University of Miami Law Review

Volume 33
Number 4 *1978 Developments in Florida Law*

Article 7

6-1-1979

Criminal Law

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This article analyzes recent developments in Florida criminal law. The areas discussed include constitutional challenges to legislative enactments, search and seizure, confessions, speedy trial, pleas of guilty and nolo contendere, evidence, jury instructions, sentencing and the death penalty.

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I. INTRODUCTION

This article surveys major recent developments in Florida criminal law.[1] The purpose of the article, however, is not to "digest" all of the decisions, but to describe the more significant holdings and place the decisions in the context of developing doctrine.[2]

II. CONSTITUTIONALITY OF LEGISLATIVE ENACTMENTS

A. *First Amendment*

This year, the Supreme Court of Florida decided three major first amendment cases: *McCall v. State*,[3] *Brown v. State*[4] and *Matthews v. State*.[5] The analysis presented in each of these cases should provide the legal community of Florida with a valuable insight into the direction in which the court is moving in this expanding constitutional area.

In *McCall*,[6] a parent had confronted her daughter's teacher regarding the teacher's method of disciplining the child. During the confrontation, the parent used profane language in the presence of approximately fifty of the teacher's pupils. The parent was charged with violating section 231.07 of the Florida Statutes, which imposes

1. Volumes 350 through 362 So. 2d. The discussion of searches and seizures, confessions, speedy trial, guilty pleas, jury instructions and sentencing represents a continuation of the discussion of those topics presented in Hatchett & Norton, *Criminal Law, 1977 Developments in Florida Law*, 32 U. MIAMI L. REV. 1007 (1978).

2. The authors have indicated their opinions concerning the correctness of the result reached in particular cases. Justice Hatchett, however, notes that he does not wish to indicate prejudgments as to the correct disposition of any particular cases prior to their proper presentation on appeal. This article is intended as a review and analysis of legal principles.

3. 354 So. 2d 869 (Fla. 1978).

4. 358 So. 2d 16 (Fla. 1978).

5. 363 So. 2d 1066 (Fla. 1978).

6. 354 So. 2d 869 (Fla. 1978).

criminal liability upon anyone "who upbraids, abuses or insults any member of the instructional staff on school property or in the presence of the pupils at a school activity."[7] The parent moved to dismiss the charges alleging that the statute was an unconstitutional violation of the first and fourteenth amendments to the Constitution of the United States, "because on its face . . . [it was] a standardless, vague, overbroad statute, which include[d] within its prohibition constitutionally protected words."[8]

In holding that section 231.07 was unconstitutional, the Supreme Court of Florida made it clear that its analysis of the case could not be limited solely to a review of the specific language used by the defendant.[9] The activity described as unlawful by section 231.07 related to "language used in a particular place dedicated to a special purpose for the benefit of special people"[10]—*i.e.*, schools. Therefore, the court reasoned that the critical question was whether the statute had been "narrowly tailored" to proscribe only that activity which was incompatible with the normal activity of a school.[11] Applying this standard, the court hypothesized that a hundred year old woman, sitting on school property at midnight with no students present, who told a teacher that the quality of his

7. FLA. STAT. § 231.07 (1975). Violation of this section is a misdemeanor of the second degree. *Id.*

8. 354 So. 2d at 870. The statute was also attacked on the ground that it violated FLA. CONST. art. I, § 4, which provides:

> Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

9. The court stated that it was "clear that if we were concerned solely with the language used by appellant, her conviction would be overturned under our recent opinion in *Spears v. State*, 337 So. 2d 977 (Fla. 1976)." 354 So. 2d at 870.

10. 354 So. 2d at 870.

11. At this point, the court applied the test enunciated by the Supreme Court of the United States in Grayned v. City of Rockford, 408 U.S. 104 (1972). 354 So. 2d at 871.

In *Grayned*, a demonstrator at a high school was convicted of violating both an anti-picketing ordinance which outlawed demonstrations near schools that were in session, and an anti-noise ordinance which prohibited the willful making of noise or any other type of diversion on grounds adjacent to a school while the school was in session. The Supreme Court declared the statute prohibiting picketing to be unconstitutional on equal protection grounds, but upheld the anti-noise statute against challenges of vagueness and overbreadth. In approving the anti-noise statute, the Court noted:

> Designed, according to its preamble, "for the protection of Schools," the ordinance forbids deliberately noisy or diversionary activity that *disrupts or is about to disrupt* normal school activities. It forbids this willful activity at *fixed times*—when school is in session—and at a sufficiently fixed place—"adjacent" to the school.

408 U.S. at 110-11 (emphasis by the Court).

work was poor, could be convicted under section 231.07.[12] The court concluded that since such harmless conduct could be penalized, the statute was unconstitutionally overbroad.[13]

In *Brown v. State*,[14] the Supreme Court of Florida was confronted with a challenge to section 847.04 of the Florida Statutes—Florida's "open profanity" statute.[15] Although section 847.04 had been previously upheld by the court against a similar challenge in *State v. Mayhew*,[16] the defendant attacked the statute on the grounds that it was unconstitutional on its face because it sought to regulate pure speech and was vague and overbroad.[17]

In revisiting this constitutional question, the court in *Brown* recognized that its prior attempt to construe narrowly the statute was without support from any limiting statutory language.[18] Since persons of common understanding, upon reading the plain language of the statute, could reasonably conclude that the mere utterance of the proscribed language without more could subject them to punishment, the statute created an impermissible chilling effect on the exercise of free speech, rendering it unconstitutional and incapable of redemption.[19]

To support this conclusion, the Supreme Court of Florida, as in *McCall*, gave examples of protected speech that could be prosecuted under the broad language of the statute. The court noted that a person could shout profanities while in an open field and if, unknown to the speaker, those words were heard by another person, the speaker could be subject to criminal prosecution under section 847.04.[20] According to the court, such analysis proved that the stat-

12. 354 So. 2d at 872.

13. *Id.* The court noted that the defendant's conduct was certainly sufficient to upbraid, abuse and insult the teacher and that there was no doubt that the confrontation occurred on school grounds in the presence of students. The court further noted, however, that the defendant could not be punished under the statute even though her conduct was reprehensible, since someone engaged in protected speech could be punished under the same statute. *Id.* (citing Coates v. City of Cincinnati, 402 U.S. 611 (1971)).

14. 358 So. 2d 16 (Fla. 1978).

15. FLA. STAT. § 847.04 (1975) which provides: "Whoever, having arrived at the age of discretion, uses profane, vulgar and indecent language, in any public place; or upon the private premises of another, or so near thereto as to be heard by another, shall be guilty of a misdemeanor of the second degree . . . ."

In *Brown*, the defendant had been convicted for uttering offensive remarks while in the presence of a police officer. 358 So. 2d at 17.

16. 288 So. 2d 243 (Fla. 1973). In *Mayhew*, the court construed § 847.04 in a manner that would support its constitutionality, finding only language that would necessarily incite a breach of the peace to be prohibited. 288 So. 2d at 244.

17. 358 So. 2d at 17.

18. *Id.* at 20.

19. *Id.* at 21.

20. *Id.* at 20.

ute impermissibly proscribed mere speech. The court then recognized the importance of first amendment freedoms in classic form: "[T]he freedom to speak one's thoughts is the matrix, the indispensable condition of nearly every other form of freedom . . . . 'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' "[21]

In *Matthews v. State*,[22] the Supreme Court of Florida indicated that the scope of review for challenges to statutes alleged to be unconstitutionally overbroad and restrictive of free speech *as applied* will be much narrower than the review afforded to challenges of the *Brown* and *McCall* type. The facts of *Matthews* as adduced by the court from the record were:

> On December 20, 1974, a young black man was shot and killed by a deputy sheriff in Escambia County. The shooting became the subject matter of a grand jury investigation which resulted in a finding that the deputy fired in self-defense. [Matthews] and other members of the black community staged several demonstrations in protest. Among other things, the demonstrators demanded removal of the deputy from office. At one of these demonstrations, [Matthews] led the crowd in the following chant: "Two, four, six, eight, who shall we assassinate? Doug Raines, Doug Raines, Sheriff Untreiner, Askew, and the whole bunch of you pigs."[23]

At trial, the state alleged that Matthews was guilty of extortion[24] because he had verbally and maliciously threatened injury to Sheriff Untreiner in order to compel the dismissal of Deputy Raines. Matthews was convicted of extortion and was sentenced to five years in prison.[25] The District Court of Appeal, First District, affirmed the conviction rejecting Matthews' argument that *as applied to him* the extortion statute violated his rights under the first, fifth

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21. *Id.* at 21 (citations omitted).

22. 363 So. 2d 1066 (Fla. 1978).

23. *Id.* at 1068.

24. FLA. STAT. § 836.05 (1973) provides:

> Whoever, either verbally or by a written or printed communication, maliciously threatens to accuse another of any crime or offense, or by such communication maliciously threatens an injury to the person, property or reputation of another, or maliciously threatens to expose another to disgrace, or to expose any secret affecting another, or to impute any deformity or lack of chastity to another, with intent thereby to extort money or any pecuniary advantage whatsoever, or with intent to compel the person so threatened, or any other person, to do any act or refrain from doing any act against his will, shall be guilty of a felony of the second degree . . . .

25. 363 So. 2d at 1968.

and fourteenth amendments to the Constitution of the United States.[26] The supreme court found that Matthews' conduct constituted a real and substantial "criminal threat" and not mere "political hyperbole."[27] Thus, according to the court, application of the extortion statute to Matthews' conduct passed muster under the standard enunciated by the Supreme Court of the United States in *Watts v. United States.*[28]

On appeal, the Supreme Court of Florida refused to inquire into the scope and purpose of the extortion statute and limited its review instead to a determination of whether there existed competent evidence in the record on appeal to support the conclusion of the district court, and whether the district court had applied the correct rule of law.[29] In discussing the scope of its review, the court stated:

> [I]t transcends the scope of our review to substitute our judgment for that of the jury, the trial judge, and the District Court of Appeal, First District, and to determine upon our view of the same evidence in the record that the statute was unconstitutional as applied to appellant.[30]

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26. *Id.* Interestingly, the First District ruled on this question even though it apparently had not been preserved in the trial court. By passing upon the validity of the statute, however, the district court preserved the question for appeal to the supreme court under FLA. CONST. art. V, § 3(b)(1). 363 So. 2d at 1067-68.

27. 363 So. 2d at 1069.

28. 394 U.S. 705 (1969) (per curiam).

In *Watts,* the defendant was convicted of threatening the President in violation of 18 U.S.C. § 871(a) (1964). The Supreme Court of the United States reversed, holding that a statute may prohibit only those spoken words which constitute a "true threat" as distinguished from speech which is protected by the first amendment. In discussing the nature of the threat made by Watts regarding his pending induction into the armed forces ("If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706), the Court stated:

> We do not believe that the kind of political hyperbole indulged in by petitioner fits within the statutory term. . . . The language of the political arena, like the language used in labor disputes, . . . is often vituperative, abusive, and inexact . . . . Taken in context, and regarding the expressly conditional nature of the statute and the reaction of the listeners, we do not see how it could be interpreted otherwise.

Id. at 708 (citations omitted).

29. 363 So. 2d at 1069.

30. *Id.* Unfortunately, under this analysis it seems that, except in very rare cases, the highest court in the state would always be bound by a lower court's determination that a statute had been constitutionally applied. It is arguable that, in a first amendment case, the state's highest court should review the scope and intent of the statute as well as everything in the record.

In this context, the Supreme Court of the United States has stated that in cases involving alleged first amendment violations, it would make an independent examination of the whole record to assure itself that the judgment does not constitute a forbidden intrusion on the field of free expression. New York Times v. Sullivan, 376 U.S. 285 (1964); Edwards v. South Carolina, 372 U.S. 229, 235 (1963).

Applying this standard, a majority of the court found sufficient evidence in the record to support the district court's findings.[31]

In a vigorous dissent in *Matthews*,[32] one justice argued that the lower courts had failed to address two questions critical to the first amendment determination: first, whether the "assassination" cheer voiced by Matthews and other demonstrators was directed to inciting, threatening, or producing imminent violence, and second, whether these cheers were likely to incite or produce such lawless action.[33] According to the justice, this inquiry was required by *Brandenburg v. Ohio*.[34] In *Brandenburg*, the Supreme Court of the United States held:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. . . . A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.[35]

The *Matthews* dissent argued that this test had actually been applied in *Watts* and, if applied in *Matthews*, would require acquittal.[36] In closing, the justice reminded the court:

> The protections of the First Amendment encompass all of our citizens, whether black militants or Ku Klux Klan members. Only by allowing our citizens to voice their political opposition to the fullest extent possible can we encourage use of the open political forum and inhibit the growing tendency of clandestine violent attacks as a means of political change.[37]

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31. 363 So. 2d at 1069. The court found evidence in the record that some demonstrators had possessed sticks and clubs, that members of the crowd had passed a steak knife from one to another, that some members of the crowd had made abusive remarks directly to police officers and that demonstrators spat on two police officers. *Id.*

32. *Id.* at 1070 (Hatchett, J., dissenting).

33. *Id.*

34. 395 U.S. 444 (1969) (per curiam).

In *Brandenburg*, the Supreme Court of the United States held unconstitutional an Ohio statute which prohibited advocating the duty, necessity, or propriety of crime, sabotage, violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political reform. The statute was held invalid because it could not be narrowly construed to proscribe only advocacy of violence directed to inciting or producing imminent lawless action and which advocacy was likely to incite or produce such action. *Id.* at 448-49.

35. *Id.* at 447-48.

36. 363 So. 2d at 1073-74.

37. *Id.* at 1075.

B. *Insanity Defenses*

In *State ex rel. Boyd v. Green,*[38] the Supreme Court of Florida dealt a death blow to section 918.017 of the Florida Statutes[39]—Florida's new statutory scheme which provided for a bifurcated trial when a defendant raised the defense of insanity. In *Green,* the trial court ruled that section 918.017 constituted a denial of due process, but upheld the constitutionality of the section of the statute[40] which had repealed the previous insanity defense procedure. The trial court concluded that, as a result of this repeal and the unconstitutionality of section 918.017, the defense of insanity no longer existed in Florida and ordered the case to proceed to trial

38. 355 So. 2d 789 (1978).

39. FLA. STAT. § 918.017 (1977) provided:

Separate proceedings on issue of insanity.—

(1) When, in a criminal case, it shall be the intention of the defendant to plead not guilty and to rely on the defense of insanity, no evidence of insanity shall be admitted until it is determined through trial or by plea whether the defendant is guilty or innocent of committing or attempting to commit the alleged criminal act. Advance notice of intention to rely upon the defense of insanity shall be given by the defendant as provided by rule. Upon a finding that the defendant is guilty of the commission or attempted commission of the criminal act, a trial shall be promptly held, either by the same trial jury, if applicable, or by a new jury, in the discretion of the court, solely on the question of whether the defendant was sane at the time the criminal act was committed or attempted. The defendant shall have the option, with approval of the court, of waiving the jury trial on the issue of sanity and allowing the determination of sanity to be made by the judge. Evidence may be presented as to any matter that the court deems relevant to the issue of sanity, regardless of its admissibility under the exclusionary rules of evidence, except as prohibited by the Constitution of the United States or the Constitution of the State of Florida. However, the defendant [shall be] given the opportunity to rebut any such evidence. If the jury or the judge shall determine that the defendant was guilty of committing or attempting to commit the criminal act and was sane at the time, then the court shall proceed as provided by law. If it is determined that the defendant was guilty of committing or attempting to commit the criminal act but was insane at the time, the court shall adjudicate the defendant not guilty by reason of insanity.

Section 918.017 codified 1977 Fla. Laws ch. 77-321, § 1 (footnote omitted). 1977 Fla. Laws ch. 77-321, § 10 repeated the previous insanity procedure contained in FLA. R. CRIM. P. 3.210, which provided in pertinent part:

(a) **At Time of Trial.**

(1) If before or during trial the court, of its own motion, or upon motion of counsel for the defendant, has reasonable ground to believe that the defendant is insane, the court shall immediately fix a time for a hearing to determine the defendant's mental condition. The defendant shall designate his attorney to serve as his representative under Fla. Stat. § 394.459(11), F.S.A., in the event the defendant is found mentally incompetent. The court may appoint not exceeding three disinterested qualified experts to examine the defendant and to testify at the hearing as to his mental condition. Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party.

