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## Criminal Law

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## CRIMINAL LAW

THOMAS A. WILLS\*

Since this article<sup>1</sup> is a continuation of the previous *Survey*,<sup>2</sup> the same policies of selection will be used, and developments in various areas will be presented as an integrated continuum.

### SENTENCE

#### I. *Deferment of Sentence by Trial Judge*

The parole and probation statutes<sup>3</sup> passed in 1957 indirectly limit the power of the trial judge to defer sentencing. It has been held that if the maximum time for which a sentence could have been imposed has expired between an adjudication of guilt and the actual passage of the sentence, the trial court no longer has the power to sentence.<sup>4</sup> This position was extended by the supreme court as follows: "when a trial judge has delayed the sentence the power to sentence must be exercised before the lapse of the extreme period for which sentence could have been imposed, and when it is inflicted the term cannot be projected beyond the extreme period."<sup>5</sup> This view was affirmed in a recent case<sup>6</sup> in which the court upheld a delayed sentence that would terminate within the extreme period.

#### II. *Reduction of Sentence by Appellate Judge*

After considerable controversy, the courts seem to have adopted the view that an appellate court should not reduce a sentence which is within the statutory limits.<sup>7</sup> This policy was applied recently in two rather unusual situations. In one, reduction was denied when the penalty imposed for conspiracy to commit the crime was greater than for the crime itself.<sup>8</sup> In the other, the defendant pled guilty to a rape charge. He was tried by a judge, and thus there was no opportunity for a recommendation of mercy by a jury. The supreme court refused to reduce the death sentence and commented: "the extent of it [the sentence] cannot be reviewed on appeal regardless of the existence or nonexistence of mitigating circumstances."<sup>9</sup>

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1. This *Survey* includes cases reported in 113 So.2d 224 through 131 So.2d and laws enacted by the 1961 General Session of the Florida Legislature.

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

3. FLA. STAT. §§ 948.01-49.03 (1961).

4. *Bateh v. State*, 101 So.2d 869 (Fla. App. 1958).

5. *State v. Bateh*, 110 So.2d 7, 10 (Fla. 1959).

6. *Rodriguez v. State*, 119 So.2d 681 (Fla. 1960).

7. *Stanford v. State*, 110 So.2d 1 (Fla. 1959); *Brown v. State*, 13 So.2d 458 (Fla. 1943).

8. *LePrell v. State*, 124 So.2d 18 (Fla. App. 1960).

9. *Davis v. State*, 123 So.2d 703, 707 (Fla. 1960).

### III. Indeterminate Sentence

The court upheld a sentence comprising four terms of six months to ten years<sup>10</sup> and indicated that the possibility of decreasing the term from the maximum does not make the sentence so indefinite as to be unconstitutional. The statute permitting indeterminate sentences<sup>11</sup> was consistent with general constitutional requirements, and sufficiently flexible to afford individualized attention in accordance with modern concepts of penology based upon deterrence and rehabilitation.

In another case involving the indeterminate sentencing provisions,<sup>12</sup> the court held that the statute should not be applied if the crime was committed before the statute was enacted.<sup>13</sup>

#### ACCUSED AS A WITNESS

##### I. *Comment by the Prosecution*<sup>14</sup>

Although by statute the prosecution is prohibited from commenting on the accused's failure to testify,<sup>15</sup> the prosecuting attorney may refer to the rule which provides that the recent unexplained possession of stolen goods raises an inference of guilt. However, the courts have implied that these two principles are not necessarily mutually exclusive.<sup>16</sup> In a recent case in which the defendant did not testify, the following statements of the prosecution were held to be error: "What has been the defense to unexplained possession? Can you find, in anything the defendant has said, which would give him an explanation for the possession of this property on January 30? Has he explained his possession in any way by his defense?"<sup>17</sup> Perhaps the courts consider that a bare statement of the rule of "unexplained possession" is all that is necessary to inform the jury, and thus any additional comment might be viewed as excessive and an infringement upon the defendant's rights.

The extent to which ambiguities are construed in the defendant's favor is illustrated by a case in which the defendant's attorney, in his opening statement, announced that the defendant would testify and admit a criminal

10. *Carneley v. Cochran*, 118 So.2d 629 (Fla. 1960).

11. FLA. STAT. § 921.18 (1961).

12. FLA. STAT. §§ 921.17-23 (1961).

13. *Sing v. State*, 115 So.2d 773 (Fla. App. 1959).

14. For an excellent analysis of the law in this area see Comment, 15 U. MIAMI L. REV. 293 (1961).

15. FLA. STAT. § 918.09 (1961). "Accused may make himself a witness. — In all criminal prosecutions the accused may at his option be sworn as a witness in his own behalf, and shall in such case be subject to examination as other witnesses, but no accused person shall be compelled to give testimony against himself, nor shall any prosecuting attorney be permitted before the jury or court to comment on the failure of the accused to testify in his own behalf, and a defendant offering no testimony in his own behalf, except his own, shall be entitled to the concluding argument before the jury."

