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One Year Review of Criminal Law and Procedure

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ONE YEAR REVIEW OF CRIMINAL LAW AND PROCEDURE

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During 1962 the Colorado Supreme Court decided more than forty cases[1] concerned with criminal law and procedure, including some cases dealing with violations of municipal ordinances. In addition, the 1962 Colorado Legislature enacted a few statutes on criminal law and procedure; and the Colorado Supreme Court in late December of 1962 adopted several amendments to the Colorado Rules of Criminal Procedure, these amendments to be effective on January 1, 1963. All three types of law—case law, statutory law and court rules—are covered by this article.

I. SUBSTANTIVE CRIMINAL LAW

A. Municipal Ordinance Violations

The famous *Merris* case[2] of 1958 contained two important propositions: (1) The municipal penal ordinance of a home rule city creates a crime, not a mere civil wrong, if there exists a counterpart state statute punishing the same conduct or if the ordinance authorizes imprisonment as punishment.[3] (2) When a state criminal statute punishes conduct of statewide concern, the home rule city lacks the power to enact a penal ordinance punishing the same conduct[4] (and conversely, when a home rule city has enacted a penal ordinance punishing conduct of local concern, a state statute punishing the same conduct is inapplicable to such conduct committed within the municipal territorial limits).

As to the first proposition, a 1962 case broadens it somewhat.[5] "Imposition of criminal sanctions," the court says, "makes them [municipal violations] crimes."[6] "Criminal sanctions" is an expression which would seem to be broad enough to include a fine as well as imprisonment, so that a muncipal violation for which a fine is the only authorized punishment may nevertheless be a crime, to be prosecuted in accordance with the law relating to criminal procedure for minor offenses.

Two events which occurred in 1961 have brought about a drastic limitation upon the second of the two propositions. A 1961 case recognized that conduct is not necessarily purely local or exclusively statewide; that some types of conduct partake of

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1 The cases discussed in this article are found in 368 P.2d through 377 P.2d No. 4.

2 Canon City v. Merris, 137 Colo. 169, 323 P.2d 614 (1958), discussed in Scott, *Municipal Penal Ordinances in Colorado*, 30 Rocky Mt. L. Rev. 267 (1958).

3 The penal ordinance of a "statutory" municipality (*i.e.*, one without home rule) is no doubt also a crime if there is a counterpart state statute or if the ordinance authorizes imprisonment.

4 The power of a "statutory" municipality to enact penal ordinances was later held to be even more limited than that of a home rule city, in Aurora v. Mitchell, 144 Colo. 526, 357 P.2d 923 (1960), discussed in Scott, *One Year Review of Criminal Law and Procedure*, 38 DICTA 65, 66 (1961).

5 Pueblo v. Clemmer, 375 P.2d 99 (Colo. 1962) (holding that one convicted of a municipal violation in municipal court on a not-guilty plea, and who involuntarily pays the fine imposed, may nevertheless thereafter appeal to the county court. The report of the case does not disclose whether the violation in question was punishable only by fine, or whether imprisonment was authorized as well.).

6 *Id.* at 100.

both qualities; and that with such types the home rule city has power to enact ordinances if the state has not forbidden the exercise of this power.[7] A 1961 statute[8] expressly authorized Colorado municipalities (both statutory and home rule) to enact penal ordinances punishing most[9] traffic offenses committed within their municipal borders. As a direct result of these events, the year 1962 saw a cessation of the sometimes difficult game, played with gusto in previous years, of pigeon-holing various types of conduct into the statewide or into the local category. No 1962 case had to deal with the statewide-local distinction.

B. *Particular Crimes*

1. Murder—Meaning of "Malice."—In one 1962 murder case,[10] the trial judge, unfortunately for the cause of justice, took too literal a view of the word "malice" in the definition of murder.[11] The prosecution's evidence at the trial on a murder charge disclosed that the defendant and the victim, who did not know each other, got into an argument at a bar, during which the defendant, after threatening the victim with a gun, shot him to death. The trial court directed a verdict of acquittal of both murder and manslaughter on the theory that, since the defendant did not know the deceased, he could not have had "malice" toward him. The prosecution obtained a review of the case on writ of error, and the supreme court quite properly disapproved of the trial court's error in directing a verdict of acquittal, pointing out that "malice" in the definition of murder is not to be taken literally.[12] It does not mean hatred, spite or ill-will, for it is clear that one can murder for love (as in a mercy killing) or for money (as by a hired killer) as well as for hatred. "Malice" in murder does not even require an intent to kill, for one can, in Colorado as well as elsewhere, commit murder by unintentionally killing another either though highly reckless conduct or in the perpetration or attempted perpetration of some felonies.

2. Murder—"In the Perpetration of."—In another 1962 murder case, the prosecution's evidence was that the defendant robbed a cab driver at gunpoint, ordered him to drive down a lonely road and stop, conversed with him for a few minutes and shot him to death.[13] The defendant was convicted of first-degree murder on the theory that he had killed the deceased in the perpetration of the robbery. The defendant contended on writ of error that the killing did not occur "in the perpetration of" the robbery because it took place some distance away from, and some time after, the robbery. The supreme court, however, rejected this argument,

7 Woolverton v. City and County of Denver, 146 Colo. 247, 361 P.2d 982 (1961) (holding that a home rule city has power to punish gambling), discussed in Scott, *One Year Review of Criminal Law and Procedure*, 39 DICTA 81, 82 (1962).

8 Colo. Sess. Laws 1961, ch. 66, amending Colo. Rev. Stat. §§ 13-4-6, -7 (1953), discussed in Scott, *One Year Review of Criminal Law and Procedure*, 39 DICTA 81, 82 (1962).

9 The statute expressly excepts three types of traffic offenses from the exercise of municipal power: (1) driving under the influence, (2) driving an unregistered car or after license revocation or suspension, and (3) hit-and-run driving.

10 People v. Spinuzzi, 369 P.2d 427 (Colo. 1962).

11 Colo. Rev. Stat. § 40-2-1 (1953) ("Murder is the unlawful killing of a human being with malice aforethought, either express or implied . . . .").

12 See *infra*, notes 148-152 and text, for a discussion of the prosecution's right to retry this defendant after his erroneous acquittal by the trial court.

13 Bizup v. People, 371 P.2d 786 (Colo. 1962).

holding that the killing was "so closely connected in point of time, place and continuity of action" with the robbery as to have been committed in the perpetration of it. "All of the defendant's acts from the time he took the money until he cold bloodedly shot his victim were one continuous integrated attempt to successfully complete his crime and escape detection."[14] This indicates a relatively broad, yet quite proper, view of the scope of those rather vague words, "in the perpetration of"—an expression which has been given a narrower interpretation in some jurisdictions.[15]

3. Voluntary Manslaughter.—It may still be the law that an intentional killing inflicted in a "mutual combat" or "chance medley" constitutes voluntary manslaughter, without regard to the traditional provocation usually required for this crime. There is not much modern law on it.[16] A 1962 Colorado case did not quite raise the question of the existence of this type of voluntary manslaughter, because the defendant killed only after the mutual combat had ended.[17] Having rendered the victim helpless, the defendant undertook to kick him in the head numerous times until he died.

4. Larceny by Bailee.—One who receives stolen property innocently (*i.e.*, not knowing it to be stolen), and who later, after learning of the stolen character of the property, converts the property to his own use, cannot, of course, be guilty of the crime of receiving stolen property knowing it to be stolen, for the receiving and the knowledge must coincide; but he is guilty of larceny by bailee in Colorado.[18]

5. Larceny from the Person.—Under the Colorado larceny statute,[19] "larceny from the person" (more familiarly known as "pickpocketing") is a felony, punishable by imprisonment of from one to ten years in the penitentiary, regardless of the value of the property stolen.[20]

6. Forgery.—A 1962 forgery case involved this fact situation:[21] X, with an intent to defraud, signed his true name to a check as

14 *Id.* at 788.
15 *E.g.*, People v. Marwig, 227 N.Y. 382, 125 N.E. 535, 22 A.L.R. 845 (1919).
16 See Note, *Manslaughter and the Adequacy of Provocation*, 106 U. Pa.L.Rev. 1021, 1031-32 (1958).
17 Trujillo v. People, 372 P.2d 86 (Colo. 1962).
18 Peters v. People, 376 P.2d 170 (Colo. 1962).
19 Colo. Rev. Stat. § 40-5-2 (6) (1960 Perm. Supp.).
20 People v. McIntosh, 369 P.2d 987 (Colo. 1962) (disapproving trial court's sentence as though defendant had been convicted of a misdemeanor, upon his conviction of larceny from the person of property worth $26).
21 Gonzales v. People, 369 P.2d 987 (Colo. 1962).

agent for the Y Co., a real company, when in fact he had no authority to do so. The supreme court held this to constitute the crime of forgery.[22] The weight of authority in other jurisdictions, however, holds this not to be forgery,[23] although a modern trend, by statute at least, is to make it so.[24] On principle, it hardly seems proper to distinguish between (1) signing another's name to a check with intent to defraud (forgery) and (2) signing one's own name to a check as agent for another, without authority to act as his agent, with intent to defraud (not forgery, by the majority view).

7. *Confidence Game.*—A 1962 Colorado case[25] holds, without discussion, that one commits the crime of confidence game, as well as the crime of forgery, when he tries to pass what he knows to be a forged check. Elsewhere in this article the propriety of convicting him, on account of this single act, of both forgery and confidence game is discussed.[26] Now, however, the question of his liability for the crime of confidence game alone is treated.

From the report of the case, it appears that the defendant, with some confederates, went to a supermarket, made out a check payable to a person whose driver's license was in the possession of a lady confederate, and forged a signature. The lady accomplice then unsuccessfully tried to cash the check with the aid of the driver's license.

