Criminal Law and Procedure

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CRIMINAL LAW AND PROCEDURE

I. SUBSTANTIVE LAW

In Winter v. Pratt the South Carolina Supreme Court refused to give a narrow reading to the state's general prohibition of the sale of liquor and held that a sale is a sale by any other name. The defendant was the operator of a motel cocktail lounge. Although "brown-bagging" was allowed, the lounge purported to offer free liquor to any patron who had neglected to bring his own supply. The patron was merely required to purchase a "set up" consisting of a glass, mixer, and ice. The price of the set up was the same to brown-baggers and free-loaders alike. A sign on the lounge wall characterized the free liquor as gifts made "in appreciation for your patronage."

The defendant was charged with violating the provisions of the Alcoholic Beverage Control Act forbidding all sales of liquor except those made in accordance with the Act. At the time only licensed wholesale and retail dealers could sell hard liquor. Although the defendant was not such a dealer, he argued that there had been no "sale" within the meaning of the statute and supported that contention by citing Colonial Stores, Inc. v. South Carolina Tax Commission. The Colonial Stores case involved the question of whether the distribution of trading stamps by a grocery store was a sale. Dicta in the case indicated that the court regarded the question of consideration as crucial in finding a sale under certain circumstances. The defendant then cited a Georgia case, Colonial Stores, Inc. v. Undercofler, in which the court expressly reached the question of consideration. The Georgia court decided that trading stamps were a cost of doing business, distributed in anticipation of good will and return business only, and that no recognizable consideration was received in return.

The defendant in Winter pointed out that the South Carolina court, in its Colonial Stores case, had commented favorably on the analysis of the Georgia court in the prior Colonial Stores case.

2. Id. at 402, 189 S.E.2d at 8.
5. 223 Ga. 105, 153 S.E.2d 549 (1967).
This comment, it was contended, indicated an acceptance by the South Carolina court of the Georgia court’s analysis of the sales question. The Georgia court found that the issuance of trading stamps was simply a method of promoting good will and return business, and that no sale had occurred. The defendant in Winter claimed the same motivation and argued that his case was thus “on all fours” with the Georgia Colonial Stores case.  

In response the State maintained that whether a sale had transpired involved a purely factual determination that could be reversed only if the finding of fact was “wholly unsupported by the evidence.” The Alcoholic Beverage Control Commission, which made the finding, considered the defendant’s gifts to be a mere scheme designed to disguise an actual sale. Citing two venerable Maryland cases, Franklin v. State and Archer v. State, the State sought to demonstrate that the defendant’s originality was no greater than his generosity. In both cases the Maryland court found the purported gifts of liquor to be thinly disguised sales.

Attacking the defendant’s analysis of consideration, the State also cited several cases holding that any benefit may constitute consideration. The good will and return business of customers, it was argued, were sufficient benefit to satisfy this requirement.

The supreme court, without mentioning either of the Colonial Stores cases, held that the money that passed as payment for the set ups was consideration for the liquor. The court also quoted two legal encyclopedias stating that a court will look behind any artifice employed to disguise an evasion of the liquor laws.

The defendant in State v. Muldrow was convicted of murder and armed robbery. He contended that he should have been sentenced as though he had committed only one offense, relying on section 17-553.2 of the South Carolina Code:

7. Id. at 7.
9. 12 Md. 236 (1858).
10. 45 Md. 33 (1876).
12. 258 S.C. at 403-04, 189 S.E.2d at 9; see 45 AM. JUR. 2d Intoxicating Liquors § 239 (1969); 48 C.J.S. Intoxicating Liquors § 244 (1955).
In determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses.\textsuperscript{14}

The court held, however, that this section was to be applied only in conjunction with section 17-553.1, which prescribes mandatory sentences for persons convicted of the third or fourth identical offense, and thus did not apply to the defendant.\textsuperscript{15}

In two cases the supreme court restated some basic common law doctrines. In \textit{State v. Collington}\textsuperscript{16} the court was confronted with an infanticide case. As in many such cases a crucial question was whether the infant had been born alive. Before testing the sufficiency of the evidence on that point, the court reaffirmed the principle that the two basic elements of the \textit{corpus delicti} for homicide—death of a human being caused by the criminal act of another—are insufficient to establish the \textit{corpus delicti} in cases of infanticide. Proof that the infant was born alive is also necessary.\textsuperscript{17}

In \textit{State v. Crowe}\textsuperscript{18} the court restated the felony-murder rule:

\begin{quote}
If two or more combined to commit an unlawful act... and, in the execution of that criminal act, a homicide is committed by one of the actors, as a probable or natural consequence of the acts done in pursuance of the common design, all present participating in the unlawful undertaking are as guilty as the one who committed the fatal act.\textsuperscript{19}
\end{quote}

The court thus upheld the murder conviction of one of the defendants because the murder had been committed during an armed robbery.

