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Criminal Procedure

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CRIMINAL PROCEDURE

I. SEARCH AND SEIZURE; ARREST

The major issues presented in this section are substantially the result of two complementary doctrines that were developed by the United States Supreme Court in the last decade. In *Mapp v. Ohio*[1] the Court applied the "exclusionary rule" to state prosecutions in order to control the activities of local law enforcement officers. This was accomplished by treating as inadmissible any evidence obtained by such officers in an improper search. Shortly thereafter, in *Wong Sun v. United States*,[2] the Court imposed further restrictions on police actions by giving an expansive reading to the "fruit of the poisonous tree" doctrine.[3] The result was to prevent the prosecution from introducing as evidence at trial any materials gathered directly or indirectly pursuant to an illegal arrest. Since these two cases were decided, one of the primary questions confronting all courts has been the scope of these doctrines—that is, how far removed from the initial error must the final material be in order to remove the taint?

In *State v. Lawhorn*[4] the defendant claimed that improperly obtained evidence had been admitted at trial and so contested the validity of his larceny conviction. The defendant asserted on appeal that the evidence had been obtained by the use of an improperly issued warrant and was therefore inadmissible. However, when the contested evidence was offered by the prosecution, counsel for the defendant made no objection nor was the validity of the warrant ever disputed prior to this appeal. The South Carolina Supreme Court affirmed the defendant's conviction, without considering the merit of his claim, since the defendant had not properly raised the issue at trial.[5]

The court in *State v. McRae*[6] considered the propriety of the search of an automobile in which the defendant was riding. The defendant and two other occupants of the automobile were detained for questioning in connection with a robbery committed earlier in the day in the same locality. One of the occupants was arrested at this time on

1. 367 U.S. 643 (1961).

2. 371 U.S. 471 (1963).

3. This language was first used by the Court in Nardone v. United States, 308 U.S. 338, 341 (1939).

4. 254 S.C. 275, 175 S.E.2d 233 (1970).

5. Normally if objections are not made at the trial, they cannot be raised for the first time on appeal. *See, e.g.*, State v. Bethea, 241 S.C. 16, 126 S.E.2d 846 (1962) and State v. Alexander, 230 S.C. 195, 95 S.E.2d 160 (1956).

6. 255 S.C. 287, 178 S.E.2d 666 (1971).

the basis of an eyewitness identification. While the suspects were being questioned, the police obtained a search warrant for the automobile. One of the items sought by the warrant was the money stolen in the robbery—some $5,000. The search of the automobile was made at police headquarters and produced a finding of money in the amount of $4,976. At this point, the defendant and the other occupant were formally arrested.

At the subsequent trial, the defendant objected to the introduction of this money as evidence on the basis that the search warrant had been improperly obtained. The defendant alleged that "probable cause" for the search was lacking at the time the warrant was issued.[7] The defendant's objection was overruled and he was subsequently convicted of larceny. On appeal the defendant claimed that introduction of the disputed evidence constituted reversible error.

However, the supreme court found that there was a more than adequate factual basis to uphold the determination of the trial court that "probable cause" was present. Thus, the court held the evidence was properly admitted and affirmed the defendant's conviction. The court then chose to go further and make a more expansive determination. The court stated that even if the warrant had been improperly issued, as the defendant claimed, the search was nevertheless valid as it was pursuant to a lawful arrest. The court recognized that for such an "arrest—search" to be valid it must be reasonable, *i.e.* not too far removed from the arrest in time or distance.[8] However, the court declared that the particular circumstances surrounding the search in this case were similar to the facts in the recent United States Supreme Court case of *Chambers v. Maroney*[9] and thus relied on the more liberal holding of *Chambers*. In *Chambers*, as here, an automobile had been impounded subsequent to an arrest and later searched at police headquarters. But in *Chambers* the arresting officers had not even attempted to obtain a search warrant. Nevertheless, the Court found

7. In order for a search to be valid there must exist, at the time of the issuance of the warrant for the search, "probable cause" for a man of ordinary care to believe that the described object is presently located at the designated place. State v. Baker, 251 S.C. 108, 160 S.E.2d 556 (1968).

8. Preston v. United States, 376 U.S. 364 (1964). In Chimel v. California, 395 U.S. 752 (1969), the Supreme Court more closely defined what a reasonable search entails. There the Court held that a warrantless search pursuant to a lawful arrest must be confined to the area in which the accused might gain possession of a weapon or destroy evidence. During the past year the *Chimel* doctrine was ruled solely prospective in two Supreme Court cases: Williams v. United States, 91 S. Ct. 1148 (1971) and Hill v. California, 91 S. Ct. 1106 (1971).

9. 399 U.S. 42 (1970).

the search to be reasonable and the evidence obtained admissible due to the particular mobility of an automobile and the fact that probable cause was present.

In *State v. Pollard*[10] the court again considered the validity of a search and the admission of evidence obtained from it. Here the defendant was arrested and accused or killing his wife. At the time of his arrest the defendant was given the necessary warnings set out in *Miranda v. Arizona*[11] and signed a form which purported to waive his constitutional rights as an accused. Thereafter, he authorized the arresting officers to search his automobile in which was found a rifle. At his trial the defendant objected to the admission of this rifle into evidence and claimed that it had been obtained through an improper search. The trial court overruled the defendant's objection and admitted the rifle into evidence. The defendant was subsequently convicted of manslaughter.

On appeal the defendant claimed such an admission of the rifle was error on the basis that his consent to the search was ineffective. The defendant claimed that for his consent to be effective he would have had to have been advised of all the possible consequences of such a search, and since he was not, the search was invalid. The supreme court, however, found that the defendant's permission to search was binding and affirmed his conviction. The court gave considerable authority[12] for the premise that such specific warnings were not required.

