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CONFINEMENT OF THE SEXUALLY IRRESPONSIBLE [UNITED STATES]

In *Minnestota ex rel. Pearson v. Probate Court of Ramsey County*[1] the Supreme Court of the United States upheld the validity of the Minnesota statute entitled "An act relating to persons having a psychopathic personality"[2] which had previously received the approval of the Supreme Court of that State.[3] The statute in brief provides for civil commitment to the state hospital for the insane of those persons found to be irresponsible in sexual conduct and thus dangerous to others. After defining the term "psychopathic personality," the act provides that all laws relating to the insane or allegedly insane shall apply to all persons having or alleged to have a psychopathic personality. Section 3 provides, however, that the existence of such condition in any person shall not constitute a defense to a criminal charge. Before proceedings against an individual are instituted, facts must first be submitted to the county attorney who, if convinced that good cause for a hearing exists, prepares a petition to be executed by a person having knowledge of the facts and then filed with the judge of the probate court. In the hearing that follows, the court must appoint two licensed doctors of medicine to assist in the examination. There is no provision for a jury. The person being examined may be represented by counsel; and if financially unable, the court may appoint one for him. Such person is entitled to have subpoenas issued out of the court to compel attendance of witnesses in his behalf. All the proceedings must be reduced to writing and become a part of the records of the court. From an order committing the person examined to confinement for treatment, an appeal lies to the district court.

The Minnesota statute was no doubt in large part prompted by the apparent increase in sex crime in the 1930's[4] which focused the attention of the public and legislators on one of the most difficult and complex problems within the whole range of the administration of the criminal law.[5] In coping with the problem presented by the sex offender, the legislator is confronted with the delicate task of balancing his natural interest in the protection of society with the basic constitutional guaranties of personal liberties.[6] For many years psychopathologists, psychiatrists, and neurologists have criticized the tests of responsibility as leaving a no-man's land between the sane and legally insane; and it is in this twilight zone that the so-called "psychopathic personality" is to be found.[7]

[1] 309 U. S. 270 (1940).

[2] Mason's Minn. Stat. 1927 (Supp. 1940) §§8992-184a-8992-184d.

[3] State ex rel. Charles Edwin Pearson v. Probate Court of Ramsey County and Another, 205 Minn. 545, 287 N. W. 297 (1939).

[4] A report of offenses known to police in 68 cities of over 100,000 population indicates that rape offenses, for example, increased from 276 in 1931 to 430 in 1939. 10 Uniform Crime Reports (No. 1) (1939) 6-7. That this increase is more apparent than real has been frequently suggested. Note, 3 John Marshall L. Q. 407 (1938). Also Strecher, Challenge of Sex Offenders; Introduction, 22 Mental Hygiene 1 (1938).

[5] Challenge of Sex Offenders, 22 Mental Hygiene 1-24 (1938).

[6] Hughes, The Minnesota "Sexual Irresponsibles Law," 25 Mental Hygiene 76 (1940).

[7] Weihofen, Insanity as a Defense in Criminal Law, 96 (1933).

In the past, the sex offender has been treated largely as any other offender—that is, by inflicting fine or imprisonment after the offense has been committed. Every state has a long list of sex offenders for which punishments of varying severity have been provided.[8] That this method alone has proven unsuccessful is generally conceded. First, the percentage of convictions for sex offenses has been low.[9] Second, it is very doubtful whether criminal prosecution of most sex offenses has proven to be a deterrent. The sex offender is notoriously a recidivist.[10] Third, psychiatrists are in general accord that a prison is not a satisfactory place for the treatement of corrigible sex offenders.[11] Fourth, confinement of sex offenders with other offenders creates anything but a healthful situation in the prisons.[12]

Another more remote approach to the general problem is provided in sterilization legislation.[13] Since the decision of the Supreme Court of the United States in *Buck v. Bell*[14] upholding the constitutionality of the Virginia statute, the state courts have generally given their sanction to such laws.[15] But it is clear that the purposes and approach of sterilization legislation are quite different from those of the Minnesota law under consideration. The fundamental idea of the sterilization movement is to reduce the number of mental defectives with which society must otherwise contend in the future,[16] one significant group of which is made up of certain types of sex offenders. The Minnesota statute is likewise designed as a preventive measure. But its purpose is to deal with the sexual psychopathics already a part of society by providing permanent confinement for those who do not respond to psychiatric treatment, and confinement and treatment for the curables until they may safely be permitted to resume their place in the community. The Minnesota law is designed to deal with the victims both of bad heredity and bad environment.[17]

The Minnesota law is not the first of its kind. Somewhat similar legislation has been enacted in Michigan[18] and Illinois,[19] but a substantial part of the Michigan statute has been declared unconstitutional

[8] Illinois Criminal Code, Chap. 38, Ill. Rev. Stat. 1939, describes at least ten distinct types of sexual offenses for which punishment is provided.

[9] There are a number of reasons for this. The strict rules of evidence which must necessarily operate in these cases make convictions difficult. Often the victim of a sex offense is reluctant to complain to the authorities. See MacCormick, Challenge of Sex Offenders: New York's Present Problem, 22 Mental Hygiene 1, 5 (1938).

[10] Id. at 6.

[11] Dietholm, Treatment in Psychiatry, 398 (1936).

[12] The sex problem in the prisons is a serious one. See Fishman, Sex in Prison (1934).

[13] In 1937 twenty-eight states had sterilization laws. For a list of states and statutes see Note, 17 Bos. U. L. Rev. 246, 260 (1937).

[14] 274 U. S. 200 (1927).

