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SURVEY OF RECENT DECISIONS BY THE NORTH CAROLINA SUPREME COURT IN THE AREA OF CRIMINAL PROCEDURE

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It is difficult to be a free and civilized citizen unless one lives in a free and civilized society. In many important respects, the courts are the guardians of our collective freedoms, and their decisions provide a bench-mark by which our freedoms can be measured. This "bench-mark" is especially apparent in those decisions regulating the methods by which society judges those charged with crimes.

This article is a survey of the decisions by the Supreme Court of North Carolina in the area of criminal procedure from the fall term of 1968 until the present. The decisions are reported in volumes 275, 276, and the first two advance issues of 277 of the North Carolina Reports. The writer of this article prefers to minimize personal comment and let the reader judge for himself whether or not the decisions of the North Carolina Supreme Court constitute a "bench-mark" that sufficiently ensures the criminal defendant his measure of our collective freedoms.

The cases are categorized and discussed in roughly the order in which the issues arise during a criminal proceeding, beginning with the arrest of a suspect and culminating with the sentencing of a convicted defendant.

I. ARREST

The criminal proceedings generally begin with the arrest of a suspect. The constitutional backdrop is the fourth amendment, which provides in relevant part that "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . particularly describing the . . . persons . . . to be seized."[1]

One of the current controversial issues under the fourth amendment is whether the police must "knock" and announce themselves prior to entry into a dwelling where they suspect illegal activity. This issue was decided

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[1] U.S. CONST. amend. IV.

by the Supreme Court of North Carolina against "no-knock" in *State v. Sparrow*.[2]

Mr. and Mrs. Sparrow rented a large two-story house in Charlotte, and from twenty to twenty-five persons of both sexes lived in the house with them, some on a permanent basis and others temporarily. The rules of the house required permanent residents to contribute to the payment of rent, food, and so on, and it was necessary for a visitor to be at least sixteen years of age to stay overnight.

The police suspected that a young, runaway girl was staying at the Sparrow house, and six policemen, armed with a warrant, went to the house to take her into custody. Three of them went to the front door; the other three gained access through the rear. The officers at the front door were not in uniform. The officers testified that they "knocked" on the door, were told to "come in," and did so. The Sparrows denied this. In any event, when the officers entered, the young runaway tried to escape; "Officer Maness caught her around the waist, whereupon [the runaway] bit him on the hand and Marvin [Mr. Sparrow] jumped on the officer's back. When Lieutenant Hall took hold of Marvin and told him he was under arrest, Katherine attempted to free her husband and kicked Lieutenant Hall."[3]

Mr. Sparrow was charged and convicted of obstructing a public officer in the discharge of his duties and sentenced to a jail sentence of between eight and twelve months.

The supreme court reversed in an opinion by Justice Moore, who wrote:

> Ordinarily, a police officer, absent invitation or permission, may not enter a private home to make an arrest or otherwise seize a person unless he first gives notice of his authority and purpose and makes a demand for and is refused entry. Without special or emergency circumstances, an entry by an officer which does not comply with these requirements is illegal. Officers have no duty to make an illegal entry into a person's home. Hence, one who resists an illegal entry is not resisting an officer in the discharge of the duties of his office. These views are in accordance with the ancient rules of the common law and are predicated on the constitutional principle that a person's home is his castle.[4]

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[2] 276 N.C. 499, 173 S.E.2d 897 (1970).
[3] *Id.* at 504, 173 S.E.2d at 900.
[4] *Id.* at 512, 173 S.E.2d at 905-06.

The crucial question then was whether the officers entered the Sparrow home legally, *i.e.*, after knocking and demanding entry. The trial court failed to submit this factual controversy for the determination of the jury, and "error in this respect was prejudicial and sufficient to entitle Marvin to a new trial."[5]

State v. McCloud[6] also involved a warrantless police intrusion into a man's "castle," this time his rented room at the Holiday Inn South in Greensboro. In the early morning hours of March 28, 1969, it was discovered that the Florida Street Baptist Church in Greensboro had been entered and the contents of a safe stolen. The officers suspected McCloud of being one of the two culprits involved. They went to the motel room where he was staying with his girl friend and arrested him on the charge of "occupying a room for immoral purposes." Some incriminating coins were found in the room incident to a search after the arrest.

North Carolina General Statutes section 15-41 authorizes an arrest of a person who has committed a felony or misdemeanor in the presence of the officer, or when the officer has reasonable grounds to believe that the person to be arrested has committed a felony or misdemeanor in his presence. The North Carolina Supreme Court, per Justice Branch, held that this statute did not authorize the officers to enter the premises without arrest warrants on the theory that a "minor immoral offense" was being committed in their presence:

> It would seem that unless the misdemeanor is committed in the presence of the officer in the sense that at the time of its commission *through his sensory perception* he might know that a misdemeanor is being committed in his presence or have reasonable ground to believe that a misdemeanor has been committed in his presence, that an arrest cannot be made without a warrant.[7]

The court held that as a consequence of this illegal entry, the coins taken from the motel room were unlawfully seized and could not be admitted into evidence. However, as will be shown shortly, the constitutional victory of McCloud was not complete.

State v. Moore[8] also involved an arrest without a warrant for a misdemeanor. On Saturday night, April 6, 1968, there was a riot in Wilson, and some stores were damaged and looted. On Sunday, April 7, Detective

[5] *Id.* at 513, 173 S.E.2d at 906.
[6] 276 N.C. 518, 173 S.E.2d 753 (1970).
[7] *Id.* at 526, 173 S.E.2d at 759 (emphasis added).
[8] 275 N.C. 141, 166 S.E.2d 53 (1969).

Davis received information "from a certain person" that Moore had been one of three persons who had broken windows at a grocery store. On Monday, April 8, two detectives went to Moore's house and put him under arrest. They did not have an arrest warrant.

The supreme court, per Justice Branch, held that the arrest was illegal because the "defendant was charged with a misdemeanor and the record clearly discloses that the alleged misdemeanors did not occur in the presence of the arresting officers, and that the arrests were made without warrants."[9]

The result was different in *State v. Roberts*.[10] There, Agent Windham received information "from a confidential informant" that the defendant was selling LSD in the vicinity of the Village Shoppe Restaurant in Fayetteville. Agent Windham called Lieutenant Struder, and the two of them took up observation positions near the restaurant. "For approximately fifteen or twenty minutes they observed the defendant and another man in a parking lot . . . milling around the parking lot talking to several other persons."[11] The defendant then entered a washerette a few doors from the restaurant; the officers followed him and put him under arrest. They then searched him and found LSD in his glove. The officers had no search or arrest warrants at the time of the arrest.

The supreme court, per Justice Lake, upheld the validity of the arrest:

> at the time of the arrest of this defendant, Lieutenant Struder had reasonable ground to believe the defendant was then in possession of some quantity of lysergic acid diethylamide. . . . Agent Windham, some twenty mintues earlier, had been advised by a confidential informer . . . that the defendant and a male companion were each in possession of a quantity of lysergic acid diethylamide and were then "dealing in it" in the vicinity of the Village Shoppe Restaurant. . . . What they saw, considered in the light of their own experience in the investigation of such offenses, confirmed in their opinion, the information so given by the informer. . . . Under these circumstances, the officers clearly had the right to arrest the defendant though they had no warrant for his arrest. Having the right to arrest him, they had the right to search him and take from him the lysergic acid diethylamide. . . .[12]

[9] *Id.* at 145-46, 166 S.E.2d at 56. Although Moore was ahead at this stage of the opinion, the aftermath was more to the liking of the state. See text at note 28 *infra*.

[10] 276 N.C. 98, 171 S.E.2d 440 (1970).

[11] *Id.* at 100, 171 S.E.2d at 441.

[12] *Id.* at 104-05, 171 S.E.2d at 444. Compare Sibron v. New York, 392 U.S. 40 (1967).

State v. Jacobs[13] also concerned "probable cause" for an arrest. There, a lady en route to Charlotte was warned by a car behind her that something was wrong. She pulled over to the side of the road, and Jacobs pulled up behind her. He told her that something was wrong with her wheel and volunteered to fix it. Since other cars had flashed their lights at her, the lady readily accepted the services of this Good Samaritan. Jacobs, an automobile mechanic, spent thirty minutes fixing her wheel and then pushed her off a steep embankment into the bushes where he raped her. Thereafter, she went back to her car, drove to a nearby service station, and reported the rape to the police. She also reported that her assailant drove a dark blue car with High Point city tag 15339 or 13559. The police traced the number 13559 to Jacobs, drove to his house, and put him under arrest. A dark blue car with High Point license number 13559 was parked outside Jacobs' house. After warning him of his constitutional rights, the police took him to the station house where he confessed. Jacobs subsequently repudiated the confession and argued that, in any event, it was vitiated by the illegal arrest. The court, per Justice Branch, held that the arrest was not without probable cause.

II. Search

The fourth amendment not only protects against unreasonable arrest, but also against unreasonable searches. There were several cases involving this problem during the period of the survey.

In *State v. Robbins*,[14] Deputy Sheriff Duncan was told to go to the house of Ferrell Robbins. When he arrived, he met Robbins' two brothers who said that they had received a telephone call earlier from Ferrell, that they could not understand what he was saying, and that they were worried that something was wrong. The screen door was locked from the inside, and Mr. Robbins' car was parked in front. Deputy Sheriff Duncan "hollered" and beat on the door and the window without receiving any answer. He could not open the door, but one of the brothers brought him an iron bar which he used to break out a panel of glass so he could reach inside and unlock the door. When he entered the house, he saw Mrs. Robbins lying dead on the floor with Mr. Robbins, gun in hand, lying wounded nearby.