The next three cases concerned the effect of an improper arrest on the resulting criminal conviction. In *State v. Holliday*[13] the supreme court upheld the defendant's conviction in the lower court for driving a motor vehicle under the influence of intoxicants, even though the prosecution admitted that the initial arrest had been improper. The court cited *Thompson v. State*[14] and *State v. Swilling*[15] as authority for the proposition that an illegal arrest, *alone,* does not invalidate a subsequent conviction. *Thompson* and *Swilling* were again relied on by the

10. 255 S.C. 339, 179 S.E.2d 21 (1971).

11. 384 U.S. 436 (1966).

12. State v. Oldham, 92 Idaho 124, 438 P.2d 275 (1968); People v. Trent, 85 Ill. App. 2d 157, 228 N.E.2d 533 (1967); State v. McCarty, 199 Kan. 116, 427 P.2d 616 (1967); Lamont v. State, 2 Md. App. 378, 334 A.2d 615 (1967); State v. Forney, 182 Neb. 802, 157 N.W.2d 403 (1968), *cert. denied,* 393 U.S. 1044 (1969); State v. Virgil, 276 N.C. 217, 172 S.E.2d 28 (1970).

13. 255 S.C. 142, 177 S.E.2d 541 (1970).

14. 251 S.C. 593, 164 S.E.2d 760 (1968).

15. 246 S.C. 144, 142 S.E.2d 864 (1965).

supreme court in *State v. McCoy.*[16] Here the defendant attacked his conviction on the grounds that his arrest warrant had not been properly executed. Again the court found that an illegal arrest or an improperly issued arrest warrant would not be an absolute bar to a prosecution for the offense concerned. *Frierson v. South Carolina*[17] was an action for federal habeas corpus relief from a state court conviction. As in the previous cases, the defendant attacked the legality of his arrest and contended that the absence of an arrest warrant invalidated his indictment, trial, and conviction. The district court, however, dismissed the defendant's petition and held that "defects in arrest procedure, which did not prejudice the accused at trial . . . 'do not constitute grounds for relief in habeas corpus.' "[18]

II. CONFESSIONS

The South Carolina Supreme Court considered the issue of determining the voluntariness of an admission in *State v. Duckson.*[19] The defendant was arrested for murder and in the course of later interrogation made a statement that led to the discovery of the alleged murder weapon. At the trial, the defendant sought to prevent the admission of the weapon into evidence by contending that his statement had been involuntarily procured. The defendant claimed that the arresting officers had not properly instructed him of his constitutional rights prior to his questioning and requested that the trial judge conduct a separate hearing to determine the voluntariness of the statement. The trial judge denied this motion and the defendant was subsequently tried and convicted of murder.

On appeal the supreme court accepted the defendant's argument that a separate hearing should have been held. The court stated that it was well settled that where the voluntariness of a statement of the accused was at issue, there must be a factual determination of this question by a body other than the trial jury[20] (usually the trial judge). To remedy the error of the trial court, the supreme cout remanded the case back to the circuit court for an independent determination of the voluntariness issue. Subsequently, the supreme court, on rehearing,[21]

16. 255 S.C. 170, 177 S.E.2d 601 (1970).
17. 314 F. Supp. 444 (D.S.C. 1970).
18. *Id.* at 445 (footnote omitted).
19. 255 S.C. 372, 179 S.E.2d 40 (1971).
20. Jackson v. Denno, 378 U.S. 368 (1964), and State v. Curley, 253 S.C. 513, 171 S.E.2d 699 (1970).
21. State v. Duckson, Order (S.C. May 11, 1971).

affirmed the conviction after a separate finding that the statement had been voluntarily given.

State v. Funchess[22] similarly concerned on appeal from a murder conviction. At the trial a confession by the defendant was admitted into evidence after conducting the required separate hearing on the voluntariness issue. After his conviction the defendant contended, on appeal, that the confession should have been ruled inadmissible at trial because it resulted from an allegedly illegal arrest. The supreme court rejected the defendant's argument and held: "[E]very statement or confession made by a person in custody as the result of an illegal arrest is not involuntary and inadmissible . . . . Voluntariness remains as the test of admissibility."[23]

This year, in *Harris v. New York,*[24] the United States Supreme Court made what may prove to be the first significant dilution of the *Miranda* doctrine. In this case the accused was arrested on narcotics charges and questioned by the police without completely being given the warnings required by *Miranda.* At trial in a New York county court, the prosecution offered into evidence statements made by the defendant during this questioning. The prosecution stipulated that the statements were offered solely to impeach the defendant's credibility and not for their factual content. The trial court admitted the statements for this purpose and carefully instructed the jury that the defendant's statements were not to be considered as evidence of his guilt, but only to throw doubt on his veracity. The defendant was found guilty and appealed without success through the New York court system. The Supreme Court granted his request for certiorari and in a five to four decision upheld the New York court's ruling. The Court stated: "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."[25]

III. RIGHT TO COUNSEL

In *State v. Taylor*[26] the defendant, after unsuccessfully defending himself, contended that he had been denied his constitutional right to

22. 255 S.C. 385, 179 S.E.2d 25 (1971).
23. *Id.* at 391, 179 S.E.2d at 28.
24. 91 S. Ct. 643 (1971).
25. *Id.* at 646.
26. 255 S.C. 268, 178 S.E.2d 244 (1970).

representation by counsel. Following the defendant's arrest for housebreaking, the trial court, six months prior to the trial, appointed an attorney to represent him. Later at a pretrial conference, the defendant advised the trial judge that he wished to serve as his own counsel. The trial judge again explained to the defendant his right to counsel and inquired if he wished a different attorney appointed. The defendant declined and restated his request, adding that he had previously successfully defended himself in another criminal proceeding. The trial court thereupon granted the defendant's motion. At the succeeding trial the defendant was convicted of housebreaking and afterwards appealed.

