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Criminal Law and Procedure

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CRIMINAL LAW AND PROCEDURE

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I. CRIMINAL PROCEDURE

A. Right to Counsel

United States Supreme Court rulings since *Gideon v. Wainwright*[1] have created new questions about the right to counsel. This section will review these decisions with several of the recent state and federal developments.

Of particular interest to South Carolina is *White v. Maryland*[2] which held that a preliminary hearing was a critical stage when the defendant could enter a plea of guilty, although there was no requirement that he plead. South Carolina has steadily maintained that counsel need not be appointed at the preliminary hearing distinguishing *White v. Maryland* on the grounds that in this state the defendant cannot plead.[3] This view has received strong support in *United States ex rel. Cooper v. Reinke*.[4]

> The Connecticut hearing in probable cause has been accurately characterized as a mere "inquest" made to determine the existence of probable cause. . . . The finding of probable cause is not final and it cannot be used against an accused on the trial . . . .
>
> The Connecticut hearing in probable cause cannot, therefore, be characterized as critical . . . . Indeed, it can hardly be termed a proceeding against the accused, to the contrary,

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1. 372 U.S. 335 (1963). *Gideon* required that counsel be appointed to defend indigents accused of crime. For a discussion, see Rogers, *Criminal Law and Procedure,* 16 S.C.L. REV. 67 (1963). A companion case, Douglas v. California, 372 U.S. 353, (1963), extended the right of counsel to the first appeal.

> We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory release beyond that state in the appellate process in which the claims have once been presented by a lawyer and passed upon by an appellate process in which the claims have once been presented by a lawyer and passed upon by an appellate court. We are dealing only with the first appeal, granted as a matter of right to rich and poor alike from a criminal conviction.

372 U.S. at 356.

2. 373 U.S. 59 (1963).

3. Moorer v. State, 244 S.C. 102, 138 S.E.2d 713 (1964); State v. White, 243 S.C. 238, 133 S.E.2d 320 (1963). The South Carolina position is criticized in Myers, *Criminal Law and Procedure,* 17 S.C.L. REV. 35, 36-37 (1965).

4. 333 F.2d 608 (2d Cir. 1964).

it appears to operate entirely for the accused's benefit. And the mere fact that an accused is required to plead does not in itself demand a contrary conclusion where the plea entered is a self-serving denial of guilt. At trial, appellant had every opportunity to present any defense that was available initially.[5]

One of the leading cases in South Carolina, *State v. White*,[6] has received federal approval. The federal district court noted:

> Petitioner could not have made any plea or asserted any defense at a preliminary hearing. He could have made no statement that could have been used for him or against him. There is no way in which petitioner could have been prejudiced in the conduct of his defense by failure to demand such hearing. In fact, preliminary hearings in South Carolina are for the benefit of the accused only, and is not part of any proceeding against him.[7]

Still, conflict exists. A district court recently ruled that California must afford counsel at a preliminary hearing although no plea could be entered.[8] The preliminary hearing was considered to be an initial adversary proceeding in which the accused may discover important elements of the prosecutor's case and may gain other strategic advantages.

It would be naive to assume that the United States Supreme Court has had its last say on this issue. The South Carolina view, while receiving considerable lower court support, is at best unreliable. Caution requires that the accused be informed of his right to counsel and counsel be appointed for indigents by the magistrate before the decision about the preliminary hearing is made. Perhaps the most effective argument in favor of counsel, and one which has received no comment, is based upon the equal protection clause. So long as the state permits a preliminary hearing for all persons accused of crime, indigent defendants, as well as the rich, should be afforded counsel at that stage.[9]

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5. 333 F.2d 608, 611-12 (2d Cir. 1964). This case expresses the majority view in federal courts. See DeToro v. Peppersack, 332 F.2d 341 (4th Cir. 1964); Latham v. Crouse, 320 F.2d 120 (10th Cir. 1964).

6. 243 S.C. 238, 133 S.E.2d 320 (1963).