When, at the trial, Deputy Sheriff Duncan sought to describe what

[13] 277 N.C. 151, 176 S.E.2d 833 (1970).
[14] 275 N.C. 537, 169 S.E.2d 858 (1969).

he saw when he entered the house, Robbins objected on the theory that the entry was illegal. The supreme court, per Justice Branch, in reviewing the trial court's decision to admit Duncan's testimony, rejected this contention:

> In the instant case the officer was not engaged in a search for evidence to be used in a criminal prosecution. He entered defendant's dwelling at the request of defendant's brothers, who were very apprehensive and worried about defendant. . . . He was simply lending the strong arm of the law to a distressed family who feared that harm had come to their brother and sister-in-law. The officer's presence was lawful and his testimony as to things in plain view was properly admitted into evidence.[15]

State v. Virgil[16] was also a "plain view" situation. One Oliver Evans broke into a gas station at 3:00 a.m., awakening an attendant sleeping there. There was an exchange of shots, and Evans fled to the highway where a car approached and stopped. Evans tried to get into the car, the attendant shot at it, and the car sped away leaving Evans behind. The police took Evans and the gas station attendant to the hospital. The next morning they went to Evans' rooming house and talked to Virgil, Evans' roommate. Virgil took them outside and consented to the search of his car. One of the officers present recalled seeing the car about an hour before the attempted holdup parked near the gas station. The officers found nothing incriminating inside the car but spotted what they thought to be blood on the chrome bolting below the outside door handle. The police removed the chrome for analysis, and the stains were found to be human blood. The chrome was admitted in evidence over the objection of Virgil who protested that the seizure of the evidence was "unreasonable."

The court, per Justice Huskins, upheld the admissibility of the bloodstained chrome: "[N]o search warrant was required. The bloodstained strip of chrome on the exterior of defendant's car was fully disclosed and open to the naked eye. No search was required to obtain it. It was legally acquired and properly admitted into evidence."[17]

State v. McCloud[18] involved the search of the interior of a car. Early on the morning of March 28, 1969, two officers saw an automobile "run

[15] *Id.* at 545, 169 S.E.2d at 863.
[16] 276 N.C. 217, 172 S.E.2d 28 (1970).
[17] *Id.* at 227, 172 S.E.2d at 34.
[18] 276 N.C. 518, 173 S.E.2d 753 (1970). See note 6 *supra.*

a red light." They pursued the automobile, which decreased speed, and the passenger jumped out and ran away. The police arrested the driver on the charge of running a red light. The officers then looked in the car and saw on the floorboard two metal flashlights, a metal pry bar, a .22 caliber pistol, a small crowbar, a thirteen inch screwdriver, and a pair of brown cloth work gloves. The officers again placed the driver under arrest, this time for the possession of burglary tools and carrying a concealed weapon. The officers then looked into the glove compartment and found a chisel, a partially filled bottle of vodka, and a roll of coins wrapped in a blue container bearing the stamp "Florida Street Baptist Church." At the subsequent trial, the defendant, who was the passenger, objected to the admission of the items seized from the car at the time of the arrests.

The court, per Justice Branch, sustained their admissibility. He wrote that the search of an automobile in connection with a lawful arrest for a traffic violation is lawful when all the circumstances give rise to a reasonable belief that the car may contain contraband or other property lawfully subject to seizure. Here, he concluded:

> the owner of the automobile was lawfully under arrest. . . . [T]he contraband articles were observed, without the necessity of search, lying on the floorboard of the automobile. Upon observing these articles, defendant was further charged with unlawful possession of burglary tools. . . . The further search [of the glove compartment] was clearly based upon a belief reasonably arising from the circumstances that the motor vehicle contained other property subject to lawful seizure.[19]

The most interesting decision in this particular area of the law is *State v. Accor*.[20] In the early morning hours of March 5, 1969, two men broke into the kitchen of the Martin house in Gastonia. They woke the daughter, who screamed loudly, and Mr. Martin, age seventy-five, turned on the kitchen light and made at the two with a vanity stool. The daughter began to pound one of them with a telephone, and a son joined in the fray. The melee continued until a next-door neighbor turned on his flood light, and the intruders fled.

The next day Accor was taken to the police station and photographed, and the photograph was put into an album with other pictures and shown to the Martins. The Martins identified Accor's picture, and he was

[19] *Id.* at 530, 173 S.E.2d at 762. The law of search and seizure of automobiles is admittedly very complicated. *See, e.g.*, Chambers v. Maroney, 399 U.S. 42 (1970).

[20] 277 N.C. 65, 175 S.E.2d 583 (1970).

arrested. At the subsequent trial, the album was placed into evidence over Accor's objection. The supreme court, per Chief Justice Bobbitt, ruled that the admission of the album was prejudicial error.

The court pointed out that when Accor was picked up, brought in, and photographed, no warrant had been issued for his arrest, the police had no evidence to support a finding of probable cause of his guilt, nor was there any evidence that he voluntarily accompanied the officers to the police station. As a consequence, the arrest or detention was illegal, and the subsequent photographs were the "fruit" of the illegality and "tainted" thereby.

The court relied upon and quoted at length from the recent decision of the United States Supreme Court, *Davis v. Mississippi*,[21] in which Mr. Justice Brennan stated that "[t]he exclusionary rule was fashioned as a sanction to redress and deter overreaching governmental conduct prohibited by the Fourth Amendment"[22] and that the exclusionary rule must apply during an investigatory detention. Otherwise,

> [i]nvestigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or investigatory detentions.[23]

III. Use of Confessions

The problems of confessions, and their admissibility into evidence, are, in some instances, closely related to the problems of arrest and illegal search. The Supreme Court held long ago that, in a federal prosecution, the fourth amendment barred as "fruit of a poison tree" evidence secured through an illegal search and seizure.[24] In 1960, this exclusionary rule

[21] 394 U.S. 721 (1969). In *Davis* a young Negro was taken to the police station and fingerprinted along with a number of other young Negroes. There was no reason to believe that any of them were guilty of a rape then being investigated. Subsequently, the fingerprints of Davis were matched with fingerprints found within the house of the rape victim, and the fingerprint testimony was utilized in the trial against Davis. The Supreme Court held that the taking of Davis' fingerprints during his illegal detention constituted an unreasonable seizure of his person in violation of the fourth amendment, and notwithstanding its relevancy and trustworthiness as an item of proof, the illegally seized evidence was inadmissible at trial.

[22] *Id.* at 724.

[23] *Id.* at 727, *cited in* State v. Accor, 277 N.C. 65, 82, 175 S.E.2d 583, 594 (1970).

[24] Weeks v. United States, 232 U.S. 383 (1914).

was made applicable to the states,[25] and in *Wong Sun v. United States*,[26] the Supreme Court extended the "poison fruit" doctrine to *verbal statements* derived "immediately from an unlawful entry and an unauthorized arrest."[27]

The *Wong Sun* principle was applied in two cases during the period covered by this survey, and in each case the holding was against the accused. In *State v. Moore*[28] the defendant was arrested on the charge of malicious damage to property. He confessed to the arresting officer that he had broken windows at a grocery store during a riot in Wilson. The arrest was illegal since the offense was a misdemeanor and the arresting officer had no warrant and the offense had not been committed in his presence.[29] Consequently, Moore argued that the confession should not have been admitted at his trial.

The court, per Justice Branch, rejected this contention and pointed out that there are two distinct lines of authority under the *Wong Sun* decision. One line of authority holds that any confession made subsequent to an illegal arrest must be excluded. The other line of authority holds that the confession is admissible unless it was caused by, brought about by, or is the fruit of the police illegality. The North Carolina Supreme Court condemned any illegal act by police officers but adopted the line of authority requiring causation before a confession will be rejected because of an illegal arrest:

> Both reason and weight of authority lead us to hold that every statement made by a person in custody as a result of an illegal arrest is not *ipso facto* involuntary and inadmissible, but the facts and circumstances surrounding such arrest and the in-custody statement should be considered in determining whether the statement is voluntary and admissible. Voluntariness remains as the test of admissibility.[30]

Applying that test to the facts before it, the court concluded that the confession was made freely, voluntarily, and understandingly.

State v. McCloud[31] was the second case under the *Wong Sun* doctrine. In *McCloud* the police illegally broke into the defendant's motel

[25] Mapp v. Ohio, 367 U.S. 643 (1960).
[26] 371 U.S. 471 (1963).
[27] *Id.* at 485.
[28] 275 N.C. 141, 166 S.E.2d 53 (1969).
[29] See text at note 8 *supra*.
[30] State v. Moore, 275 N.C. 141, 153, 166 S.E.2d 53, 62 (1969).
[31] 276 N.C. 518, 173 S.E.2d 753 (1970).

room without a warrant[32] and illegally seized some incriminating coins. Defendant then confessed. When the police sought to introduce his confession into evidence, the defendant objected that the illegal entry and illegal seizure of the coins triggered his confession.

The court, per Justice Branch, rejected this argument and found that the illegal police conduct did not cause the confession. The court pointed out that the defendant was a "knowledgeable person, a veteran of many trials and encounters with the police"[33] and concluded, therefore, that the confession was not the "fruit" of the illegally seized coins or the "product of a 'will overborne.' "[34]

During the period covered by this survey, the North Carolina Supreme Court had the interesting problem of whether a confession illegally obtained could be used as evidence to impeach the defendant's testimony rather than as evidence to prove the crime-in-chief.[35]

In *State v. Catrett*[36] the owner of a summer mountain cottage arrived one afternoon to observe some of his furniture on the front yard and a man coming out of a cottage window with two frying plans. A red and white Chevrolet was parked in the driveway with a man in the driver's seat. The man coming out of the window walked down the road, and the man in the car drove off. The cottage owner summoned the police, and, as they arrived, the red and white car drove back by the cottage. A policeman arrested the driver (Catrett). At the trial the policeman testified that at the time of the arrest, Catrett was "about as drunk a man as you see out and still going."[37] The policeman further testified that he advised Catrett of his constitutional rights and that, thereafter, Catrett confessed to the crime.

Catrett was indicted for aiding and abetting in the felonious breaking and entering of the cottage. The state did not introduce the confession during its case. Consequently, the trial judge made no findings that the confession was voluntarily and understandingly given. When the state rested, Catrett took the stand and denied that he had been near the cottage at the time of the crime. The state then put on the arresting officer who testified concerning the confession. The trial judge admitted this testimony for the limited purpose of impeaching defendant's testimony.

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[32] See text at note 6 *supra*.
[33] State v. McCloud, 276 N.C. 518, 529, 173 S.E.2d 753, 761 (1970).
[34] *Id.* at 530, 173 S.E.2d at 761.
[35] State v. Catrett, 276 N.C. 86, 171 S.E.2d 398 (1970).
[36] *Id.*
[37] *Id.* at 89, 171 S.E.2d at 400.

