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Criminal Law

JOSEPH W. HATCHETT* AND BRIAN E. NORTON**

The authors focus on the past two years of Florida appellate decisions on criminal law. The areas discussed include illegal searches and seizures, confessions, disclosure of confidential informants, the speedy trial rule, immunity, contempt, pleas of guilty and nolo contendere, improper inquiry and argument, jury instructions and sentencing.

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I. INTRODUCTION

This article surveys approximately two and a half years of Florida appellate decisions in substantive and procedural criminal law.¹ The focus, however, has been narrowed to encompass approximately a dozen areas.² These include some of the major trends developing in criminal law and procedure, as well as some well established errors which unfortunately continue to arise in Florida trial courts. A few of the topics discussed herein are as yet unresolved.³ It is hoped that the discussions of the underlying principles and reasons behind these developments will be helpful to trial judges and attorneys attempting to apply these principles to particular fact situations.

II. ILLEGAL SEARCHES AND SEIZURES

A. Procedure

In a pretrial hearing challenging the validity of a warrantless search, the initial burden is upon the defendant, as the moving party, to show that the search was invalid.⁴ That burden can be met by a motion asserting the absence of a warrant and the trial court judicially noticing that its own file in the case contains no such warrant.⁵ The burden then shifts to the state to sustain the ultimate burden as to the validity of the search.⁶ In its order granting or denying a motion to suppress, a trial court should recite its findings

1. Volumes 310 through 350 Southern Reporter 2d.

2. There have been other important decisions in criminal law during the survey period, such as: *Dumas v. State*, 350 So. 2d 464 (Fla. 1977) (procedural rules regarding sequestration of witnesses construed); *State v. Simpson*, 347 So. 2d 414 (Fla. 1977) (unlawful assembly statute narrowly construed to survive overbreadth attack); *State v. Winters*, 346 So. 2d 991 (Fla. 1977); and *State v. Wershow*, 343 So. 2d 605 (Fla. 1977) (statutes held unconstitutionally vague); *Belote v. State*, 344 So. 2d 565 (Fla. 1977) (procedural rule regarding the consolidation of cases construed); *State v. Saunders*, 339 So. 2d 641 (Fla. 1976); and *Spears v. State*, 337 So. 2d 977 (Fla. 1976) (statutes held unconstitutionally overbroad). However, most of the decisions excluded from this article are readily ascertainable through annotated versions of the statutes and rules.

3. Justice Hatchett 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 a review and analysis of legal principles.

4. *State v. Lyons*, 293 So. 2d 391 (Fla. 2d Dist. 1974).

5. *State v. Hinton*, 305 So. 2d 804 (Fla. 4th Dist. 1975).

6. *Mann v. State*, 292 So. 2d 432 (Fla. 2d Dist. 1974).

of fact and conclusions of law.⁷

In *Elson v. State*,⁸ the Supreme Court of Florida rejected the argument that a defendant had no standing to challenge the validity of a search merely because he had no right of occupancy or ownership in the premises subject to the search. The District Court of Appeal, First District, had held that the defendant did not have standing to question the validity of the search since he was not registered in the motel and, therefore, there was no constitutional inhibition against a search of the motel room.⁹ The supreme court rejected this argument and noted that although the motel room was registered to another person, the defendant possessed a key, and the room contained the defendant's property. Recognizing that federal courts since *Jones v. United States*¹⁰ have disregarded the technical distinctions relating to traditional rights of occupancy and possession, the Supreme Court of Florida held that in this context, the question of standing depended entirely on the defendant's right to be free from unreasonable searches and seizures. This is consistent with the view that the fourth amendment protects a citizen's reasonable expectations of privacy.

B. *Abandoned Property*

Some seizures by the state do not involve a search within the contemplation of the fourth amendment. A police officer may properly seize any contraband in plain view if it is observed by the officer from a place where he has a legal right to be.¹¹ Florida courts have also held that there is no search involved when the police seize contraband which has been voluntarily abandoned.¹² In *State v. Nittolo*,¹³ a police officer following a vehicle suspected of containing illegal narcotics observed the driver commit a minor traffic infraction. The officer turned on his flashing light in an attempt to stop the suspects. At this point, the officer observed something being thrown from the car. Upon retrieving the article, it was found to be a bag of marijuana. The trial court suppressed this evidence on the grounds that it was illegally obtained during a pretextual traffic stop. The Supreme Court of Florida reversed, holding that the offi-

7. *State v. Thomas*, 332 So. 2d 87 (Fla. 1st Dist. 1976); *State v. Hysell*, 281 So. 2d 417 (Fla. 2d Dist. 1973).

8. 337 So. 2d 959 (Fla. 1976).

9. *Id.* at 961. The opinion of the District Court of Appeal, First District, is reported at 310 So. 2d 450 (Fla. 1st Dist. 1975).

10. 362 U.S. 257 (1960).

11. *State v. Ashby*, 245 So. 2d 225 (Fla. 1971).

12. *See, e.g., State v. Jackson*, 240 So. 2d 88 (Fla. 3d Dist. 1970).

13. 317 So. 2d 748 (Fla. 1975).

cer's conduct prior to stopping the defendants' vehicle was neither illegal nor improper, and that the fruit of the poisonous tree doctrine was therefore inapplicable. The contraband was voluntarily abandoned by the defendants, and the police officer was where he had a right to be, doing what he was trained to do. The mere fact that the defendants panicked and discarded what was later discovered to be contraband, did not give rise to an after the fact contention that the officer was going to stop the vehicle "as a pretext for a warrantless search."¹⁴

C. *Illegal Stops*

Although a police officer may stop the driver of an automobile for questioning when he has less than probable cause,¹⁵ it is well recognized that the police may not do so arbitrarily or on a bare suspicion that the occupants are violating the law. In *Coladonato v. State*,¹⁶ a police officer observed a U-Haul van being driven in the city's business district during the early evening hours. He stopped the van because it was an unusual vehicle to be in the area at that time of night. Upon approaching the vehicle, the officer observed boxes of stereo equipment in the rear of the van. The defendant's identity was checked through the police station computers, which revealed that he was wanted on an arrest warrant in another state. A check of local stereo stores led to the discovery that the equipment in the van had been stolen in a recent burglary. The Supreme Court of Florida held that the trial court should have granted the defendant's motion to suppress this illegally seized evidence because the initial stop was not based upon any articulable facts justifying the officer's suspicion that illegal activity had been or was about to be committed.¹⁷

D. *Inventory Searches*

Florida courts have also upheld the validity of routine inventory searches of vehicles. A distinction, however, has developed between a valid inventory search and an invalid exploratory search in which the inventory is used merely as a pretext for a general search. In *State v. Jenkins*,¹⁸ the District Court of Appeal, Fourth District,

14. *Id.* at 750. See *State v. Nittolo*, 303 So. 2d 690 (Fla. 4th Dist. 1974) (Mager, J., dissenting). See also *Smith v. State*, 333 So. 2d 91 (Fla. 1st Dist. 1976).

15. *Bailey v. State*, 319 So. 2d 22, 26 (Fla. 1975).

16. 348 So. 2d 326 (Fla. 1977).

17. *Id.* at 327. See also *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Porshay v. State*, 321 So. 2d 439 (Fla. 1st Dist. 1975).

18. 319 So. 2d 91 (Fla. 4th Dist. 1975).

discussed at length the inventory search doctrine as an exception to the constitutional rule prohibiting warrantless searches. Although an inventory is considered a search within the prohibition of the fourth amendment, it will be held reasonable if the totality of the circumstances demonstrate that the search was a bona fide inventory made in the ordinary course of police procedures. The court noted that the impoundment of an automobile and its concomitant inventory search is of questionable validity when the location of the automobile does not create a traffic hazard or nuisance, and the owner or operator chooses not to have his car impounded. An individual who has been taken into custody should not have his vehicle impounded, inventoried and towed away when alternative steps can be taken to secure the vehicle, especially when the individual is willing to accept responsibility for the safe keeping of the contents of the vehicle.¹⁹

The principles set forth in *Jenkins* were approved by the Supreme Court of Florida in *Elson v. State*.²⁰ In that case, police entered a motel room for the alleged purpose of making an inventory search of its contents to protect any property belonging to the previously arrested defendant. The court reiterated that "the inventory search concept can validate a warrantless search only when the police have some valid reason or right for taking a defendant's property into custody."²¹ In *Elson*, the court rejected the state's argument that the police reasonably made an inventory of the property of the defendant to protect it while he was in jail. The motel owner, rather than the police, had a duty to protect the defendant's property in the motel room. The court stated that the defendant should have been given the choice of leaving his belongings in the motel room or requesting the sheriff to take them into custody for him. He should not have been required to have his personal belongings stored by the sheriff during the time he was in jail.

E. Consent Searches

The Supreme Court of Florida has resolved several important questions concerning the application of the consent exception to the constitutional prohibition against warrantless searches. In *Bailey v. State*,²² the District Court of Appeal, Fourth District, held that a

19. "The individual in custody should be advised of and given the choice of leaving the car in its location, contacting someone else to take charge of the car or having it impounded." *Id.* at 94.

20. 337 So. 2d 959 (Fla. 1976).

21. *Id.* at 962.

22. 295 So. 2d 133 (Fla. 4th Dist. 1974).

seizure of drugs was permissible due to the defendant's prior consent to the search which revealed the drugs. The supreme court reversed the decision of the district court.²³ A police officer had stopped the automobile in which the defendant was a passenger to determine the reason for its unusual operation. The car had been proceeding on the Florida Turnpike at a speed of only forty-five miles per hour and was weaving slightly. The court held that this initial stop was made for the purpose of investigating suspicious activity and was therefore valid. The investigation should have ceased, however, once the officer found that the driver was not under the influence of alcohol and that he possessed a valid driver's license and proof of the vehicle's ownership. In *Bailey*, the officer continued his investigation and subsequently seized a plastic sandwich bag which appeared to contain marijuana ashes. The occupants were then placed under arrest and the officer sought permission to search a cosmetic bag in the possession of one of the passengers. There was conflicting evidence as to whether such permission was given. The subsequent search revealed the drugs which became the object of the motion to suppress. The trial court denied this motion, and the district court affirmed the denial on the ground that an appellate court should not substitute its judgment for that of the trial court. The supreme court disagreed with this standard of appellate review, stating that following an illegal arrest, valid consent to search should be upheld only if the circumstances are so strong, clear and convincing as to remove any doubt that the waiver was truly voluntary.²⁴ The supreme court reversed the trial court's determination because there was a lack of clear and convincing proof that the defendant waived his constitutional right.

The Supreme Court of Florida has also resolved a conflict among the Florida appellate courts as to whether one person who jointly occupies a premises with another person may validly consent to a search and seizure of the other person's property over the objection of that person. In *Silva v. State*,²⁵ the defendant occupied an apartment with his girlfriend. Following an argument, the woman called the police and told them that her boyfriend had hit her, that he was a convicted felon and that he had guns in his closet. The defendant boyfriend told the police officers not to search his closet. The officers searched the closet, however, found the guns and arrested the defendant. The court noted, "it has generally been held that the husband and wife relationship, without more, does not

23. 319 So. 2d 22 (Fla. 1975).

24. *Id.* at 28.

25. 344 So. 2d 559 (Fla. 1977).

authorize one spouse to waive the constitutional rights of the other by consenting to a warrantless search."²⁶ The supreme court reasoned that the validity of a search in such a situation should not hinge on the marital status of the parties. Unless consent is given by the owner or rightful possessor of the property, a warrant must be obtained. The court noted that the test applicable to the fourth amendment is whether or not the person's reasonable expectations of privacy have been violated.²⁷

In *Silva*, the court cited with approval *Padron v. State*.²⁸ In that case, the defendant was arrested following a shooting incident at his home. The defendant admitted that the gun which he had used was in his house but expressly told the investigating officers that they did not have his permission to enter the house. At the time, the house was occupied by the defendant's three sons. Initially, the oldest son, sixteen years old, denied the police entry but consented after he and his younger brothers were forced outside into the cold night by the police. The district court held that the seizure was invalid on two grounds: (1) the son did not have the authority to give the consent after his father had refused to do so, and (2) the consent was not voluntary.²⁹

F. Probable Cause

If a search is based upon a valid impoundment and inventory of a vehicle or upon the voluntary consent of the person whose property is the subject of the search, then the state is not required to show that it possessed probable cause to believe that contraband, fruits of a crime or instrumentalities of a crime were present upon the person, vehicle or premises searched. All other searches, except those involving a stop and frisk of an individual for weapons³⁰ or a limited search incident to a lawful arrest,³¹ must be based upon probable cause. Probable cause exists where the facts and circumstances within the officer's knowledge are sufficient in themselves to warrant a person of reasonable caution to believe that an offense has been or is being committed.³² In several recent decisions, the courts have noted that proof of probable cause involves more than a mere showing of suspicion on the part of the officer. In *D'Agostino*

26. *Id.* at 561.

27. *Id.* at 563 (citing *Katz v. United States*, 389 U.S. 347 (1967)).

28. 328 So. 2d 216 (Fla. 4th Dist. 1976).

29. *Id.* at 218.

30. FLA. STAT. § 901.151 (1977).

31. *Gustafson v. Florida*, 414 U.S. 260 (1973).

32. *Carroll v. United States*, 267 U.S. 132 (1925).

v. State,³³ the police arrested the defendant without a warrant, but pursuant to a general "be on the lookout for" bulletin (BOLO). This BOLO stated only that a burglary had just been committed by a person with "bare legs, and white socks and shoes."³⁴ The Supreme Court of Florida held that this information was insufficient to provide probable cause, and that the arrest and search of the defendant were invalid.

In *Brown v. State*,³⁵ the defendant was a passenger in a car which had been stopped for speeding. While issuing a citation to the driver, the police observed marijuana seeds in the automobile. The passenger was searched and found to be in possession of marijuana. The District Court of Appeal, Fourth District, held that the police did not have probable cause for the warrantless search. The only fact relevant to the probable cause issue within the officer's knowledge at the time he conducted the search was that marijuana seeds were present in the automobile in which the defendant was riding as a passenger. Under these circumstances, a man of reasonable caution would not be justified in believing that the defendant possessed the marijuana.