40. 1977 Fla. Laws ch. 77-321, § 10.

without benefit of that defense.[41]

On appeal, the Supreme Court of Florida agreed with the trial judge's ruling that section 918.017 was unconstitutional.[42] The court stated that the statute would preclude an insane defendant from rebutting intent at the first trial and would limit the second trial to the question of insanity. Intent, however, is an essential element of most crimes and the state would be relieved of its burden of proving each element of the offense beyond a reasonable doubt because the defendant is precluded from offering evidence to negate the presumption of intent. According to the court, this constituted a clear denial of due process.

The supreme court disagreed, however, with the trial judge's ruling that the repeal provision was constitutional. The court held that although the repealer, standing alone, would be constitutional,

> [t]he manifest purpose of Chapter 77-312, Section 1, was to establish a two trial system for the adjudication of guilt and insanity. This procedure being clearly inconsistent with the procedure outlined in Rule 3.210, repeal of the rule was a logical part of the new legislative scheme. The two provisions are so connected and dependent on each other as to warrant the belief that the Legislature intended them as a whole. Where one provision is unconstitutional, all provisions dependent on it must also fall.[43]

C. *Habitual Petit Larceny Offenders*

Section 812.021(3) of the Florida Statutes[44] provides for en-

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41. 355 So. 2d at 791.

42. *Id.* at 794.

43. *Id.*

Justice England concurred with the court's invalidation of § 918.017, but stated that its invalidity should not have been grounded on due process considerations. According to the justice, § 918.017 would violate due process only if the second stage of the trial was conducted before a jury different from the one which determined the defendant's commission of the physical acts of the crime. While that was a possibility under § 918.017, it was not a necessity. *Id.* at 795.

The justice argued that such an inquiry was, however, irrelevant:

> Whether the same or a different jury considers insanity, however, it seems clear to me that the legislature overstepped constitutional bounds when it elected to shift the presentation of evidence on the insanity issue into a second stage of trial proceedings. It is our constitutional responsibility alone to prescribe the "course, form, manner, means, method, mode, order, process or steps" by which the substantive elements of a crime are presented in a criminal proceeding. . . . I would hold Section 921.131(1) invalid as an encroachment on this Court's exclusive power to "adopt rules for the practice and procedure in all courts." Article V, Section 2(a), Florida Constitution.

Id. (citations omitted).

44. FLA. STAT. § 812.021(3) (1977), states:

Larceny of property not described in subsection (2) is petit larceny, which consti-

hanced punishment of habitual petit larceny offenders. Pursuant to section 812.021(3), if the state could charge and offer proof at trial that a defendant had at least two prior convictions for petit larceny, a conviction could be imposed for the enhanced offense, subjecting the offender to a felony sentence rather than a misdemeanor jail term.

In *State v. Harris*,[45] defendants were charged with petit larceny. The state charged that defendants, having been twice convicted of that offense, were subject to the enhanced punishment provided by section 812.021(3) and sought to introduce evidence of those prior convictions at trial. The trial judge granted defendants' motion to dismiss, ruling that section 812.021(3) was unconstitutional "in that it deprived defendants of due process and equal protection of the law and destroyed the historical presumption of innocence by the inclusion of prior convictions in the charging information."[46]

On appeal by the state, the Supreme Court of Florida reversed the trial court, construing section 812.021(3) "so as to make it constitutional."[47] The court interpreted section 812.021(3) to create the substantive offense of "felony petit larceny."[48] According to the court, the legislature had the right to create such an offense, but the supreme court had "the right to dictate the procedure to be employed in the courts to implement it."[49] The court then rendered its constitutional construction of the statute:

> We therefore hold that Section 812.021(3) creates a substantive offense to be tried in the circuit court when felony petit larceny is charged, without bringing to the attention of the jury the fact of prior convictions as an element of the new charge. Upon conviction of the third petit larceny, the Court shall, in a separate proceeding, determine the historical fact of prior convictions and questions regarding identity in accord with general principles of law, and by following the procedure now employed under Section 775.084.[50]

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tutes a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. Upon a second conviction of petit larceny, the offender shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. Upon a third or subsequent conviction of the offense of petit larceny, the offender shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

45. 356 So. 2d 315 (Fla. 1978).

46. *Id.* at 316.

47. *Id.*

48. *Id.* at 317.

49. *Id.*

50. *Id.* (footnotes omitted). FLA. STAT. § 775.084(3)(c) (1977) provides: "Except as provided in paragraph (a), all evidence presented shall be presented in open court with full rights of confrontation, cross-examination, and representation by counsel."

D. *Statutory Presumptions*

The Supreme Court of Florida again addressed the constitutionality of an irrebuttable presumption in *MacMillan v. State*.[51] MacMillan had been charged with using electricity from a utility company without first letting it pass through a company meter in violation of section 812.14 of the Florida Statutes.[52] At trial, MacMillan asserted that the statute was unconstitutional because it placed an untenable burden upon property owners by requiring them to be custodian, caretaker, insurer and protector of the personal property of the utility company, and because, pursuant to section 812.14(3),[53] a prima facie case of guilt was made if there existed any device on the property which diverted electricity past the meter box. The defendant argued that this statutory presumption was irrational and arbitrary. The trial judge upheld the constitutionality of section 812.14(3), and MacMillan was convicted.[54]

On appeal, the Supreme Court of Florida, applying "a rational connection" standard,[55] held that section 812.14(3) was unconstitutional.[56] According to the court, under the challenged statute the presumed fact of intent to violate came into play merely upon proof that the property upon which diversion of some sort had occurred was in the actual possession of the accused, or upon proof that the accused had received a direct benefit from the utility. The court stated that it could not conclude with any substantial assurance

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51. 358 So. 2d 547 (Fla. 1978) (per curiam).

52. FLA. STAT. § 812.14 (Supp. 1976).

53. *Id.* § 812.14(3), provided in pertinent part:

> The existence, on property in the actual possession of the accused, of any connection, wire, conductor, meter alteration, or any device whatsoever, which effects the diversion or use of the service of a utility or a cable television service or community antenna line service or the use of electricity, gas, or water without the same being reported for payment as to service or measured or registered by or on a meter installed or provided by the utility shall be prima facie evidence of intent to violate, and of the violation of, this section by such accused.

54. 358 So. 2d at 547.

55. The court applied the rational connection standard enunciated by the Supreme Court of the United States:

> [A] criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, *unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.* And in the judicial assessment the congressional determination favoring the particular presumption must, of course, weigh heavily.

358 So. 2d at 549 (quoting Leary v. United States, 395 U.S. 6, 36 (1969)) (emphasis by the Supreme Court of Florida).

56. 358 So. 2d at 550. Although the court held that § 812.14(3) was unconstitutional, it did not invalidate the remainder of § 812.14. The court stated that since deletion of subsection 3 would not disturb the valid portion of the statute, subsection 3 was severable. *Id.*

that the presumed fact that the defendant was guilty of that crime was more likely than not to flow from the proved fact of possession of the premises or receipt of the benefits. One in actual possession of property or one receiving direct benefits would not more than likely be the guilty person. The court stated that common experience taught that the device or apparatus tampered with or altered was generally on the outside of a building and accessible to anyone; that direct benefits from the use of the electricity would be commonly derived by any occupant of the premises—family member or business associate; and that the billing that would constitute notice to the owner of possible diversion was only sent once a month. Moreover, a diversion could be effected by a simple alteration made by a prankster, a vandal or an angry neighbor, causing unknown benefit to the user and invoking the criminal presumption.[57]

E. *Exclusions and Exemptions*

In *Purifoy v. State*,[58] the Supreme Court of Florida resolved the difficult question of whether the state or the defendant has the burden of proving the weight of contraband in a marijuana prosecution case[59] where the substance possessed by the defendant contains both prohibited and nonprohibited material.[60]

Prior to discussing the merits, the supreme court noted the "crucial difference"[61] between statutory exclusions and exemptions. According to the court, a defendant who claims an exclusion is arguing that his particular conduct is not criminal, whereas a defendant who claims the benefit of an exception is arguing that although his conduct would otherwise be criminal, he has a statutory excuse. The importance of this distinction is that once a defendant raises a statutory exclusion as a defense, the absence of the exclusion is considered an essential element of the crime that the state must prove by substantial evidence. On the other hand, a defendant has the burden of proving that his conduct was exempted—statutorily excused—since there is nothing to excuse until the state has proven the elements of the crime.[62]

Against this background, the court noted that the defendants

57. 358 So. 2d at 550.

58. 359 So. 2d 446 (Fla. 1978).

59. In *Purifoy*, the defendants had been charged with possession of more than five grams of cannabis. *Id.*

60. FLA. STAT. § 893.02(2) (1977) specifically excludes "mature stalks" from the statutory definition of cannabis.

61. 359 So. 2d at 448.

62. *Id.* at 449.

in *Purifoy* had denied that the matter in their possession was a prohibited substance. Their defense was not merely one of a legal excuse which they were attempting to assert after the state had proven all the essential elements of the crime. Thus, the court held that where a portion of the substance introduced by the state as contraband is claimed by the defendant to be a nonprohibited matter, it becomes the state's burden to prove that the weight of the contraband alone (*i.e.*, minus any "mature stalks") exceeds the statutory threshold of five grams.[63] The court stated that to hold otherwise would not only place an intolerable burden on criminal defendants, but would also contravene the fundamental rule that the prosecution must prove every essential element of the crime charged. The statutory exclusion of "mature cannabis stalks" was not an exemption, but an integral part of the definition of this contraband.[64]

In *State v. Buchman*,[65] the Supreme Court of Florida reaffirmed the *Purifoy* exclusion-exemption distinction. The defendants in *Buchman* had been charged with the sale of unregistered securities in violation of section 517.07 of the Florida Statutes.[66] At trial, the circuit court judge ruled unconstitutional section 517.17 of the Florida Statutes,[67] which placed the burden of proving a statutory exemption to section 517.07 on the defendants. The trial court held that the statute in essence required a defendant to give up his constitutional right against self-incrimination. The trial judge allowed the prosecution to go forward, but in order to cure the self-incrimination and due process problems, he ruled that the state would have the burden of proving that the defendants were not entitled to a statutory exemption.[68]

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63. *Id.*

64. *Id.* In *Purifoy*, the state had argued that the burden of proving that the contraband weighed less than five grams due to the presence of nonprohibited matter was on the defendant pursuant to FLA. STAT. § 893.10(1) (1975), which provides:

> It shall not be necessary for the state to negative any exemption or exception set forth in this chapter in any indictment, information, or other pleading or in any trial, hearing, or other proceeding under this chapter, and the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit.

65. 361 So. 2d 692 (Fla. 1978).

66. FLA. STAT. § 517.07 (1977) (repealed 1976 Fla. Laws ch. 76-168, § 3, effective July 1, 1980).

67. *Id.* § 517.17 (repealed 1976 Fla. Laws ch. 76-168, § 3, effective July 1, 1980), which provides:

> **Burden of Proof.**—It shall not be necessary to negative any of the exemptions provided in this part in any complaint, information, indictment, or any other writ or proceedings brought under this part, and the burden of establishing the right to any exemption shall be upon the party claiming the benefit of such exemption.

68. 361 So. 2d at 693-94.

On certiorari, the supreme court held that it was not the intent of the legislature to make the lack of an *exemption* an essential element of a section 517.07 violation. Rather, the court felt that the existence of an exemption in a particular case is an affirmative defense available to the defendant. The defendant's rights against self-incrimination are not violated by this scheme, since the defendant is not required to furnish any information before the state has proven a prima facie case of guilt.[69] Thus, the court made clear that the characterization of a defense as an exclusion or exemption will dictate which party must carry the burden of proof.

F. *Statutory Vagueness and Criminal Intent*

In *State v. Allen*,[70] the Supreme Court of Florida reviewed a challenge to the constitutionality of section 812.041(1) of the Florida Statutes[71]—Florida's theft statute. Section 812.041(1) provides:

> A person is guilty of theft if he obtains or uses, or endeavors to obtain or to use, the property of another with intent:
>
> (a) To deprive the other person of a right to the property or a benefit therefrom.
>
> (b) To appropriate the property to his own use or to the use of any person not entitled thereto.

In *Allen*, defendants argued that section 812.041(1) failed to require that the proscribed conduct be "unlawful," thus eliminating the requirement of specific criminal intent in violation of their due process rights; and that the term "endeavors," as used in the statute, was impermissibly vague. The trial court agreed and dismissed the case.[72] On appeal by the state, the supreme court reversed, holding that there was no evidence to support the trial court's conclusion that the 1977 Florida Legislature intended, by its omission of the word "unlawful," to eliminate specific criminal intent as an element of the offense. In so holding, the supreme court noted that the jurisprudence of this state had long recognized the element of specific criminal intent to be a necessary requisite to a larceny conviction.[73] In addition, the court dismissed the vagueness challenge to the use of the word "endeavors," by construing that term to require proof of an overt act manifesting criminal intent, rather than merely proof of the formulation of a mental intent.[74]

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69. *Id.* at 695.
70. 362 So. 2d 10 (Fla. 1978) (per curiam).
71. FLA. STAT. § 812.014(1) (1977).
72. 362 So. 2d at 11.
73. *Id.*
74. *Id.* at 12.

Schultz v. State[75] presented the Supreme Court of Florida with a vagueness challenge to section 849.231 of the Florida Statutes,[76] which proscribes the manufacture, sale, purchase or possession of gambling devices. In *Schultz*, the trial judge rejected the defendants' vagueness challenge and construed section 849.231 to mean that the gambling devices specifically identified in the statute (*e.g.*, crap table, roulette wheel) were unlawful per se.[77] The trial judge also instructed the jury that the modifying phrase in the statute, "ordinarily or commonly used or designed to be used in the operation of gambling houses or establishments,"[78] did not pertain to the per se proscription of the specifically identified items. Thus, according to the trial judge's instructions, proof that a crap table or roulette wheel was an ordinary or commonly used gambling device was not a prerequisite to conviction under the statute.[79] Prior to a review of section 849.231, the Supreme Court of Florida set out the standards against which a statute challenged on vagueness and overbreadth grounds must be measured:

> A statute is unconstitutionally vague when men of common understanding and intelligence must necessarily guess at its meaning. . . . A statute is overbroad when legal, constitutionally protected activities are criminalized as well as illegal, unprotected activities, or when the Legislature sets a net large enough to catch all possible offenders and leaves it to the courts to step inside and determine who is being lawfully detained and who should be set free.[80]

Applying these standards, the supreme court stated that section 849.231, as construed by the trial court, was unconstitutionally vague and overbroad because, as construed, it would proscribe the possession of children's toys which resembled, or could be identified by name as, any of the items specified in the statute. In addition, possession of stage props purporting to be a roulette wheel or a crap table, but not designed for gambling nor commonly or ordinarily used for gambling, would be a punishable offense.[81] The court concluded by holding that the trial court had improperly construed section 849.231. According to the court, the statute only proscribed the manufacture, sale, purchase or possession of such items as were

75. 361 So. 2d 416 (Fla. 1978).
76. FLA. STAT. § 849.231 (1977).
77. 361 So. 2d at 418.
78. FLA. STAT. § 849.231(1) (1977).
79. 361 So. 2d at 418.
80. *Id.* (citations omitted).
81. *Id.* at 418-19.

ordinarily or commonly used or designed to be used in the operation of a gambling establishment. Thus, as construed, section 849.231 was neither unconstitutionally vague and indefinite nor overbroad.[82]

In a case decided the same day as *Schultz*, the Supreme Court of Florida rejected vagueness and overbreadth challenges to Florida's "simple child abuse" statute.[83] In *State v. Joyce*,[84] the state brought a consolidated appeal from the trial court's determination that section 827.04(2) was vague, indefinite and overbroad. On appeal, defendants argued that the trial court's dismissal was consistent with the decision of the Supreme Court of Florida in *State v. Winters*.[85]

In *Winters*, the Supreme Court of Florida had held that section 827.05 of the Florida Statutes,[86] which criminalized "negligent treatment of children," was unconstitutionally vague, indefinite and overbroad. In *Joyce*, however, the court determined that *Winters* was distinguishable since section 827.05 made criminal mere acts of simple negligence—conduct which was neither willful nor culpably negligent. The "simple child abuse" statute under attack in *Joyce*, on the other hand, required willfulness, scienter or culpable negligence. The court noted that the Supreme Court of the United States had often upheld the constitutionality of statutes challenged as vague, on the grounds that the statutes required scienter as an element of the offense.[87] The requirement of willfulness, scienter or culpable negligence in the child abuse statute therefore avoided the infirmity present in *Winters*.

