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CRIMINAL LAW

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Since this survey[1] is a continuation of previous articles,[2] the same policies of selection will be used, and developments in various areas will be presented as an integrated continuum.

I. RIGHT TO COUNSEL

Perhaps the most interesting development of the period surveyed was the change in the law governing an indigent defendant's right to counsel. Previously the Supreme Court of Florida had expressed apprehension of such changes as instances of federal intervention into state sovereignty. For example in *Cash v. Culver*,[3] after granting a new trial because the defendant's request for a continuance in order to obtain new counsel was denied, the court stated,

> In recent years much has been written regarding federal post-conviction review of state court judgments in criminal matters. We think there is substance to the notion that there has been a broadening of Fourteenth Amendment due process restrictions on state action. However, we have the view that a contributing factor in this development has been the apparent reluctance of some state courts to take cognizance of and apply many of these basic concepts of due process which are of relatively recent origin but are nonetheless controlling law. In following such a course we think the State Jurisdictions merely invite inroads on their sovereignty. See "Federalism and State Criminal Procedure," Volume 70, Harvard Law Review 1, a splendid article by Justice Walter Schaefer of the Supreme Court of Illinois. We have no desire to contribute further to this development.

The previous prevailing law in Florida with respect to indigent defendants gave an "absolute" right to counsel only in capital cases.[4] In non-capital cases any duty to furnish an indigent defendant counsel was contingent upon a finding that the defendant was incapable of defending himself adequately under the special circumstances of the particular case.[5] The manner in which the Florida courts have applied this policy in recent cases is illustrated by the following examples. An inexperienced, emotionally unstable indigent defendant was convicted

1. This survey includes cases reported in 132 So.2d through 155 So.2d 536 and laws enacted by the 1963 General Session of the Florida Legislature.

2. Wills, *Criminal Law Survey*, 16 U. MIAMI L. REV. 225 (1961); *Criminal Law Survey*, 14 U. MIAMI L. REV. 521 (1960).

3. 122 So.2d 179, 186 (Fla. 1960).

4. FLA. STAT. § 909.21 (1961).

5. Johnson v. Mayo, 40 So.2d 134 (Fla. 1949); Schafer, *Constitutional Law: Duty of Trial Court to Appoint Defense Counsel in Non-Capital Case*, 1 U. FLA. L. REV. 450 (1948).

of assault with intent to commit murder in the second degree. He had no counsel and had requested none for he was unaware of any right to do so. The court[6] remanded the case for a new trial with specific instructions that the defendant be advised of his rights.[7] On the other hand, when there was no particular evidence of inexperience or instability (other than the fact that the defendant was charged with the possession of a narcotic drug) failure to inquire of an indigent defendant as to such matters as his age, experience and mental capacity, and failure to appoint counsel were not reversible error.[8]

Gideon v. Wainwright,[9] broadened the rights of indigent defendants in non-capital cases and in so doing posed policy questions of special interest. These aspects of the case are more appropriately discussed in the *Survey* of constitutional law. Here the account will be descriptive only.

Gideon was charged with a felony—breaking and entering with the intent to commit a misdemeanor. He appeared without funds and requested counsel. His request was denied and he was convicted and sentenced to serve five years in the state prison. After his petition to the Supreme Court of Florida for a writ of habeas corpus was denied without opinion,[10] he brought certiorari to the Supreme Court of the United States.[11] The Supreme Court held that the right to counsel guaranteed by the sixth amendment, which is fundamental and essential to a fair trial, is made obligatory upon the states by the fourteenth amendment.[12] Therefore, the Court reversed the conviction and remanded to the Supreme Court of Florida for further action not inconsistent with the opinion.

One obvious question concerns the limits of the decision with respect to types of offenses. In the body of a concurring opinion Mr. Justice Harlan stated,

> The special circumstance rule has been formally abandoned in capital cases, and the time has come when it should be similarly abandoned in non capital cases, at least to offenses which, as the one involved here, carry the possibility of substantial prison

6. McNeal v. Culver, 132 So.2d 151 (Fla. 1961).

7. See also Hobbs v. Cochran, 143 So.2d 481 (Fla. 1962); Carnley v. Cochran, 143 So.2d 327 (Fla. 1962).

8. Horoshko v. State, 135 So.2d 865 (Fla. 2d Dist. 1961).

9. 372 U.S. 335 (1963).

10. Gideon v. Cochran, 135 So.2d 746 (Fla. 1961).

11. See note 9 *supra*.

12. The court emphasized that in *Betts v. Brady*, 316 U.S. 455 (1942), it was assumed that a provision of the Bill of Rights which is fundamental and essential to a fair trial is made obligatory by the fourteenth amendment, but decided under facts similar to the *Gideon* case that the right to counsel provided by the sixth amendment was not one of those rights.

sentence.[13] (Whether the rule should extend to all criminal cases need not now be decided.)[14]

Another provocative set of questions concerns the limits of the decision with respect to pre-trial[15] and post-trial procedures. Decisions of the Supreme Court indicate that an indigent defendant should be supplied counsel at the arraignment[16] and the preliminary hearing.[17] The Florida courts have had occasion to consider the duty of the state to furnish counsel in post-trial procedure in light of the *Gideon* decision. An indigent prisoner who had been convicted of a non-capital felony petitioned the district court of appeal to appoint counsel to assist him in his appeal. The case arose in Pinellas County, where a public defender had been established by an act[18] which provided for appeal "when in the opinion of the Public Defender the appeal or writ might reasonably be expected to result in reversal or modification." The district court[19] avoided the problems implied by the discretion given the public defender by directing the trial court to appoint counsel. In another case[20] an indigent defendant appealed an order denying his motion under Criminal Procedure Rule No. 1[21] to vacate judgment, and requested counsel to

13. Gideon was sentenced to five years in the state prison. The charge, breaking and entering with the intent to commit a misdemeanor, arose under FLA. STAT. § 810.05 (1961), which provides for imprisonment in the state prison or county jail not exceeding five years or fine not exceeding five hundred dollars.