The North Carolina Court of Appeals affirmed,[38] basing its decision on *Walder v. United States*.[39] Walder had been indicted in 1950 on a narcotics violation, but the indictment was dismissed because the narcotics in his possession were illegally seized. In 1952, Walder was again indicted on a narcotics violation, and this time he was brought to trial. He took the stand and on direct examination denied that he had then, *or ever*, been in possession of narcotics. The government then introduced testimony concerning the prior indictment. The Supreme Court of the United States upheld this evidence for the purpose of impeachment.

The North Carolina Supreme Court, per Chief Justice Bobbitt, reversed[40] the court of appeals and distinguished *Walder* from *Catrett* in that the impeachment testimony in *Walder* did not relate to the particular offense for which the defendant was then on trial, whereas it did in *Catrett*. More importantly, Justice Bobbitt noted that since *Walder* the United States Supreme Court had ruled in *Miranda v. Arizona*[41] that a warning of constitutional rights is a prerequisite to the admission of any statement made by the defendant. Chief Justice Bobbitt concluded that

> in-custody statements attributed to a defendant, when offered by the State and objected to by the defendant, are inadmissible *for any purpose* unless after a *voir dire* hearing in the absence of a jury, the court, based upon sufficient evidence, makes factual findings that such statements were voluntarily and understandingly made by the defendant after he had been fully advised as to his constitutional rights.[42]

Most of the "confession" cases during the period covered by this survey centered around *Miranda v. Arizona*[43] in which the United States Supreme Court held that a confession was inadmissible unless the accused was given a four-fold warning: that he has a right to remain silent; that any statement he does make may be used as evidence against him; that he has the right to consult with an attorney; and that if he is indigent, a lawyer will be appointed to represent him. Shortly after *Miranda* was decided, the Supreme Court held, in *Johnson v. New Jersey*,[44] that the *Miranda* rule was not applicable to defendants whose trial began prior to the date

[38] State v. Catrett, 5 N.C. App. 722, 169 S.E.2d 248 (1969).
[39] 347 U.S. 62 (1954).
[40] State v. Catrett, 276 N.C. 86, 171 S.E.2d 398 (1970).
[41] 384 U.S. 436 (1966).
[42] State v. Catrett, 276 N.C. 86, 97, 171 S.E.2d 398, 405 (1970) (emphasis in the original).
[43] 384 U.S. 436 (1966).
[44] 384 U.S. 719 (1966).

of the *Miranda* decision, and in *Jenkins v. Delaware*[45] the Supreme Court held that the *Miranda* rule did not apply to the retrial of defendants after the date of the *Miranda* decision if the original trial was prior to that date. The Supreme Court refused to apply *Miranda* retroactively (or prospectively to retrials when the confession evidence had been obtained prior to *Miranda*) to prevent unreasonable disruption of the administration of criminal laws and to avoid "penalizing" the law enforcement officials who complied with the "constitutional standards applicable at the time the confessions were made."[46]

An interesting application of the retroactive-prospective application of *Miranda* came before the North Carolina Supreme Court in *State v. Swann*.[47] Swann was arrested on a murder charge and confessed to the crime. The confession was given prior to the decision in *Miranda*, and, admittedly, Swann had not been advised of his right to counsel. Swann was sent to Cherry Hospital for psychiatric observation, and the psychiatrists advised that Swann was not then able to stand trial. Two years later, in 1966, he was judged able to stand trial and was tried. The jury was unable to reach a verdict. He was tried a second time in 1967 and found guilty. On post-conviction proceedings he was ordered released because of "systematic exclusion of Negroes because of race from service on the grand jury which returned the bill of indictment aginst defendant at June 1964 Criminal Session in Durham County."[48]

Swann was then arrested on a new murder warrant, and a new grand jury returned an indictment. He was tried on this new indictment in 1968, and the confession given in 1964 was used against him. The jury was unable to agree, and a second trial was held on the new indictment in 1968. In that trial, the judge withdrew a juror for reasons not stated in the record, thus bringing about a mistrial. Swann was tried for a third time on the new indictment in January, 1969 and found guilty. The pre-*Miranda* confession was again admitted at the trial. The supreme court, per Chief Justice Bobbitt, reversed the conviction on the theory that since this was a "new trial" (on a new indictment) and since it took place after the June 13, 1966 date of *Miranda*, the pre-*Miranda* confession was improperly admitted into evidence.

In *Miranda*, the Supreme Court held that after an accused is given the

[45] 395 U.S. 213 (1969).
[46] State v. Lewis, 274 N.C. 438, 451, 164 S.E.2d 177, 186 (1968).
[47] 275 N.C. 644, 170 S.E.2d 611 (1969).
[48] *Id.* at 646, 170 S.E.2d at 612.

four-fold warning, he may waive his rights to silence and confess to the crime "provided the waiver is made voluntarily, knowingly and intelligently."[49] The Supreme Court added, however, that when a confession is obtained while the suspect is in custody and/or in isolated circumstances, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[50] The Court explicitly held that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained"[51] and that "[t]he requirement of warnings and waiver of rights is fundamental with respect to the Fifth Amendment privilege and *not simply a preliminary ritual to existing methods of interrogation.*"[52]

Most of the "confession" cases arise when the state seeks to admit a confession and the defendant repudiates it with the statement that it was not made at all, or at least not made voluntarily, knowingly, and intelligently.

The North Carolina Supreme Court insists that the trial judges hold *voir dire* hearings out of the presence of the jury and make findings of fact as to the immediate circumstances and conditions surrounding the making of the purported confession when objection is made to the admissibility of a confession. If objection is not made, the trial judge need not conduct the hearing. *State v. Williams*[53] is an unsual "waiver" case which illustrates the necessity that the demand for a hearing be made.

Williams was arrested and charged with first degree murder. His attorney moved the court for a psychiatric examination, and Williams was sent to the state hospital for observation. The doctors reported that he could distinguish between right and wrong and was able to assist in his own defense. When his case was called for trial, he refused to come into the courtroom, remaining in his cell wrapped in a blanket, apparently nude. He was then examined by a psychiatrist, who reported to the judge that Williams was not insane. Williams came into the courtroom when his case was recalled the same afternoon and told the court that he did not want a lawyer. The trial judge ultimately agreed but said that he

[49] 384 U.S. at 444.
[50] *Id.* at 475.
[51] *Id.*
[52] *Id.* at 476 (emphasis added).
[53] 276 N.C. 703, 174 S.E.2d 503 (1970).

would ask the attorney previously representing Williams to remain in the courtroom to give Williams any advice he wished. During the trial, Williams did not ask the attorney for advice, nor did he cross-examine any witnesses, put on an affirmative defense, speak to the jury, or otherwise try to defend himself.

The state introduced agents from the State Bureau of Investigation who testified in part that they had interviewed Williams after fully advising him of his constitutional rights and that Williams had given a detailed confession of the crime. They then recounted the confession. When the trial ended, the jury found Williams guilty and sentenced him to death.

Williams announced in open court that he did not wish to appeal. His previous attorney, however, was permitted to appeal on his behalf and argued, in part, that the trial judge erred in permitting the State Bureau of Investigation agents to recount the details of the Williams confession without first conducting a *voir dire* investigation to determine if the confession had been freely and knowingly made. The court, per Justice Moore, rejected this argument and held that there was no obligation on the trial court in the absence of an objection to inquire *sua sponte* into the voluntariness of an alleged confession offered by the state. The court noted that "there is nothing in this record to indicate that the confession was anything less than voluntary" and concluded that "no *voir dire* is necessary unless there is an objection to the testimony concerning the alleged confession."[54]

But if objection is made, it is error for the trial court to fail to hold the *voir dire* hearings. This was pointed out in *State v. Williford*.[55] However, if such a hearing is held, the court seems to be inclined to uphold findings that confessions are voluntarily, knowingly, and intelligently made even when, to a more suspicious examiner of the facts, it might appear that the *Miranda* warnings were "simply a preliminary ritual to existing methods of interrogation." For example, in *Williford*, the defendant—who was shot in the leg during the holdup of an ABC store in Raleigh and who, after being arrested and while in great pain, confessed to the crime—saw his confession admitted by the trial court and his conviction upheld by the supreme court because "a confession is not,

[54] *Id.* at 710, 174 S.E.2d at 508. The court noted that the Court of Appeals for the Fourth Circuit in United States v. Inman, 352 F.2d 954 (4th Cir. 1965), had, at least in dictum, reached an opposite conclusion.

[55] 275 N.C. 575, 169 S.E.2d 851 (1969).

ipso facto, rendered involuntary because defendant was suffering from physical injuries and resulting pain."[56]

In *State v. Murry*,[57] a sixteen year old black was arrested on charges of rape and taken to the sheriff's office in Lumberton where he was warned of his rights to silence and to counsel. He then confessed. At trial, the defendant sought to suppress the confession because of his youth, his eighth grade education, and the fact that he gave the confession in the sheriff's office with four police officials present and other officers in the "outside" office. The supreme court, per Chief Justice Bobbitt, rejected this contention and upheld the sentence of life imprisonment because "[t]he mere fact that a confession was made while the defendant was in custody of police officers . . . and before employment of counsel to represent him, does not, of itself, render it incompetent."[58]

Similarly, in *State v. Hill*,[59] it was argued that the court should reject the murder confession of a seventeen year old black girl because of her youth, her lack of opportunity, and her tragic family life and because the record showed that she did not understand the implications of a confession. The supreme court, per Justice Higgins, rejected this argument and sustained the death sentence with the holding that "[i]t would seem that one who has arrived at the age and condition of accountability for crime may make a valid waiver of counsel, and make a voluntary confession."[60]

In like vein, the supreme court has sustained the admission of an in-custody confession when the defendant argued that it was not "intelligently" made because "no one explained the doctrine of 'felony-murder' to him,"[61] when the defendant argued that it was not "intelligently" made because "he had been drinking heavily and taking drugs and 'yellow jackets,' "[62] and when the defendant argued that his confession of killing two policemen was not "voluntarily" made because it was given in the police station with many officers present and "before he was questioned he heard officers outside the room in which he was sitting make the statements, 'We got a black boy we are fixing to lynch,' and 'Let

[56] *Id.* at 580. 169 S.E.2d at 855.
[57] 277 N.C. 197, 176 S.E.2d 738 (1970).
[58] *Id.* at 204, 176 S.E.2d at 743, *citing* State v. Gray, 268 N.C. 69, 78, 150 S.E.2d 1, 8 (1966).
[59] 276 N.C. 1, 170 S.E.2d 885 (1969).
[60] *Id.* at 14, 170 S.E.2d at 894.
[61] State v. McRae, 276 N.C. 308, 312, 172 S.E.2d 37, 39 (1970).
[62] State v. Haynes, 276 N.C. 150, 171 S.E.2d 435, 437 (1970).

us have him and take him and let him have an accident with a blackjack.' "[63]

In many state cases prior to *Miranda,* the defendant would repudiate a confession because it had been coerced. The police would deny coercion, and it was up to the state courts to determine whether the defendant or the police were telling the truth. Since no one knew to a certainty what actually went on in the police interrogation rooms, *Miranda* required that the defendant be informed of his right to counsel, the expectation being that counsel would be requested and could then testify to the veracity of the witnesses. But in North Carolina this expectation has not come to pass. In all the "capital" cases during the period of this survey, there was no request for counsel although police say they gave the *Miranda* warnings in each instance. The defendants in these cases have denied this assertion, and, thus, there has been created a new type of credibility issue: did or did not the police give the required constitutional warning?