Similarly, in *Williams v. State*,³⁶ the police arrested the driver of an automobile in which the defendant was a passenger. Subsequently, the police officer observed narcotics paraphernalia in the automobile, and a packet of heroin was found in the possession of a second passenger. An initial search of the defendant revealed nothing, but the police arrested him and discovered the presence of drugs during a more complete search at the police station. The District Court of Appeal, Fourth District, held that the police possessed insufficient information to establish probable cause to arrest the defendant since there was nothing to connect him with the contraband found in the car.

In *Britton v. State*,³⁷ police officers investigating reports of a prowler noticed the odor of marijuana emanating from a house trailer. The officers pushed their way through a door, observed marijuana inside and arrested all occupants. The District Court of Appeal, Fourth District, stated that it was improper to presume that all occupants and guests in the private home were in control and in constructive possession of the marijuana being smoked by one or merely some of them. Although the police officers' sense of smell

33. 310 So. 2d 12 (Fla. 1975).

34. *Id.* at 14.

35. 313 So. 2d 52 (Fla. 4th Dist. 1975).

36. 338 So. 2d 233 (Fla. 4th Dist. 1976).

37. 336 So. 2d 663 (Fla. 4th Dist. 1976).

told them that marijuana was being consumed within the trailer, they could not identify any particular occupant as committing a violation of the law. Thus, there was not probable cause to arrest the defendant, and the fruits of this arrest should have been suppressed.³⁸

G. *Exigent Circumstances*

In the case of a warrantless search, once probable cause is established, it is still incumbent upon the state to prove that some exigent circumstance exists which obviates the need to obtain a warrant from a neutral and detached magistrate. For example, in *Raffield v. State*,³⁹ the Supreme Court of Florida held that although the police possessed sufficient probable cause prior to making a warrantless search, no exigent circumstance existed, and that a warrant should have been obtained prior to conducting the search. The court rejected arguments by the state that several exigent circumstances existed which made it imperative that an immediate warrantless search be undertaken. First, the state argued that since other conspirators had been recently arrested, the defendant might learn of these arrests and destroy the evidence. Additionally, the search took place on Christmas Eve and the officers believed that it would have been difficult to obtain a search warrant at that time. The state admitted, however, that no effort had been made to obtain a warrant. The court stated that the police officers should have made prior arrangements for a judicial officer to be available for warrant purposes. If such an attempt had been made and no judge were available within a sufficient time, exigent circumstances might have been deemed to exist.

These cases indicate that warrantless searches are generally viewed with disfavor and that the police should obtain a warrant whenever possible. The various exigent circumstances which obviate the need for a warrant should be narrowly construed, and the police must be prepared to prove such circumstances in order to overcome the presumption that warrantless searches are invalid.

III. CONFESSIONS

A. *Procedure*

If a defendant properly moves to suppress an allegedly involuntary confession, the prosecution has the burden of proving by a

38. *Id.* at 665 (citing *Johnson v. United States*, 333 U.S. 10 (1948)).

39. 351 So. 2d 945 (Fla. 1977). See also *Hornblower v. State*, 351 So. 2d 716 (Fla. 1977).

preponderance of the evidence that the confession was freely and voluntarily given.⁴⁰ If a timely motion has been made, it is error for the trial court to refuse to hold an evidentiary hearing prior to trial.

In *McDonnell v. State*,⁴¹ the defendant filed a motion to suppress a confession but, since there was no available time on the judge's calendar, the motion was not heard prior to trial. When the case was called for trial, the defendant again requested the court to hear the motion. The judge refused on the ground that counsel should have filed the motion at an earlier date so that it could have been heard prior to trial. The statements were admitted into evidence and the defendant was convicted. The district court held that the trial court erred in refusing to hear the motion prior to trial, but concluded from the totality of the evidence that the error was harmless beyond a reasonable doubt.⁴² The Supreme Court of Florida stated that the district court had construed the harmless error doctrine in a way that would deny due process of law to the defendant⁴³ and remanded the case for a new trial. The trial court was instructed to hold a separate hearing on the admissibility of the confession prior to its admission at trial.

In *Greene v. State*,⁴⁴ the Supreme Court of Florida resolved a conflict regarding the necessity for a new trial when the trial court fails to make an explicit ruling on the issue of the voluntariness of a confession. The district court held that the trial court had erroneously refused to make an explicit finding of voluntariness, and temporarily relinquished its jurisdiction and remanded the case to the trial court to consider this issue. The supreme court, holding that this was an insufficient remedy, stated: "A judge is not a computer which can consistently make an objective determination as to the admissibility of a confession without the possibility that a prior jury verdict of guilt may influence that ruling."⁴⁵ The defendant was entitled to a new trial and an independent determination of admissibility, to be held prior to the admission of the confession before the jury.

B. *Voluntariness*

Prior to the admission into evidence of any statements made by the defendant while in custody, the prosecution must show that the

40. *McDole v. State*, 283 So. 2d 553 (Fla. 1973).

41. 336 So. 2d 553 (Fla. 1976).

42. See *Chapman v. California*, 386 U.S. 18 (1967).

43. 336 So. 2d at 555 (citing *Land v. State*, 293 So. 2d 704 (Fla. 1974)).

44. 351 So. 2d 941 (Fla. 1977).

45. *Id.* at 942.

defendant's waiver of any constitutional right, such as the right to remain silent or the right to counsel, was made both knowingly and intelligently.⁴⁶ If a defendant indicates a desire to have an attorney present during questioning, the police should discontinue their interrogation until after the person has obtained and consulted counsel.⁴⁷

Confessions, unlike guilty pleas, cannot be bargained for by the prosecution.⁴⁸ During an interrogation, it is improper for law enforcement officials to make direct or implied promises to a defendant in exchange for his confession. It is well settled that a confession should be entirely free from the influence of hope or fear.⁴⁹ In *Jarriel v. State*,⁵⁰ the District Court of Appeal, Fourth District, held that the police improperly told the defendant that his wife would be arrested unless he made a confession. In *Burch v. State*,⁵¹ however, the Supreme Court of Florida held that the action of the police in falsely telling the defendant that he had failed a polygraph test was insufficient coercion to require suppression of a confession.

C. Discovery

Statements made by a defendant which are to be used at trial should be disclosed to the defense pursuant to established rules of discovery.⁵² In *Cumbie v. State*,⁵³ the Supreme Court of Florida held that the trial court erred in admitting into evidence testimony concerning a defendant's statements. The existence of these statements was not disclosed to the defendant prior to trial, and the court did not conduct an inquiry to determine whether the defense was prejudiced by the nondisclosure.⁵⁴ Unless such an inquiry is conducted by the trial court, no appellate court can be certain that errors of this type are harmless.

46. It is not necessary for the state to prove a waiver of constitutional rights if it is shown that the statements were made spontaneously. *Sikes v. State*, 313 So. 2d 436 (Fla. 2d Dist.), case dismissed, 322 So. 2d 919 (Fla. 1975).

47. *State v. Dixon*, 348 So. 2d 333 (Fla. 2d Dist. 1977); *Singleton v. State*, 344 So. 2d 911 (Fla. 3d Dist. 1977). *But see Witt v. State*, 342 So. 2d 497 (Fla. 1977) (although defendant exercised his right to remain silent, he may later change his mind and voluntarily waive this protection).

48. *M.D.B. v. State*, 311 So. 2d 399, 401 (Fla. 4th Dist.), cert. denied, 321 So. 2d 555 (Fla. 1975).

49. *Jarriel v. State*, 317 So. 2d 141 (Fla. 4th Dist. 1975), cert. denied, 328 So. 2d 845 (Fla. 1976), and cases cited therein.

50. *Id.*

51. 343 So. 2d 831 (Fla. 1977).

52. FLA. R. CRIM. P. 3.220.

53. 345 So. 2d 1061 (Fla. 1977) (per curiam).

54. See generally *Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

D. Impeachment

Although incriminating statements made by a defendant are inadmissible during the state's presentation of its case because of the failure of custodial officers to give *Miranda* warnings, such statements may be admissible to impeach the defendant's testimony at trial. In *Nowlin v. State*,⁵⁵ the Supreme Court of Florida overruled its prior decision in *Crawford v. State*,⁵⁶ and held that an otherwise inadmissible confession may be used for impeachment if the state has first shown that it was voluntarily made. This decision follows the reasoning of the Supreme Court of the United States in *Harris v. New York*.⁵⁷ The Supreme Court of Florida stated that it was uncertain of the precise meaning of the Supreme Court's statement that confessions made in violation of *Miranda* would be admissible for impeachment if "the trustworthiness of the evidence satisfies legal standards,"⁵⁸ but held that, at the very least, it meant that the statements must be proven to have been voluntarily made.⁵⁹ This logic follows the long standing reasoning of our jurisprudence which has held that involuntary confessions are inadmissible not only because they violate a person's fifth amendment right to remain silent but also because such confessions are presumptively unreliable.

IV. DISCLOSURE OF CONFIDENTIAL INFORMANTS

Generally, the state has a privilege of nondisclosure of the identity of confidential informants who have supplied the prosecution with information concerning a crime. However, if an informant's identity is relevant and helpful to the defense, disclosure is required.⁶⁰ This is true even when an informant is not called upon to testify at trial or hearing but simply provides the police with information which is helpful in their investigation.

In *Munford v. State*,⁶¹ the trial court denied a defense motion to compel disclosure of an informant. The District Court of Appeal, Second District, reversed, stating that the informant appeared to be more than a "mere tipster." He was, rather, the sole moving force in arranging a buy of narcotics by the police. Therefore, the inform-

55. 346 So. 2d 1020 (Fla. 1977).

56. 70 Fla. 323, 70 So. 374 (1915).

57. 401 U.S. 222 (1971).

58. *Id.* at 224. Since this article was written, the Supreme Court has clarified its position on this issue. *Mincey v. Arizona*, 98 S. Ct. 2408 (1978).

59. 346 So. 2d at 1024.

60. *State v. Hassberger*, 350 So. 2d 1 (Fla. 1977).

61. 343 So. 2d 67 (Fla. 2d Dist. 1977).

ant would be valuable and material to establish the defense of entrapment or to corroborate evidence of entrapment to which the defendant may wish to testify. The court stated that the best procedure to ensure that a defendant's right to a fair trial is not abrogated, while at the same time protecting the state's interest in non-disclosure, is to hold an *in camera* hearing. At such a hearing the trial court should question the informant to ascertain whether his testimony might be helpful to the defendant. The prosecution should also be questioned concerning the interests which the government may have in resisting disclosure. *In camera* proceedings are not required in all situations. However, where the defense has made an initial showing that nondisclosure would hamper the defense, an appellate court will not uphold nondisclosure unless there is sufficient evidence in the record to the contrary. Even though the confidential informant may not have been present and may not have participated in the drug transaction for which the defendant was charged, the disclosure of his identity may be necessary if the sale is considered dependent upon a prior sale in which the informant had been a participant.⁶²

Occasionally, the state may wish to have a confidential informant testify as a witness in a criminal trial, while asserting the privilege of nondisclosure as to the informant's name and present address. In *State v. Hassberger*,⁶³ the Supreme Court of Florida answered a certified question on this issue, holding that the name of a confidential informant who testifies as a state witness at trial cannot be withheld. The court expressed approval of the personal safety exception to the otherwise ordinary duty of the state to allow the defendant full access to its witnesses on cross-examination, but noted that this exception is an exceedingly narrow one and that all doubts must be resolved in favor of the accused's constitutional right to confront witnesses against him. In *Hassberger*, a new trial was granted because the trial judge had not required the confidential informant to appear before him *in camera* and testify to specific threats which were made against his safety as a result of his testimony in that case. If the state wishes to invoke the personal safety exception, it must place sufficient evidence in the record for the reviewing court to determine whether or not the alleged threats to a witness' safety were such as to overcome the defendant's interest in disclosure. The court recognized that, in general, it is prejudicial to deny to a defendant the opportunity to place a state witness in

62. *Richert v. State*, 338 So. 2d 40 (Fla. 4th Dist. 1976), *cert. denied*, 346 So. 2d 1250 (Fla. 1977).

63. 350 So. 2d 1 (Fla. 1977).

his proper setting and to put the weight and credibility of his testimony to a test.⁶⁴ The identity of a witness is not only an appropriate preliminary step to the cross-examination of the witness, but it is also an essential step in identifying the witness with his environment.

In accord with this reasoning is *Crespo v. State*,⁶⁵ in which the District Court of Appeal, Third District, held that the trial court erred in precluding the defendant from cross-examining a confidential informant regarding criminal charges then pending against the informant. The court stated that a criminal defendant has a right to cross-examine a prosecution witness as to any matter relevant to the witness' bias or self interest. When a prosecution witness is under criminal charges at the time he testifies, the defense is entitled to elicit this fact. Even if a witness is charged with some other offense, the defendant is entitled to show by cross-examination that the witness' testimony is affected by fear or favor growing out of his detention.

As noted by the Supreme Court of Florida in *Hassberger*,⁶⁶ the disclosure of confidential informants involves the balancing of the defendant's need for full and complete cross-examination and the safety of the witness. Once the defendant has made an initial showing that the testimony of the confidential informant is relevant to the preparation of his defense, the state has the burden of proving why this evidence is unnecessary or why nondisclosure is essential. In all situations where the disclosure of an informant's identity is relevant and helpful to the defense of the accused, or essential to a fair determination of the cause, the privilege must give way. In such situations, if the government withholds the information the prosecution must be dismissed.⁶⁷

V. SPEEDY TRIAL

A. Custody

Under Florida's speedy trial rule,⁶⁸ the time period for the commencement of trial begins to run when an accused is taken into custody as a result of the conduct or criminal episode giving rise to the crime with which he has been charged. Generally, a defendant

64. *Id.* at 3 (citing *Smith v. Illinois*, 390 U.S. 129 (1968); *Alford v. United States*, 282 U.S. 687 (1931)).

65. 344 So. 2d 598 (Fla. 3d Dist. 1977).

66. 350 So. 2d 1, 2 (Fla. 1977).