14. 372 U.S. 335, 351 (1963); see also Kamesar, *Where to Draw the Line*, 22 THE LEGAL AID BRIEF CASE 10 (1963).

15. Comment, *The Right to Counsel Prior to Trial in State Criminal Procedure*, 17 U. MIAMI L. REV. 371 (1963).

16. Hamilton v. Alabama, 368 U.S. 52 (1961).

17. White v. Maryland, 373 U.S. 59 (1963).

18. Fla. Laws 1961, ch. 61-2663.

19. Donald v. State, 154 So.2d 357 (Fla. 2d Dist. 1963).

20. Weeks v. State, 156 So.2d 36 (Fla. 3d Dist. 1963). Since this case was particularly pertinent, it was included even though it appeared after the period to be surveyed.

21. FLA. R. CRIM. P. 1, effective April 1, 1963:

> A prisoner in custody under Sentence of a court established by the Laws of Florida claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or Laws of the United States, or of the State of Florida, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the Maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting attorney of the court, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.
>
> The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

assist him in his appeal. The state argued that the right of an indigent defendant to be supplied counsel for appellate purposes was limited to direct appeals from original judgments of conviction and sentence. The court rejected this view and held that:

> Since it has been decided that a failure to provide counsel for an indigent on direct review of his conviction is a violation of his constitutional rights, we think it reasonable to conclude that it would be no less of a violation of those rights to deny him counsel on appellate review of collateral proceedings attacking his conviction on constitutional grounds.[22]

The Supreme Court of Florida anticipated an avalanche of petitions for writs of habeas corpus and coram nobis. In order to expedite consideration of these cases the court adopted Criminal Procedure Rule No. 1, which gives jurisdiction to the original trial courts.[23]

The first application of the rule by the Supreme Court of Florida in response to an order from the Supreme Court of the United States was in *Roy v. Wainwright*.[24] The indigent defendant had been convicted of a non-capital felony and petitioned for a writ of habeas corpus, alleging that he had been denied counsel. The court set the pattern for the application of the rule by denying the petition without prejudice to proceed under Criminal Procedure Rule No. 1. The court took pains to help the bench and bar understand the process. It noted that the rule was copied almost verbatim from a federal statute[25] and recommended several sources[26] of information concerning the construction and application of the rule.

An appeal may be taken to the appropriate appellate court from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this rule, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

This rule shall not apply to municipal courts.

The foregoing rule shall become effective upon the filing of this order.

The Court acted under the rule making power granted by FLA. CONST. art. V, § 3. The bench has been concerned with practical means of handling the large number of cases anticipated. The legislature has provided for public defenders in each judicial circuit to represent insolvent persons charged with non-capital felonies. Fla. Laws 1963, ch. 63-409.

22. 156 So.2d 36, 38 (Fla. 3d Dist. 1963).

23. See note 21 *supra*.

24. 151 So.2d 825 (Fla. 1963). In Wittcop v. Wainwright, 151 So.2d 635 (Fla. 2d Dist. 1963), the same rule was applied but the opinion did not contain as detailed an explanation and discussion as did the *Roy* case.

25. 28 U.S.C. § 2255 (1958).

26. United States v. Hayman, 342 U.S. 205 (1951); FED. R. CRIM. P. 35; 4 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 2306; Bowman, *Processing a Motion Attacking Sentence Under Section 2255 of the Judicial Code*, 111 U. PA. L. REV. 788 (1963). See also Sanders v. United States, 373 U.S. 1 (1963); Machibroda v. United States, 368 U.S. 487 (1962); Hill v. United States, 368 U.S. 424 (1962); Barrett v. Hunter, 180 F.2d 510 (10th Cir. 1950).

Subsequently, Gideon petitioned the Supreme Court of Florida for a writ of habeas corpus.[27] The court refused the writ without prejudice to proceed under Criminal Procedure Rule No. 1. The court re-emphasized many of the points made in the *Roy*[28] case and added:

> Under the rule which we have announced, post-conviction relief can be obtained when there is a claimed denial of some fundamental or organic right in the course of the trial. The relief available is coextensive with that which would be available in habeas corpus. The rule, however minimizes the difficulties encountered in habeas corpus hearings and affords the same rights in a more convenient forum and one best prepared to consider the claims of a prisoner convicted in that very forum.[29]

The problem of bail arose under Criminal Procedure Rule No. 1 when a prisoner moved to vacate, set aside, or correct sentence. Upon denial the prisoner appealed and made a motion for supersedeas, which he intended to operate as bail while his appeal was in process. When this was denied he filed a motion in the district court for release on bail. The motion was denied[30] on the basis of federal authority.[31]

The Attorney General has advised[32] that when a sentence has been vacated under the rule, the person is not necessarily entitled to discharge, but may be held for a new trial, and if convicted he may be subject to the maximum sentence even though it exceeds the original sentence.

