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Criminal Law

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CRIMINAL LAW

I. MENTAL COMPETENCY OF THE DEFENDANT

In *State v. Cannon*,[1] the defendant was convicted of murder after basing his defense on criminal insanity. Defense counsel had requested that the trial judge charge the jury on the "federal rule"[2] of insanity as a defense, but the charge given was essentially the one that South Carolina courts have employed since 1886[3]—the *M'Naghten* rule.[4] Cannon excepted to the charge, claiming denial of his rights to due process and equal protection under the United States Constitution. The South Carolina Supreme Court, however, affirmed his conviction, stating that:

> We are aware of the alternatives which some courts have adopted, but are not convinced that the other rules set forth a better formula for determining whether a person accused of crime should be excused because of his mental condition. It should be comforting to those who would attack the M'Naghten Rule to realize that a layman jury, regardless of the rule recited, normally takes a common sense approach and determines whether the accused person is, first, guilty or not guilty, and if guilty, whether his mental condition is such that he ought to be

1. 260 S.C. 537, 197 S.E.2d 678 (1973), *cert. denied,* 42 U.S.L.W. 334 (U.S. Nov. 20, 1973).

2. MODEL PENAL CODE § 4.01 (Proposed Official Draft, 1962).

> §4.01. Mental Disease or Defect Excluding Responsibility.
>
> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.
>
> (2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

3. State v. Bundy, 24 S.C. 439, 58 Am. Rep. 262 (1886); *See also* State v. Thorne, 239 S.C. 164, 121 S.E.2d 623 (1961), *cert. denied,* 368 U.S. 979 (1962); State v. Allen, 231 S.C. 391, 98 S.E.2d 826 (1957).

4. M'Naghten's Case, 10 Cl & Fin. 200, 8 Eng. Rep. 718. The jury was instructed that it was to decide whether at the time of the crime the defendant "had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act" and was to be found guilty if he was "in a sound state of mind." The majority of the justices stated, "[T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong." 8 Eng. Rep. at 722. *See also* Wingo, *Squaring M'Naghten With Precedent—An Historical Note,* 26 S.C.L. REV. 81 (1973).

> excused of the crime because of his mental condition. We adhere to the M'Naghten Rule.[5]

The *M'Naghten* test of responsibility is recognized in the overwhelming majority of American jurisdictions, though it is supplemented in many areas by the so called "irresistible impulse" test.[6] Both standards, however, have drawn voluminous criticism from judges and commentators alike.[7]

The *M'Naghten* test is generally condemned on two grounds. First, critics argue that insanity alters the entire personality of the patient rather than merely the cognitive faculties whose absence courts have deemed critical in applying *M'Naghten*'s requirement that the defendant "know" the difference between right and wrong.[8] Second, the critics contend that this misconception in the *M'Naghten* test makes it inconsistent with the purposes of criminal justice because it fails to exclude from punishment many cases of advanced mental disorder that are not appropriate for the application of criminal sanctions.[9] The *M'Naghten* test considers impairment of cognition and does not deal with impairment of volitional capacity, but modern psychiatry seems to demand that the two be considered equally. This problem could be avoided in South Carolina by the adoption of the so called "federal rule," first promulgated in 1962 by the American Law Institute's Model Penal Code.[10] While *M'Naghten* requires a *complete* impairment of capacity wherein the defendant must not "know" the difference between right and wrong, the ALI test requires only a *substantial* impairment of capacity.[11] Thus the

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5. 260 S.C. at 547-48, 197 S.E.2d at 682.

6. One authority has defined the irresistible impulse test as follows:

> Broadly stated, this [test] requires a verdict of not guilty by reason of insanity if it is found that the defendant had a mental disease which prevented him from controlling his conduct [at the time the crime was committed]. Such a verdict is required even if the defendant knew what he was doing and that it was wrong, the M'Naghten test and the "irresistible impulse" test are alternative—*i.e.* the defendant's mental condition need not satisfy both the M'Naghten *and* "irresistible impulse" tests. W. LAFAVE & A. SCOTT, CRIMINAL LAW at 283 (1972).

7. *See, e.g.*, A. GOLDSTEIN, *M'Naghten, The Stereotype Challenged* in CRIME, LAW AND SOCIETY 387 (1971), reprinted from A. GOLDSTEIN, *The Insanity Defense* 45-66 (1967); 47 N.Y.U.L. REV. 962 (1972); *See also* ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-53 REPORT 80 (1953); *but see* Livermore & Meehl, *The Virtues of M'Naghten*, 51 MINN. L. REV. 789, 800 (1967). *See also* Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954); United States v. Currens, 290 F.2d 151 (3d Cir. 1961); United States v. Chandler, 393 F.2d 920 (4th Cir. 1968).

8. Diamond, *From M'Naghten to Currens and Beyond*, 50 CAL. L. REV. 189 (1962).

9. F. LINDMAN & D. MCINTYRE, THE MENTALLY DISABLED AND THE LAW 337 (1961).

10. *See* note 2 *supra* and accompanying text.

11. *Id.*

ALI test would encompass those defendants with significantly impaired cognitive *or* volitional capacity.

In writing the Model Penal Code, the draftsmen assumed that a test of responsibility should give expression to an intelligible principle which they were unable to find in the *M'Naghten* test. The requirement of "substantial capacity" in the ALI test should harmonize legal principles and the underlying facts by recognizing that there are certain persons with rudimentary "knowledge" of right and wrong whose mental condition renders them incapable of appreciating criminality in choosing a particular course of action. The legal test of insanity, therefore, must focus on the causal relationship between the mental disorder and the conduct of the accused. Thus, the "substantial capacity" standard in the ALI test better corresponds to legal and psychiatric realities than the *M'Naghten* rule. By requiring a degree of capacity more realistically ascertainable by medical standards, the ALI test should make it considerably easier to obtain effective testimony from competent psychiatric experts. The inflexible *M'Naghten* rule virtually assures the decision of cases in which neither experts nor lay juries can actually ascertain beyond a reasonable doubt that the defendant possessed the prescribed degree of capacity at the time of the alleged act. Minimizing such cases through application of the ALI test is a worthy goal for practical as well as theoretical reasons. Indeed, as Professor Allen has stated:

> The truth is that probably most persons acquitted under *M'Naghten* do possess some capacities, however limited, for making moral evaluations of their behavior, despite the requirement of total incapacity. The danger is, if the test does not adequately reflect the reality, caprice and inequities in its administration will result.[12]

The South Carolina Supreme Court seemingly agrees with this statement. Implicit in its decision in *Cannon* is the supposition that juries actually apply a more flexible standard than that charged under the *M'Naghten* rule—the court termed this a "common sense approach."[13] Since the court first recognized that the jury does apply a standard less rigid than the one charged and then tacitly approved of this practice, it seems logical that the

12. Allen, *The Rule of the American Law Institute's Model Penal Code*, 45 MARQUETTE L. REV. 494, 500-01 (1962).

13. 260 S.C. at 548; 197 S.E.2d at 682.

