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## Criminal Law and Procedure

Christine P. Tatum

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# CRIMINAL LAW AND PROCEDURE\*

CHRISTINE P. TATUM\*\* and HOWARD J. MARX\*\*\*

I.	ARREST	636
	A. <i>Misdemeanors</i>	636
	B. <i>Authority to Arrest</i>	637
	C. <i>Probable Cause to Arrest</i>	637
II.	CONFESSIONS	638
	A. <i>Voluntariness of Confessions</i>	638
	B. <i>Miranda Warnings</i>	640
	C. <i>Other Confession Issues</i>	641
III.	SEARCH AND SEIZURE	642
	A. <i>Search Warrants</i>	642
	B. <i>Warrantless Searches</i>	644
	1. THE PLAIN VIEW DOCTRINE	644
	2. SEARCH INCIDENT TO ARREST AND INVESTIGATIVE STOP	646
	3. CONSENT TO SEARCH	649
	4. OTHER ISSUES	651
IV.	INFORMATIONS AND GRAND JURIES	652
	A. <i>Informations</i>	652
	B. <i>Grand Juries</i>	654
V.	DISCOVERY	655
	A. <i>Exchange of Witness Lists</i>	655
	B. <i>Disclosure of Confidential Informants</i>	655
	C. <i>Affirmative Duties of the State</i>	656
	D. <i>Affirmative Duties of the Court</i>	657
VI.	RIGHT TO COUNSEL	657
	A. <i>Generally</i>	657
	B. <i>Adequacy of Counsel</i>	659
VII.	PRELIMINARY HEARINGS	660
VIII.	WIRETAPPING	661
	A. <i>Sufficiency of Affidavit for Wiretap</i>	661
	B. <i>Minimization of Unauthorized Interceptions</i>	661
	C. <i>Wiretaps Subsequent to Information</i>	662
	D. <i>Eavesdropping by a Private Person</i>	663
IX.	BAIL	663

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\* The organization of this annual survey of Florida Criminal Law follows the natural development of a case from the arrest through the appeal. The authors believe that this organization will make use of this survey easier for the reader and will aid him in finding the specific facet of the law with which he is concerned. This survey covers primarily cases reported in 279 So. 2d through 308 So. 2d. Also included are selected recent legislative enactments.

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X.	SPECIFIC CRIMES	664
A.	<i>Assault</i>	664
B.	<i>Breaking and Entering, Burglary</i>	664
C.	<i>Conspiracy</i>	666
D.	<i>Misprision of a Felony</i>	667
E.	<i>Narcotics</i>	667
F.	<i>Obscenity</i>	668
G.	<i>Receiving Stolen Goods</i>	669
H.	<i>Worthless Checks</i>	670
XI.	SEVERANCE	671
XII.	PLEAS AND PLEA BARGAINING	673
XIII.	TRIAL	674
A.	<i>Speedy Trial, Rule 3.191</i>	674
1.	SPEEDY TRIAL WITHOUT DEMAND	674
2.	SPEEDY TRIAL UPON DEMAND	680
3.	PRISONER'S RIGHT TO SPEEDY TRIAL	681
4.	OTHER ASPECTS OF RULE 3.191	682
B.	<i>Conduct of the State Attorney</i>	683
C.	<i>Former Jeopardy</i>	685
D.	<i>Jury</i>	688
E.	<i>Defenses</i>	690
1.	ALIBI	690
2.	INSANITY	691
3.	OTHER DEFENSES	692
F.	<i>Jury Instructions</i>	694
1.	INSTRUCTIONS ON PENALTIES	694
2.	INSTRUCTIONS ON LESSER INCLUDED OFFENSES	695
3.	INSTRUCTIONS ON CRIMES DIVISIBLE INTO DEGREES	697
4.	INSTRUCTIONS INVOLVING THE "ALLEN CHARGE"	697
XIV.	POST TRIAL PROCEDURES	698
A.	<i>Pre-sentence Report</i>	698
B.	<i>Sentence</i>	700
1.	GENERALLY	700
2.	DEATH PENALTY	704
C.	<i>Appeals</i>	706
1.	GENERALLY	706
2.	"HOLLINGSHEAD APPEALS"	707
3.	TRANSCRIPTS	709
D.	<i>Probation</i>	710
1.	REVOCAION	710
2.	SENTENCE UPON REVOCAION	710

## I. ARREST

### A. Misdemeanors

A police officer is not authorized to break open a door in a private dwelling in order to make an arrest without a warrant for a misdemeanor even where the officer observes the violation and is in

hot pursuit.<sup>1</sup> The court stated that the exceptions to the Florida statute<sup>2</sup> which governs when an officer may break into a building listed in *Benefield v. State*<sup>3</sup> do not apply to the warrantless arrest of a misdemeanor.

### B. Authority to Arrest

During the survey period a municipal police officer's authority to arrest was extended to interstate highways within the boundaries of municipalities.<sup>4</sup> The District Court of Appeal, Third District, held that pursuant to Florida Statutes section 316.016(3)(a) (1973) a municipal police officer is specifically authorized to enforce state traffic laws on sections of interstate highways located within municipal boundaries and that such authority is not divested by Florida Statutes section 316.006 (1973) which gives exclusive traffic control jurisdiction over such highways to the state. This latter section, according to the court, relates to fixing traffic control devices, speed limits, signs and the like to insure uniformity. The former section permits enforcement of such requirements by municipal officers.

### C. Probable Cause to Arrest

In *Gullo v. State*<sup>5</sup> a police officer was held to have probable cause to arrest, thus making admissible the fruits of a search incident to the arrest. The defendants were first observed at 2:00 A.M. entering a restaurant with a reputation for drug traffic. They were again observed at 5:00 A.M. pulling into a motel parking lot in the company of a person locally known for criminal activity (of an unstated nature). That person, when observing the arresting officer, became frightened, causing the officer to become suspicious. Another occupant of the car was absent. The officer inquired as to his whereabouts and was told that he had "gotten scared" and left. That person subsequently came from the back of the motel, looking very shaken. When questioned, the defendants said they were looking for a certain motel. The officer did not believe this because one

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1. *Rocker v. State*, 302 So. 2d 490 (Fla. 2d Dist. 1974)(involving a traffic violation and disorderly conduct).

2. FLA. STAT. § 901.19 (1973).

3. 160 So. 2d 706 (Fla. 1964).

4. *State v. Williams* 303 So. 2d 74 (Fla. 3d Dist. 1974), case dismissed, 314 So. 2d 591 (Fla. 1975).

5. 280 So. 2d 501 (Fla. 4th Dist. 1973).

of the group was known to be from the area. The officer stated that upon consideration of these facts he believed that defendant and his friends were in the process of robbing the motel and arrested them for disorderly conduct. The court held that the arrest was one which could have been made by any officer confronted with these facts. The court further held that the discovery of a marijuana seed on the seat of the car prior to the arrest did not change the facts, and that the police had a right to inventory the car.

## II. CONFESSIONS

### A. *Voluntariness of Confessions*

The United States Supreme Court held, in *Lego v. Twomey*,<sup>6</sup> that the prosecution has the burden of proving, by a preponderance of the evidence, that a confession was voluntarily given. While noting that prior Florida decisions had required a higher standard of proof<sup>7</sup> the Supreme Court of Florida adopted this standard in *McDole v. State*.<sup>8</sup> There, three men, including McDole, were charged with rape. All three subsequently confessed. In spite of considerable evidence that the confessions were obtained by beatings and coercion, the trial judge denied the motion to suppress, but allowed evidence on the issue of voluntariness to be presented to the jury for their consideration. The jury convicted the defendants. The Supreme Court of Florida reversed, holding that the trial judge erred in failing to make a specific finding of voluntariness supported by a preponderance of the evidence. The court further found that the evidence would not have supported such a finding.

*McDole* was distinguished in *Wilson v. State*<sup>9</sup> where the trial judge had not made a specific finding of voluntariness, but had simply denied the motion to suppress. The court concluded that the judge must have correctly determined that the confession was voluntary where the uncontroverted evidence indicated a total absence of coercion. This implies that no detailed finding of voluntariness is required in such a case.

In determining the voluntariness of a defendant's confession,

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6. 404 U.S. 477 (1972).

7. *E.g.*, *Perkins v. State*, 228 So. 2d 382 (Fla. 1969), where the court required that allegations supporting a motion to suppress be negated by "clear and convincing evidence."

8. 283 So. 2d 553 (Fla. 1973).

9. 304 So. 2d 119 (Fla. 1974).

the factors the trial judge must consider are whether it was freely and voluntarily given without fear, hope of reward, or promise of escaping punishment.<sup>10</sup> Furthermore, the totality of the circumstances must be considered.<sup>11</sup> In *State v. Chorpennig*,<sup>12</sup> the defendant, who had a history of mental illness and only a 7th grade education, was coerced by a police officer into confessing to a murder. The officer first told the defendant that charges would not be pressed in an unrelated matter if he admitted committing the crime. Defendant did so after being given the facts of the crime through leading questions. The officer then told the defendant that he also wished to clear up the instant case. The defendant was led to believe that he would be allowed to return home if he confessed, and was also threatened with the loss of his foster child. Again, he was given the facts of the crime through leading questions. The court held, after considering the totality of the circumstances, that the confessions were not freely made and must be suppressed.

Failure to provide a hearing to determine the validity of a confession was held to be harmless error in *McDonnell v. State*,<sup>13</sup> because of "other overwhelming evidence establishing defendant's guilt."<sup>14</sup> However, in *Land v. State*,<sup>15</sup> refusal to grant a defendant an evidentiary hearing outside the presence of the jury to enable him to testify concerning the voluntariness of his confession was held to be reversible error. The trial court recognized its error after defendant was convicted, and while refusing to grant a new trial, had attempted to rectify its error by granting a post-trial evidentiary hearing. The supreme court distinguished *Fowler v. State*<sup>16</sup>

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10. See *Williams v. State*, 143 Fla. 826, 197 So. 562 (1940).

11. See *Demattia v. State*, 292 So. 2d 390 (Fla. 3d Dist. 1974); *Williams v. State*, 156 Fla. 300, 22 So. 2d 821 (1945).

12. 294 So. 2d 54 (Fla. 2d Dist. 1974).

13. 292 So. 2d 420 (Fla. 4th Dist. 1974).

14. *Id.* at 421.

15. 293 So. 2d 704 (Fla. 1974).

16. 255 So. 2d 513 (Fla. 1971). The court below relied on *Fowler* to justify the post trial hearing. There, the evidentiary hearing addressed itself to the issue of sanity. The supreme court, in the instant case, cited the dissent of Judge Johnson in the lower court who distinguished *Fowler* by observing that a failure to afford a plenary hearing for trial on the issue of competence is not such as would necessarily affect the choice of evidentiary considerations to be subsequently presented to a jury while the trial court's disposition of the voluntariness issue would dictate to a considerable extent subsequent defense trial strategy, including evidentiary considerations to be presented to the jury.

and *Swenson v. Stidham*<sup>17</sup> in holding that *Jackson v. Denno*<sup>18</sup> required a pre-trial hearing on the voluntariness of the confession.

### B. *Miranda* Warnings

The importance of giving the *Miranda*<sup>19</sup> warnings before interrogation was reviewed in *Walls v. State*<sup>20</sup> and *Rodriquez v. State*.<sup>21</sup> In *Walls*, a police officer questioned a jailed suspect without giving the required warnings. The suspect, when asked if he robbed the victim, nodded his head in an affirmative manner. The court held that the testimony of the officer was admissible only to impeach the defendant, who, while on the stand, denied telling anyone that he had robbed the victim. The court recognized, however, that the evidence would not have been admissible as part of the State's case in chief. In *Rodriquez*, the defendant was a poorly educated Spanish-speaking person. The police officer testified that he thought he gave the *Miranda* warnings in Spanish and also that the defendant "smelled of alcohol." He further testified that he asked defendant if he would talk without a lawyer. The court, reviewing all of the circumstances, felt that the State did not meet "its heavy burden to establish that the appellant was clearly informed of his right to counsel and that he knowingly and intelligently waived his right thereto."<sup>22</sup>

The District Court of Appeal, Fourth District, dealing with a similar issue, held that the defendant's confession was not voluntary even though he signed a statement that he was given the *Miranda* warnings.<sup>23</sup> The defendant had been read the warnings but gave no acknowledgement that he understood them. He was asked to sign the warning, and did sign without being told the effect of his signa-

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17. 409 U.S. 224 (1972).

18. 378 U.S. 368 (1964). There the Court held:

It is both practical and desirable that in cases to be tried hereafter a proper determination of voluntariness be made prior to the admission of the confession to the jury which is adjudicating guilt or innocence. *Id.* at 395.

19. *Miranda v. Arizona*, 384 U.S. 436 (1966). The *Miranda* warnings are as follows:

You have a right to remain silent. Anything that you say will be admissible against you in court. You have a right to an attorney during this questioning. If you cannot afford an attorney one will be provided for you free of charge.

20. 279 So. 2d 95 (Fla. 2d Dist. 1973).

21. 287 So. 2d 395 (Fla. 3d Dist. 1973), *cert. dismissed*, 293 So. 2d 359 (Fla. 1974).

22. *Id.* at 396-97. For the state's burden in a pre-*Miranda* arrest with a post-*Miranda* trial see *State v. Statewright*, 300 So. 2d 674 (Fla. 1974).

23. *Ware v. State*, 307 So. 2d 255 (Fla. 4th Dist.), *cert. denied*, 316 So. 2d 286 (Fla. 1975).

ture. During the interrogation that followed, the officer used the "family approach," indicating to defendant that he would spend less time away from his family if he was cooperative. The court, considering the totality of the circumstances, held that the state failed to show the confession was freely and voluntarily given.

### C. Other Confession Issues

When police officers sitting in another room, inadvertently overhear a suspect make an inculpatory statement, such a confession is admissible into evidence. The facts of *Taylor v. State*<sup>24</sup> showed that the two officers overheard the defendant's statement while he was in another room speaking to his wife. The defendant had previously been advised of his *Miranda* rights. He contended that his alleged admission was wilfully intercepted in violation of chapter 934 of the Florida Statutes (1973). The court dismissed this argument, since an "interception" was defined under section 934.02 of the Florida Statutes as an "aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." Since there was nothing in the record to show that any device was used in the overhearing, the court held that the overhearing did not fall within the quoted section.

In *Adams v. State*,<sup>25</sup> defendants were improperly charged with loitering and contributing to the delinquency of a minor. Within 45 minutes they were charged with robbery, the offense the officers had in mind when the arrest was made. Defendants sought to suppress statements made after their arrest, but the statements were admitted into evidence and defendants were convicted. The District Court of Appeal, Second District, affirmed. The court indicated that while tangible evidence seized as a result of a sham arrest would be suppressible, the defendants were charged almost immediately with the proper crime; and that the police had probable cause to make the arrest. The court further indicated that while its scope is presently unclear, the *Wong Sun* doctrine<sup>26</sup> would not bar reception of a volun-

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24. 292 So. 2d 375 (Fla. 1st Dist.), *cert. denied*, 298 So. 2d 415 (Fla. 1974).

25. 295 So. 2d 114 (Fla. 2d Dist.), *cert. denied*, 305 So. 2d 200 (Fla. 1974).

26. The *Wong Sun* Doctrine, originating in *Wong Sun v. United States*, 371 U.S. 471 (1963), indicates that verbal evidence which is immediately derived from unlawful entry and an unauthorized arrest is the "fruit" of official illegality, and is inadmissible unless obtained by means sufficiently distinguishable to be purged of the primary taint.



tary confession made after full explanation of the suspect's constitutional rights.

In *State v. Applebaum*,<sup>27</sup> the defendant made certain statements to the State's witness, an informant, after the filing of the information but prior to his arrest. The trial court suppressed these statements and the State took an interlocutory appeal. Relying on *Parnell v. State*,<sup>28</sup> the court held the statements admissible as being voluntarily made before defendant had been notified of the proceedings against him.

### III. SEARCH AND SEIZURE

#### A. Search Warrants

The Supreme Court of Florida, in *State v. Wolff*,<sup>29</sup> interpreted section 933.18 of the Florida Statutes (Supp. 1974) which lists the prerequisites for issuance of a warrant to search a private dwelling. The statute's "credible witness" requirement had been restricted by the District Court of Appeal, Third District, to one who himself knows the facts; thus effectively prohibiting the use of hearsay in issuing the warrant. The Supreme Court of Florida held that this interpretation was not intended by the legislature nor mandated by the United States Supreme Court in *Aguilar v. Texas*<sup>30</sup> or *Spinelli v. United States*.<sup>31</sup> The court then presented rules for the evaluation of the information contained in the affidavit. The magistrate must evaluate: (1) the integrity and truthfulness of the witness before him; (2) the reliability of the source of the information given by the witness; and (3) the adequacy of the factual premises furnished from all sources to support the validity of the conclusion.<sup>32</sup>

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27. 296 So. 2d 591 (Fla. 3d Dist.), *cert. denied*, 305 So. 2d 197 (Fla. 1974).

28. 218 So. 2d 535 (Fla. 3d Dist. 1969).

29. 310 So. 2d 729 (Fla. 1975).

30. 378 U.S. 108 (1964).

31. 393 U.S. 410 (1969).

32. In *Hicks v. State*, 299 So. 2d 44 (Fla. 2d Dist. 1974), *cert. denied*, 310 So. 2d 739 (Fla. 1975), an affidavit for a search warrant was held to be within the *Aguilar* and *Spinelli* tests even though the information was obtained by an allegedly improper admission given by defendants. The defendants claimed that the affidavit did not specifically set out that they had received their rights. The court held that if the information was improperly obtained, procedures other than attacking a search warrant were available. "To say that the affidavit itself is defective for alleging appropriate warnings in a general way is to quibble, contrary to the common sense of the situation." *Id.* at 46. See also *State v. Middleton*, 302 So. 2d 144 (Fla. 1st Dist. 1974), where it was held that an affidavit for issuance of a residential search warrant need not recite circumstances of affiant's own personal knowledge supportive of

The allowable scope of a search under a warrant was dealt with in *Dunn v. State*,<sup>33</sup> *Joyner v. State*,<sup>34</sup> and *Cleveland v. State*.<sup>35</sup> In *Dunn*, the court suppressed evidence obtained from an automobile which was parked in the driveway of the house described in the warrant. The court observed that the warrant only described the premises and did not include the phrase "the curtilage thereof." However, a search of an automobile in a parking lot was upheld in *Joyner* where the warrant included the requisite phrase, notwithstanding the fact that the automobile was in the parking lot of a multi-unit dwelling. The court considered the parking lot part of the curtilage and found that the automobile was sufficiently identifiable by the use of keys found in the apartment.<sup>36</sup> The issue in *Cleveland* concerned not the area searched, but the evidence sought. The police, armed with a valid warrant specifying gambling paraphernalia, discovered blank driver's licenses. The court, citing *Partin v. State*,<sup>37</sup> found the search lawful and continuous and the fruits thereof were admissible.