The supreme court noted further that, although the statutory use of the term "necessary" was faulted in *Winters* for failing to provide sufficient guidelines for determining what facts constitute

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82. *Id.* at 419.

83. FLA. STAT. § 827.04(2) (1977), provides:

> Whoever, willfully or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment, or who, knowingly or by culpable negligence, permits physical or mental injury to the child, shall be guilty of a misdemeanor of the first degree . . . .

84. 361 So. 2d 406 (Fla. 1978).

85. 346 So. 2d 991 (Fla. 1977).

86. FLA. STAT. § 827.05 (1977) provided:

> **Negligent treatment of children.**—Whoever, though financially able, negligently deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment or permits a child to live in an environment, when such deprivation or environment causes the child's physical or emotional health to be significantly impaired or to be in danger of being significantly impaired shall be guilty of a misdemeanor of the second degree . . . .

87. 361 So. 2d at 407 (citing United States v. National Dairy Prods. Corp., 372 U.S. 29 (1963); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952); Screws v. United States, 325 U.S. 91 (1945)).

a deprivation of necessary items great enough to fall within the proscriptions of the statute, the dicta in that decision did not render all statutes containing the term "necessary" void for vagueness. Rather, each statute must be examined to determine whether persons of common understanding can comprehend the meaning of that word when read in conjunction with the entire act.[88]

In *Graham v. State*,[89] the Supreme Court of Florida once again discussed the standard of criminal responsibility required as a predicate to criminal liability. In *Graham*, the defendant was charged with violation of section 370.13(2)(f) of the Florida Statutes, which made it unlawful "for any person . . . willfully to molest any [stone crab] traps, lines, or buoys . . . belonging to another without the permission of the permit holder."[90] In the trial court, the defendant argued that the statute was unconstitutionally vague because it failed to inform the average citizen of the conduct proscribed and that the statute was overbroad because it proscribed essentially innocent conduct. The trial court rejected this argument, and the defendant was convicted.[91]

On appeal, the Supreme Court of Florida held that the term "molest" was not so vague as to render the statute unconstitutional since its common definition was sufficient to warn an average man of the conduct prohibited. Furthermore, the court stated that it was not necessary to reach the question of overbreadth because the trial judge had properly narrowed the scope of the statute to only those acts which were willful or malicious in nature, and had instructed the jury accordingly.[92] In so holding, the supreme court noted that while criminal responsibility may rest on acts of negligence, such negligence is generally of a higher degree than that required to establish civil liability. In prior opinions, the court had held that the degree of negligence required to sustain a criminal conviction should be at least as high as that required for the imposition of punitive damages in a civil action. According to the court, such negligence generally must demonstrate

> "a gross and flagrant character, evincing reckless disregard of human life or of the safety of persons exposed to its dangerous effects; or that entire want of care which would raise the presumption of indifference to consequences; or such wantonness or recklessness or grossly careless disregard of safety and welfare of

88. 361 So. 2d at 407.
89. 362 So. 2d 924 (Fla. 1978).
90. FLA. STAT. § 370.13(2)(f) (1977).
91. 362 So. 2d at 925.
92. *Id.*

> the public, or that reckless indifference to the rights of others, which is equivalent to an intentional violation of them."[93] 120

Since the supreme court in *Graham* was unable to determine from the record whether the defendant's conviction was predicated upon a finding of willfulness or mere negligence, it reversed and remanded the case for a new trial.

In *State v. Rou*,[94] the Supreme Court of Florida indicated that potential harm to a defendant's reputation and career, at least in the case of a public official, is a factor to be considered in a vagueness challenge. In *Rou*, a county commissioner was charged by information with using his official position to secure a "special privilege" for a friend. It was charged that he located a public road adjacent to the friend's property, contrary to the established county road program, and thereby enhanced the value of that property, thus violating section 112.313(3) of the Florida Statutes.[95] At trial the defendant argued that section 112.313(3) was unconstitutionally vague. The trial judge agreed and dismissed the information.

On appeal by the state, the supreme court agreed with the trial judge's ruling. The court stated:

> The statute is unconstitutionally vague and leaves its enforcement to the whims of prosecutors. It does not "convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice. . . ." [T]he terms "special privileges or exemptions" afford one no guidelines, no "ascertainable standard of guilt," . . . no barometer by which a public official may measure his specific conduct.[96]

The state unsuccessfully argued that any constitutional infirmity was cured by the requirement that a conviction must be based upon proof beyond a reasonable doubt that the officeholder acted with specific intent to benefit himself or another in derogation or disregard of the general public welfare. The court stated that this would merely require an after-the-fact determination of what acts best promoted the public good. This, according to the court, was insufficient since, although an adjudication of not guilty may "clear the name of the official charged with the ethical violation, . . . it

93. *Id.* at 926 (quoting Russ v. State, 140 Fla. 217, 220, 191 So. 296, 298 (1939)) (emphasis omitted by the *Graham* court).

94. 366 So. 2d 385 (Fla. 1978).

95. FLA. STAT. § 112.313(3) (1973) (current version at *id.* § 112.313(6) (1977)). Section 112.313(3) provided: "No officer or employee of a state agency, or of a county . . . shall use, or attempt to use, his official position to secure special privileges or exemptions for himself or others, except as may be otherwise provided by law."

96. 366 So. 2d at 385 (citations omitted).

cannot undo the harm inflicted upon him and his career by such a charge."[97]

The Supreme Court of Florida struck down another official misconduct statute on vagueness grounds in *State v. Deleo.*[98] In *Deleo,* several employees of the City of Hollywood were charged with official misconduct in violation of section 839.25(1)(c) of the Florida Statutes,[99] because they had "violated, with corrupt intent to obtain benefit for themselves, a statute relating to their office."[100] Defendants' motion to dismiss the indictment on the grounds that section 839.25(1)(c) was vague and susceptible to arbitrary application in violation of the Constitutions of the United States and Florida was granted by the trial court.

On appeal, the Supreme Court of Florida reviewed section 839.25, which provides in pertinent part:

> (1) "Official Misconduct" means the commission of one of the following acts by a public servant, with corrupt intent to obtain a benefit for himself or another or to cause unlawful harm to another:
>
> . . . .
>
> (c) Knowingly violating, or causing another to violate, any statute or lawfully adopted regulation or rule relating to his office.[101]

According to the court, since "Official Misconduct" under subsection (c) was

> keyed into the violation of any statute, rule or regulation, pertaining to the office of the accused, whether they contain criminal penalties themselves or not, and no matter now minor or trivial . . . an appointed employee could be charged with official misconduct, a felony in the third degree and punishable by up to five years in prison or a fine up to $5,000, for violating a minor agency rule applicable to him, which might carry no penalty of its own.[102]

As such, the court concluded that section 839.25(1)(c) was suscepti-

97. *Id.* at 386. In *Rou,* Justice England wrote a dissenting opinion with which two justices concurred. Justice England argued that the plain meaning of the terms used in § 112.313(3) was sufficient to convey a definite warning as to what conduct was proscribed. *Id.*

98. 356 So. 2d 306 (Fla. 1978).

99. FLA. STAT. § 839.25(1)(c) (1977).

100. 356 So. 2d at 307. The state alleged that the defendants had violated FLA. STAT. § 112.313(7) (1977) "in that they had employment or held a contractual relationship with a business entity subject to the regulation of or doing business with the City." *Id.*

101. FLA. STAT. § 839.25 (1977).

102. 356 So. 2d at 308 (footnotes omitted). The court rejected the state's argument that requiring proof of corrupt intent saved the statute from its susceptibility to arbitrary application. *Id.*

ble to arbitrary application and was thus unconstitutional.

In *State v. Rodriquez*,[103] the Supreme Court of Florida rejected a constitutional vagueness challenge to section 409.325(2)(a) of the Florida Statutes which provides that "[a]ny person who knowingly . . . uses, transfers, acquires, traffics, alters, forges, or possesses . . . a food stamp . . . in any manner not authorized by law is guilty of a crime."[104] Two trial courts had dismissed charges against the various defendants in *Rodriquez* because they found the language "in any manner not authorized by law" to be unconstitutionally vague.

On appeal, a sharply divided supreme court held that the phrase "not authorized by law" meant not authorized by state and federal food stamp regulations, and that the statute was sufficiently definite to inform the defendants that their conduct in selling non-food items for food stamps was proscribed.[105] Three justices dissented, arguing that the provisions of section 409.325(2)(a) failed to delineate expressly what acts were proscribed, so that a person who knowingly possessed or transferred food stamps could never be certain that he was not doing so in a "manner not authorized by law."[106]

In conclusion, despite indications to the contrary in *Deleo* and *Rou*, a general review of the cases indicates that a statute containing somewhat ambiguous language may still be upheld against a vagueness challenge if the statute can reasonably be construed to require proof of criminal intent as an essential element of the crime.[107] Fur-

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103. 365 So. 2d 157 (Fla. 1978).

104. FLA. STAT. § 409.325(2)(a) (1977).

105. 365 So. 2d at 160.

106. *Id.* at 161. In his dissent, Justice Sundberg waxed indignant at the majority's treatment of the statute:

> Although I cannot be absolutely sure of it, I believe that a majority of the Court today has potentially sanctioned an enactment by the Legislature which would make unlawful as a discrete crime "the doing of any and all acts in any manner not authorized by law." It could appropriately be entitled the "Omnibus Prevention of Unlawful Conduct Act." Of course, conduct not authorized by law is not limited to criminal conduct but includes any act in contravention of the common law or statute, civil or criminal. To my mind, there is little difference between my hypothetical "Omnibus Prevention of Unlawful Conduct Act" and the provision here under consideration. This statute does nothing more than to state that it shall be unlawful to act in any manner not authorized by law and then provides a criminal sanction.

Id.

107. In addition to the cases discussed in this section, see Leeman v. State, 357 So. 2d 703 (Fla. 1978). There, the defendant was charged with violating FLA. STAT. § 817.482 (1975), which prohibits possession of any electronic device capable of duplicating tones used in long distance telecommunications for purposes of avoiding payment for long distance telephone calls. The defendant, citing Morrissette v. United States, 342 U.S. 246 (1952), argued that the statute was unconstitutionally vague and ambiguous and was susceptible of application

thermore, it appears that due process may require that every criminal conviction in Florida be based upon proof of the individual's criminal intent or culpability. Even where a particular statute does not require the state to prove specific criminal intent, a defendant should be permitted to present evidence negating general criminal intent or culpability.[108]

G. *Unlawful Delegation of Authority*

The Supreme Court of Florida in *High Ridge Management Corp. v. State*[109] again emphasized that statutes delegating legislative authority to administrative agencies must contain objective guidelines and standards sufficient to prevent unbridled discretion or whim on the part of the agency responsible for enforcement of the act.[110] In *High Ridge,* the operators of twenty-one nursing homes sought a declaratory judgment as to their rights under the Omnibus Nursing Home Reform Act of 1978,[111] challenged the constitutionality of the Act, and requested the court to enjoin the state from enforcing it. Sections 400.23(3) and (4)[112] of the Act established a rating system for nursing homes based on criteria to be promulgated by the administrative agency in charge of investigation and licensing. The nursing homes argued that the Act was an invalid delegation of legislative power because these provisions provided no guidelines to the agency as to whether the average nursing home should be rated "A," "B" or "C," whether only a very few nursing homes should be able to attain an "AA" rating, or whether there would be a bell curve or flat percentage of homes in each group. On appeal from the circuit court's denial of the declaration, the Supreme Court of Florida reversed, stressing the fact that sections 400.23(3) and (4) failed to provide guidelines sufficient to protect against unfairness or favoritism in their application.[113]

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to those persons possessing such a device who had no intent to violate the criminal laws. The Supreme Court of Florida rejected this argument and upheld the statute, stating that the offense clearly requires proof of criminal intent.

108. In addition to the cases discussed in this section, see Coffin v. State, 374 So. 2d 504 (Fla. 1979) (rehearing denied). Such proof of criminal intent may not be necessary, however, in the prosecution of corporate entities for the violation of regulatory statutes where the legislature has clearly indicated its intention of creating a strict liability criminal offense.

109. 354 So. 2d 377 (Fla. 1977).

110. *See also* Dickinson v. State, 227 So. 2d 36, 37 (Fla. 1969) (legislature must leave nothing to unbridled discretion of agency responsible for enforcement); Smith v. Portante, 212 So. 2d 298, 299 (Fla. 1968) (express or reasonably inferrable guidelines required in act delegating powers).

111. 1976 Fla. Laws ch. 76-201 (codified at FLA. STAT. §§ 400.011-.565 (Supp. 1976)).

112. FLA. STAT. §§ 400.23(3)-(4) (Supp. 1976).

113. 354 So. 2d at 380.

The Supreme Court of Florida applied a similar standard in *State v. Cumming.*[114] In *Cumming,* the defendant had been charged with unlawful possession of an ocelot in violation of section 372.922 of the Florida Statutes,[115] which proscribes possession without a permit of any "wildlife" as defined in the statute. At trial, Cumming attacked the statute on the grounds that it was so vague as to prevent one from ascertaining whether a permit would be required in any given case, and that it was an unlawful delegation of legislative authority in that it failed to provide the Florida Game and Fresh Water Fish Commission with adequate guidelines for implementation. Cumming also attacked the rules promulgated by the Commission under the statute as vague and overbroad.[116] The trial judge agreed and dismissed the case.

On direct appeal, the supreme court held that the statute used language sufficiently definite to put owners of wildlife on notice that a permit is required, and therefore the statute was not unconstitutionally vague. In addition, the court held that the statute did not unconstitutionally delegate legislative authority because the statutory guidelines adequately described the bounds within which the Commission was to promulgate its rules. The court held, however, that the rules were unconstitutionally overbroad because they did not sufficiently define the standards upon which the permit would be granted or denied. This vested the Commission with an impermissible amount of discretion.[117] Consequently, the court held that without a valid permit procedure available to owners of wildlife covered by the statute, no prosecution for lack of a permit was possible.

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114. 365 So. 2d 153 (Fla. 1978).

115. FLA. STAT. § 372.922 (1975) provides in pertinent part:

> (1) It is unlawful for any person or persons to possess any wildlife as defined in this act, whether indigenous to Florida or not, until he has obtained a permit as provided by this section from the Game and Fresh Water Fish Commission.
>
> . . . .
>
> (3) The commission shall promulgate regulations defining Class I and II types of wildlife. The commission shall also establish regulations and requirements necessary to insure that permits are granted only to persons qualified tc possess and care properly for wildlife and that permitted wildlife possessed as personal pets will be maintained in sanitary surroundings and appropriate neighborhoods.

116. FLA. ADMIN. CODE § 16E-5.051, .052 (1976).

117. 365 So. 2d at 155-56. In particular, the court stated that although the terms "qualified persons," "sanitary surroundings" and "appropriate neighborhoods" as used in § 372.92 were adequate guidelines to the Commission, the terms were too vague as used by the agency in § 16E-5.051. 365 So. 2d at 155-56.

III. SEARCH AND SEIZURE

A. *Illegal Stops*

It is now well-settled law in Florida that a police officer may not stop and question a person on mere suspicion of illegal activity. In *Mullins v. State,*[118] a police officer observed the defendant riding a bicycle slowly through a residential area in the very early morning hours. The officer stopped the bicyclist and asked him to identify himself and to explain his activities. During this conversation, the officer detected a strong odor of marijuana and saw a clear plastic bag containing a brown substance protruding from the defendant's shirt pocket. The defendant was then arrested and the contraband seized. In reversing the trial and appellate courts,[119] which had held the detention to be reasonable, the Supreme Court of Florida stated that the bicyclist's actions were clearly insufficient to give rise to anything more than a bare suspicion of illegal activity, and accordingly, the officer had no authority to make the initial stop.[120]

Similarly, in *Foss v. State,*[121] police stopped a vehicle based on mere suspicion without any probable cause that a crime was being committed or that any traffic laws were being violated. The officers had observed the vehicle travelling ten to fifteen miles per hour below the speed limit. The car was not being driven erratically, but the officers had observed a passenger slumped over in the seat. Upon stopping the vehicle, the police observed in plain view a bag of marijuana in the possession of the passenger. The district court reversed the trial judge, stating these circumstances were insufficient to give the police either a reasonable belief that an emergency existed, or a well-founded suspicion of criminal activity on the part of the occupants of the vehicle. Therefore, the police had no right to stop the vehicle or question the occupants. The court held that the contraband seized as a result of the illegal stop should have been suppressed.[122]

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118. 366 So. 2d 1162 (Fla. 1978).