16. *Ard v. State*, 108 So.2d 38 (Fla. 1959).

17. *Furci v. State*, 113 So.2d 272, 273 (Fla. App. 1959). (Italicized in original.)

record. The defendant did not testify. The prosecution stated that when the defendant was arrested he claimed that he had never been arrested previously. The prosecution then pointed out the conflict. The appellate court held this vague and nebulous reference to be a comment on the defendant's failure to testify because "a comment made by a prosecuting attorney directly or indirectly which is subject to interpretation by a jury as a comment upon failure to testify is an encroachment . . . regardless of . . . the motive or intent, notwithstanding such comment is susceptible to a different construction."<sup>18</sup> A comment is error even though it was made inadvertently in the heat of argument.<sup>19</sup>

On the other hand, when the defense counsel states that the defendant's failure to testify is not evidence of guilt, rebuttal by the prosecution is invited. Therefore, a reply that the failure is not evidence of innocence is justified.<sup>20</sup>

## II. *Self-incrimination*

A defendant, not represented by counsel nor informed of his rights, testified upon the trial judge's invitation. The judge had stated, "tell me any statement you like now."<sup>21</sup> In reversing the conviction, the appellate court held that knowledge of his rights against self-incrimination was a prerequisite to waiver of that privilege.<sup>22</sup>

In *Brizzie v. State*<sup>23</sup> the court applied the well known rule that refusal to testify under the immunity statute<sup>24</sup> is justified if the crime involved is not covered by the statute, and held that the possession of stolen property is not within its purview, even though the related crime of larceny is.

## SEARCH AND SEIZURE

The courts continue to give the state considerable latitude in the general area of arrest and search, and are particularly liberal if automobiles<sup>25</sup> are involved. In one case,<sup>26</sup> in which the evidence was admitted when the automobile in question was in "close proximity" to the place of arrest, the court quoted the following language from *Cameron v. State*:<sup>27</sup> "the modern

18. *Otto v. State*, 126 So.2d 152, 153 (Fla. App. 1961).

19. *Milton v. State*, 127 So.2d 460 (Fla. App. 1961); *Sing v. State*, 115 So.2d 771 (Fla. App. 1959).

20. *Testasecca v. State*, 115 So.2d 584 (Fla. App. 1959).

21. *Cochran v. State*, 117 So.2d 544, 545 (Fla. App. 1960).

22. *Cochran v. State*, *supra* note 21.

23. 120 So.2d 27 (Fla. App. 1960).

24. FLA. STAT. § 932.29 (1961).

25. This position toward automobiles is reflected in *City of Miami v. Aronovitz*, 114 So.2d 784 (Fla. 1959) wherein the establishment of road blocks in order to inspect for drivers' licenses was unfortunately approved.

26. *Herring v. State*, 121 So.2d 807 (Fla. App. 1960).

27. 112 So.2d 864, 873 (Fla. App. 1959).

trend of authority is to narrow the concept of immunity against search and seizure when it involves a motor vehicle used as an aid in the commission of crime."

It had been previously decided that when the defendant was arrested for vagrancy in order to search for evidence of a bolita violation, the evidence obtained was admissible. The rationale of the court was that the arrest for vagrancy was not just a ruse since the defendant was charged with and convicted of vagrancy.<sup>28</sup> In a recent parallel case this policy was extended to admit evidence of possession of burglary tools even though the defendant was acquitted on the vagrancy charge.<sup>29</sup>

The state's power relative to search warrants was restricted in the context of jurisdictional and time requirements. When the property searched was beyond the jurisdiction of the issuing magistrate, the warrant was invalid even though the appropriate magistrate was unavailable for a fifteen day period.<sup>30</sup> A lapse of six months between the alleged observation of the offense by the affiant and the execution of the affidavit was held to be excessive and invalidated the warrant.<sup>31</sup>

#### CHARGE TO THE JURY

An important, controversial question concerning charges to the jury was reviewed, analyzed and evaluated by the courts. According to section 919.14 of the Florida Statutes,<sup>32</sup> the court shall in all cases charge the jury as to the degrees of the offense.<sup>33</sup> However, section 918.10(4) of the Florida Statutes<sup>34</sup> provides that no party shall assign as error or grounds for appeal the giving or failing to give an instruction unless he has made appropriate objection. The latter statute is qualified by a case<sup>35</sup> which held that if the failure to charge is "fundamental error" then a new trial is justified. Therefore, resolution of a particular problem would depend upon the definition of "fundamental error." In *Hamilton v. State*,<sup>36</sup> the court indicated that an error is not fundamental "unless it reaches down into the legality of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the error alleged."<sup>37</sup> Thus, it seems that there is no rule relative to categories of charges, rather each

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28. *Blake v. State*, 112 So.2d 391 (Fla. App. 1959).