\section{Search and Seizure}

Both defendants in \textit{State v. Crowe}\textsuperscript{20} challenged the admis-

\textsuperscript{14} S.C. Code Ann. § 17-553.2 (1962).
\textsuperscript{15} Id. § 17-553.1.
\textsuperscript{16} 259 S.C. 446, 192 S.E.2d 856 (1972).
\textsuperscript{17} The medical testimony was held to be sufficient to establish this fact. Id. at 451, 192 S.E.2d at 858.
\textsuperscript{19} Id. at 265, 188 S.E.2d at 382.
\textsuperscript{20} 258 S.C. 258, 188 S.E.2d 379 (1972).
tion of the murder weapon as evidence on the grounds that it had been illegally seized. One of the defendants had gone home after allegedly committing a murder, and several hours later the police, having secured an arrest warrant, went there to arrest him. He was found in his bedroom and arrested. One pistol was on a chair by the bed, another was plainly visible under the bed, and some ammunition was on a nearby dresser. These articles were seized and introduced as evidence at the trial. The supreme court ruled that *Chimel v. California* was controlling because the guns were in plain view and within reach of the defendant, justifying the police in seizing them for their own protection.

One case in which the court disallowed evidence seized in the course of a warrantless intrusion was *State v. Vice.* In that case the police followed a trail of blood from the body of a murder victim, who had been dead for several hours, to the door of the defendant’s boarding house room. The door was locked with a padlock from the outside. At the request of the police, who had no search or arrest warrant, the landlady unlocked the door and let the policemen enter the defendant’s room where certain evidence was obtained.

The State, relying on *Warden v. Hayden,* contended that the exigencies of the situation compelled an immediate search of the room. In *Warden* a robber was trailed to a house and the police arrived within five minutes. As the Supreme Court said in *Warden,* “Speed here was essential.” The South Carolina court concluded that speed was not essential in the *Vice* case because the locked door clearly indicated that the murderer was not in the room. The court also rejected the contention that the introduction of evidence obtained by the unlawful search (blood spots on the floor which were of the same type as the victim’s blood) was harmless error. The blood spots trailed from the victim’s body

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21. 395 U.S. 752 (1969). In *Chimel* a search incident to an arrest was held to have exceeded constitutional limitations. Describing those limitations, the Court stated:

A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee’s person and the area ‘within his immediate control’ . . . . *Id.* at 763.


24. *Id.* at 299. A search or arrest warrant is of course unnecessary in a “hot pursuit” situation such as that in *Warden.* The pursuit in *Vice* was not even lukewarm.
into a room that only the defendant and his landlady could open. Such evidence "could hardly be held to be harmless." 25

In *Taylor v. State* 26 the court refused to reverse a conviction because of the admission of illegally seized evidence. In contrast to *Vice*, the questionable evidence in *Taylor* was not connected to the defendant and in no way tended to incriminate him. Rather, it bore on the guilt of a co-defendant who pleaded guilty at the conclusion of the State's case. Thus the evidence, even if wrongfully seized and admitted, was harmless. 27

Another case in which illegally seized evidence was held to be harmless was *State v. Shaw*. 28 The prosecutrix in that case claimed to have been raped by the defendants in the automobile of one of them and then abandoned on the road sans her pants. The police later found a pair of women's pants in a car belonging to one of the defendants, along with a wallet belonging to another defendant. These items were seized without a warrant and placed into evidence. The State relied on the "plain view" doctrine, but the court ruled without reaching that point, holding that the only facts established by the evidence were the presence of the prosecutrix in the car (in somewhat questionable circumstances) and the presence of one of the defendants in the same automobile. At trial all of the defendants admitted and testified to being in the automobile and there having sexual relations with the prosecutrix. "Appellants therefore freely admitted everything that the introduction of these items established, and no prejudice could have resulted from their admission in evidence." 29

In *State v. Miller* 30 the court considered the admissibility of evidence obtained during a search conducted without a warrant but with the consent of a third party. The consenting party in this

