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POLICE OFFICER'S HANDBOOK

THE CRIMINAL LAW

PART VIII

PISTOL PERMIT LAW (SC)

DISMISSAL OF CHARGES  
WITHOUT A HEARING  
(IN RE: BRITTIAN)

DELAYED SEARCH FOR  
EVIDENCE WITHOUT WARRANT  
(US V. DAVIS)

FLEMING'S NOTEBOOK...CHAPTER 108:

NEW (SC) DEATH PENALTY LAW  
(NEW QUESTIONS RAISED)

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STATE DOCUMENTS

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LAW ENFORCEMENT - ETV TRAINING PROGRAM

POLICE OFFICER'S HANDBOOK

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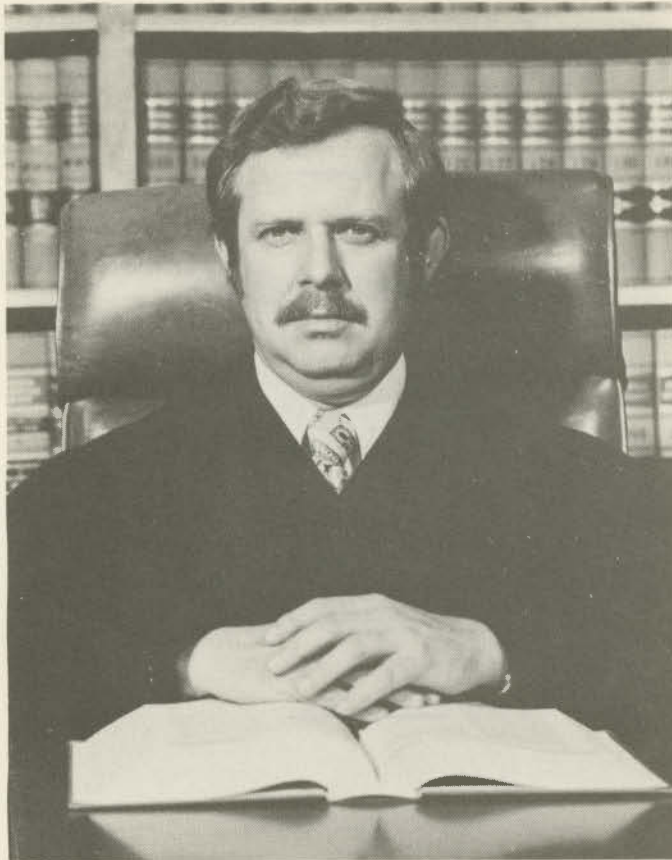
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By

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Endorsed by

South Carolina Governor, James B. Edwards  
South Carolina Law Enforcement Division  
South Carolina Sheriffs' Association  
South Carolina Enforcement Officers' Association  
South Carolina Police Chiefs' Executive Association  
South Carolina FBI National Academy Associates  
South Carolina Southern Police Institute Associates



Hon. Michael D. Glenn  
Judge of County and Family Court  
Anderson County, S.C.

"A statute may authorize the court, either of its own motion or on the application of the prosecuting officer, to order a prosecution dismissed. But in the absence of such a statute, a court has no power to dismiss a criminal prosecution except at the instance of the prosecutor."

Michael D. Glenn

Judge of County & Family Court

Anderson County, S.C.

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PISTOL PERMIT

Effective February 8, 1975, SLED will begin the issuance of pistol permits...something that has not heretofore existed in South Carolina. Under provisions of a 1974 amendment to the State's law relating to pistols, permits may be issued by SLED to:

"qualified persons when the nature of their business or employment requires that they are regularly exposed to... dangerous circumstances."

The permit issued may be restricted or unrestricted, the law stating:

"Any permit issued...shall specify the conditions under which possession (of a pistol) is authorized."

A fee of five dollars must be charged for each permit, which will be valid for a period of two years. A bond in the sum of \$20,000, issued by a commercial bonding company, will be required to be filed with the Secretary of State by each permit holder. It is thought that the cost of such bond will be approximately \$200 for the two-year period.