court too should adopt a test which embodies this more flexible standard. The ALI "substantial capacity" test would satisfy South Carolina's requirements and is already widely accepted elsewhere. It has been adopted in every federal circuit except the First, which has not considered the issue since 1962.[14] In addition, a number of states have adopted the ALI test either by judicial decision[15] or by statute.[16]

The ALI test is certainly not designed to effect dramatic increases in exculpation in any jurisdiction.[17] Its adoption in South Carolina would have minimal impact on verdicts which are rendered under the "common sense approach" recognized in *Cannon*. The court's observation there, however, is no guarantee of the consistency in jury charges to which criminal defendants are entitled. What is "common sense" for the jury is "common sense" for the court as well, and the South Carolina Supreme Court should hold that it is. The court should reconsider its unquestioning adherence to the *M'Naghten* rule and adopt the ALI test of mental capacity. By bringing the way juries are charged into consonance with the way they allegedly act, the court can help to provide both logic and consistency in the determination of mental capacity for future defendants in South Carolina.

14. Beltran v. United States, 302 F.2d 48 (1st Cir. 1962). The Court of Appeals for the District of Columbia was the most recent court to adopt the ALI test. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). The ALI test was adopted in the Court of Appeals for the Fourth Circuit in United States v. Chandler, 393 F.2d 920 (4th Cir. 1968). In other circuits, *see* United States v. Freeman, 357 F.2d 606 (2d Cir. 1966); United States v. Currens, 290 F.2d 751 (3d Cir. 1961); Blake v. United States, 407 F.2d 908 (5th Cir. 1969); United States v. Smith, 404 F.2d 720 (6th Cir. 1968); United States v. Shapiro, 383 F.2d 680 (7th Cir. 1967); Pope v. United States, 372 F.2d 710 (8th Cir. 1967); Wade v. United States, 426 F.2d 64 (9th Cir. 1970); Wion v. United States, 325 F.2d 420 (10th Cir. 1963).

15. Commonwealth v. McHoul, 352 Mass. 544, 226 N.E.2d 556 (1967); State v. Shoffner, 31 Wis. 2d 412, 143 N.W.2d 458 (1966) (If the defendant so elects and assumes the burden of proof under Wisconsin's criminal procedure); *but see, e.g.*, Terry v. Commonwealth, 371 S.W.2d 862 (Ky. 1963); State v. Shantz, 98 Ariz. 200, 403 P.2d 521 (1965); State v. White, 60 Wash. 2d 551, 374 P.2d 942 (1962); State v. Lucas, 30 N.J. 37, 152 A.2d 50 (1959).

16. CONN. GEN. STAT. ANN. § 53 A-13 (1958); ILL. REV. STAT. ch. 38, § 6-2 (1961); MD. ANN. CODE art. 59, § 9(a) (1957); MONT. REV. CODES ANN. § 95-501 (1947); UTAH CODE ANN. tit. 76, § 2-305 (1953).

17. Allen, *supra* note 12, at 501.

II. SUBSTANTIVE LAW

A. *Felony-Murder Rule*

The application of the common law "felony-murder rule"[18] was challenged and upheld in two cases, *Gore v. Leeke*[19] and *State v. Holland*.[20] The co-defendants in *Gore* had broken into and taken personal property from a residence. Their activities were discovered and law officers were soon in pursuit of Gore's automobile. During the chase a highway patrolman was fatally wounded by co-defendant Phillips, who abandoned his friends to escape in a commandeered vehicle.

Gore challenged the common law felony-murder rule as unconstitutional in substance and in application to the facts of his case. He argued that the presumption of malice in the rule vitiates due process by permitting a murder conviction without proof of malice beyond a reasonable doubt. The court rejected this contention, noting that the presumption of malice is a rule of law rather than a rule pertaining to burden of proof. In addition, "there is a rational connection between the fact proved and the ultimate fact presumed or implied, to wit: malice from the perpetration of a *malum in se* felony."[21]

It appears, however, that the court may choose to limit the application of the rule in future decisions:

> Under the facts of this case we are not called upon to decide whether or not the felony murder rule should, or should not, be applied as to every homicide committed in connection with the commission of *any* and *every* felony whether or not inherently or forseeably dangerous . . . . We conclude that the appellant's conviction of murder under the felony-murder doctrine was fully justified *under the circumstances of this case*.[22]

18. In South Carolina, the rule is defined thus: "Whenever an unlawful act, an act *malum in se*, is done in prosecution of a felonious intention, and death ensues, it will be murder." Gore v. Leeke, 261 S.C. 308, 199 S.E.2d 755 (1973), *quoting* State v. Levelle, 34 S.C. 120, 13 S.E. 319 (1891).

19. 199 S.E.2d 755 (S.C. 1973). The court observed that although Gore's appeal in this case was purportedly from an order denying post conviction relief, it was in substance an appeal from the original conviction. A motion to file a belated appeal of the conviction had previously been denied. Nevertheless, in view of the fundamental rights asserted and certain facts not previously brought to the court's attention, the questions raised in the present appeal were passed upon. The court did not indicate whether a second motion to file a belated appeal would have been granted.

20. 201 S.E.2d 118 (S.C. 1973).

21. 199 S.E.2d at 758.

22. *Id.* at 759 (emphasis added in final sentence).

Thus the court in *Gore* articulated a dual test which applies the felony-murder rule both to felonies which are inherently dangerous to human life and to felonies which are forseeably dangerous to human life merely because of the manner in which they are committed. If properly administered, such a test seems to provide the flexibility required to limit application of the felony-murder rule to the types of cases in which both its deterrent and punitive functions can be effective. But while the court in *Gore* indicated that some felony homicides may not be felony murders under either alternative of the dual test, the actions of the defendants in *Gore* constituted felony murder under both alternatives:

> Aside from any inherent danger in the breaking and entry of a private residence, and larceny therefrom albeit in the daytime, we have here the added fact that the crime was committed by well-armed felons who were still in the course of escape and asportation of the stolen goods immediately preceding the homicide.[23]

In *Holland*, the co-defendants had been convicted of murder committed during the course of a robbery. On appeal, they excepted both to the denial of a directed verdict and to portions of the trial court's charge to the jury. In rejecting the first contention, the court found that the evidence supported a conclusion that murder was committed as a natural consequence of acts done pursuant to an unlawful common design. Those participating in that design would therefore be as guilty as the slayer.

