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# Florida's Rehabilitative Sex Offender Laws

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to the homes of employees to urge them to vote against the union.[95]

(4) The employer may not make deliberate misrepresentations of material matters when he has special knowledge of facts not known to his employees and the union does not have sufficient time or opportunity to rebut these assertions.[96]

(5) An "atmosphere of fear" of economic loss renders a free choice by the employees impossible.[97] The employer may risk creating such an atmosphere by inferring the possibility of a plant shutdown if the union wins.[98] Even if the employer did not create the atmosphere of fear — it having been created by the community itself — he must actively disaffirm the possibility of a plant shutdown or suffer the election, which may have been favorable to him, to be set aside.[99]

### CONCLUSION

Since the early days of the Wagner Act, the Board and the courts have attempted to afford the employer greater latitude in speaking against the union. It is recognized that unions in many areas have gained in strength and no longer require infant protection to survive. This note has discussed in a general way only the most common of the problems that may arise. Actual situations will always require individual study and analysis of their particular facts.

MAURICE SHAMS

## FLORIDA'S REHABILITATIVE SEX OFFENDER LAWS

The social problem of the sex offender is as old as recorded history. In every society, certain sexual acts have been unlawful, as evidenced by the earliest codes yet discovered.[1] Recent empirical studies by Dr. A. C. Kinsey and others, however, have cast some doubt upon the effectiveness of the law's attempts to deter deviate sexual behavior.

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95. *Supra* note 44; Peoria Plastic Co., 117 N.L.R.B. 545 (1957).

96. Celanese Corp. v. N.L.R.B., 291 F.2d 224 (7th Cir. 1961).

97. *Supra* note 52; Worth Mfg. Co., 134 N.L.R.B. ____, 49 L.R.R.M. 1207 (1961).

98. Aragon Mills, 135 N.L.R.B. ____, 49 L.R.R.M. 1669 (1962); Storkline Corp., 135 N.L.R.B. ____, 49 L.R.R.M. 1666 (1962); Somismo, Inc., 133 N.L.R.B. ____, 49 L.R.R.M. 1030 (1961).

99. *Supra* note 53.

1. Waybright, *Florida's New Child Molester Act: Unscientific, Unrealistic,*

It has been estimated, for example, that "6 million homosexual acts take place each year for every 20 convictions. In the area of extramarital copulation the frequency to conviction ratio is nearly 30 to 40 million to 300."[2]

Modern studies in sociology and psychology, the development of mass communications, and the "realism" of the times have all contributed to an increased public awareness of and concern about the sex offender problem. In response to this concern, the Florida legislature enacted "the child molester law,"[3] in 1951 and the criminal sexual psychopath law in 1955.[4]

The Florida sex offender laws represent part of a new trend in the law's general approach to insanity. They approach the problem of sex offenders by placing emphasis on institutionalization, segregation and treatment as opposed to traditional criminal punishment. The social objectives are to protect society by confining the offender so long as he remains a menace to others and to rehabilitate the offender through clinical treatment.[5]

## THE CRIMINAL SEXUAL PSYCHOPATH LAW

### *History*

The sexual psychopath law as enacted in 1955[6] was held unconstitutional[7] within six months after passage, and was replaced by Florida statute 917.12 in 1957.[8] The 1957 statute has remained unchanged to the present time[9] and no reported case has construed it.

As originally enacted in 1955 the law provided that any defendant in any criminal prosecution could, by invoking certain procedures, be examined by two psychiatrists and thereafter have a hearing before the trial court to determine if he was a criminal sexual psychopath.[10] Section seven declared that any person found to be a criminal sexual

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*Unconstitutional*, 26 FLA. L.J. 402 n.2 (1952), citing PRITCHARD, ANCIENT NEAR EASTERN TEXTS RELATING TO THE OLD TESTAMENT 160, 162, 171, 172, 181, 185, 196 (1950).

2. COMMITTEE ON FORENSIC PSYCHIATRY OF THE GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REP'T NO. 9, PSYCHIATRICALLY DEVIATED SEX OFFENDERS 2 (1950).

3. FLA. STAT. §§801-16 (1961).

4. Fla. Laws 1955, ch. 29881, §§4-10, at 753.

5. *Supra* notes 3 & 4.

6. *Supra* note 4.

7. State v. Creekmore, 8 Fla. Supp. 189 (4th Cir. 1956).

8. Fla. Laws 1957, ch. 57-1989, §§1-12, at 24.

9. FLA. STAT. §917.12 (1961).

10. Fla. Laws 1955, ch. 29881, §4, at 753. Section one of the act defined a

psychopath was forever immune from prosecution or punishment for the crime with which he stood charged. Consequently, "such a criminal sexual psychopath who committed murder, robbed a bank, forged a check, testified falsely, or committed any other act made a crime by the laws of this state could readily escape the usual and customary penalties prescribed by statute by seeking a refuge under the protective cloak of the Act."[11]

In *State v. Creekmore*,[12] the defendant, under indictment for rape, alleged that he was a criminal sexual psychopath and asked the court to appoint two psychiatrists to examine him pursuant to a request for institutionalization. Circuit Judge Stanley held the act unconstitutional, stating that[13]

> "It is apparent that the Act undertakes to fix an entirely new standard or test of mental condition which may be invoked on behalf of an accused as a legal excuse for the commission of a crime. . . . Any form of mental disorder or insanity falling short of the legal definition of insanity, as stated in the McNaghten [*sic*] case, does not excuse the perpetrator of a criminal act under a defense of insanity in this state. . . . It is obvious that the title says nothing about granting such psychopaths immunity from prosecution or punishment for any and all crimes committed in violation of law . . . . Instead it is confined solely to *defining* criminal sexual psychopathic persons, the *commitment* of such persons and the *procedure* therefor."