29. *Rinehart v. State*, 114 So.2d 487 (Fla. App. 1959).

30. *Robinson v. State*, 124 So.2d 714 (Fla. App. 1960).

31. *Hamelmann v. State*, 113 So.2d 394 (Fla. App. 1959).

32. FLA. STAT. § 919.14 (1961).

33. For various applications of this view see *Pait v. State*, 112 So.2d 380 (Fla. 1959) and *Killen v. State*, 92 So.2d 825 (Fla. 1957).

34. FLA. STAT. § 918.10(4) (1961).

35. *Harrison v. State*, 5 So.2d 703 (Fla. 1942). This court used the expression "tremendous interest" rather than "fundamental error."

36. 88 So.2d 606 (Fla. 1956).

37. *Id.* at 607.

decision requires evaluation of the particular circumstances by means of the definition.

The problem of the apparent conflict between sections 919.14 and 918.10 arose in a trial in which the defendant was charged with first degree and convicted of second degree murder. There was no evidence presented relative to murder in the third degree and the trial judge charged that murder in the third degree was not applicable. The defendant's attorney did not object to this charge, request a charge as to third degree murder, or set forth either point in a motion for a new trial. The district court of appeal said: "We again state our holding in the instant case that failure to instruct on third degree homicide when no evidence is presented as to such crime is not a fundamental error when no request has been made by the defendant for such instruction and when the failure to so instruct is not set forth in the defendant's motion for new trial."<sup>38</sup> Subsequently, on certiorari, the supreme court upheld the decision.<sup>39</sup>

The other side of the controversy was ably expressed in a dissenting opinion by Justice Drew. He considered that section 919.14 of the Florida Statutes makes the obligation to charge absolute. Therefore, it should not be necessary to decide that the error is "fundamental." He further pointed out that section 924.32(1) of the Florida Statutes<sup>40</sup> and rule 6.16(a) of the Florida Appellate Rules give the court discretionary power to consider errors in instructions whether objected to or not. The discretion is exercised if the "interest of justice" requires, rather than on the basis of a definitional determination of whether the error is "fundamental" or not. In his opinion the "interest of justice" indicated a new trial. He expressed his view as follows:

In the trial of a criminal case the jury has the unquestioned power under our laws to find a defendant not guilty irrespective of the evidence and such verdict of not guilty is one of the few untouchable things in the law. For a court to instruct a jury in positive terms, as was done here, that they did not have the power to find a defendant charged with murder in the first degree guilty of murder in the third degree is a plain and gross error of incalculable harm in the eyes of the law to the defendant and one which should be considered by an appellate court on review even though it be presented for the first time in that court or be discovered by that court in its examination of the record.<sup>41</sup>

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38. *State v. Brown*, 118 So.2d 574, 582 (Fla. App. 1960). The trial judge not only failed to instruct as to third degree murder, but he also positively stated that murder in the third degree was not applicable; this fact seemed to be ignored by the majority of the appellate judges. This position was extended in *White v. State*, 122 So.2d 340 (Fla. App. 1960) which involved a similar situation wherein the defendants' attorney orally requested a charge on murder in the third degree, but failed to submit written instructions or to object to the failure to charge.

39. *Brown v. State*, 124 So.2d 481 (Fla. 1960).

40. FLA. STAT. § 924.32(1) (1961).

41. *Brown v. State*, 124 So.2d 481, 487 (Fla. 1960).

Justice Drew dissented in *Jefferson v. State*<sup>42</sup> for the same reason. He raised the issue again in *Johnson v. State*.<sup>43</sup> He considered that since his view had been twice rejected, the majority position must be taken as the law in Florida. He, therefore, reluctantly concurred in affirming a conviction without a recommendation of mercy when the judge had not instructed on homicide in the third degree. The writer agrees emphatically with Justice Drew.

In a related problem in which there was no request for a specific charge on justifiable homicide, nor objection to the charge given, the conviction was reversed and a new trial ordered, because the instruction omitted an essential element. The court said "that it is fundamental that when the trial judge purports to give a charge on justifiable homicide, then every essential elements of justifiable homicide, justified by any of the evidence, should be given."<sup>44</sup>