[15] Upholding constitutionality: Buck v. Ball, 143 Va. 310, 130 S. E. 516 (1925); State ex rel. Smith v. Schaeffer, 126 Kan. 607, 270 Pac. 604 (1928); State v. Troutman, 50 Id. 673, 299 Pac. 668 (1931); In Re Clayton, 120 Neb. 680, 234 N. W. 630 (1931); Re Main, 162 Okla. 65, 19 Pac. (2nd) 153 (1933); Davis v. Walton, 74 Utah 80, 276 Pac. 921 (1929). Contra: Brewer v. Volk, 204 N. C. 186, 167 S. E. 638 (1933); Williams v. Smith, 190 Ind. 526, 131 N. E. 2 (1921).

[16] "It is better for all the world, if, instead of waiting to execute degenerate offsprings for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough." Holmes, J. in Buck v. Bell, 274 U. S. 200, 207 (1927).

[17] There seems to be a tendency among psychiatrists to view many aspects of the psychopathic personality as the result of bad environment which formerly were explained in terms of hereditary failings. See Dietholm, op. cit. supra, note 11, at 396-398.

[18] Pub. Acts 1937. No. 196. The act provided for a hearing without a jury after conviction for some criminal offense but before sentence. See Note, 37 Mich. L. Rev. 613 (1939).

[19] Ill. Rev. Stat. (1939) C. 38 §§820-825. The statute provides that when a person is charged with a criminal offense and it appears to the States Attorney or Attorney-General that such person is a "criminal sexual psychopathic person" he may file a petition with the clerk of the court in which the person is charged stating facts to indicate such a condition. After the filing of the petition, the court appoints two qualified psychiatrists to ascertain whether the person is "criminally sexually psychopathic" and to file a report with the court. A jury is then impaneled and a hearing had at which time it is competent to introduce evidence of previous crimes committed by the person being examined. Upon recommendation of the jury the person is committed to the psychiatric division of the Illinois State Penitentiary or the Illinois Security Hospital until fully recovered. After having been discharged, he is then returned to the custody of the sheriff of the county from which he was committed to stand trial for

by the Supreme Court of that State.[20] The Minnesota statute, however, is by far the broadest piece of legislation on the subject yet to be enacted. It does not require, for example, that the person for whom the hearing is held be charged with a criminal offense as under the Illinois statute or convicted of a criminal offense as under the Michigan statute. The Minnesota law in a very real sense attempts to extend the concept of insanity to sexually irresponsible persons.[21]

Section 1 of the act provides: "The term 'psychopathic personality' as used in this act means the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of such conditions, as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons.[22]

It must be conceded that the definition is vague, and it was upon this ground that the chief attack as to its validity seems to have been made. The Minnesota court while granting that the statute is imperfectly drawn, gave the section the following construction: ". . . it can reasonably be said that the language of Section 1 of the act is intended to include those persons who by an habitual course of misconduct in sexual matters have evidenced an utter lack of power to control their sexual impulses. . . . It would not be reasonable to apply the provisions of the statute to every person guilty of sexual misconduct nor even to persons having strong sexual propensities. Such a definition would not only make the act impractical of enforcement and perhaps unconstitutional in its application, but would also be an unwarranted departure from the accepted meaning of the words defined."[23] The Supreme Court of the United States in the instant case held itself to be bound by this construction, and as so construed, ruled that the statute was not too vague to be upheld.

The act was further subjected to the traditional attacks on constitutional grounds. It should be observed that the Minnesota legislature made every effort at the outset to induce the courts to regard the proceedings provided for as civil and not as criminal.[24] Unlike the Michigan and Illinois statutes, the Minnesota statute was not made a part of the criminal code.[25] Throughout the act persons subjected to the hearings are referred to as "patients." Construed as a civil proceeding, the constitutional questions are less difficult. Unlike the Illinois statute, the Minnesota law makes no provision for a jury at the hearings. A similar omission proved fatal to the Michigan statute.[26] The Minnesota court met this objection by pointing out that the right of trial by jury in the majority of jurisdictions is not considered a necessary adjunct to proceedings in

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the criminal offense charged against him. See Note, 39 Col. L. Rev. 534 (1939). The constitutionality of the Illinois law has not yet been tested in the courts. Grave doubts have been expressed as to the validity of the statute. Note, 3 John Marshall L. Q. 407 (1938). In view of the attitude of the Illinois court in People v. Scott, 326 Ill. 327, 157 N. E. 247 (1927) these doubts may not be without substantial foundation.

[20] People v. Frontczak, 286 Mich. 51, 281 N. W. 534 (1938).

[21] Pearson v. Probate Court, 205 Minn. 545, 287 N. W. 297 (1939).

[22] Mason's Minn. Stat. (Supp. 1940) §8992-184a. It is interesting to compare the above statutory definition with the following in Noyes, Modern Clinical Psychiatry (1940) 504: "Psychopathic personality is a term applied to various inadequacies and deviations in the personality structure of individuals who are neither psychotic nor feebleminded, the defect existing particularly in the conative, emotional and characterological aspects of the personality. These aspects are not so organized and adapted to each other as to operate as a harmonious unit or to permit coordination of the individual with his environment."

[23] Pearson v. Probate Court, 205 Minn. 545, 555, 287 N. W. 297, 302 (1939).

[24] Commitment statutes of this general kind are usually regarded by the courts as being of a civil nature: Ex Parte Clark, 86 Kan. 539, 121 Pac. 492 (1912); Petition of Ferrier, 103 Ill. 367 (1882); Wissenburg v. Bradley, 209 Iowa 813, 229 N. W. 205 (1930); Dowdell, Petitioner, 169 Mass. 387, 47 N. E. 1033 (1897). Sterilization legislation also has been generally regarded as authorizing civil, not criminal proceedings. "We find this proceeding in no sense a criminal prosecution." State v. Troutman, 50 Idaho 673, 677, 229 Pac. 668, 670 (1931).