7. Williams v. South Carolina, 237 F. Supp. 360 (E.D.S.C. 1965).

8. Harris v. Wilson, 239 F. Supp. 204 (N.D. Cal. 1965).

9. This is the basis for decision in *Douglas, supra* note 1.

Escobedo v. Illinois[10] has seriously questioned the practice of extensively questioning suspects and obtaining confessions without the presence of counsel. In *Escobedo* the defendant had been arrested and questioned for an extended period the night his brother-in-law was shot. Late the next afternoon his lawyer obtained his release. During this period of custody he made no incriminatory statements, apparently insisting he knew nothing of the crime. Over a week later, he was again taken into custody and questioned. His lawyer arrived at the police station and both he and the defendant requested that they be permitted to discuss the matter, but the request was denied. The defendant subsequently admitted participation in the crime. The United States Supreme Court concluded that the confession should have been ruled inadmissible.

Several passages from this important case suggest a number of unanswered issues.

> It is argued that if the right to counsel is afforded prior to indictment, the number of confessions obtained by the police will diminish significantly, because most confessions are obtained during the period between arrest and indictment, and 'any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.' This argument, of course, cuts two ways. The fact that many confessions are obtained during this period points up its critical nature as a 'stage when legal aid and advice' are surely needed. . . . The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice. Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination.[11]

> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into policy custody, the police carry out a process of interrogations that lends itself to eliciting incriminating

10. 378 U.S. 478 (1964).
11. *Id.* at 485.

> statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' . . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial. . . .[12]
>
> We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.[13]

Many questions are raised. Must the suspect be informed of his right to counsel and, upon request, must counsel be afforded, before intensive questioning? The defendant had consulted with an attorney before his second arrest. Does this mean he has a right to consult with his attorney again once "the process shifted from investigatory to accusatory?" Must the suspect request counsel before his right to counsel attaches?

Most jurisdictions have sharply limited *Escobedo*. Several cases suggest that the suspect's counsel must be trying to obtain entrance into the interrogation room.[14] The most common requirement is that the suspect must specifically request counsel.[15] This latter view was embraced in *Williams v. South Carolina*[16] by the federal district court.

On the other hand, ample authority exists for a broad interpretation of *Escobedo*. *People v. Dorado*[17] has considered the

12. *Id.* at 490-91.

13. *Id.* at 492.

14. See State v. Fox, 131 N.W.2d 684 (Iowa 1964); State v. Howard, 383 S.W.2d 701 (Mo. 1964).

15. See, *e.g.*, Duncan v. State, 176 So. 2d 840 (Ala. 1965); Montgomery v. State, 176 So. 2d 331 (Fla. 1965); Commonwealth v. Tracy, 207 N.E.2d 16 (Mass. 1965); Bran v. State, 398 P.2d 251 (Nev. 1965); Commonwealth *ex rel.* Linde v. Maroney, 416 Pa. 331, 206 A.2d 288 (1965); Browne v. State, 24 Wis. 2d 491, 131 N.W.2d 169 (1964), *cert. denied* 379 U.S. 1004 (1965). In Hawaii, *Escobedo* was held not to require an immediate hearing before a magistrate. See State v. Kitashiro, 397 P.2d 558 (Hawaii 1964).

16. *Supra* note 6.

17. 42 Cal. Rptr. 169, 398 P.2d 361 (1965). *cert. denied*, 381 U.S. 937 (1965). Other cases which have interpreted *Escobedo* broadly include United States *ex rel.* Russo v. New Jersey, 351 F.2d 429 (3d Cir. 1965); State v. Hall, 397 P.2d 261 (Idaho 1964); State v. Neely, 395 P.2d 557 (Ore. 1964); State v. Dufour, 206 A.2d 82 (R.I. 1965). Also see Campbell v. State, 384 S.W.2d 4 (Tenn. 1964).

failure to advise the suspect of his absolute right to remain silent or the right to consult with counsel in violation of *Escobedo*. The United States Supreme Court's lack of interest in clarifying guides is evidenced by the denial of petitions for certiorari in two cases at the opposite ends of the spectrum.[18] Until the dust settles, law enforcement officers should be trained to advise suspects of their rights to consult with counsel and to remain silent at the earliest opportunity.

