South Carolina Law Review

Volume 24 | Issue 4 Article 4

1972

Criminal Procedure

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CRIMINAL PROCEDURE

I. RIGHT TO COUNSEL

The major issues which are presented in this section are the result of two recent decisions by the United States Supreme Court. In *Kirby v. Illinois*[1] the right to counsel was restricted when the majority of the court held that it was not required at pre-indictment lineups. The defendant, when stopped on the street for interrogation in relation to another crime, produced stolen credit cards and travelers' checks while searching for his identification. Kirby was arrested and taken to the police station where he was identified by the robbery victim. A pre-trial motion to suppress the identification testimony was denied and the defendant was convicted. He appealed contending that the *per se* exclusionary rule to identification testimony based upon a police station lineup (that was formulated in *United States v. Wade* and *Gilbert v. California*)[2] should be applied.

The majority of the court found that the right to counsel only attaches at or after the time that adversary judicial proceedings have been initiated against the defendant and that this absolute constitutional guarantee is not to be applied to a routine police investigation. The court, believing that the *Wade-Gilbert per se* exclusionary rule was meant to apply to only post indictment lineups, refused to extend the rule to pre-indictment confrontations.

Four Justices entered a very spirited dissent, holding that the *Wade-Gilbert per se* exclusionary rule was not restricted to post-indictment lineups and should be applied here to reverse the lower court. The dissent stated that there is grave potential for prejudice, intentional or not, in the pretrial lineup and unless the assistance of counsel is required, the trial itself may be reduced to a mere formality. The rationale discovered and applied by the majority was that the pre-indictment lineup is not a critical stage but a mere pre-

1. 40 U.S.L.W. 4607 (U.S. June 7, 1972).

2. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967). These cases held that a pretrial lineup was a critical stage of the criminal prosecution, and that in-court identifications based on a lineup where the defendant was unrepresented by counsel were *per se* excluded.

paratory step in the gathering of the prosecution's evidence. The dissent found the sole purpose of such confrontations to be for the accumulation of proof to buttress the conclusion by the police that the individual in custody was the offender.

While the court declined to apply the *Wade-Gilbert* rule retroactively in *Stovall v. Denno*,[3] it did not so much as hint that the rule applied only to confrontations after the accused had been indicted and ". . . at one point the Court summarized *Wade* as holding 'that the confrontation [for identification] is a critical stage, and that counsel is required at *all* confrontations.' "[4] Although *Wade* and *Gilbert* involved post-indictment lineups, the dissent found no indication that the decisions turned on that particular circumstance. The minority did not think the *Wade-Gilbert* rule required extension because they found it to cover all lineups. In closing the dissenting Justices stated:

> . . . [I]t is fair to conclude that rather than "declin[ing] to depart from [the] rationale" of *Wade* and *Gilbert* . . . the plurality today, albeit purporting to be engaged in "principled constitutional adjudication" . . . refuses even to recognize that "rationale." For my part, I do not agree that we "extend" *Wade* and *Gilbert* . . . by holding that the principles of those cases apply to confrontations for identification conducted after arrest. Because [prosecuting witness] testified at trial about his identification of petitioner at the police station show up, the exclusionary rule of *Gilbert* . . . requires reversal.[5]

The United States Supreme Court significantly extended the constitutional right to counsel in *Argersinger v. Hamlin*[6] when it held that absent a knowing and intelligent waiver, no person may be imprisoned unless he was represented by counsel at his trial. The defendant, an indigent, was tried and convicted for an offense punishable by imprisonment up to six months, a fine of $1000 or both, and given a 90 day jail sentence without the benefit of counsel. The lower court, in ruling on the right to counsel, based its decision on *Duncan v. Louisiana*[7] involving the right to trial by jury, holding that the right to court appointed counsel extends only to trials for non-petty offenses punishable by more than six months imprisonment.

3. 388 U.S. 293 (1967). The lineup involved in this case was pre-indictment.
4. 40 U.S.L.W. at 4614, *quoting from* 388 U.S. at 298.
5. 40 U.S.L.W. at 4615.
6. 40 U.S.L.W. 4679 (U.S. June 12, 1972).
7. 391 U.S. 145 (1968).

In reversing the lower court, the Supreme Court held that the right to counsel is not governed by whether or not a jury trial is required or by the classification of the offense. The court recognized the burden it was placing on the states and the judicial system but it felt that the serious repercussions, affecting a person's career and reputation, which result from even a short imprisonment justified its decision.