[25] Chapter 74 of Mason's Minn. Stat. (1927) in which the statute under consideration is to be found is entitled "Probate Courts."

[26] People v. Frontczak, 286 Mich. 51, 58, 281 N. W. 534, 538 (1938).

which sanity is determined and commitment is directed.[27] The purpose of this statute being to expand the concept of insanity to include the sexually irresponsible, it was argued, the rules in regard to the commitment of the insane should be here applied.[28] The usual theory of these cases is that the courts are the "guardians" of the mentally irresponsible and that such action as the court may take in reference to them cannot properly be regarded as punishment.[29] The guardianship theory has been utilized quite generally by the courts in upholding juvenile court laws.[30] It has also been used in upholding statutes providing for the commitment of inebriates[31] and for the commitment of dependent infants to industrial schools.[32]

The Supreme Court quickly disposed of the argument that the relator was deprived of the equal protection of the laws by holding that the test is whether there is any rational basis for making a class of the group selected in the legislation.[33] In the opinion of the court, the class selected, as identified by the Minnesota court, is made up of persons who are a dangerous element in the community which the legislature in its discretion could place under appropriate control.[34]

The success or failure of the Minnesota statute depends peculiarly upon the spirit and intelligence with which it is administered. Certainly, it is clear that the legislation could become the vehicle of the most vicious abuse,[35] a danger which the Supreme Court of the United States was well aware.[36] There are several features of the legislation which experience may prove should be remedied by amendment. Unlike the Illinois statute, for example, the Minnesota legislation does not require the assistance of trained psychiatrists at the hearings but provides only for the appointment of two licensed physicians. But whatever future experience may prove, the significance of this and similar legislative experiments can hardly be doubted. It is indicative of a growing desire on the part of legislators to get at the root of anti-social behavior by the utilization of such scientific knowledge as is available to effect that purpose.

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[27] Accord: Dowdell, Petitioner, 169 Mass. 387, 47 N. E. 1033 (1897); Gaston v. Babcock, 6. Wis. 490 (1857); Ex parte O'Connor, 29 Cal. A. 225, 155 Pac. 115 (1915). Contra: In re McLaughlin, 87 New J. Eq. 138, 102 A. 439 (1917).

[28] Pearson v. Probate Court, 205 Minn. 545, 550, 287 N. W. 297, 300 (1939).

[29] Ex parte O'Connor, 29 Cal. A. 225, 155 Pac. 115 (1915); Gaston v. Babcock, 6 Wis. 490 (1857); In re Vinstad, 169 Minn. 264, 211 N. W. 12 (1926).

[30] Peterson v. McAuliffe, 151 Minn. 467, 187 N. W. 226 (1922); Wissenburg v. Bradley, 209 Iowa 813, 229 N. W. 205 (1930); Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198 (1905).

[31] Leavitt v. City of Morris, 105 Minn. 170, 117 N. W. 393; Ex Parte O'Connor, 29 Cal. A. 225, 155 Pac. 115 (1915).

[32] Petition of Ferrier, 103 Ill. 367 (1882).

[33] Watson v. Maryland, 218 U. S. 173 (1910); Barret v. Indiana, 229 U. S. 26 (1913); Frost v. Corporation Commission, 278 U. S. 515 (1929); Bachtel v. Wilson, 204 U. S. 36 (1907).

[34] Pearson v. Probate Court, 209 U. S. 270, 275 (1940).

[35] Hughes, op. cit. supra note 6, at 83.

[36] Pearson v. Probate Court, 209 U. S. 270, 276-277 (1940).

WITHDRAWAL OF A PLEA OF GUILTY [FEDERAL]

The defendant was indicted, along with some fifty others, for mail fraud and conspiracy and pleaded not guilty to both indictments. The counsel for the United States, after discussion with the trial judge, sought to induce the defendant to change his pleas and testify against the others involved, promising that pleas of guilty would result in no more than a fine or suspended sentence. Relying on these statements, the defendant entered pleas of guilty and became a witness for the government. After the trial, which resulted in a disagreement of the jury as to the four principal defendants and the acquittal of the rest, the accused learned that the trial judge did not intend to follow the recommendations of government counsel, and asked leave to withdraw the pleas of guilty and substitute pleas of not guilty. The court refused to grant the leave and imposed a sentence of two years

imprisonment. In *Ward v. United States*[1] the Circuit Court of Appeals reversed the decision of the District Court and held that denial of a motion for withdrawal is improper if the plea of guilty was entered because of a misrepresentation.

Leave to withdraw a plea of guilty is granted or refused at the discretion of the trial court, subject to review by the appellate court for an abuse of discretion.[2] In two states, Georgia and Iowa, there is an absolute right to withdraw the plea before sentence is imposed;[3] in Texas there is a right to withdraw before retirement of the jury to assess punishment.[4] New Jersey does not allow review of the discretionary ruling.[5]

Where, as in the principal case, the prosecutor promises a light punishment in return for testimony against co-defendants, a possible basis for urging withdrawal of the plea of guilty is the existence of an enforceable contract not to prosecute. Although the trial court was said to possess discretionary power to rule on the motion for withdrawal, the Supreme Court of Illinois gave effect to such an agreement in the case of *People v. Bogolowski*.[6] In the one federal case in which the question has been considered such a compromise agreement was held to be not binding on the court, and the withdrawal of the plea was ordered on other grounds.[7]

In determining whether to give relief from a plea of guilty appellate courts consider as an important factor the conduct of the trial judge. Several states have statutes requiring the judge to explain the consequences of the plea before accepting it.[8] Missouri has gone so far as to make it a misdemeanor, punishable by fine and imprisonment, for a judge to receive the plea without giving the defendant a reasonable time to talk with a friend and an attorney.[9]