119. Mullins v. State, 353 So. 2d 605 (Fla. 3d DCA 1978). The district court opinion in *Mullins* was in direct conflict with Coladonato v. State, 348 So. 2d 326 (Fla. 1977).

In *Coladonato,* police stopped a vehicle because it was unusual to a particular area at a particular time. Contraband subsequently observed in plain view was rendered inadmissible because the initial stop, based on such bare suspicion, was held illegal.

120. 366 So. 2d at 1163. In so holding, the Supreme Court of Florida reaffirmed the continuing validity of *Coladonato.*

121. 355 So. 2d 225 (Fla. 2d DCA 1978) (per curiam).

122. *See also* McClure v. State, 358 So. 2d 1187 (Fla. 2d DCA 1978), wherein police observed a man going into the apartment of a well-known drug dealer. When the man returned to his vehicle, he had stopped and stared at the police cruiser for 15 to 30 seconds. The police turned on their flashing light and asked the driver for identification. A bag of

B. *Stop and Frisk*

If a police officer validly stops an individual for questioning, he may frisk that individual only if he has probable cause to believe that the person may be armed.[123] In *Frazer v. State,*[124] the police were called to investigate a disturbance. Upon arriving at the scene, the police stopped and frisked the defendant, an apparent bystander, and discovered a bag of marijuana. The seizure was held invalid because the police had no indication that the defendant was involved in the affray nor any indication that the defendant might be carrying a weapon.[125]

Even if police validly stop and frisk an individual for weapons, they are not allowed to extend that pat-down search in order to uncover other evidence of criminal activity. In *Meeks v. State,*[126] police stopped and frisked a defendant and felt a three-inch-wide and five-inch-long bulge in the defendant's pocket. The police officer then reached into the defendant's pocket, pulled out a plastic bag of marijuana and arrested the defendant. The district court reversed the trial court's denial of a motion to suppress the evidence, stating that the seizure was illegal because the police officer admitted that he never believed the bulge to be a weapon but rather suspected it was a bag of marijuana.[127]

C. *Consent*

Although a person may voluntarily consent to a search, the police may not obtain that consent through coercion. When the state seeks to justify the seizure of evidence based upon consent, it must show by clear and convincing evidence that the defendant freely and voluntarily consented to the warrantless search.

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marijuana observed in plain view was ordered suppressed because the police did not possess sufficient facts for a well-founded suspicion of criminal activity justifying an investigatory detention.

123. FLA. STAT. § 901.151 (1977), the Florida stop and frisk law authorizes police to detain temporarily persons under circumstances reasonably indicating that such person has committed, is committing, or is about to commit a crime. Furthermore, when an officer has probable cause to believe that the person temporarily detained is armed, he may conduct a limited search for the purpose of and to the extent of disclosing such weapon.

124. 362 So. 2d 169 (Fla. 2d DCA 1978).

125. *Id.* at 170. In reaching this decision, the court applied the Supreme Court of the United States' standard for stop and frisk: " '[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' " *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)).

126. 356 So. 2d 45 (Fla. 2d DCA 1978).

127. *Id.* at 46.

In *Taylor v. State*,[128] a law enforcement officer stopped a boat to investigate an expired commercial registration certificate and other possible violations of the fishing laws. The officer boarded the defendant's vessel and began questioning him. After the defendant denied having any fish on board, the officer asked what the defendant had in an icebox cooler on deck. The officer opened this cooler without waiting for permission and looked inside. Nothing incriminating was discovered, so the officer asked if he could look into the fish hold. The defendant made no response, but pulled open the hatch because he believed the officer had the authority to search the boat. At no time was the defendant informed that he had a right to refuse the police request to search his boat. Upon inspection of the hold, the officer discovered a large quantity of marijuana. At trial, the defendant's motion to suppress was denied.[129]

On appeal, the District Court of Appeal, Third District, reversed the trial court's finding that the defendant had voluntarily consented to the search. The court noted that there is a clear distinction between mere acquiescence to apparent authority of a law enforcement officer and unqualified consent. The court stated that such mere acquiescence to a search does not necessarily constitute a waiver of the necessity for a valid search warrant. Rather, for a person to waive his search and seizure rights, it must clearly appear that he voluntarily permitted or expressly invited and agreed to the search. Thus, under the totality of the circumstances involved in *Taylor*, especially the illegal activity of the Marine Patrol officer in conducting a search of the icebox on deck without a warrant and without consent, the defendant's acquiescence in the search of the hold was involuntary.[130] In addition, the court recognized that an illegal arrest or an illegal search presumptively taints and renders involuntary any subsequent confession or admission obtained from the victim of the search or arrest.[131]

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128. 355 So. 2d 180 (Fla. 3d DCA 1978).

129. *Id.* at 182.

130. *Id.* at 185-86. *See also* Bailey v. State, 319 So. 2d 22 (Fla. 1975). In Miranda v. State, 354 So. 2d 411 (Fla. 3d DCA 1978), however, the district court recognized that Marine Patrol officers may board a boat temporarily moored in state waters to inspect the owner's boat registration and crawfish permit and thereafter conduct a warrantless search of the vessel based upon the smell of marijuana detected by the officers.

131. 355 So. 2d at 184 (citing Brown v. Illinois, 422 U.S. 590 (1975)). Also, in interesting dicta, the court reaffirmed the vitality of the exclusionary rule in Florida:

> Although there has been some suggestion that the Fourth Amendment exclusionary rule should be altered or abolished . . . the rule of *Mapp v. Ohio* . . . remains intact. In addition, even if the federal exclusionary rule is changed, this in no way affects the fifty year old rule in Florida that evidence seized in violation of Article I, Section 12, of the Florida Constitution is inadmissible in evidence

In *Gonterman v. State,*[132] the District Court of Appeal, First District, applying a similar standard, invalidated a search conducted by state agricultural inspection officers. In *Gonterman,* the defendant had agreed to a flashlight search of his vehicle through a window but denied the officers permission for a more thorough search of the contents of the truck. "Consent" was obtained only after the defendant had been arrested for bypassing the inspection station, had been repeatedly asked to consent by the officers, and had been told by the inspectors that they possessed the authority to make a search with or without the defendant's consent. According to the court, such consent was "clearly involuntary."[133]

The fact that a person is confronted by an armed, uniformed officer, however, is not sufficient to invalidate a subsequent consent to search. In *Bagocus v. State,*[134] the defendant had driven his pickup truck, with a camper attachment, past an agricultural inspection station on an interstate highway. Two agricultural inspection officers pursued and stopped his vehicle. The officers told the defendant that he had passed an agricultural inspection station and that they would like to inspect the contents of his truck. The defendant opened the camper back on his pickup truck, and one of the officers climbed inside. The officer found several bags which were taped shut. The officers then directed the driver to return to the inspection station, and on the way, Bagocus told the officers he would like to "work something out."[135] At the officers' request, the defendant again admitted them to the rear of his truck at the inspection station where they discovered that the taped-up bags contained marijuana. The District Court of Appeal, First District, stated that the agricultural inspection officers were entitled to stop the pickup truck when it passed the inspection station and to request the driver to permit an inspection of his vehicle. The court stated further that it was unwilling to find consent involuntary as a matter of law any time that uniformed agricultural inspection officers, carrying weapons which they did not brandish in any way, asked a driver to permit an inspection of his vehicle.[136]

. . . . "In Florida the exclusionary rule is not merely a judicial construct but is written into the Constitution itself."

Id. at 184 (citations omitted).

132. 358 So. 2d 595 (Fla. 1st DCA 1978) (per curiam).

133. *Id.* at 596.

134. 359 So. 2d 885 (Fla. 1st DCA 1978).

135. *Id.* at 886.

136. *But cf.* Powell v. State, 332 So. 2d 105 (Fla. 1st DCA 1976) (no consent where defendant was given three options: waiting for key, breaking open lock or waiting for inspector to obtain search warrant); Sarga v. State, 322 So. 2d 592 (Fla. 1st DCA 1975) (no consent where officer demanded three times to open truck).

D. *Electronic Surveillance*

Chapter 934 of the Florida Statutes[137] provides a comprehensive system that prohibits the interception of electronic and oral communications except by authorized persons under specifically defined circumstances. In *State v. Walls,*[138] the Supreme Court of Florida upheld the constitutionality of section 934.06 of the Florida Statutes[139]—the cornerstone of chapter 934. In *Walls,* an extortion victim made tape recordings of an extortion threat made at his home. In a criminal action against the extorter, Walls, the trial court denied admission of the tape recordings into evidence because the interception had not been made under the direction of a law enforcement officer or with the consent of the parties to the conversation.[140] In granting Walls' motion to suppress, the trial court rejected the state's argument that sections 934.02(2), 934.03 and 934.06 were overbroad.[141]

On certiorari, the Supreme Court of Florida upheld the trial judge's ruling. The court, however, characterized the state's overbreadth arguments as effectively requesting the court to create an exception to sections 934.03 and 934.06. This request was denied out of hand because the language of the statutes was clear and unambiguous and because the recordings were clearly proscribed. The court concluded by noting that chapter 934 represents a proper exercise of legislative authority "designed to effectively protect the privacy of oral and wire communications and to protect the integrity of court and administrative proceedings."[142]

An exception to the general rule that interception of wire or oral communications is prohibited unless all parties thereto have given their consent is delineated in section 934.03(2)(c).[143] This exception permits warrantless interception of communications under the

137. FLA. STAT. §§ 934.01-.10 (1977), *as amended by* 1978 Fla. Laws ch. 78-376, §§ 1-3 (codified at FLA. STAT. §§ 934.03, .09, .10 (Supp. 1978)).

138. 356 So. 2d 294 (Fla. 1978).

139. FLA. STAT. § 934.06 (1975), provides:

> **Prohibition of use as evidence of intercepted wire or oral communication.**—Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter.

140. Thus, the electronic recording did not fall within any of the situations permitting interception delineated in FLA. STAT. § 934.03(2) (1975).

141. *Id.* §§ 934.02(2), .03, .06 (1975).

142. 356 So. 2d at 296.

143. FLA. STAT. § 934.03(2)(c) (1975).

direction of law enforcement officers where one of the parties to the communication has given prior consent, and the purpose of the interception is to obtain evidence of a criminal act. In *Aalderink v. State*,[144] the District Court of Appeal, Second District, added a judicial gloss to section 934.03(2)(c). The court made it clear that as a condition precedent to the admission at trial of recordings falling within this section, the party consenting to the interception must testify to his consent and be available for cross-examination by the defendant.

Section 934.02(4)(a),[145] the "business use" exception, provides another exception to the general proscription of chapter 934. This section permits interception of oral communications by an employer monitoring the phone calls of employees in the ordinary course of business. In *State v. Nova*,[146] the Supreme Court of Florida made it plain that this exception would be carefully limited to those instances where the employer was acting in the capacity of employer as required by the ordinary course of business.[147]

Section 934.09[148] permits nonconsensual wiretapping by law enforcement officers if done pursuant to a warrant accompanied by an affidavit containing a "full and complete statement" that other investigative procedures have been tried and failed or appear unlikely to succeed.[149] In *Zuppardi v. State*,[150] the Supreme Court of Florida took occasion to discuss the parameters of section 934.09(1)(c). The court stated that although the interception of private communications should not be permitted as a routine matter of criminal investigation where more conventional techniques might be successfully employed, neither should law enforcement officials

144. 353 So. 2d 172 (Fla. 2d DCA 1978).

145. FLA. STAT. § 934.02(4)(a) (1977).

146. 361 So. 2d 411 (Fla. 1978).

147. In *Nova*, the defendant had filed a motion to suppress the testimony of Juanita Bentley, a supervisor, concerning a threat the defendant had made against Belinda Revel during a telephone conversation he had with Revel prior to her death, which conversation was overheard by Bentley on an extension telephone. After an evidentiary hearing on the matter, the trial court denied the motion to suppress, determining that Bentley used the telephone extension to listen in on the conversation of her employee in her capacity as employment supervisor, for the benefit of her employer and in the ordinary course of business. Defendant was convicted, but the district court reversed. On certiorari, the supreme court reversed, finding that the defendant had called Revel at her place of employment, the call was received by her on a company telephone, and that a previous telephone call to Revel from defendant that same morning had left her visibly upset. Thus, the court held that the job supervisor properly listened in on the phone call in order to find out why her employee had become upset. *Id.* at 413.

148. FLA. STAT. § 934.09 (Supp. 1978).

149. *Id.* § 934.09(1)(c).

150. 367 So. 2d 601 (Fla. 1979).

be compelled to endanger themselves and their informants before wiretaps are made available. Moreover, according to the court, the purpose of the "full and complete statement" requirement is not to insure that every other imaginable method of investigation has been unsuccessfully attempted prior to use of electronic surveillance, but to inform the issuing judge of the difficulties involved in the use of conventional investigative techniques.[151]

In *Cuba v. State*,[152] the District Court of Appeal, Third District, made it clear that section 934.09(1)(c) affidavits must be presented to a "neutral and detached magistrate" and must not be based on "stale information."[153] In *Cuba*, the court noted that the affidavit in question was presented to a circuit judge, clearly meeting the "neutral and detached" requirement. In addressing the staleness issue, the court noted that the information upon which the affidavit was based was only three, four and five days old. Moreover, the court stressed that where the nature of the criminal activity being investigated involved a protracted and continuous course of conduct, as in *Cuba*, the passage of time takes on less significance.[154]

IV. CONFESSIONS

A. *Preservation of Issue for Appeal*

A challenge to the admissibility of a confession on the grounds that it was involuntarily made should be raised in a pretrial motion to suppress.[155] An objection at trial alone may not be sufficient to preserve the defendant's right to appeal the admissibility of the confession.[156] The pretrial motion and determination is required in order that the state be given a right to appeal any adverse decision. Even if a pretrial motion and determination has been made, however, it still may be necessary in some instances for a defendant to make an additional motion challenging the admissibility of this evidence at trial in order properly to preserve the right to object on appeal.[157]

151. *Id.* at 604. In *Zuppardi*, the court noted that the affidavit explained that the suspects, targets of the wiretap, were known to deal exclusively with club members, that they communicated only through codes, and that all available informants were unable or unwilling to assist law enforcement personnel in establishing direct contact with the suspects due to fear of physical danger. *Id.*

152. 362 So. 2d 29 (Fla. 3d DCA 1978).

153. *Id.* at 31-32.

154. *Id.* at 32.

155. FLA. R. CRIM. P. 3.190(i)(2).

156. Wingert v. State, 353 So. 2d 643 (Fla. 3d DCA 1977) (per curiam).

157. *Id.* at 645.

The failure of defense counsel to make a proper objection to the admissibility of a defendant's statement may constitute incompetency of counsel, subjecting the conviction to collateral attack. In *Wingert v. State,*[158] however, the District Court of Appeal, Third District, made it clear that a decision not to seek suppression of a confession does not establish incompetence of counsel where such a decision represents a reasonable trial tactic. In *Wingert,* the court noted that it was apparent from the record that the decision not to seek suppression of a recorded statement was made because the trial counsel felt that exculpatory portions of the statement were strong enough to serve the purpose of getting the defendant's explanation of the crime before the jury without putting the defendant on the witness stand.

B. *Joint Trials*

Several recent Florida decisions have discussed the problems involved when a confession of one defendant is introduced into evidence during a joint trial with other codefendants. As a general principle, a confession by one defendant, who does not testify at trial, implicating other codefendants in a joint trial, is not admissible because the other codefendant is precluded from cross-examining the truthfulness of the confession.[159] In *Cook v. State,*[160] however, in a joint trial for sexual battery, the trial court permitted into evidence the confession of three codefendants even though none of these codefendants testified. Before trial, counsel for each defendant had moved for severance because each apprehended the possible prejudicial effect of the statements. Rather than allow the cases to be severed, the state chose to delete any reference to the other defendants from each of the codefendants' statements.[161] The statements, in edited form, were introduced at trial along with the trial judge's caution to the jury that each statement was to be received in evidence only against the defendant who had given the statement. Nevertheless, the edited statements still indicated that various unmentioned codefendants were also involved in the crime, leaving the jury to infer that the other codefendants charged in the joint trial were those nameless individuals.