The court then said that, in contrast to the limited purposes set forth in the title,[14] the body of the act undertook to effect a drastic change from the well-established "right and wrong" test[15] of insanity by providing that one could be excused from legal responsibility if, in committing a crime, he was neither legally nor medically incompetent to realize the act he was doing, nor unable to comprehend the moral quality of his act. Because the title was "misleading and deceptive" in relation to the import of the act itself, the court held the act "wholly insufficient to apprise the legislators and the public

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criminal sexual psychopath as "any person who is suffering from a mental disorder which mental disorder is coupled with criminal propensities to the commission of sex offenses . . . ."

11. State v. Creekmore, *supra* note 7, at 190.

12. 8 Fla. Supp. 189 (4th Cir. 1956).

13. State v. Creekmore, *supra* note 12, at 192.

14. "The title to the Act reads — 'An Act to define criminal sexual psychopathic persons and to provide for the commitment of such persons and the procedure therefor.' " *Supra* note 10.

15. The *M'Naghten* rule, as a test of legal insanity, was adopted in Florida in Davis v. State, 44 Fla. 32, 32 So. 822 (1902).

of the broad and sweeping contents of the Act excusing criminal sexual psychopaths from prosecution and punishment for crime" and that the act therefore came within the evils intended to be arrested by the "mandatory requirement" of the Florida Constitution.[16]

*Operation of the New Act*

The criminal sexual psychopath law was repealed following the *Creekmore* decision and replaced in 1957 by Florida statute 917.12 — an even more radical approach than the old version, but one that may have been cured of the defects which led to the *Creekmore* result.

A criminal sexual psychopath is now defined as a person who, not being "insane or feeble-minded," suffers from a mental disorder which has existed not less than four months, coupled with criminal propensities to the commission of sex offenses, and who may be considered dangerous to others.[17]

The law authorizes the institutionalization of any person who is charged with or convicted of any non-capital offense, and who is found to be a criminal sexual psychopath, until there are reasonable grounds to believe that he has recovered from his psychopathy "to a degree that he will not be a menace to others."[18]

The new act is civil, not criminal, in nature, and provides expressly that it is not intended to alter existing tests of mental capacity in criminal prosecutions.[19] The crime charged need not be a sex offense. The court need only satisfy itself that there is "probable cause" for believing the person to be a criminal sexual psychopath.[20] Circuit courts of the state have exclusive jurisdiction of all proceedings under the act, retaining the case from commencement of the proceedings until final discharge. Upon motion by any party or the court the proceeding may be adjourned or sentence suspended and the person certified for a hearing and examination by the circuit court itself,[21] by two (or three) appointed psychiatrists.[22] Upon report[23] and hearing[24] the court determines whether the person is a criminal sexual

16. State v. Creekmore, *supra* note 12, at 194. See FLA. CONST. art. III, §16 (invalidating legislation to the extent that its title does not apprise a reader of normal intelligence of the act's contents).

17. FLA. STAT. §917.12 (1) (1961).

18. FLA. STAT. §917.12 (2) (d) (1961).

19. FLA. STAT. §917.12 (6) (1961).

20. FLA. STAT. §917.12 (2) (a) (b) (1961).

21. FLA. STAT. §917.12 (2) (a) (1961).

22. FLA. STAT. §917.12 (2) (c) (1961). The psychiatrists must be physicians licensed in Florida and must have directed their professional service primarily to diagnosis and treatment of mental and nervous disorders for a minimum of 5 years.

23. FLA. STAT. §917.12 (2) (c) (1961).

24. FLA. STAT. §917.12 (2) (d) (1961).

psychopath. The person must be committed to an institution if so found.[25]

Any time after institutionalization, an application may be filed in the committing court alleging that the psychopath has improved to a degree that he will not be a menace to others. A new hearing identical to the original hearing must be held although the court has discretion to appoint psychiatrists for a new examination.[26] If it is determined that the psychopath has not recovered he may be returned to the institution. If a sufficient recovery is found, however, the court must order the person discharged from the institution.[27] Criminal proceedings, if still pending, are recommended "upon the order by the circuit court discharging the person from the institution."[28] This provision seems to contemplate an institution of criminal proceedings following the order of discharge; the court appears to have no discretion in the matter and there is no provision for appeal.

