South Carolina Law Review

Volume 22 | Issue 4 Article 3

1970

Criminal Procedures

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CRIMINAL PROCEDURE

I. Search and Seizure

A question of novel impression was presented to the South Carolina Supreme Court in *State v. Curley*.[1] Does the search of an automobile with the consent of the person to whom its custody and control have been surrendered by the owner violate the owner's fourth amendment right to be free from unreasonable searches and seizures?

Curley lent his automobile to a woman, who, while driving the car, was stopped by a deputy sheriff for a traffic violation. The deputy asked for permission to search the trunk of the car, and the driver consented. While searching the trunk, the deputy discovered a pair of tennis shoes with distinctive characteristics which appeared to match footprints (of which plaster casts had been made) found at the scene of a break-in that was under investigation. On the basis of this lead the defendant Curley was arrested and charged with the break-in and robbery. An F.B.I. examination later proved that the tennis shoes matched the footprints at the scene of the crime, and the defendant Curley was convicted.

The South Carolina Supreme Court, relying on *Frazier v. Cupp*,[2] held that the driver's consent was binding as to Curley and that he had no right to assert that there had been an unreasonable search. In the words of the *Frazier* case, Curley assumed the risk that the driver would allow the police to search the car; and, the driver having given such consent, the owner cannot later complain.

In *United States v. Melvin*[3] the court of appeals reversed the conviction of the defendant for knowingly taking and receiving obscene materials from a common carrier which had traveled interstate. The conviction had been based solely on evidence which had been seized pursuant to a search warrant which had itself been issued only through a showing of probable cause by affidavit. Thus, the search warrant had to stand or fail on the basis of the affidavit and on that alone.[4]

1. 253 S.C. 513, 171 S.E.2d 699 (1970).
2. 394 U.S. 731 (1969).
3. 419 F.2d 136 (4th Cir. 1969).
4. United States v. Roth, 391 F.2d 507, 509 (7th Cir. 1967).

The affidavit was held insufficient in that it was based on tips from informers of unknown reliability and there were not sufficient details indicating any criminal activity.[5] The court in accord with *Aguilar v. Texas*[6] and *Spinelli v. United States*[7] held that the affidavit must give the magistrate concrete reasons to support the alleged reliability of the informer and must describe the defendant's criminal activities in sufficient detail so that the magistrate will be relying on something more substantial than an underworld rumor.

In *Vale v. Louisiana*[8] the defendant was lawfully arrested on the front steps of his home for a narcotics violation. The arresting officers then conducted a warrantless search of his entire house, in which a quantity of narcotics was found. The Supreme Court held the search invalid because it was not confined to the area in the immediate vicinity of the arrest and because there were no other extenuating circumstances that could justify the extended search.[9] The Court reasserted the *Chimel*[10] doctrine: warrantless searches pursuant to a lawful arrest must be confined to the area in which the accused might gain possession of a weapon or destroy evidence, unless there are exceptional circumstances which make an extensive search necessary. The Court noted that the state has the burden of proving such exceptional circumstances and that the state had not done so in the case at bar.

In *Chambers v. Maroney*[11] the defendant was arrested in his automobile by police who did not have an arrest warrant, but who did have ample probable cause for the arrest. The car was driven to the police station where it was thoroughly searched without a warrant and where highly incriminating evidence was discovered. The Court held this search to be lawful, because the police had probable cause to search at the time the car was stopped and this probable cause applied also at the police station. The members of the Court based their decision primarily

5. The only alleging of any criminal activity was that an employee at the bus station had seen a film entitled "Hungry" in the defendant's suitcase; the court correctly noted that the title could indicate a film about any number of subjects.
6. 378 U.S. 108 (1964).
7. 393 U.S. 410 (1969).
8. 90 S. Ct. 1969 (1970).
9. The officers by their own admission had determined that there was no one else in the house, so there was no possibility that any evidence in the house would be destroyed.
10. Chimel v. California, 395 U.S. 752 (1969).
11. 90 S. Ct. 1975 (1970).

on the fact that the increased mobility offered persons by cars had created the legitimate need to search cars without first obtaining a warrant. The Court further stated that, where there is probable cause to search, an auto may be detained until a search warrant can be obtained, or an immediate search without a warrant may be conducted; and either course will be permissible under the fourth amendment.

In *United States v. Van Leeuwen*,[12] the defendant contended that the evidence upon which his conviction was based was obtained by an unreasonable search and seizure. The defendant, driving a car with Canadian license plates, stopped at a United States Post Office near the Canadian border to mail two packages. The defendant insured both packages for $10,000.00 and declared that they contained coins. The postal clerk became suspicious and alerted a policeman who happened to be in the post office.

