



The Advocate

"Protectors of Your Rights"

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UPCOMING CHANGES FOR
THE ADVOCATE

By Jim Brown, Editor

On August 17, 2002, the board members and directors of SCACDL held a retreat in a conference room of a Greenville hotel. The purpose of this retreat was to define the goals for the future of SCACDL as the organization closed out its first ten years. One of the areas reviewed was the function of the newsletter, the *Advocate*. Two significant changes were made regarding the newsletter.

First, the format of the newsletter would change from an article based publication to an information based one. Thus, starting with this issue, the content of the *Advocate* will be closer to that of a newspaper than that of a law review publication. This decision was based, in part, upon the difficulty in obtaining contributions of law review type articles for publication. However, it needs to be stressed that contributions of articles are still needed and will be published as before. When articles are not available, the *Advocate* will publish

information such as legislative updates and other legal developments.

Second, the *Advocate* will no longer be published in print form after 2002. The *Advocate* will become a section of the SCACDL webpage, also slated for operation in January, 2003. The editor of the *Advocate* will become the "content master" of the entire website. The board members understand that this might cause problems for those who do not have or use internet technology but, in light of similar changes made by the SC Bar and the judicial branch of the state government, this change is in step with the present, not the future. (If necessary, upon request, the SCACDL Staff will print a copy and mail it to you.)

While the board approved these decisions in the August meeting, members are encouraged to contact your local board member or the editor (843 470-0003) to discuss these changes. Certainly the organization is designed to serve its members.

COTTON FUTURES IN SOUTH CAROLINA

By Jim Brown

In May of this year, the Supreme Court of the United States issued a unanimous opinion in *United States v. Cotton, et al*, Opinion Number 01-687, May 20, 2002. While the opinion in *Cotton* represents only one of three opinions of the 2001 court term explaining the constitutional requirements announced in *Apprendi v. New Jersey*, 530 U.S. 466 (1999), *Cotton's* new ruling, overturning early Supreme Court precedent, casts an eerie shadow on analogous situations in state court practice in South Carolina. This article first briefs the opinion in *Cotton* and then explores its possible ramifications for practice in state court.

United States v. Cotton

To understand *Cotton*, the basic holdings of *Apprendi* must be reviewed. According to *Apprendi*, constitutional principles require every fact, other than that of a prior conviction, that serves to increase the maximum possible punishment, must be passed upon by a jury. *Apprendi* at 490. In the federal context, these constitutional principles also require that these facts be presented to the grand jury. *Id.*, at 476. Given this background, here is a summary of the developments in *Cotton*.

In *Cotton*, the trial court pronounced sentences upon several defendants following their conviction after a jury trial in federal district court. The indictment upon which the trial proceeded only alleged a conspiracy to distribute and possess with the intent to distribute a "detectable amount" of cocaine and cocaine base. While this indictment was

facially valid because it did allege a crime conferring subject matter jurisdiction upon the trial court, it did not properly allege any specific weight to expose the defendant to enhanced maximum penalties. Notwithstanding this shortcoming, the trial court sentenced the defendants to a penalty only permissible if the defendants were found guilty of a greater level of conspiracy because of a determination that a greater weight of the drug was involved. Importantly, the defendants did not object to the sentencing on the ground that the amounts for which the defendants were sentenced were not alleged in the indictment.

On appeal to the Court of Appeals for the Fourth Circuit, the defendants argued that *Apprendi*, decided during the pendency of this appeal, precluded sentencing a defendant in such a manner. The Fourth Circuit noted the failure of the defendants to properly object on this basis and, thus, reviewed this argument under the standard for "plain error." The opinion of the divided Fourth Circuit vacated the sentences of the defendants by finding that the trial court was without jurisdiction to impose the enhanced sentence. The jurisdictional defect was that the indictment did not set forth the essential elements of the crime for which the defendants were sentenced. Further, the Court of Appeals found the error was plain error because the error "seriously affect(ed) the fairness, integrity or public reputation of judicial proceedings."

The Supreme Court granted certiorari. In writing the opinion of the unanimous court, Chief Justice Rehnquist found the Fourth

Circuit's interpretation of "jurisdiction" to be too broad and based upon an outdated fiction utilized to empower review of lower proceedings by appellate courts. *Cotton*, at _____. The progenitor of this rule, *Ex parte Bain*, 121 U.S. 1 (1887), was decided during a time when a defendant could only obtain review through habeas proceedings and then only if the trial court was without jurisdiction. Rehnquist found that the need for this fiction no longer existed given the appellate court's new powers of direct review. *Cotton*, at footnote 1. Further, Rehnquist noted that intervening rulings from the Court, which chipped away from the rule in *Bain*, foreshadowed the decision in *Cotton*. Finally, Rehnquist held that the portion of the *Bain* opinion holding defects in indictments as jurisdictional is now overruled. *Cotton*, at _____. Rehnquist did note the difference between jurisdictional and non-jurisdictional errors. While jurisdictional errors may never be waived, non-jurisdictional errors, like constitutional rights such as grand jury presentment and jury trial, may certainly be waived. After freeing himself from the jurisdictional quagmire, Rehnquist found the plain error, conceded by the Government, was harmless and reversed the Court of Appeals (essentially reinstating the enhanced penalty.)