*Constitutionality*

The defects of the old statute, criticized in the *Creekmore* decision, appear to have been remedied by the new act. The act expressly characterizes itself as civil, and provides that "nothing contained herein shall alter in any respect the tests of mental capacity applied in criminal prosecutions under the laws of Florida."[29] It does not apply to persons charged with a capital offense[30] such as rape.[31]

This statute has not yet been construed in any reported case. Constitutional attacks upon statutes similar to the current Florida act in other jurisdictions, however, have generally been unsuccessful.[32] Such statutes have been upheld as a valid exercise of the police power, notwithstanding constitutional attacks on grounds of denial of due process or equal protection of law, double jeopardy, retrospective operation, self-incrimination, cruel and unusual punishment, or deprivation of the right to a jury trial. "Since these statutes are generally

25. *Ibid.*

26. FLA. STAT. §917.12 (3) (1961).

27. *Ibid.*

28. *Ibid.* If criminal proceedings are begun in a trial court other than a circuit court, the act provides that the trial judge may, upon a finding of probable cause for believing the defendant to be a criminal sexual psychopath, adjourn the proceeding or suspend sentence and certify the defendant for examination in the circuit court. Section 917.12 (2) (b) similarly provides that original criminal proceedings in the circuit court may be adjourned upon a finding of probable cause, and examination procedures begun.

29. FLA. STAT. §917.12 (6) (1961).

30. FLA. STAT. §917.12 (5) (1961).

31. FLA. STAT. §794.01 (1961).

32. See Annot. 24 A.L.R.2d 350, 354 (1952).

held to be civil rather than criminal in nature and as providing for civil commitment and not punitive incarceration, most of such objections collapse of their own weight."[33]

The Minnesota statute providing for proceedings for the commitment of persons having a psychopathic personality, was the first "sexual psychopathic statute given the stamp of constitutionality."[34] Affirming the Minnesota court's judgment, the United States Supreme Court[35] pointed out that for the purpose of determining prima facie constitutionality it must accept the construction of the highest state court. The Court held the statute was not too vague or indefinite because it had been construed as requiring proof of a habitual course of misconduct in sexual matters by persons "likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of their uncontrollable desire."[36]

Citing this case, a California appellate court in 1951 held that a similar statute did not deny equal protection of the law to persons adjudicated sexual psychopaths.[37] This case held that the proceeding was civil in nature, not criminal, and that a person committed pursuant to its provisions was not confined for a criminal offense but because he was a sexual psychopath. Consequently the petitioner was not placed twice in jeopardy for the same offense.[38]

A similar statute in Michigan provided that upon the required hearing to determine whether the accused was a sexual psychopath, it was competent to introduce evidence of similar crimes by such person and a record of the punishment inflicted. This statute was held not to violate the constitutional proscription of ex post facto laws because the ex post facto clauses of both the Michigan and federal constitutions relate only to criminal cases and the statute in question was civil in nature.[39] For the same reason the court also held that commitment of the defendant to a state hospital until recovered did not violate constitutional prohibitions of excessive bail, excessive fines, and cruel and unusual punishment.[40]

However, a Massachusetts case held that a summary procedure for commitment was tantamount to a prison sentence and hence invalid, because the treatment center established in the state prison did not comply with the requirements of the sexual psychopath statute.[41]

33. *Id.* at 354.
34. State *ex rel.* Pearson v. Probate Court, 205 Minn. 545, 287 N.W. 297 (1939).
35. State *ex rel.* Pearson v. Probate Court, 309 U.S. 270 (1940).
36. *Id.* at 274.
37. *Ex parte* Keddy, 105 Cal. App. 2d 215, 233 P.2d 159 (1951).
38. *Id.* at 217, 233 P.2d at 161.
39. People v. Chapman, 301 Mich. 584, 4 N.W.2d 18 (1942).
40. *Id.* at 601-2, 4 N.W.2d at 28.
41. Commonwealth v. Hogan, 341 Mass. 372, 170 N.E.2d 327 (1960).

A recent California case held that the discharge as cured of a committed sexual psychopath did not bar prosecution for the original criminal offense, such prosecution being within the discretion and conscience of the committing judge.[42] The defendant had served sixteen months in the state hospital and was then returned as cured. Although medical experts certified that he was no longer a menace to others, the court ruled the matter of criminal prosecution to be within the discretion of the trial judge, to be exercised in light of the entire history of the case and the dictates of his conscience.[43]

Another California case held that despite the absence of an appeal provision in the sexual psychopath law[44] orders under the law are appealable under the general statute providing for appeals in special proceedings.

Measured by decisions in other jurisdictions, the Florida criminal sexual psychopath statute appears valid. The key fact is that the act is characterized as civil in nature, and is therefore not subject to objections which may be raised against a criminal law. The act also provides expressly that it does not alter any existing criminal law tests of insanity.[45] Moreover, it no longer guarantees immunity from prosecution for the crime with which the defendant is charged.[46] It seems reasonable to predict that a constitutional attack upon the Florida statute in its present form would have little chance of success.

The validity of Florida's other rehabilitative sex offender law, the child molester act, is another matter.