The South Carolina Supreme Court recognized that while an indigent defendant has the right to representation by appointed counsel in serious criminal cases,[27] this right may be waived if done intelligently and knowingly.[28] Likewise it recognized that a defendant has the unchallenged right to speak for himself if he so chooses.[29] The court, after considering the above factors, affirmed the defendant's conviction since it found that any inadequacy of his defense was attributable solely to his own volition.

In *State v. Peters*[30] the defendant was arrested for armed robbery during the month of November in 1969, and an informal hearing was held on March 30, 1970, at which time the question of appointment of counsel was to be resolved. While the defendant stated that he wished to retain his own counsel (at the time he had not done so), the trial judge appointed a Public Defender to serve as his counsel temporarily. The trial judge stipulated that if and when the defendant did retain private counsel, such counsel would be recognized by the court. The judge additionally warned the defendant that a tardy retention of counsel would not be a legitimate basis for securing a delay in the commencement of the trial.

From the time of this hearing to the date of the trial, May 25, 1970, it appeared that some communications took place between the defendant, his mother, and the desired attorney. On the trial date, the defendant requested a continuance so as to allow him sufficient time to secure his desired counsel and prepare for trial. However, the information tended to show that any dealings between the defendant and his

27. Gideon v. Wainwright, 372 U.S. 335 (1963).
28. Johnson v. Zerbst, 304 U.S. 458 (1938).
29. United States *ex rel.* Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965).
30. 255 S.C. 375, 179 S.E.2d 19 (1971).

requested attorney were, at best, preliminary. No fee negotiations had been made nor was the requested attorney physically available for service until two weeks after the trial date. After considering these facts, the trial judge denied the defendant's motion for a continuance. The defendant was represented by the Public Defender at the trial and was subsequently convicted. Thereafter the defendant appealed his conviction, contending that he had been denied his right to counsel as a result of the trial court's refusing to grant his request for a continuance. The circuit court case of *United States ex rel. Carey v. Rundle*[31] was cited by the defendant as authority for his argument.

The supreme court, however, distinguished *Carey* from the instant case due to several factors. In *Carey* it was much more apparent that the desired counsel had actually been retained, as opposed to the mere preliminary steps taken by the defendant here. In *Carey* the attorney had already been paid a fee and made the motion for the continuance himself; neither was done in *Peters*. Thus the court found that the trial judge did not abuse his discretion in denying the defendan's motion and affirmed the subsequent conviction.

In *State v. Lewis*[32] the defendant asserted that he had been effectively denied his right to counsel as a result of his appointed counsel's incompetency. The defendant claimed that his counsel failed to raise all the possible defenses available to him. However, the South Carolina Supreme Court affirmed the defendant's conviction of armed robbery and gave the following test for judging an attorney's performance:

> 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.[33]

As previously mentioned, it was in the landmark decision of *Gideon v. Wainwright*[34] that the United States Supreme Court recognized an indigent defendant's right to counsel. There the Court held

31. 409 F.2d 1210 (3d Cir. 1969).

32. 179 S.E.2d 616 (S.C. 1971).

33. *Id.* at 618, *citing* Tillman v. State, 244 S.C. 259, 264, 136 S.E.2d 300, 303 (1964).

34. 372 U.S. 335 (1963).

such a right existed for all prosecutions of "serious" crimes in state courts. During the past survey period in *Kitchens v. Smith*,[35] the Court further expanded its holding in *Gideon*. In *Kitchens* the Court made it clear that the right to counsel set out in *Gideon* was fully retroactive; the Court also held that in prosecutions for crimes where *Gideon* was applicable the defendant was not required to request counsel, rather it should be provided as a matter of course.

IV. GUILTY PLEA

Again during this year's survey period, more cases involved attacks on guilty pleas than any other issue on appeal. The predominant question in nearly all of these cases was that of the voluntariness of the plea. Two years ago in the case of *Boykin v. Alabama*,[36] the United States Supreme Court set forth a standard by which the voluntariness of guilty pleas would be determined. The Court held that a guilty plea would not be recognized unless there was an affirmative showing that it had been made voluntarily and understandingly. In order to accomplish this, the Court required that, in cases in which guilty pleas were made, the trial judge make a positive inquiry as to the voluntariness issue. It was on the basis of the holding of *Boykin* that three appeals were made to the South Carolina Supreme Court during the past year.

Hughey v. State,[37] *Dillard v. State*,[38] and *Baxley v. State*[39] were each petitions for habeas corpus relief wherein the particular defendant sought to overturn his conviction by challenging the validity of his prior guilty plea. Each defendant had previously pleaded guilty, and each sought to show that his plea had not been made and examined according to the standards given in *Boykin*. However, in each case the defendant had been tried and sentenced *prior* to the date of the *Boykin* decision, June 2, 1969. Since the *Boykin* doctrine had previously been determined to be prospective only,[40] the supreme court dismissed each petitioner's claim without ruling on the merits.

In the remainder of the cases in this section, the very basis of the

35. 91 S. Ct. 1089 (1971).
36. 395 U.S. 238 (1969).
37. 255 S.C. 155, 177 S.E.2d 553 (1970).
38. 255 S.C. 187, 177 S.E.2d 788 (1970).
39. 255 S.C. 283, 178 S.E.2d 535 (1971).
40. Halliday v. United States, 394 U.S. 831 (1969), and Davies v. State, 253 S.C. 501, 171 S.E.2d 720 (1970).

guilty plea process—the plea-bargaining system—was challenged. With the existing overcrowded criminal dockets, such a system is a practical necessity. It would be physically impossible to conduct a full-scale trial for everyone accused of a crime and, therefore, prosecutors throughout the country rely on the plea-bargining system to gain guilty pleas by the accused. In our system the accused pleads guilty, usually to an offense of a lesser degree than he was initially charged, after negotiations with the prosecutor. The accused is motivated by the fact that such actions nearly always result in a less severe sentence than would be imposed after a conviction at trial. This system has recently been attacked as being inherently coercive, the argument being that the pressures on the defendant to receive reduced punishment necessarily make all guilty pleas involuntary as a matter of law.