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25. 259 S.C. at 37, 190 S.E.2d at 512.
27. The fun and games made possible by the still-developing harmless error doctrine may be illustrated by comparing the facts in *Taylor* with those of *Whiteley v. Warden*, 401 U.S. 560 (1971). In *Whiteley* the admission of illegally seized evidence was held not to be harmless error because the only other evidence incriminating the defendant was the testimony of an accomplice. In South Carolina such a result may not be required, because this state has expressly rejected the theory that a conviction cannot stand solely on the testimony of an accomplice. The case was a prior appeal by the same appellant as in *Taylor*. *Taylor v. State*, 255 S.C. 147, 177 S.E.2d 550 (1970).
29. *Id.* at 239, 188 S.E.2d at 187. The "plain view" doctrine was announced in *Harris v. United States*, 390 U.S. 234 (1968), in which the seizure of an automobile registration card, plainly visible in the automobile, was held to have been proper.
case was the defendant's mother, and the area searched was the house in which she and the defendant lived. The record indicated that the mother consented to the search with full knowledge of her right to refuse. One piece of evidence was found in a box in the kitchen, and other items were brought from the defendant's room by the mother and given to the police.\textsuperscript{31} The court ruled that the defendant's right to be secure against unreasonable searches and seizures had not been violated. This holding would seem to be consistent with \textit{Bumper v. North Carolina},\textsuperscript{32} which indicated that a grandmother's consent to the search of a house that she owned, if made voluntarily, would be effective against a grandson who also lived there.

The facts in \textit{Miller} also seem to justify admission of the evidence under the \textit{Frazier-Katz} approach. In \textit{Frazier v. Cupp}\textsuperscript{33} consent by the defendant's cousin to the search of a jointly-used duffel bag was upheld on the theory that the defendant had assumed the risk of such consent and that, because the cousin had access to the bag, there was no "justified expectation of privacy" that would bring the case within the rule of \textit{Katz v. United States}.\textsuperscript{34} Although a son may not assume the risk of a search of his room by the police, it is not an unreasonable extension of \textit{Frazier} to find that he does assume the risk of his mother's consent to such a search.\textsuperscript{35}

\section*{III. Preliminary Hearing}

In \textit{State v. Funderburk}\textsuperscript{36} the court dealt with the consequences of a misapplication of section 43-232 of the South Carolina Code, which in certain circumstances provides for a preliminary hearing on the question of probable cause.\textsuperscript{37} The defendant

\begin{itemize}
\item \textsuperscript{31} Record at 126-36.
\item \textsuperscript{32} 391 U.S. 543 (1968).
\item \textsuperscript{33} 394 U.S. 731 (1969).
\item \textsuperscript{34} 389 U.S. 347 (1967).
\item \textsuperscript{36} 259 S.C. 256, 191 S.E.2d 520 (1972).
\item \textsuperscript{37} S.C. Code Ann. § 43-232 (1962) reads as follows:
\begin{quote}
Any magistrate who issues a warrant charging a crime beyond his jurisdiction shall grant and hold a preliminary investigation of it upon the demand in writ-
\end{quote}
\end{itemize}
was arrested upon a magistrate's warrant and made a timely written request for a preliminary hearing. The preliminary hearing was not held for several months, by which time an indictment had been handed down. The supreme court held that under the terms of section 43-232 the trial court had no jurisdiction of the case at the time of the indictment, and that this lack of jurisdiction could be raised at any point in the proceedings.

Another case arising under the same section of the Code raises some extremely interesting questions. In *State v. Wheeler* the court held that the defendant waived his right to a preliminary hearing by failing to make his request in writing. One issue in the case was whether a proceeding, which purported to be a preliminary hearing, met the requirements of the statute apart from the requirement of a written request. The parties argued this point extensively, but the court's holding disposed of it briefly. The chronology of the case is as follows:

The defendants were arrested on January 25, 1970. They were then either advised of their right to counsel, which they declined, or they were asked to sign an unexplained waiver, which they refused to do. The defendants asked for a preliminary hearing which was held on January 28, 1970. The presiding magistrate took the question of probable cause under advisement, and an indictment was returned in March, 1970. At about that time counsel for defendants were appointed. The defendants then escaped from custody and were not tried until March, 1971. More than ten days prior to the opening of the March, 1971 term of court, the defendants' counsel made a written request for a preliminary hearing, which was denied. They then moved to quash the indictment, alleging that no determination of probable cause had ever been made. At the hearing on this motion, the magis-

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*Compare Brief for Appellant at 1 with Brief for Respondent at 1.*
trate entered a statement reciting that he had found probable
cause on the basis of the 1970 hearing fourteen months earlier. This was the first time the defendants were informed of any such
determination. The motion to quash was denied, and the defen-
dants were tried and convicted of housebreaking and grand larceny.