In *Ex parte Glidden*[19] the defendant did not have counsel when he appeared before the federal commissioner. The district court found that representation by counsel was not necessary. The defendant must show that he requested counsel without being informed of his right, or that he was prejudiced. Apparently the court completely overlooked that provision of the federal law[20] which gives the defendant an unqualified right to counsel. The court also failed to explain Rule 5(b) of the Federal Rules of Criminal Procedure[21] which requires the commissioner to inform the defendant "of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel."

The most perplexing problem of *Gideon* in South Carolina is the state's failure to provide compensation for appointed counsel. As an authority recently stated:

> South Carolina is one of the few states where appointed counsel are not compensated in either capital or non capital cases. Thus, the lawyers who happen to be appointed are in effect required to subsidize the administration of justice by contributing their services and, in some instances, to lay out cash for expenses of investigating and preparing the case, conducting a trial or taking an appeal.[22]

Only three states—Louisiana, Missouri and Kentucky—follow this system and these have or are studying public defender systems for urban areas.[23]

18. *Compare* People v. Dorado, 42 Cal. Rptr. 169, 398 P.2d 361 (1965), *with* People v. Hartgraves, 31 Ill. 2d 375, 202 N.E.2d 33 (1964), *cert. denied*, 380 U.S. 961 (1965).

19. 240 F. Supp. 694 (E.D.S.C. 1965).

20. 18 U.S.C.A. § 3006A (b) (Supp. 1965).

21. FED. R. CRIM. P. 5(b).

22. Silverstein, *The Continuing Impact of Gideon v. Wainwright on the States*, 51 A.B.A.J. 1023, 1025 (1965).

23. *Ibid.* There is pending a bill for an assigned counsel program in South Carolina. See Comment, 17 S.C.L. REV. 741 (1965).

The failure to provide compensation cuts deeper than the fact that the legal profession finances what should be recognized as a public responsibility—counsel representation for the poor. The overall quality of representation must suffer when a burden of this magnitude is placed upon the bar. Indeed, Senator Ervin of North Carolina has asserted that the failure to provide compensation for assigned counsel is in violation of the right to counsel.[24] The South Carolina bar and legislature seemingly remain indifferent about the problem of compensation. Apathy is hardly a commendable quality for the state which ranks last in assuring effective assistance of counsel.

Tillman v. State[25] revealed an astonishing factual situation which involved questionable acts by the defense counsel. After the defendant was arrested for murder, his wife approached the counsel requesting representation. The defense counsel would not agree to represent the defendant unless the defendant were willing to enter a guilty plea. The defendant contended that this "condition" to representation constituted a violation of due process and tainted the voluntariness of the subsequent guilty plea. The court rejected these arguments on the grounds that the representation, although conditional, was voluntarily accepted by the defendant. Such a conclusion must be based upon the erroneous assumption that the defendant was able to make a rational, bargained decision when pitted against his own prospective defense counsel.

More surprising is the court's implied condonation of the counsel's conduct. While a lawyer is free to decline any case, once he accepts employment, he owes to his client the unqualified obligation to present by all fair and honorable means every defense that the law permits, to the end that nothing be taken from the accused save by the rules of law, legally applied. This duty of fidelity is recognized in the Canons of Professional Ethics adopted as part of the South Carolina Supreme Court Rules.

> It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer

24. Ervin, *Uncompensated Counsel: They do Not Meet the Constitutional Mandate*, A.B.A.J. 435 (1963).
25. 244 S.C. 259, 136 S.E.2d 200 (1964).

> is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no persons may be deprived of life or liberty, but by due process of law.[26]

Conditional representation subverts the lawyer's obligation. Upon accepting employment he has already bargained away his more important responsibilities.