Should any applicant require training in the use of a pistol, SLED will furnish such training for a fee of fifty dollars.

A pistol permit does not give to the permit holder any police authority whatever, and the permit is valid only in South Carolina.

PISTOL PERMIT LAW

(Act No. 1236 of 1974)

The division (SLED) may issue permits to qualified persons when the nature of their business or employment requires that they are regularly exposed to what are determined by the division to be dangerous circumstances. Any permit issued pursuant to item (12) of Section 3 shall specify the conditions under which possession of weapon is authorized.

The division shall conduct such investigation of the applicant as it deems necessary to determine his qualifications to obtain a permit. All applicants shall successfully demonstrate to the chief of the division or his designee their proficiency in both the use of pistols and the State laws pertaining thereto, or complete a training course conducted by the division to insure that the applicant is competent in the use, safety techniques and legal responsibilities related to the carrying

and use of weapons prior to the issuance of a permit. If the applicant is found at that time not to be qualified for a permit and requests training, a fee of fifty dollars shall be charged by the division for such training and shall be paid into the General Fund of the State to be used to defray the cost of such training. Any person determined by the Chief of the division to have had sufficient training from other sources, or upon examination by the Chief of the division, or his designee, to be proficient in both the use of pistols and the State laws relating thereto, shall not be required to complete such training course. Fees and renewals thereof for permits shall be five dollars payable to the division to be paid into the General Fund of the State and used to defray the cost of issuing such permits and renewals. Such permits shall be valid for two years. The Chief of the division shall establish procedures for application for permits, the testing of applicants and the issuance of permits and promulgate regulations therefor.

All persons issued permits by the State Law Enforcement Division pursuant to Section 3A shall obtain and file with the Secretary of State, as a prerequisite to issuance of such permit, a bond in the amount of twenty thousand dollars for the purpose of guaranteeing payment up to such amount of any judgment obtained against such person arising out of the negligent or unlawful use of any pistol possessed and used by such person, whether such cause of action arises out of such person's official duties or otherwise. Such bond shall be issued by a commercial bonding company licensed by the State of South Carolina, and it shall be issued for a period of time coterminous with the life of the permit. In the event any permit is cancelled, suspended, or revoked by the division, such bond shall not be effective as to covered acts committed during such times as the permit is not in effect. Any person whose application has been denied may appeal such denial to the circuit court for the county of his residence and shall be heard as on certiorari.

THE STATE SUPREME COURT (S.C.)

SPEAKS ON COURT DISMISSAL

OF CASES

It has long been customary in some recorder's and magistrate's courts for traffic cases to be 'dismissed' without hearing of the facts, for one reason or another, and without the consent of the arresting officer.

The South Carolina Supreme Court has recently held that this practice is unlawful. In Re Brittian, SC, filed December 12, 1974.

A case had been set for hearing (trial) before the Family Court of Richland County for a date and time known to the defendant and the solicitor's office. The defendant and his attorney appeared, but no one from the solicitor's office showed up. The presiding judge 'dismissed' the case for 'lack of prosecution'. The State appealed from the so-

called 'dismissal'.

The Superme Court reversed the action of the presiding judge in 'dismissing' the case and sent it back for handling. Some pertinent language contained in the Brittian case is as follows:

"The first question we are called upon to answer is, 'did the failure of the State to proceed with the prosecution at the scheduled time necessitate or warrant dismissal of the case'.

"21 Am.Jur. (2d) Criminal Law §517 (1965) reads in part:

"A statute may authorize the court, either of its own motion or on the application of the prosecuting officer, to order an indictment or prosecution dismissed. But in the absence of such a statute, a court has no power...to dismiss a criminal

prosecution except at the instance of the prosecutor.

...

"In a recent Illinois case, People v. Guido, 11 Ill.App.(3D) 1067, 297 N.E. (2d) 18 (1973), the trial court dismissed misdemeanor charges for want of prosecution. On appeal it was held that a trial court in a criminal case did not have authority to dismiss a case on the ground that the State had failed to appear. The court based its decision, in part, on the fact that the State represents the people and the considerations of public safety and welfare are involved.