One of the difficult areas of Colorado criminal law concerns the guilt of one who obtains, or attempts to obtain, money or property by means of a check which "bounces": Is it the short-check crime (a misdemeanor), or the no-account-check crime (a five-year maximum felony), or false pretenses (a ten-year felony if over $50 obtained), or confidence game (a twenty-year felony)?[27] Earlier Colorado cases have required, in addition to the use of the bad check, the defendant's worming his way into the victim's confidence.[28] Obtaining his confidence through a course of regular business dealings will not do.[29] It would seem, for the same reason, that the one-shot presentation of a bad check (whether forged, short or no-account to the victim by a stranger will not do. And yet that is all that appears in the report of the 1962 case which upheld the confidence game conviction.

8. *Miscellaneous Crimes.*—One can carry a deadly weapon concealed upon his person, in violation of the law, though he carries it as an article of merchandise and has no intention to use it as a weapon.[30] But one who possesses a record of bets on sporting events, together with a copy of the Daily Racing Form and a clipping from the newspaper showing the results of horse

22 Colo. Rev. Stat. § 40-6-1 (1953) (defining forgery of a check simply as "falsely make, alter, forge, or counterfeit any . . . check . . . . " with no specific reference to false statement of authority to sign).

23 E.g., Gilbert v. United States, 370 U.S. 650 (1962); Perkins, Criminal Law, 297 (1957).

24 See A.L.I. Model Penal Code, 83 (Tent. Draft No. 11, 1960).

25 Krantz v. People, 374 P.2d 199 (Colo. 1962).

26 See *infra* notes 113-116 and text thereto.

27 See Scott, *One Year Review of Criminal Law and Procedure*, 36 DICTA 35, 38-39 (1959).

28 E.g., Bevins v. People, 138 Colo. 123, 330 P.2d 709 (1958); see cases cited in Scott, *One Year Review of Criminal Law and Procedure*, 37 DICTA 45, 48 n.23 (1960).

29 *Ibid.*

30 Pueblo v. Sanders, 376 P.2d 996 (Colo. 1962) (municipal ordinance forbids one not a police officer to "carry concealed upon his person any pistol, bowie knife, dagger or other deadly weapon," with no specific mention of any required state of mind.

races run the previous day, does not keep or exhibit any "device or apparatus to win or gain money" within the meaning of the Colorado gambling statute.[31]

C. General Principles

1. Parties: Aid and Abet.—Colorado has an unusual statute punishing (with a misdemeanor penalty) as an "accessory during the fact" one "who stands by, without giving such help as he may [have] in his power to prevent a criminal offense from being committed."[32] This passive person is to be distinguished from his more active counterpart, the aider and abettor—one "who stands by and aids, abets and assists" and who is subject to the same punishment as the principal criminal who actually commits the crime.[33] In a 1962 case, one of Denver's police-burglars of recent scandalous fame observed a burglary in progress and knew who the burglars were.[34] While the burglary continued before his eyes, he radioed his dispatcher that the building in question had been burglarized, giving the impression that the crime had ended. The supreme court held that this conduct, by intentionally misleading the police, constituted active aid and assistance, making the actor an aider and abettor in the burglary rather than, as he contended, a mere accessory during the fact.

2. Self-defense.—The Anglo-American law is quite well settled that, in order for the defense of self-defense to operate so as to justify an intentional homicide, the killer must reasonably believe (though he need not correctly believe) both (1) that his adversary will, unless prevented, immediately inflict a fatal or serious bodily injury upon him, and (2) that he must use deadly force against his adversary in order to prevent him from inflicting such harm.[35] The Colorado statute on justifiable self-defense, though somewhat vaguely worded, seems to recognize these principles;[36] but a 1960 Colorado case held an instruction to be misleading and confusing which tells the jury that the right of self-defense in a homicide case is based upon what a reasonable person would do under similar circumstances.[37] A 1962 case puts Colorado back on the reasonable-man track, however, approving a given jury instruction that the defendant is entitled to the defense if it appeared to him and would have appeared to a reasonable man that he was in imminent danger of being killed or receiving great bodily harm; and disapproving a tendered instruction that made the defendant alone the judge of the danger, without regard to the reasonableness of his judgment.[38]

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31 People v. Wells, 374 P.2d 706 (Colo. 1962), interpreting Colo. Rev. Stat. § 40-10-9 (1953).

32 Colo. Rev. Stat. §§ 40-1-12, -13 (1953).

33 *Id.* at § 40-1-12.

34 Clews v. People, 377 P.2d 125 (Colo. 1962).

35 In many jurisdictions, including Colorado, if the killer knows that he can safely escape from what he reasonably believes to be the deadly attack of his adversary by an ignominous retreat, he is not obliged to take this escape route, but can properly stand his ground and kill his adversary, provided he was not the aggressor in beginning the difficulty. *E.g.*, Enyart v. People, 67 Colo. 434, 180 Pac. 722 (1919). See Leonard v. People, 369 P.2d 54, 63 (Colo. 1962) (approving instruction on self-defense including: "He is not required to retreat.") But if the killer, by striking the first blow, provoked the deadly attack of his adversary, he is obliged to retreat before using deadly force upon the adversary. See Perkins, *Criminal Law* 883-909 (1957).

36 Colo. Rev. Stat. § 40-2-15 (1953).

37 Vigil v. People, 143 Colo. 328, 353 P.2d 82 (1960), criticized in Scott, *One Year Review of Criminal Law and Procedure*, 38 DICTA 65, 67-68 (1961).

38 Leonard v. People, 369 P.2d 54 (Colo. 1962).

3. Insanity.—Colorado has by statute adopted the right-and-wrong test, supplemented by the irresistible-impulse test, for the defense of insanity.[39] Under the latter test, one who knows right from wrong is nevertheless insane if his mental disease renders him incapable of choosing the right and refraining from doing the wrong. One problem with the irresistible-impulse test is: how irresistible does the impulse have to be? According to psychiatrists, complete inability to resist is quite rare. Far more common are urges which are so strong that most persons could not resist them under most circumstances, but which they could nevertheless resist if a policeman were standing by.[40] Perhaps one can be held to have an irresistible impulse even if he would not have followed through his impulse with a police officer looking on. One 1962 Colorado case, involving a prosecution for murder, touched upon the problem but did not decide it.[41] A defense psychiatrist was asked by the district attorney on cross examination whether the defendant would have killed the victim if there had been a policeman at his elbow. The defense made no objection, and the psychiatrist answered yes. The jury found the defendant sane and guilty of murder. The supreme court affirmed without deciding whether the question was proper, *i.e.*, whether one can be found to have an irrestible impulse which he could have resisted had there been "a policeman at the elbow."

D. Statutory Changes

The 1962 Colorado legislature discovered a number of criminal statutes that provided for long terms of imprisonment but which had failed, apparently through oversight, to state that the imprisonment was to be served in the state penitentiary. Under the Colorado constitution,[42] such crimes were misdemeanors, for which sentences of imprisonment must be served in the county jail.[43] Thus, burglary with explosives, calling for imprisonment for a minimum of twenty-five years and a maximum of forty years,[44] was a mere misdemeanor for which the county jail was the required (though most unsatisfactory) place of imprisonment. The 1962 legislature corrected several mistakes of this kind, by providing in each instance for imprisonment in the state penitentiary.[45]

II. CRIMINAL PROCEDURE

A. Colorado Rules of Criminal Procedure: Amendments

The new Criminal Rules, promulgated by the Colorado Supreme Court in 1961 and effective on November 1 of that year, seem to be working quite well in practice.[46] Only a few cases

39 Colo. Rev. Stat. § 39-8-1(2) (1953).
40 Weihofen, Mental Disorder as a Criminal Defense, 84 (1954): "Most exhibitionists, for example, have enough control not to yield to their impulse in the presence of a policeman."
41 Bizup v. People, 371 P.2d 786 (Colo. 1962).
42 Colo. Const. art. XVIII, § 4.
43 Bustamante v. People, 133 Colo. 497, 297 P.2d 538 (1956).
44 Colo. Rev. Stat. § 40-3-7 (1953).
45 Colo. Sess. Laws 1962, cc. 46-51, 63, amending the statutes on third-degree rape (that interesting species of rape by which a female may be guilty of rape of a male under 18), burglary with explosives, insurrection, use of public funds for private purposes, sabotage, anarchy, sedition, disloyalty, and avoiding a writ of habeas corpus. In some of these statutory amendments the *length* of imprisonment, in addition to the *place* of imprisonment, was changed.
46 See 34 Rocky Mt. L. Rev. No. 1 (1961) for a symposium on the Rules, containing the text thereof and extensive commentary thereon.

concerning the Rules reached the supreme court in 1962, no doubt in good part because of the newness of the Rules.

One difficulty which has existed during 1962, the first year under the Rules, has been the overlapping of statutes and rules. Often the old statute (still on the books) provides for substantially the same procedure as the counterpart Rule, but sometimes (though far less frequently) the two are absolutely inconsistent.[47] Overlapping without inconsistency is bad enough, but inconsistency is much worse. During 1962, the Colorado Bar Association's Criminal Law Committee, which drafted the Rules, undertook to recommend to the Colorado Legislative Council the specific statutes which should be repealed or amended because of the Rules. The 1963 Legislative Council has recommended to the 1963 Legislature the adoption of the Committee's suggestions.[48]

Meanwhile, the Committee went to work to draft some recommended amendments to the Rules, in order to cure some defects which had come to light. The recommendations were, for the most part, adopted by the Colorado Supreme Court, becoming effective on January 1, 1963. Most of the amendments do not effect major changes, but three of them may be singled out for special mention: (1) Amended Rule 44 authorizes (but does not require) the district and county courts to appoint counsel to defend indigent defendants at their trials for misdemeanors.[49] (2) Amended Rule 46 provides for a new and simple procedure for enforcing the forfeiture of bail. (3) Amended Rule 35(b) allows the defendant to have a review, on writ of error, of the sentencing court's denial of relief under Colorado's new postconviction remedy (specifically, a motion in the sentencing court to vacate, set aside or correct the sentence).[50] This relief is available to convicted prisoners whose constitutional rights have been violated under circumstances which precluded correcting the constitutional wrongs by the normal channel of review on writ of error.

