held that a denial of a motion for a continuance was not an abuse of discretion where the case was over four years old, the only living witness who could identify the defendants was seventy-four years old, there was no showing that any other evidence would be forthcoming or that any other points would be raised if the motion were granted, and counsel did not renew and vigorously argue for such motion when the trial commenced four days later.

In *State v. Cannon*[63] the defendant, charged with rape, moved for a continuance so that he might obtain a psychiatric examination from a psychiatrist of his own choosing who resided 200

60. Grant v. MacDougall, 244 S.C. 387, 137 S.E.2d 270 (1964) settled this point.

61. 153 S.E.2d 392 (S.C. 1967).

62. 248 S.C. 239, 149 S.E.2d 601 (1966).

63. 248 S.C. 506, 151 S.E.2d 752 (1966).

miles away. The appellant had been examined by the South Carolina State Hospital and found to be sane. The court found, after an examination of the record, that there was no showing that any favorable evidence would have been adduced by allowing the continuance and so held to the rule adhered to in *Squires*. In the same case, error was charged in that the trial court refused to grant a change of venue. The motion was predicated on the contention that a fair and impartial trial could not be had due to prejudicial pre-trial publicity. The court found no basis for this charge and held that the trial judge has the same wide discretion to grant a change of venue motion as he does for continuance motions.

The defendant in *State v. Swilling*[64] alleged that his second trial for murder was not fair or impartial since pre-trial publicity reported that he had been previously tried, convicted and sentenced to death; and, hence, his motion for change of venue or continuance was erroneously refused. The court rejected the argument, pointing out that there was no showing that any of the jurors had read or heard the allegedly prejudicial publicity; that there was no showing of any prejudicial implications in its content; and that the trial court, in its discretion, had accepted each juror as impartial and fair.[65]

The court noted in *State v. Wells*[66] that a conspiracy to commit abortion may be prosecuted in the county where the agreement was made, or in any county where a conspirator did any overt act in furtherance of the common design.

G. Disqualification of Jurors

The defendants had been indicted, charged, and acquitted of (1) rape; (2) assault with intent to ravish; (3) assault and battery of a high and aggravated nature; and (4) conspiracy. In *State v. Johnson*[67] the state moved for a new trial[68] on the

64. No. 18664 (S.C., June 8, 1967).

65. *But see,* Sheppard v. Maxwell, 384 U.S. 333 (1966), in which the Supreme Court of the United States noted that actual prejudice may not actually need to be proved.

66. 153 S.E.2d 904 (S.C. 1967).

67. 248 S.C. 153, 149 S.E.2d 348 (1966).

68. Actually the state had moved for a mistrial. The supreme court found this to be procedurally inaccurate because "mistrial" applies to a case in which a jury is discharged without a verdict because of some error or irregularity which would prevent a proper judgment from being rendered. Here a verdict of acquittal had been returned and the jury had been discharged before the motion for mistrial had been made. The court construed it as a motion for new trial, however.

grounds that two members of the jury had been unduly influenced. The motion was denied and the state appealed.[69] The supreme court cited *Spencer v. Kirby*[70] and stated that in order to maintain its case for a new trial based on the disqualification of a juror the state had to show:

> (1) the fact of disqualification; (2) that such disqualification was unknown before the verdict; and (3) that movant was not negligent in failing to make discovery of the disqualification before verdict, and was not guilty of a lack of due diligence in discovering any disqualification.[71]

The supreme court noted that on *voir dire* examination it was revealed that certain jurors had been communicated with concerning their services as prospective jurors, and hence by the exercise of due diligence[72] the state should have pursued the matter at that time. Failing to do so amounted to a waiver by the state of any objections to the jurors. The court reaffirmed the rule that the question of the impartiality of a juror is one addressed to the sole discretion of the trial judge.[73] On *voir dire* the trial judge asked both jurors if they would be able to render respondents and the state an impartial and fair trial free of bias despite the fact that they had been communicated with. The jurors said they could and the trial judge found the jurors competent and qualified. The supreme court found that there was no abuse of discretion or error of law in the trial judge's action.

H. Double Jeopardy

Double jeopardy was used as a defense in the appeal of *State v. Squires*.[74] There the defendants, charged with burglary, armed robbery, housebreaking and larceny, pleaded guilty to burglary, and were sentenced to a term of twenty-one years in

69. Although the state ordinarily has no right to appeal from a judgment of acquittal in a criminal case, it may do so when the issue is whether a verdict of acquittal was procured by fraud and collusion. This is so because in actuality the first trial puts the defendant in no jeopardy and so would not be a bar to a second trial for the same offense. *See* State v. Howell, 220 S.C. 178, 66 S.E.2d 701 (1951).