"In State v. Charles, 183 S.C. 188, 190 S.E. 466 (1937), a discussion of a nolle prosequi (similar to a dismissal) was undertaken. This court said in part:

"In the absence of a statute, the court has no power to enter, or to direct the prosecuting officer to enter, a nolle prosequi..." 183 S.C. at 194."

The ruling of the South Carolina Supreme Court in Brittan is applicable to all courts and to all criminal charges, including recorder's and magistrate's courts and traffic charges.

DELAYED SEARCH FOR EVIDENCE

OR PLAIN SIGHT SEIZURE OF

EVIDENCE AT SCENE OF ARREST

Three officers with arrest warrants for two suspects (father and son) went to the residence of the two men and called them out. Both came out of the house, but the older man 'bolted', running a short distance. Upon being overtaken, the older man turned with a pistol in his hand. The son 'jumped' one of the officers and a shooting melee followed. The son was wounded, whereupon the older man threw his pistol away and surrendered.

In the haste of securing the father and attending to the son, the pistol was forgotten. It was remembered sometime later, and the police returned to the arrest scene about three and a half hours after the arrest to recover the pistol as evidence. They spotted the pistol in plain sight immediately upon their arrival in the yard of the

suspect's residence.

The pistol was introduced in evidence at the trial of the father for assaulting the officers.

The father's appeal from conviction was on the ground that the warrantless seizure of the pistol was unlawful, so it should not have been admitted in evidence.

It was argued for the prosecution that no search warrant was needed because:

1. The search and seizure was 'incident to the arrest'.
2. The pistol was in 'plain sight', so no search was necessary and seizure was justified.

A Federal Court of Appeals reversed the conviction, stating that the seizure of the pistol

could not have been 'incident-to-arrest' because the seizure was made three and a half hours after the arrest, and that the 'plain sight' exception was not applicable because the pistol was in the residence area (within the curtilage) and without a warrant or other lawful reason for being there, the officers were trespassers. Some pertinent language of the decision follows:

PLAIN SIGHT ARGUMENT

It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.

In the instant case, the FBI agents went to Felder Davis's home at least three and one-half hours after his arrest for the sole purpose of looking for his pistol. They drove their automobile into the curtilage of his home and proceeded,

unannounced, to look for the weapon. It was found immediately, according to the testimony of one officer, because of the reflection of the porch light on the surface of the gun. This was an unconstitutional search in the classic sense. The government will not be heard to say that the "plain view" rule applies where the observing officer has physically invaded a constitutionally protected area in order to secure the view.

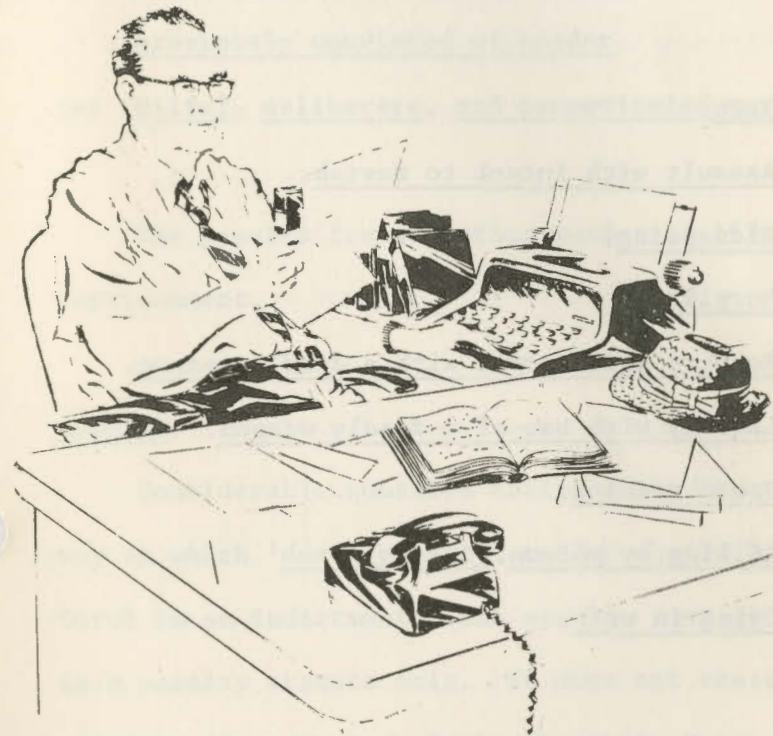
INCIDENT-TO-ARREST ARGUMENT

Is the search which produced the pistol justifiable as a search incident to a lawful arrest? To resolve this issue we shall briefly consider the scope of the doctrine of search incident to a lawful arrest.