II. SENTENCE

Some recent Florida decisions seem to approve a more flexible approach to sentencing than previously had been apparent. For example, even though an appellate court ordinarily will not be inclined to modify or reduce sentences, a case involving contempt was remanded for resentencing with instructions that the new sentence should not exceed six months in the county jail.[33] The court emphasized that appellate courts must balance the need to preserve the integrity of the lower courts with the need to temper justice with mercy.

In another instance the appellate court held that the refusal of the trial judge to give the defendant an opportunity to present evidence of mitigating circumstances before sentencing was contrary to section 921.13 of the Florida Statutes and remanded the case for that purpose.[34]

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27. Gideon v. Wainwright, 153 So.2d 299 (Fla. 1963).

28. See note 24 *supra*.

29. 153 So.2d 299, 300 (Fla. 1963). See also Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171 (1948).

30. Gammage v. State, 154 So.2d 712 (Fla. 3d Dist. 1963).

31. Reiff v. United States, 288 F.2d 887 (9th Cir. 1961).

32. June 12, 1963 No. 063-62.

33. Neering v. State, 141 So.2d 615 (Fla. 1st Dist. 1962).

34. Nations v. State, 145 So.2d 259 (Fla. 2d Dist. 1962). FLA. STAT. § 921.13 (1961) provides:

Inquiry into mitigating or aggravating circumstances. . . . When the court has dis-

An odd situation arose when the state attempted to incarcerate a 71-year-old defendant under a sentence which had remained unexecuted for five years. The state admitted it had no explanation for the delay. The appellate court[35] released the defendant without benefit of Florida authority,[36] because the long delay was not the fault of the defendant, and society would not benefit from his imprisonment.

The Supreme Court of Florida construed[37] sections 944.27-28 of the Florida Statutes to provide that gain time allowance must be approved by the Board of Commissioners of the State Institutions. The court then pointed out that this is a most inefficient mechanism because the Board comprises all cabinet officers and the Governor, and suggested remedial legislation. The legislature did amend the above statutes to provide a schedule of gain time granted by the director rather than the board.[38]

III. ACCUSED AS A WITNESS

If a statement by the prosecution could be construed as an indirect reference to the fact that the defendant did not testify, the defendant is entitled to a new trial. This policy was applied in one case[39] in which a witness testified to facts known only to himself and the defendant, and the prosecution stated that the testimony of the witness was uncontraverted. The principle was extended to a new factual situation in *Harper v. State*[40] when the prosecution commented that a co-defendant, Rogers, had not testified. The defendant (Harper) was granted a new trial. The court cited two similar Florida cases[41] and stated,[42] "Recognizing that neither of the foregoing, by reason of distinguishing facts or the nature of the pronouncement, constitute controlling precedent, we are nonetheless constrained to the view that the principles therein articulated, when applied to the instant case, require a new trial." Shortly thereafter the court cited and followed *Harper* in a similar case.[43]

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cretion as to the penalty to be inflicted on the defendant it shall, upon the suggestion of either party that there are circumstances which may properly be taken into consideration, hear evidence as to the same summarily in open court, either immediately or at a specified time and upon such notice to the adverse party, as the court may direct; or the court may inquire into such circumstances of its own motion.

35. State v. Buchanan, 149 So.2d 574 (Fla. 3d Dist. 1963).

36. The following were cited to justify the release: Weber v. Mosley, 242 S.W.2d 273 (1951); Ex Parte Bugg, 145 S.W. 831 (1912); 24B C.J.S. *Criminal Law* § 1999 (1962).

37. Nicholas v. Wainwright, 152 So.2d 458 (Fla. 1963).

38. Fla. Laws 1963, ch. 63-243; The Florida Correction Code of 1957 was adopted by Chapter 57-121 Laws of 1957 and comprises FLA. STAT. ch. 944 (1961).

39. King v. State, 143 So.2d 458 (Fla. 1962). To the same effect: Tolliver v. State, 133 So.2d 565 (Fla. 3d Dist. 1961).

40. 151 So.2d 881 (Fla. 2d Dist. 1963).

41. King v. State, 143 So.2d 458 (Fla. 1962); Trafficante v. State, 92 So.2d 811 (Fla. 1957).

42. 151 So.2d 881, 883 (1963).

43. Clouser v. State, 152 So.2d 200 (Fla. 2d Dist. 1963).

In *Pinkley v. State*[44] the court indicated that since a comment by the prosecution is not reversible error if defense counsel had previously called the jury's attention to the fact that the defendant had not testified, it was not necessary to determine whether the statement made by the prosecution amounted to a comment or not. In a later case[45] raising the same issue, the state attorney made several remarks in spite of warnings by the trial judge. The third district granted a new trial, stating that a remark by defense counsel does not open the door to any comment by the prosecution. The court specifically disagreed with the views expressed in the *Pinkley* case that it is not necessary to determine if the remarks by the prosecutor amount to a comment or not when the defense counsel previously had referred to the fact that the defendant had not testified.[46]

IV. Indictment and Information

In *Trafficante v. State*,[47] citing federal authority, the court held that a count charging a conspiracy to commit two different crimes (bribery and gambling) should not be quashed for duplicity even though the penalties for the two crimes were different. The rationale was that only one sentence could be imposed.