B. Pre-Trial Prohibition: Declaratory Judgement

A 1962 Colorado case, following precedent, allows one who has been once before in jeopardy with respect to a criminal offense to secure an original writ of prohibition in the supreme court to prevent a threatened second trial for the same offense.[51] Another 1962 case deals, in an oblique way, with another possible pre-trial remedy—that of the declaratory judgment to determine the validity of a criminal statute or penal ordinance.[52] The Colorado law is

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47 See Scott, *One Year Review of Criminal Law and Procedure*, 39 DICTA 81, 88 (1962), for a list of innovations in Colorado criminal procedure made by the Rules.

48 Colorado Legislative Council, Colorado Criminal Law, 148-56 (Research Public. No. 68, Dec. 1962).

49 Colo. R. Crim. P. 44 (1961), as it read before the amendment, required such an appointment in felony cases, but was silent as to misdemeanor cases.

50 Colo. R. Crim. P. 35(b) (1961), as originally adopted, provided for review on error, on behalf of the *prosecution*, of the sentencing court's *grant* of the motion for post-conviction relief.

51 Menton v. Johns, 377 P.2d 104 (Colo. 1962), following Markiewicz v. Black, 138 Colo. 128, 330 P.2d 539, 75 A.L.R.2d 628 (1958).

52 Bunzel v. City of Golden, 372 P.2d 161 (Colo. 1962), involved the use of the declaratory judgment device to question the validity of a municipal ordinance. The supreme court assumed the device to be proper but held the ordinance to be valid. The case does not make it clear, however, whether the ordinance in question is a penal ordinance, with criminal penalties authorized for violations.

not at all clear as to whether this remedy is available for such a purpose.[53]

C. Arrest Without Warrant

One 1962 criminal defendant claimed on writ of error that his arrest without a warrant for robbery was illegal, because the police officer who arrested him used "hearsay" evidence to determine reasonable cause. The supreme court properly held[54] that the policeman's reasonable cause to believe that a robbery had been committed by the defendant may be based upon what others have told him,[55] pointing out incidentally that "hearsay" is not the proper word for information so derived.

D. Bail

The Colorado constitution provides for bail in criminal cases except for capital offenses "where the proof is evident or the presumption great."[56] In other jurisdictions with similar constitutional provisions there is a split of authority as to whether, in a capital case, a defendant seeking bail has the burden of proving that the evidence of his guilt is weak, or whether the prosecution has the burden of proving that it is strong.[57] In a 1962 Colorado case the defendant, charged with murder, had been admitted to bail pending his trial, and was eventually acquitted by the trial judge's (erroneous) directed verdict of acquittal.[58] The supreme court, commenting on the bail aspects of the case, stated that, in view of the bailed person's temptation to abscond in a capital case, courts should "proceed with extreme caution . . . in the determination of whether the proof is evident or the presumption great."[59] Perhaps this is but another way of expressing the view of some other jurisdictions that the burden of showing that the evidence is weak rests upon the defendant.

E. Jury List

A criminal defendant charged with a felony in Colorado is by statute entitled, before arraignment, to be furnished a list of jurors on the jury panel.[60] In a 1962 case the prosecution failed to provide the defendant with the list, but as he neither objected to going to trial without it, nor could show how he was prejudiced by the lack of it, the failure did not constitute reversible error.[61]

By a sensible amendment to the Colorado Rules of Criminal Procedure,[62] the jury list is to be furnised at the time of the pre-

53 A 1960 case, Memorial Trusts, Inc. v. Beery, 144 Colo. 448, 356 P.2d 884 (1960), discussed at 38 DICTA 65, 71 (1961), held the declaratory judgment to be a proper device to determine in advance the validity of a criminal statute. In 1961, Meier v. Schooley, 147 Colo. 244, 363 P.2d 653 (1961), without referring to the 1960 case, held that the declaratory judgment cannot be used for such a purpose. The 1962 Bunzel case seems to go back to the 1960 view.

54 Brown v. People, 375 P.2d 675 (Colo. 1962) (victim of robbery identified defendant's picture as the picture of the one who had robbed him). *Accord*, Draper v. United States, 358 U.S. 307 (1959). Of course, even an illegal pretrial arrest cannot be the ground for reversal of a conviction obtained at a proper trial, the pretrial wrong being of no importance at this point. The legality of the arrest will be of great importance in the future, however, with respect to the admissibility of evidence searched for and seized without a search warrant, when the search was made incident to the arrest.

55 Information from an informr whose past information has proved reliable constitutes probable cause, though the officer does not know his identity. People v. Prewitt, 52 Cal.2d 330, 341 P.2d 1 (1959).

56 Colo. Const. art. II, § 19.

57 Orfield, Criminal Procedure from Arrest to Appeal, 108 (1947).

58 People v. Spinuzzi, 369 P.2d 427 (Colo. 1962).

59 *Id.* at 430.

60 Colo. Rev. Stat. § 39-3-6 (1953).

61 Goldsberry v. People, 369 P.2d 787 (Colo. 1962).

62 Colo. R. Crim. P. 10(f) (1963 amend.).

paration of the list of jurors who will form the panel for the defendant's case, rather than furnished at some time before arraignment when the jurors on the list will generally *not* be the jurors who will try the case.

F. Information

An information charging burglary is not improperly worded if it states that the defendant feloniously and without force entered "the room of Leo Beaubien at the Harvard Hotel, viz., room 204," with intent to commit larceny therein, even though Leo was a one-night guest at the hotel and not the owner or even a permanent resident of the building.[63]

An old Colorado statute, and a new Colorado Rule,[64] provides for indorsement of prosecution witnesses upon the information at the time of filing it, with a provision that the names of witnesses not so indorsed, whose identities are not learned by the prosecuting attorney until afterwards, may be later indorsed and the witnesses called to testify at the trial. A 1962 case concerned the trial court's granting of a motion by the prosecution to indorse two new names. The defendant objected to the motion, but, as he did not ask for a continuance on account of surprise, the supreme court held that the trial court did not commit reversible error in allowing the indorsement on the day of the trial.[65]

63 Gallegos v. People, 370 P.2d 755 (Colo. 1962).
64 Colo. Rev. Stat. §§ 39-4-1, -2 (1953); Colo. R. Crim. P. 7(b)(1) (1961).
65 Goldsberry v. People, *supra*, note 61.

G. Plea

Whether a Colorado defendant, once he has pleaded guilty to a criminal charge, may thereafter, before he is sentenced, be allowed to change his plea to not guilty is said to be a matter lying within the sound discretion of the trial court.[66] In this case the defendant, charged with burglary, pleaded guilty when unrepresented by counsel, persisting therein after having been warned by the court of the consequences of his guilty plea.[67] Before the time set for sentence he acquired counsel,[68] who, after advising the defendant to change his plea to not guilty, moved the court for permission to withdraw the guilty plea. It would seem that, in the case of a guilty plea made without counsel, if counsel later, but before sentencing, undertakes to represent the defendant and, after study, believes that the defendant has a chance of success on a not-guilty plea, it is an abuse of discretion to refuse to grant a change of plea upon motion made before sentencing. In any event, it is hard to reconcile the holding of the case with the magnanimous statement of the Colorado Supreme Court on other occasions to the effect that the discretion to allow a change of plea "should be exercised liberally in favor of life and liberty."[69]

H. Pre-Trial Discovery

Pre-trial discovery in criminal cases, to a limited extent, arrived in Colorado with the adoption in 1961 of the new Rules of Criminal Procedure. One Colorado trial judge in 1962 invented a novel type of pre-trial discovery device when he ordered that the prosecution witnesses talk to the defendant's attorney on pain of being disqualified as witnesses if they should refuse. The supreme court, however, threw cold water on this new method of forcing prosecution witnesses to talk to the defense attorney, holding that the trial court has no power to disqualify witnesses for such a reason.[70] Doubtless, however, the trial court could properly order the district attorney not to interfere with the defense attorney's attempts to interview government witnesses, holding the threat of contempt over the district attorney's head to enforce obedience to the order.

I. Voir Dire

In two 1962 cases the defendant, after his conviction, argued on writ of error that events which occurred at the voir dire necessitated a new trial. In one case a prospective juror, in answer to a question asked by the attorney for a co-defendant, stated that she was a "little prejudiced" against people of Spanish-American ancestry because several boys of that type had broken some windows at her church.[71]

Upon challenge for cause, she was excused. The defendant's motion for a mistrial, on the ground that the juror's statement had poisoned the minds of the other prospective jurors, was denied; and the

66 Hudspeth v. People, 375 P.2d 518 (Colo. 1962) (trial court's denial of defendant's motion to change plea upheld).

67 However, he did consult with his co-defendant's counsel after the prosecution presented evidence in aggravation. After this consultation defendant said he had nothing to say as to why judgment and sentence should not be pronounced.

68 The acquisition of counsel appears in the record of the case but not in the report.

69 See Gearhart v. People, 113 Colo. 9, 11, 154 P.2d 47 (1944); Abshier v. People, 87 Colo. 507, 524, 289 Pac. 1081, 1088 (1930).