## THE CHILD MOLESTER ACT

### *History*

The Florida child molester act[47] has had a stormy history. It has been held both unconstitutional[48] and constitutional[49] and has undergone considerable amendment.[50] To gain any real understanding of this unique creation of the Florida legislature, it is necessary to trace the development of the act in as orderly a fashion as the act permits.

The original act was passed in 1951 under the short title, "child molester act."[51] Offenses under its provisions included rape, attempted

42. People v. De La Roi, 185 Cal. App. 2d 469, 8 Cal. Rptr. 260 (1960).
43. *Ibid.*
44. People v. Bachman, 130 Cal. App. 2d 445, 279 P.2d 77 (1958).
45. FLA. STAT. §917.12 (6) (1961).
46. FLA. STAT. §917.12 (3) (1961).
47. FLA. STAT. ch. 801 (1961).
48. Copeland v. State, 76 So. 2d 137 (Fla. 1954).
49. Buchanan v. State, 111 So. 2d 51 (1st D.C.A. Fla. 1959).
50. See *Purpose of the Current Act*, text at notes 75-83, *infra*.
51. FLA. STAT. §801.01 (1961); Fla. Laws 1951, ch. 26843, §1, at 685.

rape, sodomy, attempted sodomy, crimes against nature, attempted crimes against nature, lewd and lascivious behavior, assault (when a sexual act was completed or attempted), and assault and battery (when a sexual act was completed or attempted), when such acts were committed against, to, or with a person twelve years of age or under.[52] Upon a defendant's conviction, the trial judge had "power and discretion" to impose the "sentence otherwise provided by law," or to commit him for treatment and rehabilitation to the Florida state hospital and stay the criminal proceedings or defer imposition of sentence pending discharge.[53]

The statute also provided for psychiatric examination after conviction,[54] probation[55] and parole.[56] Provisions relating to parole were repealed by the 1953 legislature. In a 1953 case,[57] the Florida Supreme Court held that a defendant who had been convicted under the act but who had not been sentenced, could not be placed on parole, since "the term 'parole' means the procedure by which a *prisoner*, that is to say, a duly convicted defendant *who has been sentenced* and is serving a term of imprisonment under the judgment of conviction, 'is allowed to serve the last portion of his sentence' "[58] on parole. The court then declared the parole section inoperative, because parole is exclusively a function of the executive to be exercised "only after the defendant has been convicted and sentenced and hence after the judicial labor has come to an end."[59]

In the same year there was added another amendment the effects of which may not have been fully anticipated by the legislature. The age of affected victims was raised to fourteen years or under.[60] The sentence provision was amended from "as otherwise provided by law" to "a term of years not to exceed twenty-five years in the state prison."[61] These revisions had the effect of changing the sentences provided for by separate acts of the legislature, without amending those separate acts and led directly to a holding of unconstitutionality the next year in *Copeland v. State*.[62] This case arose on defendant's appeal from a conviction of rape in Duval County, upon which a sentence of death had been imposed. Defendant filed an extraordinary motion

52. FLA. STAT. §801.02 (1961); Fla. Laws 1951, ch. 26843, §2, at 685-86.
53. FLA. STAT. §801.03 (1961); Fla. Laws 1951, ch. 26843, §§3-4, at 686.
54. FLA. STAT. §§801.03-.04, .06 (1961); Fla. Laws 1951, ch. 26843, §§3-6, at 686-87.
55. FLA. STAT. §801.08 (1961); Fla. Laws 1951, ch. 26843, §7, at 687.
56. Fla. Laws 1951, ch. 26843, §§10-12, at 688-89.
57. Marsh v. Garwood, 65 So. 2d 15 (Fla. 1953).
58. *Id.* at 19.
59. *Id.* at 21.
60. FLA. STAT. §801.02 (1961); Fla. Laws 1953, ch. 28158, §1, at 590.
61. FLA. STAT. §801.03 (1961); Fla. Laws 1953, ch. 28158, §2, at 590.
62. 76 So. 2d 137 (Fla. 1954).

for a new trial, claiming that he could not be sentenced to death because the female victim was under fourteen years of age and that his case thus came within the provisions of the child molester act. The trial court declared the act unconstitutional as applied to the crime of rape, and the Supreme Court affirmed on three grounds of noncompliance with section 16, article III of the Florida Constitution:

> (1) the act embraced and included within its provisions eleven different crimes defined in other statutes of the state of Florida;
>
> (2) the act did not publish at length the rape statute which it attempted to amend; and
>
> (3) the title of the act was insufficient to give notice that one of the purposes of the act was to change the penalty for rape when the verdict is guilty without a recommendation of mercy, from death, to imprisonment for a period not exceeding twenty-five years, when the age of the female is fourteen years or under.