67. See generally *Hatchett, Discovering the Identity of the Informer*, 46 FLA. B.J. 644 (1972).

68. FLA. R. CRIM. P. 3.191.

is taken into custody for speedy trial purposes when he is arrested.⁶⁹ If a suspect is not formally arrested, however, but is merely detained by the police for questioning, the speedy trial time limit does not commence.⁷⁰ Where a summons, rather than an arrest warrant, has been issued against an accused, the accused is taken into custody within the meaning of the speedy trial rule the moment he is served with the summons.⁷¹ Although the state has only ninety days from the date a juvenile has been taken into custody until the delinquency proceedings must begin, a juvenile who has been certified to be tried as an adult must be brought to trial within 180 days from the time he is taken into custody.⁷² In *State v. Bassham*,⁷³ the Supreme Court of Florida held that a detainer is not the equivalent of an arrest for purposes of the speedy trial rule. Therefore, a detainer placed by one county on a prisoner held by another county is not considered custody within the contemplation of the speedy trial rule.⁷⁴

B. Calculating Time Limits

In calculating the speedy trial time limits, the date the accused is taken into custody does not count.⁷⁵ The last day of the speedy trial time period is counted unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day.⁷⁶ Legal holidays do not include those days which may be federal

69. See *State v. Parnell*, 221 So. 2d 129 (Fla. 1969). In *Deloach v. State*, 338 So. 2d 1141 (Fla. 1st Dist. 1976), the defendant was taken to a hospital by the police. The officer advised the defendant that he was under arrest so that a blood alcohol test could be administered. Although he was released by the hospital and was never taken to jail, the court held that he had been taken into custody.

70. *Snead v. State*, 346 So. 2d 546 (Fla. 1st Dist. 1976). In *State ex rel. Dean v. Booth*, 349 So. 2d 806, 807 (Fla. 2d Dist. 1977), the court stated:

To construe the speedy trial rule to mean the time starts running every time the police take a suspect to the station for questioning could have a deleterious effect because the police might feel compelled to make an arrest on less than sufficient evidence in order to activate the wheels of the prosecutorial process before the time runs out.

71. *Singletary v. State*, 322 So. 2d 551 (Fla. 1975).

72. *State v. Benton*, 337 So. 2d 797 (Fla. 1976). The supreme court rejected the state's argument that the speedy trial period should commence at the time the juvenile defendant has been certified to be tried as an adult. Prosecutors may also wish to note that the supreme court has held that, according to FLA. STAT. § 39.05(7) (1975), a delinquency petition which is filed more than 30 days after a complaint is received in the intake office of the Division of Youth Services must be dismissed with prejudice.

73. 352 So. 2d 55 (Fla. 1977).

74. However, a demand for speedy trial may be made pursuant to FLA. R. CRIM. P. 3.191(b)(2).

75. *State ex rel. Williams v. Bruce*, 327 So. 2d 51 (Fla. 1st Dist. 1976).

76. *Barlow v. State*, 345 So. 2d 758 (Fla. 1st Dist. 1977).

holidays, but not state holidays.⁷⁷ If a defendant is otherwise continuously available for trial, the state must bring him to trial for a felony within 180 days. The mere swearing of a panel of jurors and qualifying them to try cases does not amount to the bringing of a defendant to trial.⁷⁸

C. Availability

A defendant, applying for a discharge because of a violation of the speedy trial rule, has the ultimate burden of showing that he was continuously available for trial during that period. The state, however, in opposing the motion for discharge, has the initial burden of making a prima facie showing of the defendant's unavailability.⁷⁹ Generally, the failure of a defendant or his counsel to appear at a scheduled court proceeding is sufficient proof that the defendant was not continuously available for trial.⁸⁰

D. Waiver

A defendant may expressly waive his right to be brought to trial within the speedy trial time period by seeking and obtaining a continuance.⁸¹ A defendant's attorney may also waive a defendant's right to a speedy trial if he stipulates to a continuance.⁸² This is true even when a defendant's attorney requests a continuance without the knowledge and consent of the defendant.⁸³

It has been held that acceptance of a court date beyond the 180 day speedy trial limit, in open court, by the defendant's attorney constitutes a valid waiver of the defendant's right to speedy trial.⁸⁴ Such a waiver, however, will not be presumed from a silent record.⁸⁵ Mere silence on the part of the defendant or his counsel at a proceeding at which the defendant's trial date is set beyond the speedy

77. *State v. Jones*, 332 So. 2d 699 (Fla. 1st Dist. 1976).

78. In *State v. May*, 332 So. 2d 146 (Fla. 3d Dist. 1976), the jury panel was sworn and examined as to their general qualifications to serve as jurors during the subsequent week. Although that was the 180th day since the defendant had been taken into custody, no jurors were called to serve in the defendant's case, no voir dire was made and no other action was taken until two days later, when the defendant moved for discharge from the crime. The district court held that it was error to deny this motion.

79. *McMullen v. State*, 331 So. 2d 357 (Fla. 1st Dist. 1976); *Troy v. State*, 341 So. 2d 223 (Fla. 3d Dist. 1976); *Richardson v. State*, 340 So. 2d 1198 (Fla. 4th Dist. 1976).

80. *State v. Exposito*, 327 So. 2d 836 (Fla. 3d Dist. 1976).

81. *FLA. R. CRIM. P.* 3.191(d)(2); *Troy v. State*, 341 So. 2d 223 (Fla. 3d Dist. 1976).

82. *State v. Kelley*, 322 So. 2d 581 (Fla. 1st Dist. 1975).

83. *Brown v. State*, 328 So. 2d 497 (Fla. 3d Dist. 1976).

84. *State v. Nelson*, 320 So. 2d 835 (Fla. 2d Dist. 1975).

85. *Smith v. State*, 345 So. 2d 1117 (Fla. 2d Dist. 1977); *Flournory v. State*, 322 So. 2d 652 (Fla. 2d Dist. 1975).

trial period does not constitute a waiver.⁸⁶

In a multiple count prosecution, a valid waiver of the speedy trial limits or a stipulation to a continuance by the defendant as to one charge also constitutes a waiver as to other charges filed against the defendant which arise out of the same transaction.⁸⁷ However, the defendant's filing of a bona fide demand for speedy trial revokes his prior waiver and entitles him to a trial within sixty days.⁸⁸

Other actions by a defendant or his counsel may contain an inherent waiver of the defendant's right to be brought to trial within the speedy trial period. In *State v. Hendricks*,⁸⁹ the District Court of Appeal, Fourth District, held that the defendant's exercise of his statutory right to transfer his case from the municipal court to the county court constituted a waiver of the speedy trial rule since it was a trial tactic which resulted in him not being continuously available for trial within the meaning of the speedy trial rule.

In *Bell v. State*,⁹⁰ the District Court of Appeal, Second District, held that the defendant's introduction of the defense of insanity, with requisite mental examinations and sanity hearings, constituted a waiver of the speedy trial rule since the defendant was not continuously available for trial. In *State v. Embry*,⁹¹ the Supreme Court of Florida resolved a conflict among the district courts as to whether or not the requirement that a defendant be continuously available for trial was negated by the filing of pretrial motions within the speedy trial time period. In *Embry*, the supreme court rejected the trial court's finding that the defendant's prior demand for speedy trial was spurious because he subsequently filed a motion to suppress. However, since Rule 3.191(d)(2) of the Florida Rules of Criminal Procedure provides that the speedy trial time limit may be extended by order of the court for periods of reasonable and necessary delay resulting from proceedings or hearings on pretrial motions, the supreme court held that the trial court had properly extended the speedy trial time limit to hold the hearing on the defendant's pretrial motion. Thus, the defendant was not entitled to discharge.

E. Extensions

A trial court has the discretion to grant a stay upon motion by

86. *State v. Ansley*, 349 So. 2d 837 (Fla. 1st Dist. 1977).

87. *State v. Luck*, 336 So. 2d 464 (Fla. 4th Dist. 1976).

88. *State v. Acurse*, 347 So. 2d 828 (Fla. 3d Dist. 1977).

89. 309 So. 2d 232 (Fla. 4th Dist. 1975).

90. 318 So. 2d 498 (Fla. 2d Dist. 1975).

91. 322 So. 2d 515 (Fla. 1975).

the state for delay caused by proceedings specifically listed in Rule 3.191(d)(2) of the Florida Rules of Criminal Procedure, or other exceptional circumstances set forth in Rule 3.191(f) of the Florida Rules of Criminal Procedure. The exceptional circumstances contemplated by that section are not limited to those specifically enumerated but include any others involving matters of substantial justice to the accused, the state or both.⁹² In addition, Rule 3.191(g) provides for an automatic ninety day extension after receipt by the trial court of a mandate from an appellate court granting a new trial to the defendant.⁹³ In all other cases, extensions of time based upon appeals taken by the state are governed by Rule 3.191(d)(2). It should be noted that this rule was amended in 1977 specifically to include an appeal by the state from an order dismissing a case.⁹⁴

In *State v. Williams*,⁹⁵ the Supreme Court of Florida stated that Rule 3.191(d)(2) specifically contemplates the effect of an interlocutory appeal on the speedy trial rule's time limits. A motion granted under this provision stays the time under the speedy trial rule only pending completion of the appellate proceedings. Upon receipt of a mandate by the trial court which concludes the appellate proceedings, the speedy trial time again begins to run. In *Williams*, the state took an interlocutory appeal and the trial court entered a stay after 135 of the 180 days available under the speedy trial rule had elapsed. The court held that once the mandate of the appellate court had been received, the state had only forty-five days left within which to bring the defendant to trial. In *State ex rel. Girard*

92. *State ex rel. Girard v. McNulty*, 348 So. 2d 311 (Fla. 1977).

93. FLA. R. CRIM. P. 3.191(g) provides:

A person who is to be tried again shall be brought to trial within 90 days from the date of declaration of a mistrial by the trial court, the date of an order by the trial court granting a new trial, the date of an order by the trial court granting a motion in arrest of judgment, or the date of receipt by the trial court of a mandate, order, or notice of whatever form from an appellate or other reviewing court which makes possible a new trial for the defendant, whichever is last in time.

94. *Id.* 3.191(d)(2) provides:

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 (emphasis added).

95. 350 So. 2d 81 (Fla. 1977).

v. McNulty,⁹⁶ the Supreme Court of Florida stated that although it is necessary for the state to apply to the trial court for an order extending the speedy trial limit, such an order will be valid even when based upon an *ex parte* motion and hearing.

An apparent conflict exists among Florida's appellate courts as to whether an interlocutory appeal by the state automatically constitutes an extension of time without regard to the entry of an order extending the time period. In *State v. Cannon*,⁹⁷ the District Court of Appeal, Fourth District, agreed with decisions of the District Court of Appeal, Third District,⁹⁸ and held that an order by the trial court is required to extend the speedy trial time during the pendency of an interlocutory appeal by the state. In *State v. Pearce*,⁹⁹ however, the District Court of Appeal, First District, held that an interlocutory appeal by the state automatically tolls the speedy trial period pending disposition of that appeal. There is also dispute as to whether a trial court is required to grant an extension under Rule 3.191(d)(2) when the state has shown one of the circumstances enumerated therein, or some other exceptional circumstances.

In *State v. Glidewell*,¹⁰⁰ the District Court of Appeal, Second District, held that the trial court erred in refusing to grant an order tolling the speedy trial time limits pending the disposition of an interlocutory appeal by the state. Until this confusion is resolved, the better practice is for the state to apply for extensions in all situations in which it is taking an interlocutory appeal.

VI. IMMUNITY

Immunity from prosecution is based entirely upon statutory authorization.¹⁰¹ Immunity statutes are mechanisms for securing a witness' self-incriminating testimony to aid in the prosecution of third parties. The Florida Statutes¹⁰² vest state prosecutors with authority to confer immunity on witnesses when the prosecution, in its discretion, believes that it would be in the public interest to allow one accused of crime to go free in order to help secure the conviction of another. The state attorney may subpoena witnesses to appear for questioning either before the grand jury or before the state attorney alone.¹⁰³ The exercise of the prosecutor's discretion as to whether or

96. 348 So. 2d 311 (Fla. 1977).

97. 332 So. 2d 127 (Fla. 4th Dist. 1976).

98. *E.g.*, *Mullin v. State*, 307 So. 2d 829 (Fla. 3d Dist. 1975).

99. 336 So. 2d 1274 (Fla. 1st Dist. 1976).

100. 311 So. 2d 126 (Fla. 2d Dist. 1975).

101. *Tsavaris v. Scruggs*, 360 So. 2d 745 (Fla. 1977).

102. FLA. STAT. § 914.04 (1977).

103. *Id.* § 27.04.

not to immunize a possible defendant in order to obtain necessary information requires difficult judgments on close questions. Under section 914.04 of the Florida Statutes, once a witness has been granted immunity, any testimony he gives may never be used against him in any criminal proceeding or investigation.¹⁰⁴ Furthermore, this statute provides for transactional immunity, which immunizes the witness from prosecution for "any transaction, matter, or thing concerning which"¹⁰⁵ he testified pursuant to the subpoena.¹⁰⁶ Transactional immunity attaches whether or not the immunized witness was a suspect before the investigation began.¹⁰⁷ However, since the purpose of the immunity statute is to provide protection from prosecution at least coextensive with the protection provided by the privilege against self-incrimination, immunity does not operate when a witness is compelled to produce nontestimonial evidence.¹⁰⁸

There is an unresolved conflict among the Florida district courts of appeal as to whether immunity attaches automatically or must be expressly granted when a witness gives testimony pursuant to a state subpoena. In *Orosz v. State*,¹⁰⁹ the District Court of Appeal, First District, held that the immunity statute is not self-operating. Although the witness in that case had been subpoenaed by the state to testify concerning a crime and did in fact testify, he was not immunized from prosecution because he failed to assert his constitutional privilege against self-incrimination. The court stated that " 'compulsory attendance is one thing and compulsory testimony is quite another.' "¹¹⁰

The District Court of Appeal, Second District, has taken a similar approach. In *State v. Newsome*,¹¹¹ the defendant voluntarily appeared at the state attorney's office where she testified under oath. She was subsequently subpoenaed to appear at the state attorney's office a second time, and without being advised of her constitutional rights, she was placed under oath and asked by the prosecu-

104. *Id.* § 914.04.

105. *Id.*

106. See *State ex rel. Hough v. Popper*, 287 So. 2d 282 (Fla. 1973).

107. *State ex rel. Key v. Fogle*, 347 So. 2d 1067 (Fla. 2d Dist. 1977).

108. *Woodsmall v. State*, 334 So. 2d 320 (Fla. 1st Dist. 1976).

109. 334 So. 2d 26 (Fla. 1st Dist. 1976).