70 People v. Spinuzzi, 369 P.2d 427 (Colo. 1962).

71 Cruz v. People, 368 P.2d 774 (Colo. 1962).

supreme court held the denial to be proper, since her quiet statement was by no means an emotional outburst of an inflammatory nature. In the other case, the defendant challenged for cause all prospective jurors who had stated on voir dire that they would regard the defendant's failure to take the witness stand as some evidence of guilt.[72] The trial court then told the jurors in strong language that the law required that they must not so regard the defendant's failure and asked them if they would follow the law in this matter. On their assurance that they would, the court denied the challenge, and the supreme court upheld its action.

J. "Exclusion Rule"

The trial court often orders that the witnesses in a criminal case stay out of the courtroom during the trial except when testifying, the purpose of this "exclusion rule" being to prevent the witnesses from taking their cues from one another. In the *Cruz* case,[73] the trial court made such an order, adding that the witnesses should not talk to each other but might talk to the district attorney's office. Thereafter, the district attorney interviewed several witnesses in a group at one conference. The defendant, on learning of this, moved for a mistrial, which the trial court denied. The supreme court affirmed the defendant's conviction, saying that the particular exclusion order did not expressly forbid such an interview and that, in any event, a mistrial is not the proper remedy for a violation of the exclusion rule. The court stated that an intentional violation of the exclusion rule might lead the trial court to disqualify the offending witness, although even here the court has discretion whether or not to impose this penalty.

A second 1962 case concerning the exclusion rule points out that the trial court, after putting witnesses under the rule, has discretion to permit a witness (here a police officer) to remain in the courtroom after testifying in order to consult with the district attorney.[74]

K. Variance

An informaion charged that the defendant robbed the victim of his money and his watch. The prosecution's proof at the trial was that the defendant robbed the victim of his watch, but there was no proof as to the money. The defendant's claim that this constituted a fatal variance was properly rejected by the supreme court, which pointed out that in robbery the kind of property taken and its value are immaterial.[75]

L. Insanity Trial

Colorado legislation provides for the alternative of two separate trials or one single trial, in the trial court's discretion, whenever a defendant has pleaded both "not guilty" and "not guilty by reason of insanity."[76] The supreme court has explained the reason for

72 Goldsberry v. People, *supra*, note 61.
73 *Supra*, note 71.
74 Edwards v. People, 377 P.2d 399 (Colo. 1962).
75 Sterling v. People, 376 P.2d 676 (Colo. 1962).
76 Colo. Rev. Stat. § 39-8-3 (Supp. 1960). Though this statute as amended in 1955 is not clearly worded, apparently the trial court has discretion, in the case of separate trials, as to whether to have the same or a different jury try the two separate issues. A different jury is the more usual procedure. *E.g.*, Trujillo v. People, 372 P.2d 86 (Colo. 1962); Leick v. People, 136 Colo. 535, 322 P.2d 674 (1958).

allowing separate trials before separate juries.[77] Since, on the issue of insanity, a much wider inquiry into the defendant's behavior (including his other crimes and other misconduct) is permitted than is allowable on the issue of guilt, a separate trial before a separate jury protects the defendant from prejudice on the issue of guilt, which might arise in the minds of a jury trying both issues.

M. Miscellaneous Minor Matters at the Trial

1. Unauthorized Communications.—One 1962 case involved a brief out-of-court communication between a juror and the manager of the store which defendant was charged with burglarizing.[78] During a recess in the trial, the manager was seen talking to the juror. This was reported to the trial judge, who, after calling the juror into chambers to find out what was said, learned that the two had not discussed the case in any way. The trial judge's refusal to take further action (such as granting a mistrial) was upheld by the supreme court, on the ground that the defendant showed no prejudice resulting from the unauthorized communication.

2. Defendant in Handcuffs.—It is wrong to exhibit a defendant to the jury in handcuffs or legs irons, or dressed in a striped suit with "County Jail" written across the back.[79] But where one juror by accident saw the defendant in handcuffs as he was being brought to the court house for the trial, the defendant's motion for a mistrial was denied. The supreme court properly upheld the denial of the motion.[80]

3. Closing Argument.—In one case, the district attorney, in his closing argument, inadvertently referred to the defendant's other crimes (*i.e.*, crimes for which he was not on trial), properly in evidence, as "other offenses" rather than using the preferable term "other transactions."[81] The defendant's motion for a mistrial was held to have been properly denied in view of the trial court's prompt admonition to the jury to disregard the use of "offenses" because the defendant had not been charged with or proved guilty of the other transactions in question. In another case, the supreme court spoke of the trial court's broad discretion as to the scope of the district attorney's (and defense attorney's) comment upon the evidence and the legitimate inferences to be drawn therefrom.[82] Counsel may not misstate the facts in evidence, but he has a good deal of freedom in the inferences he urges the jury to draw from the facts.

N. Motion to Elect Between Counts

In a 1962 case the defendant, who had been arrested with stolen property in his possession, had received it from the thief either (1) knowing, at the time he received it, that it had been stolen or (2) not knowing it then but later, after learning of it, converting it to

77 Trujillo v. People, 372 P.2d 86 (Colo. 1962).
78 Torres v. People, 369 P.2d 80 (Colo. 1962), (the manager spoke to the juror these mysterious words: "It's amazing how they can do some of it," to which the juror replied, "Yes, it is.").
79 Montoya v. People, 141 Colo. 9, 345 P.2d 1062 (1959) (handcuffs; recognizing the possibility of the necessity of handcuffs for dangerous defendants); Eaddy v. People, 115 Colo. 488, 174 P.2d 717 (1946) (striped clothing marked "County Jail").
80 Ruark v. People, 372 P.2d 158 (Colo. 1962).
81 Peters v. People, 376 P.2d 170 (Colo. 1962).
82 Bizup v. People, 371 P.2d 786 (Colo. 1962).

his own use.[83] Under the former alternative, his crime was receiving stolen property; under the latter, larceny by bailee. The district attorney, not being able to show exactly what was in the defendant's mind at the moment he received the property, prepared an information charging the defendant in the alternative in two counts. After the prosecution's evidence was in, the defendant moved to make the district attorney elect one of the two counts to submit to the jury. The trial court denied the motion, and the case was submitted to the jury with instructions to convict on only one count according to its findings of fact concerning the defendant's mental state when he received the property. The supreme court affirmed the defendant's conviction of larceny by bailee, holding that, with evidence both ways the trial court properly refused to require the prosecution to elect between the two counts.

O. *Evidence*

A number of Colorado criminal cases decided in 1962 necessarily involved problems of evidence, but, since matters of evidence will be treated in a separate article, only a few cases which relate particularly to criminal law are specifically discussed herein.

1. *Burden of Proof.*—The Colorado legislation on murder contains a provision[84] that once the prosecution has proved the defendant killed the victim,[85] the defendant has the burden of proving circumstances which mitigate the homicide to voluntary manslaughter (*i.e.*, proof that the killing was in a heat of passion induced by an adequate provocation) or which reduce it all the way down to no crime (*e.g.*, proof that the killing was in proper self-defense). The supreme court in 1962 held that this statute places upon the defendant whose defense is self-defense the burden of going forward with some evidence of self-defense, but that, once he has done so, the burden of persuasion still remains with the prosecution, and that the measure of its persuasion is still proof beyond reasonable doubt.[86] This is the way it should be as to any matter which concerns the issue of guilt or innocence.[87]

2. *Confessions.*—If one (named A) of two confederates confesses to a crime implicating the other (B), and B was not present when A confessed and never thereafter assented thereto, the confession is not admissible in evidence against B because, as to him, it is plain hearsay.[88] In a 1962 felony-murder case the prosecution's theory in the prosecution of B was that B, an adult, was the accessory before the fact who procured A, a 15-year-old boy, to rob and kill the victim.[89] The trial court admitted A's confession, with all

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83 Peters v. People, *Supra*, note 81.

84 Colo. Rev. Stat. § 40-2-20 (1953).

85 Although the statute is not clearly worded ("The killing being proved"), this probably requires proof that the defendant *intentionally* killed the victim (which intention may be inferred from his intentional use of a deadly weapon upon the victim).

86 Leonard v. People, 369 P.2d 54 (Colo. 1962).

87 The same thing applies to the issue of insanity as a defense. In the first instance the prosecution need not prove sanity, but once the defendant puts in some evidence of insanity, the prosecution has the burden of persuasion of sanity beyond a reasonable doubt. Shank v. People, 79 Colo. 576, 247 Pac. 559 (1926). Compare the situation where the defendant's defense is procedural, such as the statute of limitations. Here, if there is a dispute of fact (*e.g.*, whether the defendant in fact fled from justice so as to toll the statute), the law might properly put the burden of persuasion (by a preponderance) upon the defendant. This issue is not concerned with guilt or innocence, for the statute of limitations, if applicable, does not negative guilt.

88 If A and B are tried together and A's confession introduced into evidence, this means that the reference in A's confession to B must be deleted, or that the jury be instructed to consider the confession as to A's guilt but not B's.

89 Oaks v. People, 371 P.2d 443 (Colo. 1962).

its references to B's conduct in procuring A, on the theory that, to convict B as an accessory, it was necessary first to prove that his agent A actually did the robbing and killing. The supreme court reversed B's conviction of murder for the trial court's error in allowing A's full confession. It was proper to use it at B's trial to show A's conduct as the principal, but all references to B's conduct as an accessory must be deleted.