On appeal, the District Court of Appeal, Second District, determined that the standard to evaluate the propriety of such an edited

158. 353 So. 2d 643 (Fla. 3d DCA 1977) (per curiam).
159. Bruton v. United States, 391 U.S. 123 (1968).
160. 353 So. 2d 911 (Fla. 2d DCA 1977).
161. FLA. R. CRIM. P. 3.152 (b)(2)(ii) allows the state this option.

statement is whether the "jury was 'highly likely' to determine from a co-defendant's statement that the defendant was the nameless individual incriminated by the statement, . . . even if the inference drawn from the co-defendant's statement is incriminating only when considered in light of other evidence discovered at trial."[162] According to the court, under this standard, the admission of the edited statements was a violation of the defendant's right to confront his accusers. The district court affirmed the codefendants' convictions, however, stating that the overwhelming evidence introduced against them at trial rendered the error harmless.[163]

In *Matthews v. State,*[164] the state again chose to introduce an edited version of a codefendant's confession rather than sever the trial of the codefendants. In *Matthews,* even though any direct reference to either defendant by the other was excised by the prosecutor prior to proffer of their statements, both defendants raised objections to portions of the statements which indicated that each codefendant was less culpable than the other. The defendants argued that the deletion of either of these exculpatory statements would have unduly prejudiced the defendant who made it, whereas the admission of the statements would have allowed the jury to draw adverse inferences from it against the other codefendant. On appeal, the District Court of Appeal, Second District, reversed, stating that even though the trial court had made a good faith effort to edit the statements in a manner which would not prejudice either defendant, the trial court should have either excluded both statements entirely or granted a severance and separate trials.[165]

In *Matthews,* the district court also discussed the proper procedure to be followed by a trial court when confronted with such a problem. First, the state must submit to the court and the defense counsel an unedited copy of the defendant's statement. According to the court, to allow the state to edit the statement beforehand would defeat the purpose of Rule 3.152(b)(2) of the Florida Rules of Criminal Procedure and could lead to prejudice of the defendant or a codefendant without any notice thereof to the court or the defense.

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162. 353 So. 2d at 914.

163. *Id. But see* Russell v. State, 349 So. 2d 1224 (Fla. 2d DCA 1977).

In *Russell,* two codefendants were tried for robbery in a joint trial. During the trial, the court admitted a confession which contained a statement implicating the other codefendant in the robbery. This statement in the codefendant's confession was the only evidence which directly linked the other to that crime. The district court reversed the conviction of that defendant on the grounds that the trial court erred in refusing to delete the incriminating sentence prior to the admission of the confession at trial.

164. 353 So. 2d 1274 (Fla. 2d DCA 1978).

165. *Id.* at 1276.

Second, if a motion to sever is filed, all statements should be considered at that time and, if necessary, edited at the hearing on the motion to sever rather than after the trial has begun.[166]

V. SPEEDY TRIAL

The speedy trial rule[167] was promulgated by the Supreme Court of Florida to promote the efficient operation of the criminal justice system in this state, as well as to minimize the hardships imposed upon accused persons resulting from lengthy delays while awaiting trial.[168] The rights granted to criminal defendants pursuant to the rule are based upon the Supreme Court of Florida's constitutional rulemaking power, rather than an application of state and federal constitutional rights.[169] Recently, the Supreme Court of Florida has recognized that confusion and decisional conflict exist in the lower Florida courts regarding the proper application of several provisions of the speedy trial rule. In several decisions, the supreme court has attempted to rectify this situation by construing and clarifying these rules to achieve a more rational and consistent application in accordance with the public policy goals for which they were enacted.

The Supreme Court of Florida has indicated that the state will be strictly held to speedy trial time limits and that all defendants will be discharged if the state fails properly to maintain these time limits.[170] The trial court, however, retains great flexibility to grant time extensions upon proof by the state that delay is justified by exceptional circumstances.[171] Naturally, on appeal a defendant may still challenge the validity of the extension on the grounds that it was an abuse of the trial court's discretion.[172]

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166. *Id.*

167. FLA. R. CRIM. P. 3.191.

168. Lewis v. State, 357 So. 2d 725, 727 (Fla. 1978).

169. State v. Barnett, 366 So. 2d 411 (Fla. 1978).

FLA. CONST. art. 5, § 2(a) grants the Supreme Court of Florida power to "adopt rules for the practice and procedure in all courts."

170. State v. Barnett, 366 So. 2d 411 (Fla. 1978); Lewis v. State, 357 So. 2d 725 (Fla. 1978).

In general, FLA. R. CRIM. P. 3.191 provides that every person charged with a crime shall be, without demand, brought to trial within 90 days for misdemeanors and 180 days for felonies, and upon demand, within 60 days. For persons already imprisoned, the time limits without demand are one year for misdemeanors and nonviolent felonies, two years for other felonies and capital crimes; upon demand trial must occur within six months.

171. *See* Girrard v. McNulty, 348 So. 2d 311 (Fla. 1977); FLA. R. CRIM. P. 3.191(d)(2), (f).

172. State v. Barnett, 366 So. 2d 411 (Fla. 1978).

A. *Extensions Pending Interlocutory Appeals*

In the past, Florida district courts have been in sharp conflict as to whether an interlocutory appeal by the state automatically tolled the running of the speedy trial time limits during the pendency of that appeal.[173] The pertinent provisions of the speedy trial rule were amended by the Supreme Court of Florida to resolve this issue, and now require the state to make an application to the trial court for an extension during the pendency of an interlocutory appeal.[174] Because of the complex procedural entanglements of some criminal cases, calculation of the speedy trial time limits has not always been simple when an interlocutory appeal was involved. In light of clarifications rendered by the Supreme Court of Florida in *State v. Barnett*,[175] however, the number of days which have lapsed in the speedy trial period can be calculated with relative certainty.

In *Barnett*, the initial indictments charging four defendants with bookmaking were dismissed by the trial court. New indictments were returned and were dismissed as vague and indefinite. The state filed an appeal in the district court to review this dismissal and also filed a motion in the trial court to toll the speedy trial time limit pending disposition of the appeal, which motion the trial court denied.[176] Prior to a determination of the merits, the district court entered an order finding that the trial court should have tolled the speedy trial time and granting the state a ninety day extension. On the merits, however, the district court agreed with the trial court that the indictments were fatally vague. Rather than

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173. *Compare* State v. Small, 346 So. 2d 641 (Fla. 2d DCA 1976) *and* State v. Pearch, 336 So. 2d 1274 (Fla. 1st DCA 1976) *with* Jenkins v. State, 349 So. 2d 1192 (Fla. 4th DCA 1977) *and* State v. Cannon, 332 So. 2d 127 (Fla. 4th DCA 1976).

174. FLA. R. CRIM. P. 3.191(d)(2), which provides:

> **When Time May be Extended.** The periods of time established by this Rule for trial may at any time be waived or extended by order of the court (i) upon stipulation, signed in proper person or by counsel, by the party against whom the stipulation is sought to be enforced, provided the period of time sought to be extended has not expired at the time of signing, or (ii) on the court's own motion or motion by either party in exceptional circumstances as hereafter defined, or (iii) with good cause shown by the accused upon waiver by him or on his behalf, or (iv) a period of reasonable and necessary delay resulting from proceedings including but not limited to an examination and hearing to determine the mental competency or physical ability of the defendant to stand trial, for hearings on pretrial motions, for interlocutory appeals, *for an appeal by the State from an order dismissing the case,* and for trial of other pending criminal charges against the accused. For the purposes of this Rule, any other delay shall be unexcused.

Florida Bar *re* Florida Rules of Criminal Procedure, 343 So. 1247, 1256 (Fla. 1977) (emphasis added to indicate amended portion).

175. 366 So. 2d 411 (Fla. 1978).

176. *Id.* at 413.

pursuing its appeal further, the state filed new indictments in the trial court. The trial court dismissed the new indictments, stating as one of its grounds that the speedy trial time had expired. In so doing, the trial court refused to toll the speedy time limit for that time from the state's request for an extension until the receipt of the district court's mandate.[177]

On appeal, the Supreme Court of Florida held that the speedy trial time limit should have been tolled from the date the state filed its motion for extension until the appellate mandate was received by the trial court. Thus, upon receipt of the mandate, seventy-five days remained within which to bring defendants to trial. Since the trial court in *Barnett* improperly granted the defendant's motion for discharge for violation of the speedy trial rule, the supreme court remanded the case to the trial court with directions that the defendants be brought to trial within a reasonable period of time from receipt of the court mandate, not to exceed ninety days.[178]

B. *Calculating Time Limits: Availability for Trial and Waiver*

The Supreme Court of Florida resolved other clouded areas of the speedy trial rule in *Stuart v. State*.[179] In *Stuart*, the court held that for purposes of calculating the applicable time limitations, the swearing of the weekly jury venire may not be equated with the commencement of trial. Instead, the trial commences with the seating of the jury panel.[180] Furthermore, the court held that under the particular facts of the case, the defendant's participation in plea bargaining did not constitute a waiver of strict compliance with the speedy trial time limitations. In so holding, the court noted that the defendant in *Stuart* had continuously asserted his readiness to go to trial within the time limitations of the rule.[181]

In *Stuart*, the Supreme Court of Florida also noted that the fact that the defendant was not physically present in the courtroom on the last day of the speedy trial period was not sufficient indication of waiver, since the defense attorney asserted that the defendant could be present in the courtroom on short notice. Moreover, the court stated that no presumption of nonavailability attaches to a

177. *Id.* One hundred and five days of the 180 days available under the speedy trial rule had elapsed between the dates the defendants were arrested and the date that the state filed its motion for an extension of time during the pendency of its interlocutory appeal. *Id.*

178. *Id.* In addition, the supreme court held that the state is not required to file for an extension of the speedy trial time limit when appealing erroneous discharges of defendants for the state's alleged noncompliance with the speedy trial rule. *Id.*

179. 360 So. 2d 406 (Fla. 1978).

180. *Id.* at 409.

181. *Id.* at 410.

defendant, and that the burden is on the state to prove that the defendant was not continuously available for trial.[182]

Finally, in *Stuart*, the Supreme Court of Florida rejected the state's claim that the speedy trial limit had been implicitly extended by the trial court when it postponed the trial due to the absence of the state's chief witness. The state argued that this was a sufficient "exceptional circumstance"[183] to justify an extension of the speedy trial limits. The supreme court noted, however, that the procedural rules specifically exclude as an exceptional circumstance the failure of the state to obtain available witnesses within the speedy trial limits.[184] Moreover, according to the court, such extensions are not automatic or presumed from the circumstances, but must be expressly requested in the trial court. Therefore, the state was precluded even if an extension might have been justified since it had never made such a request.[185]

C. *Prisoners*

Generally, criminal defendants charged with felonies must be brought to trial within 180 days of their initial arrest.[186] Florida Rule of Criminal Procedure 3.191(b)(1) makes an exception to that time limitation, providing that a person who is imprisoned in Florida and subsequently charged by indictment or information shall be brought to trial within one year, or within two years if charged with a violent felony or capital crime. In *Lewis v. State*,[187] the Supreme Court of Florida held that this section applies only to those defendants imprisoned in a state or county penal or correctional institution pursuant to a criminal judgment of guilt and not to defendants being held in jail while awaiting trial.[188]

182. *Id.* at 412. Once the state has made a prima facie showing of the defendant's lack of continuous availability, however, the defendant has the ultimate burden of showing he was continuously available for trial. McMullen v. State, 331 So. 2d 357 (Fla. 1st DCA 1976); Troy v. State, 341 So. 2d 223 (Fla. 3d DCA 1976); Richardson v. State, 340 So. 2d 1198 (Fla. 4th DCA 1976).

183. *See* FLA. R. CRIM. P. 3.191(f).

184. 360 So. 2d at 412 (citing FLA. R. CRIM. P. 3.191(f)).

185. *Id.* at 413.

186. FLA. R. CRIM. P. 3.191(a)(1).

187. 357 So. 2d 725 (Fla. 1978).

188. *Id.* at 727. In *Lewis*, the supreme court also noted that situations of multiple prosecutions where one jurisdiction in this state seeks to prosecute a defendant awaiting trial in another county constitute an exceptional circumstance that may be sufficient grounds for an extension.

VI. Pleas of Guilty and Nolo Contendere

A defendant who pleads guilty waives any right to appeal errors occurring before or during the acceptance of the plea.[189] Any review of such errors can be obtained only through collateral attack.[190] A defendant, however, may appeal a sentence imposed following a guilty plea on the grounds that it is excessive.[191] A defendant may also enter a plea of nolo contendere expressly reserving the right to appeal from a prior order of the lower court, identifying with particularity the point of law being reserved.[192] An appellate court, however, will review such an alleged error only if its resolution would be dispositive of the case and the question preserved is one of law, not one of fact.[193]

The standard of review for error reserved on a plea of nolo contendere is whether the record clearly indicates that the state's case against a defendant challenging the admission of certain evidence could not have succeeded without the use of that evidence. In *Brown v. State,*[194] the trial court denied the defendant's pretrial motion to suppress a confession. Defendant thereafter pled nolo contendere, preserving the suppression issue for appeal. On appeal, the District Court of Appeal, Third District, affirmed because the record failed to show clearly that the state's case against the defendant could not have succeeded without the use of the confession sought to be suppressed. The court stated that absent a clear showing by the defendant, it would not presume that the state's case could not have succeeded without the use of the defendant's confession.[195] The Third District concluded by discussing the scope of appeal from a nolo contendere plea:

> The purpose of the . . . rule is to expedite criminal litigation by permitting defendants to plead nolo contendere while preserving a legal question for appeal only where the question is entirely dispositive of the case. That purpose is thwarted when a defendant is permitted to appeal pre-trial rulings of a trial court which are in no way dispositive of the case. Instead of expediting criminal litigation, such a procedure unnecessarily prolongs such cases.[196]

189. Honeycutt v. State, 359 So. 2d 503 (Fla. 3d DCA 1978) (per curiam).

190. Fla. Stat. § 924.06(3) (1977), which provides: "A defendant who pleads guilty or nolo contendere with no express reservation of the right to appeal shall have no right to a direct appeal. Such defendant shall obtain review by means of collateral attack."

191. Smith v. State, 358 So. 2d 1164 (Fla. 2d DCA 1978) (per curiam).

192. Fla. Stat. § 924.06(3) (1977).

193. Martinez v. State, 360 So. 2d 108 (Fla. 3d DCA 1978).

194. 355 So. 2d 138 (Fla. 3d DCA 1978).

195. *Id.* at 139-40.

196. *Id.* at 140.

Although a defendant has no right to appeal from a plea of guilty, he may in some instances ask the trial court for permission to withdraw his guilty plea and appeal the denial of that motion.[197] For example, a defendant should be permitted to withdraw his plea where the record clearly indicates the plea was based upon a failure of communication between the trial court and the defendant or upon a misunderstanding of the facts.[198] In such a case, a defendant must establish that an honest misunderstanding contaminated the voluntariness of the plea.[199]

In *State v. Reasbeck,*[200] the District Court of Appeal, Fourth District, held that the state may similarly withdraw its plea bargain offer at any time until it has been formally accepted by the court. In *Reasbeck,* the district court stated that a plea bargaining offer by the state does not constitute an enforceable contract and, therefore, may be withdrawn if the defendant has done nothing to his legal detriment in reliance upon the state's offer.[201] Once a plea of guilty or nolo contendere has been accepted by the trial court, however, neither the state nor the court has the power to reject the plea over the defendant's objections.[202]

VII. EVIDENCE

A. *Comment on Defendant's Silence*

Prior to the decision of the Supreme Court of Florida in *Clark v. State,*[203] a clear conflict existed among the district courts on the question of whether a contemporaneous objection was necessary to preserve as a point on appeal an improper comment on a defendant's exercise of his right to remain silent. The sharpest conflict appeared between the rulings of the District Court of Appeal, Fourth District, in *Bostic v. State,*[204] and the decision of the District

197. FLA. R. CRIM. P. 3.170(f), which provides in pertinent part: "The court may in its discretion, and shall upon good cause, at any time before a sentence, permit a plea of guilty to be withdrawn . . . ."

198. *See* Surace v. State, 351 So. 2d 702 (Fla. 1977); Thompson v. State, 351 So. 2d 701 (Fla. 1977); Birdsall v. State, 350 So. 2d 798 (Fla. 4th DCA 1977).

199. *See* authorities cited note 198 *supra.*

200. 359 So. 2d 564 (Fla. 4th DCA 1978).

201. *Id.* at 565.

202. State *ex rel.* Milton v. Strickland, 361 So. 2d 446 (Fla. 2d DCA 1978); State *ex rel.* Wilhoit v. Wells, 356 So. 2d 817 (Fla. 1st DCA 1978).