Pursuant to section 933.09 of the Florida Statutes (1973), an officer may break open the door of a house to execute a search warrant only after he has given due notice of his authority and purpose and has been refused admittance. An exception exists where the officer is justified in believing that persons within the house are attempting to destroy evidence. This exception was recognized in *Whisnant v. State*,<sup>38</sup> where the officer, armed with a search warrant for gambling paraphernalia, knocked and loudly announced his authority and purpose. While waiting for a response, he heard people running and furniture being moved. The officer then broke

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issuance of the warrant other than information received from a confidential informant; *State v. Compton*, 301 So. 2d 810 (Fla. 2d Dist. 1974), where the concurring opinion of Judge Mann sets out the penalty for a confidential informant who lies. Judge Mann noticed that the confidential informant's name does not have to be given but, if his statements are found to be untrue, he is vulnerable to perjury action.

33. 292 So. 2d 435 (Fla. 4th Dist.), *cert. dismissed*, 296 So. 2d 47 (Fla. 1974).

34. 303 So. 2d 60 (Fla. 1st Dist. 1974).

35. 287 So. 2d 347 (Fla. 3d Dist. 1973).

36. In *Dunn* the searching officers did not know to whom the vehicle belonged.

37. 277 So. 2d 847 (Fla. 3d Dist.), *cert. denied*, 283 So. 2d 563 (Fla. 1973). In *Partin* the court held

that a law enforcement officer conducting a search under a valid search warrant . . . may lawfully seize property not specifically described in the warrant if he has probable cause to believe it to be stolen property. *Id.* at 848.

38. 303 So. 2d 397 (Fla. 3d Dist. 1974).

down the door and seized the equipment. The court upheld the seizure, finding that the officer was justified in believing that evidence was being destroyed, and therefore was not required to wait until he was refused admittance.

Normally, a search warrant specifies the description of the premises to be searched and the property to be seized over the signature of the granting magistrate. The warrant in *Booze v. State*,<sup>39</sup> however, was not made out in this form. The requisite information was given in affidavits which were attached to the warrant and incorporated by reference on the face of the warrant. The court, in allowing the search warrant to stand, reasoned that prior decisions have permitted an affidavit to cure a defective search warrant where the two are physically connected, and where the search warrant expressly refers to the affidavit and incorporates it by reference.<sup>40</sup> The court noted the importance of the requirement that the affidavit be attached to the warrant. "[I]t avoids any possible claim or suspicion by the citizen involved that the affidavit later located in the official file was inserted after the fact . . . ."<sup>41</sup> This reasoning ignores the fact that the person whose home is to be searched may not, and probably would not, read the warrant carefully when initially confronted with it. Since the warrant and any evidence seized in the search would be returned to the issuing magistrate, the supporting affidavits could easily be changed after the fact should an unscrupulous police officer deem it necessary. While the court suggests that the extra pages be initialled or signed, it would be far better to require a small amount of extra typing in order to insure the continuity of the documents.

## B. Warrantless Searches

### 1. THE PLAIN VIEW DOCTRINE

The "plain view" doctrine allows an officer to seize contraband, stolen property, or evidence of a crime without a warrant. This exception to the warrant requirement attaches when the property in question is within the line of sight of the officer and his presence in the area is lawful.<sup>42</sup>

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39. 291 So. 2d 262 (Fla. 2d Dist.), *cert. denied*, 419 U.S. 997 (1974).

40. *Id.* at 263, quoting *Bloom v. State* 283 So. 2d 134 (Fla. 4th Dist. 1973).

41. *Id.* at 263, citing *Moore v. United States*, 461 F.2d 1236, 1239 (D.C.Cir. 1972).

42. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Harris v. United States*, 390 U.S. 234 (1968).

In *Castle v. State*,<sup>43</sup> the officer in question was a local firechief. In the course of his duties he discovered evidence of arson, which he and the Deputy State Fire Marshall removed. Defendant moved to suppress the evidence seized in this manner. The court held that the officials were on the scene lawfully, and that the evidence (candles, paper, bags of gasoline) was seized for public safety reasons. However, the court further indicated that even if the items were not seized for safety reasons, they were in plain view and could have been seized.

Where a defendant invited government investigators into his trailer and one saw what appeared to be bags of marijuana, the investigator was able to seize the supposed contraband without a warrant.<sup>44</sup> The court indicated that there was no search, and held that the presence of the investigators, and seizure of the bags in plain view was lawful. The dissenting judge, however, would have suppressed the evidence.<sup>45</sup> The facts, as he relates them, do not clearly support the majority's findings that the plain view doctrine was appropriate. Judge McCord said the record showed that only the plastic bags were visible and the investigator actually had to remove them from the trash to ascertain that they contained marijuana. He further stated that plastic bags in and of themselves have no per se nexus to criminal activity, and that without a warrant the search was illegal.<sup>46</sup>

A difficult issue concerning the plain view doctrine was broached by *McDaniel v. State*.<sup>47</sup> Defendant's brother contacted the police and informed them that the defendant had marijuana. He offered to let the police inside his brother's residence, and, in order to induce the police to enter, represented that he had the right of access to the house. He met the police at the home and broke a window to gain access. At this point, without entering, the police saw marijuana plants in the living room. Defendant claimed his brother had no right to enter and that the entry and seizure of evidence were unlawful. The state contended that the brother operated as a private person, not an agent of the police and that the plain view doctrine applied. The court agreed. The dissenting judge

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43. 305 So. 2d 794 (Fla. 4th Dist. 1974), *cert. denied*, 317 So. 2d 766 (Fla. 1975).

44. *State v. Kaufin*, 294 So. 2d 4 (Fla. 1st Dist. 1974).

45. *Id.* at 8 (McCord, J., dissenting).

46. *Id.* at 10.

47. 301 So. 2d 141 (Fla. 1st Dist. 1974).

would have suppressed the evidence, stating that defendant's brother's representation that he was responsible for the house did not legitimize the breaking, and that the marijuana did not come into view until the illegal act was complete, making the plain view doctrine inapplicable.<sup>48</sup> The result of the majority holding—that a private person can assist the police in a manner such as this—ignores the trespassory aspect of the police presence as well as the obvious illegality of the brother's action.

An interesting case involving the plain view doctrine was *State v. Day*.<sup>49</sup> A police officer, while examining a parked car, noticed the butt of a pistol protruding from under the seat. The defendant was arrested for carrying a concealed weapon and was searched incident to this arrest. The defendant brought an interlocutory appeal to suppress the weapon and contraband found on his person. The court found that the arrest was improper since a concealed weapon must be completely concealed, and that it is impossible to arrest for carrying a concealed weapon and at the same time seize that weapon on the basis that it is in plain view. The court suppressed the evidence.

## 2. SEARCH INCIDENT TO ARREST AND INVESTIGATIVE STOP

The issues of probable cause to arrest and reasonable suspicion to stop and frisk are intertwined with search and seizure problems. Police may, incident to a lawful arrest, make a full search of the person<sup>50</sup> and the area within his immediate control.<sup>51</sup> Furthermore, more constricted searches of the person are permitted, under limited circumstances, without probable cause to arrest.<sup>52</sup> The relationships between lawful arrest and search and seizure, and between stop and frisk and search and seizure are examined in the following cases.

In *State v. Brooks*,<sup>53</sup> the trial court suppressed a .22 caliber pistol, found on defendant's person, as the fruit of an unconstitutional search. Police patrolling a high crime district at 4:00 A.M. heard a gunshot. Turning the corner they observed two black males sitting on steps in front of a home. In response to the officers ques-

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48. 301 So. 2d at 142 (Rawls, C.J., dissenting).

49. 301 So. 2d 469 (Fla. 1st Dist. 1974), cert. denied, 312 So. 2d 748 (Fla. 1975).

50. E.g., *United States v. Robinson*, 414 U.S. 218 (1973).

51. *Chimel v. California*, 395 U.S. 752 (1969).

52. *Terry v. Ohio*, 392 U.S. 1 (1968).

53. 281 So. 2d 55 (Fla. 2d Dist. 1973).

tioning, defendant said they had been there a while, but heard nothing like a shot. The officer then frisked the men and found a pistol. The District Court of Appeal, Second District, reversed, holding that considering the totality of the circumstances the frisking was justified and comported with cases construing Florida's stop and frisk law,<sup>54</sup> and with *Terry v. Ohio*. It would seem that the court could have as easily reached a contrary result.

A different result was reached in *Cotellis v. State*.<sup>55</sup> Here various circumstances led the officer to be suspicious that defendant had stolen an automobile. He conducted a pat down search and retrieved a trunk key. He opened the trunk, saw a long box, which he opened, and found several pounds of marijuana. The court held the search invalid. The officer had the right to make a pat down search, but only for weapons. When he felt the key he had no authority to require defendant to produce it. As he lacked the necessary probable cause to search, and had not arrested defendant, the search was invalid.

In *Bailey v. State*,<sup>56</sup> defendant was a passenger in a car stopped for a traffic violation. After speaking with the driver the officer did

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54. FLA. STAT. § 901.151 (1973). The stop and frisk law enables a law enforcement officer to detain persons to ascertain their identity and the circumstances of their presence under circumstances reasonably indicating that the person has committed, is committing, or is about to commit a violation of a criminal law or ordinance. FLA. STAT. § 901.151 (2). Furthermore, when an officer is authorized to detain a suspect under subsection (2), and has probable cause to believe he is armed with a dangerous weapon, he may search the person to the extent necessary to disclose, and for the purpose of disclosing, such weapon. If a weapon is found it may be seized. FLA. STAT. § 901.151(5).

While the stop and frisk law was intended to reiterate the circumstances under which an officer may detain a suspected law violator as enunciated in *Terry v. Ohio*, (see FLA. STAT. ANN. § 901.151 Historical Note) the statutory language appears to be more restrictive than *Terry* with regard to when an officer may search a suspect. The statute requires probable cause to believe the suspect is armed with a dangerous weapon, and therefore a threat to the safety of the officer or others before conducting a search. *Terry*, on the other hand, held that where an officer observes conduct which leads him to reasonably conclude that criminal activity may be afoot, and that the persons with whom he is dealing may be armed and dangerous, he may conduct the prescribed limited search. It is arguable that the Florida Statute requires more than *Terry*. In *Perry v. State*, 296 So. 2d. 505 (Fla. 3d Dist. 1974), the court held that § 901.151 required that after an officer has detained a suspect, he must have probable cause to believe he is armed and dangerous before conducting a search. Compare *Thomas v. State*, 250 So. 2d 15 (Fla. 1st Dist. 1971), where the court, while finding probable cause, indicated that *Terry* made clear that the search involved was authorized by the Florida Statute.

55. 297 So. 2d 625 (Fla. 1st Dist. 1974).

56. 295 So. 2d 133 (Fla. 4th Dist. 1974), *quashed on other grounds*, 319 So. 2d 22 (Fla. 1975).

not make an arrest as "everything checked out." However, he did decide to check the identification of the two passengers. While doing this, he observed a plastic bag beneath defendant's leg. He reached in, took the bag, and found ashes with a strong odor of marijuana. He then arrested all three persons. The court held the search unreasonable stating, *inter alia*, that it was not incident to a lawful arrest inasmuch as no arrest had been made for the traffic violation.

The same issue was addressed in *D.L.C. v. State*.<sup>57</sup> An officer stopped defendant as he appeared to be violating a curfew for persons under age 16. After ascertaining that defendant was only 15, and had been drinking, the officer instructed defendant to empty his pockets. After defendant said he had done so, the officer noticed a bulge in defendant's pocket and pulled out a bag of marijuana. The court held the search lawful as incident to a valid arrest, although the defendant had not been told he was under arrest. The officer stated it was his policy not to say to a juvenile "you are under arrest" because it gets them "shaken up."<sup>58</sup>

The cases above illustrate that a search made incident to a lawful arrest is valid. However, if the arrest is made solely to legitimize a search, the search is not valid.<sup>59</sup> In *Harding v. State*,<sup>60</sup> state officers, acting on a tip, decided to serve two city traffic arrest warrants on a friend of the defendant in the defendant's home. The officers' reason was that since the friend was a well known member of the "local drug scene," it was likely that there would be drugs there. During the arrest, defendant, who had been out of the room, re-entered carrying a bag of marijuana. He was then arrested. The court found the original arrest on the traffic warrants to be a pretext arrest and therefore the plain sight seizure from the defendant was held unreasonable. The court noted, however, that it did not suggest that the arrest was illegal in the strictest sense. The court limited its holding to be, that conceding the strict legality of the arrest, under the circumstances the seizure from defendant was unreasonable.<sup>61</sup>

A defendant's arrest was also held to be a pretext in *Shaffer v. State*.<sup>62</sup> Defendant was intoxicated and asleep in the guest room of

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57. 298 So. 2d 480 (Fla. 1st Dist. 1974).

58. *Id.* at 481, (McCord, J., concurring specially).

59. See *Prather v. State*, 182 So. 2d 273 (Fla. 2d Dist. 1966).

60. 301 So. 2d 513 (Fla. 2d Dist. 1974), *cert. denied*, 314 So. 2d 151 (Fla. 1975).

61. *Id.* at 515.

62. 295 So. 2d 677 (Fla. 2d Dist.), *cert. denied*, 303 So. 2d 25 (Fla. 1974).

a private dwelling. A police officer gained lawful admittance and started to question the defendant. After receiving incorrect information (a false name), he arrested the defendant for drunkenness and took him to the police station. He was subsequently searched and a sum of money, slightly less than an amount stolen from his place of employment, was found. The court held that the arrest was patently a pretext, and held the search invalid.

Similarly, the impounding of a car on a pretext can lead to suppression of evidence subsequently seized. In *State v. Volk*,<sup>63</sup> the court analogized the needless impounding of a car to make an inventory search to a pretext arrest. There, an officer, contrary to usual police procedure, had impounded defendant's car solely to create a situation where an inventory search of the car would be appropriate.

*Gilbert v. State*,<sup>64</sup> presents an interesting factual situation. A woman who was found in a roadway, claimed she had been assaulted. She was taken to the police station to be interviewed in order to continue the investigation of her allegations. She made several statements indicating that she had very strong suicidal tendencies. The police became worried that she might carry out her threats and, for her own protection, searched her jacket for weapons. Instead they found marijuana. The court indicated that the genuine concern of the officers gave them probable cause to search her jacket and pocketbook to prevent her from harming herself, and held the search reasonable. Another situation where a defendant was not engaged in criminal activity but was searched nevertheless, was *Perry v. State*.<sup>65</sup> There defendant was "frisked" merely because he was standing next to another person against whom an arrest warrant was outstanding. The court reasoned that there was no probable cause for the officer to believe that the defendant was armed and dangerous and offered a threat to his safety. The evidence found in the search was suppressed.

### 3. CONSENT TO SEARCH

Of course, a person can waive his fourth amendment rights, and consent to a search. The issue raised by a waiver of this type is whether the waiver is given freely and with understanding of all it

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63. 291 So. 2d 643 (Fla. 2d Dist. 1974).

64. 289 So. 2d 475 (Fla. 1st Dist.), cert. denied, 294 So. 2d 660 (Fla. 1974).

65. 296 So. 2d 505 (Fla. 3d Dist. 1974).



implies.<sup>66</sup> This issue was confronted in *Holt v. State*,<sup>67</sup> where the court held that a threat made after consent was allegedly given, did not alter the voluntariness of such consent.

Certain persons may give consent to a search of another's property. This ability to give consent depends on the relationship between the person giving said consent and the area searched. In *State v. Dees*<sup>68</sup> the police were invited into the defendant's house by his wife who took them on a room-to-room tour of the home. She voluntarily gave them property which she identified as stolen. The trial court held that she did not have the authority to consent to a search. The District Court of Appeal, First District, reversed, reasoning that there was no search, as the wife voluntarily led the officers around the home.<sup>69</sup> In a similar case, a mother, who was custodian of the premises, was held to be able to consent to the search of her son's bedroom.<sup>70</sup> An officer came to the defendant's home, spoke to his mother, and informed her of the charges. He requested permission to search the defendant's room for a jacket, stating that he did not have a warrant. He also advised her that she could refuse him entrance, contact an attorney, and that anything found would be used against the defendant in court. She then led the officer to the defendant's room and produced the evidence sought. The court distinguished *Bumper*, finding no subterfuge as there had been in *Bumper*, where the officers represented that they had a search war-

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66. See *Bumper v. North Carolina*, 391 U.S. 543 (1968), and *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), where the United States Supreme Court held:

[T]hat the question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent. *Id.* at 227.

67. 302 So. 2d 775 (Fla. 1st Dist. 1974). See also *State v. Othen*, 300 So. 2d 732 (Fla. 2d Dist. 1974); *Mack v. State*, 298 So. 2d 509 (Fla. 2d Dist. 1974).

68. 280 So. 2d 51 (Fla. 1st Dist. 1973), *cert. discharged*, 291 So. 2d 195 (Fla. 1974).

69. The court distinguished *State v. Blakely*, 230 So. 2d 698 (Fla. 2d Dist. 1970), which held that the husband-wife relationship, without more, does not impute authority to one spouse to waive the other's constitutional right to demand a warrant for a premises search. The court noted in *Blakely* that the wife consented only after the officer said he could get a warrant if she did not consent. The court in the instant case did not deal with the issue of ownership or occupancy rights of the wife.

70. *Owens v. State*, 300 So. 2d 70 (Fla. 1st Dist.), *appeal dismissed*, 305 So. 2d 203 (Fla. 1974).

rant. The legal custodian of the premises could, therefore, give a valid consent to search.<sup>71</sup>

#### 4. OTHER ISSUES

As in the case of consent searches, a border search may be reasonable without probable cause. However, in *Earnest v. State*<sup>72</sup> the defendant had not crossed the border between this country and another. A port inspector nevertheless made a search of defendant's pleasure boat without a warrant or probable cause. During the search, defendant kicked a box containing marijuana into the water. The State contended this constituted abandonment of the contraband. The court held that the search was illegal since it was not shown that defendant had crossed the national border within a reasonable time prior to this action. Since the search was illegal, the abandonment did not make the evidence admissible.