The same case involved another interesting confession problem. Upon the arrest of the defendant, the prosecution employed a psychiatrist to make a mental examination of the defendant in jail—just in case the defendant should later plead not guilty by reason of insanity.[90] (He did not so plead, as it turned out). During the doctor's mental examination, the defendant orally confessed to the crime in question and at the defendant's trial the doctor testified to the defendant's confession, but (there being no issue as to insanity) not as to the defendant's mental condition. The supreme court reversed the conviction, holding that, although it might have been proper for the doctor to make the mental examination, it was reversible error to allow him to testify as to the confession he heard during the examination. This result is doubtless required by the special Colorado statute on procedure in insanity cases.[91] In other jurisdictions, however, the defendant's confession made to a psychiatrist may be admissible unless the psychiatrist has "coerced" the defendant into giving it.[92]

There were two other 1962 confession cases. In one it was held that the Colorado procedure by which the trial court determined the admissibility of a confession by hearing evidence, in the jury's presence, of its accuracy is not error because of what the jury heard, even though the trial court, finding the confession to be inaccurately transcribed, refused to allow it in evidence.[93] The jury did not hear the wording of the excluded confession, although they may have received the impression, from what they did hear, that

90 A procedure held legal in Early v. People, 142 Colo. 462, 352 P.2d 112 (1960), noted at 38 DICTA 78-79 (1961).

91 Colo. Rev. Stat. § 39-8-2 (1953 (in a mental examination of a defendant, who has pleaded not guilty by reason of insanity, made by psychiatrists of one of two state hospitals or by a commission of psychiatrists appointed by the court, "no substantive evidence acquired directly or indirectly for the first time as the result of such observation and examination shall be admissible on the issue of guilt of the crime charged . . . . ") If this is the rule as to the regular type of examination after plea, it should not be circumvented by the irregular type of examination in jail before plea.

92 Leyra v. Denno, 347 U.S. 556 (1954), involved the state prosecution's use of a psychiatrist, not to make a mental examination, but to get a confession. By pretending to be trying to help the defendant, the psychiatrist got the defendant to confess — a confession overheard by the police who were eavesdropping. The confession was held to be coerced, and its use by a state in evidence held to violate fourteenth amendment due process.

93 Clews v. People, 377 P.2d 125 (Colo. 1962).

the defendant had made damaging admissions. In still another confession case, the court held that when the defendant's voluntary confession is admissible, it may be received in all its parts including the defendant's reference therein to other misconduct (here, his acts of fornication, unrelated to the crime charged).[94]

In 1962 the United States Supreme Court reversed the Colorado murder conviction of a 14-year-old boy because it found that his confession, used in evidence against him at his trial, had been coerced by methods condemned by the due process clause of the United States Constitution's fourteenth amendment.[95] The boy had orally and voluntarily confessed immediately upon his arrest, and five days later he signed a formal written confession. This latter confession was obtained before the boy had been brought before the juvenile judge and after he had been held in Juvenile Hall for five days without seeing a lawyer, parent or other friendly adult, although his mother had made one attempt to see him. On the other hand, the boy was not threatened or beaten or subjected to any sort of relentless interrogation; he was not placed in solitary confinement; and he was told he did not have to make a statement and that he could have an attorney and his parents present. The Court held (in a 4-to-3 decision) that, on the above uncontroverted evidence concerning the events surrounding the written confession, the written confession was coerced; and that the conviction must be reversed even though, at the trial, the defendant's uncoerced oral confession, together with other evidence, adequately proved the defendant's guilt. No doubt the defendant's extreme youth was important to the majority's determination of coercion, because, except for that one factor, his treatment by the authorities does not seem to have been coercive.

3. Disqualification of Witnesses.—One case[96] suggests that the trial court may, in its discretion, disqualify a witness who has intentionally violated the courts exclusion rule;[97] another [98] that it may not, as a method of enforcing a pre-trial discovery order (here a novel one which orders the prosecution witnesses to discuss the case with the defendant's attorney), disqualify a witness who fails to obey the order.

4. Miscellaneous.—Cases involving evidence obtained by unreasonable searches and seizures—which evidence, the United States Supreme Court held in *Mapp v. Ohio,*[99] a state must not use against a state criminal defendant—have as yet hardly begun to appear in the Colorado Supreme Court reports.[100] As usual, however, a number of 1962 cases dealt with the admissibility of evidence of the defendant's other crimes.[101] Other cases denied the relevance—in a

94 Torres v. People, 369 P.2d (Colo. 1962).

95 Gallegos v. Colorado, 370 U.S. 49 (1962), reversing Gallegos v. People, 145 Colo. 53, 358 P. 2d 1028 (1960), discussed briefly at 38 DICTA 65, 78 (1961).

96 Cruz v. People, 368 P.2d 774 (Colo. 1962).

97 See *supra* notes 73-74 and text.

98 People v. Spinuzzi, 369 P.2d 427 (Colo. 1962), discussed *supra* at note 70 and text.

99 367 U.S. 643 (1961), noted at 39 DICTA 94 (1962).

100 Peters v. People, 376 P.2d 170 (Colo. 1962), held a search (without a search warrant) and seizure to be reasonable in view of the permission given (by whom is not stated) to the police to make the search. The court did not need to decide upon the retroactivity of the case of Mapp v. Ohio. For a recent federal case holding that the Mapp case applies retroactively and can be taken advantage of, in a federal habeas corpus case, by a state convict who, before Mapp, failed to object at the trial and failed to raise the point on his appeal, see Hall v. Warden, Maryland Penitentiary, 313 F.2d 483 (4th Cir. 1963).

101 Ruark v. People, 372 P.2d 158 (Colo. 1962); Peters v. People, 376 P.2d 170 (Colo. 1962); Jordan v. People, 376 P.2d 699 (Colo. 1962); Clews v. People, 377 P.2d 125 (Colo. 1962).

homicide prosecution where the defendant's defense was self-defense—of the victim's uncommunicated threats;[102] refused to require positive identification by eyewitnesses to a robbery, in view of other evidence of guilt;[103] allowed a witness to read notes he had made at the time of an event to which he is testifying, on the theory that the notes are his "past recollection recorded," although the witness did not first try to use the notes to refresh his present recollection;[104] upheld the admissibility, in a homicide case, of a photograph of the deceased, though it brought vividly to the jurors' attention the details of a shocking crime;[105] allowed evidence of flight as showing consciousness of guilt, although the defendant, after the crime, slept before fleeing;[106] and permitted a finding of guilt to rest upon circumstantial evidence alone.[107] In a case where a confederate of the defendant, called by the prosecution to testify against him, refused to testify on the ground of his privilege against self-incrimination, the district attorney's act of calling the witness was not misconduct, in view of the fact that he fully expected the witness to give testimony.[108]

P. *Instructions*

Several 1962 cases dealt with the effect upon a criminal conviction of improper jury instructions. It is, of course, error for the court to give an instruction on the law (even one which states the law correctly) if there is no proof on which to base the instruction.[109] But is it *reversible* error to do so?

In one 1962 case the defendant was charged with murder, but at the trial there was no proof of any homicide greater than manslaughter.[110] The court, over the defendant's objections, instructed on murder as well as on manslaughter, and the jury found the defendant guilty of manslaughter. It was argued on writ of error that, although it was error to instruct on murder without any support in the evidence, the defendant was not harmed thereby, because the jury rejected the murder verdict and found him guilty of manslaughter, for which there was evidentiary support. The supreme court reversed, however, on the theory that, since verdicts are often compromises between possible choices, the murder possibility enhanced the chance of a manslaughter conviction. Thus the defendant was in fact prejudiced by an instruction on a higher degree of crime than the proof warranted.[111]

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102 Trujillo v. People, 372 P.2d 86 (Colo. 1962) (Newly discovered evidence of threats not grounds for a new trial).

103 Gurule v. People, 372 P.2d 88 (Colo. 1962). See also People v. Spinuzzi, 369 P.2d 427 (Colo. 1962) (Identification witness testified, "I am not sure but I think I recognize him," meaning the defendant).

104 Jordan v. People, 376 P.2d 699 (Colo. 1962), following 3 Wigmore Evidence, §738 (3d ed. 1940). (3d ed. 1940).

105 People v. Spinuzzi, 369 P.2d 427 (Colo. 1962).

106 Goldsberry v. People, 369 P.2d 787 (Colo. 1962).

107 Edwards v. People, 377 P.2d 399 (Colo. 1962).

108 Clews v. People, 377 P.2d 125 (Colo. 1962), distinguishing De Guesaldo v. People, 147 Colo. 462, 364 P.2d 374 (1961) (prosecution did not expect confederate to testify, but did expect him to claim the privilege), noted at 39 DICTA 92 (1962).

109 Conversely, it is proper to refuse to give an instruction where there is no evidence on which to base it. Sterling v. People, 376 P.2d 676 (Colo. 1962).

110 Leonard v. People, 369 P.2d 53 (Colo. 1962).

111 It might similarly be argued that for the prosecution to qualify the jury for the death penalty when there is no possibility of imposing capital punishment (or when the prosecution does not intend to ask for it) is prejudicial error, for may not the jury be more likely to compromise on conviction of a higher degree of homicide on account of the suggestion of capital punishment?

In another 1962 case, involving a prosecution for involuntary manslaughter, there was proof that the defendant, driving his car, hit and killed another person.[112] There was some evidence that he was driving with criminal negligence, but there was no evidence that he was violating any speeding statute. The trial court instructed the jury to convict if it should find either (1) that he was criminally negligent and that this negligence was the proximate cause of the victim's death, or (2) that he was speeding in violation of law and that speeding was the proximate cause of the victim's death. The supreme court reversed the conviction of involuntary manslaughter because of the giving of instructions (containing correct statements of law) not supported by evidence and because "the jury might well have considered such instructions as an invitation to proceed on the law without evidence"—*i.e.*, to find that the defendant was speeding when there was no evidence of that fact. This error is more clearly a reversible one than the error in the case discussed in the next paragraph above. Here the jury found him guilty of the crime instructed on (manslaughter) because they found that he was speeding, but that he did not drive with criminal negligence; whereas in the previous case the jury found that he did not commit the crime on which instructions were given (murder).