The court disposed of the challenge to the jury instructions essentially by rephrasing the reasoning encapsulated above. As indicated in Justice Bussey's dissenting opinion, this approach was less than responsive to the objections of the appellants, who contended that the law as to other offenses and theories of criminal responsibility should have been included in the charge.[24]

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23. *Id. see also* State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

24. The evidence suggested that a defendant named Richards fatally stabbed the victim after the robbery had been completed and in spite of urgings of his cohorts who wished to leave the scene immediately. It follows that the jury could have found that the murder was committed by Richards alone rather than in the course of (or as the forseeable result of) a common felonious scheme. "Under the circumstances, the appellants were entitled to a full and clear-cut instruction to the effect that if the State failed to prove beyond a reasonable doubt that the homicide so occurred, the appellants should be acquitted of homicide." 201 S.E.2d at 128 (Bussey, J., dissenting). In addition, evidence presented at trial indicated that some of the co-defendants may have participated in the robbery under duress. Others voluntarily participated in binding and gagging the victim. It is arguable that an adequate charge to the jury would necessarily have dealt with

The court in *Holland* did not refer to the *Gore* opinion, though *Gore* was decided only six weeks earlier, and actually employed a different standard for determining the applicability of the felony-murder rule. The test in *Holland*, which appeared to focus solely on the manner in which the felony was committed, was drawn from the opinion in *State v. Crowe*[25] and was stated thus:

> [I]f two or more combine together to commit an unlawful act, such as robbery, and, in the execution of the 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 unlawful act.[26]

The difference between the *Gore* and *Holland* standards for felony murder is unfortunate and apparently without justification. Since the *Gore* test was presented after a significant amount of discussion, and the *Holland* court adopted the *State v. Crowe* precedent without any explanation, it seems likely that the former decision may prevail; but, until the court clarifies its holdings in *Gore* and *Holland*, the precise standard for determining felony murder in South Carolina will not be clear.

B. Statutory Presumptions

The defendant in *State v. Tabory*[27] challenged his conviction of possession for sale of marijuana. His appeal asserted in part that the statute under which he was convicted[28] created an unconstitutional presumption that persons possessing more than five grams of marijuana were *prima facie* guilty of possession for

manslaughter, assault and battery with intent to kill, assault and battery of a high and aggravated nature, and the crime of accessory after the fact of murder. The majority, however, concluded that "[t]he evidence admits of no other inference than that Thomas Bolin was murdered and the sole issue before the jury was whether the appellants here had participated in such a murder." *Id.* at 124.

25. 258 S.C. 258, 188 S.E.2d 379 (1972).

26. 201 S.E.2d at 125. *See also* State v. Cannon, 49 S.C. 550, 27 S.E. 526 (1897).

27. 260 S.C. 355, 196 S.E.2d 111 (1973).

28. S.C. CODE ANN., § 32-1492-1 (1970) amending S.C. CODE ANN. § 32-1492 (1962). This statute was superseded by S. C. CODE ANN. § 32-1510.21 *et seq.* (Supp. 1971).

29. Although the defendant was prosecuted under S.C. CODE ANN. § 32-1492.1 (1970), the trial court instructed the jury as to the 28-gram presumption required by S.C. CODE ANN. § 32-1510.49(b)(3) (Supp. 1971).

sale.[29] The court cited language in *Leary v. United States*[30] establishing the basic test for evaluating the constitutionality of criminal statutory presumptions:

> [A] criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.[31]

The South Carolina Supreme Court noted that the Court in *Leary* also "recognized a strong presumption that statutes enacted by the legislature are constitutional."[32] The defendant failed to substantiate his contention that there was no rationale between the proven fact and the presumed fact and thus he failed to overcome the presumption of constitutionality. The court observed that the quantity of marijuana possessed was 2600 pounds and concluded that had the presumption been erroneous such error would have been inoffensive.

It is arguable that the *Leary* decision placed a burden on the prosecution to demonstrate the rationality of challenged statutory presumptions. In *Tabory*, however, the court seemed to suggest that defendants are affirmatively required to "substantiate" their arguments against such presumptions. The *Leary* opinion itself is not a model of clarity, so the extent to which the *Tabory* interpretation modifies it is open to question. It is apparent, however, that the issue of the constitutional ramifications of statutory presumptions in South Carolina is not yet resolved.

III. SEARCH AND SEIZURE

The defendant in *State v. Moultrie*[33] contended that incriminating evidence introduced at his trial had been obtained pursuant to an arrest made without probable cause. Police officers had been patrolling a neighborhood in response to reports of a

30. 395 U.S. 6 (1969).

31. 260 S.C. at 363, 196 S.E.2d at 112; *see* 395 U.S. at 36. In *Leary*, the defendant successfully challenged the statutory presumption in 21 U.S.C. § 176(a) that a person possessing marijuana has knowingly and with fraudulent intent received illegally imported marijuana.

32. *Id.* The language in *Leary* to which the court apparently referred is subject to other interpretations. The Court there did say that, "in the judicial assessment the congressional determination favoring the particular presumption must, of course, weigh heavily." 395 U.S. at 35.

33. 261 S.C. 14, 198 S.E.2d 231 (1973).

robbery-beating and other crimes possibly committed by the same suspect, described as a tall Negro male wearing light colored coveralls. Noting that the appellant fit this description, the officers approached him and observed what appeared to be blood stains on his clothes. He was arrested and a subsequent search led to the discovery of objects taken in the robbery.

The court found that, in determining that probable cause existed for the arrest, the trial judge properly considered evidence as to the other crimes committed in the neighborhood. There was, according to the court, sufficient evidence to fairly support the determination of probable cause, and thus that finding was conclusive on appeal.[34] Given the legality of the arrest, evidence discovered during the accompanying search of the defendant's person was clearly admissible at trial.[35]

In *State v. Newman*,[36] the defendant argued that evidence presented at his trial was the product of an unconstitutional search and seizure and thus should have been suppressed. The court rejected his contention that *Miranda* warnings are a prerequisite to effective consent to a search. It was established that the defendant knew the officers who appeared at his door and freely granted their request to search his premises for a small caliber weapon. This uncontradicted testimony and the recent decision of the United States Supreme Court in *Schneckloth v. Bustamonte*[37] supported the trial court's finding that consent to the search was voluntarily given.

The defendant in *State v. Tabory*[38] asserted that contraband, photographs and a search warrant[39]should have been suppressed at trial as the fruits of an unlawful search and seizure. The court

34. S.C. CONST. art. V, § 5 (Supp. 1973).

35. *See* United States v. Robinson, 414 U.S. 218 (1973). In this recent decision it was decision it was held that, "[I]n the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under the Amendment." *Id.* at ___, 94 S. Ct. at 477.

36. 200 S.E.2d 82 (S.C. 1973).

37. 412 U.S. 218 (1973). In determining the voluntariness of consent to a warrantless search, the Supreme Court applies a standard less stringent than the "intentional relinquishment of a known right or privilege" that must accompany the waiver of "trial rights." Instead, "[V]oluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." *Id.* at 248-249.

38. 260 S.C. 355, 196 S.E.2d 111 (1973).