In a lottery case,<sup>45</sup> the charge involved multiple errors. After prolonged deliberation, the jury requested a definition of the word "possession." The trial judge's response included the following language: "'Whether or not the accused, or any of them, were in conscious and substantial possession of the things alleged to have been found in the premises said to have been owned by the defendants *Diecidue*, may be lawfully inferred by the surrounding circumstances, *especially in the absence of contrary or exculpatory evidence.*'"<sup>46</sup> The supreme court<sup>47</sup> granted a new trial because it found that this challenged charge was defective. The charge amounted to a reference in the presence of the jury to the fact that the defendant did not testify, without further charging that this fact must not be weighed against him. Since the prohibition in section 918.09 of the Florida Statutes<sup>48</sup> refers to the prosecuting attorney not the judge, the charge is not in violation of the statute. Nevertheless, the charge was held to be fundamental error because a reference by the judge may be even more damaging to the rights of the defendant than a reference by the prosecution. Further, the charge suggested the opinion of the case held by the judge, and as such was in conflict with the concept of the presumption of innocence until guilt is established beyond a reasonable doubt, and of a fair and impartial trial by a jury of peers.

#### FAIR TRIAL

##### 1. *Right to an Attorney*

The defendant's attorney was allowed to withdraw from the case five

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42. 128 So.2d 132 (Fla. 1961).

43. 130 So.2d 599 (Fla. 1961).

44. *Bagley v. State*, 119 So.2d 400, 403 (Fla. App. 1960).

45. *Diecidue v. State*, 131 So.2d 7 (Fla. 1961).

46. *Id.* at 10.

47. *Diecidue v. State*, 131 So.2d 7 (Fla. 1961).

48. See note 15 *supra*.

days before the trial in an ex parte hearing for which the defendant was not given notice, was not present, and had no opportunity to object or be heard. The defendant's request for a continuance in order to obtain new counsel was denied. The supreme court<sup>49</sup> ordered a new trial on the basis that section 11 of the Declaration of Rights in the Florida Constitution, which specifically provides that the defendant has a right to procure an attorney, also necessarily implies that reasonable time for this purpose and for the preparation of a defense will be afforded. The court concluded that the refusal would also constitute a denial of the due process requirements of the fourteenth amendment to the Constitution of the United States, and made the interesting observation that an opposite view might tend to cause more encroachments on state sovereignty.

## II. *Trial by Jury*

The supreme court recently reaffirmed the general view that sections 3 and 11 of the Declaration of Rights in the Florida Constitution do not require jury trials in municipal courts for violations of municipal ordinances, and specifically held that the defendant was not entitled to a jury trial in the metropolitan courts on a charge of drunken driving.<sup>50</sup>

## III. *Miscellaneous*

It is not necessary for the state to identify the person who supplied information that supported a search warrant when that person was neither a participant in the alleged crime nor a material witness.<sup>51</sup>

The court on the basis of authority from other jurisdictions, decided that the defendant had a fair trial even though the court reporter was committed to a mental hospital before he had transcribed the notes, and even though the trial judge died after the appeal had been filed.<sup>52</sup>

## JURISDICTION

The district court of appeal in *Campbell v. County of Dade*<sup>53</sup> decided that when the defendant appeared before the trial court in response to charges contained in the docket entry, the alleged illegality of the arrest did not affect the jurisdiction of the trial court to hear and determine the charges. This decision was subsequently misunderstood and misapplied in the metropolitan court in denying a motion to suppress evidence obtained

49. *Cash v. Culver*, 122 So.2d 179 (Fla. 1960), noted in 15 U. MIAMI L. REV. 323 (1961). See also *Cash v. Culver*, 358 U.S. 633 (1959); *Cash v. Culver*, 120 So.2d 590 (Fla. 1960).

50. *Boyd v. County of Dade*, 123 So.2d 323 (Fla. 1960).

51. *State v. Hardy*, 114 So.2d 344 (Fla. App. 1959).

52. *Burton v. State*, 128 So.2d 765 (Fla. App. 1961).

53. 113 So.2d 708 (Fla. App. 1959).



after an arrest alleged to be illegal. The defendant's subsequent oral motion to quash was denied, and the defendant appealed his conviction. The circuit court held that the metropolitan court had jurisdiction, noted that the metropolitan court had misapplied the *Campbell* case relative to the motion to suppress, but held that the error was not preserved for appeal since the defendant did not object to the introduction of the evidence during the trial. The district court of appeal denied certiorari even though the illegality of the arrest could affect the admissibility of evidence, because the motion to quash did not put the legality of the arrest into issue.<sup>54</sup>

Some persons in the legal profession believe that many members of the general public have little respect for the courts, lawyers and "the law." Results of the sort reported leave impressions that are very difficult to overcome.