After noting the size and the weight of the packages, their false return addresses, and the license plates of the defendant's car, the policeman notified customs. Since one addressee was under investigation for trafficking in illegal coins, the two packages were held for 29 hours[13] until a search warrant could be obtained.

The Court upheld the detention of the first class mail[14] and the subsequent search as reasonable, since, first, the private nature of this mail was not disturbed until a search warrant had been obtained and, second, the suspicious circumstances warranted detention until a search warrant could be obtained. The Court, taking all the facts into consideration, held that the detention and the searches were reasonable within the meaning and context of the fourth amendment.

II. LINEUP

In *State v. Harvey*[15] the defendant contended that his pretrial lineup identification by the prosecuting witness, conducted in the absence of counsel, deprived him of his rights under the sixth amendment of the United States Constitution. The South Carolina Supreme Court, in denying relief, noted that the lineup

12. 90 S. Ct. 1029 (1970).
13. The delay was this long because the packages were mailed late in the day and the customs office in Tennessee, where one addressee lived, could not be reached until the next day.
14. First class mail is not subject to discretionary postal inspection. 39 CFR § 131.2 (1970).
15. 253 S.C. 328, 170 S.E.2d 657 (1969).

in question took place before the decisions in *United States v. Wade*[16] and *Gilbert v. California*,[17] which afforded an accused the right to counsel at pretrial lineups, and that, according to *Stovall v. Denno*,[18] these decisions are not to be applied retroactively. Thus, the court held that there was no deprivation of any constitutional rights, since the evidence showed that the lineup was not unnecessarily suggestive or conducive to mistaken identification.[19]

III. CONFESSIONS

In *State v. Curley*[20] one co-defendant, Pearson, confessed to the crime of safecracking and implicated the other co-defendants as well. Curley moved for a severance on the grounds that Pearson's confession would be admitted into evidence and would be prejudicial to him. The motion for severance was denied, and the defendant asserted that the judge's refusal to grant the motion was error. The supreme court, in denying relief, said that it would have been reversible error if the confession of Pearson implicating his co-defendants had been admitted over proper objection[21]; however, this was not done, and the simple fact that there was such a confession did not entitle Curley to a severance of trials.

The state then proceeded to introduce against Pearson his confession made during interrogation while in the custody of the police. While a number of witnesses were available to testify on the issue of waiver, only one police officer stated that the *Miranda* warnings had been given and that Pearson had made the statements freely and voluntarily. The supreme court reversed and remanded the case to the trial court to conduct a hearing, as required by *Jackson v. Denno*,[22] to determine whether the confession was voluntary and whether the procedural safeguards required by *Miranda* were satisfied. The court accurately stated the applicable law in the following:

> The allowance of this evidence violated his privilege against self-incrimination unless the defendant, re-

16. 388 U.S. 218 (1967).
17. 388 U.S. 263 (1967).
18. 388 U.S. 293 (1967).
19. If the lineup had taken place after *Wade*, the defendant would have been entitled to have a hearing on whether any in-court identification was tainted by the lawyerless lineup.
20. 253 S.C. 513, 171 S.E.2d 699 (1970).
21. *Id.* at 519, 171 S.E.2d 702, *citing* Bruton v. United States, 391 U.S. 123 (1968).
22. 378 U.S. 368 (1964).

> ceiving the benefit of 'procedural safeguards' required by *Miranda v. Arizona* . . . voluntarily and intelligently waived the privilege. The burden was upon the State to establish such waiver in an independent hearing before a tribunal other than the trial jury, appropriately the trial judge. The record before us fails to establish that this burden has been met.[23]

In *State v. White*[24] the supreme court noted with approval that the trial court had sustained an objection to the introduction of a written statement. The police officer testified that the defendant had been advised of his rights and had waived them. The defendant testified that he had not been given the *Miranda* warnings and had not read the written statement before signing it. The statement was labelled "voluntary statement" and included in fine print an acknowledgement that the *Miranda* warnings had been given. Because the evidence was contradictory, the trial judge ruled that the written statement's being labelled, "voluntary statement," required its exclusion, since the issue was whether or not the statement was voluntary.

IV. RIGHT TO COUNSEL

A. *Right to Effective Counsel*

The sixth amendment to the Constitution of the United States and article I, § 18 of the South Carolina Constitution guarantee the accused the right to counsel in criminal proceedings. In recent years an increasing number of defendants have contended that, although they have been appointed counsel, the counsel's representation was so ineffective as to deprive them of the right to counsel. The claims are almost always rejected,[25] and the general rule is that the claim will be granted only in those cases where the counsel was so ineffective as to render the trial a farce, a mockery, or a mere sham of justice.[26]

In *State v. Harvey*[27] the defendants claimed that their trial counsel did not have time to prepare adequately for trial. They were appointed only four days before trial (two of which were Saturday and Sunday) and by their own admission were not