39. It was the defendant's contention that the search warrant had been obtained *after* an unlawful search uncovered the contraband.

rejected his contention that the U-Haul truck in which he was a passenger had been stopped and searched without probable cause. Confronted by a recent series of robberies in the area involving rental trucks, the sheriff's department had adopted a policy of stopping and inspecting such vehicles at night. Upon stopping the obviously loaded truck, a deputy was informed that it was empty; thereafter, he walked to the rear of the vehicle and smelled marijuana. A search warrant was obtained and the contraband discovered. The trial court's finding of probable cause was supported by *United States v. Gomori*[40] in which similar facts were held to justify a *warrantless* search.

In *State v. Jackson*,[41] the defendants contended that they had been arrested without probable cause and that incriminating objects subsequently seized were improperly admitted into evidence. The supreme court found, however, that officers had "reasonable cause" to forcibly stop the automobile in which defendants were riding, that the incriminating evidence was found in plain view, and that this discovery preceded the arrest.[42] Regarding the timing of the arrest, the court concluded that the "[a]rgument that the arrest took place prior to discovery is meaningless because there is no suggestion that the defendants would have been retained in custody absent these indicia of criminality."[43]

In *Henry v. United States*,[44] the defendant's car had been waved to a stop by federal agents who suspected that the defendant had violated the law. The United States Supreme Court

40. 437 F.2d 312 (4th Cir. 1971).

41. 260 S.C. 30, 194 S.E.2d 181 (1973).

42. A review of the trial transcript suggests that the court could reasonably have found otherwise. In the early morning hours of September 29, 1971, a motel clerk phoned the Sumter police to announce that he had been robbed by two Negro men, one wearing a white shirt and the other dressed in dark clothes. He had not seen a car. Shortly thereafter a search was launched for the suspects, described by police dispatch as two Negro men, one tall and one short, both wearing dark clothes. Assuming that the offenders might be trying to escape the area by car, a deputy sheriff cruised the highway towards Columbia, eventually overtaking an automobile which was apparently occupied by two men. He continued to follow the car on a "hunch". Record at 41. His testimony, however, does not indicate that he thought the occupants were trying to elude him. Police officers in Columbia, having overheard transmissions between the deputy and his dispatcher, formed a roadblock in the path of the appellants' car. The automobile was stopped and approached by some twenty officers with weapons drawn. According to the testimony of a SLED agent present at the scene, the appellants were under physical arrest at that moment. The evidence introduced at trial was discovered shortly thereafter.

43. 260 S.C. at 37, 194 S.E.2d at 184.

44. 361 U.S. 98 (1959).

found that, "when the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete."[45] In *Jackson*, the defendants were halted at a roadblock and surrounded by officers with weapons drawn *before* discovery of the evidence. Moreover, as conceded by the solicitor at the trial, "when you put a pistol on somebody, you've got him under arrest."[46]

Although the South Carolina Supreme Court apparently disagrees with the view of arrest taken by both the United States Supreme Court in *Henry* and the solicitor in *Jackson*, its own attitude is difficult to ascertain. Perhaps future decisions will clarify the court's holding in *Jackson* and provide predictability in determining the occurrence of arrests and the legality of searches and seizures which may be incident to them.[47]

IV. CONFESSIONS AND STATEMENTS OF THE ACCUSED

In *State v. Tabory*,[48] the defendant contended that *Miranda*[49] warnings should have been given prior to questioning during which a co-defendant made an inculpatory statement. A deputy had made a routine investigatory stop of an obviously loaded rental truck; upon asking what was being carried, he was told that it was empty. The court found that the statement was made in response to "routine questions" in the course of an "on-the-street encounter."[50] No custodial interrogation had occurred, and thus prior *Miranda* warnings were not required.[51]

The defendant in *State v. Johnson*[52] asserted that he had not been informed of his *Miranda* rights prior to making a confession that was later admitted into evidence. Although testimony established that the defendant may have been under the influence of

45. *Id.* at 103.

46. Record at 87.

47. Had the court determined that an arrest occurred prior to the discovery of the incriminating evidence, a novel question of law would have been presented. If an arrest is made without probable cause under circumstances that would otherwise justify an investigatory stop (see *State v. Tabory, supra*) is evidence subsequently discovered in plain view admissible at trial?

48. 260 S.C. 355, 196 S.E.2d 111 (1973).

49. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

50. 260 S.C. at 356, 196 S.E.2d at 114.

51. For a comprehensive discussion of the custodial interrogation issue in *Miranda* cases, see Smith, *The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation?*, 25 S.C.L. REV. 699 (1973).

52. 260 S.C. 600, 197 S.E.2d 823 (1973).

morphine[53] at the time of the questioning, the interrogating officer recalled that he "was very calm and very collected and he talked very intelligently."[54] The defendant stated that he could read and was handed a printed card containing the *Miranda* warnings; he examined it and indicated that he understood the contents. An admission of guilt followed shortly thereafter.

The court held these facts presented by the state to be sufficient to raise a presumption that the appellant knowingly and intelligently waived his *Miranda* rights. The burden was thus shifted to the appellant to present facts tending to show that he had not read or understood the warnings.[55] The defendant did not offer testimony on the issue, and the lower court's finding of an understanding waiver was upheld.

In *State v. Cannon*,[56] the defendant contended that the initial *Miranda* warnings were incomplete because they did not include the following information: "If you decide to answer any questions now without a lawyer present, you will still have the right to stop answering at any time or until you talk to a lawyer."[57] The court held that *Miranda* did not require this additional warning.[58]

The defendant also argued that, even if the warnings were deemed sufficient, he had not voluntarily and knowingly waived his rights. The defendant alleged that his confession was tainted because the State had used undue pressure and subterfuge during his interrogation. The eighteen year old defendant had undergone a polygraph examination and had been confronted by five police officers during an hour of interrogation prior to his confession.

53. Testimony received at trial indicated that the defendant was addicted to opiates and suffering from the effects of withdrawal. Record at 63. He was apparently given morphine prior to being transferred to the State Hospital. Record at 59. The confession was made during that trip.

54. 260 S.C. at 602, 197 S.E.2d at 824.

55. For this proposition the court cites Bell v. United States, 382 F.2d 985 (9th Cir. 1967) and United States v. Springer, 460 F.2d 1344 (7th Cir. 1972). *Bell* does support the conclusion reached. In *Springer*, however, the court emphasized that warnings were given verbally to the defendant before he read them himself. Note that the waiver issue dealt with in *Johnson* should be distinguished from the question of voluntariness of the confession. In this jurisdiction a higher quantum of proof may be required to establish that inculpatory statements were voluntarily made. *See* Ralph v. Warden, 438 F.2d 786, 793 (4th Cir. 1970); 25 S.C.L. REV. at 387 (1973).

56. 260 S.C. at 537, 197 S.E.2d at 680 (1973), *cert. denied*, 42 U.S.L.W. 5334 (U.S. Nov. 20, 1973).

57. 260 S.C. at 543, 197 S.E.2d at 680.