#### PRELIMINARY HEARING

Contra to the implication in section 901.23 of the Florida Statutes,<sup>55</sup> a preliminary hearing has been held not to be a necessary component of a valid criminal prosecution.<sup>56</sup> This view was approved and applied in a recent case, in which the appellate court affirmed a conviction in which the defendant had been taken into custody without a warrant, questioned, subsequently arrested and denied a preliminary hearing.<sup>57</sup>

#### NEW OR UNUSUAL POINTS

##### I. *Bail*

On appeal from the district court to the supreme court the defendant may be entitled to bail if certain requirements,<sup>58</sup> such as the fact that the appeal was made in good faith, are met. The district court<sup>59</sup> has decided that it has jurisdiction to determine good faith for purposes of bail, but indicated that a better procedure would be to present the question to the supreme court.<sup>60</sup>

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54. *Jones v. State*, 123 So.2d 385 (Fla. App. 1960).

55. FLA. STAT. § 901.23 (1961). "Duty of Officer after arrest without warrant. An officer who has arrested a person without a warrant, shall without unnecessary delay take the person arrested before the nearest or most accessible magistrate in the county in which the arrest occurs, having jurisdiction, and shall make before the magistrate a complaint, which shall set forth the facts showing the offense for which the person was arrested; or, if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county."

56. *Rouse v. State*, 44 Fla. 148, 32 So. 784 (1902).

57. *DiBona v. State*, 121 So.2d 192 (Fla. App. 1960).

58. For an additional discussion of the requirements see *Younghans v. State*, 90 So.2d 308 (Fla. 1956).

59. *Harrington v. State*, 114 So.2d 217 (Fla. App. 1959).

60. Also note that FLA. APP. R. 4.3(c)(6) provides that the filing of a petition for certiorari acts as a stay of proceedings in the district court and thus the defendant may be entitled to bail. *Bedami v. State*, 115 So.2d 412 (Fla. 1959).

## II. *Nolle Prosequi*

When a *nolle prosequi* has been filed against the information, an order reinstating the bond does not reinstate the information.<sup>61</sup>

## III. *Subornation of Perjury*

The Florida rule with respect to proof of perjury is that the elements must be proved by two witnesses or one witness and independent corroborating circumstances.<sup>62</sup> In a case involving subornation of perjury, in the absence of Florida precedent, the court<sup>63</sup> cited federal authority<sup>64</sup> to the effect that one witness was sufficient, and held that denial of a requested instruction that two witnesses or one witness and corroborating circumstances were required was not error.

## IV. *Insanity*

A very small dent was put in the armor of the *M'Naghten* Rule when one judge, dissenting in part from a decision affirming a conviction and death sentence, considered that the time had come to re-examine the test for sanity.<sup>65</sup> The writer wholeheartedly agrees.<sup>66</sup>

When a defendant is adjudicated insane, and subsequently released from the hospital with a discharge certificate, he should be presumed to remain insane until adjudicated sane under section 917.01(2) of the Florida Statutes.<sup>67</sup> Therefore, in a prosecution for a crime committed in the interim he is entitled to an instruction setting forth this presumption.<sup>68</sup>

## V. *Sale of Land by a Public Officer*

In *State v. Hooten*<sup>69</sup> the court held section 839.09 of the Florida Statutes<sup>70</sup> applicable to the sale of land to the county by a county commissioner who had an ownership interest in the land. The case is interesting because the point was new in Florida, and because the court employed the unusual procedure of citing civil cases as authority.

61. *State v. Newell*, 117 So.2d 752 (Fla. App. 1960).

62. *Rader v. State*, 52 So.2d 105 (Fla. 1951); *Keiv v. State*, 152 Fla. 389, 11 So.2d 886 (1943).

63. *Gordon v. State*, 119 So.2d 753 (Fla. App. 1960).

64. *Doan v. United States*, 202 F.2d 674 (9th Cir. 1953).

65. *Piccott v. State*, 116 So.2d 626, 630 (Fla. 1959).

66. For recent related articles see Cohen, *Criminal Responsibility and the Knowledge of Right and Wrong*, 14 U. MIAMI L. REV. 30 (1959); Reid, *The Working of the New Hampshire Doctrine of Criminal Insanity*, 15 U. MIAMI L. REV. 14 (1960); Block, *Temporary Insanity - First Line of Defense*, 15 U. MIAMI L. REV. 392 (1961).

67. FLA. STAT. § 917.01(2) (1961).

68. *Johnson v. State*, 118 So.2d 234 (Fla. App. 1960).

69. 122 So.2d 336 (Fla. App. 1960).