23. State v. Curley, 253 S.C. 513, 521, 171 S.E.2d 699, 703 (1970).
24. 253 S.C. 475, 171 S.E.2d 712 (1969).
25. For a case where the representation was so inadequate that the court held the right to counsel had effectively been denied, *see* Powell v. Alabama, 287 U.S. 45 (1932).
26. Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1965).
27. 253 S.C. 328, 170 S.E.2d 657 (1969).

familiar with criminal trials.[28] The defendants contended that these factors operated to deny them their right to effective counsel. The attorneys moved for a continuance on these grounds which the trial judge denied. The supreme court, in affirming the trial court's denial of a continuance, stated that such matters were properly left to the discretion of the trial judge and that he would be overruled only for an abuse of that discretion.[29]

In *Patterson v. State*[30] the defendant raised the issue of denial of his right to competent and effective counsel. The defendant's family contacted counsel to represent the defendant, but at the trial the attorney asked to be relieved because his fee had not been paid. The judge granted his request but then designated the attorney as court-appointed counsel. Then, as a "tactical" maneuver the attorney stated that he did not feel that he could adequately represent the defendant and asked for a continuance which was granted.

On appeal the defendant contended that friction between his attorney and himself combined with his own sense of hopelessness resulted in an emotional state which prevented him from communicating with his attorney. Thus, the defendant claimed that he was denied his right to effective counsel. The court found no merit in this argument, because, even if true, the defendant could attribute his emotions only to his own acts[31]; therefore, this asserted defense could form no grounds for relief.

The court further held that the defendant was not denied his right to adequate counsel, for the record affirmatively showed that counsel had done an adequate job and that he was competent in all respects. The defendant simply did not carry his burden of proof[32] in asserting that his counsel was inadequate; thus, relief was denied.

The defendant in *State v. Gilchrist*[33] was convicted of manslaughter. On appeal the defendant claimed that he had been denied adequate representation by counsel where he had been

28. Brief for Appellant at 19, State v. Harvey, 253 S.C. 328, 170 S.E.2d 657 (1969).

29. In the opinion of this writer the appellants in their brief mention a point well worth emphasizing in cases of this nature: it is *not* the state, but the accused who is entitled to a speedy trial. Brief for Appellant at 20, State v. Harvey, 253 S.C. 328, 170 S.E.2d 657 (1969).

30. 253 S.C. 382, 171 S.E.2d 235 (1969).

31. The defendant committed murder and kidnapping.

32. Petitioner must prove his assertions by a preponderance of the evidence. Tucker v. State, 248 S.C. 344, 149 S.E.2d 769 (1966).

33. 253 S.C. 23, 168 S.E.2d 779 (1969).

represented by a retained attorney who was disbarred after the trial for conduct not related to this case.

The defendant contended that his counsel seriously prejudiced his case by failing to interview and have present at the trial two eyewitnesses to the killing. This claim was supported by affidavits from the eyewitnesses and the defendant's father in which they alleged that the attorney had been informed of the availability of the witnesses. The court, while recognizing that, if the affidavits were true, they established neglect on the part of the counsel, held that no prejudice to the defendant's case resulted. The witnesses' testimony was merely cumulative and would not in any way have established the defendant's claim of self-defense.

The court further held that the record showed that counsel ably represented the defendant and was familiar with the case. Also, the defendant continued to employ him and expressed no dissatisfaction with the attorney's services until he was suspended from practice. The court stated that, in cases where private counsel was employed, relief from a conviction would be granted only when counsel's representation was so grossly inadequate that the trial was a farce or a mockery of justice.

In *Davies v. State*[34] the defendant pleaded guilty without the benefit of counsel. The court, in rejecting the defendant's claim of denial of his right to counsel, found that the defendant had been given ample opportunity to retain counsel and had intelligently and voluntarily waived this right. At the trial court level the defendant pleaded guilty; the trial court made an extensive inquiry into the circumstances surrounding the waiver of counsel and the plea of guilty. The supreme court held that the record affirmatively showed that the defendant freely, voluntarily, and understandingly pleaded guilty, and thus the verdict was affirmed.