On appeal the defendants argued that section 43-232 was
designed to safeguard the rights of the accused and should be
liberally read. Therefore, they contended that a ruling on proba-
ble cause should be made at the time of the hearing or shortly
thereafter. A portion of the statute was quoted that seemingly
requires a magistrate to determine “whether a probable case has
been made out . . . [or] whether the case ought to be dismissed
. . . and the [accused] discharged without delay.” Fourteen
months, it was argued, was exactly the delay that the statute was
designed to avoid. The State contended that the magistrate must
have determined probable cause because he forwarded the case
to the grand jury for an indictment. There is no requirement, said
the State, that a ruling be made in open court or entered into any
record, or even transmitted by the magistrate to the defendant,
as long as “the cold requirements of the statute are met.” The
question was thus reduced to whether an open and speedy ruling
on probable cause is required by section 43-232, or whether the
statute is satisfied by cavalier compliance with its provisions.
Because the court did not rule on this point in Wheeler, the
question remains unanswered.

IV. INDICTMENT

In State v. Ham the court considered the constitutional
requirements pertaining to the contents of an indictment. The
United States Constitution demands that a defendant “be in-
formed of the nature and cause of the accusation.” One of the
functions of an indictment is to convey this information. The test
of the sufficiency of an indictment, as applied in Ham, is whether

40. Record at 14.
41. Brief for Appellant at 2.
42. Id. at 1-2, quoting S.C. Code Ann. § 43-232 (1962) (emphasis added); set forth
in full at note 36 supra.
43. Brief for Respondent at 3.
45. U.S. Const. amend. VI.
the indictment contains all the necessary elements of the crime charged, thereby giving the defendant proper notice of the accusation. The court held that, in an indictment charging illegal possession of a drug, librium, the exact time of day at which the possession occurred need not be specified because it is not an element of the crime.

V. CONFESSIONS AND STATEMENTS OF THE ACCUSED

A. Voluntariness

In State v. Bellue the defendant was charged with murder, to which he confessed during police interrogation. He claimed to have been incapable of making a voluntary confession because he was under the influence of drugs at the time of the confession. The trial judge decided the evidence established that the confession was voluntary beyond a reasonable doubt. The supreme court held that such a factual determination can not be overturned on appeal if there is any evidence to support it.

In Clark v. State the defendant argued that his plea of guilty to manslaughter was involuntary. The State had in its possession a confession of murder that the defendant alleged had been illegally obtained. The defendant argued that he knew he would be convicted by the confession, and that his plea of guilty to the manslaughter charge was rendered involuntary by that knowledge. The court held that the voluntariness of the guilty plea had been decided by the trial court on the basis of a thorough examination of the defendant. Because there was evidence supporting this decision, the supreme court would not reverse. An identical ruling had been made several months earlier in McCall v. State.

In State v. Jordan the question was the voluntariness of a statement made in an allegedly wrongful custodial interrogation. The defendant in that case denied that he was given the Miranda

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46. 193 S.E.2d 121 (S.C. 1972).
47. The trial judge held a hearing on the question of voluntariness as required by Jackson v. Denno, 378 U.S. 368 (1964). The prosecution must prove at least by a preponderance of the evidence that the confession was voluntary. Lego v. Twomey, 404 U.S. 477 (1972). For further discussion of this issue, see Survey of Evidence infra.
49. 258 S.C. 469, 189 S.E.2d 6 (1972).
warnings before being questioned. The police, of course, claimed to have given the warnings. The defendant, upon being questioned by the trial judge, admitted that he had freely made certain inculpatory statements during the interrogation. The trial judge so ruled and admitted the statements into evidence. The supreme court held that the defendant’s testimony supported the trial judge’s ruling regardless of whether the Miranda warnings were given.

B. Miranda Warnings

Two other cases involving the Miranda warnings were resolved by the court through reliance on factual determinations made by the lower courts. In State v. Collington the defendant came to a police station accompanied by her father. The police testified that she was given the Miranda warnings, that she said she had already retained a lawyer but did not want him present, and that she wanted to confess to killing her baby. She then made a written confession that was subsequently admitted into evidence at the trial. The supreme court decided upon the basis of this testimony that the trial court was justified in admitting the confession.