The average defendant undoubtedly believes that he can rely upon the promises of the trial judge. When a judge induces the prisoner to plead guilty by a promise of leniency and then fails to carry out his promise the appellate court will reverse.[10] When the hope of leniency has been induced by other officers of the court, or by those in apparent authority, the judge who denies the motion for withdrawal will also usually be held to have abused his discretion. Prosecutors seldom, as in the principal case, give definite assurances that punishment will be moderated, but they frequently promise to make recommendations of a fine or suspended sentence. An accused who has been misled by the prosecutor's promise to recommend a light sentence can be denied relief by a presumption of knowledge that the court was not bound by the recommendation.[11] But this presumption has little basis in fact and it seems that in fairness the trial judge should admonish the defendant that the court will not be bound by the recommendation, or if the plea has already been entered, should permit its withdrawal.[12] Reversals have also been granted where the promise of len-

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[1] 116 F. (2d) 135 (C. C. A. 6th, 1940).

[2] Fogus v. United States, 34 F. (2d) 97 (C. C. A. 4th, 1929); Canada v. State, 144 Fla. 633, 198 So. 220 (1940); Harjo v. State (Okla. Cr. App., Oct., 1940) 106 Pac. (2d) LaFave v. State, 233 Wis. 432, 289 N. W. 670 (1940).

[3] Woodward v. State, 13 Ga. App. 130, 78 S. E. 1009 (1913); State v. Wieland, 217 Iowa 887, 251 N. W. 757 (1933).

[4] Alexander v. State, 69 Tex. Cr. R. 23, 152 S. W. 436 (1912).

[5] Clark v. State, 57 N. J. L. 489, 31 Atl. 979 (1895).

[6] 317 Ill. 460, 148 N. E. 260 (1925). Same case 326 Ill. 253, 157 N. E. 181 (1927).

[7] Camarota v. United States, 2 F. (2d) 650 (C. C. A. 3rd, 1924).

[8] Colo. Stat. Anno. C. 48 §481; Vernon's Texas Stat. Crim. Proc. Art. 501; Ill. Rev. Stat. (1939) C. 38 §732. For a case arising under the Illinois statute see People v. Cooper, 366 Ill. 113, 7 N. E. (2d) 882 (1937).

[9] Mo. Rev. Stat. (1939) §4834. In State v. Sublett, 318 Mo. 1142, 4 S. W. (2d) 463 (1928) the Supreme Court of Missouri held that non-compliance with the statute does not affect the validity of the judgment.

[10] People v. Moore, 342 Ill. 316, 174 N. E. 386 (1932); State v. Stephens, 71 Mo. 535 (1880); Harjo v. State (Okla. Cr. App. Oct., 1940) 106 Pac. (2d) 527.

[11] People v. Ensor, 319 Ill. 255, 149 N. E. 737 (1925); Mahoney v. State, 197 Ind. 335, 149 N. E. 444 (1925).

[12] People v. Campos, 3 Cal. (2d) 15, 43 Pac. (2d) 274 (1935); People v. Savin, 27 Cal. App. (2d) 56, 98 Pac. (2d) 773 (1940); Griffin v. State, 12 Ga. App. 615, 77 S. E. 1087 (1913); State v. Cochran, 332 Mo. 742, 60 S. W. (2d) 1 (1933).

iency came from arresting officers[13] or from an officer of the grand jury.[14] In a recent case a defendant who had been sentenced to life imprisonment under a conviction for first degree murder was granted a writ of *coram nobis* where it appeared that he was induced to plead guilty by the assurances of a stool pigeon that he would only be convicted of manslaughter.[15]

The plea of guilty is a confession of the crime charged and should be entered voluntarily and without coercion. Judges have been reversed where they have been guilty of coercive conduct in obtaining the plea.[16] Threats of additional charges or extra trouble made by other court officers will also afford grounds for permitting withdrawal.[17] Where the defendant is induced to plead guilty because of fear of mob violence withdrawal is allowed.[18]

Even in the absence of active misconduct on the part of the judge or court officers, where the defendant did not understand the consequence of his plea, a refusal to grant a withdrawal is held to be reversible error. Possible mental incapacity of the accused at the time he entered the plea of guilty will be given great weight in ordering reversal.[19] Mistakes may be the cause for the misapprehension; the accused may plead to the wrong indictment[20] or he may misunderstand the nature of the crime with which he is charged.[21] Failure to advise the defendant that he could have counsel[22] or the appointment of an inexperienced or indifferent attorney[23] will afford a basis for finding error. However, a defendant is usually not successful in urging withdrawal on the ground that he was induced to plead guilty by his attorney.[24] The single fact that the defendant hoped or believed that he would receive a light sentence is said not to justify a reversal.[25]

While the conduct of the court officers and the understanding of the accused bulk large in the factors which influence the judgment of appellate courts, in the doubtful cases there are other considerations which may tip the scales in favor of reversal. If it appears that the accused has a defense the upper court will be apt to grant him a jury trial.[26] If there is a possibility that the facts do not constitute the crime set out in the indictment[27] or if co-defendants were found not guilty[28] there will be a tendency to reverse. Several factors may operate in combination where one alone would probably be in-

[13] People v. Byzon, 267 Ill. 498, 108 N. E. 685 (1915); but *Cf.* People v. Brahm, 98 Cal. App. 733, 277 Pac. 896 (1929).

[14] People v. Schwarz, 201 Cal. 309, 257 Pac. 71 (1927).

[15] People v. Butterfield, 37 Cal. App. (2d) 140, 99 Pac. (2d) 310 (1940).

[16] People v. Carzoli, 340 Ill. 587, 173 N. E. 148 (1930); O'Hara v. People, 41 Mich. 623, 3 N. W. 161 (1879).