B. *Right to Counsel at Preliminary Hearing*

In South Carolina the defendant, if he makes a timely demand, has a right to have a preliminary hearing.[35] The sole purpose of the hearing is to determine if the state has probable cause to hold the accused. The accused is not permitted to plead or make a sworn statement; and, if he makes an unsworn statement, it cannot later be used against him. Thus, the South Carolina Supreme Court has held that an accused has no right

34. 253 S.C. 501, 171 S.E.2d 720 (1970).
35. S.C. CODE ANN. § 43-232 (1962).

to counsel at a preliminary hearing since it is not a critical stage.[36]

This distinction will no longer be valid in light of *Coleman v. Alabama*.[37] In *Coleman* the Supreme Court held that the Alabama preliminary hearing, which was not a required step in the prosecution, was nevertheless a critical stage in the proceedings against the accused and that he was, therefore, entitled to counsel at such a hearing. The Court reiterated that a critical stage depends on "whether potential substantial prejudice to the defendant's rights inheres in the ... confrontation and the ability of counsel to help avoid that prejudice."[38]

In the view of the *Coleman* Court a substantial benefit to an accused at any critical stage is counsel's ability to cross-examine witnesses; the results of such cross-examination could serve as a vital impeachment tool at trial or could expose the state's case as being so weak as to result in the accused not being bound over for trial. Also, testimony of witnesses who do not appear at trial would be preserved, and counsel would be better able to prepare his case. The inability of the accused to recognize and capitalize on these advantages led the Court, therefore, to hold that the preliminary hearing is a critical stage at which the right to counsel attaches.

V. RIGHT OF CONFRONTATION

In *Pointer v. Texas*[39] the Supreme Court held that the right of confrontation clause of the sixth amendment to the United States Constitution is obligatory upon the states by the fourteenth amendment. In *Illinois v. Allen*[40] the Court held that a defendant whose language and behavior during his trial was so disruptive, abusive, and disrespectful toward the judge and the court as to make continuation of his trial impossible in his presence was not deprived of his right to confrontation by his removal from the courtroom.

The trial judge constantly warned the defendant that, if his behavior did not improve, he would be removed from the courtroom. After the defendant had in fact been removed, the state presented its case in the defendant's absence, although several

36. State v. White, 243 S.C. 238, 242, 133 S.E.2d 320, 321 (1963).
37. 90 S. Ct. 1999 (1970).
38. *Id.* at 2002, *quoting from* United States v. Wade, 388 U.S. 218, 227 (1967).
39. 380 U.S. 400 (1965).
40. 90 S. Ct. 1057 (1970).

times the defendant was told that, upon his promise to behave, he would be permitted to return to the trial.

The Supreme Court held that such conduct on the part of the defendant constituted a waiver of his right to confrontation and that the trial court committed no error in excluding the defendant from the courtroom. The Court also stated that in like cases it would be permissible to exclude the defendant from court, tie and gag him, or sentence him for contempt.[41]

VI. JURY TRIAL

In *State v. Bostick*[42] the South Carolina Supreme Court upheld the refusal of the trial judge to set aside a juror who stated that he had formed an opinion about the case on the basis of "street talk." The court reiterated that it was in the power of the judge to determine the competence and indifference of the jurors and that he would be overruled on appeal only if his conclusion was not supported by the evidence or he was influenced by an error of law.[43]

The trial judge made an extensive examination of the juror in question, who stated that he would give the state and the accused a fair and impartial trial and would base his verdict solely on the evidence presented in court.

> If a juror states that he has formed an opinion but that it is not so fixed that it cannot be changed by testimony, and that he is not biased, and can give the defendant a fair trial, the judge may properly refuse to grant a challenge for cause.[44]

In *State v. Atkinson*[45] the defendant was on trial for murder. During the jury's deliberation they returned to the courtroom and inquired if the defendant were given life imprisonment, would he *ever* become eligible for parole. In response to this question the trial judge admonished the jury that, *when* a man

41. The Supreme Court recognized that excluding the defendant from the courtroom was perhaps the best way to deal with an unruly defendant. Tying and gagging, aside from being repugnant to look at, may arouse undue sympathy from the jury. Also, a man faced with death or life imprisonment may well prefer to serve a series of contempt sentences for unruliness in hopes that prosecution witnesses may die or the facts become so clouded with age as to render a conviction impossible.

42. 253 S.C. 205, 169 S.E.2d 608 (1969).

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

44. W. LEDBETTER & W. MYERS, CRIMINAL DEFENSE IN SOUTH CAROLINA 124 (1970).

45. 253 S.C. 531, 172 S.E.2d 111 (1970).

does become eligible for parole, the determination of whether he would be paroled or not was left to the Parole Board and the fact of whether he would be paroled or not was not a matter for the jury's consideration. Shortly thereafter, the jury returned a verdict of guilty of murder without a recommendation of mercy, which resulted in the defendant being given the death penalty.

The defendant contended that this exchange between the judge and the jury seriously prejudiced his rights in that the jury sentenced him to death because of the possibility of parole. The court stated that the prevailing view in this country is that the jury, in fixing the penalty, should not be invited by instruction or argument to speculate on the possible effect of pardon or parole on the sentence imposed.[46] Although affirming the conviction, the court stated that in the future perhaps greater specificity should be used. The court upheld the judge's instructions, since the jury was told that parole was none of their concern.[47]

The defendant in *State v. Atkinson*[48] also alleged error on the grounds that three jurors were excused who stated that they were unequivocally opposed to capital punishment and could not consent to any verdict which would result in the death penalty. The court in accord with *Witherspoon v. Illinois*[49] held that it was not error to exclude those jurors who were so opposed to capital

46. *Id.* at 534, 172 S.E.2d at 112, *citing,* Annot., 12 A.L.R. 3d 832, 834 (1967).