The right to counsel where loss of liberty is not involved was not considered, although there are serious situations, such as loss of drivers license, etc., in which the assistance of counsel could be most helpful. However, it seems imminent that the constitutional right to counsel will soon extend to trials in which the loss of liberty is not involved.

II. MISTRIAL

The Fourth Circuit Court of Appeals in *United States v. Walden*[8] held that the second prosecution of the defendants after the first trial was unnecessarily aborted constituted double jeopardy in violation of the Fifth Amendment. The trial judge had terminated the first trial without manifest necessity after two jurors observed one or more defendants in handcuffs at a recess. Counsel for the defendants suggested numerous curative measures, but the court declined them and refused further investigation into the matter. The trial judge based his action on *Holmes v. United States*[9] when he suggested that the defendants move for a mistrial. After the motion for mistrial was made by four defendants and the motion to sever by the other six was denied, the judge declared a mistrial.

For over a hundred years the development of the case law has been that the double jeopardy clause of the Fifth Amendment prohibits a second trial after the first has been aborted without the defendant's consent, unless there was "manifest necessity" for doing so.[10] However, the double jeopardy clause has not been considered an absolute bar to second trial because the defendants' rights were balanced against "the public's interest in fair trials designed to end in just judgments."[11]

8. 448 F.2d 925 (4th Cir. 1971).
9. 284 F.2d 716 (4th Cir. 1960).
10. United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).
11. Wade v. Hunter, 336 U.S. 684, 689 (1949).

In *Walden* the judge had acted only out of a sincere desire to protect the rights of the defendants and without intention to harass or oppress them when he originally declared the mistrial. At the second trial, the judge was doubtlessly led by a previous decision of the Fourth Circuit Court of Appeals[12] and he denied the plea of double jeopardy. Subsequent to his ruling, the United States Supreme Court made a significant departure from prior controlling case law in order to reduce the occasions on which criminal defendants may be made to face prosecution twice. In *United States v. Jorn*[13] the court held that the trial judge must not "foreclose the defendant's option (to have his trial completed by a particular tribunal) until a scrupulous exercise of judicial discretion led to the conclusion that the ends of public justice would not be served by a continuation of the proceeding."[14] The Fourth Circuit Court of Appeals thinks that *Jorn* all but eliminates a trial judge's motivation as an element of consideration in determining whether an aborted trial bars a second prosecution. The judge's motivation was beyond reproach, but he failed to exhaust all other reasonable possibilities before deciding to foreclose the defendants' option to proceed. In light of *Jorn* the court found that the scrupulous exercise of discretion, requiring the judge to seek out and consider all avenues of cure to avoid trial abortion, was not performed, therefore the six defendants who did not move for mistrial were entitled to a judgment of acquittal.

The harder problem was deciding what should be done about the four defendants who did move for the mistrial. The court certainly could not allow defendants to actively seek a mistrial and by doing so thereafter prevent any trial at all, but here the motion, albeit with the best of motivation, was solicited by the judge. By inquiring into the circumstances surrounding the entry of the motion, the Fourth Circuit court determined that actual "consent" to the declaration of a mistrial was not present. The suggestion to counsel to make the motion coupled with the refusal to adequately consider other possible cures, while not intimidating the defendants into consenting, destroyed any real effective option on their part. By pressing solicitation and by blocking other possible methods

12. United States v. Smith, 390 F.2d 420 (4th Cir. 1968).
13. United States v. Jorn, 400 U.S. 470 (1971).
14. *Id.* at 485.

of cure, the defendants' voluntariness in this action was diminished and they were put to an incomplete and uninformed choice. The court held that the mistrial was effectively declared as to all defendants prior to the ceremonial motions made by these four defendants and therefore the double jeopardy clause of the Fifth Amendment applied to everyone at the second trial.

In *State v. Tuckness*[15] the defendant, who was convicted of assault and battery of a high and aggravated nature and assault with intent to ravish, alleged that the trial judge committed error by failing to grant a mistrial after he had made comments to one of the defendant's witnesses. Upon seeing the psychiatrist smiling during cross-examination, the trial judge rebuked him in order to impress upon him the gravity of the trial.