The holding of the United States Supreme Court in *United States v. Jackson*[41] was relied upon by most of the defendants in the following cases. They generally claimed that *Jackson* stood for the above premise—that all guilty pleas were involuntary, and thus invalid, as a matter of law. In truth, the holding of *Jackson* was not nearly this broad. There the Court considered the validity of a provision of a federal statute[42] that governed the possible punishment to be imposed for the offense of kidnapping. The provision gave the jury the power to impose the death penalty upon a finding of guilty, and in an alternate section set the maximum sentence at a period of years if the accused pleaded guilty. Thus by a plea of guilty, a defendant prosecuted under this statute could assure himself of escaping the death penalty. The Court found that such a provision improperly discouraged the defendant from asserting both his fifth amendment right not to plead guilty and his sixth amendment right to demand a jury trial. On these grounds, the Court ruled the death penalty portion of this statute unconstitutional. Following this holding, the South Carolina Supreme Court ruled an analogous South Carolina statute[43] unconstitutional in *State v. Harper*.[44]

41. 390 U.S. 570 (1968).

42. 18 U.S.C. § 1201(a) (1966).

43. S.C. CODE ANN. § 17-553.4 (1962). This statute allowed a defendant to obtain an *automatic* recommendation of mercy, and thereby escape the death penalty, by pleading guilty.

44. 251 S.C. 379, 162 S.E.2d 712 (1968).

In *Brady v. United States*[45] the United States Supreme Court more clearly defined its holding in *Jackson*. In *Brady* the Court considered the validity of a guilty plea of a defendant prosecuted some nine years earlier under the same statute considered in *Jackson*. While the Court recognized the invalidity of the portion of the statute struck down in *Jackson*, it nevertheless affirmed the validity of the defendant's guilty plea. The Court held that a guilty plea was not necessarily coerced by the invalid provision, if it was motivated by the defendant's desire to plead guilty and accept the probability of a lesser punishment. The Court stated that the true issue to be determined was whether the guilty plea had been made intelligently and voluntarily.[46]

The South Carolina Supreme Court made essentially the same determination in *Sanders v. Leeke*.[47] After being charged with murder, the defendant was allowed to make a plea of guilty to the offense of manslaughter and thus avoid the possibility of a death sentence. The supreme court affirmed the lower court's denial of the defendant's request for habeas corpus relief, as it found the evidence more than amply supported the finding of the lower court that the defendant's plea had been made voluntarily. The court stated that merely because a more severe penalty was possible did not, by itself, invalidate the defendant's plea of guilty.

The South Carolina Supreme Court in *Sweet v. State*[48] considered a situation very similar to that presented in *Brady*. Here the defendant pled guilty to a charge of statutory rape which, by virtue of section 17-553.4 of the Code of Laws of South Carolina of 1962, assured him of a recommendation of mercy. This, in turn, eliminated any possibility of his receiving the death penalty. As stated earlier, this statute was subsequently held unconstitutional in *Harper*, and it is on this basis that the defendant made his request for habeas corpus relief. The defendant in his petition argued that the very existence of this statute at

45. 397 U.S. 742 (1970).

46. Essentially the same holding was made in a recent case wherein the Court stated: "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative choices of action open to the defendant." North Carolina v. Alford, 91 S. Ct. 160, 164 (1970).

47. 254 S.C. 444, 175 S.E.2d 796 (1970).

48. 255 S.C. 293, 178 S.E.2d 657 (1971). In the per curiam opinions of Owens v. State, 255 S.C. 299, 178 S.E.2d 651 (1971), and Glaze v. State, 255 S.C. 298, 178 S.E.2d 651 (1971), the supreme court affirmed the lower court's denial of habeas corpus relief for the same reasons as stated in *Sweet*.

the time he made his plea caused his plea to be involuntary as a matter of law. The supreme court rejected this argument, mainly relying on the holding of *Breland v. State*.[49] The court in *Breland* stated:

> [T]he mere fact that appellant's plea was taken in accordance with the provisions of Section 17-553.4 . . . did not automatically . . . make the plea coercively entered as a matter of law. Rather the question remains in each case whether the plea was coerced or encouraged by the death penalty power in the jury in the event of a trial.[50]

The supreme court then stated that the proper test to determine the validity of a guilty plea remained whether, under all of the facts and circumstances, the plea was made voluntarily and understandingly. Applying this test, the supreme court affirmed the lower court's denial of the defendant's petition.

Griffin v. State,[51] *White v. State*,[52] and *Moore v. State*[53] were all actions in which each defendant claimed that his guilty plea had been made involuntarily. In each case the defendant appealed from the lower court's finding of fact that the plea had been made voluntarily. The supreme court, in considering each case, merely applied the standard set out in *Dixon v. State*[54]—was there sufficient evidence to sustain the lower court's finding of fact? While the circumstances varied in each action, the supreme court found in all three that sufficient evidence was presented to sustain the lower court's factual determination and therefore affirmed the lower court's denial of relief in each instance.