The significance of the act of returning a search warrant has created a split between the Second and Fourth Districts. The District Court of Appeal, Second District, in *Nofs v. State*,<sup>73</sup> held that the return of a search warrant is a ministerial act and any failure to return the warrant using the procedure in section 933.07 of the Florida Statutes<sup>74</sup> does not void the warrant unless prejudice is shown. The District Court of Appeal, Fourth District, reads the rule literally, commanding the searching officers to return any evidence found as the result of the search incident to a warrant to the issuing magistrate or some other court having jurisdiction over the effects with which the evidence is concerned. Therefore, if the return of the search warrant is not according to the Florida statute, the warrant becomes invalid.<sup>75</sup>

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71. However a motel owner cannot give consent to have a guest's room searched. See *Sheff v. State*, 301 So. 2d 13 (Fla. 1st Dist. 1974).

72. 293 So. 2d 111 (Fla. 1st Dist. 1974).

73. 295 So. 2d 308 (Fla. 2d Dist. 1974).

74. FLA. STAT. § 933.07 (1973) provides that the judge or magistrate who examines the application and proof submitted if satisfied the probable cause exists will issue a search warrant,

commanding the officer or person forthwith to search the property described in the warrant or the person named, for the property specified, and to bring the same before the magistrate or some other court having jurisdiction of the offense.

75. *Laiser v. State*, 299 So. 2d 39 (Fla. 4th Dist. 1974). See also *State v. Schectman*, 291 So. 2d 259 (Fla. 4th Dist. 1974).

## IV. INFORMATIONS AND GRAND JURIES

A. *Informations*

In *Gerstein v. Pugh*,<sup>76</sup> the United States Supreme Court upheld, in part, the holding of the United States District Court for the Southern District of Florida which declared the Florida information rule and procedure unconstitutional.<sup>77</sup> The Supreme Court held that it is essential that an impartial magistrate determine probable cause to believe that the defendant committed a crime. The Court observed:

Although a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment.<sup>78</sup>

The second issue on appeal concerned the procedure of the hearing itself. Concerning this issue, the Supreme Court indicated that the district court and court of appeals had held that the probable cause determination must be accompanied by the full panoply of adversary safeguards such as counsel, confrontation, cross-examination, and compulsory process.<sup>79</sup> The Supreme Court held, however:

The use of an informal procedure is justified not only by the lesser consequences of a probable cause determination, but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable doubt or even a preponderance standard demands, and credibility determina-

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76. 420 U.S. 103 (1975).

77. The procedure attacked in this case enabled a prosecutor to file an information based on his sworn determination that there was probable cause to believe a crime had been committed and that defendant had committed it. The defendant then could be jailed without an opportunity for a probable cause determination by an impartial judicial officer.

This case first came to the federal courts as *Pugh v. Rainwater*, 332 F. Supp. 1107 (S.D. Fla. 1971). There the court demanded that the defendants (Dade County officials) submit a plan for probable cause hearings before a judicial officer. This was done and ordered to be implemented, 336 F. Supp. 490 (S.D. Fla. 1972). The Court of Appeals for the Fifth Circuit stayed implementation pending appeal, and asked the district court to determine the constitutionality of the amended Florida rules governing preliminary hearing. The district court found the procedure unconstitutional, 355 F. Supp. 1286 (S.D. Fla. 1973). The fifth circuit affirmed with minor modifications, *Pugh v. Rainwater*, 483 F. 2d 778 (5th Cir. 1973).

78. 420 U.S. at 117.

79. *Id.* at 119.

tions are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt.<sup>80</sup>

Concurring Justices Stewart, Douglas, Brennan, and Marshall agreed with the majority concerning the first point, but disagreed with the second. As Justice Stewart observed:

Having determined that Florida's current pretrial detention procedures are constitutionally inadequate, I think it is unnecessary to go further by way of dicta. In particular, I would not, in the abstract, attempt to specify those procedural protections that constitutionally need *not* be accorded . . .<sup>81</sup>

Although an information must be exact, if the defendant delays his attack upon the sufficiency of the information, he will lose his opportunity to do so. Rule 3.190(c) of the Florida Rules of Criminal Procedure provide that the defendant must move to dismiss the information before or upon arraignment, or waive his right to object. In *Caves v. State*,<sup>82</sup> the State omitted the element of intent to deprive in an information for auto theft. The defendant waited until trial to move to quash the information on this basis. Prior to the motion to quash and during the trial, the State had in fact shown the necessary intent. The court, in reviewing the conviction, held that the defendant had waived his right to object to the information and had no recourse since this was not a fundamental error. In *State v. Miller*,<sup>83</sup> a felony information was attacked because it was signed by an assistant state attorney. The Supreme Court of Florida held that section 27.324 of the Florida Statutes supersedes section 27.181(3)<sup>84</sup> of the Florida Statutes and provides that assistant state attorneys appointed by each state attorney are vested with all pow-

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80. *Id.* at 121.

81. *Id.* at 126, (Stewart, J., concurring).

82. 302 So. 2d 171 (Fla. 2d Dist. 1974).

83. 313 So. 2d 656 (Fla. 1975).

84. FLA. STAT. § 27.181(3) provides:

Each assistant state attorney appointed by a state attorney under the authorization of this act shall have all the powers and discharge all of the duties of the state attorney appointing him, under the direction of said state attorney, except, however, that due to constitutional limitations, no such assistant may sign informations. He shall sign indictments and other official documents, except information, as assistant state attorney, and, when so signed, the same shall have the same force and effect as if signed by the state attorney.

FLA. STAT. § 27.324 provides:

The assistant state attorneys properly appointed by the state attorney are vested with all the powers, duties, and responsibilities of state attorneys.

ers, duties, and responsibilities of state attorneys. These powers include the legal authorization to sign both felony and misdemeanor informations.<sup>85</sup>

### B. Grand Juries

Section 905.17 (1973) of the Florida Statutes had expressly prohibited anyone except "the witness under examination, the state attorney or his designated assistant, the court reporter or stenographer, and the interpreter" from being present during a grand jury proceeding. The presence of an unauthorized person was grounds for dismissal. In *Rudd v. State ex rel. Christian*,<sup>86</sup> this rule was applied to void an indictment, notwithstanding the fact that only an assigned state attorney and two assigned assistant state attorneys from another district were present. The District Court of Appeal, First District, had voided the indictment on the ground that the conjunction "or" in the statute precluded simultaneous appearance by a state attorney and an assistant state attorney at the same grand jury proceeding.<sup>87</sup> The supreme court affirmed the result but disapproved of the lower court's reasoning. The supreme court interpreted the conjunction "or" as a copulative "and" in order to effectuate the intent of the legislature, and thus approved simultaneous appearance by a state attorney and an assistant state attorney.<sup>88</sup> The court noted, however, that the assistant state attorneys in the case were not "lawful and qualified" because they were improperly assigned and affirmed the voiding of the indictment.<sup>89</sup>

As noted above, there is a provision for the presence of a court reporter during grand jury proceedings. The District Court of Appeal, Fourth District, in *State v. McArthur*<sup>90</sup> considered the issue of whether grand jury proceedings must be recorded. The court, in

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85. The court stated that section 27.324 conforms to article V, section 17 of the Florida Constitution which became effective on January 1, 1973. Section 17 of article V contains no limitations on the power of the legislature to grant assistant state attorneys authority to sign informations, as had been the construction given to section 10, article I and section 15 of article V of the 1885 Constitution in *State ex rel. Ricks v. Davidson*, 121 Fla. 196, 163 So. 588 (1935). 313 So. 2d at 657.

86. 310 So. 2d 295 (Fla. 1975).

87. *State ex rel. Christian v. Rudd*, 302 So. 2d 821 (Fla. 1st Dist. 1974).

88. FLA. STAT. § 905.17 (1) (1973) was amended by the legislature to conform to the construction given to it in this opinion. FLA. STAT. § 905.17 (1) (Supp. 1974).

89. 310 So. 2d at 298.

90. 296 So. 2d 97 (Fla. 4th Dist.), *cert. denied*, 306 So. 2d 123 (Fla. 1974).

holding that recording was not required<sup>91</sup> considered sections 905.17 and 905.27 (1973) of the Florida Statutes. The former section provides for the presence of a court reporter, but does not mandate the reporter's presence. The latter section provides that the reporter must not disclose the testimony of a witness examined before the grand jury. The court found no mandate from the legislature that a court reporter or stenographer must be present although it did note that there was a pending bill before the Florida Legislature mandating the presence of a court reporter or stenographer.

## V. DISCOVERY

### A. *Exchange of Witness Lists*

The reason behind the exchanging of witness lists is the prevention of undue surprise when a certain witness is called, and to allow the State to depose that witness before the trial. In *C.A.W. v. State*,<sup>92</sup> the defendant called a witness from the State's witness list. The court held this to be permissible since no surprise should result. In *Thomas v. State*,<sup>93</sup> the District Court of Appeal, Third District, in a per curiam decision, held that there was no reversible error shown in the admission of the State's rebuttal witness whose name was not previously disclosed to defendant's counsel. Also, the situation and facts of the case must be considered before a determination of error is made. In *Ansley v. State*,<sup>94</sup> defendant had another attorney prior to the one who conducted his defense at trial. The prior attorney was given the list of witnesses, but he did not turn it over to the subsequent attorney. The trial court made a careful investigation into the circumstances and held that there was no prejudice to the defendant. The District Court of Appeal, First District, affirmed.

### B. *Disclosure of Confidential Informants*

In *Ricketts v. State*,<sup>95</sup> a confidential informant was the only witness in a position to amplify or contradict the testimony of the

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91. *Accord*, *State v. Tucker*, 301 So. 2d 501 (Fla. 2d Dist. 1974).

92. 295 So. 2d 329 (Fla. 1st Dist. 1974).

93. 296 So. 2d 503 (Fla. 3d Dist.), *cert. denied*, 305 So. 2d 204 (Fla. 1974). *See also* *Kruglak v. State*, 300 So. 2d 315 (Fla. 3d Dist. 1974).

94. 302 So. 2d 797 (Fla. 1st Dist. 1974).

95. 305 So. 2d 296 (Fla. 4th Dist. 1974).

witnesses for the State. The State refused to reveal his name prior to the trial, relying on the general rule that a confidential informant's name need not be given when he has given information in aid of the prosecution.<sup>96</sup> This general rule, however, does not apply when the informer is an active participant in the offense and there is very little or no independent evidence of the accused's guilt. The court, in applying this exception, found that the informant's testimony was necessary and that it was reversible error not to compel the state to produce his name.

### C. *Affirmative Duties of the State*

The State has an affirmative duty to disclose material evidence tending to negate the defendant's guilt.<sup>97</sup> Similarly, admission of material evidence not produced by the State on the defendant's motion is error, although where defendant is caught "red-handed," it will be held to be harmless error.<sup>98</sup>

Furthermore, the court may find the state attorney to be in constructive possession of information he does not actually have in his possession. In *Taylor v. State*,<sup>99</sup> the court said the state attorney was in constructive possession of a statement made by defendant that was overheard by two police officers. The state attorney was actually informed of the defendant's statement shortly before the trial, so that he was not in actual possession of the statement until that time. However, the court allowed admission of the statement observing that if the defendant were surprised and his defense prejudiced, he could have asked for a continuance. The court indicated, however, that if such practice were continued, it might be necessary to rule such evidence inadmissible to enforce discovery requirements.

The Supreme Court of Florida has held that the State must produce any criminal records of potential state witnesses that are in its actual or constructive possession.<sup>100</sup> These records are in the State's possession if: (1) they are in the physical possession of any state prosecutorial or law enforcement office, or (2) the State has

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96. See *Roviaro v. United States*, 353 U.S. 53 (1957).

97. *Wilcox v. State*, 299 So. 2d 48 (Fla. 3d Dist. 1974) (dictum).

98. *McHaney v. State*, 295 So. 2d 355, 356 (Fla. 1st Dist. 1974), *rev'd on other grounds*, 314 So. 2d 134 (Fla. 1975).

99. 292 So. 2d 375 (Fla. 1st Dist.), *cert. denied*, 298 So. 2d 415 (Fla. 1974).

100. *State v. Coney*, 294 So. 2d 82 (Fla. 1974).

fingerprints of the witnesses, thereby giving it access into a federal information system that uses fingerprints as a basis of identification.<sup>101</sup> Also, if the State does not have the fingerprints in its files, but is able to obtain them through the witness' voluntary operation, then the State should do so. The State is not required to actually obtain fingerprints of the witness, but upon request by the defendant, after exhaustion of all other available means and remedies, it must ask the witness if he would consent to be fingerprinted. The witness, of course, must be informed as to the reason for this fingerprinting. Should he decline, the State is then under no further obligation to provide his fingerprints.

#### D. *Affirmative Duties of the Court*

Should one of the parties in an action not make discovery, the trial court has an affirmative duty to make careful inquiry into the reasons for such a lapse, the extent of the prejudice to both parties and the feasibility of rectifying any prejudice that it should find by some intermediate procedure.<sup>102</sup> Applying this rule in *Kruglak v. State*,<sup>103</sup> the District Court of Appeal, Third District, found that the trial judge did, in fact, make the requisite inquiries. Here, defendant's motion for discovery was not made pursuant to any specific rule and never set down for hearing. The trial judge, becoming aware of this failure after the jury was sworn, offered the defendant an opportunity to speak with the individual witnesses that the prosecution would call. This was found to be sufficient to satisfy the requirement of attempting to rectify any prejudice, and since the defendant's attorney refused this offer, there was no reversible error.<sup>104</sup>

### VI. RIGHT TO COUNSEL

#### A. *Generally*

In *Argersinger v. Hamlin*,<sup>105</sup> the United States Supreme Court extended the right to counsel embodied in the sixth amendment to *all* cases which might result in a loss of liberty. In *Rollins v. State*,<sup>106</sup>

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101. *Id.* at 87.

102. *Sheridan v. State*, 258 So. 2d 43 (Fla. 4th Dist. 1971).

103. 300 So. 2d 315 (Fla. 3d Dist. 1974).

104. *See also Lewis v. State*, 298 So. 2d 469 (Fla. 3d Dist. 1974).

105. 407 U.S. 25 (1972).

106. 299 So. 2d 586 (Fla.), *cert. denied*, 419 U.S. 1009 (1974).



defendant Rollins pled guilty to various traffic violations without the benefit of counsel or being informed of the right to counsel. She was fined \$843.00, and was told that in default of such payment, she would be incarcerated. Defendant Brown, charged with a misdemeanor, similarly pled guilty and was sentenced to pay a \$256.00 fine, or, in default, be incarcerated. Neither was able to pay and both were incarcerated. In a subsequent hearing, after a public defender had been appointed, it was argued that *Argersinger* was violated since neither had an attorney when they were sentenced. Both sides stipulated that if the cases presented only a violation of the rule in *Tate v. Short*,<sup>107</sup> then the defendants' relief would be only release from incarceration and not new trials. The latter view was adopted by the trial court, which released the defendants and stayed execution of their fines pending appeal. The appeal was heard by the Supreme Court of Florida, which held that the penalty for the convictions in the trial court was not incarceration, and that the incarceration penalty arose only after the fines were not paid. Therefore, the court allowed the convictions to stand, finding there was no violation of *Argersinger* or *Tate*. In considering the *Tate* issues, the court felt that there was no violation since the appellants were released after they had established their indigency. The court indicated that an indigent, when sentenced in the alternative to a fine or imprisonment, must be given an opportunity to pay the fine, and that this could usually be accomplished by deferring imposition of sentence. It has become common practice for courts, who have found that the defendant is not able to pay his fine at that time, to allow personal payment or timed payment, according to the defendant's ability to pay. The court further indicated, however, that "[i]n no event shall an indigent be imprisoned for nonpayment of a fine by means of an alternative sentence, but, in the absence of an alternative sentence, an indigent may be sentenced to imprisonment."<sup>108</sup>

Defendant, an airline passenger, was searched, and contraband was seized when he satisfied the criteria of the "skyjacker profile" as developed by the Federal Aviation Administration. During the hearing on a motion to suppress the evidence, the State's witness,

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107. 401 U.S. 395 (1971). The United States Supreme Court held that the equal protection clause of the fourteenth amendment forbids the incarceration of a defendant who is not able to pay a fine, where a defendant who is able to pay the fine is allowed to go free.

108. 299 So. 2d at 589.

a federal marshal, refused to testify concerning this profile. This refusal was made as a result of direct orders from the Justice Department. The State asked for an *in camera* proceeding with only the judge, witness, and court reporter present. The trial judge refused to conduct the hearing in this manner and the State appealed. The District Court of Appeal, Second District, affirmed, holding that the defendant's counsel must be allowed to be present at a hearing of this type.<sup>109</sup> While the hearing does not decide the issue of guilt or innocence of the defendant, it is clearly a critical stage of the prosecution. As such, the confrontation clause of the sixth amendment, which guarantees the accused in a criminal trial the right to confront witnesses against him, is applicable.

A defendant does not forfeit his right to counsel by disagreeing with the tactics or ideas of his public defender. In *Taylor v. State*,<sup>110</sup> the defendant and his public defender had a disagreement which resulted in the public defender petitioning to withdraw from the case. The trial court refused to appoint new counsel for the defendant but allowed him to conduct the trial *pro se*. The appellate court, after considering the record, held that the defendant did not voluntarily waive his right to counsel. The court further held that when the public defender seeks to withdraw on his own motion, a substitute counsel should be appointed unless it clearly appears, upon proper inquiry, that the defendant intelligently elected to waive his rights.

### B. Adequacy of Counsel

A defendant also has the right to be represented by counsel that is adequate, effective and competent. In *Ross v. State*,<sup>111</sup> a defendant was allowed delayed appellate review where it became apparent that the public defender did not utilize an obvious insanity defense. Prior to the trial, the public defender requested the defendant to plead guilty. Defendant declined to do so and requested a jury trial. The public defender acquiesced grudgingly. Prior to the trial, defendant made known to the public defender that he had a history of mental disturbances and that it was likely that a plea of not guilty by reason of insanity could be made. However, the public

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109. *State v. Sigerson*, 282 So. 2d 649 (Fla. 2d Dist. 1973).

110. 295 So. 2d 673 (Fla. 4th Dist. 1974).