This court has held previously that a motion for mistrial lies within the sound discretion of the trial judge,[16] and that his ruling will only be overturned when there is abuse of discretion amounting to an error of law.[17] The court on these facts quoted the following:

> Generally, the act of a judge in a criminal case in admonishing, rebuking, or warning a witness because of the latter's language or conduct is not such misconduct as to require a new trial. The court may reprove or rebuke a witness for levity or profanity, and it is proper for him to correct the volubility of a witness and admonish those who show hesitation, reluctance, or evasion.[18]

The court overruled this exception by the appellant because he failed to show either error or resulting prejudice. Judges have a great deal of discretion in this area because they have the duty of conducting the trial in an orderly manner and insuring that proper decorum is maintained during the trial.

III. DOUBLE JEOPARDY

In *State v. Greuling*[19] the South Carolina Supreme Court considered the question of whether conspiracy and accessory before the fact with respect to the same substantive crime

15. 257 S.C. 295, 185 S.E.2d 611 (1971).
16. Riddle-Duckworth Inc. v. Sullivan, 253 S.C. 411, 171 S.E.2d 486 (1969).
17. Crocker v. Weathers, 240 S.C. 412, 126 S.E.2d 335 (1962).
18. 58 AM. JUR. 2D *New Trial* §54 (1971).
19. 257 S.C. 515, 186 S.E.2d 706 (1972).

constitute separate offenses or only one offense. By a three to two decision, the court found that each offense charged involved proof of a necessary element which the other did not, therefore the offenses are separate and distinct so as to permit trial and conviction under the same indictment, although they arise out of the same transaction. The test applied by the majority in arriving at its decision is popularly known as the "same evidence" test.[20] Through the use of this test, the court found the offenses of criminal conspiracy and accessory before the fact constitute separate and distinct offenses. They stated that:

> In conspiracy, an unlawful combination must be shown, which is not necessary in establishing the offense of accessory before the fact. In accessory before the fact, it must be shown that defendant aided, counselled or encouraged the actual commission of the crime, which is unnecessary to the establishment of a conspiracy. Each offense therefore contains elements not necessary to the proof of the other.[21]

While the majority based its decision on United States Supreme Court decisions[22] for the proposition that the double convictions did not offend the double jeopardy clause of the Federal Constitution, the dissenting justices relied on the decisions of numerous state courts of last resort[23] in finding double jeopardy to be a bar to the prosecution of the two offenses. The dissent contended that the court should make an interpretation of the double jeopardy provision of the South Carolina Constitution, without detracting from the minimum standards for protection of individual and human rights established by the United States Supreme Court in its federal constitutional decisions. Also through application of the "same evidence" test, the dissent concluded that the offense of conspiracy contains no element which is not a necessary element of the offense of accessory before the fact, and

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20. In State v. Switzer, 65 S.C. 187, 43 S.E. 513 (1903) this court recognized that such rule, while generally useful and adequate, was not infallible. Research indicates that in more recent years the test has been subjected to a great deal of criticism by jurists and writers. Whitton v. State, 479 P.2d 302 (1970); People v. De Sisto, 27 Misc. 2d 217, 214 N.Y.S. 2d 858 (1961).

21. 257 S.C. at 524, 186 S.E.2d at 710.

22. Gavieres v. United States, 220 U.S. 338 (1911); Pinkerton v. United States, 328 U.S. 640 (1946); Pereira v. United States, 347 U.S. 1 (1954).

23. State v. Bell, 205 N.C. 225, 171 S.E. 50 (1933); State v. Muntzing, 146 W. Va. 878, 122 S.E.2d 851 (1961); State v. McNeil, 161 Wash. 221, 296 P. 555 (1931).

that prosecution for both was in violation of Article I, Section 17 of the South Carolina Constitution (double jeopardy clause).

In *State v. Hoffman*[24] the appellant was arrested and charged with (1) making excessive noise, (2) speeding, and (3) failure to stop when signaled to do so by an officer of the law. After an acquittal on the first two charges, the appellant was indicted and found guilty of the third offense. Hoffman interposed the plea of double jeopardy as a bar to the prosecution based on his previous acquittals. Even though the United States Supreme Court has decided that the double jeopardy clause of the federal constitution is applicable to the states through the Fourteenth Amendment, this holding does not affect the settled rule that the provisions against double jeopardy apply only to a second prosecution for the same act and crime, both in law and fact, for which the first prosecution was instituted.