58. The court cited with special approval the reasoning of Flannigan v. State, 289 Ala. 177, 266 So. 2d 643 (1972).

In finding the confession voluntary, the court relied heavily on an evidentiary hearing held by the trial judge out of the presence of the jury in which both the defendant and the State were permitted to testify to the circumstances surrounding the confession. There, the trial judge ruled that the defendant knowingly and willingly waived his rights under the fifth and sixth amendments. Furthermore, the judge charged the jury that it could still disregard the confession unless it was convinced beyond a reasonable doubt that the State had proved the confession to be freely and voluntarily made.[59] The supreme court stated that this examination by the trial judge had sufficiently explored the totality of the circumstances surrounding defendant's confession and therefore held that he did not err in admitting the confession into evidence for consideration by the jury.[60]

V. PRE-TRIAL IDENTIFICATION

In *State v. McLeod*,[61] the victim of an attempted rape had recognized her assailant as the son of a neighbor. After his arrest, the defendant was taken to the victims' home and positively identified. The appellant argued that the home confrontation was unfair and untrustworthy and additionally contended that he had a right to have counsel present when the identification was made. The court ruled that the procedural and constitutional safeguards established in *United States v. Wade*,[62] *Gilbert v. California*[63] and *Stovall v. Denno*[64] are inapplicable where the victim knows the accused, insofar as the danger of mistaken identity is not present.[65] In rejecting the defendant's second contention the court

59. *See* Jackson v. Denno, 378 U.S. 368 (1964); Lego v. Twomey, 404 U.S. 477 (1972).
60. 260 S.C. at 546, 197 S.E.2d at 682.
61. 260 S.C. 445, 196 S.E.2d 645 (1973).
62. 388 U.S. 218 (1967).
63. 388 U.S. 263 (1967).
64. 388 U.S. 293 (1967).
65. *Wade* and *Gilbert* dealt with the defendant's sixth and fourteenth amendment rights to counsel during pretrial identification procedures. The holding in Kirby v. Illinois, 406 U.S. 682 (1972) is dispositive of this issue since adversary proceedings had not been initiated against the defendant. In *Stovall*, however, the defendant argued that his confrontation with a stabbing victim was so suggestive and conductive to irreparable mistaken identification that he was denied due process of law. The court found that the confrontation was permissible in view of the totality of the circumstances surrounding it. In *McLeod*, the victim had recognized her assailant prior to the confrontation and the dangers of misidentification were minimal. Therefore, "under the facts of this case," the Constitutional safeguards normally required were unnecessary. 260 S.C. at 448, 196 S.E.2d at 646.

cited *Kirby v. Illinois*,[66] which held that the defendant's right to counsel does not attach until adversary judicial proceedings have been initiated.

The defendant in *State v. Owens*[67] contended that an in-court identification was tainted by an unlawful confrontation in a hallway outside the courtroom. In denying relief, the court found that the meeting occurred purely by chance and was not improperly suggestive of an identification. Because the witness had previously identified the appellant from photographs and at a preliminary hearing on a connected charge, the court concluded that the confrontation was not unlawful.[68]

VI. TRIAL

A. *Guilty Pleas*

The defendant in *Lambert v. State*[69] had been sentenced to sixteen years imprisonment after the State had recommended a fifteen year sentence. In an appeal from denial of post-conviction relief, the defendant contended that his guilty plea was ineffective due to a broken plea bargain. While the defendant claimed that he had been assured that a fifteen-year sentence would be imposed, the State successfully argued that a promise was made only to recommend such a sentence. The requirements of *Santobello v. New York*[70] were thus met, and "the voluntariness of the plea was not affected when the court did not accept the solicitor's recommendation."[71]

In the same appeal, the defendant asserted that the trial court committed reversible error in failing to ascertain the voluntariness of the plea before accepting it. In *Boykin v. Alabama*,[72] the United States Supreme Court noted that important constitutional rights are waived when a plea of guilty is entered in a

66. 406 U.S. 682 (1972).

67. 260 S.C. 79, 194 S.E.2d 246 (1973).

68. The court does not appear to consider carefully the implications of the *Wade* and *Gilbert* decisions. *See* note 64 *supra*. It is at least arguable that there was potential for prejudice in the confrontation that could not be reconstructed at trial and which might have been averted had counsel been present. *See* 388 U.S. at 236-37.

69. 260 S.C. 617, 198 S.E.2d 118 (1973).

70. 404 U.S. 257 (1971). In *Santobello* it was held that: "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262.

71. 260 S.C. at 621, 198 S.E.2d at 119-20.

72. 395 U.S. 238 (1969).

criminal trial.[73] It was held in that case that a trial judge erred in accepting a guilty plea without an affirmative showing that it was intelligent and voluntary. Reviewing courts could not presume a waiver of such critical rights from a silent record.[74] In *Lambert*, however, it was determined at the post-conviction hearing that the defendant had been adequately represented by counsel and that he had been fully informed as to the rights and consequences at stake in a plea of guilty. Under *Vickery v. State*,[75] the failure of a trial judge to comply with the requirements of *Boykin* may be harmless error if it is demonstrated in a later proceeding that the plea was voluntarily, intelligently and understandingly made. In *Vickery*, a post-conviction hearing began five months after the guilty plea was entered, establishing a factual record which could be adequately reviewed by the higher court. Thus, the court in *Lambert* concluded under similar circumstances that the defendant's plea was voluntarily and intelligently entered.[76]

B. Effectiveness of Counsel

In *State v. Cutter*,[77] the defendants founded their appeal in part on the alleged ineffectiveness of trial counsel. The state's evidence included crucial testimony of a switchboard operator as to a conversation overheard between a co-defendant and his alleged victim. The interception of this conversation appeared to be a violation of the federal anti-wiretap law;[78] if so, testimony concerning statements overheard should have been suppressed.[79] Although defense counsel made no motion to suppress, the supreme court nevertheless found that the appellants had been effectively represented, commenting that, "[I]f the conduct of the operator under these circumstances was indeed in violation of federal law, we question that there are many members of the trial bar or

73. The federal rights involved are the privilege against compulsory self-incrimination, the right to trial by jury and the right to confront one's accusers. *Id.* at 243.

74. *Id.*

75. 258 S.C. 33, 186 S.E.2d 827 (1972).

76. Under *Vickery*, the voluntariness of a guilty plea is determined from "both the record made at the time of the entry of the guilty plea and the record of the post-conviction proceeding." 260 S.C. at 621, 198 S.E.2d at 119.

77. 261 S.C. 140, 199 S.E.2d 61 (1973).

78. 18 U.S.C. § 2511 (1968).

79. 18 U.S.C. § 2515 (1968). Section 2518(10)(a) provides that an aggrieved person in any trial may move to suppress the contents of any intercepted communication on the grounds that the interception was unlawful.

bench of this state to whom the point would have occurred."[80]

Under section 2515 of the federal anti-wiretap law, no part of the contents of a wire or oral communication intercepted in violation of the chapter may be received in evidence before any court.[81] While it is unlawful to intercept wire or oral communications, an exception is provided for the switchboard operator who intercepts a communication ". . . while engaged in any activity which is a necessary incident to the rendition of his service . . . ."[82] The operator's "activity" in *Cutter*, however well-intentioned, would not fall within this exception.