111. 287 So. 2d 372 (Fla. 2d Dist. 1973).

defender did not file a notice of intent to plead not guilty by reason of insanity, as required by the rules of criminal procedure. During the trial, testimony of a psychiatrist offered on behalf of the defendant was excluded. The public defender did not object, nor on appeal argue this point. The appellate court, in considering the trial court record, found that the defendant did not have adequate counsel and appointed successor counsel with directions to file another appellate brief. It would now seem, at least in the Second District, that the actions of public defenders in providing adequate representation for indigents is coming under closer judicial scrutiny. This can only result in better protection of the rights of indigents.<sup>112</sup>

## VII. PRELIMINARY HEARINGS

The issue of whether a defendant has the right to call witnesses at a preliminary hearing was answered in the affirmative by the District Court of Appeal, Second District, in *Johnson v. Strickland*.<sup>113</sup> The trial judge had refused a request to call a witness requested by the defense, reasoning that the standard was probable cause, not reasonable doubt, and that probable cause had been established. The appellate court held that a judge has ample authority to prevent the preliminary hearing from becoming a discovery proceeding, but that authority should not be exercised by the curtailment of legitimate inquiry into grounds for belief of probable cause. As long as the inquiry is made in good faith, Florida Rules afford defendants the right to cross-examine the State's witnesses and offer their own.

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112. In other cases touching on the right to counsel issue the following rulings were made: In *Stansel v. State*, 297 So. 2d 63 (Fla. 2d. Dist. 1974) it was held that the trial court erred in considering *in camera* evidence in a bail proceeding, thus denying the accused his rights of cross-examination and confrontation. The court described this as an adversary proceeding thus implying right to counsel. In *Vena v. State*, 295 So. 2d 720 (Fla. 3d. Dist. 1974), *cert. denied*, 307 So. 2d 184 (Fla. 1975), the court said that while there is no need for counsel at fingerprinting, failure to notify counsel of the taking of prints may be reversible error. In *Gerstein v. Pugh*, 420 U.S. 103 (1975), the United States Supreme Court held that counsel was not required at a probable cause hearing since it was not a "critical stage" of the criminal process. Finally, in *State ex rel. Rash v. Williams*, 302 So. 2d 474 (Fla. 3d. Dist. 1974), an action for a writ of prohibition, the court did not reach the question of whether an attorney must be present during a mental examination pursuant to section 917.14(1)(b) of the Florida Statutes, which is an investigation to determine if defendant is a mentally disordered sex offender.

113. 300 So. 2d 50 (Fla. 2d. Dist. 1974).

## VIII. WIRETAPPING

A. *Sufficiency of Affidavit for Wiretap*

The Supreme Court of Florida, in *Rodriguez v. State*,<sup>114</sup> addressed the issues of the sufficiency of an affidavit for wiretap and whether the recordings made pursuant to this wiretap should be suppressed for failure to minimize unauthorized interception of certain innocent telephone conversations.<sup>115</sup> The court, after examining the appropriate statute,<sup>116</sup> held that the affidavit was insufficient to establish probable cause for belief that the offense in question was being committed or was about to be committed,<sup>117</sup> and that the phones sought to be tapped were, or were about to be, used in connection with commission of that offense.<sup>118</sup> The affidavit in question alleged that the dwelling had three different phone numbers which were listed under three different names of occupants of the home. It further alleged that the affiant had, 38 days prior to the date of the affidavit, received a statement given by a woman, which said that her husband worked for the defendant in a gambling operation. It also alleged that the defendant's stepdaughter's ex-boyfriend had seen gambling operations taking place on the premises sometime in the past. The court, in considering the totality of the affidavit, found it to be stale. The two key allegations, those of the woman and the boyfriend, concerned past circumstances, and therefore did not comply with the statute. The court then observed that these facts indicated grounds for suspicion but were not sufficient to establish probable cause that the offense continued.

B. *Minimization of Unauthorized Interceptions*

The second issue in *Rodriguez* concerned minimization of unauthorized interception of matters not dealing with the crime. This issue was one of first impression in Florida. The court, therefore, relied upon the appropriate federal rule<sup>119</sup> and the federal cases construing its use.<sup>120</sup> The court noted that in the federal cases the

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114. 297 So. 2d 15 (Fla. 1974). For a later case dealing with wiretaps without probable cause see *State v. Alphonse*, 315 So. 2d. 506 (Fla. 4th Dist. 1975).

115. This issue will be discussed in section B, *infra*.

116. FLA. STAT. § 934.09(3)(1973).

117. *Id.* at (3)(a).

118. *Id.* at (3)(d).

119. 18 U.S.C. § 2518(5) (1970).

120. See *United States v. Manfredi*, 488 F.2d 588 (2d Cir. 1973).

courts considered factors such as whether or not privileged communications were intercepted, the percentage of interceptions terminated as nonpertinent, whether authorization was limited to interception of certain types of conversations, and whether there was judicial supervision over the actual interception procedures. The court held that the requisite minimization effort had not been shown. The court then discussed the three different remedies developed by the federal courts where the requisite minimization effort has not been made. One group of cases<sup>121</sup> holds that only that portion of evidence obtained in violation of the minimization requirements should be suppressed. A second group<sup>122</sup> holds that where minimization requirements are not met, all wiretap evidence must be suppressed. The third group of cases<sup>123</sup> holds that where minimization procedures are blatantly ignored, all evidence must be suppressed, but where violations occur despite efforts to minimize, only unauthorized interceptions need be suppressed. The Supreme Court of Florida chose this third position.

### C. Wiretaps Subsequent to Information

In *Scaldeferri v. State*,<sup>124</sup> defendants were planning a robbery and enlisted the aid of two other men who were undercover agents "wired for sound." After the first meeting, an information was filed and warrants for the arrest of defendants were issued. During the second meeting, which was arranged during the first, the agents were again "wired." These tapes were admitted into evidence and the defendants sought to appeal denial of their motion to suppress. The District Court of Appeal, Third District, distinguishing *Massiah v. United States*,<sup>125</sup> held that a recording of a meeting which occurred before arrest but after an information was filed was admissible where the meeting had been arranged prior to the filing. The *Massiah* opinion recognized the right of the government to

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121. *E.g.*, *United States v. Cox*, 462 F.2d 1293 (8th Cir. 1972).

122. *E.g.*, *United States v. George*, 465 F.2d 772 (6th Cir. 1973).

123. *E.g.*, *United States v. Lanza*, 349 F. Supp. 929 (M.D. Fla. 1972).

124. 294 So. 2d 407 (Fla. 3d Dist.), *cert. denied*, 303 So. 2d 2, (Fla. 1974), *cert. denied*, 419 U.S. 993 (1975).

125. 377 U.S. 201 (1964). In *Massiah*, a co-defendant was cooperating with the government and met *Massiah* in a place that was "wired for sound." The co-defendant elicited incriminating statements from *Massiah* after he was arrested, had employed an attorney, was arraigned, and had pled not guilty. The Supreme Court held that the information elicited was not admissible into evidence.

continue its investigation after an indictment; however, it forbade the use of trickery to obtain incriminating statements after arrest and retention of counsel. The court held that *Massiah* did not apply since the meeting that was recorded was held prior to arrest and prior to retention of counsel.

#### D. *Eavesdropping by a Private Person*

In *Horn v. State*,<sup>126</sup> a critical telephone call was intercepted by a private person. Defendant attempted to suppress the contents of this telephone message, but was unsuccessful in the lower court. On appeal, the District Court of Appeal, First District, held that the evidence obtained was inadmissible. The court considered Florida Statutes section 934.06 (1973), which makes inadmissible any evidence obtained by an interception of a telephone call that is not authorized by law. The court then observed that a person who, without authorization, eavesdrops on another's telephone conversation is guilty of a third degree misdemeanor. Therefore, reasoned the court, the evidence obtained by this illegal eavesdropping was inadmissible since the eavesdropper did not lawfully intercept the conversation.

### IX. BAIL

In *State ex rel. Harrington v. Genung*,<sup>127</sup> defendant applied for release on his own recognizance pursuant to section 924.071(2) (1973) of the Florida Statutes. This section provides that "[a] defendant in custody whose case is stayed either automatically or by order of the court [while the state takes an appeal] shall be released on his recognizance pending the appeal if he is charged with a bailable offense." Defendant contended that the trial court had no discretion and erred by setting bail at \$20,000 for one count of the indictment. The court indicated that, generally, the power to admit a person to bail is a judicial function and thus must be free from legislative encroachment. Then, relying on *Simmons v. State*,<sup>128</sup> the court held that the word "shall" must be interpreted as merely directory and not mandatory, and denied defendant's petition for writ of habeas corpus.

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126. 298 So. 2d 194 (Fla. 1st Dist. 1974).

127. 300 So. 2d 271 (Fla. 2d Dist. 1974).

128. 160 Fla. 629, 36 So. 2d 207 (1948).

## X. SPECIFIC CRIMES

### A. Assault

An essential element of assault is the performance of some act which creates in the victim a well-founded fear of violence. Applying this rule, the court in *White v. State*<sup>129</sup> held that when the facts of a case show that the victim did not see the bottle which struck him, nor the person who threw it, it was reversible error not to instruct the jury as to the above-mentioned element.

### B. Breaking and Entering, Burglary

The District Court of Appeal, Fourth District, in *Hill v. State*,<sup>130</sup> held that a gasoline storage tank was not a "vessel" as contemplated by section 810.05 of the Florida Statutes.<sup>131</sup> The court, construing this statute which concerns breaking and entering, indicated that the word "vessel" in the context of the statute meant a marine structure intended for transport, not a container for liquid.

Grand larceny is not a lesser included offense in the crime of breaking and entering a building with the intent to commit a felony, to wit: grand larceny. Thus, breaking and entering to commit a felony is an entirely separate offense from the felony which is intended. A defendant may be convicted of either crime, or both, but the "evidence essential to prove one is not essential to the conviction for the other."<sup>132</sup>

Where the State's only evidence of an intent to commit grand larceny is that the building broken into contained property valued in excess of \$100, such evidence is not sufficient to prove intent. This was the holding in *West v. State*<sup>133</sup> where defendant was arrested after breaking into his former place of employment. Defendant only had two keys to the building in his possession when arrested, and items of personal property in the building with a value in excess of \$100 were not taken. Similarly, *Jackson v. State*<sup>134</sup> held that defendants who had broken into a dwelling containing property in excess

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129. 299 So. 2d 243 (Fla. 1st Dist. 1974).

130. 302 So. 2d 785 (Fla. 4th Dist. 1974).

131. FLA. STAT. § 810.05 was repealed by Fla. Laws 1974, ch. 74-383, effective July 1, 1975.

132. *Ashley v. State*, 292 So. 2d 616 (Fla. 2d Dist. 1974).

133. 289 So. 2d 758 (Fla. 3d Dist. 1974).

134. 300 So. 2d 47 (Fla. 3d Dist. 1974).

of \$100 and who were in such dwelling for a very short period of time and took nothing, were not guilty of breaking and entering with the intent to commit grand larceny. The court reversed and remanded with directions to enter judgments against the defendants for breaking and entering with intent to commit a misdemeanor, to wit: petit larceny.

In *Vinson v. State*,<sup>135</sup> however, the District Court of Appeal, Second District, reached a different result on the issue of intent to commit grand larceny. Defendant was apprehended shortly after committing the crime, and the stolen goods found in his automobile had a total value of less than \$100. The appellate court, nevertheless, sustained defendant's conviction for breaking and entering with intent to commit a felony, to wit: grand larceny. It reasoned that there was other evidence sufficient to show the requisite intent to commit grand larceny. The court stated,

[t]he record reveals first that there were additional items of value on the premises. In addition, the evidence shows that a strongbox was broken into which contained only non-negotiable securities, drawers were searched, and that appellant was prevented from completing whatever his mission may have been by the return of the occupants . . . .<sup>136</sup>

The above cases can be reconciled by using the court's reasoning in *Platt v. State*.<sup>137</sup> In that case, the court stated that the requisite intent needed to prove grand larceny may be shown either by evidence of the market value of what was actually stolen, or by other evidence or circumstances. In *Jackson and West*, the "other evidence or circumstances" showed only that the defendants had broken and entered the building in question and left without taking anything, or only taking items worth less than \$100. In the *Vinson* case, however, defendant had conducted a thorough search and had rifled the strongbox. This, coupled with the fact that the evidence indicated he was caught in the act and prevented from completing his mission by the return of the occupants, was sufficient to support the jury's conclusion that there was an intent to steal goods of a value in excess of \$100. What may have been the determinative factor in *Vinson* was the fact that the defendant had been prevented

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135. 300 So. 2d 714 (Fla. 2d Dist. 1974).

136. *Id.* at 715.

137. 291 So. 2d 96 (Fla. 2d Dist. 1974).



from completing the act, and it could be inferred that he had intended to take and would have taken more but for the interruption. This factor distinguishes *Vinson* from *West*, and apparently from *Jackson* also, although the *Jackson* court gives few facts. Also, it should be noted that the *Vinson* court considered the value of the items on the premises as a factor to be considered in determining intent.

### C. Conspiracy

Where two or more persons conspire with another person, who, unknown to them, is a government agent, to commit an offense under an agreement with an intention that an essential ingredient of the offense is to be performed only by the agent, such persons cannot be convicted of conspiracy.<sup>138</sup> This rule was held not to apply in *Betancourt v. State*,<sup>139</sup> where the court found an offer to sell contraband sufficient to convict for sale, and that an actual purchase is not an essential element of unlawful sale of marijuana. In *Young v. State*,<sup>140</sup> *Betancourt* was cited to affirm a conviction of one charged with conspiracy to sell cannabis to a police officer. However, the dissenting judge, citing *King*, would have reversed, as the conspiracy was to sell to a police officer, and since the officer was an essential ingredient to the conspiracy charged, defendant could not be legally convicted.<sup>141</sup>

The District Court of Appeal, Second District, in *Little v. State*,<sup>142</sup> held that a conviction for assault with intent to murder is tainted by evidence of conspiracy which does not link defendant to the planning of the crime. In order to prosecute successfully for conspiracy, the evidence must directly connect the defendant to the planning of the crime. Persons who aid and abet, as did defendant, have the same criminal responsibility as the principal, but this responsibility does not include conspiracy. Separate evidence of complicity in the conspiracy is a prerequisite to admissibility of evidence concerning details of the conspiracy, with which the accused is not directly linked. The defendant, therefore, was correct in contesting the admissibility of the evidence concerning the de-

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138. *King v. State*, 104 So. 2d 730 (Fla. 1957).

139. 228 So. 2d 124 (Fla. 3d Dist. 1969).

140. 291 So. 2d 660 (Fla. 4th Dist. 1974).

141. *Id.* at 660 (Owen, C.J., dissenting).

142. 293 So. 2d 775 (Fla. 2d Dist. 1974).

tails of the conspiracy at times when he was absent. The case was reversed and remanded for a new trial, even though there was ample evidence of defendant's guilt as an aider and abetter, and the court would have felt obliged to affirm had the conspiracy count not been added.

#### D. *Misprision of a Felony*

In *Holland v. State*,<sup>143</sup> defendant, City Manager of the City of Pinellas Park, Florida, found that his assistant was growing marijuana in his backyard. He informed the chief of police, city councilmen, and other officials, who agreed with him that the city should be spared the embarrassment of a criminal prosecution and that discharge of the offender from his post would be an appropriate penalty. The defendant was subsequently indicted for misprision of a felony, which is the common law crime of failure to report a felony. While the court noted that on the facts stated it could find that the defendant had done all that he was required to do under the common law, and thus was not guilty of misprision, it did not decide the case on this basis. Rather, it decided the issue of whether misprision of felony was included in Florida's adoption of the common law, by section 775.01 of the Florida Statutes.<sup>144</sup> The court interpreted that statute to mean that the legislature granted the courts the necessary discretion to prevent the blind adherence to the common law where it was unsuited to the modern context. Then, after examining the origins of misprision and the cases of other districts concerning the judicial use of the common law, the court held that misprision was not suited to American criminal law, and was not adopted into Florida substantive law by section 775.01.

#### E. *Narcotics*

The District Court of Appeal, Second District, in *State v. Vinson*,<sup>145</sup> was presented with the interesting issue of whether a prescription issued by a doctor and given to another person, that was not issued in good faith in the course of his professional practice,

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143. 302 So. 2d 806 (Fla. 2d Dist. 1974). For an in-depth consideration of this case, see 30 U. MIAMI L. REV. 222 (1975).

144. FLA. STAT. § 775.01 (1973) states: "The common law of England in relation to crimes, except so far as the same relates to modes and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject."

145. 298 So. 2d 505 (Fla. 2d Dist. 1974).

constituted a constructive delivery of drugs so as to violate the Florida Comprehensive Drug Abuse Prevention Control Act.<sup>146</sup> The court held that the delivery was such as to give constructive possession of the drugs. As the court said, "one is said to have constructive possession of a chattel when he has the ability to maintain control over it or reduce it to his physical possession even though he does not have actual personal dominion."<sup>147</sup> Thus, the court reasoned that it would seem reasonable to assume that by the inclusion of the words "actual or constructive" in the definition of delivery in the statute, the legislature intended to encompass a situation where a doctor, by reason of his right to issue prescriptions, does so in bad faith and thereby provides a method of obtaining controlled drugs. The court also addressed the issue of whether it would be necessary for the prescription to be filled before the felony could be committed. It returned to the wording of the statute and noted that delivery was defined as the "actual, constructive or attempted transfer."<sup>148</sup> Therefore, the court reasoned that one who attempts to make a transfer is guilty of the substantive offense even though the transfer is not successful. Because of the definition of delivery, he is just as guilty where the transfer of the drug never takes place as where it does.

#### F. *Obscenity*

The constitutionality of section 847.05 of the Florida Statutes (1973), which relates to obscene language, was upheld by the Supreme Court of Florida in *Jones v. State*.<sup>149</sup> The defendant's contention was that the statute prohibiting the use or utterance of any indecent or obscene language was unconstitutional on the ground of overbreadth. The court first examined defendant's language and found it to be indecent and obscene. The court then observed that at common law, any outrage of decency was a crime. In the words of the court, "[n]o distortion of the Constitution (state or United States) should prevent our Legislature from keeping its

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146. FLA. STAT. ch. 893 (1973).

147. 298 So. 2d at 507.

148. *Id.* at 509.