The test generally applied is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first indictment. When two separate and distinct crimes are committed in the same transaction, the prohibition against double jeopardy does not apply just because the crimes are so closely connected in point of time that it is impossible to separate the evidence related to them. Since the evidence necessary to prove the offenses of speeding and making excessive noise would not be sufficient to convict the appellant of failure to stop when signaled by a law officer, double jeopardy would not act as a bar to the second prosecution.

IV. JUDGE AND SOLICITOR

In *State v. Addis*[25] the defendant was convicted of involuntary manslaughter and brought this appeal, contending that the participation by a private attorney in the prosecution of his case deprived him of equal protection of the law and was a denial of due process. Prior to the criminal trial the prosecuting attorney had represented the family of the deceased in settling a civil claim against the defendant, therefore Addis moved that the attorney not be permitted to

24. 257 S.C. 461, 186 S.E.2d 421 (1972).
25. 257 S.C. 482, 186 S.E.2d 415 (1972).

participate.[26] The court found the code sections cited by the defendant were designed to control the activities of the solicitor and that when a private attorney participates in the trial of a case and does only what a solicitor should do, the defendant has no right to complain. The court noted that the weight of authority appears to be in keeping with its decision that the participation of private counsel, hired by any persons interested in securing a conviction does not violate the constitution or any statutory or common law principle.

In *State v. Best*[27] the State appealed, questioning the action of the trial judge who had changed and suspended the sentences he imposed on the respondents after the term of court had terminated. The prosecution of the three defendants arose out of a riotous incident at the Lamar schools and they were tried and convicted. After the expiration of the term of court, the trial judge was approached concerning the modification of the respondent's sentences, and he agreed to keep the case under review and further stated that he would retain jurisdiction of the case. Subsequently the trial judge modified the sentences and then after reassignment to a different circuit, he further suspended the sentences, all of this being done without notification to the State.

Under the South Carolina judicial system the presiding judge in the circuit court loses jurisdiction with the adjournment of the term[28] therefore he is without authority to change, amend, or modify any sentence previously imposed. In deciding this case the South Carolina Supreme Court relied on its previous holding in *Shillito v. City of Spartanburg*,[29] quoting from it as follows:

26. S.C. CODE ANN. §17-1 (1962), provides:

> How criminal action prosecuted.—A criminal action is prosecuted by the State, as a party, against a person charged with a public offense, for the punishment thereof.

S.C. CODE ANN. §17-2 (1962), provides:

> Prosecuting officer not to accept fees, etc.—No prosecuting officer shall receive any fee or reward from or in behalf of a prosecutor for services in any prosecution or business which it is his offcial business to attend, nor be concerned as counsel or attorney for either party in a civil action depending upon the same state of facts.

27. 257 S.C. 361, 186 S.E.2d 272 (1972).

28. *Id.* at 275, *citing* State v. Thompson, 122 S.C. 407, 115 S.E. 326 (1922).

29. 215 S.C. 83, 54 S.E.2d 521 (1949).

> Any designated judge who has held court in another circuit than his own, has the power, notwithstanding his absence from such circuit, to decide all matters which have been submitted to him within such circuit, decide motions for new trials duly made, or perform any other act required by law or the rules of the court in order to prepare any case so tried by him for review in an appellate court.
>
> But the jurisdiction and power of a circuit judge goes no farther. The rule does not contemplate that after he has left the circuit, he shall decide any matter which has not been submitted to or heard by him while holding court in such circuit. No authority is given to him to hear and determine new matter, even though such matter may arise in the same case.[30]

Even though there was no motion pending before the judge to change the sentences at the time he left the circuit, the respondents contended that the time, place, manner, and extent to which sentences are suspended are exclusive matters for the trial judge, and the fact that he has left the circuit is no impediment to the exercise of this power by him. The court disagreed with this argument and based its holding on section 55-591 of the South Carolina Code of Laws, stating that the judge of any court of record with criminal jurisdiction is authorized to suspend the execution of the sentence only *at the time of sentence.*

The South Carolina Supreme Court, in the interest of the orderly administration of justice, reversed the orders of the trial judge and in concluding their opinion appropriately quoted from the United States Supreme Court:

> [W]e would be reluctant to hold that the court has a continuing power on his own initiative to grant what the defendant has not the right to go into open court and ask. To approve the practice followed in this case would almost certainly subject trial judges to private appeals and application by counsel or friends of one convicted. We think that expiration of the time in which relief can openly be asked of the judge, terminates the time within which it can properly be granted on the court's own initiative. . . .[31]