Even though a plea bargain has been accepted, the trial court may still impose a greater sentence than that in the plea bargain agreement. Nevertheless, in such a situation, the defendant must be given a clear opportunity to withdraw his plea and go to trial. *Id.*

203. 363 So. 2d 331 (Fla. 1978).

204. 332 So. 2d 349 (Fla. 4th DCA 1976), *rev'd,* 363 So. 2d 331 (Fla. 1978) (contemporaneous objection not necessary).

Court of Appeal, Second District, in *Clark*.[205] In both *Bostic* and *Clark*, the state had admitted that the testimony elicited was improper. The only legal question presented was whether such a comment on silence constituted reversible error even in the absence of an objection. In *Clark*, the Supreme Court of Florida held that the contemporaneous objection rule should be applied to this situation, requiring an objection and motion for mistrial in order to preserve the error and obtain a new trial.[206]

In resolving this issue, the supreme court reviewed applicable constitutional principles and state and federal precedent. According to the court, it was clear that under *Miranda v. Arizona*,[207] the prosecution could not use the fact that a defendant had claimed his privilege to remain silent in the face of accusation. It was also clear that, if properly preserved for appeal, the admission of testimony indicating the defendant's refusal to waive his right to silence constituted reversible error. The Supreme Court of Florida further stated, however, that such error was reversible without contemporaneous objection only if it constituted "fundamental error"—that error which goes to the foundation of the case or to the merits of the cause of action.[208] The court then held that even though an improper comment on a defendant's exercise of his right to remain silent represents constitutional error, it is not fundamental error.

In *Clark*, the Supreme Court of Florida concluded by providing a comprehensive outline of the status of the law with respect to comments on a defendant's exercise of his right to silence. First, it is reversible error in a jury trial for a prosecutor to comment upon or elicit an improper comment from a witness on the defendant's exercise of his right to remain silent. This constitutes reversible error even if a witness spontaneously volunteers the testimony.[209] Second, in a nonjury trial, an improper comment will usually not result in reversible error, but may serve as grounds for imposing sanctions against the offending person.[210] Third, no error occurs when defense counsel comments on or elicits testimony concerning the defendant's exercise of his right to remain silent.[211] Fourth, when an improper comment is made, the defendant must object and request a mistrial. A failure to object or to ask for a mistrial will be

205. 336 So. 2d 349 (Fla. 4th DCA 1976) (contemporaneous objection required).
206. *Id.* at 335.
207. 384 U.S. 436 (1966).
208. 363 So. 2d at 333.
209. *Id.* at 334.
210. *Id.*
211. *Id.* at 334-35.

considered an implied waiver of the error.[212] Fifth, where the objection and motion for mistrial are made, the trial court must determine whether there was an improper comment. If the trial court denies a mistrial and the defendant is convicted, the improper comment may be raised as a point on appeal.[213] Sixth, if the defendant fails to move for a mistrial and he is convicted, he may not object for the first time on appeal.[214]

B. *Marital Privilege*

In *Kerlin v. State,*[215] the Supreme Court of Florida issued a major opinion resolving the question of whether the evidentiary privilege protecting communications between a husband and wife extends to the observation of criminal conduct of one spouse by another. In *Kerlin,* the court detailed the historical development of the privilege and noted its public policy purpose. According to the supreme court, the primary reason for the immunity is to protect marital confidences which are regarded as so essential to the preservation of the marriage relationship as to outweigh the burden the privilege places on the administration of justice.[216] The court held that it would be unwise to extend this privilege to exclude testimony about criminal acts committed by one spouse and observed by the other. The court stated that contrary to the policies for which the rule was developed, such an application might prevent a spouse from testifying about violence committed upon family members.[217]

Furthermore, the Supreme Court of Florida recognized that the marital evidentiary privilege is a personal one which may be waived by the communicating spouse. Such a waiver occurs either by failure to assert the privilege through objection or by a voluntary revelation by the privilege holder.[218] The court cautioned, however, that the privilege is not waived merely because a defendant testifies in his own behalf without revealing the contents of the confidential communication with his spouse. Similarly, the defendant's spouse may not be cross-examined concerning such conversations.[219]

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212. *Id.* at 334.
213. *Id.*
214. *Id.*
215. 352 So. 2d 45 (Fla. 1977).
216. *Id.* at 51.
217. *Id.* at 52.
218. *Id.*
219. *Id.* at 52-53.

C. *Restrictions on Cross-Examination*

Trial court restrictions on cross-examinations were reviewed on numerous occasions in 1978. In *Coxwell v. State*,[220] the Supreme Court of Florida reaffirmed the broad scope of cross-examination of witnesses, stating that it encompasses all subjects "germane to that witness' testimony on direct examination."[221] In *Coxwell*, at the defendant's trial for the premeditated murder of his wife, a state witness testified that the defendant had hired him to kill the wife. The witness also stated that over a six month period he had discussed various plans for the murder with the defendant. During cross-examination of this witness, the defense began to inquire about the prior plans. The state objected to this line of questioning on the ground that it was beyond the scope of direct examination, and the objection was sustained.

On appeal, the Supreme Court of Florida reversed, stating that although the scope of cross-examination is not without limits, cross-examination of a witness on subjects covered by his direct testimony is an absolute right, the denial of which constitutes reversible error.[223] Curtailment of the defense's inquiry, the court stated, ignored "the expansive perimeters of subject matter relevance which the constitutional guarantee of cross-examination must accommodate to retain vitality."[224]

In *Coxwell*, the Supreme Court of Florida declared that when direct examination opens a general subject, cross-examination is not confined to the specific facts of that testimony. Rather, it extends to the " ' "entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clear the facts testified to . . . ." ' "[225] Moreover, the court emphasized that defense counsel cannot be denied the opportunity to elicit from the state's key witness testimony which may lead to the development of a defense theory or lay a predicate for subsequent impeachment of the witness.[226]

Similarly, in *Brown v. State*,[227] the District Court of Appeal,

220. 361 So. 2d 148 (Fla. 1978).

221. *Id.* at 152.

222. *Id.* at 149-50.

223. *Id.* at 152 (citing Coco v. State, 62 So. 2d 892 (Fla. 1953)). In *Coco*, the supreme court held that the right to cross-examine adverse witnesses on subjects opened by direct examination is an absolute right. 62 So. 2d at 894-95.

224. 361 So. 2d at 152.

225. *Id.* at 151 (quoting Coco v. State, 62 So. 2d 892, 895 (Fla. 1953) (quoting 58 AM. JUR. *Witnesses* § 632, at 352 (1948))).

226. 361 So. 2d at 152.

227. 362 So. 2d 437 (Fla. 4th DCA 1978).

Fourth District, held the trial court's restriction of defense cross-examination, directed to discrediting or impeaching the witness, to be reversible error. In *Brown,* at defendant's trial for sexual battery upon a minor, the child's testimony regarding sexual intercourse with the defendant was corroborated by the child's mother, the defendant's former girl friend. Defense counsel attempted to attack the mother's credibility by showing the stormy past relationship between her and the defendant, but the state's objection to this inquiry was sustained by the trial judge. On appeal, the Fourth District found that the mother's testimony was so incriminating that if the jury believed the story, guilt was clear. The district court concluded that without the right to impeach this damning testimony, the defendant was defenseless and therefore reversed the conviction.[228]

A further limit on the trial court's discretion to restrict cross-examination was reaffirmed in *Keane v. State.*[229] There, the District Court of Appeal, Fourth District, emphasized the defendant's right to cross-examine a prosecution witness in reference to criminal charges the witness is facing at the time he testifies. Thus, in *Keane,* the Fourth District reversed the defendant's conviction because the trial court had refused to allow defense counsel to question the alleged victim about the victim's pending criminal charges.[230]

Questioning an adverse witness to demonstrate bias affecting his credibility is also within the scope of cross-examination. In *Lombardi v. State,*[231] the defendant was charged with assaulting a law enforcement officer. At trial, through his own testimony and through cross-examination of the alleged victim, the defendant attempted to introduce evidence of a civil suit he had filed against the sheriff's department four years earlier.[232] The trial court sustained the state's objections to the cross-examination on the grounds that remoteness in time rendered the civil suit immaterial. On appeal, the District Court of Appeal, Fourth District, reversed, holding that the exclusion of this evidence was prejudicial because it was clearly important to demonstrating the bias and credibility of the witness.[233] The court stated that the passage of four years time since the suit had been filed went to the weight of the evidence, not its admissibility.

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228. *Id.* at 438.
229. 357 So. 2d 457 (Fla. 4th DCA 1978).
230. *Id.* at 458.
231. 358 So. 2d 220 (Fla. 4th DCA 1978).
232. *Id.* at 221.
233. *Id.* at 222.

D. *Restrictions on Defense Testimony*

In *Flynn v. State*,[234] the District Court of Appeal, Fourth District, held that where entrapment is asserted as a defense, the defendants must be permitted to testify as to their motives and state of mind at the time of the alleged entrapment.[235] In *Flynn*, during the defendant's trial for delivery of cannabis, the trial judge refused to allow the defendant to testify about a discussion he had with the informant involved in setting up a drug transaction. In reversing, the Fourth District emphasized that by excluding testimony relevant to the defendant's state of mind, the trial court had removed the heart of defendant's entrapment defense.[236]

In *Banks v. State*,[237] a defendant charged with murder attempted to support his claim of self-defense with the testimony of witnesses concerning the deceased's reputation for violence. The trial court sustained the prosecutor's objection to introduction of this testimony on the grounds that the defendant had not established his prior knowledge of the deceased's reputation. On appeal, the Fourth District reversed, stating that evidence of a deceased's violent character is admissible when self-defense is asserted if the issue involves either the conduct of the deceased or the reasonableness of the defendant's belief that he is in imminent danger from the deceased.[238] The Fourth District instructed that only when a defendant seeks to prove that his actions were based on the deceased's reputation for violence is it necessary that a defendant establish prior knowledge of such reputation. In *Banks*, the victim's reputation for violence was relevant to support the defendant's testimony concerning the deceased's aggressiveness at the time of the murder.[239]

In *White v. State*,[240] the District Court of Appeal, Fourth District, held that it was reversible error for the trial judge in a burglary prosecution to exclude defendant's testimony concerning his activi-

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234. 351 So. 2d 377 (Fla. 4th DCA 1977).

235. *Id.* at 378.

236. *Id.*

237. 351 So. 2d 1071 (Fla. 4th DCA 1977).

238. *Id.* at 1072.

239. *Id.*

In Jenkins v. State, 349 So. 2d 1191 (Fla. 4th DCA 1977), the Fourth District held that it was error for the trial court to exclude evidence of a previous attack on the defendant by the victim where the defendant was relying on self-defense in his aggravated assault case. Also, in Morofsky v. State, 354 So. 2d 1249 (Fla. 4th DCA 1978), the Fourth District held in an aggravated assault case that testimony of threats made to the defendant by the victim's brother should have been allowed into evidence. The court noted that the two brothers had acted in a common scheme to force payment of a debt by the defendant.

240. 356 So. 2d 56 (Fla. 4th DCA 1978).

ties on the night of the burglary. The trial judge had excluded the testimony because the defendant had failed to reply to the state's pretrial demand for notice of intention to claim alibi as required by Florida Rule of Criminal Procedure 3.200. The Fourth District held that where, as in *White,* the alibi is the defendant's only defense, notice is not required under Rule 3.200.[241] The court further noted that since the alibi went to the heart of White's defense, the exclusion of the testimony deprived the defendant of his right to be heard in his own defense.

E. *Proffer of Testimony*

Generally, when a court denies the admission of certain testimony, the attorney seeking the admission of this evidence should make an offer of proof (proffer). The purpose of a proffer is to put into the record that testimony which was excluded from the jury at trial so that an appellate court can consider the admissibility of the testimony.[242] It is ordinarily reversible error for the trial court to deny a proffer of testimony for the record.[243] The refusal of a trial court to allow a proffer, however, may not be reversible error if all of the testimony which could have been established on proffer was allowed into evidence through the testimony of other witnesses.[244]

A proffer must be clear and specific so that the appellate court can determine whether the trial court erred in excluding the proposed testimony.[245] Counsel should therefore ensure that statements constituting an offer of proof are reasonably specific and demonstrate the purpose of proof offered unless such purpose is clearly apparent. If the party attempting to introduce evidence does not, by his offer of proof, make its purpose clear to the trial court, objection to a ruling denying admission of the evidence will not be considered by the appellate court, even though the party may have had a legitimate purpose in proposing its introduction.[246]

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241. *Id.* at 57.

242. Williams v. State, 353 So. 2d 956 (Fla. 1st DCA 1978); *see* C. MCCORMICK, THE LAW OF EVIDENCE 110-12 (2d ed. 1972).

243. M.P. v. State, 350 So. 2d 1122 (Fla. 3d DCA 1977) (reversible error because proffered testimony placed witness' credibility in issue and was essential to defense).

244. Williams v. State, 353 So. 2d 956 (Fla. 1st DCA 1978) (proffer of testimony regarding coercion of state's witness denied, but counsel allowed to cross-examine witness and police officers involved in alleged coercion).

245. Phillips v. State, 351 So. 2d 738 (Fla. 3d DCA 1977) (proposed testimony of doctors may have been relevant to assertion of self-defense in murder trial, but proffer was not clear and specific enough for court to evaluate admissibility).

246. *Id.*

VIII. JURY INSTRUCTIONS

A. *Lesser-Included Offenses*

In *State v. Abreau,*[247] the Supreme Court of Florida clarified the application of the harmless error doctrine to a trial court's failure to give requested jury instructions on lesser-included offenses. In *Abreau,* prior to an inquiry into the merits, the court noted that the distinction between the next immediate lesser offense, which is one step removed from the offense charged, and an offense which is two steps removed, is critical to this issue.

According to the court, it is prejudicial per se for a trial court to refuse to give instructions on the next immediate lesser-included offense.[248] This error cannot be considered harmless because it is impossible to determine if, given the complete instruction, the jury would have "pardoned" the defendant to the extent of convicting him on the lesser offense.[249]

The Supreme Court of Florida made it clear, however, that where, as in *Abreau,* the court gave instructions on the next immediate lesser-included offense and only refused to instruct the jury on an offense two steps removed, the harmless error doctrine does apply.[250] The court reasoned that in this situation "the jury is given a fair opportunity to exercise its inherent 'pardon' power by returning a verdict of not guilty as to the next lower crime."[251]

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247. 363 So. 2d 1063 (Fla. 1978) (per curiam).

248. *Id.* at 1064 (citing Lomax v. State, 345 So. 2d 719 (Fla. 1977)).

249. 363 So. 2d at 1064.

250. *Id.* In so holding, the supreme court stated that to the extent that Lomax v. State, 345 So. 2d 719 (Fla. 1977), "intimates that the harmless error doctrine cannot be invoked whenever there has been a failure to instruct on *any* lesser-included offense, it is disapproved." 363 So. 2d at 1064 (emphasis by the court).

251. 363 So. 2d at 1064. The court concluded by providing a helpful illustration of the next immediate lesser-included offense—two step removed lesser-included offense dichotomy:

> [I]f a defendant is charged with offense "A" of which "B" is the next immediate lesser-included offense (one step removed) and "C" is the next below "B" (two steps removed), then when the jury is instructed on "B" yet still convicts the accused of "A" it is logical to assume that the panel would not have found him guilty only of "C" (that is, would have passed over "B") so that the failure to instruct on "C" is harmless. If, however, the jury only receives instructions on "A" and "C" and returns a conviction on "A", the error cannot be harmless because it is impossible to determine whether the jury, if given the opportunity, would have "pardoned" the defendant to the extent of convicting him on "B" (although it may have been unwilling to make the two-step leap downward to "C").

Id.

B. *Attempts*

In *State v. Thomas,*[252] the Supreme Court of Florida recognized that the requirement for instructions on lesser-included offenses does not apply to an attempt to commit the substantive crime charged, where the attempt itself is not a punishable crime. Thus, in *Thomas,* where the defendant was charged with possession of burglary tools and only the actual possession of burglary tools accompanied by a criminal intent or usage was a crime, no instruction on attempt was required.[253]

Similarly, in *Hestor v. State,*[254] the District Court of Appeal, Fourth District, held that where the elements of the crime charged include an attempt, it is not necessary to give a separate instruction on attempt. The reason for this rule is that where a crime is itself an attempt to do an act or accomplish a result, there can be no attempt to commit that crime.[255]

C. *Requested Instructions*

Defense counsel's failure to object to a trial court's refusal to give a particular jury instruction, or the failure to make a timely objection, usually constitutes a waiver of the issue on appeal.[256] Moreover, unless the standard jury instructions are clearly inadequate or erroneous under the circumstances, their use will not constitute reversible error.[257]

Where, however, a defendant does not request a specific instruction at the charge conference but raises an objection to an instruction before the jury begins deliberations, the trial court's failure to give an appropriate instruction at that time may constitute reversible error.[258] Furthermore, a trial judge is required to

252. 362 So. 2d 1348 (Fla. 1978).