[17] Peterson v. State, 58 Okla. Cr. App. 391, 54 Pac. (2d) 209 (1936) Prosecutors; Fromcke v. State, 37 Okla. Cr. App. 421, 258 Pac. 927 (1927) (Arresting officers).

[18] State v. Poglianich, 43 Idaho 409, 252 Pac. 177 (1927); Little v. Commonwealth, 142 Ky. 922, 133 S. W. 1149 (1911).

[19] Insanity: Eckles v. State, 132 Fla. 526, 180 So. 764 (1938); Deloach v. State, 77 Miss. 691, 27 So. 618 (1900). Illiteracy: State v. Maresca, 85 Conn. 509, 83 Atl. 635 (1912). Infancy: State v. Oberst, 127 Kan. 412. 273 Pac. 490 (1929) (17 year old boy sentenced to life imprisonment upon plea of guilty to first degree murder charge). Sickness: Commonwealth v. Patch, 98 Pa. Super. 464 (1930) (Defendant, who was very sick, entered plea of guilty expecting a suspended sentence).

[20] Canada v. State, 144 Fla. 633, 198 So. 220 (1940); Davis v. State, 20 Ga. 674 (1856).

[21] State v. Maresca, 85 Conn. 509, 83 Atl. 635 (1912); Farley v. State, 23 Ga. App. 151, 97 S. E. 870 (1919).

[22] Harris v. State, 203 Ind. 505, 181 N. E. 33 (1932); People v. Pisoni, 233 Mich. 462, 206 N. W. 986 (1926); Tipton v. State, 30 Okla Cr. App. 56, 235 Pac. 259 (1925).

[23] Rhodes v. State, 199 Ind. 183, 156 N. E. 389 (1927); State v. Paglianich, 43 Idaho 409, 252 Pac. 177 (1927).

[24] Swinea v. State, 196 Ark. 1179, 112 S. W. (2d) 969 (1938); State v. Wood, 200 Wash. 21, 93 Pac. (2d) 294 (1939); But *Cf.* State v. McAllister, 96 Mont. 348, 30 Pac. (2d) 821 (1934); People v. Casaras, 104 Mont. 404, 66 Pac. (2d) 774 (1937).

[25] People v. Barnard, 296 Ill. App. 156. 15 N. E. (2d) 915 (1938); People v. Chesnas, 325 Ill. 361, 156 N. E. 372 (1927); People v. Dabner, 153 Cal. 398, 95 Pac. 880 (1908). The last two cases involved death sentences.

[26] Ketring v. State, 209 Ind. 618, 200 N. E. 212 (1936); People v. Piechowiak, 278 Mich. 530, 270 N. W. 793 (1936). However, a defendant will not be permitted to withdraw the plea in order to enter a merely technical defense: Carr v. State, 194 Ind. 162, 143 N. E. 378, 83 A. L. R. 1349 (1924) (Illegal search); Bartozek v. State, 186 Wis. 644, 203 N. W. 374 (1925) (Illegal arrest).

[27] LaFave v. State, 233 Wis. 342, 289 N. W. 670 (1940).

[28] People v. Rucker, 254 Mich. 342, 236 N. W. 801 (1931).

sufficient. For example, the defendants' fear of a state witness, their poor command of the English language, and an unusually severe sentence led the Supreme Court of Florida to say that in the furtherance of justice the defendants should be allowed a jury trial.[29]

Since the defendant in the principal case made a confession of his guilt to the court, the question remains whether that confession might be used in evidence at his subsequent trial. The federal courts, including the Supreme Court of the United States, have held that a former plea of guilty is inadmissible as evidence[30] and the majority of state courts follow the same rule.[31]

So long as judicial discretion is exercised liberally there is little danger of defeating justice by holding a defendant to his plea of guilty, even though that plea involves a confession and a waiver of jury trial. At the same time there is a considerable saving to the state of the time and money which would have been spent on a prosecution. From a review of the cases it is evident that appellate courts are vigilant in guarding against the overzealous prosecutor; guilty pleas obtained by outright coercion or fraudulent misrepresentation are not allowed to stand.

However, too much emphasis should not be placed on protecting only the person who has been intentionally deceived. If the jealous protection of every defendant's rights is an end to be sought, the primary question in every case should be: "Was the accused misled by *any* cause whatsoever,—misled as to the nature of the charge, the effect of his plea, or the probable severity of his punishment?"

Although, from an administrative viewpoint it is undesirable to allow a defendant to speculate on his punishment and to then withdraw his plea if he is disappointed, it is more important that no defendant be sentenced who has entered his plea because of misapprehension. Furthermore, since compromise agreements are seldom held to be binding upon the state, it is to the advantage of the prosecutor to allow defendants to withdraw their pleas of guilty in case the judge does not follow the recommendations for leniency. Few defendants will offer testimony against accomplices if they have neither the assurance that the prosecutor's recommendations will be followed, nor the knowledge that the guilty plea can be withdrawn in case the promised light sentence is not awarded.

In any case, legal discretion should be exercised liberally in favor of giving the defendant a chance to prove his innocence to a jury. It is of some importance that the courts turn over to the penal authorities for reformation persons who have no cause to feel that they have been "railroaded" to prison without a fair opportunity to prove their innocence.

NEIL WALSH.

[29] Artigas v. State, 140 Fla. 671, 192 So. 795 (1939).

[30] Kercheval v. United States, 274 U. S. 220 (1926); Pharr v. United States, 48 F. (2d) 770 (C. C. A., 9th, 1931). This rule does not apply to a plea of guilty made before a United States Commissioner: United States v. Adelman, 107 F. (2d) 499 (C. C. A., 2d, 1939).