110. *Id.* at 28 (citing the principle of law set forth in *State ex rel. Foster v. Hall*, 230 So. 2d 722, 723 (Fla. 2d Dist. 1970)). See also *State ex rel. Hemmings v. Coleman*, 187 So. 793 (Fla. 1939), which stands for the proposition that a person's constitutional rights are not violated if he is compelled to attend a grand jury investigatory proceeding and, after being advised of his fifth amendment privilege, gives self-incriminating testimony without objection.

111. 349 So. 2d 771 (Fla. 2d Dist. 1977).

tion if she could explain certain inconsistencies in her prior testimony. An information was later filed charging her with perjury by contradictory statements. The trial court held that since the defendant was not the focus of the investigation, no transactional immunity was conferred upon her. The trial court, however, determined that the witness was granted "use" immunity. The district court disagreed that the witness was granted any immunity whatsoever:

In order for a witness' testimony to result in either transactional or use immunity . . . the witness must be *compelled* to testify. The fact that . . . [the witness] was subpoenaed to testify, standing alone, does not mean that her testimony was compelled. Since she did not object to giving testimony, and the record does not reveal that she was coerced in any way, [her testimony was not compelled and immunity did not attach].¹¹²

The prosecution was under no obligation to apprise the witness of her *Miranda* rights because she was not the target of any investigation. Similarly, in *State v. Perkins*,¹¹³ the court held that a defendant could not claim transactional or use immunity on the grounds that he had turned over documents to the state attorney in compliance with a subpoena duces tecum when neither the defendant nor his counsel objected on the grounds of self-incrimination during the investigatory proceedings.¹¹⁴

The District Courts of Appeal for the Third and Fourth Districts have taken a different approach. If a witness presents testimonial evidence pursuant to a subpoena to appear before an investigatory proceeding of the state attorney, that witness is automatically granted transactional and use immunity unless the witness has waived his immunity.¹¹⁵ In *State v. Yatman*,¹¹⁶ the defendant was issued a subpoena commanding him to appear before the state attorney and to answer questions concerning various criminal charges pending against him and others. Acting on the belief that his client would be immunized from prosecution, the witness' attorney advised his client to appear and to testify. At the deposition, the state attorney advised the defendant of his rights and asked him to sign a waiver of immunity. The defendant complied with this request and was subsequently charged with the commission of a crime. The defendant moved to dismiss the information on the grounds that the

112. *Id.* at 772 (citations omitted) (emphasis in original).

113. 349 So. 2d 802 (Fla. 2d Dist. 1977).

114. *Accord*, *State v. Powell*, 343 So. 2d 892 (Fla. 1st Dist. 1977); *Thomas v. State*, 342 So. 2d 978 (Fla. 1st Dist. 1977).

115. *State v. Deems*, 334 So. 2d 829 (Fla. 3d Dist. 1976).

116. 320 So. 2d 401 (Fla. 4th Dist. 1975).

state had granted the defendant immunity by taking his deposition in the absence of counsel. The trial court found that the defendant had not intelligently waived immunity and granted the motion. The District Court of Appeal, Fourth District, remanded the case for further proceedings on the issue of whether or not the waiver of immunity was voluntary. It rejected the state's argument that the proper remedy for an involuntary waiver of immunity is merely suppression of the statements, rather than dismissal of the prosecution. The court emphasized that unless an intelligent waiver of immunity is shown, the state, by issuing process requiring a defendant to appear and give testimony, effectively immunizes that defendant from prosecution.¹¹⁷

The Supreme Court of Florida has not resolved this conflict. The court has, however, recently addressed a related issue which provides some indication as to its attitude toward this subject. In *Tsavaris v. Scruggs*,¹¹⁸ the defendant, Dr. Tsavaris, was being investigated for the murder of his girlfriend. The state attorney issued a subpoena duces tecum to the doctor's secretary, ordering her to produce various office files, including medical records and the doctor's personal appointment book. The defense argued that the secretary's compliance with the subpoena conferred immunity upon Tsavaris. The supreme court rejected this argument, holding that no citizen can be immunized from prosecution by another citizen's compliance with a subpoena. In addition, the court noted that Dr. Tsavaris had been called as a witness before the grand jury, but invoked his fifth amendment privilege. At that point the prosecution stopped all questioning, thereby electing not to confer immunity from prosecution upon the witness.

Because of the present state of confusion in this area, the best approach for state prosecutors would be to advise all witnesses appearing pursuant to a subpoena that they have the right to assert the privilege against self-incrimination. This is particularly true in those cases where a witness has been charged or is suspected of the crimes under investigation. If the witness then refuses to testify, the prosecutor can determine whether he wishes to confer immunity from prosecution. If the witness is advised of his rights and voluntarily answers questions, no immunity will attach.

117. The court stated that, "if the alleged waiver of immunity was involuntary, then the state by issuing process to require [the defendant] to testify before the state attorney without an intelligent waiver of immunity has effectively immunized the [defendant] from prosecution in accordance with the statute." *Id.* at 403.

118. 360 So. 2d 745 (Fla. 1977).

VII. CONTEMPT

Although a prosecutor has the power to compel the attendance of a witness at any investigatory or court proceeding, he lacks inherent power to compel testimony. At most, he can grant immunity from prosecution, and if the witness continues his refusal to testify the state may seek to invoke the powers of the court. The refusal of a witness to testify pursuant to a court order or a grant of immunity by the state may subject the witness to either civil or criminal contempt.

In *Pugliese v. Pugliese*,¹¹⁹ the Supreme Court of Florida discussed at length the distinctions between civil and criminal contempt, direct and indirect criminal contempt, and the procedural requirements for both.¹²⁰ The court noted that certain conduct can be the subject of either civil contempt (proceedings to coerce a person to act in a certain way) or can be the basis for criminal contempt (proceedings where the trial court determines the conduct to be obstinate and seeks to vindicate the authority of the court by punishing the contemnor). Although the nature of the conduct is not determinative of the character of the order, a distinction must be made since criminal contempt proceedings involve greater procedural due process safeguards.¹²¹ When civil contempt proceedings are converted to criminal contempt, procedural due process of law requires that the contemnor be given prior notice and a fair opportunity to prepare for the hearing on those charges.

In order to be held in contempt of court for refusal to comply with a court order, such refusal must be willful. In *Garo v. Garo*,¹²² the Supreme Court of Florida held that an order holding a party in contempt for nonpayment of alimony was deficient because the trial court made no specific finding that the party was presently able to

119. 347 So. 2d 422 (Fla. 1977).

120. For examples of direct and indirect criminal contempts, see *Shelley v. District Ct. App.*, 350 So. 2d 471 (Fla. 1977); *Jackson v. State*, 345 So. 2d 645 (Fla. 1977); *Martinez v. State*, 339 So. 2d 1133 (Fla. 2d Dist. 1976); *Garber v. State*, 335 So. 2d 609 (Fla. 2d Dist. 1976); *Easley v. State*, 334 So. 2d 630 (Fla. 2d Dist. 1976).

121. FLA. R. CRIM. P. 3.830 & 3.840. In *Pugliese*, certain statements by the trial court indicated that the contempt sentence was intended to punish, rather than to coerce the contemnor. In addition, the absence of any provision allowing the contemnor to purge himself of the contempt, and thereby terminate the sentence, made it appear that the order was for criminal contempt. The court, however, noted that the order was sought by the adverse party to the litigation, which is the classic method for initiating civil contempt. Furthermore, although the contemnor's counsel had received notice of a hearing for contempt, he had no reason to believe at the time of the hearing that it was for other than civil contempt. The contemnor was not notified that he was charged with a crime. If he had had such notice, he might not have admitted his violations of the trial court's order.

122. 347 So. 2d 418 (Fla. 1977).

pay any amounts due, or that the contemnor previously had the ability to comply but had divested himself of that ability through fault or neglect designed to frustrate the intent and purpose of the order.¹²³ In *Aiello v. State*,¹²⁴ the defendant was held in contempt and incarcerated for his refusal to respond to questions posed by the state pursuant to a subpoena issued in the course of an investigation regarding a pending criminal trial. The defendant was advised, however, that he would be permitted to purge himself by testifying at the subsequent trial. The defendant, who was still in custody when the trial began, offered to testify on behalf of the state but was not called as a witness. The appellate court held that the defendant should have been discharged from custody because he had been denied the opportunity to purge himself of contempt through no fault of his own.

Generally, if a witness has been given immunity from prosecution, he cannot with impunity refuse to testify on grounds of self-incrimination. In *McDonald v. State*,¹²⁵ the defendant was acquitted of an alleged rape after testifying at trial on his own behalf. He was subsequently called as a witness at the trial of a codefendant on the same rape charges. He refused to testify about the circumstances of the crime, asserting his privilege against self-incrimination. The trial court advised the witness that his prior acquittal precluded the state from trying him again on those charges. In addition, the prosecutor immunized McDonald.¹²⁶ The witness, however, continued his refusal to answer. After each refusal, the trial court summarily found him guilty of direct criminal contempt and thereafter sentenced him to fifteen consecutive terms of 178 days each. On appeal, the District Court of Appeal, Fourth District, reversed the imposition of multiple contempt convictions but held that the trial court was correct in advising the witness that since he was immune from prosecution, he could not with impunity refuse to testify on the grounds of self-incrimination. The court reasoned that if a witness is granted full immunity in order to compel him to testify, that protection is complete unless the witness perjures himself while testifying. The immunized witness need not fear prosecution for prior inconsistent or perjured statements.¹²⁷ The court noted that its opinion was in apparent conflict with the decisions of the District Courts of Appeal for the First and Third Districts in *Saunders v.*

123. See also *Faircloth v. Faircloth*, 339 So. 2d 650 (Fla. 1976).

124. 338 So. 2d 1101 (Fla. 4th Dist. 1976).

125. 321 So. 2d 453 (Fla. 4th Dist. 1975).

126. This immunity was granted pursuant to FLA. STAT. § 914.04 (1973).

127. 321 So. 2d at 455.

*State*¹²⁸ and *Salem v. State*,¹²⁹ respectively. In those cases, the courts upheld the witnesses' refusals to testify, despite grants of immunity, on the basis of a justified fear of self-incrimination. In both of those cases, the witnesses had previously testified under oath and allegedly feared prosecution for perjury by inconsistent statements.¹³⁰ The District Court of Appeal, Fourth District, in *McDonald* stated that *Salem* and *Saunders* may have been correctly decided if based upon the fact that the witnesses were given a limited, rather than a complete offer of immunity from prosecution. The *McDonald* court, however, emphasized that it would strongly disagree with the holdings in those cases if full immunity had been granted and the courts had upheld the refusals of the witnesses on the basis that there allegedly existed a substantial risk of prosecution for perjury growing out of prior inconsistent testimony.¹³¹

If a trial court wishes to impose a sentence of imprisonment in excess of six months for a conviction of criminal contempt, it is necessary for the court to empanel a jury to determine the question of guilt or innocence.¹³² If, as in *McDonald*, a witness improperly refuses to answer a series of questions pertaining to the subject matter of an investigation or trial, he commits only one contempt, and multiple contempt penalties are unlawful.¹³³

VIII. PLEAS OF GUILTY AND NOLO CONTENDERE

A. Acceptance of Pleas

In *Williams v. State*,¹³⁴ the Supreme Court of Florida resolved a sharp conflict among the district courts as to whether it is reversible error for a trial court to accept a plea of guilty without inquiring, on the record, into the factual basis for the plea. The court noted that trial courts have a duty to determine: (1) that the circumstances surrounding a plea reflect a full understanding by the defendant of the significance of his plea; (2) that the plea is made voluntarily; and (3) that there is a factual basis for the plea. The court noted that ninety percent of criminal felony cases are disposed of by guilty pleas and that the acceptance of such pleas is one of the most

128. 319 So. 2d 118 (Fla. 1st Dist. 1975).

129. 305 So. 2d 23 (Fla. 3d Dist. 1974).

130. See *Brown v. State*, 334 So. 2d 597 (Fla. 1976).

131. See *State v. Newsome*, 349 So. 2d 771, 772-74 (Fla. 2d Dist. 1977) (Boardman, J., dissenting); *Feldman v. State*, 348 So. 2d 415 (Fla. 1st Dist. 1977).

132. *Aaron v. State*, 345 So. 2d 641 (Fla. 1977).

133. *McDonald v. State*, 321 So. 2d 453, 458 (Fla. 4th Dist. 1976); accord, *Baker v. Eisenstadt*, 456 F.2d 383 (1st Cir. 1972).

134. 316 So. 2d 267 (Fla. 1975).

important tasks of a trial judge. A proper and thorough inquiry by the trial court at the time the plea is entered reduces unnecessary appellate and post conviction review. The purpose of the factual basis requirement is to ensure that the facts of the case fit the offense for which the defendant is charged. Its primary purpose is to avoid the possibility that a defendant will mistakenly enter a plea of guilty to the wrong offense. In addition, a defendant must understand the nature of the charge against him and the consequences of his plea. The court in *Williams*, however, recognized that a plea is not rendered involuntary because the defendant is influenced by fear of a higher penalty in the event he is convicted at trial so long as the plea represents a voluntary and intelligent choice among alternative courses of action open to him.¹³⁵ The supreme court stated that trial courts have broad discretion in determining what type of procedure to utilize in ascertaining the necessary factual information. For example, the court may derive the factual basis for the plea through statements and admissions made by the defendant, his counsel and the prosecutor, or by other factual evidence and testimony presented in the case. The supreme court held that if the record reflects a voluntary and intelligent plea, the failure of the trial judge to determine fully whether the defendant mistakenly entered a plea to the wrong offense is no ground upon which to vacate the plea absent a showing of prejudice or manifest injustice. The principles set forth in *Williams* have been incorporated into Rule 3.172 of the Florida Rules of Criminal Procedure.¹³⁶

In *State v. Lyles*,¹³⁷ the trial court conducted an inquiry into the factual basis of the defendant's plea, but during the colloquy between the court and the defendant, the defendant made factual allegations implying a possible defense to the charges. Because the trial judge failed to ask the defendant whether or not he had discussed this defense with his attorney and had been made aware that by pleading guilty he was waiving this defense, the case was remanded with instructions to the trial court to: (1) make a proper inquiry into the discussions between defendant and his counsel relative to any defenses that might be applicable; (2) receive further evidence concerning the factual basis of the plea; and (3) allow the defendant an opportunity to present evidence on his own behalf to show how, if at all, any manifest injustice had occurred.¹³⁸

135. See *North Carolina v. Alford*, 400 U.S. 25 (1970).

136. The Florida Bar. *Re Florida Rules of Criminal Procedure*, 343 So. 2d 1247, 1254 (Fla. 1977) (per curiam); FLA. R. CRIM. P. 3.172.