70. FLA. STAT. § 839.09 (1961). "Boards not to purchase supplies from members of boards.—No state or county board or municipal board or council shall purchase supplies, goods or materials for public use from any firm or corporation in which any member of

## WORTHLESS CHECKS

The problems relating to the statutory provisions concerning worthless checks were analyzed by the courts during the period surveyed. However, the reader should note that the Florida Legislature in its 1961 session amended the statute so that many of the problems that arose in the past are now moot.<sup>71</sup>

I. *Problems Prior to the 1961 Amendment*

In one case<sup>72</sup> the defendant issued a worthless check of 100 dollars. The state made no allegation that the defendant received anything of value in exchange for the check. He was convicted of a misdemeanor under the appropriate section of the Florida Statutes.<sup>73</sup> The rationale was based on the statutory section (amended in 1961) which stated that "any persons violating provisions of this section shall be punished in the same manner as provided for by law for punishment for the crime of larceny."<sup>74</sup>

The larceny statutes, sections 811.021(2) and (3) of the Florida Statutes<sup>75</sup> distinguished between a felony and a misdemeanor on the basis of the value of the property stolen. When the defendant receives nothing

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such board is either directly or indirectly interested, nor shall any such board pay for such supplies, goods or materials so purchased. Any person violating the provisions of this section shall be punished, upon conviction, by fine not exceeding five hundred dollars or imprisonment not exceeding one year; provided, that no member of any board aforesaid who shall have recorded his vote against such illegal purchase, or who shall have been absent at the taking of the vote thereon, shall be convicted of a violation of this section."

71. The amendment abrogates the relationship that existed between the penalty for larceny and the issuance of a worthless check. (See text at note 74 *infra*.) The statute now provides specific penalties for violation of its provisions. Fla. Laws 1961, ch 61-284 amends FLA. STAT. § 832.05(2) (1959) as follows: "Violation of the provisions of the subsection shall constitute a misdemeanor and shall be punishable by imprisonment in the county jail not exceeding six (6) months or by fine not exceeding three hundred dollars (\$300.00), unless the check, draft or other written order drawn, made, uttered, issued or delivered be in the amount of fifty dollars (\$50.00), or its equivalent, or more and the payee or a subsequent holder thereof receives something of value therefor. In that event the violation shall constitute a felony and shall be punishable by imprisonment in the state penitentiary not exceeding five (5) years, or in the county jail not exceeding twelve (12) months, or by fine not exceeding one thousand dollars (\$1,000.00)." It also amends FLA. STAT. § 832.05(3) (1959) as follows: "Violation of the provisions of this subsection shall, if the check, draft or other written order be for an amount less than fifty dollars (\$50.00) or its equivalent, constitute a misdemeanor and shall be punishable by imprisonment in the county jail not exceeding six (6) months or by fine not exceeding three hundred dollars (\$300.00). Violation of the provisions of this subsection shall, if the check, draft or other written order be in the amount of fifty dollars (\$50.00), or its equivalent, or more, constitute a felony and be punishable by imprisonment in the state penitentiary not exceeding five (5) years, or in the county jail not exceeding twelve (12) months, or by fine not exceeding one thousand dollars (\$1,000.00)." FLA. STAT. § 832.05 (1959) was further amended by Fla. Laws 1961, ch. 61-185 to provide that if the case were dismissed for want of prosecution, the costs must be paid by the person who applied for the warrant.

72. *State v. Culver*, 113 So.2d 383 (Fla. 1959).

73. Fla. Laws 1953, ch. 28096, § 1(2), at 306.

74. Fla. Laws 1953, ch. 28096, § 1(6)(a), at 308.

75. FLA. STAT. §§ 811.021(2), (3) (1961).

of value for the worthless check, there is nothing which corresponds to "property stolen." Therefore, the conviction could not be for a felony and thus would have to be considered as a misdemeanor under section 775.08 of the Florida Statutes<sup>76</sup> and punished according to section 775.07 of the Florida Statutes.<sup>77</sup> This position has been followed and the defendant released when he had already served a term longer than section 775.07 provides.<sup>78</sup>

When the defendant receives something of value in exchange for the check, the appropriate section is 832.05(3) of the Florida Statutes.<sup>79</sup> Relating the appropriate provisions,<sup>80</sup> prior to the 1961 amendment,<sup>81</sup> the crime would be a felony if the value were 100 dollars or over.<sup>82</sup>

## II. A Problem That Remains After Passage of the 1961 Amendment

The determination of the meaning and application of the requirement that the worthless check must be given in exchange for something of value is a current problem not resolved by the new legislation.<sup>83</sup> Courts have reversed convictions when the worthless check was given as part payment of a pre-existing debt for work and materials,<sup>84</sup> and when the check was for labor alone.<sup>85</sup> In the latter case the court indicated that the defendant

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76. FLA. STAT. § 775.08 (1961). "Felonies and misdemeanors defined. — Any crime punishable by death, or imprisonment in the state prison, is a felony, and no other crime shall be so considered. Every other offense is a misdemeanor."

77. FLA. STAT. § 775.07 (1961). "Punishment for misdemeanors where not otherwise provided. — The punishment for commission of crimes other than felonies in this state, when not otherwise provided by statute, or when the penalty provided by such statute is ineffectual because of constitutional provisions, or because the same is otherwise illegal or void, shall be a fine not exceeding two hundred dollars or imprisonment not exceeding ninety days; and where punishment by fine alone is provided the court may, in his discretion, sentence the defendant to serve not exceeding sixty days in default of the payment of the said fine."