In State v. Smith a thirteen-year-old boy was arrested for murder and given the Miranda warnings in the presence of his mother. Both the defendant and his mother waived his right to an attorney and volunteered to take a lie detector test. The defendant took the test and at its conclusion was told that the results indicated that he had not told the truth. By this time thirty minutes had passed since the Miranda warnings had been given. They were not repeated, and the defendant in the presence of his mother confessed to the crime charged. This confession was introduced as evidence at the trial. The trial judge, however, refused to allow it, stating that the Miranda warnings should have been repeated as a matter of law. On appeal by the State, the supreme court reversed the trial judge, holding that the question of whether the Miranda warnings should have been repeated is one of fact, not law. Thus the question should have been decided by the trial judge only after an inquiry into the surrounding circum-

51. 259 S.C. 446, 192 S.E.2d 856 (1972).
52. Brief for Appellant at 7-11.
53. 192 S.E.2d 870 (S.C. 1972).
stances. This decision seems to be in line with numerous cases involving different factual situations.\textsuperscript{54}

C. Self-Incrimination

On the morning of March 16, 1968, an unidentified male called the Charleston Police Department and reported that a man had been hurt on George Street. This call was automatically recorded. A body was discovered, and Lawrence Vice, Jr., the defendant in \textit{State v. Vice},\textsuperscript{55} was charged with the murder. At his trial Vice was required to speak into a tape recorder out of the jury's presence so that his recorded voice could be compared by the jury with the recording made of the phone call to the Police Department. The supreme court on appeal held that requiring Vice to submit to the second recording, and admitting this recording as evidence, did not infringe upon Vice's privilege against self-incrimination. The court thus apparently abandoned a long-standing rule of evidence in South Carolina.

Many courts and writers have argued that the privilege against self-incrimination applies only to "testimonial or communicative" evidence.\textsuperscript{56} This approach has been followed by the United States Supreme Court in \textit{Schmerber v. California},\textsuperscript{57} upholding the forceful taking of a blood sample. More recently, in \textit{United States v. Wade},\textsuperscript{58} the Court decided that a defendant may be compelled to speak aloud in a line-up for the purpose of voice identification by witnesses to the crime. \textit{Wade} was relied upon by the State in \textit{Vice} and cited by the South Carolina court to support its holding.\textsuperscript{59}

Prior to \textit{Vice}, however, South Carolina had not specifically adopted the "communicative" approach of \textit{Schmerber} in this area. The late Professor James Dreher summarized the state's rule in his widely-used treatise on South Carolina evidence law: "South Carolina . . . has drawn the line between active conduct and passive. Under our decisions, a suspect may be required to

\textsuperscript{54} See, e.g., Maguire v. United States, 396 F.2d 327 (9th Cir. 1968). The question should be viewed in terms of the purposes of \textit{Miranda}. Resolution of the question should thus be based on the duration of effectiveness of the first warning in each case.

\textsuperscript{55} 259 S.C. 30, 190 S.E.2d 510 (1972).

\textsuperscript{56} See, e.g., C. McCormick, EVIDENCE § 124 (2d ed. 1972).

\textsuperscript{57} 384 U.S. 757 (1966).

\textsuperscript{58} 388 U.S. 218 (1967).

\textsuperscript{59} 259 S.C. at 38, 190 S.E.2d at 513.
allow his fingerprints to be taken, or his body examined, . . . but he may not be required to use his voice for identification."\(^{60}\)

*State v. Taylor*\(^{61}\) was cited by the defendant in *Vice* for the proposition that an accused may not be forced to use his voice for identification.\(^{62}\) *State v. Griffin*\(^{63}\) was cited as articulating the "active-passive" test, and for illustrating the "utmost caution" historically exercised by the South Carolina court when deciding questions of self-incrimination.\(^{64}\) In *Griffin* it was held that at trial the police could remove the defendant's shoe and fit it into an incriminating, molded footprint, but that the defendant could not be required to do so himself.

Neither *Taylor* nor *Griffin* was distinguished or even mentioned by the State's brief in *Vice*. Neither case was discussed by the court in its opinion. Thus, though neither case has been expressly overruled, the holding in *Vice* leads to the unmistakable conclusion that they are no longer the law in South Carolina and that the "communicative" test of the *Schmerber* decision has been adopted.

One federal court case in South Carolina dealt with the problem of self-incrimination. In *United States v. 20 "Dealers Choice" Machines & Coin Contents of $3.50*,\(^{65}\) the defendants were charged with failure to register illegal gambling devices. The district court held that the very act of registration would have been an incriminating admission and that such self-incrimination can not be required.