149. 293 So. 2d 33 (Fla. 1974), *appeal dismissed*, 419 U.S. 1081 (1975). FLA. STAT. § 847.05 (1973) provides: "any person who shall publicly use or utter any indecent or obscene language shall be guilty of a misdemeanor of the second degree . . . ."

people free from obscene and foul language.”<sup>150</sup> The court then determined that the words of the statute established a standard by which an average citizen of common understanding would reasonably be aware of what conduct was prohibited by the statute. The court thus held that the statute came within constitutional bounds and was not void for overbreadth. Justice Ervin dissented, noting that the statute did not bother to specifically limit, define, or describe indecent or obscene language within the context of recognized constitutional limitations. He felt that the statute should define the nature of the obscene language prohibited and should be restricted “to references of sexual acts of a prurient nature, and limiting it to situations involving ‘fighting words’ or breaches of the peace.”<sup>151</sup>

### G. *Receiving Stolen Goods*

The District Court of Appeal, Fourth District, was presented with an issue of first impression in Florida concerning the “*corpus delicti*” of the crime of buying, receiving, or aiding in the concealment of stolen property.<sup>152</sup> At trial, the State established that defendant had succeeded in pawning a stolen calculator. Over a defense objection that the *corpus delicti* was not otherwise proven, the State also introduced defendant’s statement which involved his telling police that after asking one Holmes whether the calculator was “hot,” he, the defendant, agreed to pawn the machine for Holmes in exchange for a \$10 payment, and did so. Defendant also told police that Holmes asked him to pawn the machine because he, Holmes, did not have the necessary identification. The problem as to admissibility arises from the fact that an extrajudicial confession by the defendant cannot be used to obtain a criminal conviction unless there is *prima facie* evidence of the *corpus delicti* of the crime independent of the confession. The court first examined the Florida definition of *corpus delicti*. It found that in Florida law, *corpus delicti* consists of showing “both (a) the fact that the crime charged

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150. *Id.* at 34. See also *Rhodes v. State*, 283 So. 2d 351 (Fla. 1973)(concerning lewd and lascivious materials); *Papp v. State*, 281 So. 2d 600 (Fla. 4th Dist. 1973), *quashed*, 298 So. 2d 374 (Fla. 1974).

151. 293 So. 2d at 35, (Ervin, J., dissenting). See *Canney v. State*, 298 So. 2d 495 (Fla. 2d Dist. 1974), *cert. denied*, 310 So. 2d 743 (Fla. 1975), where the defendant was arrested under a similar municipal ordinance for saying “goddamn.”

152. *McQueen v. State*, 304 So. 2d 501 (Fla. 4th Dist.), *cert. denied*, 315 So. 2d 193 (Fla. 1975).

has been committed, and (b) that some person is criminally responsible for it."<sup>153</sup> The problem presented in this case was that the State had failed to show that the crime charged had been committed because there was no showing that defendant had knowledge of, or reason to know of, the stolen character of the machine.<sup>154</sup> In reversing the conviction and discharging the defendant, the court held that actual or implied knowledge that the goods in question are stolen is a necessary element of the crime of buying, receiving, or aiding in the concealment of stolen property.

#### H. *Worthless Checks*

In *Dirk v. State*,<sup>155</sup> defendant was arrested and charged with passing a worthless check in violation of section 832.05(3) of the Florida Statutes (1973).<sup>156</sup> On appeal he claimed that the entire chapter was violative of his rights to due process and against self-incrimination under the federal and state constitutions. Specifically, he attacked section 832.05(6) which provides that

in all prosecutions under this section, the introduction in evidence of any unpaid and dishonored check, draft, or other written order, having the drawee's refusal to pay stamped or written thereon, or attached thereto, with the reason therefor as aforesaid, shall be prima facie evidence of the making or uttering of said check . . . shall be prima facie evidence of knowledge of insufficient funds in or credit with such drawee . . . .

The majority opinion found no reason to recede from its previous decisions upholding the constitutionality of the statute. Justices Ervin and Dekle dissented in part, reasoning that the simple return of a check did not meet federal constitutional standards for such a

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153. *Id.* at 502.

154. FLA. STAT. § 811.16 (1973) provides: "Whoever buys, receives, or aids in the concealment of stolen money, goods, or property, knowing the same to have been stolen, shall be guilty of a felony. . . ." This section was amended by Fla. Laws 1974, ch. 74-383, effective July 1, 1975, and transferred to § 812.031.

155. 305 So. 2d 187 (Fla. 1974).

156. This section makes it unlawful for any person or corporation to obtain anything of value by means of a check or other written order upon any bank, person, or corporation, knowing at the time of the making that the maker does not have sufficient funds or credit to pay same on presentation. However, no crime may be charged if payee knows or has reason to know that drawer does not have sufficient funds to insure payment.

prima facie presumption.<sup>157</sup> These constitutional standards are the "more likely than not" standard (the presumed fact is more likely than not to flow from the proven fact on which it is made to depend) enunciated in *Leary v. United States*,<sup>158</sup> and the "reasonable doubt" standard (the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) enunciated in *Barnes v. United States*.<sup>159</sup> Justice Ervin felt that the statute failed to meet these standards. He listed eight situations where a check might be returned for insufficient funds in which it would be both "beyond a reasonable doubt" and "more likely than not" that the maker had no criminal knowledge of insufficient funds and intent to defraud.<sup>160</sup> Having found that the section of the statute failed these constitutional tests, Justice Ervin argued that subsection (6) appeared to be violative of a defendant's constitutional right against self-incrimination and also violated the rule that statutory presumptions may not operate retrospectively. In summary, Judge Ervin felt that in light of the United States Supreme Court's decision in *Barnes*, the Florida court should reconsider its position regarding the constitutionality of the statutory presumptions under the statute in question. He did, however, find the remainder of the statute constitutional and felt it should be preserved.<sup>161</sup>

## XI. SEVERANCE

Defendant Wilson and another defendant were arrested under a five count information. The first three counts involved the co-defendant only, and the last two counts involved the defendant only. There was, in fact, no connection between the two defendants and none was alleged in the information. Wilson moved several times for severance, claiming that the joinder on the information was improper. The trial court did not grant these motions and the defendant appealed from his conviction and sentence. The District Court of Appeal, First District, reversed,<sup>162</sup> holding that a defendant is entitled to severance upon a motion, where the information did

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157. 305 So. 2d at 188 (Ervin, J., dissenting in part, concurring in part).

158. 395 U.S. 6 (1969).

159. 412 U.S. 837 (1973).

160. 305 So. 2d at 190.

161. *Id.*

162. *Wilson v. State*, 298 So. 2d 433 (Fla. 4th Dist. 1974).

not meet the requirements of Rule 3.150(b) of the Florida Rules of Criminal Procedure.<sup>163</sup> The court, answering the State's argument that defendant failed to show any prejudice resulting from joinder, held that if the charging document does not meet the requirements of Rule 3.150(b), a defendant is entitled (upon motion) to severance without a demonstration of prejudice. The onus is on the State to show its authority for joining several defendants in one indictment or information.

In *Elias v. State*,<sup>164</sup> the joinder of two defendants was proper in that defendant Rodriguez allegedly aided and abetted defendant Elias in the sale of narcotics. Defendant Elias sought severance on the grounds that the defenses that would be presented during trial were antagonistic, and because certain federal charges were pending against defendant Rodriguez, and Rodriguez was characterized by the news media as a "reputed heroin kingpin." He also objected that certain testimony that would be offered against Rodriguez to show a general pattern of criminality would prejudice his case. Elias cited *Suarez v. State*<sup>165</sup> to support the argument that severance should be granted to avoid the effects of the above mentioned testimony. The court distinguished the *Elias* situation observing that the *Suarez* rationale was not simply that error occurred because competent evidence was offered against one defendant which was inadmissible as to others, but that such evidence was *prejudicial* to the defendants against whom the evidence was inadmissible (court's emphasis). The court said *Suarez* did not hold that whenever evidence competent against one defendant but inadmissible against another is offered in a joint trial there must be a severance. Turning to the instant case, the court found that the lower court had clearly instructed the jury that the testimony concerning Rodriguez was admissible only against him and not against Elias. Further, the witnesses had testified that they had never known of any drug transaction which involved defendant Elias. The court then held that the admission of the testimony was not prejudicial to defendant Elias and upheld the conviction.

It is questionable whether the court's analysis of, and reliance

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163. This rule allows two or more defendant's to be charged in the same indictment or information when each is charged with accountability for all offenses, each defendant is charged with conspiracy, or the several offenses charged are part of a common scheme or plan.

164. 301 So. 2d 111 (Fla. 2d Dist. 1974), *cert. denied*, 312 So. 2d 746 (Fla. 1975).

165. 95 Fla. 42, 115 So. 519 (Fla. 1928).

upon, *Suarez* is well founded. In its summary of *Suarez* in the instant case, the court indicated that the supreme court had observed in *Suarez*, that even if a cautionary instruction had been given, it was doubtful whether the prejudicial effect of the testimony could be removed from the minds of the jurors.<sup>166</sup> It would seem, therefore, that the court could just as easily have found the cautionary instruction to have been limited in its effectiveness and held the other way.

## XII. PLEAS AND PLEA BARGAINING

In *Davis v. State*,<sup>167</sup> the Supreme Court of Florida dealt with an issue raised by the plea bargaining system. The question presented was:

[W]hen a judge who has participated in or tentatively approved a plea bargain decides not to include the concessions contemplated therein in his final disposition of the case and affirmatively offers the defendant the opportunity to withdraw his guilty plea, may the defendant refuse to withdraw his plea on the ground that the plea bargain is a specifically enforceable contract?<sup>168</sup>

The court held that the defendant could not specifically enforce the plea bargain. The court further indicated that if the plea bargain is not carried out the defendant has two alternatives: (1) withdraw his plea and proceed to disposition without any of his admissions, statements, or other evidence given during plea negotiations being used against him; or (2) the defendant may agree to proceed with the guilty plea without being bound by any conditions or agreements. The court also spoke with approval of the plea bargaining safeguards prescribed by *Santobello v. New York*.<sup>169</sup> These are as follows: (1) the accused pleading guilty must be counseled, absent a waiver; (2) the sentencing judge must develop the factual basis for the plea on the record; (3) the plea must be voluntarily and knowingly made; and (4) if the plea was induced by promises, the essence of the promises must be made known.<sup>170</sup>

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166. 301 So. 2d at 115.

167. 308 So. 2d 27 (Fla. 1975).

168. *Id.* at 29. For an earlier response by the First District to a similar problem see *Kurlin v. State*, 302 So. 2d 147 (Fla. 1st Dist. 1974).

169. 404 U.S. 257 (1974).

170. *Id.* at 260. Failure of a court to inquire into the existence of factual basis for defendant's plea of guilty to a manslaughter charge was held to be harmless error in *Grant*



XIII. TRIAL<sup>171</sup>A. *Speedy Trial, Rule 3.191*

## 1. SPEEDY TRIAL WITHOUT DEMAND

The right to a speedy trial is guaranteed by the sixth amendment to the United States Constitution and by section 16 of the Declaration of Rights in the Florida Constitution of 1968. Rule 3.191 of the Florida Rules of Criminal Procedure was promulgated by the Supreme Court of Florida "to implement the constitutionally guaranteed right to a speedy trial."<sup>172</sup>

Rule 3.191 is a complex rule and, therefore, there is considerable controversy regarding its application. In the recent decision of *Rubiera v. Dade County ex rel. Benitez*,<sup>173</sup> dissenting Justice Ervin expressed criticism of judicial construction of this rule:

Since adoption of the present speedy trial rule, I have witnessed the pronouncement of several opinions of this court rationalizing away express language of the Rule and fashioning "loopholes" for the prosecution and trial court when time periods of the Rule have run. Apparently our trial courts and prosecutors cannot meet the requirements of the Rule and are continually before this court to find "ways out."

I think the most forthright thing to do is to either drop the Rule or substantially modify it. This would avoid the continual rationalization of the express language of the Rule which is no credit to this court.

I have carefully reviewed our speedy trial decisions since we adopted the Rule and am convinced that now the Rule is greatly emasculated. It has become by our interpretations more a pretense and sham than a real mechanism to further the speedy disposition of criminal cases.<sup>174</sup>

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v. State, 303 So. 2d 425 (Fla. 2d Dist. 1974), *affirmed*, 316 So. 2d 282 (Fla. 1975), where the defendant did not allege that he was prejudiced by this failure. *See also* Suggs v. State, 304 So. 2d 463 (Fla. 2d Dist. 1974), where a favorable plea bargain was held to show sufficient facts so that the trial judge did not have to make a more detailed determination of defendant's understanding of his plea.

171. The materials concerning evidence are covered in *Survey of Florida Law-Evidence*, 30 U. MIAMI L. REV. 561 (1976).

172. *Turnor v. Olliff*, 281 So. 2d 384 (Fla. 1st Dist. 1973), *citing*, *State ex rel. Reynolds v. Willis*, 255 So. 2d 287 (Fla. 1st Dist. 1971).

173. 305 So. 2d 161 (Fla. 1974).

174. *Id.* at 166.

Rule 3.191(a)(1) provides for speedy trial without demand. Every person charged by indictment or information must be brought to trial within 90 days if the crime charged is a misdemeanor and within 180 days if it is a felony. The time period begins to run when the person is arrested for the crime charged. The only requirement incumbent upon the defendant is to be continuously available for trial.

Several decisions during this period have dealt with the question of what constitutes "continuously available for trial." In *State ex rel. Covington v. Rowe*<sup>175</sup> the court found that the initial burden of showing that a defendant was not available for trial lies with the State. The defendant had failed to appear at a hearing due to improper notice by the State. She subsequently appeared for trial twice, and the trial was reset both times. However, defendant did not appear on the third date set for trial. The court found that the State had not met its burden of showing unavailability, and that the defendant had met any possible burden upon her to show she was continuously available. It appears from the decision that very short notice was given for the third trial date.<sup>176</sup>

The Supreme Court of Florida considered the question in great depth in *Rubiera v. Dade County ex rel. Benitez*.<sup>177</sup> The defendant was charged with a misdemeanor, and under Rule 3.191(a)(1) was entitled to be brought to trial within 90 days in the metropolitan court. Defendant was involved in discovery and due to an error in the clerk's office, the subpoenas for depositions were not served until the day before the 90 day period was to end. A motion to discharge was filed pursuant to 3.191(d)(1) and was denied. Upon motion of the defendant, the circuit court entered a writ of prohibition and ordered the defendant discharged. The District Court of Appeal, Third District, affirmed.

The supreme court quashed the decision and discharged the writ. The court found that the defendant was not "continuously available" for trial within the meaning of Rule 3.191(a)(1) because he was involved in pretrial preparation. The court reasoned that discovery is one of the reasonable delays envisioned by 3.191(d)(2).<sup>178</sup> However, since the defendant did not receive an ex-

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175. 281 So. 2d 71 (Fla. 3d Dist. 1973).

176. *Id.* at 72.

177. 305 So. 2d 161 (Fla. 1974).

178. Rule 3.191(d)(2) provides for extending or waiving the time periods established by

tension by court order, he fell within 3.191(d)(3),<sup>179</sup> and the delay was unexcused. Therefore, the defendant was not entitled to trial within the original 90 days. In dissent, Justice Ervin pointed out that the majority had in effect construed "continuously available for trial" to mean "prepared for trial." Rule 3.191(c) requires that the defendant be prepared for trial, but this section applies only to demands for speedy trial, and not to speedy trial without demand. As the dissent states, "[e]quating a defendant's discovery efforts with 'unavailability' to avoid discharge of a defendant for failure to afford him a speedy trial has no foundation in the Rule."<sup>180</sup>

In *Rubiera* the supreme court stated that a court order is crucial if an extension of time is to be allowed under 3.191(d)(2) and (3).<sup>181</sup> The requirement of a court order was controlling in *Mullin v. State*.<sup>182</sup> Defendant was not brought to trial for 223 days following a suppression hearing because of an interlocutory appeal by the State. The State never requested an extension order pursuant to Rule 3.191(d)(2)(iv). On appeal, the District Court of Appeal, Third District, reversed the defendant's convictions and life sentences for robbery and murder and discharged the defendant.

The requirement of a court order was also applied in *Pouncy v. State*.<sup>183</sup> There, the defendants were arrested on April 7, 1973. On July 5, 1973, a hearing was held on the defendant's motion to sup-

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the Rule by order of the court (i) upon stipulation, provided the period of time sought to be extended had not expired at the time the stipulation is signed, (ii) on the court's own motion or motion by either party in exceptional circumstances, (iii) with good cause shown by the accused upon waiver by him, or (iv) upon reasonable and necessary delay for proceedings including, but not limited to, physical or mental examinations, interlocutory appeals, hearings on pretrial motions, and trial or other pending charges by the accused.

Exceptional circumstances contemplated by (d)(2)(ii) are listed in subsection (f) and include (i) unexpected illness or incapacity or unavoidable absence of a person whose testimony is necessary for the trial, (ii) a showing by the State of unusual complexity requiring extra investigation or preparation, (iii) a showing by the State that specific evidence is unavailable despite diligent efforts to secure it, but that it will be available at a later time, (iv) material unanticipated developments, (v) for accommodation of a co-defendant when there is reason not to sever, or (vi) when the accused has caused major delay.

179. Subsection (d)(3) provides for continuances and states in part that if the trial does not commence within the time established a motion for discharge shall be granted unless a time extension has been ordered within (d)(2) or the delay is due to the unexcused actions or decisions of the accused or a co-defendant. If due to unexcused actions of the accused the motion for discharge shall be voidable on motion of the State.

180. 305 So. 2d at 166.

181. *Id.* at 163.

182. 307 So. 2d 829 (Fla. 3d Dist. 1974).

183. 296 So. 2d 625 (Fla. 3d Dist. 1974).

press, which was denied on September 17, 1973. The State argued that the pre-trial motion extended the time for trial under 3.191(d)(2)(iv). The District Court of Appeal, Third District, held that an extension under 3.191(d) must be by order of court, and in the absence of such order the speedy trial time is not extended or tolled. Defendants were, therefore, discharged. In light of *Rubiera* a different result might be possible by arguing unexcused delay under 3.191(d)(3). Thus defendant might not be entitled to discharge even though no court order is obtained.

The *Rubiera* and *Mullin* cases dealt specifically with delays not pursuant to court order. However, even when the trial court has entered an order pursuant to Rule 3.191(d)(2), there is controversy over whether the speedy trial requirements are extended or waived. The Rule itself provides for both alternatives: "The periods of time established by this Rule for trial may at any time be waived or extended by order of the court . . . ." <sup>184</sup>

As might be expected, two distinct lines have developed interpreting this provision. In *Swanson v. Love*,<sup>185</sup> the defendant was charged with robbery. Upon his motion, the trial date was continued from June 5 to June 12, 1973. The State subsequently filed a notice of nolle prosequi but later refiled charging the same crime. The court held that 3.191(h)(2) meant that the speedy trial period ran from the date of arrest despite the nolle prosequi.<sup>186</sup> However, the court also held that the delay due to the continuance was to be tacked to the 180 days to determine the last permissible trial date. The court, therefore, remanded for the trial judge to determine exactly how many days were chargeable to the defendant and to extend the speedy trial date accordingly. The District Court of Appeal, Second District, reiterated this tacking approach in *Griffith v. State*.<sup>187</sup> Defendant was held chargeable with an 11-day delay caused by continuances. The court held that the 11 days must be added to 180 days to determine the speedy trial period.