47. In the opinion of this writer the prejudice to the defendant was so strong that it required a new trial. The jury in its question to the judge, "*if* the defendant becomes eligible for parole," (253 S.C. at 534, 172 S.E.2d at 112), was obviously not concerned with the function of the parole board or its members but merely whether there was *any* chance that this man would be put back on the streets in the event of a sentence of life imprisonment. Then, taking as valid the general rule that the jury should not consider the effect of parole on its sentence, this writer would draw the conclusion that in fact the jury *did* consider the possibility of parole. The judge in his answer to the jury's question spoke of "*when* a man becomes eligible for parole," (253 S.C. at 534, 172 S.E.2d at 112), leaving the inference that the defendant might become eligible for parole. There is, of course, no way to determine how the jury reacted to this statement, but the court stated that shortly thereafter the jury returned with the death penalty. So, there is a strong inference, too strong when a man's life is at stake, that the jury assumed that the defendant might become eligible for parole. The court itself suggested an instruction recommended in *State v. Conner,* 241 N.C. 468, 471-72, 85 S.E.2d 584, 587 (1955) which said, in substance, that parole is not a matter for the jury's concern and that they should decide on death or life imprisonment on the basis of the facts presented and not on what any other branch of the government might do at a later date.

48. 253 S.C. 531, 172 S.E.2d 111 (1970).

49. 391 U.S. 510 (1968). *See also* Comment, *Empanelling Jurors,* 22 S.C.L. REV. 98 (1970).

punishment that they could not assent to a verdict which would result in the death penalty, regardless of what the evidence dictated.

In *Ladd v. South Carolina*[50] the state appealed from an order of the federal district court granting the defendant a writ of habeas corpus. Two of the veniremen had been contacted in Ladd's favor before the trial began, and one of the contacted men served on the jury which convicted Ladd. The venireman who was contacted but did not serve made the contact known to the judge, who then, out of the jury's presence, conducted a hearing and decided that the contact was not prejudicial. In his instructions to the jury the judge admonished the jury not to consider anything heard out of court and commented that in his opinion anyone who attempted to influence a juror committed one of the most dastardly acts which a man could do.

The district court, in granting the writ, was influenced by *Remmer v. United States*[51] where the Court held that any improper private communication to a juror was presumptively prejudicial and that the state must carry a strong burden of proof in disproving prejudice.

In overruling the district court's decision, the court of appeals held that the state had proved that no prejudice did result. In *Remmer* the court, after learning of the improper contact, had an agent of the Federal Bureau of Investigation make an investigation and said nothing to the defense about the matter. The court in *Remmer* felt that the juror may have been unduly discomfited by the investigation and that this may have influenced his decision.

In *Ladd* this was not possible because the juror did not know that the contact was known to the court and he could not have taken the charge personally. The court of appeals felt that the state had disproved any possible prejudice to the defendant and thus denied his writ of habeas corpus. *Remmer* only dictated that the judge determine in a hearing whether the contact was prejudicial, and this requirement was met in the present case.

In *Baldwin v. New York*[52] the defendant was convicted of "jostling"[53] without a jury trial and sentenced to one year in

50. 415 F.2d 870 (4th Cir. 1969).
51. 347 U.S. 227 (1954).
52. 90 S. Ct. 1886 (1970).
53. "Jostling" is a crime contrived by legislatures to control pickpockets. N.Y. PENAL LAW § 165.25 (McKinney 1965).

jail. In reversing the conviction, the Supreme Court held that, when the possible punishment for a crime exceeds six months, the crime cannot be considered petty for purposes of determining whether or not the defendant is entitled to a jury trial.

The Court rejected the felony-misdemeanor distinction as determinative of the right to a jury trial and based it instead on the possible punishment which the defendant can receive. Now, in all cases where the maximum possible punishment exceeds six months, the defendant has a right to trial by jury.

The question of whether the right to trial by jury means a twelve man jury was presented to the Supreme Court in *Williams v. Florida*.[54] The Court came to the conclusion that a twelve man jury was but a historical accident and holds no constitutional significance.

While expressing the view that twelve men may be an ideal size for a jury — large enough to promote deliberation, and yet small enough to retain the individual sense of responsibility — the Court held that there was no constitutional prohibition on a jury of a different size. The Court stated that it would leave the size of juries to the legislatures unhampered by any constitutional requirements.