This problem did not arise in *State v. McRae*[64] because the defendant there was given the warnings and had signed a written waiver in the presence of the deputy clerk of the superior court before any questioning took place.

The problem does not arise in the federal courts, for the Supreme Court has held for many years that a confession is not admissible into evidence unless the arrested suspect is taken "without delay" to a magistrate who informs him of his rights to silence, counsel, and so on.[65] This precludes the opportunity for detained questioning and coerced confessions.

The federal *"Mallory"* exclusionary doctrine is based upon the requirements of rule 5(a) of the Federal Rules of Criminal Procedure and is not a constitutional limitation binding upon the state courts.[66] But there is nothing to prevent North Carolina courts from adopting a similar exclusionary rule to vitalize the North Carolina constitutional and statutory provisions which, like rule 5(a) of the Federal Rules, require that all person put under arrest be taken to a magistrate "as soon as may be."[67]

[63] State v. Sanders, 276 N.C. 598, 611, 174 S.E.2d 487, 497 (1970).
[64] 276 N.C. 308, 172 S.E.2d 37 (1970).
[65] Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943).
[66] Ker v. California, 374 U.S. 23 (1963).
[67] N.C. CONST. art. I, §§ 14, 17, 18; N.C. GEN. STAT. § 15-46 (1965); N.C. GEN.

It would minimize the questions which now arise when defendants seek to repudiate their confessions with the assertion that they were not given the *Miranda* warnings.

IV. Line-Up, Photograph, and In-Court Identification

The cases involving identification of the accused by the victim during a criminal trial share some of the due process attributes of the cases dealing with "coerced confessions" and illegally obtained evidence.

In *United States v. Wade*[68] the United States Supreme Court held that a "line-up" identification procedure is a "critical stage" of the criminal trial and that, consequently, a suspect is entitled to the assistance of counsel to ensure that the line-up is conducted fairly. The Court also applied the "exclusionary rules" so that any information gained by the state at a line-up cannot be used against the accused unless he has counsel with him at the line-up or has intelligently and knowingly waived his right to the assistance of counsel. The Court acknowledged, however, that if an in-court identification has an origin independent of the line-up information and is, thus, not tainted by the illegal line-up, it is admissible.

In *Stoval v. Denno*[69] the United States Supreme Court, while ruling that the *Wade* requirement of counsel at line-ups would not be given retroactive application, acknowledged that a line-up procedure may be "so unnecessarily suggestive and conducive to irreparable mistaken identification"[70] as to be a denial of due process apart from the right-to-counsel rule. *Foster v. California*[71] illustrates this last principle. In that case a holdup victim identified the culprit as a tall man wearing a leather jacket. Foster, six feet tall and wearing a leather jacket, was put in a three-man line-up with two short men, and the victim picked him out as the robber. The Supreme Court held that "[T]his procedure so undermined the reliability of the eyewitness identification as to violate due process."[72]

Finally, in *Simmons v. United States*[73] victims of a robbery identified the defendant from photographs shown to them by the police. The

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Stat. § 15-47 (Supp. 1969). *See also* State v. McCloud, 276 N.C. 518, 531, 173 S.E.2d 753, 762 (1970); State v. Moore, 275 N.C. 141, 146, 166 S.E.2d 53, 57 (1969).

[68] 388 U.S. 218 (1967).

[69] 388 U.S. 293 (1967).

[70] *Id.* at 302.

[71] 394 U.S. 440 (1969).

[72] *Id.* at 443.

[73] 390 U.S. 377 (1968).

Supreme Court upheld the conviction under the facts in that case, but warned that:

> convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground [due process] . . . if the photographic identification procedure was so impermissibly suggestive as to give rise to a very susbtantial likelihood of irreparable misidentification . . . .[74]

During the period covered by this survey, the North Carolina Supreme Court passed on seven situations involving alleged impermissibly suggestive line-ups and suggestive photographs.

State v. Rogers[75] concerned a rape, during evening hours, along an unlighted stretch of a city block. The victim, even though "visibility was poor," told the police than her assailant "was a young colored male with smooth skin, hair cut short, dressed in a dark blue jacket and dark pants and had a men's leather belt looped loosely and hanging around his neck."[76] The police rounded up four suspects, all fourteen or fifteen years of age, with one, Rogers, wearing a belt hanging around his neck. The victim asked that Rogers put on a dark blue jacket, and when he did, she identified him as her assailant. At the subsequent trial, she testified to the jury that she had identified Rogers at the line-up, and she made an additional in-court identification. Rogers was convicted and given a life sentence.

On appeal, he argued that he was the victim of a suggestive line-up procedure. The supreme court, per Justice Huskins, pointed out that the line-up took place prior to the *Wade* decision, and, therefore, the requirement of counsel did not apply. It also held that there was no denial of due process:

> The belt around defendant's neck was the only mark of identification peculiar to him alone. It was placed there by defendant himself—not by law enforcement authorities. The officers were under no compulsion, constitutional or otherwise, to remove it. Nor were they required to place similar belts around the necks of the other boys in the lineup. Its presence cannot be attributed to the officers or regarded as the kind of rigged "suggestiveness" in identification procedures which *Wade* and *Gilbert* and *Foster* were designed to deter. Its presence was simply an existing fact—it was around defendant's neck when he was picked

[74] *Id.* at 384.
[75] 275 N.C. 411, 168 S.E.2d 345 (1969).
[76] *Id.* at 416, 168 S.E.2d at 347.

> up, there when he was taken to the police station, and still there when viewed by the victim. No one put the belt on him and no one asked him to remove it. The victim was permitted to see him in rainment of his own choosing. Considering the totality of circumstances, as we are required to do, we hold that the lineup in this case did not offend constitutional requirements . . . .[77]

State v. Gatling[78] involved a robbery. The victim was hitchhiking near the main gate of Camp Lejeune where he was picked up "by two colored men wearing marine utility clothes and driving an old model, white, two door Pontiac."[79] They drove him around, robbed him, and threw him out in a lonely area. He reported the crime to the police and gave them a description of the car and the license-plate number. The car was spotted soon thereafter. Gatling was in the driver's seat with a friend next to him. They were taken to the police staiton where the victim was waiting. He "positively identified Gatling and Banks as the men who robbed him."[80] He so testified at the trial, and over the objections of the defendants, made in-court identifications.

Gatling protested that he had not had the assistance of counsel at the line-up at the police station, but the court, per Justice Huskins, rejected this contention on the theory that the *Wade* decision did not apply:

> there was no lineup; nor were defendants "shown singly" for identification purposes. They were taken to the jail for incarceration—not for identification. Russell's [the victim's] presence there was not prearranged by the officers. He had remained there of his own volition after reporting the robbery. . . . This is a far cry from the facts in *Wade* and *Gilbert* and certainly is not the type of confrontation for identification purposes which those cases were designed to deter. In our view *Wade* and *Gilbert* do not encompass and have no application to the facts in this case.[81]

Apart from the requirements of counsel at a line-up, the court also held that "the victim's identification of defendants at the jail did not take

[77] *Id.* at 429, 168 S.E.2d at 356. There was evidence in this case that Rogers was a member of the "Hunt Street Angels" and that many members of this street club wore belts around their necks at times.

[78] 275 N.C. 625, 170 S.E.2d 593 (1969).

[79] *Id.* at 626, 170 S.E.2d at 593.

[80] *Id.* at 628, 170 S.E.2d at 594. Gatling had an alibi at the trial—that he was on duty at the Marine Base until 4:00 p.m. on the day of the robbery—and the senior noncommissioned officer and several others backed him up. They were not sure, however, whether it was 4:00 p.m. eastern standard time, or daylight savings time.

[81] *Id.* at 632-33, 170 S.E.2d at 597.

place under circumstances 'so unnecessarily suggestive and conducive to irreparable mistaken identification' as to be a denial of due process of law"[82] under the principles expounded in *Stoval*. *State v. Austin*[83] was a much simpler situation. Two armed men held up a store. They were not masked, and one was a customer known to the victim. Ten days or so after the robbery, the victim was shown a number of pictures and identified the two robbers. At the trial, he made an in-court identification.

The supreme court, per Justice Huskins, affirmed the conviction on the theory that "[e]ven if *Wade* and *Gilbert* applied in this case . . . [the in-court identification] was in no way related to the lineup."[84] The court explained that the prosecuting witness had observed both defendants from eight to ten minutes during the robbery, that the defendants were undisguised, and that their actual description fits the description the victim gave the officers following the robbery.

State v. Blackwell[85] was more complicated. Fannie Dillard went to a "drink house" in Winston-Salem late one night to get a drink of wine. After several drinks she said "Oh, I wish Sonny was here to walk me home."[86] A stranger said he would walk her home and put his arm around her waist. She testified that on the way home, the stranger raped her. She identified Blackwell as the stranger; he was convicted and sentenced to life imprisonment.