V. Search and Seizure

The law concerning the property rights which a person must possess in order to contest the validity of a warrant to search that property, was the subject of much dispute and discussion in a recent case.[48] The defendant was not allowed to contest the validity of a warrant to search an apartment. The apartment was leased to and occupied by his "girl friend." The defendant paid part of the rent, had a key, and occasionally slept there. The district court of appeal could not reach a clear majority opinion. Judge Hendry decided that the defendant had sufficient property interest to contest. His view was that Florida courts have treated the decisions of the Supreme Court of the United States as authority in search and seizure cases,[49] and that continued compliance, though not mandatory, is advisable. He then cited *Jones v. United States*,[50] in which on similar facts[51] the defendant's property interest was held sufficient.

44. 142 So.2d 144 (Fla. 2d Dist. 1962).

45. Griffin v. State, 150 So.2d 466 (Fla. 3d Dist. 1963).

46. See Comment, *Failure to Testify—Comment by Co-Defendant*, 17 U. Miami L. Rev. 435 (1963).

47. 136 So.2d 264 (Fla. 2d Dist. 1961). The general principle that a single conspiracy may have for its purpose the commission of two or more different offenses, has been applied previously, Brown v. State, 130 Fla. 479, 178 So. 153 (1938), but the issue was former jeopardy.

48. Leveson v. State, 138 So.2d 361 (Fla. 3d Dist. 1962).

49. Houston v. State, 113 So.2d 582 (Fla. 1st Dist. 1959).

50. 362 U.S. 257 (1960).

51. The defendant paid no rent and was allowed occupancy as a friend.

Justice Hendry stated:[52] "Viewing the question . . . in the light of the decision of the United States Supreme Court in the Jones Case . . . the trial court was in error . . . ."[53]

Judge Carroll[54] held that the defendant as a lessee-occupant should have been allowed to contest the validity of the warrant on the basis of existing Florida law.[55] He saw no reason for an expressed or implied extension of Florida law to include "anyone legitimately on the premises."[56] Judge Pearson[57] thought that Florida should not adopt the *Jones* decision and that under existing Florida law the defendant did not have standing to contest.

On certiorari[58] the Florida Supreme Court restored jurisdiction to the district court with the request that a clear majority be adopted with supporting theory. On reconsideration by the district court,[59] the majority opinion said that the defedant had standing to contest but stated "[W]e have been unable to reconcile the . . . views of the separate judges as to some of the *reasoning* employed . . . ."[60] On the state's subsequent petition for certiorari on the basis of a question of great public interest, the supreme court held that under existing Florida law the defendant's right of custody and possession was sufficient for him to contest the validity of the search warrant.[61] The court specifically stated that it was not necessary to determine the applicability of the rule of *Jones v. United States*.

The law pertaining to the search of vehicles was severely limited in a well reasoned case.[62] After the defendant had wrecked his car, he was taken to a hospital and the car was towed to a garage and impounded. Subsequently police officers, without a warrant and not as an incident of a valid arrest, searched the car and found lottery tickets. At the trial the defendant made the appropriate objections to the admission of evidence so obtained. The district court noted that the legality of the search depended upon section 933.19 of the Florida Statutes, which adopted the decision in *Carroll v. United States*[63] as the law of Florida. Florida courts consider that the case holds that a search of a vehicle "will be deemed reasonable if the searching officer, prior to making the search, had probable cause to believe that the contents of the automobile offended

52. 138 So.2d 361, 364 (Fla. 3d Dist. 1962).
53. The *Jones* decision contains the following language: "anyone legitimately on the premises where a search occurs may challenge its legality . . . ." 358 U.S. 257, 267 (1960).
54. 138 So.2d 361, 366 (Fla. 3d Dist. 1962) (concurring opinion).
55. Mixon v. State, 54 So.2d 190 (Fla. 1951).
56. See note 53 *supra*.
57. 138 So.2d 361, 367 (Fla. 3d Dist. 1962) (dissenting opinion).
58. State v. Leveson, 147 So.2d 524 (Fla. 1962).
59. Leveson v. State, 149 So.2d 80 (Fla. 3d Dist. 1963).
60. 149 So.2d 80, 81 (Fla. 3d Dist. 1963).
61. State v. Leveson, 151 So.2d 283 (Fla. 1963).
62. Miller v. State, 137 So.2d 21 (Fla. 2d Dist. 1962).
63. 267 U.S. 132 (1925).

against the law . . . ."[64] The district court stated that the trend of Florida cases[65] was to restrict the application of this rule, that further restriction was to be expected, and ruled that the search was illegal for two reasons. First, when (as in the instant case) "doubt exists as to whether the officer was reasonable in concluding that a search was justified, such a doubt must be resolved in favor of the defendant whose property was searched."[66] Second, the *Carroll*[67] doctrine was designed to apply when a vehicle could be employed as a means of escape or removing evidence. Here the car was a wreck, not an operating vehicle, and thus the state had time to procure a warrant without risk.