The court demonstrated the extent to which the 1953 amendment attempted to amend the penalty provisions of eleven other crimes by use of the following chart:[63]

| "Offense | Punishment Under General Statute | Punishment Under Child Molester Act | Difference |
|---|---|---|---|
| Attempted rape | 10 yrs. | 25 yrs. | Plus 15 yrs. |
| (Assault with intent to commit rape) | 20 yrs. | 25 yrs. | Plus 5 yrs. |
| Sodomy | 20 yrs. | 25 yrs. | Plus 5 yrs. |
| Attempted sodomy | 5 yrs. | 25 yrs. | Plus 20 yrs. |
| (Assault with intent to commit sodomy) | 10 yrs. | 25 yrs. | Plus 15 yrs. |
| Crimes against nature | 20 yrs. | 25 yrs. | Plus 5 yrs. |
| Attempted crimes against nature | 5 yrs. | 25 yrs. | Plus 20 yrs. |
| (Assault with intent to commit crimes against nature) | 10 yrs. | 25 yrs. | Plus 15 yrs. |
| Lewd and lascivious behavior | 6 months | 25 yrs. | Plus 24½ yrs. |
| Assault (sexual act on child under 14 yrs.) | 10 yrs. | 25 yrs. | Plus 15 yrs. |
| Assault and battery (sexual act on child under 14 yrs.) | 10 yrs. | 25 yrs. | Plus 15 yrs." |

63. *Id.* at 141.

In 1955, the act was further amended. The crime of rape was deleted from subsection (2), but otherwise no change was effected.[64] In 1957 the legislature added incest and attempted incest as crimes within the purview of the act.[65] Neither amendment was responsive to the *Copeland* criticism that the act contained crimes denounced by other statutes.

The 1959 case of *Buchanan v. State*,[66] a First District Court of Appeal decision, upheld the act in its entirety. Defendant, convicted of lewd and lascivious assault in Marion County, urged that the twenty-year sentence imposed was illegal in that the act was unconstitutional and that he was in reality convicted under Florida statute 800.04, which prescribed a maximum sentence of ten years.[67]

The court upheld the child molester act on the grounds that:

> (1) the *Copeland* case restricted its holding expressly to the crime of rape;
>
> (2) the act did not in terms purport to amend any prior statutory provision and section 16, article III applies only to laws that assume "in terms" to revise, alter or amend a particular act;[68]
>
> (3) the title of the 1951 and 1953 session laws put the legislature on proper notice that the act would provide for punishment for the offense of lewd and lascivious behavior to or with children;
>
> (4) even if the title of the act were insufficient under the Constitution, "the act became valid by incorporation in the general revision of the Laws of Florida . . . ."[69]

In a vigorous dissent, Chief Judge Sturgis urged that[70]

> "[N]either the original act . . . nor the 1953 act incorporating it as part of the Florida Statutes meets the constitutional requirements of Article III, Section 16, Constitution of Florida, governing the enactment of a law that has the effect of amending

64. FLA. STAT. §801.02 (1961); Fla. Laws 1955, ch. 29923, §1, at 858.

65. FLA. STAT. §801.02 (1961); Fla. Laws 1957, ch. 57-1990, §1, at 28.

66. 111 So. 2d 51 (1st D.C.A. Fla. 1959).

67. FLA. STAT. §800.04 (1957) dealt with lewd and lascivious assault upon a child under 14 years of age. The statute was identical to FLA. STAT. §800.04 (1961) and its provisions appear to be entirely incorporated into subsection (2) of the child molester act, with one exception: §800.04 is limited to offenses with regard to a child under 14 years old, whereas the child molester act contemplates such an offense with regard to "a person fourteen years of age or under." FLA. STAT. §801.02 (1961).

68. Buchanan v. State, 111 So. 2d 51, 57 (1st D.C.A. Fla. 1959).

69. *Id.* at 56.

70. *Id.* at 63.

> or revising an existing law . . . [I]ncorporation of an act in a general revision of the statutes does not cure the act of any unconstitutionality of its content. . . . By the same logic, any legislative undertaking to revise or amend an existing law, including those contained in Florida Statutes, must *reenact and publish at length* the revised section, subsection of a section, or paragraph of a subsection of a section."

In another 1959 decision, *Ross v. State*,[71] the Third District Court of Appeal affirmed a conviction of assault in a lewd and lascivious manner on a girl under fourteen years of age, but held that the sentence imposed by the trial court, one year in the county jail, was unlawful. Citing *Buchanan* the court said, "[T]he provision for sentence as contained in [the lewd assault statute], which authorized imprisonment in the state prison, *or in the county jail*, is superceded by the penalty provisions for such crime as provided for in the later enacted Child Molester Act" which directs imprisonment, if ordered, to be served in the state prison at Raiford.[72] This language seems to be a clear affirmation that the penalty provisions of the child molester act supercede those for identical offenses contained in other Florida statutes. It follows, therefore, that the act remains subject to the objection raised in *Copeland* — that it does not publish at length the statutes that it attempts to amend.[73] Even though the act does not *"in terms"* amend these statutes[74] they are, if *Ross* is controlling, as surely and materially affected as if the change had been spelled out.

*Operation of the Current Act*

By no means were all of the crucial provisions of the child molester law brought into question in *Copeland, Buchanan* and *Ross*. To evaluate the validity of the act as a whole, it is necessary first to consider some of the other provisions not yet tested.