When the victim had reported the crime to the police, they presented her with fifteen or twenty photographs, and she picked defendant's photograph from the others. The police arrested him and brought him to the police station where he was confronted with the victim. She asked the police "to ask him to embrace me around my waist . . . to see how near I come to his shoulder"[87] and then identified him although since the rape "[h]e had cut and shaved his hair off, and he had a white earring in his ear."[88] Defendant objected that the "vital in-court identification by the prosecution witness was tainted by illegal out-of-court identification,"[89] but the court, per Justice Branch, held that the record:

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[82] *Id.* at 633, 170 S.E.2d at 597-98.
[83] 276 N.C. 391, 172 S.E.2d 507 (1970).
[84] *Id.* at 397, 172 S.E.2d at 511.
[85] 276 N.C. 714, 174 S.E.2d 534 (1970).
[86] *Id.* at 716, 174 S.E.2d at 536.
[87] *Id.* at 718, 174 S.E.2d at 537.
[88] *Id.* at 719, 174 S.E.2d at 537.
[89] *Id.* at 719, 174 S.E.2d at 538.

> clearly establishes that the in-court identification was based upon observation of the suspect immediately before and at the time the crime was committed, so that the in-court identification was of independent origin and untainted by any illegality in the identification by photograph or the in-custody confrontation.[90]

State v. Accor[91] also involved the use of photographs. Two burglars were apprehended during a burglary, but they escaped after a scuffle with the home occupants. Accor and another were suspected by the police; they were photographed; and their pictures put in an album with the photographs "of eleven other adult Negro males."[92] The album was shown to each of the home occupants in private, and they identified Accor as one of the burglars. At trial, the victims made in-court identifications. Defendant objected that "the photographic identifications were illegal because there was a 'lineup in disguise' when counsel for defendants were not present."[93] The court, per Chief Justice Bobbitt, rejected this contention with the holding that:

> In our view, the doctrine of Wade and Gilbert *should not be extended* to out-of-court examinations of photographs including that of *a suspect*, whether the suspect be at liberty or in custody. We shall adhere to this view unless and until the Supreme Court of the United States enunciates such an extension of the Wade and Gilbert doctrine.[94]

State v. Jacobs[95] is the final photograph case. A rape victim identified her assailant and the make and license number of his automobile. This led the police to Jacobs, an Indian, and they took two color pictures of him. They gave these two pictures, along with ten other "black and white" pictures of white men, to the victim, and she identified Jacobs. Each picture was marked on its face with the date on which it was taken. The victim did not know at that time that the assailant was an Indian and had described him to the police as a "white person." Jacobs objected that the photographic identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" under *Simmons v. United States*.[96] The Supreme Court, per Justice Branch, held that if the procedure was in error, it was

[90] *Id.* at 724, 174 S.E.2d at 541.
[91] 277 N.C. 65, 175 S.E.2d 583 (1970).
[92] *Id.* at 69, 175 S.E.2d at 586.
[93] *Id.* at 78, 175 S.E.2d at 591.
[94] *Id.* at 80-81, 175 S.E.2d at 593 (emphasis in the original). The supreme court reversed for other reasons. *See* text at note 20 *supra*.
[95] 277 N.C. 151, 176 S.E.2d 744 (1970).
[96] 390 U.S. 377, 384 (1968).

not prejudicial error, for "[t]he record reveals that the prosecuting witness had opportunity to observe defendant for a period of about an hour and a half in a lighted area"[97] before the rape took place; so the in-court identification was a case of "independent origin" and was, therefore, untainted by any illegality in the pre-trial identification by photograph.

State v. McNeil[98] is another rape case. A fifteen year old girl was attacked by a stranger on her way home from school. Two young boys happened by and threw a stick into the bushes where the assault was taking place. The assailant ran and was recognized by the young boys. They identified him to the police. Two policemen took him to the school the next day. One held him outside on the school yard, and the other went in and led the victim to the window to observe the suspect. She told the policeman, "That is him."[99] At the subsequent trial the victim made an in-court identification, the victim was found guilty and sentenced to life imprisonment.

Defendant appealed on the theory that "his constitutional right to a lawyer was violated by the officers in that they took him to the school house"[100] for identification. He contended further that his in-court identification by the victim was "tainted" by the prior identification at the school house. The court, per Justice Higgins, ruled that there was no "taint" from the confrontation at the school house and asked rhetorically:

> Why should the appellate courts indulge the presumption that the victim's in-court identification is not reliable and should be excluded in cases where the witness had made a prior identification, even if the suspect was in custody? What difference does it make if the identification was made while he was in custody, in a line up, or in a rogue's gallery picture? . . . The main issue is the guilt or innocence of the suspect. To exclude the evidence of the victim identifying him because she had previously seen him in the presence of officers is a case of the tail wagging the dog.[101]

V. Remote and Prejudicial Testimony

Evidence in a criminal trial which only serves to inflame the passions and prejudices of the jury violates due process of law.[102] As Professor

[97] State v. Jacobs, 277 N.C. 151, 161, 176 S.E.2d 744, 750 (1970).
[98] 277 N.C. 162, 176 S.E.2d 732 (1970).
[99] *Id.* at 167, 176 S.E.2d at 734.
[100] *Id.* at 170, 176 S.E.2d 736.
[101] *Id.* at 172, 176 S.E.2d at 738.
[102] *See, e.g.*, Scales v. United States, 367 U.S. 203, 255-56 (1961); Lisenba v. California, 314 U.S. 219, 228 (1941).

McCormick points out, even "relevance is not always enough. There may remain the question, is its value worth what it costs? There are several counterbalancing factors. . . . In order of their importance, they are these. First, the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility or sympathy . . . ."[103]

The supreme court has struck this balance between relevance and prejudice on several recent occasions, usually when the state had introduced evidence of past criminality or misconduct or when the state sought to illustrate the facts of a crime with pictures that could only serve to inflame the jurors.

In *State v. Williams*[104] the defendant was on trial for the rape of a member of the Women's Army Corps living with her soldier husband at Fort Bragg. The defendant confessed to the crime (he later repudiated the confession) and told the investigating officers that he was then AWOL from Fort Hood, Texas. He objected when this fact was made known to the jury. The court, per Justice Bobbitt, held that his "absent-without-leave" status with the Army "has no significant relationship to whether he committed the crime for which he was indicted . . . [and that] it would have been technically correct to strike this particular sentence"[105] from the defendant's prior statement. But the court could not "conceive that the jurors could have been affected" by this information, so its admission was not "prejudicial."

In a different *State v. Williams*,[106] the defendant was on trial for his life on a murder charge, and the state introduced a confession which included the statement that at the time of the crime, the accused was on "work release," *i.e.*, sentenced to prison but released during the day to work on the outside. The defendant was found guilty and sentenced to death; his attorney argued that the "work release" evidence was prejudicial. The court, per Justice Moore, rejected this contention with these not altogether unambiguous words:

> While it is undoubtedly the rule of law that evidence of a distinct substantive offense is inadmissible to prove another independent crime, this rule is subject to well-established exceptions where the two crimes are disconnected and not related to each other. Proof of the commission of other like offenses to show a chain of circumstantial evidence with

[103] C. McCORMICK, LAW OF EVIDENCE § 152, at 319 (1st ed. 1954).
[104] 275 N.C. 77, 165 S.E.2d 481 (1969).
[105] *Id.* at 89, 165 S.E.2d at 489.
[106] 276 N.C. 703, 174 S.E.2d 503 (1970).

> respect to the matter on trial or to show the identity of the person charged is competent. The testimony that defendant was on "work release" was competent as proof of the identity of defendant and as a fact in the chain of events leading up to the commission of the alleged crime.[107]

State v. Moore[108] also concerned the admissibility of past misconduct. Moore, on trial for the murder of his wife, admitted that he had shot her but claimed that the gun had gone off accidentally when he dropped it on the floor while reaching for a cigarette. The state introduced evidence that, in 1965, the "defendant had slapped his wife several times, . . . torn her clothes from her body, and 'snatched her out on the porch by the hair of her head.' "[109] In October of that same year, he had beaten her and torn off her blouse. Just prior to Christmas in 1967, he hit his wife "in the side with a bottle of whiskey and beat her in the face,"[110] and, in 1968, he took two gasoline credit cards from her purse, tore them up, and said that he was going to put a stop to her going so much. The morning after this occurrence, a neighbor heard the wife give several screams and, later that afternoon, observed that the wife had a bruised eye and a cut on her nose. The court held all this evidence "admissible as bearing on intent, malice, motive, premediation and deliberation on the part of the prisoner."[111]

More serious and difficult are the situations where the state introduces photographs depicting the more sordid and revolting aspects of a crime. Thus, in *State v. Atkinson*,[112] the defendant was charged with the murder of his four year old stepdaughter. He confessed to the crime and took the police to the wooded area where he had buried her. At the trial the state introduced pictures of the burial area and of the victim. The state also put into evidence the shovel used by the defendant to dig the grave and the clothing worn by the child at the time of death. The state also introduced evidence by a pathologist that the child had been raped prior to her death (defendant was not not charged with rape) and photographs of her body to illustrate the brutal nature of the rape. The jury sentenced the defendant to death.

The court, per Justice Lake, upheld the conviction and sentence.

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[107] *Id.* at 711-12, 174 S.E.2d at 509 (citations omitted).
[108] 275 N.C. 198, 166 S.E.2d 652 (1969).
[109] *Id.* at 203, 166 S.E.2d at 655.
[110] *Id.* at 203, 166 S.E.2d at 656.
[111] *Id.* at 206, 166 S.E.2d at 658.
[112] 275 N.C. 288, 167 S.E.2d 241 (1969).