78. *State v. Cochran*, 115 So.2d 169 (Fla. 1959); *Greer v. Culver*, 113 So.2d 386 (Fla. 1959).

79. FLA. STAT. § 832.05(3) (1961). "Obtaining Property In Return For Worthless Checks, Etc.; Penalty. — It shall be unlawful for any person, firm or corporation to obtain any services, goods, wares or other things of value by means of a check, draft or other written order upon any bank, person, firm or corporation, knowing at the time of the making, drawing, uttering, issuing or delivering of said check or draft that the maker thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation, provided however that no crime may be charged in respect to the giving of any such check or draft or other written order where the payee knows or has been expressly notified or has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to insure payment thereof."

80. See Fla. Laws 1953, ch. 28096, § 1(6)(a), at 308 and FLA. STAT. § 811.021(2) (1961).

81. Fla. Laws 1961, ch. 61-284.

82. *Penrod v. Cochran*, 123 So.2d 334 (Fla. 1960).

83. Fla. Laws 1961, ch. 61-284. "It shall be unlawful for any person, firm or corporation to obtain any services, goods, wares or other things of value by means of a check, draft or other written order upon any bank, person, firm or corporation . . . ." (Emphasis added.)

84. *Harris v. State*, 123 So.2d 572 (Fla. App. 1960).

85. *Helms v. State*, 128 So.2d 756 (Fla. App. 1961).

could be convicted under section 832.05(2) of the Florida Statutes<sup>86</sup> for a misdemeanor.<sup>87</sup>

#### ESCAPE

If the defendant escapes from confinement for civil contempt, he can not be prosecuted under section 944.40 of the Florida Statutes,<sup>88</sup> because this statute only applies to escape from confinement for either misdemeanors or felonies.<sup>89</sup> In habeas corpus proceedings, the court managed to remand the case to try the defendant for escape by resorting to section 2.01 of the Florida Statutes<sup>90</sup> so that the common law derived from England relating to lawful confinement, generally, could be invoked.

#### HOMICIDE

The general rule that a confession or admission standing alone is insufficient to establish the elements of the corpus delicti beyond a reasonable doubt was given an interesting interpretation in a homicide case.<sup>91</sup> The defendant claimed that when charged with murder in the first degree, the corpus delicti is not proved beyond a reasonable doubt unless the confession is coupled with the independent evidence which must establish either premeditation or commission of one of the felonies under the felony rule. The court disagreed and, citing a New York case,<sup>92</sup> held that the criminal agency element of the corpus delicti could be satisfied by coupling the confession with proof of circumstances that would amount to homicide in any degree.

#### OBSCENE LITERATURE

The constitutionality of section 847.01 of the Florida Statutes<sup>93</sup> has

86. FLA. STAT. § 832.05(2) (1961). "Worthless Checks. — It shall be unlawful for any person, firm or corporation to draw, make, utter, issue or deliver to another any check, draft, or other written order on any bank or depository for the payment of money or its equivalent, knowing at the time of the drawing, making, uttering, issuing or delivering such check or draft that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same on presentation; provided, that this section shall not apply to any check where the payee or holder knows or has been expressly notified prior to the drawing or uttering of same or has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to insure payment as aforesaid, nor shall this section apply to any post dated check."

87. *Helms v. State*, 128 So.2d 756 (Fla. App. 1961). A judge of one of the courts posed the following question. If a person bought property valued in excess of \$100.00 would he limit possible prosecution to a misdemeanor by charging the property and issuing a worthless check on a subsequent day for the "pre-existing" debt?

88. FLA. STAT. § 944.40 (1961).

89. *Duscksworth v. Boyer*, 125 So.2d 844 (Fla. 1960).

90. FLA. STAT. § 2.01 (1959). "Common law and certain statutes declared in force. — The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state."

91. *Jefferson v. State*, 128 So.2d 132 (Fla. 1961).

92. *People v. Lytton*, 257 N.Y. 310, 178 N.E. 290 (1931).

93. Fla. Laws 1955, ch. 29849, § 1, at 698.

been unsuccessfully attacked on the basis of infringement upon freedom of speech, and upon failure to provide sufficient standards of guilt.<sup>94</sup> The statute has since been revised.<sup>95</sup>

According to *Rachleff v. Mahon*,<sup>96</sup> it is proper for the county solicitor to bring an action for a declaratory judgment to determine whether certain publications are obscene in order to decide whether chapter 847 of the Florida Statutes<sup>97</sup> would apply. The court approved the test of obscenity proposed in *Roth v. United States*<sup>98</sup> ("whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests") and decided that the judge could determine the issue without a jury, and without receiving testimony of witnesses as evidence of contemporary community standards.