137. 316 So. 2d 277 (Fla. 1975).

138. *Id.* at 279. See also *State v. Kendrick*, 336 So. 2d 353 (Fla. 1976); *Andrews v. State*, 343 So. 2d 844 (Fla. 1st Dist. 1976); *Miles v. State*, 338 So. 2d 547 (Fla. 3d Dist. 1976).

If the facts asserted by a defendant set forth a defense which is irrelevant to the charges to which the defendant pleads guilty, the trial court need not make any inquiry to determine whether or not the defendant has intelligently waived his right to assert this defense.¹³⁹ However, the procedures set forth in *Williams* govern the acceptance of all guilty pleas, including pleas entered as the result of plea bargaining.¹⁴⁰

B. *Nolo Contendere*

Until 1977, there was no requirement that the trial court make an inquiry into the factual basis of a plea of *nolo contendere*.¹⁴¹ In 1977, however, the Supreme Court of Florida adopted Rule 3.172(a) of the Florida Rules of Criminal Procedure, which makes such inquiry mandatory.¹⁴² A plea of *nolo contendere* does not admit the allegations of the charge in a technical sense, but states that the defendant does not choose to contest the charges filed against him. It is the equivalent of a guilty plea only insofar as it gives the court the power to punish. Furthermore, a plea of *nolo contendere* is an admission of guilt and waives all formal defects, as well as the defendant's right to raise issues of fact on the questions of guilt or innocence. In *Vinson v. State*,¹⁴³ the supreme court held that if a defendant pleads guilty or *nolo contendere* to the charges against him, the court must either: "(1) accept the plea and enter a judgment and sentence thereon; or (2) reject the plea, enter a plea of not guilty for the defendant (after which the defendant would have a choice of entering a plea of guilty or not guilty)"¹⁴⁴ and proceed to trial. A trial court has no authority to enter a judgment of not guilty based upon the facts set forth in the plea hearing.¹⁴⁵

Generally, a defendant enters a plea of *nolo contendere* rather than a plea of guilty for the purpose of reserving for appellate review a question of law which the trial court has decided against the defendant. In *State v. Ashby*,¹⁴⁶ the supreme court noted that plead-

139. *Dardy v. State*, 324 So. 2d 178 (Fla. 1st Dist. 1975).

140. *Grant v. State*, 316 So. 2d 282 (Fla. 1975).

141. *Vinson v. State*, 345 So. 2d 711 (Fla. 1977).

142. The Florida Bar. *Re Florida Rules of Criminal Procedure*, 343 So. 2d 1247, 1254 (Fla. 1977) (per curiam); FLA. R. CRIM. P. 3.172(a).

143. 345 So. 2d 711 (Fla. 1977).

144. *Id.* at 717.

145. In *Vinson*, the defendant was charged with unlawful delivery of a controlled substance. Pursuant to plea bargaining, he entered a plea of *nolo contendere* to the charges. Over the state's objection, the trial court proceeded to receive into evidence various exhibits and to hear testimony. Subsequently, the trial court entered an order finding the defendant not guilty of all charges.

146. 245 So. 2d 225 (Fla. 1971).

ing *nolo contendere* and specifically reserving the right to appeal a question of law is an acceptable practice. Generally, trial courts should allow defendants to enter pleas of *nolo contendere*, reserving their right to appeal any legal issue, rather than force defendants to enter pleas of guilty.¹⁴⁷ The holding in *Ashby* has been strictly construed. If the record on appeal fails to reflect that the appellant's plea of *nolo contendere* was entered with a reservation of his right to appeal a particular point of law, the appellate court will not consider that issue. However, appellate courts have generally allowed defendants to file supplemental records reflecting that the plea of *nolo contendere* was in fact conditional on the reservation of the right to appeal.¹⁴⁸ The supplemental record must show that the entry of the plea was conditioned upon the reservation of a defendant's right to appeal rather than his mere intention to appeal subsequent to the entry of the plea. The recently amended Florida Appellate Rules require not only an express reservation of the right to appeal, but also the identification of the specific point of law being reserved.¹⁴⁹

The procedure of pleading *nolo contendere* with a specific reservation of the right to appeal avoids the cost and delay of a full trial when that would be futile. However, the decision of whether to proceed by this method should be made with caution and only after careful analysis of the individual case. For example, if one is pleading *nolo contendere*, while specifically reserving the right to appeal the constitutionality of a statute on its face, the defense should realize that the appellate court will limit itself to a review of that issue alone, and will refuse to address the issue of whether the statute can be constitutionally applied under the facts involved in that particular case. Questions of fact are generally waived by a plea of *nolo contendere*.¹⁵⁰ However, the sufficiency, on its face, of the charging instrument is subject to review if properly preserved.¹⁵¹

The Florida Rules of Criminal Procedure specifically contemplate situations in which pleas of guilty or *nolo contendere* may be

147. *Rece v. State*, 333 So. 2d 494 (Fla. 4th Dist. 1976).

148. *Farrell v. State*, 317 So. 2d 142 (Fla. 1st Dist. 1975). See *Beverly v. State*, 322 So. 2d 597 (Fla. 1st Dist. 1975).

149. FLA. APP. R. 9.140(b) provides:

A defendant may not appeal from a judgment entered upon a plea of guilty; nor may a defendant appeal from a judgment entered upon a plea of *nolo contendere* without an express reservation of the right to appeal from a prior order of the lower tribunal, identifying with particularity the point of law being reserved.

150. *Hand v. State*, 334 So. 2d 601 (Fla. 1976).

151. *Allen v. State*, 326 So. 2d 419 (Fla. 1975); *Cartey v. State*, 337 So. 2d 835 (Fla. 2d Dist. 1976).

withdrawn.¹⁵² A plea may be withdrawn in the trial court's discretion for good cause shown at any time prior to sentencing. If the plea is shown to have been involuntary or if the defendant was incompetent at the time he entered the plea, it is error for the trial court to deny a defendant's motion to withdraw his plea.¹⁵³ However, if a defendant has pleaded guilty pursuant to a plea bargaining agreement in which the state has promised to recommend a certain sentence, the refusal of the trial judge to accept the state attorney's recommendation is insufficient grounds to reverse a trial court's order denying a motion by the defendant to withdraw his plea, so long as the trial court informed the defendant prior to entry of the plea that the court would not be bound by the state's recommendation as to the sentence.¹⁵⁴ On the other hand, if the guilty plea was induced by a commitment made by the trial judge and communicated to the defendant or was based upon a failure of communication or misunderstanding of the facts, the plea may be withdrawn.¹⁵⁵

In *Norris v. State*,¹⁵⁶ the defendant alleged that prior to the entry of her plea, she was not informed of the mandatory three year minimum sentence required upon conviction of aggravated assault involving a firearm. The case was remanded for an evidentiary hearing to determine whether the defendant in fact failed to understand the significance of her guilty plea to an offense involving the use of a firearm. In *Brown v. State*,¹⁵⁷ the appellate court reversed the trial court's order denying defendant's motion to withdraw his plea prior to sentencing. The district court stated that a full review of the proceedings disclosed a general pattern on the part of the trial court to pressure the defendant into entering a plea of guilty. The trial court had allowed the state to amend an information on the morning of trial to include a count charging an additional crime. The trial court denied the defendant's request for a continuance. In addition, the trial judge informed the defendant that he would impose the maximum sentence of twenty years if the defendant went to trial, whereas he would impose a five year sentence if the defendant would plead guilty. On the basis of these facts, the district court held that the trial court had abused its discretion in refusing to allow the defendant to withdraw his guilty plea.

Other Florida cases have held that if a trial court participates

152. *Humphries v. State*, 336 So. 2d 432 (Fla. 1st Dist. 1976); FLA. R. CRIM. P. 3.170(f).

153. *Alleluio v. State*, 338 So. 2d 1137 (Fla. 1st Dist. 1976).

154. *State v. Adams*, 342 So. 2d 818 (Fla. 1977); FLA. R. CRIM. P. 3.171(b)(1).

155. *Surace v. State*, 351 So. 2d 702 (Fla. 1977).

156. 343 So. 2d 964 (Fla. 1st Dist. 1977).

157. 344 So. 2d 1286 (Fla. 1st Dist. 1977).

in plea bargaining arrangements and agrees that a certain sentence will be awarded if the defendant cooperates with the plea bargain, the trial court should not later give a higher sentence based upon other factors if the defendant has fulfilled his part of the bargain.¹⁵⁸ If a trial judge believes that he should not comply with the bargained sentencing arrangements, he is obliged to permit the defendant to withdraw his plea. It is hoped that the recently amended Florida Criminal Procedure Rules, governing plea discussions and agreements and setting forth the various responsibilities of the prosecuting attorney, the defense attorney and the trial judge, will prove helpful in assuring that pleas entered pursuant to such discussions will be based upon a full understanding of the consequences.¹⁵⁹

IX. IMPROPER INQUIRY AND ARGUMENT

The Florida appellate courts have long attempted to delineate what constitutes proper and improper argument by counsel during trial. The courts seek to ensure that a criminal defendant is afforded his constitutional right to present his defense to a jury at a fair and impartial trial. In addition, while a representative of the state attorney's office must vigorously perform his function as a prosecutor, it is also his responsibility to ensure that the accused has a fair and impartial trial.¹⁶⁰ However, numerous cases have continued to appear in the appellate courts in which the prosecution has exceeded proper bounds, necessitating reversal and remand for new trial.¹⁶¹

A. *Character Evidence*

It is a well established rule that the state cannot put an ac-

158. *Pringle v. State*, 341 So. 2d 535 (Fla. 2d Dist. 1977); *Williams v. State*, 341 So. 2d 214 (Fla. 2d Dist. 1976); *Moore v. State*, 339 So. 2d 228 (Fla. 2d Dist. 1976). See also FLA. R. CRIM. P. 3.151(d).

159. FLA. R. CRIM. P. 3.171-.172.

160. *Rolle v. State*, 268 So. 2d 541 (Fla. 3d Dist. 1972).

161. As noted by Judge Downey in *Harden v. State*, 303 So. 2d 679, 680-81 (Fla. 4th Dist. 1974):

Many of the appeals in criminal cases today have only one troublesome point on appeal, i.e., improper prosecutorial comment during argument and/or improper inquiry into the defendant's past criminal record.

In this day and time we should be able to assume that trial counsel is familiar with the limitations upon inquiry into a defendant's criminal record, particularly those lawyers charged with the responsibility of prosecuting serious crimes.

Certainly nothing new has been stated here, but I would hope that merely pointing up the problem might refresh the recollection of prosecutors regarding their responsibility and thereby perhaps obviate the frequency with which we face the problem.

cused's character into evidence unless and until the defendant raises the issue of his good character, either by testimony of his witnesses or by his own testimony.¹⁶² The state's improper introduction of evidence relating to a defendant's bad character constitutes reversible error whether such evidence was introduced as a trial maneuver or whether its introduction resulted from inadvertence.¹⁶³ The fact that a defendant takes the witness stand and testifies in his own behalf, admitting prior convictions, does not render the error harmless.¹⁶⁴ Furthermore, it is improper for a prosecutor to cross-examine a defense witness concerning the alleged criminal character of the defendant, unless the defendant has first chosen to place his good character in issue.¹⁶⁵

B. *Prior Convictions*

If a defendant testifies at his trial, his testimony may be impeached through inquiry by the state regarding any prior convictions. If he admits such convictions, he may be asked how many times he has been convicted, but if he denies the convictions, the state must produce the record. In either event, the inquiry must stop at this point. The matter may not be pursued to the point of naming the crime.¹⁶⁶

There is a conflict among the district courts as to the proper manner of impeachment. In *Irvin v. State*,¹⁶⁷ the District Court of Appeal, Fourth District, held that it was harmful error for a prosecutor to attempt to impeach a defendant's answer concerning his prior crimes without producing and entering into evidence the record of prior convictions. In a footnote, the court stated that a rap sheet would be insufficient documentation for this purpose, since "[s]uch a document is liable to inaccuracies and is not a certified document."¹⁶⁸ In *State v. Young*,¹⁶⁹ however, the District Court of Appeal, First District, stated that it was proper for the prosecution to impeach a defendant's answer concerning the number of his prior convictions by using a rap sheet to refresh his memory.

162. *Andrews v. State*, 172 So. 2d 505 (Fla. 1st Dist. 1965); *Jordan v. State*, 107 Fla. 333, 144 So. 669 (1932).

163. *Post v. State*, 315 So. 2d 230 (Fla. 2d Dist. 1975).

164. *Id.* at 232.

165. *Roti v. State*, 334 So. 2d 146 (Fla. 2d Dist. 1976).

166. *McArthur v. Cooke*, 99 So. 2d 565 (Fla. 1957); *Jones v. State*, 305 So. 2d 827 (Fla. 4th Dist. 1975).

167. 324 So. 2d 684 (Fla. 4th Dist. 1976).

168. *Id.* at 686 n.2.

169. 283 So. 2d 58 (Fla. 1st Dist. 1973), *cert. denied*, 290 So. 2d 61 (Fla. 1974).

In *Fulton v. State*,¹⁷⁰ the Supreme Court of Florida stated that although a witness may be questioned about his prior convictions for the purpose of testing his credibility, it is generally improper to produce evidence of pending charges against a witness for impeachment purposes. The court noted that the admission of such evidence might unduly prejudice a jury against the witness; that an unproven charge does not logically tend to affect a witness's credibility; and that a person is presumed innocent until guilt is legally established. There are exceptions to this general rule, for example, where the pending charges arise out of the same episode which led to the charges on which the defendant is being tried,¹⁷¹ or where the existence of pending charges may be relevant to show the witness' motive for assisting the state.¹⁷² In *Fulton*, the state apparently offered the evidence of pending charges in an effort to show the witness' bias against the state. The court held that the supposed bias of a defense witness, attributable to charges concerning a totally distinct offense, is not a proper subject for impeachment. The probative value of such inquiry is outweighed by the likelihood of prejudice to the accused. In *Fulton*, this improper inquiry denied the defendant an opportunity fairly to present his claim of self defense to the jury and was thus reversible error.