VII. Speedy Trial

In *Dickey v. Florida*[55] the defendant was tried and convicted for an armed robbery which allegedly occurred eight years prior to his trial. Numerous motions for a prompt trial had been filed by the defendant, who, although he was incarcerated in a federal prison the entire eight years, could still have been made available for trial. The Supreme Court held that the unexplained and unnecessary delay violated the defendant's right to a speedy trial; and where two potential witnesses had died, another was unavailable, and police records had been destroyed, the conviction was reversed and the state barred from bringing any other proceeding arising out of the charges.

VIII. Guilty Pleas

With today's overcrowded criminal dockets, the guilty plea is necessary to the effective administration of the criminal courts. Yet in the period surveyed, more cases involved attacks

54. 90 S. Ct. 1893 (1970).
55. 90 S. Ct. 1564 (1970).

on guilty pleas obtained through the plea-bargaining system than any other single question on appeal.

In *McMann v. Richardson*[56] the Court considered the question of whether an improperly obtained confession renders a subsequent guilty plea invalid. This question quite often arises when the defendant has confessed to the crime and there is a possibility that the confession will be deemed free and voluntary and introduced into evidence against him. The defendant can either plead guilty and usually get a lighter sentence, or he can go to trial and attempt to have the confession ruled inadmissible; in the later instance he will either win his case or, if the confession is admitted, be found guilty and possibly receive a stiffer penalty.[57] If the defendant attempts to have the confession ruled inadmissible, and it is admitted over objection, he can later attack the admission on appeal.

The Court held that, in these circumstances with reasonably competent advice of counsel, the defendant must either plead guilty or attack the confession at trial. He cannot plead guilty and then later in a collateral proceeding attack the plea as involuntary because of a confession which he thinks is inadmissible.

The Court summed up its position in the following statement:

> In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the grounds that counsel may have misjudged the admissibility of the defendant's confession.[58]

In *State v. Fuller*[59] the South Carolina Supreme Court was faced with the same question presented in *McMann v. Richardson*. The defendant, after an extensive examination by the trial court, intelligently and voluntarily pleaded guilty to murder. On appeal he attacked his guilty plea as being induced by an involuntary confession. The court held that,

56. 90 S. Ct. 1441 (1970).
57. This necessarily assumes that the state's case without the confession is too weak to convict the defendant.
58. McMann v. Richardson, 90 S. Ct. 1441, 1448 (1970). The Court also stated that waiving trial entails the risk that good-faith judgments of reasonably competent counsel will turn out to be mistaken. *Id.*
59. Smith's Adv. Sht., No. 17, Op. No. 19062 (S.C. May 29, 1970).

in pleading guilty, the defendant had waived his right to attack his confession as involuntary later. The court stated the general rule that a voluntary guilty plea constitutes a waiver of nonjurisdictional defenses, including any violations of constitutional rights prior to the plea.[60]

In *Brady v. United States*[61] the defendant was essentially attacking the plea bargaining system. The defendant was indicted for kidnapping and, if he went to trial, faced a possible death sentence; instead he pleaded guilty and received a sentence of thirty years. On appeal he claimed that his guilty plea was invalid because it is a violation of the fifth amendment to influence or encourage a guilty plea by a promise of leniency and that he was coerced by the fear of a greater penalty if the state was forced to prove its case.

The Court held that a guilty plea is not coerced, and hence invalid, if motivated by the defendant's desire to plead guilty and accept the probability of a lesser punishment rather than go to trial and chance receiving a penalty ranging from acquittal to the highest penalty authorized by law.

In *Brady* the defendant also claimed that he had pleaded guilty because of fear of the death penalty which was authorized by law. Subsequent to Brady's plea, the Supreme Court held in *United States v. Jackson*[62] that the death penalty could not be imposed under the statute[63] under which Brady was sentenced because it needlessly discouraged the assertion of a person's innocence. But the court stated that this does not necessarily imply that a person who pleads guilty under the statute did so involuntarily. The test is still whether the guilty plea was intelligently and voluntarily made.

Sanders v. Leeke[64] presented a similar question to the South Carolina Supreme Court. In that case the defendant charged with murder was allowed, after the consent of the solicitor was obtained, to plead guilty to the lesser included offense of manslaughter and thereby to avoid a possible death sentence.

On appeal from a denial of a writ of habeas corpus, the court held that the evidence fully established that the defendant had pleaded guilty intelligently and voluntarily.

60. *Id.* at 35, *citing* 22 C.J.S. *Criminal Law* § 424(7) (1961). For an exception to the general rule, *see* Chambers v. Florida, 309 U.S. 227 (1940).
61. 90 S. Ct. 1463 (1970).
62. 390 U.S. 570 (1968).
63. 18 U.S.C.A. § 1201 (1966).
64. Smith's Adv. Sht., No. 24, Op. No. 19081 (S.C. July 18, 1970).