### VI. Lineups

In *State v. Williams*\(^{66}\) the defendant was pointed out from the witness stand by the victims of two crimes. On cross-examination one witness admitted that the defendant had previously been shown to her through a two-way mirror at police headquarters. The other witness testified that he had identified the defendant at a pre-trial lineup where no counsel was present.

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63. 129 S.C. 200, 124 S.E. 81 (1924).

64. Brief for Appellant at 28.


In *United States v. Wade*\(^7\) the United States Supreme Court held that an accused is entitled to the presence of counsel at a lineup. It was also held that a pre-trial identification, made in the absence of counsel and affirmed on the witness stand, may render the in-court identification inadmissible as "fruit of the poisonous tree." When such an identification is made, the government must establish by clear and convincing evidence that the in-court identification is of independent origin and untainted by an unlawful prior confrontation. This showing should be made before the trial judge and out of the jury's presence.\(^6\)

In *Williams* no such showing or determination was made. Upon objection by the defense attorney at trial, the judge merely noted the objection and allowed the testimony to be given. The supreme court, citing *Wade*, remanded the case to the trial court for a hearing on the independence of the in-court identifications. If the identifications were found to have been tainted by the pre-trial confrontations, the defendant was entitled to a new trial.

In *State v. Miller*\(^6\) the defendant was identified at a properly conducted lineup by a witness to the crime. While testifying about the lineup identification, the witness stated to the jury that all the participants in the lineup had worn prison uniforms. The defendant contended that such testimony improperly implied that he had been convicted of another crime prior to the line-up. This implication, he argued, created prejudice against him in the minds of the jurors, thereby denying him the right to a trial by a fair and impartial jury. The supreme court rejected this contention, reasoning that the logical inference from the witness' testimony was merely that the defendant was being held for trial on the crime charged.

**VII. Trial**

**A. Venue**

The defendants in *United States v. Walden*\(^7\) had committed a series of robberies of federally insured banks in several states. An indictment of numerous counts was returned against the de-

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67. 388 U.S. 218 (1967). The Court in *Wade* based the right to counsel upon the right to confrontation.
68. *Id.*
69. 258 S.C. 572, 190 S.E.2d 23 (1972).
70. 464 F.2d 1015 (4th Cir. 1972).
fendants, and a trial on all counts was held in the District of South Carolina. The Court of Appeals for the Fourth Circuit held that venue for counts of the indictment charging robbery of banks in states other than South Carolina was improperly laid in South Carolina, and that the defendants were entitled to trials in the states in which the various robberies took place.

B. Security

In *State v. Smith*\(^1\) the court considered the effect of extraordinary security precautions in the courtroom. The trial judge had received information that guns would be brought into court during a specific trial and used against the court and the jurors. As a precaution prospective jurors were told to assemble in a room not normally used for that purpose. Three police officers were stationed at the courtroom door, but only one was in uniform. Persons entering the courtroom were searched outside the door, unseen by the jurors. From seven to ten police officers were inside the courtroom. Two, the number regularly in attendance, were in uniform as usual. The rest wore plain clothes. The defendant objected to these precautions and moved for a continuance, which was denied. The supreme court confirmed the judge’s decision, holding that such precautions were reasonable under the circumstances, were taken in the most unobtrusive manner possible, and in no sense deprived the defendant of a fair trial.

C. Continuance

Another basis for the continuance requested in *Smith* was the failure of one of the defendant’s alibi witnesses to appear at the trial. The witness had been subpoenaed, and a bench warrant was issued when she failed to appear. Because she could not be located, the solicitor and counsel for the defendant prepared a statement stipulating the witness’ anticipated testimony, and this statement was read to the jury. The defendant’s motion for a continuance until the witness could be found was denied by the trial judge. The supreme court on appeal held that a motion for a continuance is addressed to the discretion of the trial judge and that in this instance no abuse of that discretion was shown.\(^2\)

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\(^1\) 259 S.C. 309, 191 S.E.2d 638 (1972).

\(^2\) Id.
In *State v. Bennett* the defendant made a motion for a continuance at the start of the trial. Although he had retained an attorney, he said that he wanted to hire William Kunstler to defend him. On appeal from the denial of the motion for continuance, the supreme court stated that the defendant's constitutional right to counsel had been fully met by "diligent and talented" counsel, and that no grounds for a continuance existed which would justify a reversal of the lower court's ruling.

The defendant in *State v. Muldrow* was charged with murder and armed robbery. He sought to establish an alibi by the testimony of several witnesses that he had been placing a long-distance telephone call at the time of the crime. To support this alibi, he attempted to introduce records of the telephone company, but those records did not become available until Monday, October 11, 1971. The trial concluded on Friday, October 8, 1971. The defendant moved for a continuance until the evidence could be obtained. The motion was denied, however, and the defendant alleged error.