[31] State v. Hook, 174 Minn. 590, 219 N. W. 926 (1928); Heath v. State, 23 Okla. Cr. App. 382, 214 Pac. 1091 (1923); State v. Jensen, 74 Utah 299, 279 Pac. 506 (1929). *Contra:* Rascon v. State, 47 Ariz. 501, 57 Pac. (2d) 304 (1936); People v. Steinmetz, 240 N. Y. 411, 148 N. E. 597 (1925). The majority rule applies only to a plea of guilty entered at the trial and later withdrawn. It does not apply to a plea of guilty made at a preliminary hearing. See State v. Call, 100 Me. 403, 61 Atl. 833 (1905).

CRIMINAL LIABILITY FOR MEDICAL MALPRACTICE [FLORIDA]

On September 20, 1940, the Supreme Court of Florida, in *State v. Heines*,[1] sustained, by a four to two decision, a criminal information charging a chiropractor with manslaughter. In so doing the court overruled the order of the trial Court quashing the information.

The information charged that defendant "did unlawfully, feloniously, willfully and by unskillful acts and procurement and culpable negligence and the exercise of gross ignorance and lack of ordinary

[1] 197 So. 787 (September 20, 1940).

knowledge and skill in medicine,[2] . . . . prescribe and instruct the said Henry Cole against the use of a certain drug, to wit: Insulin, in a negligent attempt to cure an infection of the foot of the said Henry Cole, and the said Henry Cole then and there to the knowledge of the said R. L. Heines, was suffering from the disease known as diabetes, in the treatment of which insulin was indispensable . . . . and as a result of the said R. L. Heines prescribing that the said Henry Cole not take Insulin, as aforesaid, the said infection spread with such rapidity that the said Henry Cole did die."

In considering whether this information should be quashed the court should have kept in mind two propositions: *first*, the Florida statute, that "no indictment shall be quashed . . . for any cause whatsoever, unless the court shall be of the opinion that the indictment is so vague, indistinct and indefinite as to mislead the accused and embarrass him in the preparation of his defense;"[3] *secondly*, that if there was no basis for criminal negligence alleged in the information, the information should have been quashed.

The cardinal point made by the minority is that the information was vague in that it did not charge sufficient facts to establish causal relation between the advice of the defendant and the death of the decedent. The information charges the foot condition as the cause of death but the instructions given by Dr. Heines to the deceased are not specifically set forth; nor is there any allegation that the decedent followed the instructions. Thus it is not stated in the information that the death of Henry Cole was the necessary and certain result of the directions which Dr. Heines gave him with respect to the insulin.[4] It may be argued that under the Florida statute it is not necessary to allege these things.[5] Indeed, it is not, where such material propositions are clearly to be inferred from the matters alleged in the information. But this information does not state facts from which it can be inferred, with any degree of certainty, that there was a casual relation between the following of the instructions and the death of the decedent. From the statement of facts it cannot even be assumed that the decedent followed the instructions; for it is more reasonable to assume that he discontinued the insulin for a longer period than advised. Dr. Heines was treating a foot sore. He had no intention of treating the diabetes and therefore no reason for so sharply changing the decedent's insulin consumption as to affect the diabetes. The very fact that this information does not make a clear affirmative statement of causal relation weakens it; this fact coupled with the additional fact that it permits a presumption that there

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[2] In connection with this part of the charge, it is interesting to note the requirements for the practice of chiropractic in Florida, "Each applicant shall be a graduate from an accredited high school and shall be a full-time graduate of a recognized chartered chiropractic school or college which requires for graduation the completion of a four years' course of not less than six months each and not less than four thousand hours' active attendance in the same. The time spent in night or correspondence courses shall not be counted as part of said four thousand hours." In addition, an examination must be passed over the following subjects: anatomy, physiology, chemistry, bacteriology, pathology, hygiene, chiropractic analysis, orthopedia, and adjusting as taught by recognized chiropractic schools and colleges. Florida Statutes (1940 parts), §§3442 and 3445.

[3] Florida Statutes (1940 parts), §8369.

[4] *Cf.* State v. McFadden, 48 Wash. 259, 93 Pac. 414 (1908). See note 15, *infra*.

[5] A good statement of the rule generally followed as to the degree of certainty required in an indictment is found in 27 American Jurisprudence 625. It is as follows: 'The true test is not whether the indictment could possibly be made more definite and certain, but whether it contains every element of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet, and whether, in case other criminal proceedings are taken against him later, based on the same matters, the record shows with accuracy to what extent he may plead a former acquittal or conviction in bar of the later proceedings.' This is substantially the test set out by the Florida Statute, and it is likewise set out by statute in South Dakota. State v. Morse, 35 S. D. 18, 150 N. W. 293 (1914). Illinois courts hold that an indictment must allege all facts necessary to constitute the crime charged and must do so with sufficient certainty; sufficiency is defined as the degree of specificity necessary to notify accused of the charge he is to meet and to enable him to prepare his defense. People v. Moore, 368 Ill. 455, 14 N. E. (2d) 494 (1938); People v. Shaver, 367 Ill. 339, 11 N.E. (2d) 400 (1937).

was no causal relation, makes the defect more serious.[6]

The second point the court should have considered is whether, accepting as true all that the information charged, and assuming causal relation, sufficient negligence is alleged to constitute criminal negligence. The rule recognized by the courts generally is that "a physician is required to exercise only that degree of care, diligence, judgment, and skill which other physicians of good standing of the same school or system of practice usually exercise in the same or similar localities under like or similar circumstances, having due regard to the advanced state of the medical profession at the time in question."[7] A second rule which might be applied is that all persons practicing medicine in any capacity might be required to meet the standard of practice of the average physician and surgeon in general practice in the same or similar localities. The Florida Supreme Court showed definitely in *Foster v. Thornton*,[8] that it did not follow the second standard. There it required that a witness testifying upon the issue of negligent practice by a defendant chiropractor, qualify himself as a chiropractor. That the law of Florida recognizes an independent standard of practice for chiropractors is further indicated by the fact that the State of Florida licenses chiropractors as such.