V. MENTAL COMPETENCY OF THE DEFENDANT

In *State v. Bradford*[55] the defendant was accused and subsequently convicted of rape. At the trial the defendant's counsel based his defense on the alleged mental deficiency of the defendant. He sought alternately to quash the indictment or, at least, gain a continuance of the trial on the grounds of the defendant's insufficient mental capacity. Both of these motions were denied by the trial court. During the trial, evidence

49. 253 S.C. 187, 169 S.E.2d 604 (1969).
50. *Id.* at 191, 169 S.E.2d at 605.
51. 255 S.C. 357, 179 S.E.2d 33 (1971).
52. 179 S.E.2d 906 (S.C. 1971).
53. 180 S.E.2d 540 (S.C. 1971).
54. 253 S.C. 41, 168 S.E.2d 770 (1969).
55. 180 S.E.2d 632 (S.C. 1971).

was introduced that indicated that the defendant was, in fact, feeble-minded, but no evidence was given on the issue of sanity nor was insanity pleaded as a defense for the defendant's actions. At the close of the trial, defense counsel unsuccessfully requested that the trial court charge the jury that the defendant's mental condition and intelligence were factors to be considered by them in their determination of guilt. The defendant appealed from the subsequent conviction and alleged that the trial court had erred in denying the above motions. The supreme court, however, sustained the trial court's actions and affirmed the defendant's conviction. The court stated:

> Criminal responsibility does not depend upon the mental age of the defendant, nor upon whether his mind is above or below that of the average or normal man. Subnormal mentality is not a defense to crime unless the accused is by reason thereof unable to distinguish between right and wrong with respect to the particular act in question.[56]

VI. DOUBLE JEOPARDY

In *State v. Hill*[57] the South Carolina Supreme Court considered the propriety of placing an accused in criminal jeopardy in more than one court proceeding for acts that took place in a common incident. Here the defendants, Hill and his wife, were involved in a disagreement with a third party in which they allegedly fought and injured him. As a result they were arrested by the local police and charged in municipal court with the relatively minor offense of disorderly conduct. To this charge they posted and subsequently forfeited bond, but, shortly thereafter, they were indicted in the circuit court for the much more serious offense of assault and battery with intent to kill, because of their actions in the same incident. The defendants were subsequently tried and convicted of assault and battery of a high and aggravated nature, a lesser included offense, but still one of a relatively serious nature. At the trial the defendants unsuccessfully raised the defense of a former jeopardy and based their appeal on this point.

In considering their argument, the supreme court agreed that a true claim of double jeopardy is a valid defense and acknowledged that normally no one may be tried twice for the same crime in the same court;[58] nor may there be multiple trials for the same crime in different

56. *Id.* at 636, *citing* State v. Gardner, 219 S.C. 97, 106, 64 S.E.2d 130, 135 (1951).
57. 254 S.C. 321, 175 S.E.2d 227 (1970).
58. Benton v. Maryland, 395 U.S. 784 (1969).

courts of the same state.[59] Nevertheless, the court stated that for a defendant to properly raise the defense of former jeopardy, the second offense must relate to the same act and crime. The court found such was not the case here and stated: "The offenses were separate and distinct and the facts necessary to sustain each were different. Appellants, in law and in fact, committed separate offenses which supported separate charges."[60] The defendant's conviction was thus affirmed by the supreme court.

VII. JOINT TRIALS

Two of the actions in this section arose from a series of riots in the South Carolina Central Correctional Institution that took place in the month of October 1968. In the action of *State v. Greene*[61] twelve inmates were jointly charged and convicted of the offense of prison rioting; six of the accused entered pleas of not guilty and it is these six that brought this appeal. Prior to their trial, the appellants petitioned unsuccessfully for separate trials; they now assert on appeal that denial of this motion was reversible error. The supreme court, however, affirmed their convictions and stated that the appellants had failed to show that a joint trial had been prejudicial to them. The court found that all of the charges arose out of the same uncomplicated facts and circumstances with no conflict in the defenses interposed.

The case of *State v. Avery*[62] concerned essentially the same issue and circumstances considered in *Greene*. Two of the three defendants were convicted of prison rioting and appealed, because of the trial court's denial of their motion for separate trials. As in *Greene*, the supreme court affirmed the convictions because it found no prejudice had resulted from trying the defendants jointly. Judge Bussey wrote separate opinions in *Greene* (dissenting) and *Avery* (concurring) and stated in each that he agreed with the appellants' contention that the motion for severance should have been granted. However, he found that the joint trial was prejudicial only in the *Greene* case. In *Avery* he found no prejudice and stated that the fact that one of the defendants had been acquitted substantiated this finding.[63]

59. Waller v. Florida, 397 U.S. 387 (1970).
60. 254 S.C. 321, 327, 175 S.E.2d 227, 230.
61. 180 S.E.2d 179 (S.C. 1971).
62. 180 S.E.2d 190 (S.C. 1971).
63. The South Carolina Supreme Court has been consistently hesitant to overturn convictions in cases where the trial court has denied motions for severance of trials. *See,*

In *State v. Tillman*[64] the three defendants were charged and subsequently convicted of grand larceny. At their trial they unsuccessfully moved for severance on the basis that their defenses were antagonistic. On appeal the defendants asserted that denial of this motion had unduly prejudiced them. The supreme court rejected the defendants' assertions and affirmed their convictions. The supreme court stated that the denial of the defendants' motion for severance was a factual determination made by the trial court and would be disturbed only if absolutely without basis.[65] The supreme court then examined the trial court's actions in light of the entire record and found no abuse of the trial court's discretion.

VIII. JURY TRIAL

In *State v. Burgin*[66] the South Carolina Supreme Court considered the issue whether there was an absolute right not to be tried by a jury. The defendant was indicted for the offense of distributing obscene material and, prior to trial, moved to be tried without a jury. The court denied this motion, and the defendant objected, claiming he had a constitutional right to waive trial by jury. After his subsequent conviction, the defendant brought his appeal on the basis of this alleged right. The supreme court affirmed the conviction relying upon the United States Supreme Court case of *Singer v. United States*[67] wherein the Court found that no such right to waiver of jury trial existed.