The State contended that the motion had been addressed to the trial judge's discretion. It was pointed out that the jury was sequestered and that the evidence, if obtained, would not have established either who placed the alleged telephone call or the exact time of the call. The supreme court held that, in view of the probable weight of the evidence and the potential inconvenience to the jury, the denial of the continuance was not an abuse of discretion by the trial judge.

In *State v. Ham* the court ruled that a long delay did not deny the defendant's right to a speedy trial because the delay was caused by the defendant's own requests for removals and continuances.

**D. Consolidation and Joinder**

In *State v. Crowe* two defendants, Crowe and Wright, were tried together for a single murder. The testimony indicated that

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73. 259 S.C. 50, 190 S.E.2d 497 (1972).
74. Id. at 54, 190 S.E.2d at 498.
75. 259 S.C. 415, 192 S.E.2d 211 (1972).
76. Brief for Appellant at 3.
77. Brief for Respondent at 2.
Crowe had shot the victim. Wright was charged with murder under the felony-murder doctrine.\textsuperscript{80} When Wright refused to testify by asserting his privilege against self-incrimination, Crowe unsuccessfully requested severance. The supreme court held that the refusal to sever was not error. Before error will be found some prejudice arising out of the joint trial must be shown. In the court's view, Crowe failed to demonstrate that Wright would have testified at a separate trial, or that such testimony, if forthcoming, would have exonerated Crowe.

In \textit{State v. Taylor}\textsuperscript{81} the supreme court rejected one defendant's contention that a co-defendant's change of plea to guilty, after the trial was underway, denied the defendant a trial before a fair and impartial jury. The court found no facts indicating that the jury was biased because of the change of plea.

\textbf{E. Evidence}

In \textit{State v. Wheeler}\textsuperscript{82} the State's case against the defendants was built entirely on circumstantial evidence. The supreme court in upholding the conviction set out the requirements for circumstantial proof: "Where circumstantial evidence is relied upon by the state in a criminal case, there must be positive proof of facts and circumstances which, taken together, warrant inferences of guilt to a moral certainty, to the exclusion of any other reasonable hypothesis."\textsuperscript{83}

Charged with voluntary manslaughter, the defendant in \textit{State v. Washington}\textsuperscript{84} asserted that he had killed the victim in self-defense. He was convicted and appealed, contending that there was no evidence contradicting his assertion and that a directed verdict should have been granted. The supreme court in affirming held that, even when testimony is uncontradicted, reasonable men can disbelieve it and decide that another course of events, known to be more natural from experience, is more probable. This possibility, when viewed in light of the burden upon the defendant to establish self-defense, justified submission of the case to the jury.

\begin{footnotesize}
\textsuperscript{80} See note 18 \textit{supra} and accompanying text.
\textsuperscript{81} 258 S.C. 369, 188 S.E.2d 850 (1972).
\textsuperscript{82} 193 S.E.2d 515 (S.C. 1972).
\textsuperscript{83} \textit{Id.} at 519.
\textsuperscript{84} 193 S.E.2d 509 (S.C. 1972).
\end{footnotesize}
In State v. Taylor\(^\text{85}\) the defendant voluntarily took the stand at his trial. On cross-examination the prosecutor asked why the defendant had made no exculpatory statement while under interrogation after his arrest. On appeal, the supreme court stated that the defendant had waived his privilege against self-incrimination by taking the stand. Inquiry into the defendant's failure to make a prior statement was therefore a legitimate attack on his credibility which did not undermine the right to remain silent during police interrogation.\(^\text{86}\)

**F. Verdict**

The indictment in Young v. State\(^\text{87}\) charged robbery and larceny. The defendant was found guilty of robbery, but no specific verdict was returned on the charge of larceny. The defendant appealed on the grounds that the verdicts were inconsistent, because the absence of a verdict on the larceny charge amounted to a verdict of not guilty. The court pointed out that robbery is merely larceny with an additional element.\(^\text{88}\) Thus, because robbery includes all the elements of larceny, the court reasoned that the jury necessarily found the defendant guilty of larceny as a condition precedent to finding him guilty of robbery. Failure to announce this preliminary determination did not, in the court's view, make the verdicts inconsistent.