C. *Improper Comments*

Generally, an appellate court will not consider allegedly improper and prejudicial remarks made by a prosecutor unless the defense objected to them at trial.¹⁷³ A timely objection to an improper comment allows the trial court an opportunity to rebuke the prosecutor for such impropriety and specifically to instruct the jury to disregard such comments. Whether or not the comments necessitate the granting of a mistrial is usually left to the sound discretion of the trial court.¹⁷⁴

Considerable latitude is afforded trial counsel in arguments concerning the merits of the case. Logical inferences from the evidence are usually permissible. Also, otherwise improper arguments made by a prosecutor will not be held reversible error if they are invited by the argument of the defendant's attorney and do not

170. 335 So. 2d 280 (Fla. 1976).

171. *Herzig v. State*, 213 So. 2d 900 (Fla. 4th Dist. 1968).

172. *Lee v. State*, 318 So. 2d 431 (Fla. 4th Dist. 1975); *Morrell v. State*, 297 So. 2d 579 (Fla. 1st Dist. 1974).

173. *Thomas v. State*, 326 So. 2d 413 (Fla. 1975); *State v. Jones*, 204 So. 2d 515 (Fla. 1967).

174. *Paramore v. State*, 229 So. 2d 855 (Fla. 1969).

prejudice the defendant's right to a fair trial.¹⁷⁵ In *State v. Rucker*,¹⁷⁶ the prosecutor made an improper reference during closing argument to the defendant's identification through the use of "mug shots." The Supreme Court of Florida reiterated its prior holding in *Loftin v. State*,¹⁷⁷ wherein it had held that a reference to the phrase "mug shots" does not constitute reversible error in all cases, especially when the trial court sustains an objection to the comment and gives the jury cautionary instructions. If, however, such comments are coupled with other improper references and thereby raise an impermissible inference as to the criminal character of the defendant, they may have the cumulative effect of denying the defendant his right to a fair trial.¹⁷⁸

There are, however, several areas in which comments by a prosecutor are particularly prejudicial and will generally result in the reversal of a conviction. In *Bennett v. State*,¹⁷⁹ the supreme court held that any comment before a jury concerning a defendant's exercise of his fifth amendment right to remain silent constitutes reversible error without consideration of the harmless error doctrine.¹⁸⁰ Although silence in the face of an accusation does not always raise a logical inference of the accused's guilt, the prejudicial effect of this testimony outweighs any probative value.¹⁸¹

Another category of highly improper comments concerns expressions by the prosecutor of his personal belief in the guilt of the accused or the credibility of a key witness, when such expressions imply that the state has additional information or knowledge which has not been presented. In *Thompson v. State*¹⁸² and *Richardson v. State*,¹⁸³ the prosecutor improperly remarked during closing argument to the jury that the state could have produced several other witnesses to support the case against the defendants.¹⁸⁴ If an impro-

175. *Allen v. State*, 320 So. 2d 828 (Fla. 4th Dist. 1975).

176. 330 So. 2d 470 (Fla. 1976).

177. 273 So. 2d 70 (Fla. 1973).

178. See generally *Perkins v. State*, 349 So. 2d 776 (Fla. 2d Dist. 1977); *State v. Woodson*, 330 So. 2d 152 (Fla. 4th Dist. 1976).

179. 316 So. 2d 41 (Fla. 1975).

180. See also *Shannon v. State*, 335 So. 2d 5 (Fla. 1976).

181. See *United States v. Hale*, 422 U.S. 171 (1975).

182. 318 So. 2d 549 (Fla. 4th Dist. 1975), cert. denied, 333 So. 2d 465 (Fla. 1976).

183. 335 So. 2d 835 (Fla. 4th Dist. 1976).

184. In *Thompson*, the jury's verdict hinged upon the weighing of the credibility of a single state witness against that of a single defense witness, the defendant himself. The prosecutor freely admitted during closing argument to the jury that the state's case was based upon the jury's acceptance of a police officer's testimony concerning certain statements allegedly made by the defendant at the scene of the crime. Instead of merely arguing why the jury should believe the officer's testimony from the evidence presented at trial, the prosecutor stated:

per remark by the prosecutor is of such character that neither rebuke nor retraction may entirely destroy its sinister influence, a new trial may be granted regardless of the defendant's lack of objection.

A prosecutor should confine his closing argument to the evidence in the record and should not make comments which cannot be reasonably inferred therefrom. In a criminal trial, it is left to the determination of the jury whether or not to believe a witness' testimony. Prosecutors should not attempt to sway jurors by passion or prejudice.¹⁸⁵ Likewise, it is well settled that it is reversible error for a prosecutor to use the so-called "golden rule" argument (a technique of asking the jurors to place themselves in the position of the victim).¹⁸⁶ In *Lucas v. State*,¹⁸⁷ a prosecutor was describing the crime of sexual battery during closing argument to the jury and queried of the female jury members, "think how you ladies would feel if that happened to you."¹⁸⁸ This statement was held to be reversible error.

X. JURY INSTRUCTIONS

A. Procedure

Criminal defendants must be given an opportunity to participate in the determination of the instructions and other information that should be given to the jury. In *Ivory v. State*,¹⁸⁹ the Supreme Court of Florida held that a defendant in a criminal case is denied a fair trial and due process of law when the trial judge responds to a request from the jury, during the period of its deliberations, without affording the prosecutor and the defendant or his counsel an opportunity to be present and object to or request alternative courses of action. In *Ivory*, the jury, after retiring to consider its verdict, sent out requests for additional information and supplemental instructions. The trial judge responded to the jury's request without notifying the defendant or his counsel. The supreme court found this improper and held that any communication with the jury outside the presence of the defendant or his counsel is so fraught

Now there were a lot of officers there; and I did tell you that I was going to present five of them. This was a mistake on my part, because at the time I thought I was going to, but there wasn't any need.

I said to myself, "Should I swamp them in quantity, or shall I give them one good witness?" I just presented one witness who heard those statements.

318 So. 2d at 551.

185. *Wilson v. State*, 294 So. 2d 327 (Fla. 1974); *Grant v. State*, 194 So. 2d 612 (Fla. 1967); *Pait v. State*, 112 So. 2d 380 (Fla. 1959).

186. *E.g.*, *Adams v. State*, 192 So. 2d 762 (Fla. 1966).

187. 335 So. 2d 566 (Fla. 1st Dist. 1976).

188. *Id.* at 567.

189. 351 So. 2d 26 (Fla. 1977).

with potential prejudice that it cannot be considered harmless error. It should be noted that, generally, trial counsel must object to the giving of a particular instruction (or the refusal to give a particular instruction) in order to preserve the point for appeal. The proper procedure is to submit to the court a written request for jury instructions.¹⁹⁰ This rule, however, is not rigidly applied where the trial court has previously indicated its refusal to give the requested information.¹⁹¹

B. Lesser Included Offenses

In *Brown v. State*,¹⁹² the Supreme Court of Florida set forth the substantive law relating to instruction on lesser included offenses. The cases are divided into four general categories: (1) crimes divisible into degrees; (2) attempts to commit offenses; (3) offenses necessarily included in the offense charged; and (4) offenses which may or may not be included in the offense charged, depending on the accusatory pleading and the evidence. In *Brown*, the court held that an instruction must be given on all necessarily included offenses, without regard to the evidence in the case.¹⁹³ In subsequent cases, the court has held that such an instruction should be given in spite of objection by the defense.¹⁹⁴

The mandatory nature of this requirement was modified, however, in *DeLaine v. State*¹⁹⁵ and *State v. Wilson*.¹⁹⁶ In *DeLaine*, the defendant was charged with rape. The lesser included offenses were assault with intent to commit rape, assault and battery and bare assault. The trial court instructed the jury on the lesser included crime of assault with intent to commit rape, but refused to give an instruction on the other lesser included crimes. The supreme court observed that the jury could have convicted the defendant of that lesser included offense included in the instructions, but did not do so, choosing rather to convict on the greater charge of rape. The court concluded that since the jury did not convict the defendant of assault with intent to commit rape, the jury would not have convicted him of assault and battery, which is "two steps removed" from the crime of rape.¹⁹⁷

190. FLA. APP. R. 6.7(g).

191. *Brown v. State*, 206 So. 2d 377, 384 (Fla. 1968).

192. *Id.*; *Wilson v. State*, 344 So. 2d 1315 (Fla. 2d Dist. 1977).

193. 206 So. 2d at 377.

194. *Rayner v. State*, 273 So. 2d 759 (Fla. 1973); *State v. Washington*, 268 So. 2d 901 (Fla. 1972).

195. 262 So. 2d 655 (Fla. 1972).

196. 276 So. 2d 45 (Fla. 1973).

197. 262 So. 2d at 658.

In *State v. Terry*,¹⁹⁸ the supreme court again attempted to clarify its position as to the instruction on lesser included offenses. There, the defendant had been charged with assault with intent to commit murder in the first degree. The jury found the defendant guilty of aggravated assault after considering testimony that she shot the victim in self defense. The trial judge instructed the jury on the offenses of assault with intent to commit murder in the first degree, assault with intent to commit murder in the second degree, assault with intent to commit manslaughter, aggravated battery and aggravated assault, but refused to instruct the jury on assault and battery and bare assault. The court found that the crime of bare assault is necessarily included within the greater offense of assault with intent to commit murder and thus falls within category three of *Brown*. It was, therefore, prejudicial error for the trial court to omit an instruction regarding this offense. The court further found that assault and battery falls within category four of *Brown*, since it is an offense which may or may not be included in the major offense, depending on the accusatory pleading and the evidence. The supreme court stated that in order to determine whether or not it was necessary to instruct on assault and battery, the trial court should have analyzed the charging information (the accusatory pleading) and the evidence presented at trial (the proof).¹⁹⁹ Since the information and the evidence showed that the defendant had not merely shot at the victim but had also injured him, the lesser included offense of assault and battery should have been given.

In *Lomax v. State*,²⁰⁰ the Supreme Court of Florida noted the conflicting decisions among the district courts and again attempted to clarify its position. In *Lomax*, the defendant was charged with robbery. Defense counsel requested instructions on attempted robbery, assault with intent to commit murder, grand larceny and petit larceny. Although the trial court gave instructions regarding robbery, grand larceny and petit larceny, it refused to instruct the jury regarding assault with intent to commit robbery and attempted robbery. The district court had determined that this was error but concluded that such error was harmless, since there was overwhelming evidence that the defendant committed the greater crime, and the jury could not reasonably have found that only the lesser crime was committed.²⁰¹ The supreme court rejected the district court's reasoning that the failure to instruct on a lesser included offense

198. 336 So. 2d 65 (Fla. 1976).

199. *Id.* at 68 (citing *Gilford v. State*, 313 So. 2d 729 (Fla. 1975)).

200. 345 So. 2d 719 (Fla. 1977).

201. *Lomax v. State*, 322 So. 2d 650, 651 (Fla. 2d Dist. 1975).

should be held harmless if no reasonable jury could infer that the crime charged was not in fact committed. That reasoning would improperly allow a trial court to invade the province of the jury by making a unilateral determination that a lesser included offense instruction is unnecessary when there is overwhelming evidence to convict the defendant of the crime charged.²⁰² The court noted that *Terry* and other similar decisions are based on the concept of "jury pardoning." This concept contemplates that a jury has the power, and must be given the opportunity, to "pardon" a defendant for a more serious offense by convicting him of a lesser one, even one which does not exist as a matter of fact in the case. Thus, instructions on attempts to commit the greater offense charged should be given, even though the evidence clearly shows that the major offense was completed.²⁰³ However, it is not necessary for a trial court to instruct on the attempt to commit a certain crime when, as a matter of law, the attempt to commit that offense does not constitute a crime in the State of Florida.²⁰⁴

C. Homicide

It appears that the Supreme Court of Florida has made a distinction between those instructions necessary in homicide prosecutions and those required in prosecutions for other offenses. In *Martin v. State*,²⁰⁵ the supreme court specifically held that in cases involving homicide, proper jury instructions are limited to those charges involving lawful and unlawful homicide. In that case, the court held that it was not error for the trial court to refuse to instruct on aggravated assault, even though that crime might technically qualify as a category four lesser included offense under *Brown v. State*.²⁰⁶ The court rejected the argument that this holding might allow the trial court to invade the province of the jury, because the jury's duty in a homicide prosecution is to ascertain whether the defendant caused the victim's death, and if so, whether the homicide was justifiable or unjustifiable.

In *Adams v. State*,²⁰⁷ the Supreme Court of Florida rejected the "jury pardon" concept, at least as it pertains to the various degrees of homicide under category one of *Brown*. In *Adams*, the defendant

202. 345 So. 2d at 721.

203. *Id.*

204. *King v. State*, 339 So. 2d 172 (Fla. 1976). See *Silvestri v. State*, 332 So. 2d 351 (Fla. 4th Dist.), *aff'd*, 340 So. 2d 928 (Fla. 1976).

205. 342 So. 2d 501 (Fla. 1977).

206. 206 So. 2d 377 (Fla. 1968).

207. 341 So. 2d 765 (Fla. 1977), *cert. denied*, 434 U.S. 878 (1977).

was convicted of first degree murder. The indictment and evidence showed that the murder had been committed by the defendant during the commission of a robbery. The supreme court noted that the distinction between first and second degree felony murder depends on whether or not the defendant was present at the scene of the crime.²⁰⁸ The court held that it was not error for the trial court to instruct the jury that it was required to return a verdict of murder in the first degree if it believed that the defendant had fatally beaten the victim during the course of a robbery.

Similarly, in *State v. Jefferson*²⁰⁹ the defendant was charged with first degree felony murder. The court instructed the jury regarding the offenses of first degree felony murder, first degree murder, second degree murder, third degree murder, manslaughter, excusable homicide, nonexcusable homicide, aggravated assault and several other lesser-included offenses. No instruction, however, was requested or given on second degree *felony* murder. The District Court of Appeal, Fourth District, held that the trial court's failure to instruct on second degree felony murder constituted fundamental error.²¹⁰ The supreme court disagreed and quashed the decision of the appellate court.

D. *Insanity*

In *Roberts v. State*,²¹¹ the Supreme Court of Florida held that the failure to instruct the jury in accordance with the defendant's request, as to the consequences of a verdict of not guilty by reason of insanity, constituted reversible error. In doing so, the court expressly adopted the "Lyles Rule."²¹² The court rejected the State's argument that by informing the jurors of the consequences of their verdict, their attention would be drawn from their chief function as triers of fact, and they would be led to compromise their verdicts. To the contrary, the supreme court stated:

Freed from confusion and wonderment as to the possible practical effect of a verdict of not guilty by reason of insanity, jurors will be able to weigh the evidence relating to the factual existence of legal insanity in an atmosphere untroubled by the distracting thought that such a verdict would allow a dangerous psychopath to roam at large.²¹³

208. See *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

209. 347 So. 2d 427 (Fla. 1977).