253. *Id.* at 1350.

254. 363 So. 2d 26 (Fla. 4th DCA 1978).

255. King v. State, 339 So. 2d 172 (Fla. 1976).

256. *See* Simpkin v. State, 363 So. 2d 45, 46-47 (Fla. 3d DCA 1978) (per curiam); Jones v. State, 358 So. 2d 37, 38 (Fla. 4th DCA 1978); Stanley v. State, 357 So. 2d 1031, 1034 (Fla. 3d DCA 1978) (per curiam).

257. *See* State v. Carrizales, 356 So. 2d 274 (Fla. 1978). In *Carrizales,* defendant's requested instruction on manslaughter was denied. Instead, the trial court instructed on self-defense, excusable homicide and justifiable homicide because defendant had raised self-defense as a defense theory. The Supreme Court of Florida affirmed defendant's conviction, stating that the standard instructions given by the trial judge adequately covered the proffered defense. *Id. See also* Barket v. State, 356 So. 2d 263 (Fla. 1978) (per curiam); Rabin v. State, 356 So. 2d 39 (Fla. 3d DCA 1978).

258. Bunn v. State, 363 So. 2d 16 (Fla. 3d DCA 1978). In *Bunn,* the district court noted, however, that tte "better practice" would have been for defendant to make a specific request at the charge conference. *Id.* at 17.

charge the jury on the law of the case,[259] and, regardless of whether that instruction is standard or proposed by the defense, his failure to do so is reversible error.[260]

D. *Reinstruction of the Jury*

A trial court may not communicate with the jury unless the defendant, defendant's counsel and the state are present.[261] Moreover, in *Ivory v. State*,[262] the Supreme Court of Florida made it clear that such improper communication constitutes harmful error:

> Any communication with the jury outside the presence of the prosecutor, the defendant, and defendant's counsel is so fraught with potential prejudice that it cannot be considered harmless.
>
> . . . [I]t is prejudicial error for a trial judge to respond to a request from the jury without the prosecuting attorney, the defendant, and defendant's counsel being present and having the opportunity to participate in the discussion of the action to be taken on the jury's request. This right to participate includes the right to place objections on record as well as the right to make full argument as to the reasons the jury's request should or should not be honored.[263]

In *Henry v. State*,[264] the jury, after receiving instructions on nine charges related to murder, informed the judge: "we do have a problem understanding the difference in murder in the first degree and murder in the second degree."[265] After a conference with counsel, the court reinstructed the jury only on first and second degree murder, overruling the defendant's request for reinstruction on all degrees of unlawful homicide and upon justifiable and excusable homicide.[266]

In affirming the trial judge's limited reinstruction, the Supreme Court of Florida noted that it is within the discretion of the trial judge to determine the feasibility and scope of reinstruction.[267] The

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259. FLA. R. CRIM. P. 3.390(a).

260. *See, e.g.*, Harrison v. State, 149 Fla. 365, 5 So. 2d 703 (1942); Taylor v. State, 320 So. 2d 428 (Fla. 2d DCA 1975). This assumes a timely objection where appropriate.

261. Ivory v. State, 351 So. 2d 26 (Fla. 1977); McQuay v. State, 352 So. 2d 1276 (Fla. 1st DCA 1977).

For example, in *McQuay*, the District Court of Appeal, First District, held that it was reversible error for the bailiff, without the presence of defense counsel, to reply to the jury's question regarding the effect of the failure of a jury to come to a verdict.

262. 351 So. 2d 26 (Fla. 1977).

263. *Id.* at 28.

264. 359 So. 2d 864 (Fla. 1978).

265. *Id.* at 865.

266. *Id.*

267. *Id.* at 866.

court cautioned, however, that the reinstruction must be complete and not give the appearance of placing the trial judge in the role of an interested advocate rather than an impartial arbiter.[268] The supreme court concluded by stating that where, as in *Henry*, the reinstruction responds directly and impartially to the jury's question, "[r]equiring the court to repeat all of its original instructions whenever the jury requests additional instructions on a particular point would be both exhausting and time consuming to the court, the jury and the parties."[269]

IX. SENTENCING

A. *Credit, General Sentences and Split Sentences*

Credit is now granted automatically to defendants for time incarcerated while awaiting trial and sentencing.[270] Moreover, any sentence must take into account time spent in a state hospital pursuant to commitment under the mentally disordered sex offender program.[271]

In the area of general sentences, it is now well settled that trial judges may no longer commit a person to a prison term "at hard labor."[272] Furthermore, a general sentence may not be imposed upon a defendant convicted of multiple offenses, even if the defendant pled guilty to all offenses charged.[273] Rather, any sentence given must specify for which offense it has been imposed.

Florida's split sentencing statute[274] provides that a sentencing judge may prescribe a set period of incarceration, followed by a specified period of probation. In *State v. Holmes*,[275] the Supreme

268. *Id.* at 867.

269. *Id.* In reaching its decision, the supreme court distinguished its opinion in Hedges v. State, 172 So. 2d 824 (Fla. 1965). The court stated that *Hedges* merely held "that where a jury specifically requests reinstruction on the 'different degrees' of the charges levied, and, accordingly, the court reinstructs on manslaughter and the other degrees of unlawful homicide, the court is then compelled to reinstruct on excusable justifiable homicide as a necessary concomitant of manslaughter." 359 So. 2d at 867.

270. FLA. STAT. § 921.161(1) (1977); *see* Brooks v. State, 349 So. 2d 794 (Fla. 2d DCA 1977) (per curiam).

271. FLA. STAT. § 917.218 (1977); *see* Hall v. State, 358 So. 2d 891 (Fla. 2d DCA 1977) (per curiam).

272. Brooks v. State, 349 So. 2d 794 (Fla. 2d DCA 1977) (per curiam).

273. Dorfman v. State, 351 So. 2d 954 (Fla. 1977). In *Dorfman*, the Supreme Court of Florida rendered a scathing condemnation of the use of general sentences in this context: "The evil of a general sentence . . . inheres in the uncertainty that its inscrutability creates, for if the trial judge had committed reversible error as to any count for any reason, the entire sentence would have to be vacated." *Id.* at 957.

274. FLA. STAT. § 948.01(4) (1977).

275. 360 So. 2d 380 (Fla. 1978).

Court of Florida made it clear that the combined split sentences cannot exceed the maximum period of incarceration allowable under the statute defining the crime.[276] If probation is revoked, however, a trial judge may impose any initially valid sentence, less time already served.[277]

In *Alvarez v. State*,[278] the Supreme Court of Florida made it equally clear that a defendant convicted of a life felony may be sentenced to any term, even a term presumptively longer than the defendant's life expectancy. According to the court, "[a]ny sentence no matter how short, may eventually extend beyond the life of the prisoner. Mortality and life expectancy are irrelevant to limitations . . . ."[279]

Section 775.084 of the Florida Statutes (1977) provides enhanced sentences for habitual felony offenders. In *Grey v. State*,[280] the District Court of Appeal, Fourth District, held that as a condition precedent to the imposition of an enhanced sentence under the recidivist statute, the trial court must make a determination based on a preponderance of evidence that the enhanced sentence is necessary to protect the public from further criminal activity by the defendant.[281] Moreover, the court emphasized that the evidence relied upon by the trial court for the enhanced sentence must be produced in open court.[282]

B. *Mandatory Minimum Sentencing*

Section 775.087(2) of the Florida Statutes (1977) prescribes a three year minimum term of imprisonment for the conviction of certain enumerated felonies if the perpetrator had in his possession a firearm. The Supreme Court of Florida, although recognizing the constitutionality of these mandatory minimum sentencing provisions,[283] has directed that the provisions must be narrowly construed.[284] Only the crimes specifically enumerated in the statute require the three year minimum sentence if a firearm were used.[285]

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276. *Id.* at 383.

277. *Id.* Defendant, however, is not given credit for time spent on probation.

278. 358 So. 2d 10 (Fla. 1978).

279. *Id.* at 12 (footnote omitted).

280. 362 So. 2d 425 (Fla. 4th DCA 1978).

281. *Id.* at 426; Grimmett v. State, 357 So. 2d 461 (Fla. 2d DCA 1978) (per curiam).

282. 362 So. 2d at 426.

283. D'Alessandro v. Shearer, 360 So. 2d 774 (Fla. 1978); Sowell v. State, 342 So. 2d 969 (Fla. 1977).

284. *See* Earnest v. State, 351 So. 2d 957 (Fla. 1977); State v. Wershow, 343 So. 2d 603 (Fla. 1977).

285. *See* Jones v. State, 356 So. 2d 4 (Fla. 4th DCA 1977) (statute lists "any murder" but does not specify manslaughter); Rozier v. State, 353 So. 2d 193 (Fla. 3d DCA 1977) (per

Moreover, the mandatory minimum sentences only apply to an individual who was in personal possession of a firearm during the commission of the crime. The provisions do not apply to persons who participated in an enumerated felony in which another participant possessed a firearm.[286] In addition the District Court of Appeal, Second District, has held that consecutive three year sentences are not required for multiple count convictions and that the trial judge has discretion to impose consecutive or concurrent minimum three year sentences in such cases.[287]

C. *Authority to Modify the Sentence*

The trial court may reduce a legally imposed sentence within sixty days and may correct an illegally imposed sentence at any time.[288] A trial court may also correct clerical mistakes in its judgment and records at any time.[289] It is now clear, however, that once a notice of appeal has been filed from the judgment and sentence, exclusive jurisdiction vests in the appellate court.[290] If, however, an appellate court has affirmed the judgment of conviction or the sentence imposed, or has denied an appeal or petition for certiorari, the trial court can reduce the sentence within sixty days of receipt of the appellate court's order.[291]

D. *Mentally Disordered Sex Offenders*

Section 917.13 of the Florida Statutes (1977) vests the trial court with discretion to defer sentencing a defendant who has been convicted or has pled guilty to a sex offense.[292] Instead, the court

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curiam) (manslaughter not specified in statute). The statute lists the following felonies: "murder, sexual battery, robbery, burglary, arson, aggravated assault, aggravated battery, kidnapping, escape, breaking and entering with intent to commit a felony, or aircraft piracy, or any attempt to commit" these crimes. FLA. STAT. § 775.087(2)(a) (1977).

286. Earnest v. State, 351 So. 2d 957, 958 (Fla. 1977) (provisions do not apply to "vicarious possession").

287. Brown v. State, 353 So. 2d 214 (Fla. 2d DCA 1977) (also holding that mandatory minimum sentence does not preclude allowance of credit for time served prior to imposition of sentence).

288. FLA. R. CRIM. P. 3.800.

289. Perry v. State, 357 So. 2d 425 (Fla. 3d DCA 1978) (per curiam) (error in bench docket); *see* Biggs v. Wainwright, 223 So. 2d 316 (Fla. 1969).

290. Depson v. State, 363 So. 2d 43 (Fla. 1st DCA 1978) (per curiam); Kelly v. State, 359 So. 2d 493 (Fla. 1st DCA 1978) (per curiam).

291. FLA. R. CRIM. P. 3.800(b); *see* State v. Mancil, 354 So. 2d 1258 (Fla. 2d DCA 1978); State v. Migdahl, 353 So. 2d 635 (Fla. 3d DCA 1977); State *ex rel.* Lewis v. Sandstrom, 350 So. 2d 1112 (Fla. 3d DCA 1977).

292. FLA. STAT. § 917.14 (1977) provides that this certification may be made on the motion of the court, the defendant or the state.

may certify the defendant for a hearing and examination to determine whether he is a mentally disordered sex offender. Although certification of a defendant is totally within the discretion of the trial court, once a defendant has been certified, the hearing procedure is mandatory.[293] Moreover, it is improper for a trial court to defer until after the defendant has served his sentence the determination as to whether the defendant needs treatment.[294]

In *Gammill v. Wainwright,*[295] the Supreme Court of Florida declared that once a defendant has been committed for treatment, the trial court must defer sentencing until treatment is completed.[296] Furthermore, the trial court, in sentencing, must consider any rehabilitative effect the treatment may have had on the defendant. According to the supreme court, this procedure is necessary to give effect to the treatment purpose of the statute without preventing the trial court from requiring a prison term where circumstances indicate that it is necessary.[297]

E. *Probation*

In *Hines v. State,*[298] the Supreme Court of Florida determined that affidavits charging violations of probation which merely allege that the probationer has been arrested for a felony are an insufficient basis for permanent revocation of probation.[299] In *Hines,* the defendant had conceded that the evidence introduced at his probation revocation hearing was sufficient to justify the revocation of his probation. He contended, however, that although an affidavit merely alleging that a probationer has been arrested for a certain felony is a sufficient basis for *temporary* revocation of probation, a *permanent* revocation must be based upon an affidavit alleging that the probationer actually committed the crime charged and must provide sufficient allegations as to the essential factual elements of that crime.[300]

On certiorari, the Supreme Court of Florida emphasized that

293. Cook v. State, 357 So. 2d 462 (Fla. 2d DCA 1978).

294. Hoshaw v. State, 359 So. 2d 920 (Fla. 3d DCA 1978).

If the trial court finds that a defendant is a mentally disordered sex offender, it must commit him for care, treatment and rehabilitation and defer sentencing until treatment has been completed. FLA. STAT. § 917.19 (1977); *see* Gonsonovowski v. State, 350 So. 2d 19 (Fla. 2d DCA 1977).

295. 357 So. 2d 714 (Fla. 1978).

296. *Id.* at 716.

297. *Id.*

298. 358 So. 2d 183 (Fla. 1978).

299. *Id.* at 185.

300. *Id.* at 184.

probation revocation procedures must comply with minimum requirements of due process, and that it is generally improper permanently to revoke probation based solely upon proof that a probationer has been arrested.[301] Fundamental fairness requires that a defendant be placed on notice as to what he must do or refrain from doing while on probation. The supreme court, therefore, directed that any affidavit upon which a permanent revocation of probation is to be based must set forth the basic facts concerning the alleged violation, including its nature, time and place of occurrence.[302] The court noted, however, that an affidavit for revocation of probation need not set forth factual allegations with the specificity required in criminal indictments and informations.[303]

F. *Conditions of Probation*

In *Isaacs v. State*[304] and *Pace v. State,*[305] the District Court of Appeal, Fourth District, upheld, as a condition of probation, a trial court's imposition of the requirement that the probationer consent to a search of his person, residence or automobile by any law enforcement officer at any time.[306] In *Grubbs v. State,*[307] however, the Fourth District, when presented with the identical question, chose not to follow its past decisions. Instead, the Fourth District certified the question of the propriety of such conditions to the Supreme Court of Florida.[308] Since the supreme court has not yet rendered its decision on the question, the validity of such conditions remains in doubt.

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301. *Id.* at 185 (citing Gagnon v. Scarpelli, 411 U.S. 778 (1973)).

302. *Id.* at 185.

303. *Id.* In *Hines,* the supreme court conceded that the written factual allegations in the affidavit for violation of probation did not provide sufficient notice to Hines of the charges against him. Nonetheless, the court found no violation of due process and upheld the revocation since the record clearly indicated that the probationer had actual notice of the charges, that he had been arrested near the scene of the crime shortly after its occurrence, and that he had confessed to his involvement. *Id.*

304. 351 So. 2d 359 (Fla. 4th DCA 1977).

305. 350 So. 2d 1075 (Fla. 4th DCA 1977).

306. In *Pace,* the Fourth District stated that such a condition passes muster under a probationer's diminished fourth and fifth amendment rights. *Id.* at 1076.

307. 362 So. 2d 396 (Fla. 4th DCA 1978).

308. *Id.* at 397. The district court stated:

> [W]e feel this question is of great public interest and accordingly the following question is hereby certified to the Supreme Court:
>
> > Is a condition of probation requiring a probationer to consent to a search at any time, by any law enforcement officer, violative of the probationer's rights under the Fourth Amendment of the United States' Constitution or Article I, Section 12 of the Florida Constitution?
>
> *Id.*

Restitution has long been considered a proper condition of probation.[309] In *Bunting v. State*,[310] however, the District Court of Appeal, Fourth District, cautioned that trial courts do not have authority to impose restitution in addition to a term of imprisonment where the sentencing statute does not authorize restitution as a means of punishment. In addition, in *Byrd v. State*,[311] the Fourth District declared that in the case of an indigent defendant, restitution is an improper condition of probation.