One 1962 case points out that it is sometimes reversible error to instruct the jury in the exact language of the statute—as where the statute is so ambiguously worded as to tend to confuse the jury.[113] Here the statute in question provides that, once the prosecution has proved that the defendant killed the victim, "the burden of proving circumstances of mitigation, or that justify or excuse the homicide, will devolve on the accused." The quoted portion has been construed to mean that the defendant has the burden of going forward with the evidence, but that he does not have the burden of persuasion;[114] however, one could never in the world learn this from simply reading the statute. This statute, then, must be more than merely read to the jury; it must be explained.

Q. Verdict

1. Number of Crimes.—In one 1962 case the defendant, acting in concert with a confederate, forged a check, and the confederate unsuccessfully attempted to pass it.[115] The defendant was charged with four separate crimes arising out of the one transaction: (1) confidence game,[116] (2) conspiracy to commit confidence game, (3) forgery, and (4) conspiracy to commit forgery. He was convicted on all four counts and sentenced to a term of imprisonment on each count (the report failing to state whether the sentences were to be served consecutively or concurrently. The supreme court affirmed the conviction without specifically discussing whether it was proper to make four separate crimes out of what might seem to be but one. It is quite well settled that one who agrees with another to commit a crime and who then goes ahead and commits it may be convicted of both the conspiracy and the substantive crime, and sentenced

112 Rumley v. People, 368 P.2d 197 (Colo. 1962).
113 Leonard v. People, 369 P.2d 54 (Colo. 1962).
114 *Ibid.*, construing Colo. Rev. Stat. § 40-2-20 (1953).
115 Krantz v. People, 374 P.2d 199 (Colo. 1962).
116 Colo. Rev. Stat. § 40-10-1 (1953) provides for a one to twenty year term of imprisonment for one who obtains, or *attempts* to obtain, any money or property from another by means of a confidence game.

consecutively for each.[117] It is not so clear, however, that one who forges an instrument and later utters it can properly be convicted of (and receive separate consecutive sentences for) both forgery and confidence game. Under the Colorado statute,[118] one who forges a document and then utters it cannot be guilty of two separate acts of forgery. The statute plainly says that one who utters a forged instrument is guilty of forgery, so that uttering is simply one way of committing forgery.[119] (On similar principles, one who has forcible sexual relations with a sixteen-year-old mentally defective girl is guilty of one rape, not three, though he has committed his one rape in three different ways.)[120] If the legislature does not intend to impose two forgery penalties upon one who first forges and then utters, it is hard to believe that it could have intended a forgery penalty plus a confidence game penalty for the same conduct.[121]

2. *Consistency.*—In a 1962 conspiracy case, four persons—A, B, C and D — were tried together for an alleged conspiracy with one another to steal.[122] A, B and C were acquitted, but D was found guilty. On writ of error the supreme court reversed the conviction and ordered D's discharge, for the "incongruous conclusion" that D conspired with A, B and C, although they did not conspire with him.[123] In another 1962 case the defendant was charged in two counts with burglary and larceny, on the theory that he first entered into another's hotel room with intent to steal and that he then stole.[124] The jury convicted him of the burglary, but it was not able to agree upon the larceny; so the district attorney's motion to dismiss the larceny charge was granted. On writ of error the defendant urged that the verdict of conviction of burglary was inconsistent[125]

117 *E.g.* Callahan v. United States, 364 U.S. 587 (1961). *Contra:* Model Penal Code, § 1.07(1)(b), forbidding two convictions when "one offense consists only of a conspiracy to commit the other."

118 Colo. Rev. Stat. § 40-6-1 (1953).

119 Davenport v. People, 138 Colo. 291, 332 P.2d 485 (1959) (evidence of uttering supports conviction of forgery).

120 *E.g.*, People v. Craig, 17 Cal.2d 453, 110 P.2d 403 (1951) (one act of forcible intercourse with 16-year-old girl is one offense, not two).

121 In dealing with the counterpart situation with respect to federal crimes, the United States Supreme Court has sometimes held that Congress did not mean to make two separate crimes out of what is really one transaction. Thus, where the defendant entered a federally-insured bank with intent to rob, and then robbed, he could not properly be convicted of both burglary and robbery; the former merges into the latter. Prince v. United States, 352 U.S. 322 (1957).

122 Archuleta v. People, 368 P.2d 422 (Colo. 1962).

123 *Accord:* Commonwealth v. Avrach, 110 Pa. Super. 438, 168 Atl. 531 (1933) (joint trial of A and B, alleged conspirators; A convicted, B acquitted). Cf. People v. Levy, 299 Ill. App. 453, 20 N.E. 2d 171 (1939) (A tried in a separate trial for conspiracy with B and convicted; judgment reversed. A to be held in custody or under bond, to be convicted if B is convicted, and to be acquitted if B is acquitted, at B's later trial).

124 Gallegos v. People, 370 P.2d 755 (Colo. 1962).

125 As to the extent to which verdicts must be consistent, see 2 King, Colorado Practice Methods, § 2377 (1956).

with the acquittal of larceny, but the supreme court, affirming the conviction, properly held that the verdicts were not in fact inconsistent. One may enter a place with intent to steal (and thus commit burglary) and then, once inside, fail to commit larceny—perhaps because he can find nothing worth stealing, or because he is frightened away before he can lay hands on something worth taking, or even because, overcome with remorse, he changes his mind about stealing.

R. Motion for New Trial

A 1962 case states that a motion for a new trial on account of newly discovered evidence is to be regarded with disfavor, and that the trial court's discretion in acting on the motion is not (ordinarily, at least) to be disturbed on writ of error by the supreme court.[126] It is true that there are fairly stringent rules about the kind of new evidence which will warrant a new trial. The evidence must be newly-discovered, not merely cumulative, not available at the trial, and, if known then, might well have led to a different result. It seems wrong, in view of these orthodox limitations, to add what appears to be an invitation to trial courts to deny such a motion even when the new evidence satisfies the requirements.

S. Sentence

1. Conviction on Two Counts.—One who has been convicted of both burglary and conspiracy to commit that burglary may be sentenced consecutively for each crime,[127] although often the trial court in its discretion imposes concurrent sentences, as it may do whenever a defendant is convicted of two or more counts in a multiple-count information. Where the trial court gave a single sentence without designating which of two convictions the sentence applied to, it was held not to be reversible error warranting a new trial or a new sentence, so long as the sentence imposed did not exceed that which could have been given for either of the two convictions.[128]

2. Collection of Fine.—A municipal ordinance provides for enforcing the collection of a fine imposed by the municipal court upon a defendant, by throwing the defendant, who fails to pay it on demand, into the city jail until he pays. The supreme court upheld the district court's release of a defendant who had been thus confined without the required demand having first been made upon him.[129]

3. Service of Sentence.—In figuring the service of a sentence of imprisonment, time spent by the prisoner on parole and while an escapee does not count.[130] Only a desperate prisoner, clutching at straws, could argue otherwise.

4. Juvenile Delinquency Sentence.—The county court, in a juvenile delinquency proceeding, was not authorized to sentence the child to a term of imprisonment in the county jail.[131] One may wonder how the court could have thought the juvenile was going to get, in the county jail, the care approximating that given by his

126 See Edwards v. People, 377 P.2d 399, 404 (Colo. 1962).
127 *Supra*, note 117.
128 Vigil v. People, 375 P.2d 103 (Colo. 1962).
129 Application of Montez, 370 P.2d 154 (Colo. 1962).
130 Furlow v. Tinsley, 377 P.2d 132 (Colo. 1962).
131 Martinez v. People, 372 P.2d 947 (Colo. 1962). Colo. Rev. Stat. § 22-8-1 (1953), before its amendment in 1960, did provide for a possible county jail term for juvenile delinquents over 14. The amendment deleted this provision.

parents, or how he was going to be treated there as "misdirected and misguided, and needing aid, encouragement, help and assistance"[132] unless it be a most unusual county jail.

T. *Appeal from Municipal or Justice Court*

Two 1962 cases concerned the right of a defendant, convicted of municipal or county court, to appeal after having paid the fine imposed upon him. The first case held that one who *involuntarily* pays the fine imposed by the municipal court can still appeal to the county (in Denver, the superior) court.[133] The second case held that, even where the fine is paid *voluntarily,* the defendant (convicted in this case in justice court) may appeal.[134]

The latter case also held that one is not precluded from appealing by his failure to identify, in his notice of appeal, the crime of which he was convicted. Although the statute on appeals requires this identification, the supreme court, labeling the requirement highly technical, found that the appellant's failure to identify the crime did not prejudice the prosecution, which knew exactly what the offense was.

Another 1962 case allows one who has pleaded guilty in municipal court to appeal to the county (superior) court, where he will get a trial *de novo.*[135] In an analogous situation, a Colorado statute very clearly gives this privilege to one who has pleaded guilty in the justice of the peace court.[136]

U. *Review on Writ of Error*

1. Confession of Error.—In two cases the Attorney General confessed error before the Colorado Supreme Court, in the tradition of the office of the Solicitor General of the United States before the United States Supreme Court.[137]

2. Reversible Error.—One case explained at some length that, even when the guilt of the convicted defendant is indicated by the record, serious trial errors of a prejudicial nature warrant a remand for a new trial.[138] The supreme court apparently believed this defendant's guilt to be clearly shown by the record; but, so as not to prejudice his chances for a fair trial on remand, it properly expressed this notion in the more cautious language of "indicated" guilt.