> Our legal system does not constitute the lawyer the judge as to the justice or soundness of the causes committed to him, but deems it in the ends of justice to have all the facts and arguments on each side of the controversy presented by expert counsel, stimulated to a maximum of industry and ingenuity by the contest, for decision by the court and jury. Experience has shown that in many cases a lawyer's first impression of a case has turned out on further investigation to be erroneous.[27]

In *Pitt v. MacDougall*[28] the court concluded that the defendant did not waive his right to the assistance of counsel where the trial judge failed to advise him of his right. Intelligent waiver requires knowledge and may not be presumed from a silent record.

B. Search and Seizure

In *State v. Hill*[29] the sufficiency of an affidavit for a search warrant was attacked on two grounds: (1) an informer was not identified, and (2) insufficient facts appeared to establish the reliability of the undisclosed source.[30] The defendant's contention that the informer's identify must be disclosed was rejected because of the potential deleterious effect upon law enforcement.[31]

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26. S.C. SUP. CT. R. 33(5).

27. Drinker, LEGAL ETHICS 142-43 (1953).

28. 245 S.C. 98, 138 S.E.2d 840 (1964).

29. 245 S.C. 76, 138 S.E.2d 829 (1964).

30. The affidavit stated the following:

> Personally comes J. L. Tabor who being sworn, says that he is informed by Informer and has good reasons to believe The occupants of 303 Haynie Street has concealed on his or her premises, or in his, her dwelling or in a motor vehicle used by him or her at (sic) Has (sic) a quantity of illegal whiskey.

Id. at 78, 138 S.E.2d at 830.

31. This view accords with the federal law. See Jones v. United States, 262 U.S. 257 (1960).

An affidavit can comply with the sufficiency requirement without identifying the informer. Sufficient facts may be alleged so that the magistrate may weigh the information and its source More important than the name of the informer is, "how well the informer is known to the affiant; whether affiant has had previous dealings with the informer; whether past experience has shown the informer to be reliable; the circumstances under which the information was disclosed, and precisely what the information was."[32] Here the affidavit was factually barren. "The affidavit, therefore, did not disclose anything which the issuing officer could consider in arriving at a determination of whether there was probable cause for the issuance of the warrant, which, in effect, left the determination of probable cause to the judgment and discretion of the police officer, rather than to the issuing officer."[33] *Mapp v. Ohio*[34] required the evidence to be excluded.

This case is extremely important in clarifying affidavit requirements in South Carolina. In *Aguilar v. Texas*[35] the federal standard for affidavit sufficiency was imposed upon the states. *Hill*[36] suggests that the South Carolina Supreme Court has adopted a conforming test.

C. Injunctions

In *Petition of Freeze*[37] an injunction was sought in the federal district court to restrain the prosecuting authorities from pursuing a fraudulent check charge against the accused. The charge had been pending since the spring of 1961. The accused alleged he had been available for trial and the delay constituted a denial of his constitutional right to a speedy trial. The injunction was refused because the accused failed to exhaust all state remedies.

32. 245 S.C. 76, 81, 138 S.E.2d 829, 831 (1964).

33. *Ibid.*

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

35. 378 U.S. 108 (1964). The affidavit in *Aguilar* was strikingly similar to the affidavit in *Hill*. Mr. Justice Goldberg commented as follows:

> Here the "mere conclusions" that petitioner possessed narcotics was not even that of the affiant himself: it was that of an unidentified informant. The affidavit here not only 'contains no affirmative allegation that the affiant spoke with personal knowledge. For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on . . . to show probable cause.' He necessarily accepted "without question" the informant's "suspicion', 'belief' or 'mere conclusion.'

36. State v. Hill, *supra* note 28.

37. 234 F. Supp. 427 (E.D.S.C. 1964).