An interesting pair of cases involved searches following an invitation to enter. In one instance the defendants, unaware that the two strangers standing in the rain were police officers, invited them into the building out of the weather. The officers observed general activity associated with lottery operation, identified themselves, arrested the defendants and searched the building. The search was held lawful because it was related to a lawful arrest for a felony being committed in the officers' presence.[68]

In the other case the officers had followed the defendant to a city beyond their jurisdiction and thus were acting only under the color of their office. They knocked upon the door of his motel room and he allowed them to enter, knowing that they were police officers. The district court[69] held that when an officer gains access to private living quarters under color of his office he must have some valid basis for the intrusion, and here there was none. The policy of the court was stated in strong language: "Any other rule . . . would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."[70]

VI. Fair Trial

Since defendants have considerable difficulty obtaining information from the state, the courts are frequently sympathetic to the argument that withholding information may preclude a fair trial. For example, when the state's witness (a detective) was allowed to refer to notes made during interrogation, a refusal to make the notes available to the defense

64. Miller v. State, 137 So.2d 21, 22 (Fla. 2d Dist. 1962).

65. Byrd v. State, 80 So.2d 694 (Fla. 1955); Collins v. State, 65 So.2d 61 (Fla. 1953); Cameron v. State, 112 So.2d 864 (Fla. 1st Dist. 1959); Alexander v. State, 107 So.2d 261 (Fla. 2d Dist. 1958).

66. 137 So.2d 21, 25 (Fla. 2d Dist. 1962).

67. See note 54 *supra*.

68. Adams v. State, 143 So.2d 903 (Fla. 2d Dist. 1962). The fact that the officers had a search warrant is immaterial because the warrant was invalid, the validity of the search was not based upon the warrant, and the warrant was not used to gain entrance.

69. Collins v. State, 143 So.2d 700 (Fla. 2d Dist. 1962).

70. *Id.* at 703.

was a denial of the defendant's right to confront his accusers and to conduct a full and fair cross-examination.[71] On the other hand, in an incest case, the defendant claimed that refusal to order a blood test was error. The district court held that since a blood test did not bear directly upon the issue, but rather would serve only to impeach a witness, and when other witnesses had given testimony sufficient to sustain a conviction, the refusal was not reversible error.[72] *Baker v. State*[73] introduced an important limitation upon the "right" of the state to refuse to identify a "confidential informant." The court stated,

> It is true that it has been held in this state that the prosecution may not always be required to reveal the name of a confidential informant, but this rule should not be applicable when the so-called alleged "confidential informant" actually executes the affidavit which is the initial instrument which set in motion what ultimately results in a criminal proceeding.[74]

In *Morgan v. State*[75] the court decided, on basis of federal authority, that the defendant is not entitled to access to the pre-sentence report of the Florida Parole Commission because it is not a public document but rather confidential in nature.

When a defendant pleaded not guilty and not guilty by reason of insanity, the trial judge committed reversible error by reading to the jury a court order stating that the defendant was sane, able to stand trial and aid his attorney. This amounted to an improper comment on the weight, character, or effect of evidence relating to a material issue.[76]

A question which appears to be new in Florida arose in *Goswick v. State*.[77] The defendant claimed that the prosecution infringed upon his right against self-incrimination by showing on cross-examination of a witness for the state that the witness had invoked the fifth amendment when he was subpoenaed before the state's attorney. The court, citing federal authority,[78] affirmed the conviction and indicated that the question turned upon whether the jury would be likely to consider that the witness's refusal to testify implied that the defendant was guilty.

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71. Minturn v. State, 136 So.2d 359 (Fla. 3d Dist. 1962).

72. Bowden v. State, 137 So.2d 621 (Fla. 2d Dist. 1962).

73. 150 So.2d 729 (Fla. 3d Dist. 1963).

74. 150 So.2d 729, 730 (Fla. 3d Dist. 1963).

75. 142 So.2d 308 (Fla. 2d Dist. 1962). For a discussion of defendants' rights to discovery see State v. Lampp, 155 So.2d 10 (Fla. 2d Dist. 1963). The court held that the defendant's constitutional rights (equal protection, due process) did not entitle him to subpoenas ad testificandum, requiring persons to appear before the court reporter and disclose to the defense counsel under oath any knowledge they had about the case so that a defense might be prepared.

76. Gans v. State, 134 So.2d 257 (Fla. 3d Dist. 1961).

77. 137 So.2d 863 (Fla. 3d Dist. 1962).

78. United States v. Sing Kee, 250 F.2d 236 (2d Cir. 1957).

VII. JURISDICTION

Questions have arisen concerning the practice of substituting one justice of the peace for another who was not available. The Supreme Court of Florida[79] resolved the problem by amending Rule 21(a)(4)(i), to provide that a justice of the peace who is unable to act, or his clerk, may so advise the chief justice. The latter may assign any other justice of the peace, or any other judge (except supreme court justices, district court of appeal judges or circuit judges) of any other state court having the same or greater jurisdiction, to perform the duty. The court pointed out that section 37.22[80] of the Florida Statutes is no longer effective in the absence of an order designating the substituted judge to act for the disabled judge.[81]

VIII. CHARGE TO THE JURY

Section 918.10(4) of the Florida Statutes provides that the giving or failure to give instructions to the jury cannot be assigned as error unless appropriate objection was made. Related problems have been solved in two ways. First, a new trial will be granted even though no appropriate objection was made, if the judge caused "fundamental error."[82] The definition of fundamental error was discussed in *Brown v. State*,[83] in which the majority decided that an erroneous charge as to murder in the third degree was not fundamental error when the evidence did not put this degree of homicide in issue. The second solution, suggested by Justice Drew in his dissenting opinion in the *Brown* case, is to apply Rule 6.16(a) of the Florida Appellate Rules, which gives appellate courts discretionary power, in the "interests of justice," to consider errors in instructions whether they were objected to or not. This method was adopted in *Canada v. State*[84] to grant a new trial when the charge on an essential element (intent necessary for larceny) was insufficient, no appropriate objection was made, but the evidence put the issue in doubt.