However, in *Chester v. State*,<sup>188</sup> the District Court of Appeal, Third District, found that the delay caused by the defendant

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184. FLA. R. CRIM. P. 3.191(d)(2).

185. 290 So. 2d 112 (Fla. 2d Dist. 1974).

186. FLA. R. CRIM. P. 3.191(h)(2) states in part: "The intent of this Rule shall not be avoided by the State by entering a *nolle prosequi* to a crime charged and by prosecuting a new crime grounded on the same conduct or criminal episode . . . ."

187. 299 So. 2d 618 (Fla. 2d Dist. 1974).

188. 298 So. 2d 529 (Fla. 3d Dist. 1974).

amounted to a waiver of the speedy trial requirement. Defendant was charged with murder in the first degree. One hundred days after his arrest the court granted a motion for a psychiatric evaluation at defendant's request. The evaluation extended 93 days because of the defendant's non-cooperation. One hundred forty-eight days after the evaluation period was over, the defendant filed a motion to discharge which was denied. After additional delay, the trial was held 281 days after arrest, exclusive of the evaluation period. The court looked to Rule 3.191(d)(3)(i) and the Supreme Court of Florida decision in *State ex rel. Butler v. Cullen*<sup>189</sup> to determine that the defendant had waived the rule and therefore the 180-day limit no longer applied. The court further found that delay had not deprived the defendant of a speedy trial under constitutional standards.<sup>190</sup> The dissent pointed out that the psychiatric evaluation was court ordered, and, therefore, was an excused delay under 3.191(d)(2)(iv) rather than an unexcused delay under 3.191(d)(3) and urged a finding of extension rather than waiver.<sup>191</sup> Similarly, the court in *Davis v. State*<sup>192</sup> held that a defense continuance had the effect of making the speedy trial rule inapplicable and that the trial court had the authority to set the trial date within a reasonable time.

It is submitted that *Rubiera* does not resolve this issue, although dicta in that decision seems to support the extension theory. "Such delays [3.191(d)(2)] are 'excused' with the qualification that a court order extending time has been entered."<sup>193</sup>

As previously mentioned, under Rule 3.191(d)(2) and (f) the court may order an extension of time if exceptional circumstances exist.<sup>194</sup> The rule expressly indicates that general congestion of the court's docket, lack of diligent preparation, failure to obtain available witnesses, and other foreseeable delays are not exceptional cir-

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189. 253 So. 2d 861 (Fla. 1971). In *Cullen* the supreme court held that where a continuance was requested by defendants, and granted, "the time limitations in the rule were no longer applicable and the Court had the right and authority to set the case for trial within a reasonable time." *Id* at 863.

190. 298 So. 2d at 531. In determining that defendant had not been denied his constitutional right to a speedy trial, the court cited *Barker v. Wingo*, 407 U.S. 514 (1972), and listed the four factors to be considered in assessing whether a defendant's right to a speedy trial has been denied. These are: (1) length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant.

191. 298 So. 2d at 532-33.

192. 302 So. 2d 464 (Fla. 3d Dist. 1974).

193. 305 So. 2d at 163.

194. See note 178 *supra*.

cumstances. The procedural facts in *Riggins v. State*<sup>195</sup> are illustrative of the questions facing the courts in determining whether or not a trial is "speedy." In *Riggins* the total time between arrest and trial was approximately 280 days. The District Court of Appeal, First District, considered that the initial delay was caused by the discovery that Riggins was a minor. However, the court found that the State's burden under 3.191(f) to show exceptional circumstances was not met since the record reflected no reason why the defendant's age was not discovered for 7 months. Furthermore, the delay after a guardian ad litem was appointed was not supported by any reason. The court also held that even if there had been justifiable reasons for delaying the minor's trial, this delay would not be justified as to co-defendant McGill unless the State had shown there was reason not to sever as required by 3.191(f)(v). Both defendants were discharged.

The issue of what constitutes exigent circumstances which toll the running of the rule under 3.191(f) was considered in *Crain v. State*.<sup>196</sup> Marijuana seized from the defendant was not identified as such until a month after his arrest. The court held that this was not an exceptional circumstance within the meaning of the rule. A District Court of Appeal, Third District, decision<sup>197</sup> indicated the type of exceptional circumstances covered by 3.191(f). Defendant's case was set for trial 173 days after arrest. The State moved for a continuance pursuant to 3.191(f) on the grounds that the State's chief witness, a police officer, was hospitalized and would require 30 days to recuperate. The trial court granted the continuance and a 30-day extension. The trial was held 132 days after this hearing. The Third District held that the trial court reasonably followed the provision of Rule 3.191(f): "Under the foregoing circumstances the court may set a new trial within a reasonable time."<sup>198</sup> Once the trial judge granted the state an exceptional circumstances continuance, the

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195. 301 So. 2d 124 (Fla. 1st Dist. 1974). Riggins and a co-defendant, McGill, were arrested on May 24, 1972, and informed against on July 12, 1972. On August 24, 1972, both defendants requested psychological evaluations. Riggins was evaluated on September 14, 1972 and McGill on October 5, 1972. When the case was called for trial on December 11, 1972, it came to the court's attention that Riggins was a minor. A guardian ad litem was appointed January 15, 1973. Trial was held March 5, 1973.

196. 302 So. 2d 433 (Fla. 2d Dist. 1974).

197. *King v. State*, 303 So. 2d 389 (Fla. 3d Dist. 1974).

198. *Id.* at 391. Rule 3.191(f) sets forth various circumstances under which a new trial can be set within a reasonable time. Circumstances other than those enumerated may also allow the court to set a date within a reasonable time.

quantitative provision of the rule was no longer applicable. The defendant's right to speedy trial then was measured by constitutional standards. The court expressly rejected any time-tacking procedure.

## 2. SPEEDY TRIAL UPON DEMAND

Rule 3.191 also provides for a speedy trial upon the demand of the defendant in subsection (a)(2). After filing a demand, the defendant must be brought to trial within 60 days unless the State is granted a continuance due to exceptional circumstances. Rule 3.191(c) places certain restrictions on the demand: "A demand for a speedy trial shall be deemed a pleading by the accused that he is available for trial, has diligently investigated his case, and that he is prepared or will be prepared for trial." Both the State and the defendant are bound by the demand and defense continuances can be granted only with the consent of the State or upon a showing of good cause.

Prior to the survey period, the Supreme Court of Florida set down further guidelines for demanding a speedy trial. In *State ex rel. Hanks v. Goodman*,<sup>199</sup> the court required trial judges to determine whether the defendant had a bona fide desire to obtain an early trial and whether defendant was prepared for trial. If these requirements were not met the demand would be stricken as null and void. In *Turner v. State*,<sup>200</sup> the court found the demand spurious when the defendant subsequently moved to compel disclosure of favorable evidence and to depose witnesses.

The District Court of Appeal, Fourth District, applied these tests in *Embry v. State*,<sup>201</sup> and held that the mere filing of a motion to suppress after filing a demand did not render the demand invalid. Every preparatory act after demand does not invalidate the demand, and the court will consider the nature of the act in determining whether the demand is actually bona fide.

The court may refuse to grant a defense continuance after a speedy trial demand has been made under the provisions of the

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199. 253 So. 2d 129 (Fla. 1971). In this case the accused had filed his demand for a speedy trial before he was charged with the crime. The court held that under the present rule the accused cannot control the criminal docket by filing demands for a trial for which he is not in fact prepared.

200. 272 So. 2d 129 (Fla. 1973).

201. 300 So. 2d 24 (Fla. 4th Dist. 1974).

rule.<sup>202</sup> The trial court in *Rembert v. State*<sup>203</sup> denied such continuance based on a previous demand. However, the District Court of Appeal, Third District, held that the denial was erroneous because the demand was void, having been made before the information was filed against the defendant.

The question of an untimely demand was raised in *State v. Hill*.<sup>204</sup> Defendant, an indigent, prepared a hand written motion for speedy trial the day after he was arrested. A week later the State filed the information. After 60 days had passed, the defendant petitioned for discharge which the court granted. The District Court of Appeal, First District, said that if this was a new question they would decide that any prior demand for speedy trial would become effective upon the filing of the information. But in light of supreme court cases<sup>205</sup> holding such a demand to be void, the court found the defendant's motion ineffective as a demand for a speedy trial. However, while holding that the trial court erred insofar as it construed the motion for a speedy trial to have been timely, the court construed the motion for discharge as a petition for habeas corpus and affirmed the discharge.

### 3. PRISONER'S RIGHT TO SPEEDY TRIAL

Further provisions of Rule 3.191 provide special guidelines for defendants who are already imprisoned. The supreme court sustained the validity of Rule 3.191(b)(1)<sup>206</sup> in *State v. Lott*.<sup>207</sup> The circuit court, upon defendant's motion, had discharged the defendant because 180 days had passed since his arrest. During this period, defendant had been incarcerated in another county. The trial court found the rule unconstitutional in that it denied the defendant equal protection because of this status as a prisoner, and further

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202. FLA. R. CRIM. P. 3.191(c).

203. 284 So. 2d 428 (Fla. 3d Dist. 1973).

204. 299 So. 2d 625 (Fla. 1st Dist. 1974).

205. *State v. Gravlee*, 276 So. 2d 480 (Fla. 1973); *State ex rel. Butler v. Cullen*, 253 So. 2d 861 (Fla. 1971); *State ex rel. Hanks v. Goodman*, 253 So. 2d 129 (Fla. 1971).

206. Rule 3.191(b)(1) provides that a prisoner in the State of Florida is entitled, without demand, to be brought to trial within 1 year if the crime charged is a misdemeanor or non-violent felony and within 2 years if the crime is a violent felony or a capital crime. The time commences when the person is taken into custody as a result of the subject crime or when the charge is filed whichever is earlier. Rule 3.191(b)(2) provides that a prisoner who demands a speedy trial must be tried within 6 months of the demand.

207. 286 So. 2d 565 (Fla. 1973).



stated that the Supreme Court of Florida had abused its discretion with regard to its rulemaking power by granting the State an additional 6 months to try a defendant who is confined in a state prison. The supreme court reversed, holding that the trial court was bound by the rule and had erred in finding the rule unconstitutional. The court further examined decisions of the United States Supreme Court<sup>208</sup> and found that the rule met the standard set down by that Court. The court concluded that 3.191(b)(1) insured speedy trial rights of prisoners rather than derogating therefrom, especially in light of Rule 3.191(b)(2) which provides for a 6-month speedy trial on demand. In dissent, Justices Ervin and McCain, found that the difference in the rule regarding prisoners had no rational basis, and denied them equal protection.<sup>209</sup>

The right to trial within 1 year applies only to a prisoner who is imprisoned in a penal or correctional institution in the State of Florida or a subdivision thereof.<sup>210</sup> Therefore, the defendant's right to trial within 1 year begins to run from the date he is incarcerated in Florida, even if he was previously detained elsewhere on the same charge.

#### 4. OTHER ASPECTS OF RULE 3.191

Rule 3.191(h)(2) specifically provides that the State cannot avoid speedy trial requirements by filing a nolle prosequi to a charge and prosecuting a new crime based on the same event or conduct. In *Crain v. State*,<sup>211</sup> the defendant was arrested and charged with driving while under the influence of a prohibited drug. The defendant was charged 1 month later with a misdemeanor of possession of marijuana after the State received lab reports. A nolle prosequi was entered and the State filed a new information charging felony marijuana possession. A total of 206 days elapsed between the initial arrest and the trial. The District Court of Appeal, Second District, held that the applicable speedy trial limit was 180 days regardless of the original misdemeanor charge. This time period commenced upon the initial arrest since that was when the defendant was taken

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208. *Smith v. Hoey*, 393 U.S. 374 (1969); *United States v. Ewell*, 383 U.S. 116 (1966); *Pollard v. United States*, 352 U.S. 354 (1957); *Beavers v. Haubert*, 198 U.S. 77 (1905).

209. 286 So. 2d at 568.

210. *Perez v. State*, 283 So. 2d 575, 576 (Fla. 4th Dist. 1973).

211. 302 So. 2d 433 (Fla. 2d Dist. 1974); *accord*, *Gue v. State*, 297 So. 2d 135 (Fla. 2d Dist. 1974); *State ex rel. Green v. Patterson*, 279 So. 2d 362 (Fla. 2d Dist. 1973).

into custody for the conduct giving rise to the felony charge.

If a defendant is to be tried again as a result of a mistrial, the granting of a new trial, an arrest of judgment, or remand from an appellate court, Rule 3.191(g) requires that he be brought to trial within 90 days. Any waiver of this provision must be in the form of a stipulation signed by the defendant or counsel.<sup>212</sup>

Rule 3.191 applies only to defendants charged "with a crime by indictment or information." Therefore, prosecutions in metropolitan courts for traffic offenses have been held not to fall within the speedy trial requirement,<sup>213</sup> even if the case was transferred to county court for a jury trial.<sup>214</sup> Another case<sup>215</sup> found that when a traffic case was transferred to county court, the speedy trial requirements applied although the time period ran from the date of actual docketing, not the date of arrest. The Supreme Court of Florida has resolved the question by amending Florida Traffic Court Rule 6.13 so as to include Rule 3.191 and make it applicable to traffic offenses.<sup>216</sup>

### B. *Conduct of the State Attorney*

It is well settled law that counsel has wide latitude in making a final argument to the jury.<sup>217</sup> However, in criminal prosecutions the conduct of the state attorney must be examined in light of the prejudicial effect likely to be had upon the jury. The State attorney is not an attorney striving for a conviction at any cost. "He is a quasi-judicial officer whose main objective should always be to

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212. *State ex rel. Williams v. Cowart*, 281 So. 2d 527 (Fla. 3d Dist. 1973).

213. *State v. Jones*, 285 So. 2d 651 (Fla. 3d Dist. 1973).

214. *Castaneda v. Conser*, 292 So. 2d 37 (Fla. 4th Dist. 1974).

215. *State v. Hendricks*, 309 So. 2d 232 (Fla. 4th Dist. 1975).

216. *In re* Rule 6.13, Fla. Traffic Court Rules, 287 So. 2d 677 (Fla. 1974). FLA. STAT. ch. 316, however, has been recently amended. Section 316.026 now provides that a violation of Chapter 316 "shall be deemed an infraction" as defined in section 318.13(3), with the exception of the offenses enumerated in 316.026(4). These exceptions include: section 316.019 (fleeing or attempting to elude a police officer); sections 316.027 and 316.061 (leaving the scene of an accident); section 316.028 (driving under the influence of alcohol or drugs); section 316.029 (reckless driving); and section 316.067 (giving a false report). Section 318.13(3) defines an infraction as a "noncriminal violation which is not punishable by incarceration, and for which there is no right to a trial by jury or a right to court appointed counsel." The procedure for dealing with infractions is prescribed in section 318.14. In view of the above, it would seem that the Florida Rules of Criminal Procedure would not apply to traffic offenses except those excepted by 316.026(4). See FLA. STAT. chs. 316 and 318 (1975).

217. *Flicker v. State*, 296 So. 2d 109 (Fla. 1st Dist. 1974), citing *Lovell v. Henry*, 212 So. 2d 67 (Fla. 3d Dist. 1968).

serve justice and see that every defendant receive[s] a fair trial."<sup>218</sup>

Therefore, in *Wilson v. State*,<sup>219</sup> the Supreme Court of Florida found that the remarks of the prosecutor were so prejudicial to the defendant that the entire proceeding was tainted. Defendant had been indicted for the murder of her husband and had been found not guilty at trial. Six months later defendant was charged with perjury arising out of her testimony at the murder trial. During the closing argument at the perjury trial the prosecutor alluded to the murder of defendant's husband 16 times and directly accused her of murder 3 times. He also accused her of adultery and bigamy, felonies with which she was never charged. The court found the trial so permeated with immaterial and fatally prejudicial remarks that the conviction was reversed, despite the fact that defense had not objected to every impermissible reference. Similarly, the District Court of Appeal, First District, in *Flicker v. State*,<sup>220</sup> found that the State attorney had exceeded permissible grounds in closing argument. The prosecutor stated to the jury that he had voluntarily dismissed count I as there was insufficient evidence, thus possibly leading the jury to believe there must have been adequate evidence on the other counts. Count I had in fact been dismissed by the court as a result of a motion for a directed verdict. The court reversed the convictions on all other counts, finding the entire trial tainted. The court also noted the aggravating effect of the trial judge's remark that the dismissal had been suggested by the court, "and the state went along with it."<sup>221</sup>

The proper procedure for the defense to follow where improper comments are made by the prosecutor was set down in *Mabery v. State*.<sup>222</sup> The State attorney stated to the jury that if the defendant testified as to something that could be questioned, he should have brought witnesses to testify in his behalf. The defense asked for a mistrial which was denied. The court found that the remark was improper but not prejudicial. Where the remark is not in itself inflammatory the proper recourse is to object and move for corrective instructions. If the motion for corrective instructions is denied, is inadequate, or if the offense is repeated the remedy is a mistrial.

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218. *Frazier v. State*, 294 So. 2d 691, 692 (Fla. 1st Dist. 1974), citing *Washington v. State*, 86 Fla. 533, 542-43, 98 So. 605, 609 (1923).

219. 294 So. 2d 327 (Fla. 1974).

220. 296 So. 2d 109 (Fla. 1st Dist. 1974).

221. *Id.* at 113.

222. 303 So. 2d 369 (Fla. 3d Dist. 1974).

The court will consider the improper remarks within the context of the entire trial to determine if there was prejudice to the defendant. In *Arline v. State*<sup>223</sup> the prosecutor remarked that in his heart he believed the defendant to be guilty and urged the jury to find likewise. The court found the remark improper, but in light of the totality of the final argument and the evidence presented, not so prejudicial as to require reversal.