The issue of whether the accused was constitutionally denied a speedy trial was never discussed. The sole basis for the decision was whether the federal court is the proper forum. Another serious question not discussed is whether injunctive relief is appropriate. Equity will not ordinarily interfere to prevent the enforcement of the criminal law.[38] It seems equally poor policy to permit solicitors to hold stale criminal charges indefinitely. This is an area that is in great need of clarifying legislation.

D. Preliminary Hearing

In *Blandshaw v. State*[39] the defendant alleged that he had requested a preliminary hearing in writing pursuant to the state statute but it was denied. The lower court ordered the petition for writ of habeas corpus dismissed without a hearing. The order was reversed. If the defendant properly requests a preliminary hearing, the court of general sessions cannot acquire jurisdiction until after the hearing. If the defendant can establish his allegations, then the court in which he was convicted never had jurisdiction.

E. Jurisdiction

The jurisdiction of the county court to try offenses was challenged in two cases. In *State v. Douglas*,[41] the defendant objected to the transfer of a charge of driving a motor vehicle while under the influence of intoxicants from the court of general sessions to the county court. The county court clearly had concurrent jurisdiction to try the offense, but there was no authority for the transfer. Since the court had clear jurisdiction over such offenses, the court considered the jurisdictional objection waived by the defendant when he failed to object and went to trial. The defect was a lack of jurisdiction over the person which must be raised at the earliest opportunity.

In *Mosolygo v. State*[42] the county court tried the defendant for housebreaking and grand larceny. The defendant objected because the county court had a six man jury rather than a twelve man jury. The writ of habeas corpus in the federal court was

38. See Buffalo Gravel Corp. v. Moore, 194 N. Y. Supp. 225, *aff'd*, 234 N.Y. 542, 138 N.E. 439 (1922).
39. 245 S.C. 385, 140 S.E.2d 784 (1965).
40. S.C. CODE ANN. § 43-232 (1962).
41. 245 S.C. 83, 138 S.E.2d 845 (1964).
42. 240 F. Supp. 998 (E.D.S.C. 1965).

denied on the grounds that no federal constitution issue was raised.[43] It would seem the defendant was claiming he was denied due process because of the jury being limited to six persons. Thus a more accurate ground for denial of the petition was stated by the late Mr. Chief Justice Taylor of the South Carolina Supreme Court—that due process does not preclude a state from reducing the number of persons necessary to constitute a jury.[44]

F. Judge and Solicitor

In *State v. Swilling*[45] the defendant's conviction for murder was reversed because prejudicial evidence of character or reputation was introduced into the trial. Although the defendant never placed his reputation in issue, the solicitor on several occasions during cross-examination asked pointed questions about his drinking and tendencies toward violence. In addition, the trial judge instructed the jury that it could take into consideration the bad reputation of the defendant. Although the judge recalled the jury and instructed them to disregard that portion of the charge, the prejudicial impact of the inadvertent instruction, taken with the impropriety of the prosecutor, was too great to overcome.

G. Sufficiency of the Evidence

The two cases which turned on the sufficiency of evidence reflect the difficulty of prediction when this frequently used ground of appeal is involved. In *State v. Atkins*[46] a conviction for receiving stolen goods was affirmed. The circumstantial evidence of the defendant's knowledge that the goods were stolen was sufficient to submit the case to the jury. Here, the evidence was that the "liquor was acquired, late at night, from a stranger . . . in violation of liquor law, at a mere fraction of its selling price, at an unorthodox place, with no inquiry as to its source."[47] The defendant would have to show "a total failure of competent

43. *Id.* at 1003.

44. *Ibid.* Compare Maxwell v. Dow, 176 U.S. 581 (1900), upholding a Utah conviction by a jury of eight. The recent incorporation of various rights into due process suggests this issue may be reconsidered by the United States Supreme Court.

45. 246 S.C. 144, 142 S.E.2d 864 (1965).

46. 244 S.C. 213, 136 S.E.2d 298 (1964).

47. *Ibid.*

evidence . . ." or the non-existence of evidence before reversal can be obtained.[48] With such a burden on the defendant, reversal in any case would be unlikely.