This brings the present court to a dilemma. The rule generally followed is the law in Florida.[9] Probably no court follows the second rule suggested, except through error, unless the case is governed by one of three exceptions to the general rule. Those exceptions are: (1) practice without a license,[10] (2) practice in violation of a license, (3) practice in diagnosis.[11] Furthermore, in applying the rule generally used the court will be unable to give a sufficient charge on chiropractors' standard of practice because diabetics do not as a rule go to chiropractors for treatment; this is an exceptional case. The majority in the Heines case indicated that it would not support a judgment based upon statements by chiropractors, as expert witnesses, as to what they would do in such a case; it is what they actually have done and are accustomed to doing that makes a standard of practice. Therefore, the court must either bring this case under an exception to the general rule, or find a way to set up a chiropractors' standard of practice with respect to treating the diabetic patient for chiropractic ills.[12] A possible escape from this dilemma would be a general negligence charge to the jury, making the defendant's status as a chiropractor merely one of the circumstances bearing upon the determination of reasonable care.[13] But here too, there would be no knowledge of a chiropractors' standard for the jury to draw upon and it would con-

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[6] If we follow the presumption that there is no causal relation alleged, a serious question is then raised as to whether the information charges criminal intent. The information seeks to charge culpable negligence which according to the Florida Statute is a substitute for criminal intent. Florida Statutes (1940 Parts), §7141. But even if the information does charge culpable negligence, the fact that causal relation is not clearly shown impedes the inference that the defendant should have realized that death would be the necessary and certain result of his act. If this inference is not clear, the inference of criminal intent is not clear. For further development of this point see Cook, "Act, Intention, and Motive in the Criminal Law," 26 *Yale Law Journal* 658 (1917). See also discussion of State v. McFadden in note 15, *infra*.

[7] Kuechler v. Volgmann, 180 Wis. 238, 192 N.W. 1015. 31 A.L.R. 326, (1923).

[8] 125 Fla. 699, 170 So. 459, (1936).

[9] *Idem*.

[10] Whipple v. Grandchamp, 261 Mass. 40, 158 N.E. 270, (1927).

[11] Kuechler v. Volgmann, 180 Wis. 238, 192 N.W. 1015 (1923).

[12] An issue might be formed as to whether or not Dr. Heines was negligent in accepting a diabetic patient in the first place. Evidence of chiropractors could then come in upon this point. A satisfactory special negligence formula could be charged to the jury in accordance with the rule generally used, the rule here being the chiropractors' standard of practice. But such negligence would hardly be gross negligence constituting criminal liability. *Cf.* Deward v. Whitney, 298 Mass. 41, 9 N.E. (2d) 369 (1937).

[13] When evidence cannot be secured to formulate a special negligence formula in accordance with the rule generally used, and the physicians' and surgeons' formula is improper, a court will often fall back upon the general negligence formula; the care of an ordinary prudent man under the same or similar circumstances. The factors requiring a special negligence formula, are disregarded as such, and are dropped into the position of circumstances bearing upon the setting of the general negligence standard. See

sciously or unconsciously substitute its casual knowledge of the best known procedure in dealing with diabetics—the insulin therapy of the physician and surgeon.

By very liberal construction the information will bear the interpretation that the cause of death charged was the diabetes. Were Dr. Heines a physician and surgeon competent to treat all phases of disease, he would be liable for incompetent treatment of the diabetes regardless of his specific undertaking, for his training and competence would include this.[14] Cases were cited by the majority in which physicians and surgeons were held liable for gross negligence under similar facts.[15] However, no cases involving a chiropractor were cited. Since a chiropractor is not to be held under the physicians' and surgeons' standard these cases should have little weight here.

Even if Dr. Heines' training and competence did make him subject to the physicians' and surgeons' standard of practice in treating diabetes, it would be difficult to find him guilty of manslaughter for an act of negligence according to that standard. For, it must be assumed that the allegation of the information is true; that the foot condition was the cause of death. That the discontinuance of insulin prejudiced the diabetic condition is irrelevant, if it was not the cause of death.[16] On this information we must find the defendant criminally negligent in treating the foot sore. Indeed, the information charges that the discontinuance of insulin made the foot condition grow worse. But no indication of the nature of proper therapy is given. Reference to decedent's diabetes is made to indicate that Dr. Heines was criminally negligent in failing to realize that discontinuance of insulin was not the proper therapy. However, that inference is substantially rebutted

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the very interesting case of Nelson v. Harrington, 72 Wis. 591, 40 N.W. 228, 1 L.R.A. 719, (1888), where the court was unable to formulate a special negligence formula properly due the defendant, and fell back upon the general negligence formula.

[14] Walkenhorst v. Kesler, 92 Utah 312, 67 Pac. (2d) 654 (1937).