IX. SPEEDY TRIAL

In *State v. Dukes*[68] the three defendants—Dukes, Watkins, and Horger—were arrested and charged with the offenses of housebreaking and grand larceny on December 8, 1969. They were originally to be

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e.g., State v. Britt, 235 S.C. 395, 111 S.E.2d 669 (1959), in which such a conviction was upheld even though the two defendants based their motions for severance on mutually hostile defenses.

64. 180 S.E.2d 209 (S.C. 1971).

65. State v. Prather, 251 S.C. 608, 164 S.E.2d 756 (1968), and State v. Britt, 235 S.C. 395, 111 S.E.2d 669 (1959).

66. 255 S.C. 237, 178 S.E.2d 325 (1970).

67. 380 U.S. 24 (1965). The courts of other states are divided as to whether such a right exists. Some do recognize the waiver of trial by jury as an absolute right exercisable by the defendant alone; others require the consent of the court, the proseution, or both. Note, *Constitutional Law: Criminal Procedure: Waiver of Jury Trial*, 51 CORNELL L.Q. 339 (1966).

68. 182 S.E.2d 286 (S.C. 1971).

tried jointly in the February 1970 term of the Sumter County circuit court but, at this time, Horger was not ready for trial. Dukes and Watkins were ready and were represented by appointed counsel, while Horger had retained his own attorney. Due to unavoidable circumstances, Horger was required to retain a different attorney shortly before the trial date. Therefore, he requested a continuance in order to properly prepare his defense. When the lower court granted Horger a continuance, Dukes and Watkins moved for severance and requested an immediate trial. This motion was denied, and the case was continued until the April 1970 term at which time all of the defendants were tried and convicted of the above charges. Dukes and Watkins subsequently appealed and contended that they had been prejudiced by the delay and had been denied their constitutional right to a speedy trial. They claimed that an immediate trial had been necessary to ensure the presence, as a witness, of one Durant, who had allegedly entrapped the defendants. While Durant was admittedly absent when the trial took place, the appellants did not complain at that time. They failed to request a continuance so as to later obtain Durant's presence, even though the trial judge implied that such a motion would have been accepted.

In response to the appellants' arguments the South Carolina Supreme Court stated:

> Whether or not a person accused of crime has been denied his constitutional right to a speedy trial is a question to be answered in the light of the circumstances of each case. A speedy trial does not mean an immediate one; it does not imply undue haste, for the state, too, is entitled to a reasonable time in which to prepare its case; it simply means a trial without unreasonable and unnecessary delay.[69]

The court then stated that in light of all the circumstances—namely, the relative brevity of the delay, the failure of the appellants to request a continuance, the fact that it was not the State that caused the delay, and the failure of the appellants to make any attempt to suggest what Durant's testimony would have been—if any impropriety was present it was due to the appellants. The court thus held that the appellants had not been denied their right to a speedy trial and affirmed their conviction.

69. *Id.* at 288, *citing* Wheeler v. State, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966).

X. TRIAL PROCEDURE

In *State v. Parker*[70] the defendant attacked the validity of his murder conviction on the basis of allegedly improper instructions made by the trial judge. The disputed statement was made at the close of the State's presentation of evidence. Immediately prior to a temporary recess, the trial judge gave the following instructions to the jury: "In your absence from the courtroom do not discuss this case with anyone, and don't discuss it with each other. In the event that anyone should attempt to talk to you about this case, find out who they are and report it to the court."[71] Counsel for the defendant immediately requested that the judge further instruct the jury "that they should not deliberate until all of the evidence is in."[72] The trial judge refused to give this instruction or amend its original statement.

The South Carolina Supreme Court held the defendant's attack to be without merit and affirmed the conviction. The court recognized that in all criminal proceedings the trial judge should instruct the jury that they should neither discuss the case before them with anyone nor form any opinion as to guilt, prior to the submission to them of the entire case.[73] Nevertheless, the supreme court held that the trial judge's instructions complied satisfactorily with this test, as the court found no prejudice or injury to the defendant as a result of the disputed instructions.

In the joint decisions of *McGautha v. California* and *Crampton v. Ohio*[74] the United States Supreme Court considered one of the basic issues of criminal trial procedure—does our conception of due process require a bifurcated trial? In the *Crampton* case the Court faced probably the most extreme example of when the existing system of allowing determination of guilt and punishment in the same trial might be suspect. Here the defendant had been found guilty of murder and sentenced to death in the same trial and by the same verdict.

The Court acknowledged that separate proceedings to determine criminal liability and punishment might theoretically be more desirable, but found that such procedures were not demanded by due process.

70. 255 S.C. 359, 179 S.E.2d 31 (1971).
71. *Id.* at 361, 179 S.E.2d at 32.
72. *Id.*
73. State v. Wells, 249 S.C. 249, 153 S.E.2d 904 (1967).
74. 91 S. Ct. 1454 (1971).