V. SENTENCING

In *Wood v. State*[32] the defendant, following his plea of guilty to two counts charging telephonic communications in violation of statute, was sentenced to five years on each count

30. *Id.* at 85, 54 S.E.2d at 522-3.
31. United States v. Smith, 331 U.S. 469 (1947).
32. 257 S.C. 179, 184 S.E.2d 702 (1971).

to run concurrently. Thereafter, he appealed contending the sentence constituted cruel and unusual punishment within the meaning of Article I, Section 19 of the South Carolina Constitution. The charge of unconstitutionality was addressed only to the sentence, not to the statute under which it was imposed. The court thereby avoided the issue as to whether the sentencing was unconstitutional and affirming the lower court concluded by stating:

> It is well settled in this State that this Court has no jurisdiction to disturb, because of alleged excessiveness, a sentence which is within the limits prescribed by statute unless: (a) the statute itself violates the constitutional injunction . . . against cruel and unusual punishment, or (b) the sentence is the result of partiality, prejudice or pressure or corrupt motive.[33]

The South Carolina Supreme Court in *McLamore v. State*[34] considered the issue of whether sentencing a defendant to the public works of the county or in the alternative to serve his time in the State Penitentiary was an unconstitutional delegation of judicial authority. This was a class action in which the appellant purported to litigate in behalf of all persons serving sentences of six months or more in the county prison camps of Richland County. The appellant did not seek release from confinement but wanted section 17-554 of the South Carolina Code of Laws[35] declared an unconstitutional delegation of judicial authority, contrary to the South Carolina Constitution.[36]

The appellant had been sentenced to labor upon the public works of Richland County for a period of nine years or be confined to hard labor at the State Penitentiary for a like period. After this it was the county supervisor, who in his sole

33. *Id.* at 182, 184 S.E.2d at 703.

34. 257 S.C. 413, 186 S.E.2d 250 (1972).

35. §17-554 provides:

> Able-bodied male convicts to work on county or municipal chain-gangs. In every case in which imprisonment is provided as the punishment . . . all able-bodied male convicts shall be sentenced to hard labor on the public works of the county . . . and in the alternative to imprisonment in the county jail or State Penitentiary at hard labor. . . .

36. S.C. CONST. art. V, §33, provides: "Sentence to labor on highways. Circuit courts and all Courts inferior thereto and municipal courts shall have the power, in their discretion, to impose sentence of labor upon highways, streets and other public works upon persons by them sentenced to imprisonment."

discretion, selected the prisoner to be assigned to the county prison camp. It is the selection of prisoners by the county supervisor which the appellant argued was an unconstitutional delegation of judicial authority in violation of the constitution. The appellant contended that the judge was required by the constitution to exercise a discretion and determine where he should serve his sentence, and that this authority could not be delegated.

In affirming the lower court, the supreme court held that the judge had not delegated his authority. The constitutional provision in question was construed to require the judge to use discretion in whether to sentence the appellant to hard labor, but the constitution does not impose upon the trial judge a duty beyond that imposed by statute. The court held that the legislature had conferred the duty upon the county supervisor of determining where the defendant's sentence would be served, and that it had not been delegated to him by the judge.

The next two cases deal with the sentencing of youthful offenders. In *Ballard v. State*[37] the nineteen year old defendant was on a two year probation period for a suspended sentence of breaking and entering when he pleaded guilty to burglary. Counsel for the defendant requested that sentencing be imposed under the Youthful Offender Act[38] but in view of the breach of probation the trial court refused.

On appeal the defendant contended that in the light of section 55-395(d) of the South Carolina Code of Laws (Youthful Offender Act),[39] the court abused its discretion in failing to sentence him as requested. The defendant made a novel argument in urging that the statute makes it obligatory upon the court to find specifically that a youthful offender will not derive benefit from treatment before the court may impose sentence under any other applicable penal provisions. The defendant further urged that the evaluation must be of the same quality as that provided by the reception and evaluation center under the Act,[40] and that the trial judge's cursory con-

37. 258 S.C. 91, 187 S.E.2d 224 (1972).

38. S.C. CODE ANN. §55-395 (Supp. 1969).

39. §55-395(d) "If the court shall find that the youthful offender will not derive benefit from treatment, then the court may sentence the youthful offender under any other applicable penal provision."