It is well settled that a prosecutor may not directly or indirectly comment on a defendant's failure to testify.<sup>224</sup> Some confusion has arisen, however, as to whether the prosecutor may comment on a defendant's failure to testify on some aspects of the case when he has testified about other aspects of the case. Originally, in *Sykes v. State*,<sup>225</sup> the Supreme Court of Florida had taken the position that such comments would constitute reversible error. Later, in *Odom v. State*,<sup>226</sup> the supreme court receded from *Sykes* and held that once a defendant chooses to take the stand the prosecutor is entitled to comment on his failure to testify about any aspect of the case. However, in *Singleton v. State*,<sup>227</sup> the District Court of Appeal, Second District, apparently unaware of the *Odom* decision, cited *Sykes* as representing the state of the law on this issue. However, the same court, in *Craft v. State*,<sup>228</sup> receded from its earlier holding and followed *Odom*. Notwithstanding the impropriety of a prosecutor's comment, however, a failure by the defense to object thereto, will foreclose that issue on appeal; and it is immaterial whether the improper comments were made during final argument or voir dire.<sup>229</sup>

### C. Former Jeopardy

Article I, section 9 of the Florida Constitution guarantees that "[n]o person shall . . . be twice put in jeopardy for the same offense . . . ." This provision is implemented by Florida Statute 910.11.<sup>230</sup>

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223. 303 So. 2d 37 (Fla. 1st Dist. 1974).

224. See *Britt v. State*, 301 So. 2d 151 (Fla. 4th Dist. 1974), and cases cited therein.

225. 78 Fla. 167, 82 So. 778 (1919).

226. 109 So. 2d 163 (Fla. 1959).

227. 183 So. 2d 245 (Fla. 2d Dist. 1966).

228. 300 So. 2d 307 (Fla. 2d Dist. 1974).

229. *Britt v. State*, 301 So. 2d 151 (Fla. 4th Dist. 1974).

230. FLA. STAT. § 910.11 (1973).

#### Conviction or acquittal bar to prosecution

- (1) No person shall be held to answer on a second indictment, information, or affidavit for an offense for which he has been acquitted. The acquittal shall be a

The proper method for raising the defense of former jeopardy is a motion to dismiss pursuant to 3.190(b) and (c)(2) Florida Rules of Criminal Procedure. Failure to raise the issue during trial constitutes a waiver of the defense.<sup>231</sup> The general rule which Florida follows is that a plea of guilty entered in a court of competent jurisdiction to a valid criminal charge will bar further prosecution for offenses based on the same transaction.<sup>232</sup>

In *Troupe v. Rowe*<sup>233</sup> the defendant entered a plea of guilty after plea bargaining between defendant's attorney and the state attorney. Defendant urged the court for a "finding" of guilt rather than an adjudication, which would allow him to return to the Army. Over the State's objection, the judge accepted the plea, entered a "finding" of guilt, and sentenced the defendant. After a recess the State returned and again asked for an adjudication of guilt. The judge set aside the sentence and set a new trial date. Hearing the case on conflict certiorari after the district court had denied a writ of prohibition, the supreme court held that jeopardy had attached and the sentence could not be changed since the state attorney's request to change would amount to an increase in the sentence. The court restated its prior holding that any modification of a sentence is subject to the constitutional prohibition against double jeopardy.

Two similar cases during this survey period involved guilty pleas in county court and subsequent attempts to prosecute in circuit court for an offense arising out of the same act. In *State ex rel. Miller v. Patterson*<sup>234</sup> the court found that the defendant had in fact pled to a misdemeanor which was a lesser included offense of the felony later charged. Upon entering his plea, the defendant was placed in jeopardy and the State was precluded from prosecuting on a higher degree of the same offense. The District Court of Appeal, First District, adopted the reasoning of *State ex rel. Miller* in *State ex rel. Seal v. Shepard*.<sup>235</sup> The court further pointed out that it

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bar to a subsequent prosecution for the same offense, notwithstanding any defect in the form or circumstances of the indictment, information, or affidavit.

(2) When a person may be tried for an offense in two or more counties, a conviction or acquittal in one county shall be a bar to prosecution for the same offense in another county.

231. *Johnson v. State*, 299 So. 2d 155 (Fla. 3d Dist. 1974).

232. *Troupe v. Rowe*, 283 So. 2d 857 (Fla. 1973), citing *Ray v. State*, 231 So. 2d 813 (Fla. 1969).

233. 283 So. 2d 857 (Fla. 1973).

234. 284 So. 2d 9 (Fla. 2d Dist. 1973).

235. 299 So. 2d 644 (Fla. 1st Dist. 1974).

would be manifestly unfair for the State attorney to participate in plea negotiations in county court and later assert that the county court had no jurisdiction and that, therefore, jeopardy could not have attached. It should be noted that in both of these cases, the county court had jurisdiction over the misdemeanor charges.

*Caves v. State*<sup>236</sup> dealt directly with the issue of the jurisdiction of the court to accept the guilty plea. Defendant was charged with assault with intent to commit rape. At a preliminary hearing a justice of the peace sitting as committing magistrate found probable cause only as to assault with intent to commit sodomy. Since this statute had been declared unconstitutional<sup>237</sup> the justice of the peace entered a finding of probable cause on a charge of lewd and lascivious conduct. Defendant entered a guilty plea to this charge. The District Court of Appeal, Second District, held that a subsequent prosecution pursuant to an information charging assault with intent to commit rape was not barred by former jeopardy because the justice of the peace had no jurisdiction to accept the defendant's guilty plea. Justices of the peace have no statutory jurisdiction to try felony cases, nor authority to reduce the felony charges alleged in the complaint, and therefore, have no power to accept a plea where the crime originally charged is a felony.

In *State v. Beamon*,<sup>238</sup> defendant was charged with a burglary occurring on November 26. In the bill of particulars filed by the State, the date alleged was November 24. At trial the victim testified as to the later date and the judge granted a judgment of acquittal. The State filed a second information charging defendant with the same crime committed on the 26th and amended the bill of particulars to conform. The trial judge had dismissed the charge on the ground that the defendant had previously been placed in jeopardy for the same offense. The District Court of Appeal, Third District, had affirmed, applying a four-step test:

The test to sustain a plea of former jeopardy is that it must be made to appear that (1) there was a former prosecution in the same state for the same offense; (2) that the same person was in jeopardy on the first prosecution; (3) that the parties are identical in the same prosecution; and (4) that the particular offense on the

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236. 303 So. 2d 658 (Fla. 2d Dist. 1974).

237. Former FLA. STAT. § 800.01 was declared unconstitutional as overbroad in *Franklin v. State*, 257 So. 2d 21 (Fla. 1971).

238. 298 So. 2d 376 (Fla. 1974).

prosecution of which the jeopardy attached was such an offense as to constitute a bar.<sup>239</sup>

The court found that the State was attempting to prosecute the defendant under the second information on a charge for which he was acquitted. They found that the change of dates did not alter the crime charged. On certiorari the Supreme Court of Florida quashed the Third District's decision and found that there was no former jeopardy bar. Applying the same test, the supreme court determined that the defendant had not been prosecuted before for the same offense. The first information as limited by the bill of particulars charged a different and distinct offense from the second information because the dates were different. As the court pointed out:

The defendant is estopped by virtue of *his* inconsistent positions in first claiming as a basis for acquittal the materiality of the date and then contending on the new information that the actual, different date of the alleged offense is immaterial now, so that whatever the date of the alleged offense he was acquitted of it in the first trial. (emphasis in original).<sup>240</sup>

In a prosecution for possession of narcotics, the defendant in *Camp v. State*<sup>241</sup> filed a sworn motion to dismiss pursuant to Rule 3.190(c)(4) of the Florida Rules of Criminal Procedure, contending that he did not have knowledge that narcotics were on his premises. The State failed to file a traverse, and under Florida Rule of Criminal Procedure 3.190(d) defendant's allegations were admitted and established a valid defense.<sup>242</sup> The District Court of Appeal, Fourth District, reversed the denial of defendant's motion to dismiss, noting, however, that the dismissal would not bar subsequent prosecution under the authority of *State v. Giesy*.<sup>243</sup>

#### D. Jury

The law is well-settled in Florida that a criminal defendant has

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239. 302 So. 2d 208, 209-10 (Fla. 3d Dist. 1973).

240. 298 So. 2d at 378.

241. 293 So. 2d 114 (Fla. 4th Dist. 1974).

242. FLA. R. CRIM. P. 3.190 (d) provides that the State may traverse or demur to a motion to dismiss which alleges factual matters, and such matters shall be deemed admitted unless specifically denied by the State in such traverse.

243. 243 So. 2d 635 (Fla. 4th Dist. 1971). The Author's Comment to Rule 3.190 also indicates that a dismissal under rule 3.190 (c)(4) would not appear as a bar to a subsequent prosecution.

the right peremptorily to challenge a juror at any time before the jury is sworn.<sup>244</sup> Thus, it is reversible error for a trial judge to deny a peremptory challenge to one of the veniremen previously seated in the jury box but not yet sworn. This principle was followed in *Shelby v. State*.<sup>245</sup> The jury panel was picked, tendered, and accepted, and several days later was called to the box for the trial. The District Court of Appeal, First District, found that it was error to refuse the defendant peremptory challenges at that point because the jury was not yet sworn. To answer the question the court referred to the 1860 case of *O'Connor v. State*<sup>246</sup> which held the right to challenge absolute before the juror is sworn. The court concluded nothing had changed that right.

In *Bocanegra v. State*<sup>247</sup> the defendant challenged the court's procedure of swearing each juror individually before the full panel was selected. The District Court of Appeal, Second District, found no error in the instant case, but indicated that the better practice is to postpone swearing until the full panel is selected.

Rule 3.280 of the Florida Rules of Criminal Procedure requires that once the jury retires to consider the verdict, any alternate jurors must be discharged. The District Court of Appeal, Fourth District, found there was fundamental reversible error in allowing an alternate to accompany the jury during deliberations, although the alternate did not participate in any discussion.<sup>248</sup> The court stated that anything less than private and secret jury deliberation infringes on the defendant's constitutional right to trial by jury. In contrast, the court in *Ennis v. State*<sup>249</sup> found it to be harmless error for the bailiff to answer jurors' questions regarding testimony given at the trial after deliberations had begun.

During the survey period section 40.01 of the Florida Statutes (1973), relating to qualification and disqualification of jurors, was upheld by the supreme court in the face of numerous challenges.<sup>250</sup>

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244. *Knee v. State*, 294 So. 2d 411 (Fla. 4th Dist. 1974), citing *Ellis v. State*, 25 Fla. 702, 6 So. 768 (1889); *Kennick v. State*, 107 So. 2d 59 (Fla. 1st Dist. 1958); FLA. R. CRIM. P. 3.310.

245. 301 So. 2d 461 (Fla. 1st Dist. 1974).

246. 9 Fla. 215 (1860).

247. 303 So. 2d 429 (Fla. 2d Dist. 1974), citing *King v. State*, 125 Fla. 316, 169 So. 747 (1936).

248. *Berry v. State*, 298 So. 2d 491 (Fla. 4th Dist. 1974).

249. 300 So. 2d 325 (Fla. 1st Dist. 1974).

250. *Wilson v. State*, 306 So. 2d 513 (Fla. 1975); *Jones v. State*, 289 So. 2d 385 (Fla. 1975); *Slaughter v. State*, 301 So. 2d 762 (Fla. 1974); *Reed v. State*, 292 So. 2d 7 (Fla. 1974).



## E. Defenses

### 1. ALIBI

Rule 3.200 of the Florida Rules of Criminal Procedure provides that upon demand by the State, one intending to claim an alibi must supply specific information with respect thereto and give the names and addresses of witnesses who will be called to prove the alibi. If notice is given, the court may, in its discretion, exclude an alibi witness whose name is not on the notice. In *Bell v. State*<sup>251</sup> the defense had served notice of alibi and listed witnesses. Just prior to trial the defendant informed his counsel that one of the State's witnesses could support the alibi. The trial court refused to allow the testimony. The District Court of Appeal, Second District, reversed, noting that the rule itself allows waiving the requirements if good cause is shown. In view of the fact that the witness was called by the State, there was no compelling reason to exclude the testimony.

Inquiry into the circumstances surrounding noncompliance with the rule should be conducted before excluding a witness from testifying. The court in *Barnes v. State*<sup>252</sup> reached this conclusion following the reasoning in cases construing Rule 3.220 of the Florida Rules of Criminal Procedure.<sup>253</sup> The case was remanded for a hearing to determine if good cause had been shown. In *Shelby v. State*<sup>254</sup> the defendant filed his notice of alibi 2 days before trial. The District Court of Appeal, First District, held the trial court erred in excluding the alibi witnesses because any noncompliance by the defendant was the result of the State's delay in making the demand. The State had made the demand only 7 days prior to trial, thus frustrating the defendant's ability to provide the list 10 days before trial as required. These cases indicate the prevalent view that Rule 3.200 is to be applied reasonably with the primary objective to insure defendant a fair trial.<sup>255</sup>

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251. 287 So. 2d 717 (Fla. 2d Dist. 1974).

252. 294 So. 2d 679 (Fla. 2d Dist. 1974).

253. Rule 3.220 deals with discovery, and the court seemed to feel that cases construing this rule were analogous to the present situation.

254. 301 So. 2d 461 (Fla. 1st Dist. 1974).

255. 287 So. 2d at 718.

## 2. INSANITY

Rule 3.210 of the Florida Rules of Criminal Procedure provides basic guidelines for the determination of a defendant's sanity. If a defendant wishes to rely on a defense of insanity, he must notify the court of his intent to use the defense of insanity and enter a plea of not guilty.<sup>256</sup> The rule also provides for procedures to determine if the defendant is sane at the time of the trial.<sup>257</sup> The rule is well settled in Florida that all persons are presumed to be sane.<sup>258</sup> However, this presumption vanishes when sufficient testimony is presented to create a reasonable doubt as to the defendant's sanity. The burden at that point is on the State to prove sanity beyond a reasonable doubt. In *Byrd v. State*<sup>259</sup> the defense produced two psychiatrists who testified as to the insanity of the defendant at the time of the offense. On rebuttal, the State produced two lay witnesses. Defendant contended that the trial court erred in refusing to direct a judgment of acquittal. The supreme court sustained defendant's conviction reiterating the principle that the question of a defendant's mental condition at the time of the offense is a question of fact for the jury. The jury does not necessarily have to believe expert testimony over non-expert testimony.

When a defendant has been adjudicated incompetent prior to the time of the crime charged, his plea of insanity places the burden on the State to show he was sane when the crime was committed to the exclusion of every reasonable doubt.<sup>260</sup> The District Court of Appeal, Fourth District, held that Rule 3.210 requires the court to enter a written order determining that defendant was competent to stand trial.<sup>261</sup>

The defendant in *Turner v. State*<sup>262</sup> attacked the validity of the "M'Naghten Rule."<sup>263</sup> The District Court of Appeal, First District,

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256. FLA. R. CRIM. P. 3.210 (b), Author's Comments. See also FLA. R. CRIM. P. 3.170(a).

257. FLA. R. CRIM. P. 3.210(a).

258. *Byrd v. State*, 297 So. 2d 22 (Fla. 1974), citing *Farrell v. State*, 101 So. 2d 130 (Fla. 1958).

259. 297 So. 2d 22 (Fla. 1974).

260. *Emerson v. State*, 294 So. 2d 721 (Fla. 4th Dist. 1974).

261. *Id.*

262. 297 So. 2d 640 (Fla. 1st Dist. 1974).

263. The "M'Naghten Rule" or "right wrong" test states essentially, that if the accused was possessed of sufficient understanding when he committed the act to know the nature and quality of the act, and knew it was wrong, he is criminally responsible therefor. However, if he did not know the nature and quality of the act, or even if he did know the nature and

upheld the use of a standard jury instruction which embraces the requirement of the M'Naghten Rule, relying on the Supreme Court of Florida's consistent validation of this "right or wrong" test to determine sanity.<sup>264</sup> This same test was again upheld by the supreme court in *Walker v. State*,<sup>265</sup> where the court held that it was within the province of a jury to determine defendant's ability to distinguish right from wrong at the time of the crime. However, the court also held that the implementation of the M'Naghten test did not affect the trial judge's authority to make an independent determination of the defendant's mental condition at the time of sentencing. The intent of the rules relating to the determination of sanity at the time of sentencing is that no insane person shall be incarcerated and thereby denied mental treatment. Therefore, defendant was entitled to an evidentiary hearing on the question of sanity for sentencing purposes.<sup>266</sup>

The supreme court considered the scope of the questions which could be asked of a psychiatrist called by the defendant in *Roseman v. State*.<sup>267</sup> Defendant called two psychiatrists and elicited in detail all the facts and circumstances leading up to and including the crime. The court held that there was a proper foundation for the State to call other psychiatrists to testify to the facts surrounding the crime as told to them by the defendant. The court rejected the defendant's arguments that his right against self-incrimination was violated by the testimony of the state psychiatrist. The court distinguished this case from *McMunn v. State*<sup>268</sup> where the District Court of Appeal, First District, had found that testimony concerning facts told the psychiatrist was inadmissible on the grounds that in *McMunn* the defendant had objected to the testimony while in this case he had not.

### 3. OTHER DEFENSES

Self-defense is in the nature of confession and avoidance where

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quality of the act, if he did not know it was wrong, he is not criminally responsible therefor. *Hixon v. State*, 165 So. 2d 436, 439 (Fla. 2d Dist. 1964). This test was adopted by the Supreme Court of Florida in *Davis v. State*, 44 Fla. 32, 32 So. 822 (Fla. 1902).

264. *Anderson v. State*, 276 So. 2d 17 (Fla. 1973).

265. 296 So. 2d 27 (Fla. 1974).

266. *Id.* at 31. On petition for rehearing the supreme court determined such a hearing had been held. *Id.*

267. 293 So. 2d 64 (Fla. 1974).

268. 264 So. 2d 868 (Fla. 1st Dist. 1972).

the defendant admits the act and seeks to establish facts constituting excuse or justification. The defendant who relies on self-defense has the burden of going forward with the evidence. The burden, however, does not require a jury instruction on the burden of self-defense.<sup>269</sup> The defendant is entitled to a jury instruction on the legal requirements of self-defense when he relies upon such a defense. In *Taylor v. State*<sup>270</sup> the District Court of Appeal, Fourth District, held it was error for the trial judge to refuse to recognize the defense and to so instruct. No matter how weak or improbable was defendant's testimony, self-defense was a question for the jury to decide after proper instruction.

The Florida courts continue to apply the general rule that a defense of entrapment is available only where a person charged with a crime had no intention of committing it but for the inducement, enticement, or instigation of an officer of law.<sup>271</sup> This defense is therefore extremely limited in scope.