Since the enactment of the federal anti-wiretap law in 1968, section 2515 alone has been cited in over fifty federal cases.[83] It is obvious that the court and counsel in the *Cutter* trial erred by failing to question the admissibility of the operator's testimony. There is a significant possibility that this error was seriously prejudicial to the defendants' case. One wonders whether the defendants find solace in the belief that there are a few members of the bar or bench to whom the point would have occurred.

The indigent defendant in *State v. Marshall*[84] contested a murder conviction, asserting that he had been represented at his arraignment by an attorney having less than five years of experience and thus was deprived of statutory rights.[85] Under section 17-507 of the South Carolina Code, indigents accused of capital offenses are to be assigned two counsel, of whom one must have a minimum of five years of experience before the bar. Of the three attorneys[86] appointed to represent the defendant, two met the minimum qualification. Although only the attorney with less than five years experience was present at the arraignment, no ensuing prejudice to the appellant was shown to exist. Thus, the defendant was not deprived of any rights under section 17-507.[87]

80. 261 S.C. at 146, 199 S.E.2d at 64.

81. 18 U.S.C. § 2515.

82. 18 U.S.C. § 2511(2)(a).

83. 73 SHEPARD'S UNITED STATES CITATIONS, STATUTES AND COURT RULES No. 1, part 2 at 178 (Jan. 1974).

84. 260 S.C. 323, 195 S.E.2d 709 (1973).

85. S.C. CODE ANN. § 17-507 (1962).

86. Appointment of three attorneys, however, is not illegal or prejudicial through any inference of the seriousness of the offense charged. State v. Cooper, 212 S.C. 61, 46 S.E.2d 545 (1948).

87. Section 17-507 does not require that the more experienced counsel in fact be present during all proceedings, although the court did not address this point.

C. Comments from the Bench

In *State v. Cutter*[88] the appellants challenged a conviction for blackmail, asserting in part that a prejudicial question had been posed by the court to a witness. A switchboard operator had testified as to a conversation she overheard between a co-defendant and his victim. At the conclusion of her testimony the court asked, "Did he ask him for any money?" and received an affirmative reply.[89] Citing the controlling case of *State v. Anderson*,[90] the supreme court found no error on the part of the trial judge. *Anderson* allows the trial judge, governed by rules of fairness and impartiality, to ask any questions he deems necessary to ascertain the truth of matters at issue.[91]

The "fairness and impartiality" standard of *Anderson* was stretched at least to its outer limits in *State v. Mitchell*,[92] where the trial was marred by a heated verbal exchange between the judge and defense counsel.[93] The defendant sought a new trial on the grounds that the statements of the judge and his questioning of a witness were prejudicial. The supreme court, with Justices Brailsford and Bussey dissenting, held that the statements of the judge to defense counsel did not prejudice the defendant or make it difficult for him to receive a fair trial.

The dissenting justices took a far different view, urging that the trial judge had exceeded the bounds of propriety when he:

> [W]ithout provocation disclosed by the record, lost his temper, and, by the clearest inference if not directly, accused counsel of misrepresenting facts to the court. The judge's examination of the witness immediately afterward concerning the same facts tended to emphasize his distrust of the representations which

88. 261 S.C. 140, 199 S.E.2d 61 (1973).

89. 261 S.C. at 145, 199 S.E.2d at 64.

90. 85 S.C. 299, 67 S.E. 237 (1910).

91. In *Anderson* it is observed that:

> A grave responsibility rests upon a trial judge. It is his duty to see to it that justice be done in every case, if it can be done according to law; and, if he thinks that the attorney for either party, either from inadvertence or any other cause, has failed to ask the witnesses the questions necessary and proper to bring out all the testimony which tends to ascertain the truth of the matter under investigation, we can see no legal objection to his propounding such questions; but, of course, he should do so in a fair and impartial manner, and should not by the form or manner of his questions express or indicate to the jury his opinion as to the facts of the case, or as to the weight or sufficiency of the evidence. *Id.* at 233, 67 S.E. at 238.

92. 200 S.E.2d 448 (S.C. 1973).

93. *Id.* at 451-52.

> had just been made to him in the most unequivocal terms by counsel.
>
> The remarks of the court tended to impugn the credibility of counsel and to diminish him and his defense of appellant in the eyes of the jury. Counsel's ability to furnish effective representation was to that extent impaired, perhaps to appellant's serious prejudice.[94]

In *Smith v. State*,[95] the trial judge made the statement that the defendant's husband was a "cold-blooded murderer" at the time of sentencing. The defendant alleged that this remark evidenced prejudice on the part of the judge which was reflected in the sentence given to the defendant. The supreme court per curiam held that the record was devoid of prejudice because the "consecutive sentences of three years each were well within statutory and constitutional grounds and there is no showing that they resulted to any degree from prejudice on the part of the court."[96]

D. Jury Charges

In *State v. Taylor*,[97] the supreme court reversed the defendant's manslaughter conviction on the grounds that failure of the trial court to give a self-defense instruction constituted prejudicial error.

The entire defense was a denial of the killing; thus no attempt was made to justify it on the ground of self-defense, nor was a charge on that ground requested. During its deliberations the jury requested information regarding self-defense. The defense counsel then requested a charge on the law of self-defense, but the trial judge refused both requests because in his opinion the issue had not been raised by the evidence. The supreme court found that it was reasonably inferrable from the testimony that the victim had been killed in self-defense, and held that failure to charge the jury on the law of self-defense constituted reversible error. *Taylor* actually reaffirms old precedent on a point not recently addressed by the supreme court. Of the cases cited as authority by the court,[98] however, only *State v. Pittman*[99] makes

94. *Id.* at 452-53. Mitchell was found guilty despite uncontradicted testimony of a state psychiatrist that he had been legally insane at the time of the alleged crime.

95. 199 S.E.2d 302 (S.C. 1973).

96. *Id.* at 303.

97. 200 S.E. 2d 387 (S.C. 1973).

98. *Id.* at 388.

99. 137 S.C. 75, 134 S.E. 514 (1926).

it clear that a self-defense charge is not required in all homicide cases.[100] There, as in *Taylor*, the court required such a charge only where it was reasonably inferrable from the evidence that "the accused inflicted the mortal wound but justifiably did so in self-defense."[101]

In *State v. Graham*,[102] the defendant had answered murder charges with a plea of self-defense. The charge to the jury included instructions concerning the laws of mutual combat and the jury was informed "that the plea of self-defense could not be invoked if the shooting resulted from mutual intent to fight."[103] Appellant was convicted of manslaughter and his exceptions to the jury charge were rejected. Evidence that the parties had armed themselves and threatened each other was held to warrant submission of the issue of mutual combat to the jury.[104]

E. Sentencing

In the companion cases of *Richards v. Crump*[105] and *Fields v. Leeke*,[106] indigent defendants were convicted and alternatively sentenced to pay immediate fines or serve a period of imprisonment. Incarcerated because of their inability to pay, the defendants appealed, alleging that they had been unconstitutionally deprived of due process and equal protection of the law. The court found it unnecessary to deal with the constitutional issues, relying instead on legislation recently enacted by the General Assembly,[107] but not in force when the defendants were tried and sent-

100. *See also* State v. Anderson, 85 S.C. 229, 67 S.E. 237 (1910).