> [T]he jury was properly instructed that the photographs in question were allowed in evidence for the sole purpose of illustrating the testimony of the witnesses and not as substantive evidence. The fact that a photograph depicts a horrible, gruesome and revolting scene . . . does not render the photograph incompetent in evidence, when properly authenticated as a correct portrayal of the conditions observed by and related by the witness . . . .[113]

The photographs substantiating the rape were additionally admissible "to establish the motive, premeditation, deliberation and malice on the part of the defendant for and in the murder with which he was charged."[114]

State v. Barrow[115] also concerned the use of a photograph to illustrate the fact of death. Barrow was charged with murder. He admitted the killing but alleged that it was in self-defense. At the trial the state introduced a photograph of the deceased as he lay face down in the doorway after having been shot three times. This was used to illustrate the testimony of a bystander as to what had gone on. The court, per Justice Huskins, ruled that the photograph was admissible because "if a photograph is relevant and material, the fact that it is gory or gruesome, and thus may tend to arouse prejudice, will not alone render it inadmissible."[116]

But photographs of the victim will not be admitted in all circumstances. Thus, in *State v. Mercer*,[117] some pictures were admitted, others rejected. Mercer was estranged from his wife and, in an attempt at reconcilation, went to the house where she was living with a woman friend. He thought his wife's relationship with her friend "involved more than normal affection."[118] When he arrived, he was denied admittance; whereupon, he fired three or four shots into the front bedroom killing his wife, her friend, and the infant son of the friend. He was charged with first degree murder for each of the three homicides, and at the trial photographs were admitted. Four of them showed the bedroom with the wife's body lying on the bed. The court, per Justice Bobbitt, held that this evidence was admissible. Four additional pictures showed Ida (the friend) and Jeffrey (her son) lying dead at the funeral home. The court held that these photographs "depicting scenes which are poignant and in-

[113] *Id.* at 311, 167 S.E.2d at 254-55.
[114] *Id.* at 313, 167 S.E.2d at 256.
[115] 276 N.C. 381, 172 S.E.2d 512 (1970).
[116] *Id.* at 385, 172 S.E.2d at 514, *citing* D. STANSBURY, NORTH CAROLINA EVIDENCE § 34 (2d ed. 1963).
[117] 275 N.C. 108, 165 S.E.2d 328 (1969).
[118] *Id.* at 111, 165 S.E.2d at 331.

flammatory, have no probative value in respect of any issue for the determination of the jury."[119] The court concluded:

> [W]here a prejudicial photograph is relevant, competent and therefore admissible, the admission of an excessive number of photographs depicting substantially the same scene may be sufficient ground for a new trial when the additional photographs add nothing in the way of probative value but tend solely to inflame the jurors.[120]

In *State v. Rogers*[121] there were no photographs, but the accused in a rape trial objected when the clothing worn by the victim—skirt, bra, blouse, slip, shoes, and raincoat—was introduced into evidence. The court, per Justice Huskins, summarily rejected the defendant's contention that this evidence was prejudicial with the comment that "[a]rticles of clothing identified as worn by the victim at the time the crime was committed are competent evidence, and their admission has been approved in many decisions of this Court."[122]

State v. Strickland[123] involved the use of motion pictures as evidence. On the night of December 1, 1967, a deputy sheriff saw an automobile run off the road into a tree. He went to the aid of the driver, who was drunk. The deputy began to direct the traffic, and the driver of the car left the scene. The car was registered to Strickland, and two hours later a patrolman went to his home. Strickland was in a very intoxicated condition. He was taken to the police station, and movies were made of him as he performed certain tests. Strickland was then charged with operating a motor vehicle while under the influence of intoxicating liquor. He denied the charge, claiming that he had been at home all evening drinking a beer or two.

The movies were shown to the jury, and Strickland objected on the grounds of self-incrimination. The court, per Justice Branch, rejected this challenge because the privilege against self-incrimination relates only to testimony of communicative acts and does not apply to acts not communicative in nature. However, the sound track of the movie projected the voice of the accused admitting that he had been driving the car on the evening in question and that he had been drinking. The court held that this statement was clearly substantive evidence and inadmissible in

[119] *Id.* at 121, 165 S.E.2d at 337.
[120] *Id.* at 120, 165 S.E.2d at 337.
[121] 275 N.C. 411, 168 S.E.2d 345 (1969).
[122] *Id.* at 430, 168 S.E.2d at 356.
[123] 276 N.C. 253, 173 S.E.2d 129 (1970).

the absence of a *voir dire* hearing to determine whether it was "voluntarily and understandingly made" by the defendant after he had been advised of his constitutional rights. As there had been no such *voir dire* hearing, the conviction was reversed. However, the court added a general note of caution concerning movies and their use in trials:

> we think it appropriate to observe that the use of properly authenticated moving pictures to illustrate a witness' testimony may be of invaluable aid in the jury's search for a verdict that speaks the truth. However, the powerful impact of this type of evidence requires the trial judge to examine carefully into its authenticity, relevancy, and competency, and—if he finds it to be competent—to give the jury proper limiting instructions at the time it is introduced.[124]

VI. Right to Counsel

In *Gideon v. Wainwright*,[125] the Supreme Court of the United States held that the right to counsel, guaranteed in the sixth amendment, is made obligatory upon the states by the due process clause of the fourteenth amendment. In that case, the Supreme Court made this ruling as to state felony cases, but it did not say whether the ruling applied to state misdemeanor cases.[126]

Following the decision in *Gideon*, the North Carolina legislature required the judges of the superior courts in *felony* cases to advise all defendants that they were entitled to counsel and to appoint counsel for each defendant found to be indigent unless the right to counsel was intelligently and understandingly waived. Concerning those accused of misdemeanors, the North Carolina legislature authorized, but did not require, the judges to appoint counsel for each indigent "if in the opinion of the judge such appointment [was] warranted."[127]

In *State v. Morris*[128] and in *State v. Green*,[129] the North Carolina Supreme Court had an opportunity to explicate the situations in which misdemeanor defendants must be advised of their right to retain counsel,

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[125] 372 U.S. 335 (1963).

[124] *Id.* at 262, 173 S.E.2d at 135.

[126] The Supreme Court of the United States recently has extended the right of counsel guaranteed in the sixth amendment to the states via the fourteenth amendment in misdemeanor cases when the punishment may exceed six months in jail or a fine of five hundred dollars. Baldwin v. New York, 399 U.S. 66 (1970).

[127] N.C. Gen. Stat. § 15-4.1 (1965).

[128] 275 N.C. 50, 165 S.E.2d 245 (1969).

[129] 277 N.C. 188, 76 S.E.2d 756 (1970).

of their right to have counsel appointed for them if they cannot afford counsel, and of the possible adverse consequences of standing trial without counsel.

Morris concerned a charge of operating a motor vehicle upon a public street while under the the influence of intoxicants. This offense was a misdemeanor punishable by up to two years imprisonment. Morris was convicted of this charge and sentenced to eighteen months. On appeal, he argued that it was error for the trial court not to have advised him of his right to court-appointed counsel. The supreme court, per Justice Huskins, agreed and held:

> defendant here, who is charged with a serious offense, has a constitutional right to the assistance of counsel during his trial in the superior court and . . . G.S. 15-4.1, insofar as it purports to leave to the discretion of the trial judge the appointment of counsel for indigent defendants charged with serious offenses, is unconstitutional. A serious offense is one for which the authorized punishment exceeds six months' imprisonment and a $500 fine.[130]

In *Green*, the defendant was charged and found guilty of willful neglect and refusal to support two named illegitimate children. He was sentenced to jail for a term of six months, but the sentence was suspended for two years on condition that he pay into court the sum of ten dollars per week for the support of the two children. He appealed alleging error by the trial judge in not making inquiry into his indigency and failing to afford him counsel.

The court, per Justice Huskins, recited that since the maximum punishment for willful failure to support illegitimate children was a jail sentence of six months, this offense was not a " 'serious misdemeanor' so as to require appointment of counsel or intelligent waiver thereof under the Sixth and Fourteenth Amendments to the United States Constitution[.]"[131]

In other cases dealing with right to counsel, the supreme court held that there was no such right under the *Wade* line-up decision when the police display an album of photographs to the victims of a crime to identify a suspect[132] and that "even in capital offenses a defendant may

[130] State v. Morris, 275 N.C. 50, 59, 165 S.E.2d 245, 251 (1969). *See* note 126 *supra*.
[131] State v. Green, 277 N.C. 188, 192, 176 S.E.2d 756, 759 (1970).
[132] State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970).

intelligently and understandingly waive counsel during an in-custody interrogation."[133]

VII. Right to Trial by Jury

The Supreme Court of North Carolina also clarified the right to trial by jury. This was necessitated by the decision by the Supreme Court of the United States in *Duncan v. Louisiana*.[134]

The North Carolina Supreme Court ruled upon two claims relating to the right to jury trial during the period of this survey. In *Blue Jeans Corp. v. Amalgamated Clothing Workers*,[135] some strikers at the Whiteville Manufacturing Company violated a state court injunction against using "loud, boisterous and insulting language to persons lawfully using the driveway" of the struck premises "in a willful attempt to intimidate and harass or insult employees and other persons doing business" with the corporation.[136] They were tried without a jury and sentenced to fines of ten dollars or to five days in the county jail. They appealed arguing that they were denied a jury trial in violation of the federal and state constitutions.

The court, per Justice Huskins, rejected the contention. Noting that the maximum punishment permitted under North Carolina General Statutes sections 5-1 and 5-4 was a fine of 250 dollars or imprisonment for thirty days or both, the court concluded that "the offense is petty and there is no constitutional right to a jury trial in either federal or state courts."[137]

Chief Justice Bobbitt dissented on the theory that article 1, section 13, of the North Carolina Constitution "confers upon every person accused of having committed a criminal offense, even though it be a petty misdemeanor, the right to trial by jury either in the inferior court or in the superior court upon original trial or trial *de novo* upon defendant's appeal from an inferior court."[138]

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[133] State v. McRae, 276 N.C. 308, 316, 172 S.E.2d 37, 42 (1970).

[134] 391 U.S. 145 (1968). The Supreme Court also has required a trial by jury in a contempt-of-court situation when the potential punishment is more than "petty," i.e., more than six months or five hundred dollars. Bloom v. Illinois, 391 U.S. 194 (1968); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 206 (1968). It has not yet decided the right to trial by jury in a "juvenile" proceeding, although it has required that many other attributes of "due process" be followed. *See, e.g., In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967).

[135] 275 N.C. 503, 169 S.E.2d 867 (1969).

[136] *Id.* at 506, 169 S.E.2d at 868.

[137] *Id.* at 511, 169 S.E.2d at 872.

[138] *Id.* at 516, 169 S.E.2d at 875 (Bobbitt, C.J. & Sharp, J., dissenting).

