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## Criminal Law – Pardons – Habitual Offender Laws

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questionable, even in light of this decision, whether Florida would apply the felony-murder doctrine where the deceased is a co-felon. Prior to the instant case, the only cases holding the doctrine applicable to the death of a co-felon, were those in which a co-felon either accidentally caused his own death<sup>17</sup> or was unintentionally killed by another felon.<sup>18</sup>

The principal case presents a far-reaching application of the felony murder doctrine, for it is, as far as can be ascertained, the first time the doctrine has been applied where the victim of a felony justifiably kills a co-felon. The majority based its decision on the concept that the death of the co-felon was the natural consequence of the felonious act. But, how can one be guilty of murder for a killing that was unquestionably a justifiable homicide? Here, the deceased was a perpetrator of the robbery whose death was certainly *not* in furtherance of the crime. The conviction of his co-felon seems to be a wholly unwarranted extension of the doctrine. It is submitted, therefore, that the felony murder doctrine should not be one of limitless application. Where the homicide is justifiable, it should not form the basis of a murder charge against the co-felon.

ROBERT L. SHEVIN

### CRIMINAL LAW—PARDONS— HABITUAL OFFENDER LAWS

The defendant's sentence was set aside, and a greater sentence imposed under the habitual offender law,<sup>1</sup> predicated upon a prior felony conviction for which a full pardon had been given. *Held*, reversed, the prior conviction may not be considered under the habitual offender law when a full pardon has been granted. *Fields v. State*, 85 So. 2d 609 (Fla. 1956).

There is conflict of authority as to the effect of a pardon.<sup>2</sup> The minority view takes the position that a pardon has the effect of blotting out both the legal consequences and the guilt of the offender.<sup>3</sup> This rationale has its basis in Blackstone's definition that ". . . the effect of such pardon by the king is to make the offender a new man. . . ." *Ex parte Garland*<sup>4</sup> is an illustrative case. There the court held a pardon reached both the punish-

17. *Commonwealth v. Bolish*, 381 Pa. 500, 113 A.2d 464 (1955).

18. *People v. Cabalero*, 31 Cal. App.2d 52, 87 P.2d 364 (1939).

1. FLA. STAT. § 775.09 (1953).

2. See *Weihofer, The Effect of a Pardon*, 88 U. PA. L. REV. 177 (1939); *Williston, Does a Pardon Blot Out Guilt?*, 28 HARV. L. REV. 647 (1915).

3. *State v. Childers*, 197 La. 715, 2 So.2d. 189 (1941); *State v. Martin*, 59 Ohio St. 212, 52 N.E. 188 (1898); *Ex parte Crump*, 10 Okla. Crim. 133, 135 Pac 428 (1913); *Scrivnor v. State*, 113 Tex. Crim. 194, 20 S.W.2d 416 (1925), *rev'd*, *Jones v. State*, 141 Tex. Crim. 70, 147 S.W.2d 508 (1941); *Edwards v. Commonwealth*, 78 Va. 39, 49 Am. Rep. 377 (1883).

4. 4 BLACKSTONE, COMMENTARIES 1773.

5. 71 U.S. (4 Wall.) 333 (1866).

ment and the guilt of the offender, and in the eyes of the law the offender never committed the offense. Jurisdictions following this theory hold that a pardoned conviction cannot be used as a basis for invoking habitual offender laws.<sup>6</sup> It is argued that to hold otherwise would be a punishment in consequence of the pardoned prior offense and not of the subsequent offense.<sup>7</sup> Further, to permit the pardoned offense to be counted as a conviction under the habitual offender laws would constitute a legislative limitation upon the executive power to pardon.<sup>8</sup>

The majority of jurisdictions hold that a prior pardon is immaterial<sup>9</sup> since the habitual offender laws create an offense that is separate and distinct,<sup>10</sup> increased punishment is for the latter offense only, and the prior conviction is but an element in determining its application.<sup>11</sup> In *People v. Carlesi*,<sup>12</sup> it was held that a pardon restores civil rights and terminates legal consequences flowing from the conviction, but the record of guilt cannot be obliterated. Even a presidential pardon with a recital of the belief that the offender was innocent will not eradicate the judicial finding of guilt.<sup>13</sup> Although pardoned, one is still a convicted criminal<sup>14</sup> because the executive has no power to direct the judiciary to forget the fact of the prior conviction;<sup>15</sup> it is a record of the court that cannot be erased or blotted out.<sup>16</sup> There is no legislative interference with the executive's power to pardon, as it is within the province of the legislature to attach greater criminality to a subsequent offense of which the pardoned prior offense is but an element.<sup>17</sup>

Prior to the instant case the Florida Supreme Court had not been confronted with the precise issue presented therein. However, the court

6. See note 3 *supra*.

7. *Edwards v. Commonwealth*, 78 Va. 39, 49 Am. Rep. 377 (1883).

8. *State v. Lee*, 171 La 744, 132 So. 219 (1931).

9. *Croseclose v. Plummer*, 106 F.2d 311 (9th Cir. 1939), *cert. denied*, 308 U.S. 614 (1939); *People ex rel. Prisament v. Brophy*, 287 N.Y. 132, 38 N.E.2d 468 (1941), *cert. denied*, 317 U.S. 625 (1942); *Jones v. State*, 141 Tex. Crim. 70, 147 S.W.2d 508 (1941); *State v. Edelstein*, 146 Wash. 221, 262 Pac. 622 (1927); *Dean v. Skeen*, 70 S.E.2d 256 (W. Va. 1952).