IX. CONFESSIONS

A line of federal decisions[85] indicates that an unnecessary delay in

79. *In re* Florida Appellate Rules, 132 So.2d 159 (Fla. 1961).

80. "In case a justice of the peace be disqualified or unable from any cause to try any criminal case, the same may be tried before any other justice of the peace of the county, or before the county judge." FLA. STAT. § 37.22 (1961).

81. The case which raised the problem was State v. Robinson, 132 So.2d 159 (Fla. 1961).

82. Leach v. State, 132 So.2d 329 (Fla. 1961); Hamilton v. State, 88 So.2d 606 (Fla. 1956).

83. 124 So.2d 481 (Fla. 1960); Wills, *Criminal Law Survey*, 16 U. MIAMI L. REV. 225 (1961).

84. 139 So.2d 753 (Fla. 2d Dist. 1962).

85. *E.g.*, Mallory v. United States, 354 U.S. 449 (1957); Upshaw v. United States, 335 U.S. 410 (1948); McNabb v. United States, 318 U.S. 332 (1943). *But see* United States v. Mitchell, 322 U.S. 65 (1943) (Court held admissible a confession that was not the "fruit" of the unlawful delay).

presentation before a magistrate in itself constitutes a denial of due process and renders a confession so obtained inadmissible. Sections 901.06 and 901.23 of the Florida Statutes provide that after arrest the defendant should be taken before a magistrate without unnecessary delay. Florida has not followed the federal rule, the practice of the police is not always in compliance with the above statutes, and failure to comply does not affect the validity of a subsequent trial.[86] The trend toward federal practices evident in other phases of criminal procedure has not made much of a change in this area. In *Milton v. Cochran*[87] the defendant claimed his confession was coerced by several factors, one being a 22-day delay between arrest and presentation before a magistrate. The court stated it was not shown that the delay caused the confession, and although it did not condone such action by the police, it expressly reaffirmed the position that the federal rule does not apply. In another case[88] in which the delay was about a week, the majority held the confession to be admissible. Justice Drew expressed the view in dissent that delay itself can amount to duress. The court rejected the federal rule in still another case[89] in which the delay was about a month.[90]

X. WITHDRAWAL OF PLEA OF GUILTY

Section 909.13 of the Florida Statutes provides that a plea of not guilty may be withdrawn at the discretion of the court at any time *before* sentence. In *Banks v. State*[91] the court held that to refuse to allow the defendant to withdraw a plea of guilty *after* sentence was an abuse of discretion when the defendant, on the basis of conversations with the state attorney, honestly but mistakenly believed that he would be put on probation.[92] On the other hand, when a defendant mistakenly believed that the pre-sentence investigation would result in recommendation for probation, withdrawal of his plea of guilty after sentence was denied.[93] It was not an abuse of discretion to deny a defendant's motion to withdraw his plea of guilty made before sentence, when the reason for the

86. DiBona v. State, 121 So.2d 192 (Fla. 2d Dist. 1960). Note also that in Simmons v. State, 132 So.2d 235 (Fla. 2d Dist. 1961), it was not error to refuse to allow the defendant to withdraw his plea of guilty on the basis that he had been denied a preliminary hearing.

87. 147 So.2d 137 (Fla. 1962).

88. Dawson v. State, 139 So.2d 408 (Fla. 1962).

89. Young v. State, 140 So.2d 97 (Fla. 1962).

90. See also Leach v. State, 132 So.2d 329 (Fla. 1961). In another case, Kraft v. State, 143 So.2d 863 (Fla. 2d Dist. 1962), it was held that the confession was admissible because the record did not show that the defendant was not taken before a magistrate.

For general background see Enwall, *Effect of Delay Between Arrest Without Warrant and Preliminary Hearing upon Admissibility of ad Interim Confessions*, 2 U. FLA. L. REV. 330 (1949).

91. 136 So.2d 25 (Fla. 1st Dist. 1962).

92. Withdrawal of a plea of guilty after sentence has been allowed before. Ward v. State, 156 Fla. 185, 22 So.2d 887 (1945).

93. Morgan v. State, 142 So.2d 308 (Fla. 2d Dist. 1962).

motion was the failure to present the defendant to a committing magistrate.[94]

An appalling case involved a collateral issue. An obviously emotionally disturbed defendant without an attorney pleaded "guilty by reason of insanity." The trial judge treated his plea as an unqualified plea of guilty and he was convicted. The supreme court[95] stated that the trial judge should have taken steps under the appropriate statutes[96] to determine sanity and remanded the case for this purpose.

XI. IMMUNITY

There have been instances[97] in the past in which the courts seemed to consider that procedural expediency outweighed the defendant's rights to immunity under section 932.29 of the Florida Statutes. In a recent case,[98] the appellate court afforded the defendant ample protection. At the trial the defendant refused to answer a question. The trial judge told him that his answer would not incriminate him and that if he refused to answer he would be in contempt. The defendant did refuse and was held in contempt. The appellate court reversed because the trial judge did not inform the defendant of his rights under the statute.[99]

XII. BAIL

An important point concerning bail was resolved in *Mathis v. Starr*.[100] An insolvent defendant indicted for a capital crime had been denied bond by the circuit court because "it is necessary that the petitioner show that he can make bail in a reasonable amount *before* the court will determine whether or not he is entitled to bail."[101] The Supreme Court of Florida decided that denial of bail in a capital case where the proof is not evident nor the presumption great is a denial of due process and that the solvency of the defendant is not a condition precedent to the circuit court's primary duty of making such a determination.