The factors justifying a search incident to a lawful arrest - the need to seize weapons and prevent the arrestee from destroying evidence - were completely absent at the time the FBI agents discovered the pistol; the arrestees had been securely confined for several hours.

The search must be substantially contemporaneous with the arrest.

FLEMING'S NOTEBOOK



FLEMING'S NOTEBOOK...Chapter 108:

South Carolina's new death penalty statute (Act No. 1109 of 1974) provides the penalty of death for murder committed in connection with the crimes of:

- (a) Rape.
- (b) Assault with intent to ravish.
- (c) Kidnapping.
- (d) Burglary.
- (e) Robbery while armed with a deadly weapon.
- (f) Larceny with use of a deadly weapon.
- (g) Housebreaking.
- (h) Killing by poison.
- (i) Lying in wait.

Death is provided also for:

- (1) Murder committed for hire.
- (2) Murder of a law enforcement officer or correctional officer while on duty.
- (3) Multiple murders, or murder committed by anyone previously convicted of murder.
- (4) Wilful, deliberate, and premeditated murder.

The penalty for any other murder is life imprisonment.

COMMENT:

Considerable question arises as to the proper way in which 'death penalty' murder should be set forth in an indictment. The new law (Act 1109) is a penalty statute only. It does not create new crimes, unless it is held by the State Supreme Court (S.C.) to have created degrees of murder. In that event, the creation of degrees of the common law crime of murder would be by necessary inference.

As this editor sees it, there are several choices:

I. Charge the special circumstances, using one count only, i.e."

"John Doe did with malice aforethought kill Richard Roe while committing the crime of housebreaking."

(The danger with choice (I) is that a jury could find as a fact that John Doe was guilty of murder, but not while committing the crime of housebreaking. In such event, could the jury find him guilty of common law murder only (life imprisonment), or must they find him 'guilty' or 'not guilty' of the specific charge made, viz. murder while committing the crime of housebreaking? If common law murder "under any other circumstances" is a lesser, included offense in a 'death penalty' murder charge, the jury could find a verdict of 'guilty' to the lesser, included offense. If not, a verdict of

'not guilty' to the 'death penalty' charge might exonerate the defendant even though the jury finds as a fact that he is guilty of murder "under any other circumstance".)

II. COUNT ONE

"John Doe did with malice aforethought kill Richard Roe while committing the crime of housebreaking."

COUNT TWO

"John Doe did with malice aforethought kill Richard Roe."

(Choice (II)) seems safer than choice (I), since it does not run the risk of the defendant escaping altogether if a jury should not find him guilty of the 'death penalty' charge, but does believe him guilty of murder in another circumstance (life imprisonment).)

III. "John Doe did with malice aforethought kill  
Richard Roe."

(The jury would be instructed that if their  
finding on this charge of common law murder is  
'guilty', they must return a special verdict as to  
whether or not the defendant committed the crime in  
circumstances requiring imposition of the death  
penalty, such as:)

SPECIAL VERDICT

We the jury find that the defendant John Doe  
did commit such murder:  
       while committing the crime of housebreaking.  
yes     no

SPECIAL COMMENT

It is felt that the presiding judge is not  
empowered to impose the death penalty upon a finding  
of a verdict of 'guilty' to the charge of murder  
unless the special circumstances requiring the death  
penalty are charged in the indictment...even though  
the evidence shows such special circumstances to  
have existed. To impose the death penalty in such  
circumstances would require a finding of fact by the  
presiding judge.

30...EFM

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