Therefore, in accord with *Brady*, the mere fact that he did so to avoid the possible imposition of the death penalty did not render his plea involuntary. The court quoted *Brady* as saying that it is not unconstitutional for the state to give a man a substantial benefit for pleading guilty since the defendant in so doing also yields a substantial benefit to the state. The court further stated that the fact that Sanders was reluctant to plead guilty was of no consequence since the record showed that he did so voluntarily.

In *Breland v. State*[65] the defendant pleaded guilty to a charge of rape, and the trial judge accepted his plea under section 17-553.4 of the Code of Laws of South Carolina of 1962 and gave him a sentence of twenty-one years. Under section 17-553.4 of the Code the trial judge is allowed to accept a plea of guilty to a capital offense in lieu of a jury recommendation of mercy. Therefore, by pleading guilty, the defendant can avoid the death penalty. Subsequent to Breland's plea of guilty, in *State v. Harper*[66] the court ruled this section unconstitutional as unduly encouraging the defendant to plead guilty.

The court in accord with *Brady* held that the statute did not necessarily cause every guilty plea that was entered under it to be coerced, but that it was the duty of the court to determine, in light of the effect of the statute, if the plea was or was not freely, intelligently, and voluntarily made. The court determined from the record that Breland pleaded guilty on advice of counsel and that, although he was reluctant, it was still voluntary. Breland stated at his habeas corpus hearing that the only reason he pleaded guilty was because he anticipated a much lighter sentence than the one which he received.

IX. SENTENCING

In *Williams v. Illinois*[67] the defendant was sentenced to one year's imprisonment and fined five-hundred dollars, the statutory maximum for petty theft. The defendant was also taxed five dollars for court costs. The sentence provided that, if at the end of the one year prison sentence the defendant

65. 253 S.C. 187, 169 S.E.2d 604 (1969).
66. 251 S.C. 379, 162 S.E.2d 712 (1968). The court ruled this statute unconstitutional because of the mandate of *United States v. Jackson*, 390 U.S. 570 (1968).
67. 90 S. Ct. 2018 (1970).

could not pay the fine, he was to be held in confinement until he worked off the fine at the rate of five dollars per day. The defendant was indigent and could not pay the fine. The result was that the sentence caused the indigent defendant to be confined beyond the maximum period provided by statute because he could not pay the fine.

The Supreme Court held that, when the aggregate period of punishment for a crime exceeds the statutory maximum and this is the direct result of an involuntary nonpayment of a fine or court costs, there is unreasonable and unequal discrimination based solely on ability to pay; therefore, the Court reversed. The Court stated the policy reason for the decision by saying that there is no "equal justice where the kind of a trial (sentence) a man gets depends on the amount of money he has."[68] This prolonged sentence would fall only on the indigent, and in the Court's view such a result was not permissible. This holding was carefully restricted to the facts by the Court, and the opinion also stated that this decision did not deal in any way with the thirty dollars or thirty days type of sentence.

South Carolina law and practice will be affected in those cases with fact situations similar to that in *Williams*. Section 17-574 of the 1962 Code provides that indigents may be confined to jail until their fines have been satisfied. So in those cases where the defendant is sentenced to the statutory maximum plus a fine, *Williams* will dictate that he cannot be held in confinement to pay off the fine beyond the statutory limit.

X. APPEALS

In *State v. Anderson*[69] the defendant was convicted of murder and sentenced to life imprisonment. On appeal the defendant attempted to raise several points which were not raised in the trial court. In a capital case it is well settled in this state that the supreme court will take notice of any error which affects the substantial rights of the accused even though the same was not made a ground of appeal.[70]

In *Anderson*, however, the court restricted this doctrine to only those cases where the defendant received the death penalty. The fact that he could have been sentenced to death is

68. Griffin v. Illinois, 351 U.S. 12, 19 (1956).
69. 253 S.C. 168, 169 S.E.2d 706 (1969).
70. State v. Bigham, 133 S.C. 491, 508, 131 S.E.2d 603, 608 (1926).

of no importance. The court henceforth will apply this doctrine only in those instances where the defendant actually received the death penalty.

In *Alfinito v. United States*[71] the defendant sought to obtain a copy of the minutes of the criminal proceedings against him. The district court, in denying his request, held that, absent any showing of need, charging of error, or deprivation of constitutional rights, the transcript need not be furnished. The state at its expense need not provide a copy of the documents for the defendant to peruse so that he can decide if he wishes to engage in any further litigation absent some assertion of error.

XI. DOUBLE JEOPARDY

In *Benton v. Maryland* [72] the Supreme Court held that the double jeopardy clause of the fifth amendment was applicable to the states through the fourteenth amendment. In the survey period the Supreme Court decided three cases of great interest and importance in this area.