70. 234 S.C. 59, 106 S.E.2d 883 (1959).

71. State v. Johnson, 248 S.C. 153, 162, 149 S.E.2d 348, 352 (1966).

72. S.C. CODE ANN. § 38-203 (1962). It is provided by this section and the cases construing it that all objections to jurors must be made before they are impaneled if the party could have, using due diligence, found any objection, and when not made prior thereto such objections are deemed waived thereafter.

73. S.C. CODE ANN. § 38-202 (1962).

74. 248 S.C. 239, 149 S.E.2d 601 (1966).

the State Penitentiary. Thereafter the appellants won a new trial on the grounds that they did not have the benefit of counsel when their guilty please were entered. Upon the new trial, the defendants were tried on all four counts of the original indictment, pleaded not guilty, were found guilty on all four counts by the jury, and consequently were given a harsher sentence. From this trial the defendants appealed contending they were placed in double jeopardy because they did not request or want a new trial and that the harsher sentences could not be imposed on retrial for the same crimes as were charged in the original trial.

The court found that a new trial was all that defendants were entitled to and that they had not declined this relief. The supreme court disposed of the double jeopardy argument by pointing out that the general rule is that a defendant waives the constitutional protection against double jeopardy when he seeks to set aside a verdict or judgment either on motion in the lower court or on appeal and a new trial is granted. By the same reasoning, when the new trial is ordered and begun it is the same as if no prior trial had ever been had. Therefore, it is constitutionally permissible to retry and convict a defendant of counts, "which he was not convicted of on the first trial, including a higher degree of crime than that of his first conviction, in which latter instance the defendant would, of necessity, be subject to a harsher sentence upon the new trial."[75] But the Fourth Circuit Court of Appeals in *Patton v. North Carolina*[76] held that increasing a defendant's sentence on retrial, after a reversal of a conviction on constitutional grounds, denied him equal protection, violated the principles of double jeopardy, and had a chilling effect on the exercise of his right to a fair trial.

I. Miscellaneous

In yet another round in the case of *Moorer v. South Carolina*[77] a federal court ordered the district court to release 355 schedules detailing the circumstances of rape cases in South Carolina from 1945-1965 to the attorneys for Moorer since they constituted the work-product of counsel for the defendant, the information contained therein might prove useful in the instant or other litiga-

75. *Id.* at 249, 149 S.E.2d at 605 (1966).

76. No. 11,005 (4th Cir. June 14, 1967).

77. 368 F.2d 458 (4th Cir. 1966). *See* Moorer v. State, 347 F.2d 502 (4th Cir. 1965); 245 S.C. 633, 142 S.E.2d 46 (1965); 244 S.C. 102, 135 S.E.2d 713 (1964).

tion on the issue of the effect of race on capital sentencing, and since there appeared to be no reason to withhold them.

A sentence of three months in the county jail was held not to be cruel and unusual punishment for a conviction of criminal contempt for jury tampering in *State v. Johnson*.[78]

Allen v. MacDougall[79] reaffirmed this state's position that a denial of a preliminary hearing to an accused who had been indicted by a grand jury, did not amount to a denial of due process, at least where the defendant was adequately represented by counsel who did not request it.[80]

The court in *State v. Morris*,[81] noting a division of legal authority on the question, followed the majority view and held that where a fine imposed on a criminal accused is voluntarily paid, the right to appeal or review by writ of certiorari is waived.

II. CRIMINAL LAW

A. Conspiracy

In *State v. Wells*[82] a pregnant female went to the defendant, Wells, for an abortion. Wells had been recommended by Ellisor. After attempts by Wells and his nurses to induce a miscarriage had failed, Wells told the girl to see Ellisor about a Mr. Jones. Jones performed an operation which resulted in the girl's needing immediate medical attention. Wells and Jones lived in different counties, but the evidence showed they knew each other. From their convictions for conspiracy to commit abortion, the defendants appealed alleging that their directed verdicts based on insufficiency in the evidence should have been granted. The defendants relied on the "Wharton" or "concert of action" rule[83] which states

> Where co-operation or concert between two or more persons is essential to the commission of a substantive crime and there is no ingredient of an alleged conspiracy that is not present in the substantive crime, it is held that the persons necessarily involved cannot be charged with conspiracy to