[15] Hampton v. State, 50 Fla. 55, 39 So. 421 (1905), was a manslaughter case wherein a duly licensed physician and surgeon negligently performed a surgical operation upon a woman's womb from which she died. The case is authority for the proposition that a duly licensed physician and surgeon is guilty of criminal negligence, if grossly ignorant, incompetent, or grossly inattentive to his patient, though he acts with good intent and with the expectation that the result will prove beneficial. State v. Lester, 127 Minn. 282, 149 N.W. 297 (1914), also cited by the majority, involved a duly licensed physician and surgeon who negligently operated an x-ray machine and inflicted a mortal burn upon the decedent. Karsunky v. State, 197 Wash. 87, 84 Pac. (2d) 390 (1938), the third decision cited by the court, was a case of manslaughter concerning an unlicensed drugless healer who undertook to treat the decedent for diabetes and clearly advised him not to use insulin at all, but to follow the defendants' suggested carbohydrate diet and to take the defendant's medicine. The case is distinguishable from the case at bar in that Dr. Karsunky undertook to treat the decedent for diabetes while no such charge was made against Dr. Heines in the instant case. Where a doctor's skill and competence are of a general nature, his undertaking to treat only a restricted phase of a patient's condition will not limit his liability. On the other hand, a doctor with restricted training and liability may increase the scope of his liability by undertaking treatment beyond his skill and competence. See Walkenhorst v. Kesler, 92 Utah 312, 67 Pac. (2d) 654, (1937). Furthermore, Dr. Karsunky was practicing without a license, and was subject to the standards of practice of the ordinary physician and surgeon in the locality, whereas Dr. Heines was practicing with a license and was subject to the standards of practice of the ordinary chiropractor in the locality. Whipple v. Grandchamp, 261 Mass. 40, 158 N.E. 270, (1927). See also State v. Smith, 25 Idaho 541, 138 Pac. 1107, (1914). The court overlooked State v. McFadden, 48 Wash. 259, 93 Pac. 414, (1908), a manslaughter case, wherein a duly licensed physician instructed the mother of a sick child under his care, to withhold from it all food save water, fruit juice, and such other nourishment as he might direct; the child diet of starvation. The information was held insufficient because it did not show the starvation of the child to be the necessary and certain results of the directions. See also State v. Smith, 25 Idaho 541, 138 Pac. 1107, (1914).

[16] It is possible that this sore was a diabetic sore; but the State's attorney could have ascertained this fact and charged it. This would still have left an issue of negligence in diagnosis. The Florida courts hold that a chiropractor in diagnosing must meet the physicians' standard, and must determine at his peril whether or not the ailment is one which can be properly treated by chiropractic. Foster v. Thornton, 125 Fla. 699, 170 So. 459, (1936). See also Kuechler v. Volgmann, 180 Wis. 238, 192 N.W. 1015, 31 A.L.R. 126, (1923).

by the inference that Dr. Heines did not know the exact nature of the sore, that he was not negligent in diagnosing it, and that he was carefully trying to discover a proper therapy for it.

The majority seemed to feel that the public-welfare policy of protecting the people from incompetent practitioners had particular application in this case. They felt impelled by it, to hold that Dr. Heines was practicing in violation of his license, and that he was therefore answerable to the standard of care and practice of the average physician and surgeon in the same locality. But it seems that a better way to protect the public would be by means of licensing and providing for civil liability, rather than attempting to regulate by means of criminal liability. Doctors will go ahead and try to cure persons by using their best efforts and being firm enough to take the risks of difficult cases and treatment where only civil liability faces them, but criminal liability might deter not only the few incompetents, substantially regulated by license and civil liability at present, but also the highly competent doctor whose activity should not be limited.

A further point to be urged is that in no case should the law operate to the prejudice of any one group. The chiropractor should not be made to answer to the physicians' and surgeons' standard. The incompetent practitioner is a problem of the chiropractic profession as of every other medical profession and is a problem relative to the standard of care and practice of the chiropractors. The degree to which a chiropractor is chargeable with knowledge of the possible effect of his treatment upon the individual, is limited by the training and competency of the chiropractor,[17] provided he is practicing according to his license. If we assume that treatment by a chiropractor is proper for a foot sore, we assume that drugless therapy is. To this degree the chiropractor has not exceeded his license. The facts of this case—the purpose of Dr. Heines' treatment—strongly indicate that he, in good faith, in the light of his training and experience, was warranted in not anticipating so grave a result from his advice. Under the circumstances of this case, the standard proposed by the majority becomes unduly severe, for here a doctor of a school held incompetent to treat a given disease, and whose members never treat that disease, treats someone who has it, for another disease which members of the school are held perfectly competent to treat.[18] Shall we hold Dr. Heines grossly ignorant in his treatment because he treats a condition he is perfectly competent to treat?[19] Apparently the majority would do just that.[20]

Turning back to the information, and viewing it in the light of these considerations and the two propositions originally set forth, the conclusion is inescapable that the information should have been quashed. It is vague and ambiguous. And finally, when this case comes to trial the strong dicta of this opinion, that the defendant be held to the general physicians' standard, should certainly not be followed. ELLSWORTH POWER.

[17] Walkenhorst v. Kesler, 92 Utah 312, 67 Pac. (2d) 654, (1937).

[18] The Florida Statute does not prohibit chiropractors from treating foot sores. Florida Rev. Stat. (1940), §3446 says: "Any chiropractor who has complied with the provisions of this Chapter may adjust three hundred or more articulations of the body and all structures adjacent thereto including the use of x-ray for diagnosis, but shall not prescribe or administer to any person any medicine or drug included in materia medica, perform any surgery, except as hereinabove stated, nor practice obstetrics."

[19] In Coty v. Baughman, 50 S.D. 372, 210 N.W. 348, 48 A.L.R. 1205 (1926), the court said: "A chiropractor is not prohibited by the statute from treating patients. He is only prohibited from practicing obstetrics and from treating 'contagious and infectious diseases.' If a tubercular patient developed some other disease for which chiropractic was a recognized therapeutic agency, and which was neither contagious nor infectious, we think a chiropractor might treat the patient for that disease, if done honestly and in good faith, and not as a mere cover for treating contagious or infectious diseases. In this case the child was suffering from pulmonary tuberculosis. She also developed bowel trouble. There is no question but the chiropractor acted in perfect good faith and treated the child for bowel trouble. We think the employment of the chiropractor under the circumstances here shown raised no presumption and was no evidence of either negligence or neglect."

[20] "The information in this case clearly charged that the defendant was in such a position and that the death of a person was directly traceable to his gross ignorance." State v. Heines, 197 So. 787, 788 (1940).