The act still applies to any person convicted of any of the twelve enumerated offenses, including such persons placed on probation.[75] One charged with such an offense may petition the court for a psychiatric and psychological examination, or an examination may be ordered upon the court's own initiative.[76] All examinations are made by a court-appointed psychiatrist and a clinical psychologist. The court

71. 112 So. 2d 69 (3d D.C.A. Fla. 1959).
72. *Id.* at 70.
73. Copeland v. State, 76 So. 2d 137, 141 (Fla. 1954).
74. See Buchanan v. State, 111 So. 2d 51, 56 (1st D.C.A. Fla. 1959). (Emphasis added.)
75. Ross v. State, *supra* note 71.
76. FLA. STAT. §§801.02, .03 (1), .08 (2) (1961).

has discretion to refuse to order the examination prior to conviction.[77] After conviction, if the judge elects to follow the procedure for institutionalization, the examination must be given.[78] If the latter procedure is followed, the trial judge may order the defendant committed to either the Florida research and treatment center,[79] or to the state hospital to which he should be sent because of age or color, if found to be psychotic or mentally defective.[80]

When the superintendent of the institution certifies to the committing court that the person "is not insane and further that [the] institution has exhausted its curative abilities," the person is returned to the court for further disposition of his case.[81] A report is also submitted with a diagnosis, prognosis and opinion as to whether the person is dangerous to society.[82] No persons can be discharged without the permission of the court, but one discharged may be placed on probation.[83]

*Other Aspects*

Unlike the criminal sexual psychopath law,[84] the child molester act does not guarantee the defendant the right to have counsel present at the psychiatric examination. The United States Supreme Court, in *Carnley v. Cochran*,[85] reversed a conviction under the act of an illiterate petitioner not represented by counsel.[86] Although the holding was restricted to the question of right to counsel, Mr. Justice Brennan cast doubt upon the validity of the child molester act, stating:[87]

77. FLA. STAT. §801.10 (1961). A 1957 amendment permits the defendant to ask the court to order a similar examination of the complaining witness. FLA. STAT. §801.101 (1961).

78. FLA. STAT. §801.03 (2) (1961).

79. FLA. STAT. §801.03 (1) (b) (1961).

80. FLA. STAT. §801.16 (2) (1961). The Florida research and treatment center is supervised by a chief psychiatrist, a chief psychologist and a chief psychiatric social worker. The personnel at the center are hired by a Board of Commissioners of State Institutions on recommendation by the Citizens' Therapy Board. This consists of the heads of the departments of psychology and psychiatry at Florida State University, the University of Florida, and the University of Miami. Research as well as treatment of patients is a function of the center. The Mental Health Staff Board was created for the dual purpose of considering the patients' degree of response to treatment with a view to discharge, and studying ways to improve the effectiveness of the law. FLA. STAT. §§801.11-.12 (1961). See also Wills, *Criminal Law Survey*, 14 U. MIAMI L. REV. 521, 532 (1959).

81. FLA. STAT. §801.03 (3) (1961).

82. *Ibid.*

83. FLA. STAT. §801.13 (2) (1961).

84. FLA. STAT. §917.12 (2) (d) (1961).

85. 82 Sup. Ct. 884 (1962).

86. Carnley v. Cochran, 123 So. 2d 249 (Fla. 1960).

87. Carnley v. Cochran, *supra* note 85 at 885-86.

"The assistance of counsel might well have materially aided the petitioner in coping with several aspects of the case. He was charged with . . . assault in a lewd, lascivious and indecent manner, upon a female child under the age of 14. At the time of trial two sets of Florida criminal statutes contained language reaching such behavior. Sections 741.22 and 800.04, Florida Statutes, 1959, F.S.A., were general criminal provisions separately defining the two offenses of incest and assault in a lewd, lascivious, and indecent manner. In addition, both offenses were included within the later enacted Chapter 801 of the Florida Statutes — Florida's so-called Child Molester Act — if the victim was 14 years of age or younger . . . . The Florida Supreme Court plainly conceived the petitioner's prosecution for both offenses as having been under the Child Molester Act. . . . While that is an obviously plausible view, a lawyer, but not a layman, might have perceived that because the Child Molester Act was invoked against the petitioner in respect of conduct elsewhere specifically defined as criminal, the 1954 decision of the Florida Supreme Court in *Copeland v. State*, 76 So. 2d 137, raised doubts, under the Florida Constitution, of the validity of a prosecution based on the Act."