78. 249 S.C. 1, 152 S.E.2d 669 (1967).
79. 248 S.C. 588, 151 S.E.2d 863 (1966).
80. *See* State v. White, 243 S.C. 238, 133 S.E.2d 320 (1963).
81. No. 18668 (S.C., June 13, 1967).
82. 153 S.E.2d 904 (S.C. 1967).
83. The court noted that the defense was a novel one and had never been considered or applied in South Carolina.

commit the substantive offense and also with the substantive crime itself.[84]

The court sidestepped the issue of whether the "Wharton" rule was applicable in South Carolina or whether a woman may conspire with others to procure an abortion on herself, and held flatly that under its construction of the abortion laws[85] the substantive offense of the conspiracy could be committed by one person and therefore the "Wharton" rule was inapplicable. The record showed that Ellisor and Wells' nurses actively participated in the conspiracy with Wells, and that after it was established Jones joined in and furthered the common design by actually accomplishing the object of the conspiracy. Consequently, the court found no insufficiency in the evidence.

B. Contempt

In *State v. Johnson*[86] the father and the uncle of one of three defendants in a rape prosecution were ordered by rule of the judge who presided over the trial to show cause why they should not be held in contempt for contacting and attempting to influence two members of the jury panel.[87] The defense raised was that the contact alluded to was made with the juror's wife and not the juror and that the defendant's wife and not the defendant actually discussed the case with the juror's wife. On appeal the court noted that participation in the offense was obvious since the defendant's presence at the discussion had been proved by the state. The supreme court pointed out that despite the failure of design, one is guilty of contempt when one intends to corrupt the administration of justice and commits an overt act in furtherance of this design.[88] The fact that the jurors tampered with did not sit in the trial of the case was held to be immaterial.

It was held that if, as here, a return to the charges in the rule for contempt admits the charges, it is as if a guilty plea had

84. 16 AM. JUR. 2d *Conspiracy* § 16 (1964).

85. S.C. CODE ANN. § 16-82 (1962).

86. 249 S.C. 1, 152 S.E.2d 669 (1967).

87. In this case constructive contempt was charged; that is, the alleged contemptuous conduct did not occur in the courtroom itself. Such proceedings may be properly begun by a rule to show cause based upon the petition of the solicitor coupled with an affidavit or petition stating the facts upon which the charges lie. *See* Hornsby v. Hornsby, 187 S.C. 463, 198 S.E. 29 (1938); State v. Blackwell, 10 S.C. 35 (1875).

88. State v. Weinberg, 229 S.C. 286, 92 S.E.2d 842 (1956).

been rendered, and although contempt proceedings are criminal in nature and require that the state bear the burden of proof of guilt beyond a reasonable doubt, charges admitted to be true are deemed true and need no further proof. The test of intent in such cases is subjective intent, and therefore inferences of guilt could be properly drawn from the admittedly truthful charges and affidavits. Finally, in the court's opinion the defendants had not been denied their constitutional right of confrontation of witnesses against them. Such right was held to have been waived by the defendant's failure to request such confrontation in the trial.

C. Murder

In *State v. Watts*[89] the defendant's husband was found fatally wounded in his house. The evidence indicated that the defendant shot the deceased after the two had had an altercation. The murder weapon was found in an adjoining room along with one spent cartridge. One issue raised on appeal was whether the *corpus delicti* had been proved. The elements constituting the *corpus delicti* are: (1) the death of the person whose life is alleged to have been taken feloniously and (2) proof of the criminal agency of another in taking the life of such person.[90] The defendant conceded that the first element had been proved but alleged that the second could not be proved by certain statements or a confession of the accused.

The supreme court found that the fact that a pistol, a deadly weapon, had been used to inflict the mortal wound was enough to raise a presumption of malicious use of firearms and prove the elements of the *corpus delicti.* The court, continuing its reasoning, next disposed of any objection to the use of the extra-judicial statements, further proving the *corpus delicti* and the defendant's guilt. The accused had said, "I shot Francis with his own gun" shortly after arriving police officers had discovered the decedent and the murder weapon. The court rejected an argument based on *Miranda*[91] that the statement was inadmissible, by pointing out that no arrest had been made, that this was not a custodial interrogation, and that the *Miranda* rule was not in force at the time of the trial. Furthermore, the statement was not objected to when introduced at the trial.

89. 249 S.C. 80, 152 S.E.2d 684 (1967).
90. State v. Epes, 209 S.C. 246, 39 S.E.2d 769 (1946).
91. Miranda v. Arizona, 384 U.S. 436 (1966).