The Court, therefore, affirmed the convictions of both defendants and concluded its opinion by stating:

> [T]he Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of . . . criminology, or even those that measure up to the individual predilections of members of this Court . . . . From a constitutional standpoint we cannot conclude that it is impermissible for a State to consider that the compassionate purposes of jury sentencing in capital cases are better served by having the issues of guilt and punishment determined in a single trial than by focusing the jury's attention solely on punishment after the issue of guilt has been determined.[75]

XI. DIRECTED VERDICT

In *State v. Taylor*[76] the defendant was convicted of voluntary manslaughter and brought this appeal, contending that his motion for a directed verdict of acquittal had been improperly rejected. The defendant claimed that the only evidence presented against him by the State was the testimony of a co-defendant, and asserted that such testimony was too suspect to support a conviction. The South Carolina Supreme Court accepted as true, defendant's claim that the only incriminating evidence was the disputed testimony. Nevertheless, the court affirmed the conviction and the denial of the defendant's motion, and answered his contention that the uncorroborated testimony of an accomplice would not sustain a conviction by stating:

> Such is not the law in South Carolina. The weight to be given the testimony of an accomplice is for the fact finding body and if his uncorroborated evidence satisfies the jury of the defendant's guilt beyond a reasonable doubt, a conviction is warranted.[77]

In *State v. Fleming*[78] the two defendants were arrested and charged with rape. During the trial the defendants gave one account of the incident, while the alleged victim gave a completely contradictory version; her testimony was the only evidence of guilt offered by the State. After the completion of all the testimony, the defendants unsuccessfully moved for a directed verdict of acquittal. The case was then submitted

75. *Id.* at 1474.

76. 255 S.C. 147, 177 S.E.2d 550 (1970).

77. *Id.* at 149, 177 S.E.2d at 551, *citing* State v. Rutledge, 232 S.C. 223, 226, 101 S.E.2d 289, 290 (1957).

78. 254 S.C. 415, 175 S.E.2d 624 (1970).

to the jury, who found one defendant guilty of rape and the other guilty of a lesser assault offense. Both of the defendants appealed their convictions claiming that the trial court had erred in denying their motion for a directed verdict.

In response to the defendants' claims, the supreme court stated the following to be the test to be applied in ruling on such motions. All of the evidence must be viewed in the light most favorable to the State; the proper issue is the very existence of any incriminating evidence, be it direct or circumstantial, rather than the weight.[79] The court thereupon affirmed both convictions stating that "[a] motion for a directed verdict of not guilty is properly refused where the determination of guilt is dependent upon the credibility of the witness."[80]

The same issue—whether a motion for a directed verdict of acquittal should be granted when the State's case depends solely upon the credibility of a witness—was also faced and similarly ruled upon in the cases of *State v. Jordan*[81] and *State v. Fogle*.[82]

XII. SENTENCING

In the United States Court of Appeals case of *United States v. Gambert*,[83] the defendant was initially convicted in 1968 of interstate transportation of a stolen motor vehicle and sentenced to two years imprisonment. The defendant appealed and was granted a new trial due to procedural error committed in the first trial. At the second trial, the defendant was again convicted of the same offense, but this time he received a three year sentence. The defendant again appealed, this time attacking the propriety of his conviction and his sentence.

The court of appeals summarily concluded that the defendant's arguments questioning the validity of his conviction were without merit, and devoted its interest to the issue of the increased sentence. In deciding this issue the court of appeals stated that the recent United States Supreme Court decision of *North Carolina v. Pearce*[84] was con-

79. State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963), and State v. Rayfield, 232 S.C. 230, 101 S.E.2d 505 (1958).

80. 254 S.C. 415, 420, 175 S.E.2d 624, 626 (1970), *citing* State v. Marshall, 250 S.C. 448, 450, 158 S.E.2d 650, 651 (1968).

81. 255 S.C. 86, 177 S.E.2d 464 (1970).

82. 181 S.E.2d 483 (S.C. 1971).

83. 433 F.2d 321 (4th Cir. 1970).

84. 395 U.S. 711 (1969).

trolling. In *Pearce,* the Court stated that there was no absolute constitutional bar to imposing a more severe sentence after a retrial and reconviction of the same offense. The Court held, however, if the harsher sentence was imposed essentially to punish the defendant for bringing his appeal, then the sentence would not stand as the Court found this would have a chilling effect on the defendant's right of appeal. The circuit court found that the actions of the trial court in the second trial led to an implication that the defendant's sentence was increased in order to punish him for his alleged perjury in the retrial (the defendant had not testified in the first trial). The circuit court therefore affirmed the defendant's conviction but remanded the case for resentencing.

In *Picklesimer v. State*[85] the South Carolina Supreme Court interpreted a recent amendment to a South Carolina penal statute.[86] The statute set out at what point in a prisoner's sentence he would be eligible for parole. Prior to the latest amendment, the disputed language of the statute had read "shall have served at least one third of the term for which he was sentenced to serve."[87] This portion of the statute was amended to read "shall have served at least one third of the term."[88] The prisoner-petitioner had been sentenced to a term of confinement to be followed by a suspended term. He contended that his point of parole eligibility should be computed by considering only the period of confinement. The State, however, insisted that the entire sentence should be the basis of computing the point of eligibility. The lower court agreed with the prisoner, and the State appealed to the supreme court for a final determination. The supreme court stated that the omission of the phrase "for which he was sentenced to serve" in the amendment was significant and intended to yield the meaning urged here by the State. The supreme court thus overruled the lower court's interpretation and denied the prisoner's petition.

In *Tate v. Short*[89] the United States Supreme Court took another step toward eliminating the thirty dollars or thirty days type of sentence. Here the indigent defendant had been convicted of nine separate traffic offenses in the Corporations Court of Houston, Texas, and was

85. 254 S.C. 596, 176 S.E.2d 536 (1970).
86. S.C. CODE ANN. § 55-611 (1) (Supp. 1963).
87. S.C. CODE ANN. § 55-611 (1) (1962).
88. S.C. CODE ANN. § 55-611 (1) (Supp. 1963).
89. 401 U.S. 395 (1971).

fined a total of $425.[90] As he was unable to pay the required fine, he was ordered imprisoned for eighty-five days, each day being substituted for five dollars fine. After unsuccessful appeals to the Texas state courts, the defendant requested and was granted certiorari by the United States Supreme Court. The Court overruled the imprisonment sentence and held that such a practice of confinement based solely upon a defendant's indigency was in violation of the equal protection clause of the fourteenth amendment. In so holding, the Court further expanded its position taken the previous year in *Williams v. Illinois*,[91] where an indigent defendant had been sentenced to a combined jail sentence and fine, the jail sentence being the statutory maximum for the particular offense. In *Williams* after the defendant had completed his initial jail sentence, he was still unable to pay the fine and thus was held in confinement until he had worked off the fine at the rate of five dollars per day. The Court reversed the imposition of this additional sentence and held that, when the aggregate period of imprisonment exceeded the statutory maximum due to an involuntary nonpayment of a fine, this amounted to an unreasonable and unequal discrimination based solely on financial status.