210. 334 So. 2d 178 (Fla. 4th Dist. 1976).

211. 335 So. 2d 285 (Fla. 1976).

212. *Lyles v. United States*, 254 F.2d 725 (D.C. Cir. 1957).

213. 335 So. 2d at 289.

The court noted that the consequences of a verdict of acquittal by reason of insanity are set forth in the Florida Rules of Criminal Procedure.²¹⁴ In *Wheeler v. State*,²¹⁵ the court reaffirmed its holding in *Roberts* but rejected the defendant's argument that the court should abandon the M'Naughten Rule.²¹⁶ The court noted that it had recently reapproved this rule by adopting jury instructions on insanity which require a jury to determine whether a defendant was incapable of distinguishing right from wrong at the time of the alleged offense.²¹⁷

XI. SENTENCING

The prescribed punishment for a criminal offense is a matter of substantive law.²¹⁸ When imposing a sentence, a trial court must comply with the relevant statutory requirements. In *Benyard v. Wainwright*,²¹⁹ the Supreme Court of Florida held that a statute,²²⁰ governing the imposition of concurrent and consecutive terms of imprisonment, controls over inconsistent criminal procedure rules.²²¹ The court reasoned that since the determination as to whether a sentence is consecutive or concurrent directly affects the length of time spent in prison, substantive rather than procedural rights are involved and these rights must be protected.

The statute governing credit for county jail time already served has undergone a similar development. Prior to its amendment in 1973, the Florida Statutes²²² left the determination of whether credit should be given for time spent in jail awaiting trial to the trial court's discretion.²²³ The statute, however, now provides that such credit is mandatory.²²⁴ In cases decided since the amendment, this section has been construed to require trial courts to give credit for time served as a condition of probation,²²⁵ and to give credit even though the defendant was held in jail on other charges.²²⁶ The

214. FLA. R. CRIM. P. 3.460.

215. 344 So. 2d 244 (Fla. 1977).

216. Florida has adhered to the M'Naughten Rule since 1902. *Anderson v. State*, 276 So. 2d 17 (Fla. 1973).

217. 344 So. 2d at 246 n.2.

218. See *State v. Garcia*, 229 So. 2d 236, 238 (Fla. 1969).

219. 322 So. 2d 473 (Fla. 1975).

220. FLA. STAT. § 921.16 (1975).

221. FLA. R. CRIM. P. 3.722.

222. FLA. STAT. § 921.161 (1973) (current version at FLA. STAT. § 921.161 (1975)).

223. But see *Adams v. Wainwright*, 275 So. 2d 235 (Fla. 1973).

224. FLA. STAT. § 921.161(1) (1977).

225. *Ivey v. State*, 327 So. 2d 219 (Fla. 1976); *DeLaughter v. State*, 337 So. 2d 848 (Fla. 2d Dist. 1976).

226. *Voulo v. Wainwright*, 290 So. 2d 58 (Fla. 1974).

courts, however, have also held that a defendant is not entitled to duplicate credits against several different sentences.²²⁷

Prior to July 1, 1974, the Florida Statutes²²⁸ specified that a term of probation could not extend more than two years beyond the maximum permissible sentence. This provision, however, was eliminated by the legislature in 1974,²²⁹ and subsequently it has been held that absent a specific legislative grant, a court cannot impose probation beyond the maximum permissible sentence for the crime of which the defendant stands convicted.²³⁰ This same amendment expanded the trial judge's specific statutory authority to use a "split sentence probation alternative" for persons convicted of felonies as well as misdemeanors.²³¹ Thus, it is proper for a trial court to prescribe a period of county jail followed by probation, so long as the cumulative time does not exceed the maximum permissible sentence. Similarly, it is proper for a trial court to award probation and impose, as a special condition, that the defendant serve a portion of his probation in the county jail.²³²

In accordance with the concept that the legislature, rather than the judiciary, has the authority to prescribe sentences for crimes, the supreme court has recently rejected several attacks on the constitutionality of various maximum and minimum sentencing statutes.²³³ These statutes neither constitute a usurpation of executive or judicial power nor constitute cruel and unusual punishment. However, the supreme court has held that a trial court, pursuant to legislative authority, may consider the imposition of probation as an alternative to a mandatory minimum sentence.²³⁴

A. Probation

The alternative of probation vests wide discretion in the trial court to regulate the conduct of a criminal defendant without taking

227. *Freeman v. State*, 340 So. 2d 1251 (Fla. 2d Dist. 1976); *Dixon v. State*, 339 So. 2d 688 (Fla. 2d Dist. 1976).

228. FLA. STAT. § 948.04 (1973).

229. 1974 Fla. Laws, ch. 74-112, § 10.

230. *Magnin v. State*, 334 So. 2d 638 (Fla. 2d Dist. 1976); *Watts v. State*, 328 So. 2d 223 (Fla. 2d Dist. 1976).

However, FLA. STAT. § 948.04, as amended, does provide for probation up to six months, which is in excess of the 60 day maximum sentence for a misdemeanor of the second degree.

231. *McNulty v. State*, 339 So. 2d 1155 (Fla. 1st Dist. 1976).

232. *State v. Jones*, 327 So. 2d 18 (Fla. 1976).

233. *Sowell v. State*, 342 So. 2d 969 (Fla. 1977); *Banks v. State*, 342 So. 2d 469 (Fla. 1976); *Owens v. State*, 316 So. 2d 537 (Fla. 1975); *Dorminey v. State*, 314 So. 2d 134 (Fla. 1975).

234. *Berezovsky v. State*, 350 So. 2d 80 (Fla. 1977) (construing FLA. STAT. § 948.01 (1975)).

the more drastic step of incarceration. Of course, as noted above, it is proper to require a defendant to serve some time in county jail as a condition of probation.²³⁵ Thus, a trial court has the discretion of giving a probationer a "taste" of the hardships of incarceration, thereby providing a warning of possible consequences if further criminal acts are committed. In addition to the routine conditions of probation, such as those requiring a defendant to avoid criminal acts and to file periodic reports during a probationary period, a trial court may impose any other special condition of probation, so long as it is not unreasonable or unrelated to the purposes of rehabilitation. The purpose of probation is primarily to rehabilitate and not to punish.²³⁶ A condition of probation reasonably related to the crime for which the offender has been convicted and directed toward a reasonable restraint of activity in order to diminish the inclination to commit similar crimes is proper and, therefore, not an abuse of discretion.²³⁷ For example, in *Russell v. State*,²³⁸ the defendant had been convicted of aggravated assault during a shooting incident in a store known as "Dave's 95th Street Gunshop." As a special condition of probation, the trial court required the defendant to avoid those premises. On appeal from the imposition of probation, the appellate court held the condition valid. However, in *Kominsky v. State*,²³⁹ the defendant was placed on probation pursuant to a conviction for possession of marijuana. Two of the special conditions the trial court imposed restricted the defendant's driving to a maximum speed of thirty-five miles per hour and required the defendant to observe an eight p.m. to six a.m. curfew. The District Court of Appeal, First District, held that the curfew restriction was so harsh that it would counteract the concept of rehabilitation, and amended it to read eleven p.m. to six a.m. Furthermore, the court stated that the maximum driving speed restriction was unreasonable since a minimum speed of forty miles per hour is required on all interstate highways.

Several recent decisions have noted the problems involved in imposing a condition of probation which orders the payment of money without regard to the probationer's rights to due process and equal protection of the laws. In *Fresneda v. State*,²⁴⁰ the Supreme Court of Florida held that the trial court had improperly required

235. *State v. Askary*, 330 So. 2d 458 (Fla. 1976); *State v. Jones*, 327 So. 2d 18 (Fla. 1976).

236. *Kominsky v. State*, 330 So. 2d 800 (Fla. 1st Dist. 1976).

237. *Russell v. State*, 342 So. 2d 96 (Fla. 3d Dist. 1977).

238. *Id.*

239. 330 So. 2d 800 (Fla. 1st Dist. 1976).

240. 347 So. 2d 1021 (Fla. 1977).

the defendant, who was convicted of leaving the scene of an accident, to pay more than \$1,600 in restitution without an opportunity to be fully heard as to the amount of damages. The court held that a trial judge cannot impose a condition of probation requiring a probationer to pay money to, and for the benefit of, the victim of his crime in excess of the amount of damage the criminal conduct caused the victim. Therefore, before ordering restitution as a condition of probation, the trial judge should give the defendant notice of the proposed restitution order and allow the defendant an opportunity to be heard as to the amount of damage or loss "caused by his offense."²⁴¹

In *Crowder v. State*,²⁴² the district court held that the statutory provision on restitution²⁴³ does not allow a court to require a defendant, as a condition of probation, to make restitution in other unrelated cases for which the defendant has not been convicted. In *Crowder*, the trial judge improperly required the defendant to make restitution in twenty other cases, unrelated to the offense for which he was convicted. The court, however, noted that this might not prevent a trial court from including such conditions in a probation order when the defendant, as part of a plea bargain, acknowledges his responsibility for the other offenses and agrees to make restitution. It has also been held that it is unconstitutional to revoke a defendant's probation for failure to make required payments pursuant to a special condition of probation, when there has been no showing that the probationer is in fact able to make such payments.²⁴⁴ In addition, the various debtor exemptions provided by the Florida Constitution and statutes may place restraints on a trial court's ability to collect money from a probationer by means of a special condition of probation.

In *State v. Williams*,²⁴⁵ the supreme court held that section 27.56 of the Florida Statutes (1975), which requires recoupment of the cost of services received from the public defender by an indigent defendant, is constitutional only if the judgment debtor is afforded the protections which other debtors receive under state constitutional or statutory exemptions. This principle of law may be applicable to those cases requiring a probationer to pay money under a special condition of probation. As noted above,²⁴⁶ trial courts may

241. *Id.* at 1022; FLA. STAT. § 948.03(1)(g) (1977).

242. 334 So. 2d 819 (Fla. 4th Dist. 1976).

243. FLA. STAT. § 948.03(1)(g) (1977).

244. *Fuller v. Oregon*, 417 U.S. 40 (1974); *Gryca v. State*, 315 So. 2d 221 (Fla. 1st Dist. 1975); *Robbins v. State*, 318 So. 2d 472 (Fla. 4th Dist. 1975).

245. 343 So. 2d 35 (Fla. 1977).

246. See text accompanying notes 122-23, *supra*.

find a person to be in contempt of court for failure to make payments of money under a court order only if the trial court makes a finding that the defendant has the present ability to comply with the order and willfully refuses to do so, or that the defendant previously had the ability to comply but divested himself of that ability through his own fault or neglect designed to frustrate the intent and purpose of the order.²⁴⁷ No useful rehabilitative purpose exists for revoking a defendant's probation absent a showing of willful disobedience to the trial court's special condition of probation.

Probation revocation procedures must comply with minimal due process requirements. Thus, a defendant's probation cannot be revoked based upon a probation violation of which he has no notice and with which he has not been specifically charged.²⁴⁸ Furthermore, fundamental fairness requires that a defendant be put on notice as to what he must do or must refrain from doing on probation. Probation should not be revoked absent such notice.²⁴⁹ A trial court, however, has the authority to impose additional valid conditions during the probationary period.²⁵⁰ It has been held improper to revoke probation if the probationer has been denied discovery of the information on which the revocation is based.²⁵¹ Although a much lower standard of proof is required of the state in proving a violation of probation, revocation cannot be based solely upon hearsay.²⁵² Furthermore, probation cannot be revoked solely upon proof that a probationer has been arrested for a crime.²⁵³ The failure to introduce sufficient proof of a violation at the time of revocation is not cured by a defendant's subsequent conviction in the substantive case.²⁵⁴ However, the fact that a probationer may have been previously acquitted of the substantive criminal charges does not, under the principle of collateral estoppel or double jeopardy, prevent his probation from being revoked on the same facts which gave rise to those charges.²⁵⁵ It should be noted that generally it is improper to attack a condition of probation in an appeal from a revocation of probation. Rather, an improper condition of probation should be directly ap-

247. See *Garro v. Garro*, 347 So. 2d 418 (Fla. 1977); *Faircloth v. Faircloth*, 339 So. 2d 650 (Fla. 1976).

248. *State v. Spratling*, 336 So. 2d 361 (Fla. 1976).

249. *Id.*; *Morgan v. State*, 341 So. 2d 201 (Fla. 2d Dist. 1977).

250. *Barber v. State*, 344 So. 2d 913 (Fla. 3d Dist. 1977); FLA. STAT. § 948.03(2) (1977).

251. *Sukert v. State*, 325 So. 2d 439 (Fla. 3d Dist. 1976).

252. *Brown v. State*, 338 So. 2d 573 (Fla. 2d Dist. 1976); *White v. State*, 301 So. 2d 464 (Fla. 4th Dist. 1974).

253. *Brown v. State*, 338 So. 2d 573 (Fla. 2d Dist. 1976); *Crum v. State*, 286 So. 2d 268 (Fla. 4th Dist. 1973).

254. *Warr v. State*, 330 So. 2d 504 (Fla. 4th Dist. 1976).

255. *Russ v. State*, 313 So. 2d 758 (Fla. 1975).

pealed at the time it is imposed by the trial court.²⁵⁶

A person placed upon probation should realize that his legal status has changed considerably. In *State v. Heath*,²⁵⁷ the Supreme Court of Florida held:

[A] probationer, upon a specific request and at periodic intervals, may be required to identify himself and provide all necessary information for his supervision including the place of his residence and his employment. He may also be required to confirm or deny his location at a particular place at a particular time, to explain his noncriminal conduct, and to permit the search of his person and quarters by the supervisor. Failure to do so may itself be grounds for revocation or [sic] probation. His agreement to accept the terms of probation effectively waives his fifth amendment privilege with regard to this information.

However, the court in *Heath* recognized that the fifth amendment privilege against self-incrimination is still applicable to a probationer to protect him from inquiry into specific conduct and into circumstances concerning a separate criminal offense. In *State v. Mangam*,²⁵⁸ the supreme court reiterated that when a probationer refuses to discuss his compliance or noncompliance with the terms of his probation concerning his residence, the trial judge may consider this fact in a revocation hearing and properly infer from this silence that the probationer failed to maintain his residence as required by the terms of his probation.