Scienter or knowledge of the obscene character of the literature is an "essential element" in the sense that a charge by the trial judge that the state need not prove scienter is reversible error.<sup>99</sup> However, it is not an "essential element" in the sense that if omitted from the information, this defect can be waived by failing to move to quash, and the error cannot be put in issue for the first time on appeal.<sup>100</sup>

#### EVIDENCE

The law regulating the admissibility of evidence concerning previous crimes and convictions has been somewhat ambiguous. In a recent case the court thoroughly reviewed the problem and affirmed the view that this evidence is not admissible if the sole purpose is to reflect upon the character of the defendant,<sup>101</sup> but is admissible if relevant to the issues in point.<sup>102</sup> During the period under survey this policy was applied in two cases<sup>103</sup> in which the defendants shot and killed police officers who were attempting to arrest them. Evidence tending to show that the defendants had committed prior burglaries and thus were apprehensive of capture was admitted as relevant to the motive. Also, evidence of a previous robbery was admitted in a murder trial because the murder occurred during a robbery involving a similar scheme.<sup>104</sup> In an arson case, the court excluded mere accusations

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94. *Tracey v. State*, 130 So.2d 605 (Fla. 1961); *Cohen v. State*, 125 So.2d 560 (Fla. 1960).

95. Fla. Laws 1961, ch. 61-7.

96. 124 So.2d 878 (Fla. App. 1960).

97. FLA. STAT. ch. 847 (1961).

98. 354 U.S. 476, 489 (1957).

99. *Cohen v. State*, 125 So.2d 560 (Fla. 1960).

100. *Tracey v. State*, 130 So.2d 605 (Fla. 1961).

101. *Williams v. State*, 110 So.2d 654 (Fla. 1959).

102. This view has been supported. See *Ross v. State*, 112 So.2d 69 (Fla. App. 1959).

103. *Johnson v. State*, 130 So.2d 599 (Fla. 1961); *Machiewitz v. State*, 114 So.2d 684 (Fla. 1959).

104. *Griffen v. State*, 124 So.2d 38 (Fla. App. 1960).

of previous acts of arson which were not specifically expressed nor sufficiently connected to the arson charged.<sup>105</sup>

A very interesting modification of the policy occurred in a murder case in which the trial court considered that evidence of a robbery and shooting which occurred one month after the homicide for which the defendant was on trial was relevant to the identity of the defendant, the weapon and to the similarity of pattern.<sup>106</sup> However, the court in reversing and remanding for a new trial, qualified the application of the relevancy test as follows:

In the present case we are convinced that the testimony about the subsequent crime was so disproportionate to the issues of sameness of the perpetrator and weapon and of design that it may well have influenced the jury to find a verdict resulting in the death penalty while a restriction of that testimony might have resulted in a recommendation of mercy, a verdict of guilty of murder of a lesser degree or even a verdict of not guilty.<sup>107</sup>

#### LEGISLATION

The legislature made relatively few changes in this area during the survey period. Those revisions which involved penalties were heretofore discussed in reference to the larceny statutes.<sup>108</sup>

##### I. *Witnesses*

Section 942.02(2) of the Florida Statutes<sup>109</sup> provides that a judge of a court of record may issue a summons directing a witness to attend a trial in another state if, among other limitations, "the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence [and of any other state through which the witness may be required to pass by ordinary course of travel], will give him protection from arrest and the service of civil and criminal process . . ." The protection of the witness has been reduced by the deletion of the provision enclosed in the brackets.<sup>110</sup>

##### II. *Rape*

It has been held that previous unchaste conduct could be used as a defense to statutory rape when the parties had had intercourse with each other previously (within the statute of limitations) but without the jurisdiction,<sup>111</sup> but not when the previous intercourse was within the jurisdic-

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105. *Hooper v. State*, 115 So.2d 769 (Fla. App. 1959).

106. *Williams v. State*, 117 So.2d 473 (Fla. 1960).

107. *Id.* at 476.

108. See note 71 *supra* and accompanying text.

109. FLA. STAT. § 942.02(2) (1961).

110. Fla. Laws 1961, ch. 61-491.

111. *State v. Capps*, 98 So.2d 745 (Fla. 1957).

tion.<sup>112</sup> This rather odd situation may have had something to do with the amendment<sup>113</sup> to section 794.05 of the Florida Statutes to provide that: "It shall not be a defense . . . that the prosecuting witness was not of previous chaste character at the time of the act when the lack of previous chaste character in the prosecuting witness was caused solely by previous intercourse between the defendant and the prosecuting witness."<sup>114</sup>

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112. *Hunter v. State*, 85 Fla. 91, 95 So. 115 (1923).

113. Fla. Laws 1961, ch. 61-109.

114. FLA. STAT. § 794.05(2) (1961).