In *In re Burrus*[139] the court, per Justice Huskins, held that there was no right to a jury trial in a delinquency proceeding. There, some forty school children, all under sixteen, had protested school conditions at Swans Corner with boisterous marches through the streets, thereby interfering with the flow of traffic. The district court judge declared that they were delinquents, ordered them confined to a state institution, and suspended the order on the conditions that they violate no laws of North Carolina for twelve months, that they report to the social services department at least once each month, that they be home by 11:00 each night, and that they attend school.[140]

By way of contrast to the decision in the *Burrus* case, it should be noted that if a child is fourteen and charged with a capital offense, the juvenile courts have no jurisdiction, and the trial in the superior court is before a jury.[141]

VIII. Right to a Jury Drawn From a Cross-Section of the Community

The fourteenth amendment requires not only that a criminal defendant be afforded the right to trial by jury, but also that he have a jury drawn from a cross-section of the community from which no identifiable group is systematically and intentionally excluded.[142] In the survey period, a number of challenges to the composition of the grand or petty juries were made by litigants and rejected by the North Carolina Supreme Court.

In *State v. Rogers*,[143] the defendant moved to dismiss the indictment on the theory that Negroes were systematically excluded from the grand jury which indicted him. The supreme court, per Justice Huskins, denied this motion because "there is no . . . evidence in this record to support" it.[144] The fourteen year old Negro youth also moved to dismiss the indictment because nonproperty owners were systematically excluded from the jury list in Durham County. The record showed that the county

[139] 275 N.C. 517, 169 S.E.2d 879 (1969).

[140] The court also held that the juvenile is not entitled to a public trial, that the North Carolina Juvenile Court Act is not unconstitutionally vague, and that there was no error in preventing an appeal in forma pauperis in these proceedings. Chief Justice Bobbitt and Justice Sharp dissented without opinion. The Supreme Court of the United States agreed to review the case. 397 U.S. 1036 (1970).

[141] State v. Rogers, 275 N.C. 411, 425, 168 S.E.2d 345, 353 (1969).

[142] Carter v. Jury Comm'n of Greene County, 396 U.S. 320 (1970).

[143] 275 N.C. 411, 168 S.E.2d 345 (1969).

[144] *Id.* at 420, 168 S.E.2d at 350.

commissioners drew the members of the grand jury and the petit jury from the names on the tax records. The court ruled that this fact "does not show racial discrimination in the selection of prospective jurors" and that absent discrimination "by race or other identifiable group," a state is at liberty "to prescribe such qualifications for jurors as it deems proper." The court acknowledged that selection of jurors exclusively from the names on the tax records was in violation of state law but concluded that this "does not affect the legality of the jury; as the provisions of the state law are 'directory and not mandatory.' "[145]

In *State v. Roseboro*[146] the sixteen year old Negro youth indicted for the murder of a white woman moved to dismiss the indictment on the grounds that "members of his economic class and race were arbitrarily and systematically excluded [from jury service]."[147] The court, per Justice Higgins, found that the grand jury (drawn from Cleveland County) was properly constituted and that approximately fifty per cent of its members were of the defendant's race. The court also found that the petit jury (drawn from Burke County) was properly constituted. Approximately six to eight per cent of the total population of Burke County were members of the defendant's race, and two members of the "colored race were summoned on the original venire, three on the first additional venire, and two one [*sic*] the second additional venire."[148] The record did not show how many veniremen reported in obedience to the writs. Members of the "colored race were passed by the court as qualified,"[149] but removed by preemptory challenge by the state. However, the court still held that "the jury selection conformed to the pattern approved by both State and Federal decisions."[150]

In *State v. Spencer*[151] a number of black civil rights demonstrators were charged with obstructing the highway. Prior to trial, defense counsel moved to quash the jury venire and indicated a desire to make a showing on the motion. The trial judge indicated a willingness to hear evidence but said he would not delay the trial. The attorney then showed that of the total jurors present on the regular jury panel, fifty-four were

[145] *Id.* at 422-24, 168 S.E.2d at 351-52.
[146] 276 N.C. 185, 171 S.E.2d 886 (1970).
[147] *Id.* at 189, 171 S.E.2d at 888.
[148] *Id.* at 193, 171 S.E.2d at 891.
[149] *Id.*
[150] *Id.*
[151] 276 N.C. 535, 173 S.E.2d 765 (1970).

white and twenty were Negro. The supreme court, per Justice Huskins, held that this showing was inadequate to prove the denial of constitutional rights and that it was not error for the trial judge not to delay the trial since the defense counsel has been retained some four months earlier and had had ample time to make out a case if a case could be made out.

In *Witherspoon v. Illinois*[152] a defendant was convicted of murder and sentenced to death by an Illinois jury from which all prospective jurors who voiced sentiment against the death sentence had been culled. The defendant argued that this resulted in the systematic exclusion of an identifiable segment of the community. The Supreme Court of the United States held that there was no evidence that a "death prone" jury could not fairly determine the issues of guilt or innocence, but that a "sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty."[153]

In *State v. Williams*[154] the defendants had been found guilty of rape and *sentenced to life imprisonment.* They argued that their convictions and sentences were unconstitutional because the trial court excluded jurors who voiced a personal conviction against capital punishment. The supreme court, per Chief Justice Bobbitt, affirmed the conviction and sentence because *Witherspoon* only applies when the death sentence is given and because there was no greater evidence here than in *Witherspoon* that a "death-qualified" jury is "necessarily . . . biased . . . with respect to a defendant's guilt."[155]

In "death sentence" cases, the supreme court followed *Witherspoon* by reversing convictions when, as in *State v. Ruth*,[156] jurors were excluded who "stated simply a general objection to or conscientious scruples against the infliction of capital punishment"[157] and by affirming the convictions when—as in *State v. Atkinson*,[158] *State v. Sanders*,[159] and *State v. Miller*[160]—the excluded jurors made it clear that they would not return a death verdict whatever the evidence might be.

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[152] 391 U.S. 510 (1968).
[153] *Id.* at 521-23.
[154] 275 N.C. 77, 165 S.E.2d 481 (1969).
[155] *Id.* at 85, 165 S.E.2d at 486.
[156] 276 N.C. 36, 170 S.E.2d 897 (1969).
[157] *Id.* at 40, 170 S.E.2d at 899.
[158] 275 N.C. 288, 167 S.E.2d 241 (1969).
[159] 276 N.C. 598, 174 S.E.2d 487 (1970).
[160] 276 N.C. 681, 174 S.E.2d 481 (1970).

IX. Cruel and Unusual Punishment

The United States and the North Carolina Constitutions prohibit "cruel and unsual" punishments, and in a number of cases during the period of this survey, it was argued that certain penalties were cruel, unusual, and disproportionate to the crime charged. Thus, in *State v. Rogers*[161] it was argued that the possibility of a death penalty is cruel and unusual when applied to a fourteen year old boy charged with rape; in *State v. Benton*[162] it was argued to be cruel and unsual to sentence an accessory to second degree murder to life imprisonment; in *State v. Accor*[163] it was argued that it was cruel and unusual to subject to the death penalty a man charged with burglary in the first degree; in *State v. Hill*[164] it was contended that it was cruel and unusual to convict a seventeen year old girl to death for murder, especially when she was of low intelligence and from a broken home; and in *State v. Roseboro*[165] the argument was made that it was cruel and unusual to sentence a sixteen year old boy to death for murder.

These contentions were rejected, generally on the theory that the court "has neither the power to change the law nor to remit the penalty the law exacts after conviction. . . . [A]ppeals for changes in the law should be made to the Legislature; appeals for relief from its penalties after conviction should be made to the Governor."[166]

The federal courts, ever since *Marbury v. Madison*,[167] have been more inclined toward exercising the powers of judicial review when a statute is attacked on constitutional grounds. When eighth amendment "cruel and unusual punishment" issues are raised, the Supreme Court measures the statute and punishment against the "evolving standards of decency that mark the progress of a maturing society."[168] By close decisions, the Court has sustained the second electrocution of a Louisiana prisoner after the first effort proved abortive,[169] nullified a California law permitting the imprisonment of persons "addicted to the use of narcotics,"[170] and

[161] 275 N.C. 411, 168 S.E.2d 345 (1969).
[162] 276 N.C. 641, 174 S.E.2d 793 (1970).
[163] 277 N.C. 65, 175 S.E.2d 583 (1970).
[164] 276 N.C. 1, 170 S.E.2d 885 (1969).
[165] 276 N.C. 185, 171 S.E.2d 886 (1970).
[166] *Id.* at 197, 171 S.E.2d at 894.
[167] 5 U.S. (1 Cranch) 137 (1803).
[168] Trop v. Dulles, 356 U.S. 86, 101 (1958).
[169] Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).
[170] Robinson v. California, 370 U.S. 660 (1962).

sustained a Texas law authorizing the imprisonment of chronic alcoholics who appear drunk in public.[171]

The Supreme Court has so far refused to review the constitutionality of a death penalty for rape when the rapist has neither taken nor endangered human life.[172] However, the Court of Appeals for the Fourth Circuit recently decided this issue[173] and held that the death penalty in these circumstances was "cruel and unusual," hence, unconstitutional.

In that case, a Negro named William Ralph broke into a Montgomery County, Maryland, home and threatened the victim and her young son with death unless she submitted to him. A subsequent physician's examination of the woman showed no outward evidence of injury or violence, nor any signs of unsual psychological trauma. Ralph was convicted and sentenced to death. Judge Butzner, for a unanimous three judge panel, reversed the sentence and sent the case back for the imposition of a lesser penalty.

The court ruled that capital punishment for a rape under these circumstances is "so disproportionate that, in fact, it has been widely rejected." Judge Butzner cited data showing that the United States is one of four nations in which a rape conviction is punishable by death (the others are Malawi, Nationalist China, and the Union of South Africa) and that within the United States, more than two-thirds of the states and Congress "consider the death penalty to be an excessive punishment for the crime of rape."

The court concluded that the death penalty for rape is not only "unusual," but also "cruel" and that the infrequency of its imposition indicates that "it is meted out arbitrarily."[174]

Other Issues Centering Around the Death Penalty

The quality of justice within a state is often measured by the official treatment toward those charged with the more repulsive and brutal crimes, *i.e.*, the capital offenses. It is not amiss then to discuss two other current issues centering around the imposition of the death penalty.