10. *People v. Carlesi*, 154 App. Div. 481, 139 N.Y. Supp. 309, *aff'd on op below*, 208 N.Y. 547, 101 N.E. 1114 (1913), *aff'd*, 233 U.S. 51 (1914); *State v. Bloomdale*, 21 N.D. 77, 128 N.W. 682 (1910); *Commonwealth ex rel. v. Smith*, 324 Pa. 73, 187 Atl. 387 (1936).

11. *McDonald v. Massachusetts*, 180 U.S. 311 (1901); *People v. Dutton*, 9 Cal.2d 505, 71 P.2d 218, *app. dism.*, 302 U.S. 656 (1937); *Kelley v. State*, 204 Ind. 612, 185 N.E. 453 (1933); *Herndon v. Commonwealth*, 105 Ky. 197, 48 S.W. 989 (1899); *State v. Stern*, 210 Minn. 107, 297 N.W. 321 (1941).

12. 154 App. Div. 481, 139 N.Y. Supp. 309, *aff'd on op below*, 208 N.Y. 547, 101 N.E. 1114 (1913), *aff'd*, 233 U.S. 51 (1914).

13. *People ex rel. Prisament v. Brophy*, 287 N.Y. 132, 38 N.E. 2d 468 (1941), *cert. denied*, 317 U.S. 625 (1942).

14. *People v. Biggs*, 9 Cal.2d 508, 71 P.2d 214 (1937).

15. *Jones v. State*, 141 Tex. Crim. 70, 147 S.W.2d 508 (1941).

16. *Newton v. State*, 56 Okla. Crim. 391, 40 P.2d 688 (1935); *Commonwealth ex rel. v. Smith*, 324 Pa. 73, 187 Atl. 387 (1936).

17. *State v. Stern*, 210 Minn. 107, 297 N.W. 321 (1941).

in a prior advisory opinion ruled that a pardon blotted out the offense in the eyes of the law.<sup>18</sup> The court has not literally interpreted this "blotting out" theory since it later held that a pardon does not restore one to the practice of law;<sup>19</sup> nor will it preclude revocation of a license to practice medicine.<sup>20</sup> They consider proceedings for a criminal act and for disbarment as separate and distinct, and a pardon for the former is not a pardon for the latter.<sup>21</sup> These decisions, however, concerned license privileges and did not construe the habitual offender law.

In the principal case the court bases its decision upon an exclusionary rule of statutory construction. It was concluded that it was the legislative intent to exclude pardoned offenses by not expressly including them in the habitual offender law.<sup>22</sup> A cardinal rule of statutory construction provides that a statute is to be construed according to the intent of the legislature.<sup>23</sup> All other rules of statutory construction are subordinate and are mere aids in determining legislative intent.<sup>24</sup> It is submitted it may have been the intent of the legislature to include pardoned offenses in the application of this law. However, these statutes should have no bearing when a pardon is given because of innocence, since the element of criminal habit is not present. The habitual offender laws are designed to deter crime and thereby to protect society. These statutes are not directed to any particular crime but only to the recurrent offender.

The criminal character or habits of the individual, the chief postulate of the habitual criminal statutes, is often as clearly disclosed by a pardoned conviction as by one never condoned.<sup>25</sup>

IWA W. KAY, JR.

### NEGLIGENCE—GUEST STATUTE— RIGHT OF RECOVERY

The plaintiff sued for the wrongful death of her minor child who was killed while riding as a guest in the defendant's automobile. *Held*, the guest statute<sup>1</sup> applied, thus precluding the plaintiff from recovering where the

18. *In re* Advisory Opinion to the Governor of Florida, 14 Fla. 318 (1872).

19. *State v. Snyder*, 136 Fla. 875, 187 So. 381 (1939).

20. *Page v. Watson*, 140 Fla. 536, 192 So. 205 (1938); *State v. Hazzard*, 139 Wash. 487, 247 Pac. 957 (1926); *accord*, *Prichard v. Battle*, 178 Va. 455, 17 S.E.2d 393 (1941).

21. *Branch v. State*, 120 Fla. 666, 163 So. 48 (1935).

22. *Kelley v. State*, 204 Ind. 612, 185 N.E. 453 (1933); *State v. Martin*, 59 Ohio St. 212, 52 N.E. 188 (1898); *contra*, *People v. Biggs*, 9 Cal.2d 508, 71 P.2d 214 (1937).

23. *State v. Taylor*, 80 So.2d 618 (Ala. 1954); *Abood v. City of Jacksonville*, 80 So.2d 443 (Fla. 1955); *Crawford v. School Dist. 6*, 342 Mich. 564, 70 N.W.2d 789 (1955).

24. *United States v. Raynor*, 302 U.S. 540 (1938); *Johnson v. Southern Pac.*, 196 U.S. 1 (1904); *State v. Doran*, 124 Conn. 160, 198 Atl. 573 (1938).

25. *People v. Biggs*, 9 Cal.2d 508, 71 P.2d 214, 216 (1937).

1. FLA. STAT. § 320.59 (1955).