In *Croteau v. State*,²⁵⁹ the supreme court stated that a person does not absolutely forfeit the protections of the fourth amendment merely by assuming the status of a probationer. That status, however, is a factor which may be taken into account in determining whether a particular search was in fact reasonable. The court noted that although illegally seized evidence is clearly inadmissible in a criminal trial for a new and distinct criminal offense, such evidence may be admissible in a probation revocation hearing.²⁶⁰

256. *Welsh v. State*, 326 So. 2d 37 (Fla. 4th Dist. 1976); *Brown v. State*, 305 So. 2d 309 (Fla. 4th Dist. 1974).

257. 343 So. 2d 13, 16 (Fla. 1977).

258. 343 So. 2d 599 (Fla. 1977).

259. 334 So. 2d 577 (Fla. 1976).

260. In his concurring opinion in *Croteau*, however, Mr. Justice Hatchett noted that it was unnecessary for the majority to reach this issue. *Id.* at 580-81 n.2. See also *Bruno v. State*, 343 So. 2d 1335 (Fla. 1st Dist. 1977). But see *State v. Gansz*, 297 So. 2d 614 (Fla. 4th Dist. 1974).

B. *Same Transaction Rule*

The same transaction rule, as it applies in sentencing criminal defendants, has generated tremendous confusion in both the trial and appellate courts of Florida. The policies behind this doctrine have their roots in the history of our common law.²⁶¹ Although there have been many Florida decisions construing this principle, much of the recent litigation was initiated by the decisions of the Supreme Court of Florida in *Cone v. State*²⁶² and *Foster v. State*.²⁶³ In *Cone*, the defendant was convicted of armed robbery and use of a firearm during the commission of the same robbery. The court noted that the two crimes, charged in the same information, were merely facets of the same criminal act. Therefore, the supreme court held that the defendant's sentence as to the use of a firearm during the commission of the robbery must be vacated, since only one sentence, for the higher offense, could be imposed.²⁶⁴ In *Foster*, the defendant was convicted of burglary and possession of burglary tools. The supreme court held that the trial court had erred in imposing two sentences (one for each offense) since the two crimes constituted facets of the same criminal transaction.²⁶⁵

A conflict subsequently arose among the district courts of appeal as to whether a trial court could impose separate sentences upon a defendant convicted of the crimes of breaking and entering with intent to commit grand larceny, and grand larceny. In *Estevez v. State*,²⁶⁶ the supreme court resolved this conflict, holding that the crimes of breaking and entering and grand larceny are separate offenses, not facets of the same transaction, and that two separate sentences may be imposed upon conviction of the two offenses.²⁶⁷ In *Jenkins v. Wainwright*,²⁶⁸ the supreme court further attempted to clarify its position on this subject, holding that when a defendant is convicted of possessing two different illegal drugs, the same transaction rule does not apply to prevent the trial court from imposing two separate sentences for two separate possession counts.²⁶⁹ Even though each crime arose from the same incident, the defendant was properly convicted of both counts since the possession of each drug

261. A lengthy analysis of Florida's common law history in this area set forth by Chief Judge Robert T. Mann, in *Edmond v. State*, 280 So. 2d 449, 450-54 (Fla. 2d Dist. 1973).

262. 285 So. 2d 12 (Fla. 1973).

263. 286 So. 2d 549 (Fla. 1973).

264. 285 So. 2d at 13.

265. 286 So. 2d at 551. See also *Yost v. State*, 243 So. 2d 469 (Fla. 3d Dist. 1971).

266. 313 So. 2d 692 (Fla. 1975).

267. *Id.* at 694-95 (citing *Steele v. Mayo*, 72 So. 2d 386 (Fla. 1954)).

268. 322 So. 2d 477 (Fla. 1975).

269. *Id.* at 479.

constituted a separate violation of the law. Thus, multiple sentences were proper. Noting the inconsistency between this decision and its prior decision in *Foster v. State*,²⁷⁰ the court specifically receded from that decision to the extent that it conflicted with *Jenkins*.

Recently, in *State v. Heisterman*,²⁷¹ the Supreme Court of Florida quashed a decision of the District Court of Appeal, Third District, which held that the defendant was improperly convicted and sentenced for two separate offenses because the facts proved at trial constituted only one criminal act. The facts showed that the defendant stood outside an occupied dwelling with a gun in his hand yelling threats to the people inside. The defendant then fired six shots into the house. The state argued, and the supreme court agreed, that an assault with intent to commit murder was completed when the defendant verbally threatened the occupants of the house and pointed a gun in their direction, placing them in fear of their lives.²⁷² This crime was proven without evidence that any shots were fired. The defendant's other conviction, on the charge of shooting a gun into an occupied dwelling, was based upon the additional evidence that several shots were actually fired into the house. Accordingly, the supreme court found that the separate sentences imposed by the trial court were proper and remanded the case with instructions to reinstate the judgment and sentence imposed by the trial court.²⁷³

In spite of these attempts to clarify the present status of the applicability of the same transaction rule, unresolved questions continue to create conflicts among the various appellate districts. In *Johnson v. State*²⁷⁴ the District Court of Appeal, Third District, found that the decision of the supreme court in *Cone* had been overruled implicitly by the subsequent decisions of the supreme court in *Estevez* and *Jenkins*. Other district courts of appeal, however, continue to follow the holding in *Cone*.²⁷⁵

In 1976, the Florida legislature passed a statute which provides:

Whoever, in the course of one criminal transaction or episode, commits an act or acts constituting a violation of two or more criminal statutes, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense, excluding

270. 286 So. 2d 549 (Fla. 1973).

271. 343 So. 2d 1272 (Fla. 1977).

272. *Id.* at 1273.

273. *Id.*

274. 338 So. 2d 556, 557 (Fla. 3d Dist. 1976).

275. *Rusnak v. State*, 336 So. 2d 1227 (Fla. 2d Dist. 1976); *Carter v. State*, 330 So. 2d 508 (Fla. 4th Dist. 1976); *Robinson v. State*, 323 So. 2d 62 (Fla. 1st Dist. 1975); *Farmer v. State*, 315 So. 2d 225 (Fla. 2d Dist. 1975).

lesser included offenses committed during said criminal episode, and the sentencing judge may order the sentence to be served concurrently or consecutively.²⁷⁶

Since the legislature has the primary authority to determine what sentences are to be imposed for particular crimes, this statute may resolve some of the conflicts which have arisen concerning the same transaction rule. This section is consistent with *Estevez* and *Jenkins*, but contrary to *Cone*. However, under this statute it appears improper for a trial court to impose sentences on each of several counts arising out of the same criminal transaction when one or more of those offenses are merely lesser included offenses of the major offense for which the defendant has been convicted. For example, in *Taylor v. State*²⁷⁷ the defendant was convicted of two counts of robbery, two counts of using a firearm while committing or attempting to commit a felony, one count of sexual battery, and two counts of grand larceny. Although affirming the other sentences, the District Court of Appeal, First District, held that it was error to impose sentences on the grand larceny convictions since they were lesser included offenses of the robbery charges. Similarly, *Yost v. State*²⁷⁸ may continue to be valid since, depending on the facts of the case, the crime of possession of a controlled substance is a lesser included offense of the crime of sale or delivery of that same controlled substance.²⁷⁹

C. Death Penalty

Florida's capital sentencing procedures, as enacted by statute, give specific and detailed guidance to juries and trial judges to assist them in deciding whether to impose the death penalty or life imprisonment.²⁸⁰ One or more of the aggravating circumstances enumerated in the statute must be found to exist before a death sentence may be imposed.²⁸¹ However, additional circumstances not enumerated in the statute may be introduced in mitigation. Where such mitigating circumstances exist, the death sentence should be imposed only if the statutory aggravating circumstances outweigh the mitigating circumstances.²⁸² As noted in *State v. Dixon*,²⁸³ this

276. FLA. STAT. § 775.021(4) (1977).

277. 330 So. 2d 44 (Fla. 1st Dist. 1976).

278. 243 So. 2d 469 (Fla. 3d Dist. 1971).

279. See also *Orange v. State*, 334 So. 2d 277 (Fla. 3d Dist. 1976).

280. FLA. STAT. § 921.141 (1977).

281. *Id.* Purdy v. State, 343 So. 2d 4, 6 (Fla. 1977).

282. *Elledge v. State*, 346 So. 2d 998, 1002 (Fla. 1977); FLA. STAT. § 921.141(3)(b) (1977).

See also Note, *The Eighth Amendment, Rape, and Sexual Battery: A Study in Methods of*

weighing process requires more than a mere counting of "X" number of aggravating circumstances and "Y" number of mitigating circumstances. Instead it requires a reasoned judgment, in light of the totality of circumstances, as to which factual situations require the imposition of death and which can be satisfied by life imprisonment.

Quite often trial courts have considered aggravating circumstances not authorized by the statute. In those cases where statutory and nonstatutory aggravating circumstances were considered, but where no mitigating circumstances were found to exist, the error was considered harmless.²⁸⁴ Where mitigating circumstances are present, however, any consideration of a nonstatutory aggravating circumstance by the trial judge entitles a defendant to a sentence and trial.²⁸⁵ Similarly, trial judges may occasionally find the presence of two statutory aggravating circumstances when only one aggravating factor is actually supported by the evidence. In *Gibson v. State*,²⁸⁶ for example, the trial court found that the murder was committed during the commission of a robbery and for the purpose of pecuniary gain. The Supreme Court of Florida noted that in all robbery murders these two factors will be identical.²⁸⁷ This piling up of aggravating circumstances may improperly tip the scales of the weighing process in favor of death and, in most cases, is therefore impermissible.²⁸⁸ However, where there are no mitigating circumstances, there is no danger that an unauthorized aggravating factor has served to overcome the mitigating circumstances in the weighing process, and such error will be held harmless.²⁸⁹

It also has been held improper to find as an aggravating circumstance that the murder was committed in an extremely "heinous, atrocious, and cruel manner,"²⁹⁰ when the facts of the killing were no more shocking than in the majority of murder cases.²⁹¹ In *Halliwell v. State*,²⁹² the victim's body had been mutilated and dismembered, but only after death had occurred. The actual killing, the court held, was not committed in a heinous, atrocious and cruel

Judicial Review, 32 U. MIAMI L. REV. 690, 704-08 (1978).

283. 283 So. 2d 1, 10 (Fla. 1973).

284. See, e.g., *Darden v. State*, 329 So. 2d 287 (Fla. 1976).

285. *Elledge v. State*, 346 So. 2d 998 (Fla. 1977); see *Miller v. State*, 332 So. 2d 65 (Fla. 1976); *Messer v. State*, 330 So. 2d 137 (Fla. 1976).

286. 351 So. 2d 948 (Fla. 1977); see *Provence v. State*, 337 So. 2d 783 (Fla. 1976).

287. 351 So. 2d at 952. See also *Provence v. State*, 337 So. 2d 783 (Fla. 1976).

288. 351 So. 2d at 953; see *Elledge v. State*, 346 So. 2d 998, 1003 (Fla. 1977).

289. *Gibson v. State*, 351 So. 2d 948 (Fla. 1977).

290. FLA. STAT. § 921.141 (1977).

291. *State v. Dixon*, 283 So. 2d 1 (Fla. 1973).

292. 323 So. 2d 557 (Fla. 1975).

manner. Similarly, in *Purdy v. State*²⁹³ the supreme court held that the trial court erred in finding that the crime was committed in a heinous, atrocious and cruel manner, when there was no evidence to distinguish that crime from any other violation of the same criminal statute.²⁹⁴

A problem arises when a trial court determines that the aggravating circumstances in a case outweigh those in mitigation and imposes a sentence of death notwithstanding the jury's determination that the defendant should receive life imprisonment. When there is such disagreement between the jury and the judge, the jury's recommendation should generally prevail.²⁹⁵ In *Tedder v. State*, the Supreme Court of Florida stated: "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."²⁹⁶ The supreme court has upheld a trial judge's sentence of death in spite of the jury's recommendation of life only when the court found the jury's recommendation unreasonable.²⁹⁷

It has also been held that a discrepancy in the sentencing of codefendants equally culpable of a crime does not comply with the concept of equal justice under the law.²⁹⁸ Courts are presented with difficult situations when one codefendant has pleaded guilty to a lesser offense and received a lesser sentence, and the other defendant has gone to trial and received a sentence of death.²⁹⁹ In *Messer v. State*,³⁰⁰ the supreme court held that evidence as to a lesser sentence received by a codefendant is admissible, and may be presented to the jury in the sentencing phase of a capital case.

The concept of equal justice under the law applies to the imposition of similar sentences for similar crimes. It is not reserved only for those cases in which two or more codefendants are sentenced for the same crime. The Supreme Court of the United States found that the Florida death penalty statute adequately provides for such equal justice by requiring the Supreme Court of Florida to review

293. 343 So. 2d 4 (Fla. 1977).

294. *Id.* In *Purdy*, the defendant was convicted of committing an involuntary sexual battery on a child under 11 years of age. See Note, *supra* note 282, at 704-08.

295. *Tedder v. State*, 322 So. 2d 908 (Fla. 1975).

296. *Id.* at 910.

297. *Barclay v. State*, 343 So. 2d 1266 (Fla. 1977). *But see Burch v. State*, 343 So. 2d 831 (Fla. 1977) (the supreme court failed to find a compelling reason to uphold the trial court's rejection of the life sentence recommended by the jury).

298. *Slater v. State*, 316 So. 2d 539 (Fla. 1975).

299. See *Witt v. State*, 342 So. 2d 497 (Fla. 1977).

300. 330 So. 2d 137 (Fla. 1976).

all death sentences for consistency.³⁰¹ Since it is a difficult task to fit the various decisions in capital cases into a regular and predictable pattern,³⁰² appellate counsel in all death penalty cases have a great responsibility, wherever possible, to present the court with comparisons of sentences imposed in similar circumstances.

301. *Proffitt v. Florida*, 428 U.S. 242 (1976); see Note, *supra* note 282, at 701 n.47.

302. See *Spenkelink v. State*, 350 So. 2d 85, 87-88 (Fla. 1977) (Hatchett, J., concurring), *cert. denied*, 434 U.S. 960 (1978).