Yet in *State v. Gilliam*[49] a conviction for housebreaking was reversed without alluding to the *Atkins* "strong" language. Evidence indicated that "a small pane of glass had been broken from one of the windows and the window latch was in an unlocked position. He 'discovered' that a roll of five hundred five cent stamps was 'missing' . . . . A print on a fragment of the glass pane . . . was identified as having been made by one of the defendant's fingers."[50] The court did not consider this evidence sufficient to establish "substantial evidence of guilt."

These cases suggest that the court has ample "precedent" for whatever it decides to do when this issue is being considered. In a close case, *Atkins* may require affirmance or *Gilliam* may demand reversal, depending upon which course the court considers to be in accordance with justice.

H. Sentence

In *State v. Petty*[51] the defendants were convicted of a conspiracy to violate a gambling statute. The South Carolina statute[52] provides "any person found guilty of the crime of conspiracy shall be sentenced to pay a fine of not more than five thousand dollars or to be imprisoned for not more than five years. . . ." Although the statute requires fine or imprisonment, in the alternative, the lower court imposed both confinement and a fine on each defendant. The sentence was reversed. While the lower court had the discretion to fix either fine or confinement or to give the defendant his choice, a sentence to both exceeded the limits of the statute.

I. Probation and Parole

In *Sanders v. MacDougall*[53] the defendant was sentenced to a term of five years, provided that upon the service of three years the balance of the sentence was to be suspended. After serving

48. *Id.* at 216, 136 S.E.2d at 300. See also State v. Smith, 245 S.C. 59, 138 S.E.2d 705 (1964).
49. 245 S.C. 311, 140 S.E.2d 480 (1965).
50. *Id.* at 314, 140 S.E.2d at 481.
51. 245 S.C. 40, 138 S.E.2d 643 (1964).
52. S.C. CODE ANN. § 16-550 (1962).
53. 244 S.C. 160, 135 S.E.2d 836 (1964).

almost two years he was paroled until the expiration of the five years. After three years, but before the expiration of the five year term, the parole board purported to revoke the petitioner's parole. The parole board's action was held void since it had no jurisdiction after the expiration of the three year period the defendant was required to serve. The defendant is considered to be on probation during the time his sentence is suspended. The courts have exclusive jurisdiction to revoke probation. While released on parole a prisoner continues to serve his sentence.

J. Miscellaneous

Moorer v. MacDougall[54] has entered another phase of adjudication. Several new grounds have been asserted, two of which may attract attention. First, the defendant claims that the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life constitutes cruel and unusual punishment. The court rejected this argument without meritorious comment. In *Rudolph v. Alabama*[55] Justices Goldberg, Black and Douglas dissented from a denial of certiorari on this issue. The constitutional objection to the death penalty under such circumstances may well be considered in the near future.

Second, the defendant contends that the death penalty as applied to him was a denial of equal protection and due process because in South Carolina the penalty has been reserved almost exclusively for Negroes convicted of raping white women. The court disposed of this issue on the grounds that statistical evidence that more Negroes than whites were sentenced to death for rape does not show discrimination.[56]

54. 245 S.C. 633, 142 S.E.2d 46 (1965). The selection of the jury was upheld in Moorer v. State, 244 S.C. 102, 135 S.E.2d 713 (1964), surveyed in Myers, *Criminal Law and Procedure*, 17 S.C.L. REV. 35, 39 (1965). The case is far from final since the federal courts have agreed to review. See Moorer v. South Carolina, 347 F.2d 502 (4th Cir. 1965).

55. 275 Ala. 115, 152 So. 2d 662, *cert. denied*, 375 U.S. 889 (1963).