94. Simmons v. State, 132 So.2d 235 (Fla. 2d Dist. 1961).

95. Hobbs v. Cochran, 143 So.2d 481 (Fla. 1962).

96. FLA. STAT. ch. 917 (1961).

97. Poppell v. State, 148 Fla. 275, 4 So.2d 331 (Fla. 1941).

98. Ballangee v. State, 144 So.2d 68 (Fla. 2d Dist. 1962).

99. FLA. STAT. § 932.24 (1961).

100. 152 So.2d 161 (Fla. 1963). In another case, Lambert v. State, 151 So.2d 675 (Fla. 1st Dist. 1963), the law concerning the power of the court to set and modify bail was discussed and applied to a novel factual situation. The defendant posted bond pending his appeal. Subsequently he was arrested on another charge and the trial judge doubled his bond. The defendant claimed that the bond was increased without further hearing. The trial judge's order included the clause, "This cause coming on to be heard upon the court's own motion . . . ." Since the court is presumed to follow correct procedure, and since the record failed to show an abuse of discretion, the motion to reduce bail was denied.

101. 152 So.2d 161, 162 (Fla. 1963).

XIII. STATUTE OF LIMITATIONS

Section 932.05 of the Florida Statutes provides that non-capital offenses must be prosecuted within two years after commission. No difficulty arises when an indictment or information was filed within two years even though the trial was considerably delayed, and probably some attorneys assumed that the filing of a charge was the first act by the state which would toll the statute. In *State v. Emanuel*[102] the court held that the prosecution was commenced and the statute tolled when a valid arrest warrant was placed in the hands of the proper official for service.

XIV. HABITUAL OFFENDERS

An important limitation of the application of the habitual offenders statute[103] was illustrated in *Reynolds v. Cochran*.[104] The defendant was arrested and subsequently sentenced under the statute two months after he had completed all sentences for previous convictions. The supreme court held that completed sentences could not be extended by resentencing, and that a habitual offender may not be subject to enhanced punishment by the statute once he has fully satisfied the judgment pursuant to his conviction for his last offense. The court noted that the statute provided, "If *at any time* after sentence or conviction it shall appear that a person convicted of a felony has previously been convicted of crimes . . . the court in which such conviction was had shall cause said person *whether confined in prison or otherwise*, to be brought before it,"[105] and that this language had been applied literally in some cases.[106] Nevertheless, the court preferred to so limit the statute and thus avoid issues of due process, equal protection and cruel and unusual punishment.

XV. NOLO CONTENDERE

The case of *Peel v. State*[107] concerned matters of first impression in Florida. The court held that when the defendant voluntarily pleaded nolo contendere on condition that he would be given a life sentence, he may not complain of the trial court's acceptance of his plea. It further was held that the plea has the same effect as a plea of guilty, in that the defendant may not raise questions on appeal concerning matters other than the sufficiency of the accusatory writ.

XVI. FORMER JEOPARDY

The usual rule that former jeopardy may not be used as a defense when the former proceedings were void was applied to an unusual situa-

102. 153 So.2d 839 (Fla. 2d Dist. 1963).
103. FLA. STAT. §§ 775.09-.11 (1961).
104. 138 So.2d 500 (Fla. 1962).
105. FLA. STAT. § 775.11 (1961). (Emphasis added.)
106. State v. Nelson, 160 Fla. 744, 36 So.2d 427 (1948).
107. 105 So.2d 281 (Fla. 2d Dist. 1963).

tion in which a minor's former conviction for the offense was void because the "notice to parents statute"[108] was not satisfied.[109]

XVII. LOTTERY

The defendant was charged with a violation of section 849.09 of the Florida Statutes, by an information which stated that he previously had been convicted of violating the same statute, which provides heavier penalties for successive convictions. The defendant moved to quash, alleging that the reference to a previous conviction deprived him of due process and his presumption of innocence, and placed his character into evidence without his permission. The court[110] noted that when a defendant is tried for a particular crime, he would be denied a fair trial if the indictment or information alleged that he had been convicted previously of an unrelated crime for the purpose of enhanced punishment under the habitual offender statute.[111] However, it noted that the two statutes are quite different. The habitual offender statute[112] refers to habitual felonious criminality generally, while the lottery statute involves identical or related offenses. The former statute provides for distinct proceedings to determine whether the defendant had successive convictions and thus the fact of prior convictions need not be determined at the trial for a subsequent violation. The latter statute has no such provision. Florida statutes involving forgery,[113] counterfeiting,[114] narcotics,[115] and beverage laws[116] are similar to the lottery statute in that the increased penalty for successive convictions is provided in the body of the statute. The Supreme Court of Florida has held, under the beverage statute, that an allegation of the former conviction is not only permitted, but required.[117] Therefore the court held that the information charging a previous conviction for lottery was not defective.