X. DEATH PENALTY

Section 921.141(1) of the Florida Statutes (1977), requires a separate sentencing hearing in all cases in which a defendant has been convicted of a capital crime. In this hearing, the sentencing jury and judge must determine whether a death sentence is appropriate by weighing the aggravating factors proven by the prosecution against the mitigating factors presented by the circumstances of the case.[312] Although the aggravating factors which can be consid-

309. *See, e.g.*, Cuba v. State, 362 So. 2d 29 (Fla. 3d DCA 1978) (per curiam).

310. 361 So. 2d 810 (Fla. 4th DCA 1978).

311. 353 So. 2d 1228, 1229 (Fla. 4th DCA 1978).

312. FLA. STAT. § 921.141(5)-(6) (1977), which provide:

(5) AGGRAVATING CIRCUMSTANCES—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

ered by the judge and jury are confined to those enumerated in the statute, there is no similar restriction on the consideration of mitigating circumstances.[313] In fact, in *Songer v. State,*[314] the Supreme Court of Florida made it clear that this nonexclusive construction of the mitigating circumstances section is necessary for the death penalty statute to pass muster under the eighth and fourteenth amendments to the Constitution of the United States.[315]

A. *"Doubling Up" of Aggravating Circumstances*

Several of the aggravating circumstances enumerated in section 921.141(5) overlap, and, in some circumstances, trial courts have found the existence of two aggravating factors supported by the same set of facts. For example, in *Provence v. State,*[316] the sentencing court found a murder had been committed during the commission of a robbery. Based upon these same facts, the court also determined that the murder was committed for pecuniary gain.[317] Recognizing that the existence of both aggravating circumstances would be present in all robbery murders, and not where the murder was committed in the course of any other enumerated felony, the Supreme Court of Florida held that such "doubling up" of aggravating factors could not be approved since it would unreasonably tip the scales in favor of the death sentence.[318]

Similarly, in *Ellege v. State,*[319] the Supreme Court of Florida held that the addition of a nonstatutory aggravating factor into the weighing process constitutes reversible error where mitigating circumstances exist. In *Jackson v. State,*[320] however, the Supreme Court of Florida, relying on *Provence* and *Ellege,* upheld a death

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(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

313. *See, e.g.,* Washington v. State, 362 So. 2d 658 (Fla. 1978) (per curiam) (consideration of defendant's voluntary surrender and ultimate guilty plea appropriate); McCaskill v. State, 344 So. 2d 1276 (Fla. 1977) (review of facts in light of other decisions to determine if death sentence appropriate); Chambers v. State, 339 So. 2d 204 (Fla. 1976) (consideration of the totality of the circumstances).

314. 365 So. 2d 696 (Fla. 1978) (per curiam).

315. *Id.* at 700. *See also* Spinkellink v. Wainwright, 578 F.2d 582, 620-21 (5th Cir. 1978).

316. 337 So. 2d 783 (Fla. 1977), *cert. denied,* 431 U.S. 969 (1977).

317. 337 So. 2d at 786.

318. *Id.*

319. 346 So. 2d 998 (Fla. 1977).

320. 359 So. 2d 1190 (Fla. 1978) (per curiam), *cert. denied,* 99 S. Ct. 881 (1979).

sentence even though it was based on doubling up of statutory aggravating circumstances, since no mitigating circumstances existed. According to the court, in such cases there is no danger that an unauthorized aggravating factor has served to overcome the mitigating circumstances in the weighing process.[321]

The same reversible error test applies in cases where a trial court has improperly considered a nonstatutory aggravating factor in the weighing process. In *Mikenas v. State,*[322] the trial court listed as an aggravating factor the defendant's substantial history of prior criminal activity. On appeal, the Supreme Court of Florida held that the nonstatutory circumstance should not have been considered by the trial court and, since there had been mitigating circumstances, required the case to be remanded for resentencing.[323]

B. *Heinous, Atrocious and Cruel Murders*

Conviction of a capital felony which was "especially heinous, atrocious, or cruel" is considered an aggravating circumstance in the determination of whether to impose the death penalty.[324] In *State v. Dixon,*[325] the Supreme Court of Florida limited this statutory factor to those capital felonies which are accompanied by such additional acts as to set the crime apart from the norm of capital felonies. Only those conscienceless or pitiless murders which are unnecessarily tortuous to the victims are included in this category.[326]

Applying this standard, in *Salvatore v. State,*[327] the Supreme Court of Florida upheld the trial court's finding that the defendant's actions were heinous, atrocious and cruel. In *Salvatore,* the defendant and several coconspirators concocted an elaborate plan to murder a wealthy business associate. The victim was lured into the business office and attacked with a steel pipe. Two of the conspirators took turns beating the victim to death, while the victim repeatedly begged for mercy.[328]

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321. *Id.* at 1001-03.

322. 43 FLA. L.W. 529 (Fla. Nov. 9, 1978) (No. 75-579C).

323. *Id.* at 530.

324. FLA. STAT. § 921.141(5)(h) (1977).

325. 283 So. 2d 1 (Fla. 1973).

326. *Id.* at 9.

327. 366 So. 2d 745 (Fla. 1978).

328. *Id.* at 426. Applying the same standard, the Supreme Court of Florida also found heinous, atrocious and cruel crimes. In Jackson v. State, 359 So. 2d 1190 (Fla. 1978) (per curiam), *cert. denied,* 99 S. Ct. 881 (1979), the defendant and a companion abducted a couple and drove them to an isolated area. The male victim was shot while resisting his captors but somehow managed to escape. The female victim was shot and was stuffed in the car's trunk still alive. She was then transported to another isolated area. An electrical cord was tied

In *Riley v. State,*[329] however, the Supreme Court of Florida reversed the trial court's finding of heinous, atrocious and cruel circumstances because the trial court had not focused its inquiry on the effect of the defendant's acts on the victim. In *Riley,* the trial court had found the fact that the victim's son was forced to watch his father's execution to be sufficiently atrocious to warrant the death penalty. In reversing, the supreme court stated that "[t]here was nothing atrocious (for death penalty purposes) done to the victim . . . who died instantaneously from a gunshot in the head."[330]

C. *Murder to Avoid Lawful Arrest*

Another aggravating circumstance occurs when a capital felony is committed for the purpose of avoiding lawful arrest.[331] In *Riley v. State,*[332] the Supreme Court of Florida construed this factor to include the murder of witnesses, who are not law enforcement personnel, where the proof of intent to avoid arrest and detection is very strong. Also, in *Washington v. State,*[333] the supreme court upheld the application of this factor even though the defendant has eventually surrendered to the police and confessed to the crime.

D. *Sentencing Disparity*

In *Slater v. State,*[334] the Supreme Court of Florida vacated the defendant's death sentence because a more culpable accomplice had received a life sentence. The court recently reaffirmed this principle in *Jackson v. State,*[335] stating that " 'defendants should not be treated differently upon the same or similar facts.' "[336] In *Jackson,*

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around her neck, and she was covered with branches and shrubs. In that condition, she was left to die, and she finally suffocated. The trial court noted that the victim was eight months pregnant at the time of her death.

In Smith v. State, 356 So. 2d 395 (Fla. 4th DCA), *cert. denied,* 357 So. 2d 188 (Fla. 1978), the defendant and two accomplices planned the robbery of a homosexual. After robbing the victim, the criminals put the victim in the trunk of his car and drove him to an isolated area. The defendant then hit the victim with a tire iron while an accomplice repeatedly stabbed him with an icepick. Believing the man to be dead, the murderers locked the victim in the trunk, doused the car with gasoline, and set it afire. Expert testimony revealed the victim had died from incineration or asphyxiation.

329. 366 So. 2d 19 (Fla. 1978) (per curiam).

330. *Id.* at 21.

331. FLA. STAT. § 921.141(5)(e) (1977).

332. 366 So. 2d 19 (Fla. 1978) (per curiam).

333. 362 So. 2d 658 (Fla. 1978) (per curiam). In *Washington,* the supreme court noted that the defendant surrendered only after his accomplices had been arrested. *Id.* at 661.

334. 316 So. 2d 539 (Fla. 1975).

335. 366 So. 2d 752 (Fla. 1978) (per curiam).

336. *Id.* at 757 (quoting Slater v. State, 316 So. 2d 539, 542 (Fla. 1973)).

however, the court held that the disparity between the sentences imposed on the codefendants was justified because the defendant receiving the death penalty was more culpable under the total circumstances of the case and was the dominating force in the commission of the crime.[337]

E. *Jury Recommendations*

In *Buckrem v. State*,[338] the Supreme Court of Florida reaffirmed the rule that:

> "A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."[339]

Buckrem involved a personal dispute between neighbors in the apartment building. During the late evening, the defendant, who had been drinking heavily, insulted his neighbor's girlfriend. The neighbor struck the defendant, who fell and sustained cuts on his face. While his wife washed the blood off his face, the defendant stated that he was going to kill his neighbor. Early the next morning the defendant broke into the neighbor's apartment, struck the neighbor in the eye with the barrel of a gun and then shot him. The girlfriend was then shot to death.[340]

After Buckrem had been found guilty, the jury recommended that a life sentence be imposed. The trial court, however, imposed the death sentence.[341] The Supreme Court of Florida reversed, stating:

> Defendant Buckrem was drinking during the night the homicide was committed. He had a previous altercation with Caylor and was obviously disturbed, as well as intoxicated. The defendant had no previous criminal activity, was gainfully employed, but engaged in the use of alcoholic beverages on weekends. On the facts and circumstances of this case, there is insufficient reason shown by the record to override the jury's advisory sentence. After carefully reviewing the entire record we conclude that the court should have followed the jury's recommendation for life sentence.[342]

337. *Id.*; *see* Smith v. State, 365 So. 2d 704, 708 (Fla. 1978) (per curiam).
338. 355 So. 2d 111 (Fla. 1978).
339. *Id.* at 113 (quoting Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975)).
340. *Id.* at 112.
341. *Id.* at 112-13.
342. *Id.* at 113-14. In upholding the jury's recommendation, the court recognized that

F. *Mitigating Circumstances*

In *Hargrave v. State*,[343] the Supreme Court of Florida held that where a defendant in a capital case presents evidence in the penalty phase of the trial in support of one or more mitigating circumstances, the jury and the trial court are not required to make a finding that such mitigating factor exists. The court emphasized that the judge and jury are free to weigh the sufficiency of that evidence and its credibility, and conclude that there is an insufficient basis for a finding in favor of the defendant. Given this attitude, it appears unlikely that the Supreme Court of Florida will reverse a judge's and jury's rejection of evidence offered in mitigation.

Additionally, the youth of a defendant may not always be considered a mitigating circumstance. While in *Mikenas v. State*,[344] the Supreme Court of Florida affirmed a finding of mitigation where the defendant was twenty-two years old, in *Meeks v. State*[345] the court upheld the trial court's refusal to consider a twenty-one year old defendant's youth as a mitigating circumstance.

G. *Presentence Investigation Reports*

During the survey period there has been great debate on whether the State of Florida should continue using presentence investigation ("PSI") reports in capital cases.[346] The Supreme Court of Florida invited public defenders, prosecutors and the legal community to file briefs and to argue the merits of PSI reports.[347] This discussion of the effectiveness or usefulness of PSI reports was prompted by the ruling of the Supreme Court of the United States in *Gardner v. Florida*.[348] *Gardner* held that a defendant in a criminal case must be afforded the opportunity to refute all matters contained in the PSI report which were considered by the sentencing court.[349] After months of deliberation, the Supreme Court of Florida held that no changes would be made regarding the use of PSI reports in capital cases.[350] According to the court, the PSI report is an im-

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the extreme emotional condition of a defendant in a murder case can be a basis for mitigating punishment. *Id.* at 113.

343. 366 So. 2d 1 (Fla. 1978) (per curiam).

344. 43 FLA. L.W. 529 (Fla. Nov. 9, 1978) (No. 75-579C).

345. 339 So. 2d 186 (Fla. 1976).

346. *See In re* Florida Rules of Criminal Procedure, Rule 3.710, 362 So. 2d 655 (Fla. 1978) (per curiam).

347. *Id.*

348. 430 U.S. 349 (1977).

349. *Id.* at 360-62.

350. 362 So. 2d at 656.

portant tool that should continue to be available to the trial court.[351]

A trial court has great discretion in the use of a PSI report and may order such a report directed solely to matters in mitigation.[352] Although Florida Rule of Criminal Procedure 3.170 requires a PSI report in all cases where the defendant is found guilty of his first felony offense or is convicted of a felony while under the age of eighteen, this rule does not apply to capital sentencing cases.[353] Finally, disclosure of the PSI report is necessary only if the trial court has considered such material in imposing the death sentence. If the trial court were "aware" of certain facts contained in the PSI report but expressly states that it did not "consider" the information in its sentencing determination, disclosure is not required.[354]

H. *Use of Photographs*

Aldridge v. State[355] was concerned with the problem of the prosecutor's use of gory photographs of a dead victim's body. In *Aldridge*, the Supreme Court of Florida upheld the prosecutor's introduction into evidence of a photograph of a murder victim's body near the restaurant which the victim had owned, even though the parties had stipulated to the date and place of the death. In so holding, the supreme court restated the rule that any relevant photographs may be admitted into evidence.[356] According to the court, the photo was relevant to details of the events leading up to the crime in that it showed the location of the victim's body in relation to the restaurant which had been robbed. Moreover, the court determined that this one photograph was not so objectionable and inflammatory as to require setting aside the jury's verdict.[357]

In *Jackson v. State*,[358] however, the Supreme Court of Florida issued a strong warning to Florida prosecutors "that gory and gruesome photographs admitted primarily to inflame the jury will result in a reversal of the conviction."[359] In *Jackson*, the supreme court found that three photographs taken of the murdered victims were gruesome, but upheld the conviction relying on prior cases which have held that offensive matter depicted in photographs will not prohibit them from being admitted into evidence if relevant.

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351. *Id.*
352. Salvatore v. State, 366 So. 2d 745 (Fla. 1978).
353. FLA. R. CRIM. P. 3.710.
354. Alford v. State, 355 So. 2d 108 (Fla. 1977), *cert. denied*, 436 U.S. 935 (1978).
355. 351 So. 2d 942 (Fla. 1977) (per curiam), *cert. denied*, 99 S. Ct. 220 (1978).
356. *Id.* at 943.
357. *Id.* at 943-44.
358. 359 So. 2d 1190 (Fla. 1978) (per curiam), *cert. denied*, 99 S. Ct. 881 (1979).
359. *Id.* at 1191.

I. *Pretrial Publicity*

In *Hoy v. State,*[360] the Supreme Court of Florida announced guidelines for granting a change of venue because of pretrial publicity. In that case, two young people were brutally murdered. The two major newspapers in that county covered the investigation extensively. In one newspaper, the coverage included a first page reprint of the defendant's confession. The defendant moved for a change of venue based on pretrial publicity, which was denied by the trial judge.[361]

On appeal, the Supreme Court of Florida, relying on *Dobbert v. State,*[362] held that the trial judge had not abused his discretion in denying defendant's motion. The court stated that in *Hoy,* as in *Dobbert,* the trial judge had carefully questioned each group of prospective jurors to ensure their impartiality.[363] The trial judge's voir dire, the supreme court noted, produced evidence that the newspaper that published the confessions also published with equal prominence the defendant's retraction of his confession.[364] In addition, the court found it significant that none of the jurors had read the articles in question, and that many of the prospective jurors did not even subscribe to the newspapers in question.[365] The court also stressed the fact that the defense only utilized twenty-five of its forty preemptory challenges.[366]

In conclusion, when *Hoy* is viewed in the shadow of *Dobbert,* it now appears extremely difficult to build a record sufficient to reverse a trial court's denial of a motion for change of venue where the trial judge has conducted a careful voir dire. Any such attempt should focus not only on the inflammatory content of local news articles, but also on the pervasive effect of the publicity on community sentiment.

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360. 353 So. 2d 826 (Fla. 1977) (per curiam).
361. *Id.* at 827-28.
362. 328 So. 2d 43 (Fla. 1976).
363. 353 So. 2d at 829.
364. *Id.*
365. *Id.*
366. *Id.* at 831.