56. An examination of statistics is interesting. The following are taken from Sellin, *The Death Penalty* in the MODEL PENAL CODE, (Tent. Draft No. 9, 1959):

Executions in the United States, 1930-1957, For Offenses Other Than Murder

	White	*Negro*
Total	75	397
Rape	41	370
Rape in the South	38	363
Rape in South Carolina	4	35

In *Grant v. MacDougall*[57] the defendant attempted to condition his request for a writ of habeas corpus upon the court being willing to order his absolute release. The court agreed that the lower court need not release the defendant, but rather could make such disposition as the circumstances required. Any defenses the defendant may have to a second trial must be raised in that forum.

In *State v. Swilling*,[58] the defendant's unlawful arrest was not considered a grounds for discharge. A proper arrest warrant was subsequently issued and seemingly the state did not obtain evidence during the period of illegal detention.

In *State v. Smith*[59] the defense counsel's failure to object to the charges given the jury and his failure to reserve other objections to the evidence waived any defects.

II. CRIMINAL LAW

A. Assault and Battery

State v. Moore[60] and *State v. Hollman*[61] raised the issue of whether the trial judge should charge the law of simple assault and battery to the jury. In both cases, the defendants were convicted of assault and battery of a high and aggravated nature.

> Assault and battery of a high and aggravated nature is an unlawful act of violent injury to the person of another, accompanied by circumstances of aggravation, such as the use of a deadly weapon, the infliction of serious bodily injury, the intent to commit a felony, the great disparity between the ages and physical conditions of the parties, a difference in the sexes, indecent liberties or familiarities with a female, the purposeful infliction of shame and disgrace, resistance of lawful authority, and others.[62]

Simple assault and battery is an unlawful act of violent injury without aggravation. There must be evidence the lesser offense is committed before the trial court should charge the jury.

57. 244 S.C. 387, 137 S.E.2d 270 (1964).
58. 246 S.C. 144, 142 S.E.2d 864 (1965).
59. 245 S.C. 59, 138 S.E.2d 705 (1964).
60. 245 S.C. 416, 140 S.E.2d 779 (1965).
61. 245 S.C. 362, 140 S.E.2d 597 (1965).
62. *Id.* at 364, 140 S.E.2d at 598.

In *Hollman* the state's evidence established that the thirty-three year old defendant attacked a seventeen year old girl with a knife. The defendant's evidence completely denied the charge. The court correctly upheld the trial judge's refusal to charge the lesser offense. Only two alternatives were available—acquittal or assault and battery of a high and aggravated nature.

In *Moore* the state's evidence indicated the defendant's car rammed the victim's car and the defendant then struck the victim with a metal object inflicting serious injury. The defendant's evidence raised doubts about whether the car or a metal object was used and about the seriousness of the injury. Although the defendant used the alibi defense, he attempted to rebut the circumstances of aggravation. The court concluded that the trial court erred in not submitting the lesser charge upon request.

B. Offenses Against Property

In *State v. Amerson*[63] the jury considered whether the defendant was guilty of grand larceny and housebreaking. He was convicted for housebreaking but acquitted of grand larceny. On appeal the defendant claimed that the verdicts were inconsistent. The claim was rejected because it "is not essential to the commission of the crime of housebreaking that one commit grand larceny. It is sufficient that the one breaking and entering did so with the intent to commit any crime."[64] The jury could have concluded the defendant was guilty of petit larceny.

In *State v. White*[65] the defendant was convicted of breach of trust with fraudulent intent on an indictment which related that the victim left a tractor and dump trailer with the defendant and that he appropriated the equipment to his own use. The equipment was left with the defendant so that he could sell it. The equipment was sold as authorized but the victim never received his share of the proceeds. The conviction was reversed because the indictment was at variance with the evidence. At most, the defendant was guilty of a fraudulent conversion of the proceeds of the sale, not the equipment. Consequently, he was entitled to have the indictment accurately state the accusation against him.

63. 244 S.C. 374, 137 S.E.2d 284 (1964).
64. *Id.* at 379, 137 S.E.2d at 286. S.C. CODE ANN. § 16-332 (1962) provides that the intent required is to commit "a felony or other crime of a lesser grade."
65. 244 S.C. 349, 137 S.E.2d 97 (1964).