Another case held that one who is convicted of two crimes when the proof shows he could have committed but one (as where one is charged with embezzlement and larceny of the same property at the same time and place, the district attorney not knowing which of the two crimes the evidence will prove), a conviction of

132 Colo. Rev. Stat. § 22-8-13 (1953).
133 Pueblo v. Clemmer, 375 P.2d 99 (Colo. 1962), distinguishing Scott v. Denver, 125 Colo. 68, 241 P.2d 857 (1952) (no appeal if fine paid voluntarily).
134 Jackson v. People, 376 P.2d 991 (Colo. 1962), overruling Scott v. Denver, *supra* note 133.
135 Pueblo v. Trujillo, 374 P.2d 863 (Colo. 1962), following the weight of authority, see Annot., 42 A.L.R.2d 995 (1955).
136 Colo. Rev. Stat. § 79-13-2 (Supp. 1960).
137 McCray v. People, 371 P.2d 422 (Colo. 1962) (confession that evidence does not support verdict of conviction); Martinez v. People, 372 P.2d 947 (Colo. 1962) (confession that sentence was to an improper place of confinement).
138 Oaks v. People, 371 P.2d 443 (Colo. 1962). On this principle the United States Supreme Court reversed the defendant's conviction in Gallegos v. Colorado, 370 U.S. 49 (1962), on account of the state's use of the defendant's coerced written confession, even though this confession merely repeated the defendant's earlier voluntary oral confession, which was properly used in evidence. If a serious error like the use of a coerced confession is made, the United States Supreme Court will reverse, without considering whether the error is not prejudicial in view of other strong evidence of guilt.

both crimes is not reversible if the trial court sentences the defendant concurrently, the sentence being less than the maximum which could have been imposed for the lesser of the two crimes.[139]

3. Verdict "Contrary to Law and Evidence."—It seems that everyone who seeks review of his criminal case on writ of error complains vaguely (in his motion for a new trial and in his brief; and formerly in his assignments of error, now abolished) that the verdict of guilt is "contrary to the law and the evidence." The supreme court in 1962 reiterated an earlier statement that "Such a general allegation is defective as to form, and such assignment being improperly presented ordinarily need not be considered on its merits."[140] It seems clear that the defendant who complains about the trial court's application of the *law* to his case should point out the specific error—whether it be in its rulings on the evidence, or in refusing to declare a mistrial, or in giving or refusing instructions, or whatever it may be—of which he complains. Where the complaint is about the *evidence,* he should specifically claim that the trial court erred in refusing to direct a requested judgment of acquittal, or in denying a motion for new trial because the verdict was not supported by the weight of the evidence, or (under Rule 29(b) of the new Rules) in denying the defendant's post-verdict motion for judgment of acquittal in accordance with his earlier motion for a judgment of acquittal,[141] as may be appropriate in the particular case.

4. Review by Certiorari.—Rule 106(a) (4) of the Colorado Rules of Civil Procedure allows a higher court to vacate the judgment of an inferior court which has "exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy." In one 1962 case, the supreme court, in an original proceeding in that court, vacated the judgment of a district court which had summarily found the district attorney in contempt and fined him $25 for failing to be present or represented by his deputy when a criminal case was called.[142] The supreme court found that the district court lacked jurisdiction to proceed summarily, for the

139 Clews v. People, 377 P.2d 125 (Colo. 1962). Query, however, whether this should be so if the two crimes carry different maximum penalties. It could be argued that the trial court might have sentenced him more severely with the greater crime in mind, although the jury might have acquitted him of that crime if it had done its duty and convicted him of one and acquitted him of the other.

140 See Cruz v. People, 368 P.2d 774, 775 (Colo. 1962). The supreme court goes on to consider whether the evidence supports the verdict.

141 Perhaps this post-verdict motion may be termed, a little loosely, a motion for judgment notwithstanding the verdict, or judgment n.o.v.—as the counterpart motion in civil procedure is generally called.

142 District Attorney v. District Court, 371 P.2d 271 (Colo. 1962).

contempt, if any, did not occur wholly in the court's presence. As to the use of the extraordinary remedy of certiorari[143] in lieu of of the ordinary remedy of writ of error, it may be noted that the supreme court apparently uses the word "jurisdiction" here in a rather broad (if somewhat vague) sense;[144] and that it finds the writ of error to be an inadequate remedy in a situation when it ought to be adequate to do justice, especially when the situation involves a mere monetary fine.[145] Perhaps the trouble lies in the vague state of the Colorado procedural law in cases of criminal contempt.[146] The law ought to be that one fined for contempt can pay his fine (to save himself from going to jail) and yet apply to the supreme court for a review of the trial court's action in finding him guilty of contempt.

V. Parole Violation

One 1962 case ordered the release of a parolee who had been arrested for suspected parole violation and kept in confinement, pending the parole department's investigation of the violation, for a period longer than the fifteen-day period specified by the statute.[147]

W. Former Jeopardy

In 1962, two cases before the Colorado Supreme Court involved the question of whether the state constitutional prohibition against double jeopardy forbids the retrial of a criminal defendant acquitted by a directed verdict of the trial court, which erroneously held that the prosecution's evidence, assuming it to be true, did not prove that the defendant committed the crime charged.[148] In one, the trial court directed a verdict of acquittal of both murder and manslaughter where the prosecution's proof was that the defendant shot the victim to death in cold blood, the reason for this startling action being that the defendant did not know the victim and so could not have acted with malice toward him.[149] In the other, the trial court directed a verdict of acquittal in a case involving assault to rob and conspiracy to rob, on the erroneous ground that the prosecution had not proved venue.[150] Later, the trial court, recognizing its mistake, ordered a new trial. In each case, does a retrial constitute double jeopardy?

This is doubtless the way most American jurisdictions would interpret their double-jeopardy provisions;[151] but it is arguable

143 Under Colo. R. Civ. P. 106 the writ of that name is abolished, but Rule 106(a)(4) keeps alive the remedy of that former name.

144 See also Tolland v. Strohl, 364 P.2d 588 (Colo. 1961), noted at 39 DICTA 99 (1962) (trial court tried defendant too hastily and so "exceeded its jurisdiction").

145 Cf. Douglas v. Municipal Court, 377 P.2d 738 (Colo. 1963) (writ of prohibition to prohibit prosecution in municipal court for violation of penal ordinance denied, in view of adequate remedy of defending at jury trial, followed by review on writ of error).

146 The original rules proposed by the Colorado Bar Association Committee contained Rule 42 on procedure in criminal contempt cases, but the rule was deleted by the Colorado Supreme Court in adopting the Rules in 1961.

147 Schooley v. Wilson, 374 P.2d 353 (Colo. 1962), applying Colo. Rev. Stat. § 39-17-6 (1953), as amended by Colo. Sess. Laws 1961, ch. 104.

148 Colo. Const. art. II, §18: " . . . nor shall any person be twice put in jeopardy for the same offense. If the jury disagree, or if the judgment be arrested after the verdict, or if the judgment be reversed for error in law, the accused shall not be deemed to have been in jeopardy."

149 People v. Spinuzzi, 369 P.2d (Colo. 1962). See *supra* notes 10-12 and text for a discussion of this erroneous ruling.

150 Menton v. Johns, 377 P.2d 104 (Colo. 1962).

151 E.g., Kepner v. United States, 195 U.S. 100 (1904). *Contra:* State v. Lee, 65 Conn. 265, 30 Atl. 1110 (1894). The Connecticut view does not violate the due process clause of the fourteenth amendment; Palko v. Connecticut, 302 U.S. 319 (1937).

that, under Colorado's unusual provision, a retrial, after an erroneous acquittal not on the merits, does not constitute double jeopardy. Colorado provides that "if the judgment be reversed for error in law" the defendant is not deemed to have been in jeopardy; and this literally is broad enough to include the reversal of an erroneous *acquittal* (as well as the reversal of an erroneous *conviction*) on account of the trial court's error of law. As to whether a retrial should be permitted on principle, I am impressed by this recent statement concerning trial court errors: "In the criminal area, it is hard to say whether more harm is done by unjust convictions or unjust acquittals. Perhaps the latter, for an appellate court can weed out the unjust convictions, and there is a fair to good chance that it actually will do so."[152]

In another 1962 case, the defendant, convicted of larceny from the person (a felony, with a maximum penalty of ten years in the penitentiary) was erroneously sentenced by the trial court to six months in the county jail (a misdemeanor sentence).[153] The prosecution appealed, and the supreme court naturally held the sentence to be erroneous. But the supreme court "disapproved" of the sentence instead of remanding for a new sentence. Does double jeopardy forbid a correct resentence here? Surely, it does not[154] even if the net result may be the imposition of a more severe sentence,[155] of course, time served under the old sentence should be counted as service under the new one.[156]

X. *Postconviction Remedies*

1. Habeas Corpus.—The habeas corpus remedy is available only to persons in custody. Very likely one who has been convicted, served part of his sentence and been paroled is in "constructive" custody for habeas corpus purposes, so long as he is under the supervision of the parole department.[157]

In 1958, the Colorado Supreme Court disapproved of the trial court's practice of appointing counsel for an indigent convict seeking habeas corpus relief, on the ground that habeas corpus is a civil, not a criminal, remedy.[158] In a recent federal case involving a petition for federal habeas corpus brought by a Colorado convict having difficulty, without the aid of counsel, in exhausting his Colorado remedies, the federal district judge expressed his concern over this Colorado policy, calling it a "sad commentary" on Colorado's judicial system.[159] It may be noted, however, that the new remedy created by Colorado Rule 35(b) provides for postconviction relief on behalf of convicted defendants under certain circum-

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152 Bishop, Book Review, 72 Yale L. J. 618, 622 (1963).