XVIII. WORTHLESS CHECK

The previous survey[118] noted that the phrase "things of value" contained in the worthless check statute[119] created problems of interpretation. The third district[120] reversed a conviction for issuing a worthless

108. FLA. STAT. § 932.38 (1961).
109. Michell v. State, 154 So.2d 701 (Fla. 2d Dist. 1963).
110. State v. Curtis, 152 So.2d 754 (Fla. 2d Dist. 1963).
111. Shargaa v. State, 102 So.2d 814 (Fla. 1958).
112. See note 103 *supra*.
113. FLA. STAT. § 831.10 (1961).
114. FLA. STAT. § 831.17 (1961).
115. FLA. STAT. § 398.22 (1961).
116. FLA. STAT. § 562.45 (1961).
117. Barnhill v. State, 41 So.2d 329 (Fla. 1949); Smith v. State, 75 Fla. 468, 78 So. 530 (1918).
118. Wills, *Criminal Law Survey*, 16 U. MIAMI L. REV. 225 (1961).
119. FLA. STAT. § 832.05(3) (1961).
120. Harris v. State, 123 So.2d 752 (Fla. 3d Dist. 1960).

check to obtain things of value in excess of $100.00 because the check was issued to pay a pre-existing debt—not a "thing of value." On certiorari the supreme court[121] stated that the defendant could have been convicted under the lesser included offense of issuing a worthless check without obtaining something of value.[122]

XIX. SECURITIES

In *Hammond v. State*,[123] a case of first impression, the court construed section 517.05, of the Uniform Sale of Securities Law, so that the transaction may be exempt from registration even though the securities are not.

XX. HOMICIDE

The question of manslaughter by culpable negligence in failure to aid or be concerned with the safety of another arose during the period surveyed but Florida law remains uncertain. The defendant was convicted for failing to aid his wife during a four-hour period when she needed medical attention. The First District[124] reversed, but avoided the issue by deciding that the conduct of the defendant was not the cause of death.[125]

XXI. CONCEALED WEAPONS

The language "care, custody, possession or control" of a relatively new statute[126] concerning concealed weapons was held[127] not to require physical handling.[128]

XXII. EXTORTION

Generally it is immaterial whether an extortion threat is directed against the person to whom the threat is communicated or against another person. This principle was applied to sustain a conviction under the Florida statute[129] when the threat was to expose alleged tax evasion activities of a corporation in which the person was interested.[130]

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121. State v. Harris, 136 So.2d 633 (Fla. 1962).

122. FLA. STAT. § 832.05(2) (1961). The meaning of the phrases "things of value" and "pre-existing debt" is not resolved. Consider the problem posed in the previous survey—a person charges articles in excess of one hundred dollars value and the following day sends the store a worthless check.

123. 151 So.2d 872 (Fla. 2d Dist. 1963).

124. Nevals v. State, 145 So.2d 883 (Fla. 1st Dist. 1962).

125. Failure of a father to furnish medical aid to a badly burned child for three weeks was held not to be manslaughter by culpable negligence. Bradley v. State, 79 Fla. 651, 84 So. 677 (1920).

126. FLA. STAT. § 790.23 (1961).

127. Maloney v. State, 146 So.2d 581 (Fla. 2d Dist. 1962).

128. The court cited Reynolds v. State, 92 Fla. 1038, 111 So. 285 (1926) (concerning liquor); People v. Furey, 13 App. Div. 2d 412, 217 N.Y.S.2d 189 (1961); People v. Russo, 278 App. Div. 98, 103 N.Y.S.2d 603 (1951).

129. FLA. STAT. § 836.05 (1961).

130. State v. McInnes, 153 So.2d 854 (Fla. 1st Dist. 1963).

XXIII. LEGISLATION

Defendants have difficulty obtaining information from the state. The legislature increased defendant's rights in this regard by providing[131] that after an indictment or information is filed, the court upon motion *shall* order the prosecuting attorney to permit the defendant to inspect and copy or photograph written or recorded statements or confessions whether signed or unsigned. Judicial discretion is not mentioned nor implied.

Charpter 921 of the Florida Statutes, dealing with sentencing, was amended by a provision[131] that there shall be no "authority to cause a sentence to imprisonment to begin running at any time prior to the date that it is imposed."[132] The act permits credit on the sentence for time spent in jail before the sentence was imposed. The indeterminate sentence statute,[133] which provided that the maximum sentence could be less than the maximum authorized by law for the non-capital felony involved, has been amended[134] so that the maximum sentence may be less than the maximum authorized by law but not less than the authorized minimum, if any.

A new act[135] which may affect the number of times the question of sanity will be raised provides that persons committed to a state hospital by order of a criminal court shall be liable for payment for care and maintenance. The provision does not apply to persons committed while serving a criminal sentence.

The legislature provided for a group to be known as the "special commission for the study of the abolition of the death penalty in capital cases." The duty of the commission is "to make an investigation and study relative to the abolition of the death penalty in capital cases," and report to the next session.[136] In the opinion of the writer the creation of such a commission is a progressive and laudable step. The language used seems to imply that the problem is not the advisability of abolishing the death penalty but the means.

Other legislation of interest was incorporated in the text of the survey.[137]

131. Fla. Laws 1963, ch. 63-263.

132. Fla. Laws 1963, ch. 63-457, to be codified as FLA. STAT. § 921.161 (1963).

133. FLA. STAT. § 921.18 (1961).

134. Fla. Laws 1963, ch. 63-306.

135. Fla. Laws 1963, ch. 63-551, amending FLA. STAT. § 394.22 by adding a subsection (20).

136. Fla. Laws 1963, ch. 63-362.

137. See note 21 *supra* (public defenders office), and note 37 *supra* (sentence).