40. S.C. CODE ANN. §55-395(b) (Supp. 1969).

sideration was an abuse of discretion. The court rejected this argument in holding there is no requirement that the judge make specific factual findings or observations and evaluation as provided by statute. Having heard the defendant's admission of guilt and having seen his record this court found no abuse of discretion in refusing to impose sentence under the Youthful Offender Act.

Also in *State v. McKinley*[41] a sixteen year old defendant appealed his imprisonment in the Department of Corrections. The appeal was based on section 55-50.30 of the South Carolina Code of Laws which prescribes that no child under the age of seventeen shall be committed to any penal institution other than the Board of Juvenile Corrections or the Board of Juvenile Placement and Aftercare. The lower court declared this provision arbitrary and irrational due to the unavailability of adequately secure correctional facilities within the Board of Juvenile Corrections and thereupon did not find this statutory provision of binding effect upon the inherent sentencing power of that Court.

The supreme court reversed, finding the commitment contrary to the law, and declared that the court has no inherent authority to sentence anyone convicted of a crime to the South Carolina Department of Corrections without statutory authorization.

There were three cases decided during this reporting period which reversed the sentence of death because the statutory law had the effect of making it applicable only to those defendants who asserted their right to plead not guilty. In *Thomas v. Leeke*[42] the defendant was found guilty of rape and sentenced to death when the jury did not recommend mercy. On petition for habeas corpus the circuit court remanded the case for resentencing as if the jury had recommended mercy to the court and the State had appealed. The defendant argued that his constitutional rights to plead not guilty and to demand a jury trial were infringed upon by the combination of two sections of the South Carolina Code of Laws.[43]

41. 257 S.C. 82, 184 S.E.2d 80 (1971).

42. 257 S.C. 491, 186 S.E.2d 516 (1970).

43. S.C. CODE ANN. §16-72 (1962) provides:

> Punishment for rape or assault with intent to ravish.—Any person convicted of rape or assault with intent to ravish shall

As a result of a 1968 United States Supreme Court case,[44] our supreme court invalidated section 17-553.4 of the code in *State v. Harper*.[45] In *Jackson* the court said that ". . . the evil in the . . . statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly *encourages* them";[46] Thomas maintained that the South Carolina statutes held out a similar enticement in 1965 to him. In reversing the circuit court and rejecting the defendant's argument, the South Carolina Supreme Court held that the enactment of the statute had not affected the accused's right to avoid the death penalty. The court, finding that section 17-553.4 had conferred no new rights on the accused but was designed only to facilitate procedure, stated:

> Prior to 1962 in a capital case if the State elected not to pursue the death penalty, and the accused wished to enter a guilty plea, the procedure was to empanel a jury and instruct it to write the verdict "guilty with recommendation to mercy." From 1962 to 1968 the same result was accomplished, if the State did not wish to ask for the death penalty and the accused wished to plead guilty, by merely having him sign a guilty plea.
>
> Before the 1962 amendment and after the amendment an accused person's chances of avoiding the death penalty were the same. At both times he could enter a lesser plea only if the court accepted the same.[47]

The court ruled that the amendment had created no impermissible burden on Thomas and that the ruling on Jackson did not apply.

However, on writ of certiorari to the United States Supreme Court, this decision was reversed and remanded for sentencing as proposed by the circuit court. Since the Court

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suffer death unless the jury shall recommend him to the mercy of the court in which event he shall be confined at hard labor in the State Penitentiary for a term not exceeding forty years nor less than five years, at the discretion of the presiding judge. S.C. CODE ANN. §17-553.4 (1962) prior to invalidation provided:

> Sentencing in case of guilty pleas.—In all cases where by law the punishment is affected by the jury recommended the accused to the mercy of the court, and a plea of guilty is accepted with the approval of the court, the accused shall be sentenced in like manner as if the jury in a trial had recommended him to the mercy of the court.

44. United States v. Jackson, 390 U.S. 570 (1968).
45. 251 S.C. 379, 162 S.E.2d 712 (1968).
46. 390 U.S. at 583.
47. 257 S.C. at 497, 186 S.E.2d at 518.

reversed without opinion and cited *Jackson* as its basis it must be assumed that other sentences based on these statutes could be subject to reversal.

In *State v. Cannon*[48] and *State v. Hamilton*[49] the defendants were found guilty of rape and murder respectively and sentenced to death. These sentences were rendered under the statutes previously discussed, so in light of the reversal of *Thomas v. Leeke*[50] the South Carolina Supreme Court reversed the death sentences and remanded the defendants for sentencing as though the jury had returned a verdict with the recommendation of mercy.