101. 200 S.E.2d at 388.

102. 260 S.C. 449, 196 S.E.2d 495 (1973).

103. *Id.* at 450, 196 S.E.2d at 495.

104. In general, a defendant may not claim self-defense if he could, with reasonable safety, have retreated from the combat. State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955). The plea of self-defense is likewise unavailable to the defendant who meets another with the intention of doing injury to him. State v. Jones, 113 S.C. 134, 101 S.E. 647 (1919). Mutuality of intent will not justify a claim of self-defense.

105. 260 S.C. 504, 197 S.E. 2d 298 (1973).

106. 260 S.C. 507, 197 S.E.2d 299 (1973).

107. No. 233, [1973] S.C. Acts & Jt. Res. 266. Section 1 of the Act provides that:

> In any offense carrying a fine or imprisonment, the judge or magistrate hearing the case shall, upon a decision of guilty of the accused being determined and it being established that he is indigent at that time, set up a reasonable payment schedule for the payment of such fine, taking into consideration the income, dependents, and necessities of life of the individual. Such payments shall be made to the magistrate or clerk of court as the case may be until such fine is paid in full. Failure to comply with the payment schedule shall constitute contempt of court; however, imprisonment for contempt may not exceed the

enced. This statute directs the sentencing judge, upon the conviction of an indigent for an offense carrying a fine or imprisonment, to set up a reasonable schedule for the payment of the fine. The cases were accordingly remanded for resentencing.[108]

It is probable that the same result would be required under the constitutional claims raised by the defendants. In *Williams v. Illinois*,[109] it was held that "a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine."[110] A concurring opinion in *Morris v. Schoonfield*[111] considered other sentencing practices to be equally violative of the Equal Protection Clause: "[T]he same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term . . . ."[112]

This position was adopted by the majority of the Court in *Tate v. Short*.[113] On the basis of these precedents, the Fifth Circuit in *Frazier v. Jordan*[114] condemned the sentencing practices that were challenged in *Richards* and *Fields*. It was held that the alternative sentence resulted in a difference of treatment based on wealth, creating a suspect classification which could only be justified by a compelling state interest. The court rejected the argument that punitive and deterrent interests could not be adequately protected through alternative methods of fine collection.[115]

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amount of time of the original sentence, and where part of the fine has been paid the imprisonment cannot exceed the remaining pro rata portion of the sentence.

No person found to be indigent shall be imprisoned because of inability to pay the fine in full at the time of conviction.

Entitlement to free counsel shall not be determinative as to defendant's indigency.

108. Although the defendants were convicted and sentenced before enactment of the statute, the court does not question its applicability to their case. It is merely stated that resentencing is required "in keeping with the provisions of this legislative enactment." 260 S.C. at 506, 197 S.E.2d at 299.

109. 399 U.S. 235 (1970). The indigent defendant had been sentenced both to pay a fine and serve the maximum period of imprisonment provided by law. After completing the prison sentence he was incarcerated for an additional period to "work off" his monetary obligations.

110. *Id.* at 243.

111. 399 U.S. 508 (1969).

112. *Id.* at 509.

113. 401 U.S. 395 (1971). In *Tate*, an indigent was jailed due to his inability to pay traffic fines. Under the state laws applicable at that time, fines were the only punishment authorized for the offenses committed.

114. 457 F.2d 726 (5th Cir. 1972).

115. *Id.* at 729. The court specifically mentioned the installment plan as a suitable alternative.

It is ironic that the South Carolina statute enacted to deal with these objections may itself be challenged as violative of the Equal Protection clause. The court in *Frazier* notes that: "[I]t would likely be impermissible for the state to collect over time from indigents an amount whose present value would be less than that of the fine imposed on non-indigents."[116]

Thus, *Frazier* suggests that courts must employ in such cases either interest payments or something in the nature of the time price differential found in installment sales contracts. By not doing so the South Carolina law seems to provide for the imposition of varying financial penalties based on the wealth of those convicted.

VII. MISCELLANEOUS

A. *Speedy Trial*

In *State v. Owens*,[117] the defendant contended that he had been denied a speedy trial because of a delay of approximately six months. In upholding the trial court's refusal to dismiss, the supreme court noted that the defendant "failed to meet the burden of showing that delay in his trial was 'due to the neglect and wilfulness of the State's prosecution.' "[118]

The speedy trial issue is dealt with more comprehensively in *State v. Foster*.[119] The defendants had been indicted for housebreaking in 1965; while on bond they were apprehended and incarcerated in Florida for other crimes. Although a detainer was placed with the imprisoning authorities, no additional action was taken until the defendants demanded a speedy trial in 1971. An additional one and one-half year delay ensued before the defendants were returned to South Carolina to stand trial.

In finding that the defendants had not been denied their sixth amendment rights, the supreme court relied on the balancing test formulated in *Barker v. Wingo*.[120] That case identifies four factors to be assessed in determining whether the right to a speedy trial has been abridged: "Length of delay, the reason for the delay, the defendant's assertion of his right and prejudice to

116. *Id.* (citations omitted).

117. 260 S.C. 79, 194 S.E.2d 246 (1973).

118. *Id.* at 82, 194 S.E.2d at 248; *see* State v. Dukes, 245 S.C. 218, 242, 182 S.E.2d 286, 288 (1971).

119. 260 S.C. 511, 197 S.E.2d 280 (1973).

120. 407 U.S. 514 (1972).

the defendant."[121] In *Foster*, the court acknowledges that the delay involved was rather lengthy but attributes it to the State's "inaction" and "administrative procedures" rather than to any "active attempt . . . to delay the trials."[122] The court further notes that "[t]he record offers no reason for the failure of the defendants to assert their right sooner, and under *Barker* a failure to assert the right will make it difficult for the defendants to prove that they were denied a speedy trial."[123]

Finally, the State demonstrated the lack of any prejudice resulting from the seven and one-half year delay. While the prosecution presented four witnesses including the arresting officers, the defendants chose not to offer any testimony in their defense. In upholding the conviction, the court concluded that this lack of prejudice, coupled with the defendants' tardiness in requesting trial, outweighs the State's responsibility for the delay. The defendants' right to a speedy trial had not been abridged.