South Carolina State Law Comparison

Before exploration of the possible ramifications of the *Cotton* decision in South Carolina state practice, a review of current state law is necessary. First, Fifth Amendment grand jury rights have not been incorporated through the Fourteenth Amendment and, thus, do not apply to state court proceedings. *Hurtado v. California*, 110 U.S. 516 (1884). However, the South Carolina Constitution and Code both require grand jury review in circuit court proceedings. See *S.C. Constitution Article 1, Section 11* and

S.C. Code Section 17-19-10. Also, judicial precedent holds that defects which create an invalid indictment are jurisdictional; thus objection to these defects can not be waived. *State v. Lynch*, 344 S.C. 635, 545 S.E.2d 511 (2001). Further, state precedent holds that a trial court is deprived of jurisdiction if a valid indictment is amended to charge an offense which carries an increased punishment or to charge an offense of a different nature. See *Lynch* generally. Therefore, current law requires consent of the defendant before a valid indictment can be amended to allege a crime not considered a lesser included offense of the valid charge.

One question for practitioners in South Carolina state practice is whether our appellate courts will adopt the new approach from *Cotton*. The jurisdictional label placed on certain imperfections in indictments may well have outlived its purpose in trial practice now that the right to counsel applies to almost all state circuit court proceedings and given the direct review and post conviction provisions currently available in state law. Further, the changing face of this area of law may put the trial practitioner on notice of future changes. If this area of law changes, the savvy practitioner must actively preserve his client's rights. Then, the question becomes, "How should counsel properly protect his client?"

Future Practice

While South Carolina has no reported decisions applying the rules of *Apprendi* to state practice, there are situations where *Apprendi* clearly would apply. Obviously, drug charges are affected by *Apprendi* because of the tiered nature of sentencing based upon the amount of drugs involved. See generally *S.C. Code Section 44-53-370 and 375*. Further, many crimes in South Carolina

provide for different sentencing ranges based upon the dollar amount of the transaction. E.g. *S.C. Code, Title 16, Chapter 14, Financial Transaction Card Crime Act*. Finally, crimes such as carjacking have increased penalties when a certain circumstance is found, such as "great bodily injury" of the victim. See *S.C. Code Section 16-3-1075*.

At least in circumstances involving indictments that are not totally defective on their face for failure to sufficiently state any crime, objections regarding missing elements in indictments may no longer involve jurisdictional questions. This new regard for elemental defects in indictments as non-jurisdictional, mandates defense counsel now make timely objections to trial regarding elements not passed upon by the grand jury.

Failure to object, as was the case in *Cotton*, reduces a defendant's chances of success on appeal considering the possibility of waiver. (Plain error review is not available in S.C. state court even if the appealing party could meet this higher standard.)

First, counsel should object to trial, including both opening argument and introduction of evidence, regarding elements of an offense greater than that validly stated in the indictment. Counsel may wish to object prior to the swearing of the jury, but this will likely result in the withdrawal of the charge against the defendant until the state can properly present the greater charge to the grand jury. Counsel would probably be better off by objecting, in limine, after the jury is sworn, but prior to the opening from the state. Counsel should simply explain to the judge that the defendant objects to being placed at jeopardy for any offense greater than the exact charge stated in the indictment. This explanation should list the elements believed to be missing. Counsel should remind the trial

court that *S.C. Code Section 17-19-90* only requires objections prior to the swearing of the jury when the indictment is defective on its face. This case involves a valid indictment, but only for a charge lesser than that possible given the evidence. Also, state the grounds upon which the objections are made, both statutory and constitutional.

Counsel needs to stress to the court that the defendant considers the election by the government to proceed from the grand jury forward on a charge lesser than that presented in the arrest warrant as final jeopardy regarding the greater charge. The defendant is not even privy to records of the grand jury proceeding, much less given the opportunity to thwart any efforts of the government through any course of action during grand jury presentation. Thus, the government should be estopped from proceeding on more than it created at the grand jury stage. Remind the trial judge that the grand jury is generally the first critical stage for the defendant, according to established constitutional law. Finally, explain to the judge at this early stage, that in the unlikely event of conviction, the defendant obviously objects to sentencing within the range provided for the greater charge, even if the judge allows trial on the issues solely presented by allegations of the greater offense.

Second, counsel should object to jury consideration of the greater offense. The jury's role should be limited to deciding whether guilt has been established for the indicted offense or any included lessors. Third, counsel should object to the imposition of any sentence which exceeds the maximum punishment established for the charge reviewed by the grand jury. This distinguishes this case from *Cotton*. Remember, in *Cotton*, objection to trial of the greater charge and sentencing based upon the same was deemed waived by the court.

Why should counsel proceed with this caution before the appellate courts in SC mandate this course of action? Because judicial decisions may be applied retroactively without violating due process when the changes are neither unexpected or indefensible. See *Rogers v. Tennessee*, 532 U.S. 451 (2001); but compare *Bowie v. City of Columbia*, 378 U.S. 347 (1964)¹. The U.S. Supreme Court decision in *Cotton* may well represent the notice necessary for retroactive change in South Carolina law because the Court, in *Cotton*, applied its new rule retroactively.

Thus, counsel should diligently review the indictment for elemental deficiency regarding the exact level of crime charged in light of *Apprendi*. If the indictment properly alleges a crime, but not the one actually being pursued, a timely objection is likely necessary to prevent possible waiver of this issue. Finally, a timely objection may also serve to limit the issues and evidence presented to the jury at trial.

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¹ *Bowie* was successfully argued, in part, by the Honorable Matthew J. Perry, Jr., now a Senior U.S. District Court Judge for the District of South Carolina and long considered a defender of civil liberties.