Traditionally, attacks against capital punishment emphasize that the death penalty is cruel and unsual[175] and that it is applied on a selective —*i.e.*, racial—basis.[176] A more recent attack on the death penalty argues

[171] Powell v. Texas, 392 U.S. 514 (1967)
[172] Rudolph v. Alabama, 375 U.S. 899 (1963).
[173] Ralph v. Warden, 39 U.S.L.W. 2330 (4th Cir. Dec. 11, 1970).
[174] *Id.* at 2331.
[175] See text at notes 151-55 *supra.*
[176] *See, e.g.*, State v. Rogers, 275 N.C. 411, 422, 168 S.E.2d 345, 351 (1969).

that the state laws that give juries unbridled discretion to impose the death penalty or, alternatively, to recommend life imprisonment are void under the due process clause because they suffer the "vice of vagueness."

A second argument recently advanced against the death penalty is that the system whereby a single jury both determines guilt and imposes sentence is a denial of important trial rights.[177] The rationale advanced is that an accused may have a good case to put before the jury in connection with the sentence, *e.g.*, a psychotic or psychopathic personality resulting in numerous anti-social activities, but he is hesitant to put this case before the same jury which determines guilt. Consequently, he is deterred from taking the witness stand in a "single jury" process. He argues that due process requires that he be given a "bifurcated trial," *i.e.*, a trial before one jury on the issue of guilt and a subsequent trial before a different jury on the issue of punishment.

These issues are now, and for some time have been, pending before the Supreme Court of the United States.[178] They were raised in a number of North Carolina appeals and were all rejected, generally over the dissents of Justice Sharp and Chief Justice Bobbitt who suggest that the North Carolina court stay its hand pending resolution of these problems by the Supreme Court.

X. Other Important Decisions

The North Carolina Supreme Court handed down other significant decisions during the period of this survey. There are not more than one or two in each individual area of criminal procedure, and so they are discussed collectively under appropriate sub-headings below.

A. Right to Confrontation

There is new doctrine in North Carolina regarding the use of the confession of a codefendant who does not take the stand when that confession implicates the accused. The situation is illustrated in *State v. Parrish*.[179] There, Parrish and Jimmy Harris were jointly charged with

[177] *See* cases cited note 178 *infra*.

[178] McGautha v. California, 70 Cal. 2d 770, 452 P.2d 650 (1969), *cert. granted*, 38 U.S.L.W. 3478 (U.S. June 1, 1970) (No. 486, 1969 Term, renumbered No. 203, 1970 Term); Crumpler v. Ohio, 18 Ohio St. 2d 182, 248 N.E.2d 614 (1969), *cert. granted*, 38 U.S.L.W. 3478 (U.S. June 1, 1970) (No. 709, 1969 Term, renumbered 204, 1970 Term); and see Maxwell v. Bishop, 398 U.S. 262 (1970).

[179] 275 N.C. 69, 165 S.E.2d 230 (1969).

a series of house-breakings. Harris confessed and said that he and Parrish had committed the crimes. Harris did not take the stand at the trial. The confession was read to the jury. Since Harris did not take the stand at trial, he was not subject to cross examination by Parrish concerning the validity and authenticity of those portions of the confession implicating Parrish. The supreme court, per Justice Huskins, ruled that this was error and explained:

> Defendant's position was unsound at the time this case was tried below. At that time it was not error to admit the extra-judicial confession of one defendant, even though it implicated a codefendant against whom it was inadmissible, provided the trial judge instructed the jury to consider the confession only against the defendant who made it. . . .
>
> Since the trial of this case, however, the United States Supreme Court in Bruton v. United States, 391 U.S. 123 . . . held that in a joint trial the admission of the confession of one defendant, who did not take the stand, implicating the other violated the co-defendant's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. The decision in *Bruton* is retroactive. . . .
>
> The rule now applicable in North Carolina is summarized by Sharp, J. with her usual clarity in State v. Fox, 274 N.C. 277 . . . as follows: "The result is that in joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant. If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately. . . ."[180]

B. Double Jeopardy

There is one recent "double jeopardy" decision, *State v. Wright*,[181] which is significant because of subsequent events. In that case, Wright was accused of rape, was convicted, and was sentenced to life imprisonment. His conviction was reversed on appeal, and he was tried anew. He argued that he should not a second time be placed on trial for his life since the earlier sentence of "life imprisonment" precluded the possibility of a "death sentence." The court, per Justice Branch, not only rejected this suggestion, but also held that because Wright was

[180] *Id.* at 73-74, 165 S.E.2d at 234.
[181] 275 N.C. 242, 166 S.E.2d 681 (1969).

sentenced to life imprisonment, not death, on his second trial, "there [was] no basis for this assignment of error."[182]

Subsequent to this decision, the Supreme Court of the United States held in *Price v. Georgia*[183] that if a man was once tried on a murder charge and found guilty of the lesser included offense of voluntary manslaughter and thereafter appealed and secured a reversal, he could not be tried a second time on any charge higher than the lesser offense for which he had been earlier convicted. Mr. Chief Justice Burger explained that it was not "harmless error" because the petitioner on the second trial "suffered no greater punishment on the subsequent conviction" because "[t]he Double Jeopardy Clause . . . is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. To be charged and to be subjected to a second trial for first degree murder is an ordeal not to be viewed lightly."[184] Although the factual situation in the *Price* case differed from that in *Wright*, it is clear that the North Carolina Supreme Court will have to rethink its holding.

A second issue concerning aspects of the double jeopardy clause was also decided by the Supreme Court of North Carolina during the survey period: the issue of increased sentences after trial de novo in the superior court on appeal from a lesser sentence in the district court after trial without jury. The focal point of issue was the applicability of *North Carolina v. Pearce*[185] to this situation.

In *Pearce*, the defendant had been convicted in North Carolina of assault to commit rape, and his conviction was reversed on appeal to the North Carolina Supreme Court because an involuntary confession had been used against him. Pearce was tried a second time, found guilty, and a larger sentence was then imposed. The Supreme Court of the United States held that the "guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction,"[186] but that the due process clause of the fourteenth amendment precludes a procedure which serves to "chill the exercise of basic constitutional rights."[187] One of these "basic rights" is the right to appeal, and the possibility of a "vindictive" larger sentence upon retrial following a

[182] *Id.* at 247, 166 S.E.2d at 684.
[183] 398 U.S. 323 (1970).
[184] *Id.* at 331.
[185] 395 U.S. 711 (1969).
[186] *Id.* at 719.
[187] *Id.* at 724.

successful appeal would certainly have "chilling effect." It follows, concluded the Court, that due process of law:

> requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal. . . . Due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.[188]

To assure the absence of such a vindictiveness, the Court held that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for doing so must affirmatively appear, and the reasons "must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding."[189]

It was argued during the survey period that the rationale of *Pearce* precludes the imposition of a harsher sentence upon appeal to the superior court from a conviction in a district court. The argument goes this way. Minor offenses are triable as of the first instance in the district court where trial is not by jury. The state gives an absolute right to appeal an adverse judgment of the district court to the superior court where there is a trial de novo by a jury. If the superior court gives harsher sentences than those appealed from, there will be a "chilling effect" on those who seek review, and hence a denial of the right to a trial by jury.

The North Carolina Supreme Court rejected this argument. In *State v. Spencer*,[190] Justice Huskins wrote:

> We think *Pearce* is factually distinguishable and has no application here. There are many valid distinctions between a *retrial in the same court after reversal* and trial *de novo* in a higher court upon appeal—especially when the right of appeal is absolute and unconditional. Here, no defect in the first trial *caused a retrial* in the superior court. Rather the trial there was *de novo* and a matter of absolute right. . . .
>
> [w]hen these defendants appealed to the superior court the slate was wiped clean and the cases stood for trial in the superior court as if

[188] *Id.* at 725.
[189] *Id.* at 726.
[190] State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970).

there had been no previous trial in the district court. Hence, in the sound discretion of the superior court judge, his sentence may be lighter or heavier than that imposed in the district court.[191]

The Court added in a practical vein that:

To hold otherwise, and say that upon appeal the superior court judge may decrease the sentence imposed below but is precluded from increasing it, would encourage appeal to the superior court in every case. Trial in the district court would be futile and the court itself an impediment to the administration of justice.[192]

C. Speedy Trial

The right to a speedy trial guaranteed in the sixth amendment is made applicable to the states by the fourteenth amendment.[193] During the survey period of this article, the North Carolina Supreme Court handed down an opinion—*State v. Johnson*—[194] extending this protection to a person arrested for a crime, but not charged with it until four years later.

Briefly, in that case, Johnson and a companion were arrested for the holdup of a service station in Sharpsburg and taken to the Wilson County jail. There, they were identified by the victim, and they confessed to the crime, naming a third person as also being involved. They were also charged with holding up other stores in the vicinity. This was in 1963. They were indicted on the other charges, tried, convicted, and sentenced, but they were not indicted on the holdup in Sharpsburg until 1967. At that time, their court-appointed attorney reported that "the case was then so old he could find nobody who remembered anything about it." He moved to dismiss for denial of a speedy trial. The supreme court, per Justice Sharp, ruled that it was error to deny this motion:

We here hold that when there has been an atypical delay in issuing a warrant or in securing an indictment and the defendant shows (1) that the prosecution deliberately and unnecessarily caused the delay for the convenience or supposed advantage of the State; and (2) that the length of the delay created a reasonable possibility of prejudice, de-

[191] *Id.* at 545, 173 S.E.2d at 772 (emphasis in the original).
[192] *Id.*
[193] Klopfer v. North Carolina, 386 U.S. 213 (1967).
[194] State v. Johnson, 275 N.C. 264, 167 S.E.2d 274 (1969). *See* Note, *Criminal Procedure—The Potential Defendant's Right to a Speedy Trial*, 48 N.C.L. REV. 121 (1969), for an extensive discussion on this case.

fendant has been denied his right to a speedy trial and the prosecution must be dismissed.[195]

CONCLUSION

This, then, has been a brief glimpse of the processes of the administration of criminal justice in North Carolina during a recent period of time. The reader must determine for himself if these processes measure up to what he hopes and expects them to be.

[195] 275 N.C. at 277, 167 S.E.2d at 283.