The Court held that the Fourteenth Amendment secured petitioner's right to counsel and that the right had not been intelligently waived.[88]

The child molester act differs from the criminal sexual psychopath law in another important respect in that it fails to characterize itself as either civil or criminal. From the provision relating to sentencing,[89] and its effect on sentences prescribed in other statutes,[90] one might well surmise that the act is criminal. But the act expressly provides that the expense of examination may be recovered from the defendant's estate by the county, and that costs of treatment may be recovered by the state from the defendant's estate.[91] The "civil" criminal sexual psychopath law only authorizes the state to recover costs of examination and treatment, "where possible," from "such person," without mentioning his estate.[92] It might therefore be reasonably inferred that the child molester act, with its broader cost recovery provisions, is also civil in nature. If so, a court might well inquire into the validity of a provision for imprisonment appearing in a "civil" statute. Assuming that the provision is valid, the fact that costs may be recovered though the defendant is not subsequently

88. *Id.* at 890.
89. FLA. STAT. §801.03 (1961).
90. Copeland v. State, *supra* note 73 at 141.
91. FLA. STAT. §§801.07, .09 (1961).
92. FLA. STAT. §917.12 (7) (1961). (Emphasis added.)

convicted[93] could be construed as compelling him to pay costs, which is prohibited by the Florida Constitution except after conviction.[94] The costs, moreover, could run to a sizeable amount if treatment is protracted and might be considered both as an excessive fine[95] and a cruel and unusual punishment.[96]

The question of the character of the act has not been answered by the courts. The act might be construed as both civil and criminal. In its original form, the act provided alternative theories upon which the trial judge might proceed, *viz*: "Sentence said person to the sentence otherwise provided by law, *or* . . . commit such person for treatment. . . ."[97] But the 1953 act, as amended, deleted the word "or."[98] Thus the act can no longer be said to provide for alternative civil and criminal procedures. Was the "or" dropped by accident? It has not reappeared,[99] although the provision has since been amended in other particulars.[100] Whether by accident or design, the deletion supports the proposition that the act is not one of alternatives but is sui generis as a combination of civil and criminal procedure.

Another distinction is that the criminal sexual psychopath law disclaims[101] any alteration of the *M'Naghten* "right and wrong" test of insanity, while the child molester act is silent on this point and is possibly vulnerable to attack under the *Creekmore rationale*.[102]

If the child molester act is a criminal statute, its violation is a felony,[103] since the maximum sentence is twenty-five years in the state prison.[104] The act provides for probation,[105] which may be granted

93. This is a real possibility under the act, since examination may be had prior to conviction. Although examination would usually be given only after a defendant had been convicted under the act (FLA. STAT. §801.03 (1)-(2) (1961)), the examination may be given before conviction if defendant petitions therefore and the court approves or when the court of its own initiative orders the examination after the defendant has been charged with an offense within the purview of the act, which may be before conviction. FLA. STAT. §801.10 (1961). Thus, a conviction may not necessarily precede the examination, or occur thereafter, because defendant might be acquitted. He would still be liable for costs under the act.

94. FLA. CONST. DECL. OF RIGHTS §14.

95. FLA. CONST. DECL. OF RIGHTS §8.

96. *Ibid.*

97. FLA. STAT. §801.03 (1) (a), (b) (1961); Fla. Laws 1951, ch. 26843, §§3-4, at 686. (Emphasis added.)

98. FLA. STAT. §801.03 (1) (a) (1961); Fla. Laws 1953, ch. 28158, §6, at 591.

99. FLA. STAT. §801.03 (1) (a) (1961).

100. See *e.g.*, Fla. Laws 1957, ch. 57-1990.

101. FLA. STAT. §917.12 (6) (1961).

102. State v. Creekmore, 8 Fla. Supp. 189 (4th Cir. 1956).

103. See FLA. STAT. §775.08 (1961).

104. FLA. STAT. §801.03 (1) (a) (1961). The provision is silent as to a minimum period of imprisonment.

105. See FLA. STAT. §801.08 (3) (1961).

in the trial judge's discretion after suspension of the imposition of sentence[106] and apparently in lieu of commitment to the Florida research and treatment center or the state hospital. A violator cannot be placed on probation until the court is satisfied that he will receive psychiatric help on a regular basis, with reports filed by the counselor with the probation officer every six months.[107] Psychiatric treatment is therefore a mandatory condition of probation in addition to those suggested by the probation statute.[108] Costs of treatment shall not be charged against the county.[109] If the defendant or his estate is obligated to pay the costs of treatment, this obligation might well be an unreasonable condition of probation, especially when it is considered that probation, if granted, may last as long as twenty-seven years.[110] Although a defendant who has been placed on probation may petition for a writ of habeas corpus,[111] there has been no reported case under the act on this point.

If the defendant is institutionalized under the act, the trial judge may in his discretion defer the imposition of sentence pending the person's discharge from treatment.[112] No time limit is expressed for such treatment. However, a Florida statute[113] passed in 1957 provides that when sentence has been withheld and has not been altered for a period of five years, the defendant shall not thereafter by sentenced for conviction of the same crime. Therefore if the trial judge defers imposition of sentence pursuant to the defendant's institutionalization under the act, the defendant presumably may not be sentenced to prison if his treatment lasts longer than five years.