153 People v. McIntosh, 369 P.2d 987 (Colo. 1962).

154 Colo. R. Crim. P. 35(a) (1961) authorizes a trial court to correct an illegal sentence at any time. A misdemeanor sentence for a felony conviction is surely an "illegal" sentence within the meaning of the Rule, just as a felony sentence for a misdemeanor conviction would be.

155 Cf. United States v. Howell, 103 F.Supp. 714 (D.W.Va. 1952), aff'd 199 F.2d 366 (4th Cir. 1952) (a sentence declared void because of absence of defendant's counsel when sentence pronounced may be increased on resentence, the void sentence being nonexistent).

156 Colo. R. Crim. P. 35(c) (1961), as amended in 1963, see *supra* notes 49-50 and text thereto, specifically so provides.

157 See Schooley v. Wilson, 374 P.2d 353, 354 (Colo. 1962) (the parolee having been jailed for investigation of suspected parole violation *held* to be in *actual* custody and so eligible for habeas corpus relief).

158 McGrath v. Tinsley, 138 Colo. 18, 328 P.2d 579 (1958).

159 Pigg v. Tinsley, (D. Colo. 1963) (unreported). See Rocky Mt. News, Jan. 22, 1963.

stances,[160] and this is a criminal, not a civil, remedy, for which a trial court probably may, though it need not, appoint counsel.

2. *Remedy under Rule 35(b).*—The first case utilizing this new remedy reached the supreme court in 1962.[161] The defendant's post-conviction motion to vacate his sentence for burglary stated, among other things, that his guilty plea had been obtained by threats to arrest and prosecute his sister unless he admitted participation in the burglary. The trial court denied the motion without a hearing as to the truth of the allegations of coercion. The wrong complained of, the court said, was not the type of wrong remediable by Rule 35(b), since the normal remedy of writ of error had been available to correct the wrong if the defendant was thus coerced into pleading guilty. The supreme court merely stated that the trial court "correctly" denied the motion.

While it is true that the writ of error is an adequate remedy to right many constitutional wrongs, it is not adequate if the wrong does not appear on the record so as to be reviewable on error. And the fact that a guilty plea is coerced would naturally not appear in the record.[162] Rule 35(b) expressly provides for relief in the case of a violation of constitutional rights "of a sort not effectively subject to review on writ of error . . . because the violation through no fault of the prisoner did not appear upon the record so as to be subject to review." Thus the trial court should have held a hearing as to the truth of the allegations of coercion of the guilty plea.[163]

Y. *Extradition*

Two 1962 cases concerned the extradition, from Colorado to another state, of a fugitive from the other state who had fled to Colorado. In each case the other state's governor had made demand upon the Colorado governor for the extradition of the fugitive, who had

160 See Colo. R. Crim. P. 35(b) (1961). This Rule contains nothing about the appointment of counsel. Rule 44 provides for appointment of counsel to represent the indigent defendant in a felony case "at every stage of the trial court proceedings." Perhaps this does not cover the postconviction phase in the trial court, but that does not mean the trial court may not appoint counsel if it believes justice requires it. The federal courts often appoint counsel for indigent federal or state prisoners seeking postconviction relief in the federal courts. *E.g.*, Dillon v. United States, 307 F.2d 445 (9th Cir. 1962) (federal prisoner); United States *ex rel.* Wissonfeld v. Wilkins, 281 F.2d 707 (2d Cir. 1960) (state prisoner).

161 Hudspeth v. People, 375 P.2d 518 (Colo. 1962).

162 Thus in Waley v. Johnston, 316 U.S. 101 (1942), postconviction habeas corpus was allowed for the allegation that federal police coerced a guilty plea from a federal criminal defendant.

163 See *Symposium on the Colorado Rules of Criminal Procedure*, 35 Rocky Mt. L. Rev. 70-71 (1961)

then been arrested on the Colorado governor's warrant and lodged in a Colorado jail. In one case, the district court on its own motion dismissed the extradition proceeding, because no agent from that state had come to Colorado for the fugitive within sixty days after his Colorado arrest.[164] The supreme court disapproved of this action by the trial court, stating that the proper procedure is for the fugitive to file a petition for a writ of habeas corpus, to be followed by a courtroom hearing after notice to the proper Colorado and foreign officials.[165] In the other case, the fugitive filed a petition for a writ of habeas corpus alleging certain defects in the extradition proceeding.[166] The court granted the petition, ordering the sheriff (who had custody of the fugitive) to show cause why he properly detained the fugitive. A hearing was held at which the sheriff showed, by presenting the extradition papers, that the extradition proceeding was valid. The court thereupon discharged the writ. On error, the fugitive argued that since the sheriff never filed a formal written return to the writ before the hearing, the hearing was defective. The supreme court rejected his contention, properly placing substance ahead of form.

Z. *Criminal Contempt*

Two 1962 cases dealt with criminal contempt. In one the district attorney was not present, either personally or by his official representative, when a criminal case on the docket was called for trial.[167] This absence caused considerable inconvenience and delay in the transaction of the court's business. When the district attorney next appeared in court, the court summarily held him in contempt, imposing a $25 fine. On review by the supreme court, the judgment of contempt was vacated. It may well be criminal contempt for a district attorney "wilfully or intentionally"[168] to be absent when a case is called, thus causing inconvenience and delay; but if so, it is not a direct contempt committed entirely in the court's presence. The mental element (wilfulness or intention) cannot be known by the court through personal observation in the courtroom—unlike the case of the disappointed litigant or his lawyer who throws a brickbat at, or who makes known his displeasure by using abusive language toward, the judge as he sits on the bench. Indirect contempts are not punishable summarily. Although, in the case of indirect contempt, there need not be an information followed by trial by jury, there must at least be notice to the alleged contemnor (if he is not in court, notice is generally in the form of a rule to show cause why he should not be adjudged in contempt for the alleged specific misconduct), followed by a hearing at which he is entitled to defend himself, before the court can adjudge him in contempt.

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164 Krutka v. Bryer, 372 P.2d 83 (Colo. 1962).

165 Query, however, whether the delay of sixty days in coming for the accused by representatives of the demanding state is a proper ground for dismissing the proceeding on a writ of habeas corpus, since the statute, Colo. Rev. Stat. § 60-1-10 (1953), provides that a petition for habeas corpus by the fugitive is the proper way to "test the legality of his arrest." Delay after arrest can hardly affect the legality of the arrest itself.

166 Bright v. Foster, 374 P.2d 865 (Colo. 1962).

167 District Attorney v. District Court, 371 P.2d 271 (Colo. 1962).

168 Query what "wilfully" means. Perhaps it means "recklessly" — *i.e.*, the district attorney realizes that there is a great risk of delay and inconvenience though he does not know for sure that this will happen and does not desire it.

In the other case, the supreme court said that a lawyer who, in violation of the trial court's rules, showed up for the pretrial conference in a civil case totally unprepared might perhaps be guilty of a direct criminal contempt punishable summarily.[169] The supreme court held, however, that the following irregular procedure by the trial court in handling the matter was improper. The trial court, three days after the attending lawyer's misconduct, entered an order retroactive to the day of the misconduct ordering that the lawyer pay $150 "expenses" to the lawyer for the other side, who had been inconvenienced by the offending lawyer's unpreparedness. The trial court did not, in fact, think to call the matter a contempt for another month, when for the first time it spoke of it as a disciplinary matter.[170]

AA. Juvenile Delinquency

A juvenile delinquency proceeding is defective, and a determination of delinquency must be reversed, if the statutory requirement of notice to the juvenile's parents or guardian, giving the date and hour of the hearing, is not fulfilled.[171]

BB. Statutory Changes

The 1962 legislature made two minor amendments to existing Colorado criminal procedure.

1. Statute of Limitations.—Existing Colorado law exempts, from the ordinary three-year statute of limitations[172] on prosecutions for felonies, the crimes of murder, forgery and kidnapping, for which trio of crimes there is no time limitation at all. In 1962 another exception was provided for: in the case of felonies (other than the select three) committed by a public official in connection with the duties of his office, the official must be prosecuted within three years after the termination of his employment, or within six years after the commission of his crime, whichever first occurs.[173]

2. Insanity Procedure.—Existing Colorado law allows the trial court to order the mental examination of a defendant who has pleaded insanity at the time of the alleged crime (or who claims later to have become insane), to be conducted by a commission of one to three psychiatrists. The law before 1962 required that these psychiatrists live or have an office within thirty miles of the town where the case is pending; but a 1962 amendment eliminates the thirty-mile requirement,[174] no doubt because in some areas of Colorado there are simply no psychiatrists to be found within a thirty-mile radius of the place of trial.

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169 Pittman v. District Court, 369 P.2d 85 (Colo. 1962).

170 It is unfortunate that the Colorado Supreme Court, in adopting the Colorado Rules, did not adopt proposed Rule 42 on criminal contempt based upon Fed. R. Crim. P. 42, which makes quite plain the difference between direct and indirect criminal contempts and the different procedure to be followed depending upon the type of contempt involved.

171 Martinez v. People, 372 P.2d 947 (Colo. 1962), based upon Colo. Rev. Stat. §§ 22-8-1, 22-8-3 (Supp. 1960) (parents or guardian must be notified of the hearing and must show whether they are able to correct the child or remove the cause of his delinquency).

172 That is, the indictment must be found, or the information filed, within three years after the felony is committed.

173 Colo. Sess. Laws 1962, ch. 44, amending Colo. Rev. Stat. § 39-1-3 (1953). Why forgery belongs in the select group of three felonies as to which there is no time limitation is something of a mystery. For an argument favoring the amendment of the statute of limitations concerning embezzlement, see 36 DICTA 42 (1959).

174 Colo. Sess. Laws 1962, ch. 45 amending §§ 39-8-2(1), 39-8-6, as amended in 1961.