Thus the *Tate* decision further questions the validity of laws that absolutely require imprisonment when a defendant is unable to pay the assessed fine South Carolina law[92] and practices would seem to be affected by *Tate*.

XIII. APPEALS

In *State v. Willard*[93] the South Carolina Supreme Court reaffirmed the existing law as to what can and what cannot be made the subject of an appeal from a criminal conviction. Here the defendant appealed from a conviction of making obscene telephone calls, on the grounds that prejudicial testimony had been admitted at the trial. However, the defendant made no objection, nor was any question ever raised as to the propriety of the testimony prior to the appeal. The defendant was represented at trial by an apparently capable counsel of his own choosing.

90. In Texas such offenses are punishable by fine alone.
91. 399 U.S. 235 (1970).
92. S.C. CODE ANN. § 17-574 (1962).
93. 255 S.C. 68, 177 S.E.2d 129 (1970).

The supreme court affirmed the conviction of the defendant without considering any possible prejudice from the disputed testimony. The court stated that it was well established that if objections are not made at the time of the introduction of evidence at trial, they cannot be raised for the first time on appeal.[94] Similarly, the court ruled that if an issue has not been presented to and therefore not ruled upon by the trial court, it will generally not be considered on appeal.[95]

The supreme court considered some of the basic elements of a defendant's right to appeal in *State v. Lagerquist*.[96] The defendants were convicted of criminal conspiracy on May 29, 1967, and thereafter gave timely notice of their intention to appeal. The defendants made an immediate request for a trial transcript, but as the trial consumed some nine days of court time it was recognized that the transcript would not be immediately forthcoming. Therefore, the trial judge issued a consent order extending the time for perfecting the appeal to sixty days after obtaining the transcript. The defendants were released on bail pending the outcome of the appeal. On December 11, 1969, the defendants moved to have their conviction set aside after having made periodic requests for a copy of the record. This motion was denied by the lower court. The transcript was finally completed and made available to the defendants on February 5, 1970. The defendants based their appeal on the denial of the motion to have their conviction set aside. They asserted that the extended delay in supplying them with a transcript violated their right to a speedy trial and denied them due process of law.

The supreme court stated first that neither the State nor Federal constitutional right to a speedy trial applied to appeals. The court further stated that while certain circumstances surrounding a delay in awaiting an appeal (*e.g.*, imprisonment) may be so onerous as to constitute a denial of due process; this was not the case here. Despite the length of the delay, the court found that the defendants still had not been deprived of an appeal. The supreme court thus rejected the defendants' arguments and affirmed the action of the lower court in denying the defendants' motion.

In *State v. Lee*[97] the supreme court was confronted with an exam-

94. State v. Lawhorn, 254 S.C. 275, 175 S.E.2d 233 (1970).

95. State v. Rutland, 43 S.C. 176, 133 S.E.2d 127 (1963). *See also* State v. White, 253 S.C. 475, 171 S.E.2d 712 (1969).

96. 254 S.C. 501, 176 S.E.2d 141 (1970).

97. 255 S.C. 309 178 S.E.2d 652 (1971).

ple of the "harmless error" rule. While not truly a rule of law, this premise stands for the proposition that not every mistake made at a criminal trial is significant enough to merit a new trial or a reversal of a decision. The defendant must also show that the error was materially prejudicial to him.[98] In *Lee* the defendant was charged with the murder of one Wilbur Vause. At the trial the State introduced a witness who testified as to the defendant's alleged threats to kill Wilbur Lynch. At this point the State interrupted the proceedings and claimed surprise and hurt from the testimony of this witness and requested that the court declare him hostile. The prosecutor claimed that prior to the trial the witness had told him that he had heard the defendant threaten to kill Wilbur Vause. The trial court granted the State's request and allowed the prosecutor to cross-examine its own witness over the defendant's objections. The defendant was subsequently convicted of the lesser offense of manslaughter. The defendant then brought this appeal and claimed that the lower court's actions in allowing the prosecutor to cross-examine his own witness was prejudicial error. The supreme court expressed doubt as to whether the trial court's actions were, in fact, error but found this point immaterial. The court stated that any testimony relating to alleged prior threats made by the defendant would be relevant only to the element of malice. Since the defendant was finally convicted of the offense of manslaughter, an offense devoid of malice by definition, any error made concerning this issue was necessarily harmless. Thus the supreme court rejected the defendant's argument and affirmed the conviction.

XIV. JUVENILE COURTS

The United States Supreme Court in *McKeiver v. Pennsylvania*[99] considered whether or not an accused juvenile was entitled to a jury trial in a delinquency proceeding. In this case the two parties concerned were fifteen and sixteen years old and faced possible confinement until their twenty-first birthdays. Although the Court recognized that the holding of *In re Gault*[100] required that a juvenile trial possess the essentials of due process and fair treatment, it nevertheless held that this was a "modified" due process which did not require a trial by jury as an absolute right.

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98. *See, e.g.*, Chapman v. California, 386 U.S. 18 (1967) and State v. Deas, 202 S.C. 9, 23 S.E.2d 820 (1943).

99. 91 S. Ct. 1976 (1971).

100. 387 U.S. 1 (1967).