### *Validity*

As early as 1952, the child molester act became the subject of scathing criticism. One qualified critic urged that the law and its basic assumptions are both invalid.[114] Describing its passage as the result of a "manufactured illusion of a crime wave," he criticized the "economy-minded legislature" for passing an act "which would require treatment of only a few offenders," and attacked the singling out of child molesters from other sex offenders simply because public sentiment could more easily be aroused to favor legislation when young

106. FLA. STAT. §948.01 (1961).
107. FLA. STAT. §801.08 (3) (1961).
108. FLA. STAT. §948.03 (1) (1961).
109. FLA. STAT. §801.08 (3) (1961).
110. FLA. STAT. §948.04 (1961).
111. *Ex parte* Bosso, 41 So. 2d 322 (Fla. 1949).
112. FLA. STAT. §801.03 (1) (b) (1961).
113. FLA. STAT. §775.14 (1961).
114. Waybright, *Florida's New Child Molester Act: Unscientific, Unrealistic, Unconstitutional*, 26 FLA. L.J. 402 (1952).

children are involved.[115] Other constitutional objections raised were the very grounds upon which the Florida Court held the act unconstitutional as applied to rape in the *Copeland* decision.[116] The act was also criticized as medically unsound and unrealistic since psychiatrists themselves are in disagreement about diagnosis and treatment.

The child molester act in its present form may be unconstitutional. If attacked in an appropriate proceeding, it might be struck down entirely or in part because:

> (1) The act violates section 16, article III of the Florida Constitution in that it covers twelve separate crimes defined by other statutes,[117] while the Constitution requires that "each law enacted in the Legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title . . . ."[118] The provision is mandatory.[119] Furthermore, the act does not publish at length the criminal statutes that it amends by increasing the maximum sentences. The Constitution requires that "the act as revised or . . . amended, shall be reenacted and published at length."[120] Both of these defects were denounced in the *Copeland* case and have not been cured.[121]
>
> (2) For reasons discussed earlier, the act could be classified as criminal, or civil, or alternatively civil or criminal[122] or a combination of civil and criminal procedure. If criminal,[123] the issues of recovery of costs of examination and treatment are valid constitutional objections.[124]

115. *Id.* at 403.

116. *Id.* at 405-7; Copeland v. State, 76 So. 2d 137 (Fla. 1954).

117. FLA. STAT. §801.02 (1961).

118. FLA. CONST. art. III, §16.

119. Boyer v. Black, 154 Fla. 723, 18 So. 2d 886 (1944).

120. FLA. CONST. art. III, §16.

121. Copeland v. State, *supra* note 116, at 141, 142. Although the First District Court held in the *Buchanan* case that any deficiency in the title of the act was cured by the incorporation of the act in the general revision of the laws of Florida, this still may not have had the effect of curing other constitutional objections. Chief Judge Sturgis, dissenting, stated that such incorporation did not cure the act of any unconstitutionality of its *content*, and that any legislative attempt to amend or revise an existing law must *"reenact and publish at length"* the revised section. This has not been done.

122. Despite the absence of the word "or," it may still be open to the trial judge to elect which procedure he will follow.

123. As it may be, since nearly every reported case arising under the act has resulted from an appeal of conviction and sentence under it. For other cases, see Adams v. Culver, 111 So. 2d 665 (Fla. 1959); Champlin v. State, 122 So. 2d 412 (2d D.C.A. Fla. 1960).

124. *Supra* note 94.

## CONCLUSION

Florida's rehabilitative sex offender laws are a study in contrasts. The criminal sexual psychopath law, while not nearly so elaborate in its treatment provisions as the child molester act, has at least been cured of the defects which rendered its earlier prototype unconstitutional.[125] It provides a procedure that is expressly civil in nature and appears valid as measured by decisions from other jurisdictions. If the treatment provisions of the child molester act were incorporated into the criminal sexual psychopath law, the latter might be made more effective as a means of rehabilitation. But there is no serious legal fault to find with the law in its present form.

However, the child molester act contains serious defects which make it vulnerable to attacks upon its constitutionality. The defects discussed in the *Copeland* decision for the most part have not been cured; the only legislative response was to drop the crime of rape — and add those of incest and attempted incest. Presumably the public pressure for initial enactment was not followed by a sense of urgency to make needed corrections. It may be expected that the other problems raised by the act, *e.g.*, parole, probation, its possible alteration of the *M'Naghten* rule, its civil or criminal character, will not be resolved until the Florida Supreme Court has had occasion to either follow its decision in *Copeland* or overrule it and affirm the district court's decision in *Buchanan* upholding the act.

To avoid the risk of another holding of unconstitutionality, the child molester act should be amended in the light of the following criteria:

> (1) The act should expressly characterize itself as a civil or a criminal statute. If it is to be civil, the lead of the criminal sexual psychopath law should be followed and the provisions for sentence and imprisonment should be eliminated.
>
> (2) If the act is to be criminal, the penalty provisions of other affected statutes should be re-enacted and published at length, as required by the Florida Constitution. Or, the legislature should re-adopt the provisions of the original 1951 act giving the trial judge discretion to impose sentence *otherwise provided by law.*
>
> (3) The problem of recovery of costs for examination, treatment, and as a condition of probation should be clarified. If the act is to be criminal in nature, provision should be made that costs are not recoverable except upon an adjudication of guilt. They also should be limited to a reasonable amount.

125. See State v. Creekmore, *supra* note 102.