A similar point was raised in State v. McFadden.\(^\text{89}\) The defendant was charged with larceny and housebreaking. The evi-

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86. The exact basis of this holding is somewhat obscure. Defendant's waiver of the fifth amendment privilege at trial was not the point in dispute. The crucial question presented by this case is whether a penalty can be placed at trial upon the exercise of a constitutional privilege before trial. It cannot be disputed that Miranda firmly established the right to remain silent during a pre-trial interrogation. This right is constitutionally based. Miranda v. Arizona, 384 U.S. 436 (1966). In Griffin v. California, 380 U.S. 609 (1965), the Supreme Court expressly barred comment by the prosecutor on the defendant's exercise of the fifth amendment privilege at trial. Such comment, it was held, amounts to a penalty upon the exercise of the constitutional privilege. Although no case has arisen upon the exact facts in Taylor, the analogy to Griffin is obvious. There seems to be no reason to permit a penalty, by prosecutorial comment, upon the exercise of a constitutional right to remain silent before trial, while the same penalty, through the same means, is expressly forbidden when placed upon the exercise of the privilege during trial.
88. "Robbery is larceny from the person by violence or intimidation. It is both an offense against the person and an offense against property." R. PERKINS, CRIMINAL LAW 190 (2d ed. 1969) (footnotes omitted).
89. 193 S.E.2d 536 (S.C. 1972).
dence indicated that he drove the "getaway car" while some accomplices did the actual "dirty work." There was a dispute as to the defendant's knowledge of his accomplices' precise intentions when he let them out of the car. Because of the ambivalence of the evidence on this point, it was held that the jury could reasonably conclude that the defendant knew his friends intended to commit larceny but did not know that they intended to break into a house to do it. A verdict of guilty of larceny was therefore not inconsistent with a verdict of not guilty of housebreaking.

G. Sentence

In State v. Crowe90 the supreme court rejected the contention that the death penalty was cruel and unusual punishment. Two subsequent cases,91 however, were returned to the lower courts for resentencing to comply with Furman v. Georgia,92 in which the United States Supreme Court held the death penalty unconstitutional.93

VIII. Appeal

Several cases arose during 1972 in which objections were held to have been waived. In State v. Taylor94 the prosecution had questioned the defendant about some prior parole violations. The court held that, even when this line of questioning is improper, the error is waived by the defendant's failure to object at trial.

In State v. Jordan95 the court refused to consider grounds for

90. 258 S.C. 258, 188 S.E.2d 379 (1972). See also note 18 supra and accompanying text.
91. State v. Bellue, 193 S.E.2d 121 (S.C. 1972); State v. Gibson, 259 S.C. 459, 192 S.E.2d 720 (1972). In Bellue the supreme court also indicated that the doctrine of in favorem vitae is no longer available. The court has historically applied the doctrine in cases where the appellant had been sentenced to death. In such cases questions not properly before the court due to waiver, etc., would be considered. The Furman case, however, has made the doctrine inapplicable.
92. 408 U.S. 238 (1972).
95. 258 S.C. 240, 188 S.E.2d 780 (1972).
an objection which had not been relied on at the trial. In the same case cross-examination of a witness on a point to which an objection had previously been made, without reservation of the objection, was held to be a waiver of the objection.

The sword cuts both ways, however, as was demonstrated by State v. Hall\textsuperscript{96} in which it was held that an objection is waived if not reserved before redirect examination on the point challenged.

In Sellers v. State\textsuperscript{97} disciplinary proceedings resulted in loss by some inmates at the state penitentiary of good conduct benefits and segregation of those inmates in maximum security cells. Relying on a California federal court case, Cluchette v. Procunier,\textsuperscript{98} the inmates contended that the disciplinary proceedings could result in a "grievous loss," and were therefore subject to due process requirements. The supreme court apparently rejected this argument, reasoning that the actions of the prison officials had been made in good faith and in pursuance of order and discipline within the prison. Such actions, it was held, are not subject to judicial review. The underlying question in Sellers, however, was not decided by the court. That question is, at what stage do disciplinary proceedings conducted by state prison officials become subject to due process requirements. Sellers did not meet the question squarely, and the United States Supreme Court has not ruled on the point.

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\textsuperscript{97} 193 S.E.2d 513 (S.C. 1972), \textit{cert. denied}, 93 S. Ct. 967 (1973). Sellers is currently seeking habeas corpus in federal district court.

\textsuperscript{98} 328 F. Supp. 767 (N.D. Cal. 1971). The "grievous loss" test is adapted from Goldberg v. Kelly, 397 U.S. 254 (1969), and must be judged according to the potential rather than the actual loss. \textit{Goldberg} involved the necessity of a hearing before termination of welfare payments.