In *Waller v. Florida*[73] the Court considered whether a defendant could be tried for the same, or an included, offense in both the municipal and the state courts. The defendant was tried in a municipal court for destruction of city property and later in state court for grand larceny. The state courts considered the ordinance violation as included in grand larceny, and the Supreme Court decided the case on that supposition.

The decision was primarily based on the fact that the defendant had been tried and convicted twice by two courts of the same sovereignty. This result followed from the fact that the municipal courts were created by and derived their powers from the state government. The Court thus held that the second trial for the same crime was violative of the defendant's right not to be twice put in jeopardy for the same offense; the second conviction was, therefore, a nullity. This decision will not affect state and federal prosecutions for the same acts, since they are two distinct sovereignties and their judicial powers are derived from separate sources.

71. 305 F. Supp. 568 (D.S.C. 1969).
72. 395 U.S. 784 (1969).
73. 90 S. Ct. 1184 (1970).

The Court in *Ashe v. Swenson*[74] held that the doctrine of collateral estoppel is embodied in the double jeopardy clause of the fifth amendment. The defendant, along with two or three accomplices, was charged with robbing six men who were playing poker. The defendant was first tried for robbing one of the players. At the trial the state's evidence that the defendant was one of the robbers was weak, and he was acquitted by the jury for insufficient evidence. Six weeks later, the state again tried the defendant for robbing one of the other poker players. At this trial the state's evidence, from the same witnesses, was much stronger as to the defendant's identity, and he was convicted. It seems as if the six weeks delay had improved the witnesses's memory.

In overruling the second conviction, the Supreme Court defined "collateral estoppel" as standing for the proposition that, once an issue of ultimate fact has been decided by a valid and final judgment, it cannot be relitigated between the same parties. This rule was first one of civil law, but it has been for fifty years a rule of federal criminal law.[75]

This rule was incorporated into the double jeopardy provision by the Court. In *Ashe* its effect was this: at the first trial the only issue to be determined was the identity of the defendant. Once the jury decided that he was not one of the robbers, the state was estopped from trying to prove that he was in a later trial. Therefore, any subsequent trial of Ashe for the robbery of the other men was barred.

This rule has one important qualification. Where the defendant is first acquitted on a general verdict of not guilty and is later retried and convicted, the appellate court must look at the entire record and determine if the jury could have convicted on any issue other than the one which the defendant wishes to preclude from consideration. Therefore, the court, in making the rule of collateral estoppel applicable to the states, will preclude the state from trying a defendant several times to obtain a conviction under similar factual circumstances.

In *Price v. Georgia*[76] the defendant was tried for murder and convicted on the lesser included offense of voluntary manslaughter. The conviction was overturned on appeal. The

74. 90 S. Ct. 1189 (1970).
75. United States v. Oppenheimer, 242 U.S. 85 (1916).
76. 90 S. Ct. 1757 (1970).

defendant was again tried for murder and again convicted of voluntary manslaughter. The Court, in reversing the conviction, held that the state was limited to trying the defendant for voluntary manslaughter in the second trial. The Court reasoned that, since in the first case the jury was given a chance to convict the defendant of murder and had instead convicted him of the lesser included offense of voluntary manslaughter, he had impliedly been acquitted of murder; this implied acquittal ended his susceptibility to jeopardy. The fact that the defendant was not convicted of murder the second time was deemed to be of no importance. The double jeopardy clause talks in terms of being *put* in jeopardy, not in terms of conviction. Thus, jeopardy ended for Price with the implied acquittal for murder, and he could not again be tried for murder.[77]

XII. JUVENILE COURTS

The Court in *In Re Gault*[78] held that a juvenile trial requires the essentials of due process and fair treatment. In the case of *In Re Winship*[79] the United States Supreme Court was faced with the issue of whether or not a juvenile could be declared delinquent on a standard of proof less than the standard of proof, beyond a reasonable doubt.

The court first stated that "[t]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[80] The Court then held that the reasonable doubt standard is required in the adjudicatory[81] stage of a delinquency hearing by the due process clause. The Court rejected the argument that, because a juvenile hearing is sometimes labelled civil rather than criminal, the Court should hold the due process clause inapplicable to juvenile proceedings.

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77. The Court did not express any opinion as to whether the defendant could be retried for voluntary manslaughter but left that decision to the Georgia courts.
78. 387 U.S. 1 (1967).
79. 90 S. Ct. 1068 (1970).
80. *Id.* at 1073.
81. In most states, juvenile hearings are bifurcated: the adjudicatory phase is determinative as to guilt or innocence, and the disposition hearing is determinative as to what is to be done with the juvenile. *See also* Comment, *Infant's Right to Trial by Jury*, 22 S.C.L. REV. 423 (1970).