D. Rape

Carnal knowledge, which is completed by even the slightest penetration, is a material element in a prosecution for rape and must be proved beyond a reasonable doubt.[92] In *State v. Thomas*[93] one of the appellant's contentions was that since there was no convincing proof of penetration, the verdict of guilty was contrary to the weight of the evidence. The court held that even without the pathologist's report, which could have been objected to, other competent evidence supported the state's argument that penetration had been achieved, namely, the detailed testimony of the prosecutrix' doctor coupled with her own testimony that the defendant had "raped" her. As to this latter point the court noted that there was no doubt that the prosecutrix knew the ordinary meaning of the word "rape."[94]

E. Robbery

In *Dukes v. State*[95] the supreme court tried to clarify any previous misconceptions with regard to the state's robbery statutes. Robbery was defined as "larceny from the person or immediate presence of another by violence or intimidation."[96] The court noted that at common law it was classified as a felony for which no special punishment was provided by statute whether it was committed on the highway or elsewhere. Hence, it fell under Section 17-552 of the Code which provides a maximum of ten years imprisonment for a felony for which no special punishment is provided.[97] Where one commits robbery while armed with a pistol or other deadly weapon,[98] however, a special punishment is provided in Section 16-333, namely, a maximum penalty of twenty-five years at hard labor.[99] According to the court, armed robbery could be properly charged where it occurred on a highway or elsewhere. Thus, armed robbery on the highway was held to be subject to Section 16-333.

CHARLES ARTHUR TAYLOR, III

92. *See* State v. Worthy, 239 S.C. 449, 123 S.E.2d 835 (1962); State v. Wyatt, 221 S.C. 407, 70 S.E.2d 635 (1952); State v. Miller, 211 S.C. 306, 45 S.E.2d 23 (1947).

93. 248 S.C. 573, 151 S.E.2d 855 (1966).

94. *See* State v. Moorer, 241 S.C. 487, 129 S.E.2d 330 (1963).

95. 248 S.C. 227, 149 S.E.2d 598 (1966).

96. *Id.* at 231, 149 S.E.2d at 599 (1966).

97. S.C. CODE ANN. § 17-552 (1962).

98. "Deadly weapon" as used in the statute is defined in S.C. CODE ANN. § 16-145 (1962).

99. S.C. CODE ANN. § 16-333 (1962).

DAMAGES

The case of *Hughey v. Ausborn*[1] presented a close damages issue to the Supreme Court of South Carolina. According to the majority opinion the question had never before been decided in South Carolina.

The wife and minor child of the respondent in this action had been injured as a result of the negligence of the appellant and each had recovered both actual and punitive damages for her personal injuries in separate actions against the appellant. The present action was brought by the respondent to recover damages for medical expenses incurred by his wife and minor child and for the loss of consortium of his wife. The lower court again awarded both actual and punitive damages.

On appeal the principal question was whether punitive damages should be allowed in a case in which the injury inflicted on the plaintiff had at once and perhaps more directly been an injury to his wife and child. The South Carolina Supreme Court, by a four-to-one decision, reversed the lower court's decision on this issue.[2]

At issue in this case is the *legal* independence of a cause of action that is *factually* dependent on the existence of another cause of action. The husband-father's injury is factually dependent on the injury to his wife and child, both with respect to recovery for medical expenses and with respect to recovery for loss of consortium. The law, however, makes pointed efforts to separate the elements of damages sustained by the parties, and separate causes of action arise.

Can it be said, however, that the husband-father's cause of action is so completely legally independent that if the negligence which proximately caused his injury was committed recklessly and willfully, he should be allowed to recover punitive damages? The South Carolina Supreme Court, following most of the scant authority on the question, answered in the negative. The court held that the husband-father's right of recovery is strictly compensatory.

A concurring opinion by Justice Brailsford provides a clue to what was perhaps the basic reason behind the decision; namely, the fear that a defendant may otherwise be "mulct

1. 154 S.E.2d 839 (S.C. 1967).
2. *Id.*

twice for the same loss."[3] A defendant will be subject only once to suit for the medical expenses of the wife, for example, or for any of the other elements of compensatory damages. He may, however, be punished unduly in the form of exemplary damages if both indirectly injured plaintiffs and directly injured plaintiffs are allowed to recover such damages.[4]

ROBERT L. WYNN, III

3. 154 S.E.2d at 843.

4. The lone dissenting opinion, by Justice Bussey, is based primarily on the premise that the question in this case has already been decided in South Carolina. The cases cited by the dissent, however, are factually distinguished by Justice Brailsford in his concurring opinion. It is Justice Brailsford's opinion, and apparently the opinion of the other justices making up the majority, that the cases raised are examples of truly *original* causes of action.