VI. Bail

In *DeAngelis v. State*[51] the petitioner, while on a 120-day grace period by the Lexington County Court to get his business affairs in order before serving his sentence, was found guilty of three additional crimes. After an unsuccessful appeal the South Carolina Supreme Court and a subsequent denial by that court on a petition for rehearing and a motion for bond pending determination of a petition for certiorari to be filed with the Supreme Court of the United States, the petitioner sought bail pending a hearing on his plea for a writ of habeas corpus. While there has been a great deal of doubt through the years on this matter, the District Court of South Carolina concluded that the power to release on bail pending decision as to whether the writ should finally be issued was a judicial function of the court to be discharged in the exercise of judicial discretion.

The district court recognized that this power to grant bail should be sparingly exercised due to the compelling interests on the side of proceeding to execute the criminal judgment but also recognized that there could be situations with a substantial showing of countervailing circumstances to override or postpone that objective. This case is unique in that the merits of the petition for habeas corpus had not yet been determined, so based on the petitioner's prior record showing a disregard for the sanctity of person and property, the court

48. 257 S.C. 425, 186 S.E.2d 413 (1972).
49. 257 S.C. 429, 186 S.E.2d 419 (1972).
50. See n. 42 *supra*.
51. 330 F.Supp. 889 (D.S.C. 1971).

denied his request for bail. Even though the district court has recognized a petitioner's right to this form of relief, it appears that an unusually strong justification will be necessary to obtain it.

VII: JURY

In *State v. Hicks*[52] and *Thomas v. Leeke*[53] the defendants appealed, alleging they were denied equal protection of the law because the trial court excluded prospective jurors who stated opposition to capital punishment. The test laid down by the United States Supreme Court to guide lower courts in determining whether a prospective juror is qualified or not is:

> . . . a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.[54]

After a review of the voir dire examination of the jurors, the trial court determined that their opposition to capital punishment was such as to prevent them from rendering a verdict of guilty regardless of the evidence. Since the State as well as the defendant is entitled to a fair trial, excusing the jurors for cause within the narrowly prescribed grounds accepted by this court,[55] was constitutionally permissible.

VIII. MISCELLANEOUS

In *State v. Bennett*[56] the South Carolina Supreme Court settled the often-raised contention that it is prejudicial error to deny a defendant two trials, one on the question of guilt and the other for determination of sentence. The decision was based on a recent United States Supreme Court case[57] which held that a bifurcated trial is not required by the United States Constitution.

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52. 257 S.C. 279, 185 S.E.2d 746 (1971).
53. 257 S.C. 491, 186 S.E.2d 516 (1970).
54. *Id.* at 520, quoting from Witherspoon v. Illinois, 391 U.S. 510, 522 (1968).
55. State v. Atkinson, 253 S.C. 531, 172 S.E.2d 111 (1970).
56. 256 S.C. 234, 182 S.E.2d 291 (1971).
57. McGautha v. California, 402 U.S. 183 (1971).

The question of the right to pretrial discovery in criminal cases was considered in *State v. Flood.*[58] The defendant contended that the refusal to grant the discovery motion was a denial of due process and a denial of a fair trial. While sections 43-231 *et seq.* of the South Carolina Code of Laws entitle an accused person to a preliminary hearing in order to appraise the nature of the State's evidence, there are no other statutes or rules of court providing for discovery in criminal cases. The court found no right to pretrial discovery at common law and therefore found no error in the ruling of the trial judge.

IX. JUVENILE COURTS

The United States Supreme Court in *Ivan v. New York City*[59] considered whether the standard of proof, beyond a reasonable doubt, should be applied retroactively. On March 31, 1970 *In Re Winship*[60] held that proof beyond a reasonable doubt was among the essentials of due process and fair treatment that must be afforded the juvenile charged with a crime. The court, believing the main purpose of *Winship* was to overcome the aspect of a criminal trial that substantially impairs the truth finding function, held that *Winship* should be given complete retroactive effect.

ROBERT L. HALLMAN, JR.

58. 257 S.C. 141. 184 S.E.2d 549 (1971).
59. 40 U.S.L.W. 3586 (U.S. June 13, 1972).
60. 397 U.S. 358 (1970).