It should be noted that the defendant in *Barker* was represented by counsel throughout. The Court there emphasized that, for strategic reasons, the defendant made no objection to the numerous continuances sought by the prosecutor.[124] In *Foster*, it appears that the defendants were not represented by counsel during their imprisonment in Florida and might thus have been unaware of their rights to demand a speedy trial. This issue, however, was not raised on appeal.

The court does not clearly address itself to the defendants' contention that prejudice resulted from the death of two witnesses and the unavailability of another.[125] In *Foster*, the court apparently relied heavily on the relative weakness of the defendants' case in finding that "the record is simply void of even minimal prejudice."[126] It is certainly conceivable, however, that the defense was inadequate not in spite of, but rather as a result of, the seven and one-half year delay.

B. *Conferring with Sequestered Witnesses*

During the course of the trial in *State v. Taylor*,[127] the court

121. *Id.* at 530.
122. 260 S.C. at 514-15, 197 S.E.2d at 281.
123. *Id.*
124. 407 U.S. at 534-35.
125. Brief for Appellant at 8, State v. Foster, 260 S.C. 511, 197 S.E.2d 280 (1973).
126. 260 S.C. at 515, 197 S.E.2d at 282.
127. 200 S.E.2d 387 (S.C. 1973).

ruled that the defendant could not personally confer with his own sequestered witnesses. Although the court refused to determine whether the ruling constituted prejudicial error,[128] it decided to "make the following observations which may be of some help and guidance to the court should the issue reoccur upon the retrial of the case."[129] The court recognized that the accused has a constitutional right to be present at every stage of a criminal trial, is entitled to be represented by counsel and to assist counsel in the preparation of his defense. Thus, the court concluded, without citing any authority, that any rule abridging the right of a defendant to confer with his witnesses before presenting them must "be examined with close scrutiny."[130] Such scrutiny should not, however, preclude reasonable precautions by the court to insure that the purpose of sequestration[131] is not defeated. In this regard, the court noted, "requiring the presence of defense counsel, who is himself an officer of the court, should be adequate protection."[132]

C. *Adequacy of Proof*

In *State v. Tabory*,[133] the defendant unsuccessfully contended that inadequate proof existed to sustain a conviction for possession of marijuana. Possession cannot be established absent a showing that the defendant had a right to exercise dominion and control over the thing allegedly possessed.[134] The court found that proof of the defendant's presence in a truck carrying the contraband, coupled with the incrimimating testimony of a State's witness, made a jury issue on the question of possession.

In *State v. Owens*[135] the defendant argued that a directed verdict should have been granted by the trial court due to the State's failure to prove facts alleged in the indictments. Whereas the defendant was charged with making and uttering a forged instrument, no evidence was produced to show that he had made the forgery. The supreme court rejected this contention, citing *State v. Orr*.[136] In that case it is said: "[O]ne found in the possession of a forged instrument . . . and applying it to his own use,

128. There was a question as to whether the ruling was appropriately objected to.
129. 200 S.E.2d at 389.
130. *Id.*
131. *See generally* 6 WIGMORE, EVIDENCE §§ 1837-38.
132. 200 S.E.2d at 389.
133. 260 S.C. 355, 196 S.E.2d 111 (1973).
134. *See, e.g.*, United States v. Bethea, 422 F.2d 790 (D.C. Cir. 1971).
135. 260 S.C. 79, 194 S.E.2d 246 (1973).
136. 225 S.C. 369, 82 S.E.2d 523 (1954), *cert. denied*, 348 U.S. 848 (1954).

must, in the absence of explanation satisfactory to the jury, be presumed to have forged it or to have been privy to its forgery."[137]

D. *Delay in Driver's License Suspension*

In *State v. Chavis*,[138] the State appealed an order reinstating the driver's license of the respondent. Respondent Chavis had been convicted of driving under the influence of intoxicating liquor[139] and had previously refused to submit to a breathalyzer test. The South Carolina Highway Department was not notified of this refusal or of the conviction until approximately one year later. Respondent's license was then suspended for consecutive periods of 90 days[140] and 6 months.[141] The trial court found that the delayed suspensions were violative of due process. The supreme court rejected this reasoning and overturned the reinstatement order. The court noted that the Highway Department had not been notified of the infractions and thus was not responsible for the delay; in addition, the respondent failed to demonstrate any resulting prejudice. The Department merely executed mandatory duties in ordering the suspensions and the statutory provisions themselves were sufficient notice to the respondent.

E. *Post-conviction Relief*

In *Guinyard v. State*,[142] the defendant appealed the lower court's denial of his petition for post-conviction relief,[143] contending that relief should have been granted due to the State's failure to respond to his application within thirty days as prescribed by section 17-606[144] of the Code. Noting that this section "grants to the trial court authority to extend the time for the filing of any

137. *Id.* at 374, 82 S.E.2d at 526.

138. 200 S.E.2d 390 (S.C. 1973).

139. S.C. CODE ANN. § 46-343 (1962).

140. S.C. CODE ANN. § 46-344(d). The penalty for refusal to submit to the breathalyzer test is a ninety-day suspension of the driver's license (Cum. Supp. 1973).

141. S.C. CODE ANN. § 46-348 (1962). The licenses of first offenders under § 46-348 are suspended for six months.

142. 260 S.C. 220, 195 S.E.2d 392 (1973).

143. *See* S.C. CODE ANN. § 17-601 *et seq.* (1962).

144. S.C. CODE ANN. § 17-601(a) (1962) reads as follows:

> Within thirty days after the docketing of the application, or within any further time the court may fix, the State shall respond by answer or by motion which may be supported by affidavits. At any time prior to entry of judgment the court may, when appropriate, issue orders for amendment of the application or any pleading or motion, for pleading over, for filing further pleadings or

pleading,"[145] the supreme court reasoned that the time limit is discretionary with the trial court rather than mandatory. The six month delay accordingly was found to be permissible. The court suggests that this holding is not conclusive; since the issue apparently was not raised before the trial court, the objection could not be made for the first time on appeal.

It might be observed that the record is silent as to other significant matters. Under section 17-601(a) the trial court may "issue orders . . . for extending the time of the filing of any pleading."[146] The record fails to disclose that the trial court issued such an order at any time during the six month delay between the application for relief and the State's response. Perhaps we are to infer from *Guinyard* that the lower court would have issued such an order had the State bothered to request it.

In *State v. Adams*[147] it was held that, although a witness' testimony at the preliminary hearing as to the date of an illegal transaction differed from the date testified to at trial, no surprise or prejudice to the defendant resulted. The correct date had previously been identified in the warrant and indictment; the defendant was aware of the discrepancy and chose not to object at the preliminary hearing.

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motions, or for extending the time of the filing of any pleading. In considering the application, the court shall take account of substance, regardless of defects of form. If the application is not accompanied by the record of the proceedings challenged therein, the respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application.

145. 260 S.C. at 225, 195 S.E.2d at 394.

146. S.C. CODE ANN. § 17-601(a) (1962).

147. 201 S.E.2d 129 (S.C. 1973).