The Florida statute of limitations requires prosecution of offenses not punishable by death to commence within 2 years of the offense. In *State v. King*<sup>272</sup> the supreme court considered a certified question as to when the statute of limitations begins to run in a larceny case. The crime of larceny was determined to be complete upon the taking, and the statute of limitations in Florida runs from that date. The court refused to create an exception to the statute for continuing, discoverable offenses, stating "[i]f this is a 'loop-hole' that should be closed, we must turn to the legislature to do so."<sup>273</sup> An unusual question regarding the statute of limitations arose as a result of *Furman v. Georgia*.<sup>274</sup> Prior to that decision a capital crime could be prosecuted at any time. Defendants urged that their prosecutions were barred by the 2-year statute of limitations since the offenses charged were no longer capital.<sup>275</sup> The supreme court rejected this argument, holding that because the crimes were com-

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269. *Bolin v. State*, 297 So. 2d 317 (Fla. 3d Dist. 1974).

270. 301 So. 2d 123 (Fla. 4th Dist. 1974).

271. *English v. State*, 301 So. 2d 813 (Fla. 2d Dist. 1974); *Davis v. State*, 302 So. 2d 464 (Fla. 3d Dist. 1974).

272. 282 So. 2d 162 (Fla. 1973).

273. *Id.* at 167.

274. 408 U.S. 238 (1972).

275. The death penalty was reestablished in 1972 and is codified as FLA. STAT. § 921.141 (1975).

mitted prior to *Furman* and because the statute of limitations is substantive, the 2-year limit was not applicable.<sup>276</sup>

## F. *Jury Instructions*

### 1. INSTRUCTIONS ON PENALTIES

Florida Rule of Criminal Procedure 3.390(a) requires, *inter alia*, that the presiding judge "must include in said charge the penalty fixed by law for the offense for which the accused is then on trial." This has been a statutory requirement in Florida since 1945.<sup>277</sup> However, during this survey period there were conflicting decisions as to whether this rule is discretionary or mandatory. In *Johnson v. State*,<sup>278</sup> the District Court of Appeal, Second District, held that the rule permits the exercise of discretion as to whether to charge on the penalty. This decision was based on a 1948 Supreme Court of Florida decision, *Simmons v. State*,<sup>279</sup> which held that such a charge was discretionary. While following *Simmons*, the district court recognized a conflict with the wording of Rule 3.390(a), promulgated by the Supreme Court of Florida in 1967, and certified the question as a matter of great public interest to the supreme court. The District Court of Appeal, First District, considered the same issue in *Terry v. State*<sup>280</sup> and held that the rule was mandatory and required giving the requested charge. The court considered the *Johnson* decision and certified the question to the supreme court.

The Supreme Court of Florida resolved the question in *Johnson v. State*<sup>281</sup> by holding that Florida Rule of Criminal Procedure 3.390(a) is discretionary. The court relied on *Simmons v. State*<sup>282</sup> even though that case primarily dealt with a legislative attempt to infringe on the trial court's judicial function. The court referred also to the language of standard jury instructions in criminal cases section 2.14<sup>283</sup> which instructs that a jury is not to be concerned with the penalty which might be imposed. Also, in *Settle v. State*,<sup>284</sup> it

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276. *State ex rel. Manucy v. Wadsworth*, 293 So. 2d 345 (Fla. 1974).

277. Fla. Laws 1945, ch. 22775 § 1.

278. 297 So. 2d 35 (Fla. 2d Dist. 1974).

279. 160 Fla. 626, 36 So. 2d 207 (1948). This case was based on lack of legislative authority to promulgate rules for courts.

280. 302 So. 2d 142 (Fla. 1st Dist. 1974).

281. 308 So. 2d 38 (Fla. 1974).

282. 160 Fla. 626, 36 So. 2d 207 (1948). See note 278 and accompanying text.

283. As validated by FLA. R. CRIM. P. 3.985.

284. 288 So. 2d 511 (Fla. 2d Dist. 1974).

was held that the trial judge is not required to inform the jury of the punishment for any of the lesser included offenses other than the one charged, although the defendant may be convicted of one of these lesser offenses.

## 2. INSTRUCTIONS ON LESSER INCLUDED OFFENSES

The need for jury instructions on lesser included offenses continues to be a controversial issue in Florida appellate courts. Rule 3.510 of Florida Rules of Criminal Procedure requires that:

Upon an indictment or information upon which the defendant is to be tried for any offense, the jurors may convict the defendant of an attempt to commit such offense if such attempt is an offense, or may convict him of any offense which is necessarily included in the offense charged. The court shall charge the jury in this regard.

The Supreme Court of Florida had, prior to the survey period, ruled that jury instructions on lesser included offenses were mandatory.<sup>285</sup> The District Court of Appeal, Fourth District, reaffirmed this mandate in two recent cases. In *Ward v. State*<sup>286</sup> the court found reversible error where the trial court refused to instruct the jury on an attempt to commit the crime charged where the attempt was also a crime. The trial court had refused to so instruct due to the weight of the evidence presented. The appellate court found that "it makes no difference that the proof established the greater crime charged . . . ."<sup>287</sup> Similarly, in *Bracy v. State*<sup>288</sup> the court held that it was error to refuse to charge the jury on attempt and lesser included offenses regardless of the trial court's conclusion about the evidence. "Such instructions must be given even though it is the opinion of the trial court that the proofs clearly establish the crime charged."<sup>289</sup>

In *Wilcox v. State*,<sup>290</sup> however, the District Court of Appeal, Third District, departed slightly from the mandate of Rule 3.510. It was held to be harmless error not to charge the jury on a lesser offense of simple assault in a robbery prosecution. The court found

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285. *Brown v. State*, 206 So. 2d 377 (Fla. 1968); accord, *Raynor v. State*, 273 So. 2d 759 (Fla. 1973); *State v. Washington*, 268 So. 2d 901 (Fla. 1972).

286. 287 So. 2d 138 (Fla. 4th Dist. 1973).

287. *Id.* at 139.

288. 299 So. 2d 126 (Fla. 4th Dist. 1974).

289. *Id.* at 126.

290. 299 So. 2d 48 (Fla. 3d Dist. 1974).

this harmless because instructions were given on four other lesser included offenses. It was also held harmless error not to give a requested instruction on the lesser included offense of assault in a prosecution for robbery in *Stephens v. State*.<sup>291</sup> The error was harmless in view of the overwhelming evidence to support the jury's verdict.

A somewhat different situation was presented in *Gilford v. State*.<sup>292</sup> There the defendant was charged with breaking and entering with intent to commit a felony, and was convicted and sentenced. On appeal, defendant claimed the trial court erred in not instructing the jury on the lesser included offense of breaking and entering with intent to commit a misdemeanor, to wit: petit larceny. The District Court of Appeal, Second District, affirmed the trial court because there was absolutely no evidence whatsoever to indicate that the value of the stolen property was less than \$100. This led the court to conclude that the error asserted, if any, was harmless. On certiorari, the Supreme Court of Florida went further and held that there was no error in not instructing the jury on the lesser offense.<sup>293</sup> The trial court need only instruct on lesser offenses where there is evidence that the lesser included offense has been committed. If there is no such evidence no jury charge is necessary.

In reaching this conclusion the court discussed the *Brown* decision.<sup>294</sup> The court said that in *Brown* the particular holding was that the proof of the lesser offense " 'necessarily' was shown by proof of the greater." The court gave the example of armed robbery which also proves an assault, and indicated in this situation an instruction must be given. In that situation proof of the assault inheres in proof of the armed robbery. The court went on to say, however, that proof of the greater offense is not always proof of the lesser. This was the situation in *Gilford*. On the facts in *Gilford*, the only proof was that the value of the property taken was \$600; and there was no way that this could be reduced to less than \$100, the market value necessary to include the lesser offense of petty larceny. The court added that Rule 3.510 does not change this result. The court said the rule was drafted in the context of existing law which requires proof for a

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291. 279 So. 2d 331 (Fla. 2d Dist. 1973).

292. 281 So. 2d 919 (Fla. 2d Dist. 1973), *aff'd*, 313 So. 2d 729 (Fla. 1975).

293. *Gilford v. State*, 313 So. 2d 729 (Fla. 1975).

294. See note 285 *supra* and accompanying text.

conviction. Here there was no proof to support a conviction for the lesser offense.<sup>295</sup>

### 3. INSTRUCTIONS ON CRIMES DIVISIBLE INTO DEGREES

After retiring in a murder trial, the jury requested that the court re-read the charge regarding second degree murder, self-defense, and manslaughter. The court re-read these charges, but refused to repeat a charge on excusable homicide which the defendant had requested. The District Court of Appeal, Third District, reversed the defendant's conviction of manslaughter on the grounds that the jury was left with incomplete and possibly misleading instructions.<sup>296</sup> Similarly, in *Clark v. State*<sup>297</sup> the court based its decision on "the clear language of [Fla. R. Crim. P.] 3.510 [which] makes an instruction of justifiable and excusable homicide, as part of the definition of manslaughter, a mandatory requirement,"<sup>298</sup> and reversed defendant's second degree murder conviction, where the judge had failed to re-read all charges including those pertaining to justifiable and excusable homicide and self defense.

In *Dykman v. State*<sup>299</sup> the jury requested re-instruction on first, second, and third degree murder and manslaughter. The trial court gave these instructions but did not re-instruct on excusable and justifiable homicide. The District Court of Appeal, Third District, held that it was error not to give full instruction, but that the error was cured when the court recalled the jury 5 minutes later and gave them the remainder of the requested instructions. There was no prejudice to the defendant even though the bailiff testified that the jury had reached a verdict before being recalled because a verdict is not final until accepted by the court.

### 4. INSTRUCTIONS INVOLVING THE "ALLEN CHARGE"

In *State v. Bryan*,<sup>300</sup> defendant had been convicted of manslaughter after a second degree murder prosecution. The jury had

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295. *Id.* at 733.

296. *Ford v. State*, 292 So. 2d 390 (Fla. 3d Dist. 1974), citing *Bagley v. State*, 119 So. 2d 400 (Fla. 1st Dist. 1960); accord, *McCormick v. State*, 308 So. 2d 126 (Fla. 4th Dist. 1975); *Clark v. State*, 301 So. 2d 456 (Fla. 3d Dist. 1974).

297. 301 So. 2d 456 (Fla. 3d Dist. 1974).

298. *Id.* at 457.

299. 300 So. 2d 695 (Fla. 3d Dist. 1974).

300. 290 So. 2d 482 (Fla. 1974).



deliberated for 5 hours when the court called them in to see if they were close to reaching a verdict. Since they were not, the judge delivered an "Allen Charge," urging minority members to reconsider their position to see if they could agree in good conscience with the majority. After another half hour of deliberation, the jury was again recalled and given a 20-minute deadline, within which time they returned with a guilty verdict. The Supreme Court of Florida found no error in this procedure, reasoning that the charge given was balanced, urging neither conviction nor acquittal. The court cited with approval the 1896 United States Supreme Court decision in *Allen v. United States*<sup>301</sup> which upheld such a charge. They also referred to standard jury instruction 2.19, which was found to be materially consistent with the charges actually given. As to the 20-minute deadline, the court found that this also was not coercive. The defendant petitioned for federal habeas corpus relief and the district court vacated his judgment and sentence, holding that the "Allen Charge" coupled with the deadline was coercive and denied the defendant his constitutional rights<sup>302</sup> under the fifth and fourteenth amendments.

A similar situation arose in *Evans v. State*<sup>303</sup> where the trial judge gave standard jury instruction 2.19 and told the jury to return for one more ballot after they had deliberated for over 5 hours. Within minutes of this so called "Modified Allen Charge" the jury returned with a verdict of guilty. The District Court of Appeal, Third District, found no error, relying on *State v. Bryan*<sup>304</sup> despite the fact it was vacated by a federal court.<sup>305</sup> The court considered the federal court decision but found it unpersuasive with regard to the facts and evidence in *Evans*.

#### XIV. POST TRIAL PROCEDURES

##### A. *Pre-Sentence Report*

Rule 3.710 of the Florida Rules of Criminal Procedure provides for a pre-sentence report by the Probation and Parole Commission.

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301. 164 U.S. 492 (1896).

302. *Bryan v. Wainwright*, 377 F. Supp. 766 (M.D. Fla. 1974).

303. 303 So. 2d 68 (Fla. 3d Dist. 1974).

304. 290 So. 2d 482 (Fla. 1974).

305. 377 F. Supp. 766. See note 301 *supra* and accompanying text.

In all cases in which the court has discretion as to what sentence may be imposed, the court may refer the case to the probation and parole commission for investigation and recommendation. No sentence or sentences other than probation shall be imposed on any defendant found guilty of a first felony offense or found guilty of a felony while under the age of 18 years, until after such investigation has first been made and the recommendations of the commission received and considered by the sentencing judge.

The Committee Note<sup>306</sup> points out that the report is discretionary except in two instances: the sentencing of a first felony offender and the sentencing of a defendant under 18 years of age. Decisions during this survey period reflect the position of the committee.

In *Still v. State*<sup>307</sup> there was nothing in the record on appeal to indicate that the defendant had been convicted of a prior felony offense. The court therefore vacated the sentence with instructions to the trial court to conduct the pre-sentence investigation pursuant to Rule 3.710. Similarly, in *Harden v. State*<sup>308</sup> the District Court of Appeal, First District, held that a sentence imposed for a first felony offense was illegal due to the court's failure to receive and consider a pre-sentence investigation. Failure of defendant's counsel to request the investigation did not amount to a waiver of the right because the language of the rule is mandatory. The court clarified its position on waiver in *Mitchum v. State*.<sup>309</sup> While mere failure to request a pre-sentence investigation does not constitute a waiver, a defendant can waive the report. In *Kurlin v. State*<sup>310</sup> the same court found that defendant waived his right to a report by fleeing the jurisdiction and thereby making himself unavailable to participate in the investigation.

Florida Statutes section 921.23 (Supp. 1974) requires a pre-sentence investigation in all felony cases. The validity of this statute was challenged in *Johnson v. State*.<sup>311</sup> The District Court of Appeal, First District, found the statute in direct conflict with Rule 3.710. Holding that a pre-sentence investigation is procedural, the court

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306. FLA. R. CRIM. P. 3.710, Committee Notes.

307. 296 So. 2d 67 (Fla. 1st Dist. 1974).

308. 290 So. 2d 551 (Fla. 1st Dist. 1974).

309. 292 So. 2d 620 (Fla. 1st Dist. 1974).

310. 302 So. 2d 147 (Fla. 1st Dist. 1974).

311. 308 So. 2d 127 (Fla. 1st Dist. 1975).

found section 921.23 unconstitutional as an infringement on the rulemaking power of the supreme court insofar as it conflicted with Rule 3.710.<sup>312</sup>

Sentencing may be held in abeyance while the trial court awaits the results of a pre-sentence investigation. The defendant has no constitutional right to a speedy disposition of his case after he is tried and convicted. Therefore, a delay in a report will not warrant a discharge.<sup>313</sup>

## B. Sentence

### 1. GENERALLY

In Florida, where an information contains more than one count, but each is a facet or phase of the same transaction, only one sentence may be imposed. The sentence imposed should be for the highest offense charged.<sup>314</sup> This "single transaction rule" was applied in numerous cases during the survey period with somewhat varying results. Crimes held to be facets of the same transaction included: sale and possession of drugs;<sup>315</sup> breaking and entering with intent to commit the felony of assault with intent to commit rape and assault with intent to commit rape;<sup>316</sup> aggravated assault and assault with intent to commit a felony;<sup>317</sup> and aggravated assault and resisting a police officer with violence.<sup>318</sup>

The single transaction issue is most frequently encountered when a defendant is charged with breaking and entering with intent to commit grand or petit larceny and with the larceny itself. The most complete discussion of the issue is found in *Edmond v. State*.<sup>319</sup> The District Court of Appeal, Second District, traced the single transaction rule back to a 1796 English case, and surveyed all Florida cases on the subject. The conclusion of this scholarly opinion is that:

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312. FLA. STAT. § 921.231 (1975) made minor changes in the section which was declared unconstitutional. These changes would not appear to correct the constitutional defect.

313. *State v. Sweetmen*, 302 So. 2d 164 (Fla. 4th Dist. 1974).

314. *Yost v. State*, 243 So. 2d 469 (Fla. 3d Dist. 1971), citing *Williams v. State*, 69 So. 2d 766 (Fla. 1953).

315. *Wilson v. State*, 293 So. 2d 81 (Fla. 3d Dist. 1974); *Van Aernam v. State*, 281 So. 2d 43 (Fla. 1st Dist. 1973).

316. *Benson v. State*, 301 So. 2d 503 (Fla. 2d Dist. 1974).

317. *Parks v. State*, 300 So. 2d 903 (Fla. 4th Dist. 1974).

318. *Moody v. State*, 279 So. 2d 909 (Fla. 4th Dist. 1973).

319. 280 So. 2d 449 (Fla. 2d Dist. 1973).

For more than a century the Supreme Court of Florida has adhered with constancy, with the single *apparent* exception of *Steele v. Mayo* . . . to the so-called single transaction rule, limiting punishment to the gravest of those several offenses into which a single criminal episode may be categorized.<sup>320</sup>

The *Edmond* decision produced an abundance of cases in the district courts which split over the result. The District Court of Appeal, Second District,<sup>321</sup> consistently followed the rationale of *Edmond*, as did the District Court of Appeal, First District.<sup>322</sup> The Fourth District and Third District<sup>323</sup> adhered to the view that the offenses of breaking and entering with intent to commit grand larceny and grand larceny are two distinct crimes and do not fall within the two facets of the same transaction rule. On conflict certiorari<sup>324</sup> the supreme court settled the issue and agreed with the view that the offenses are separate and two sentences can properly be imposed.

The supreme court employed the single transaction rule with regard to a defendant charged with a felony and with the use of a firearm during the commission of a felony in *Cone v. State*.<sup>325</sup> In this case the court found that the crimes of robbery and use of a firearm were facets of the same criminal act. The district court of appeal opinions after *Cone* are consistent.<sup>326</sup>

It should be noted that even when the courts find the sentences illegal, separate convictions for crimes arising out of the same criminal transaction are generally upheld.<sup>327</sup>

When a defendant has successfully appealed his conviction, been retried, and again adjudicated guilty, the court may impose a more severe sentence as long as the guidelines of *North Carolina v.*

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320. *Id.* at 450.

321. *Baggett v. State*, 302 So. 2d 206 (Fla. 2d Dist. 1974); *Austile v. State*, 301 So. 2d 30 (Fla. 2d Dist. 1974); *Christia v. State*, 295 So. 2d 692 (Fla. 2d Dist. 1974); *Davis v. State*, 277 So. 2d 300, (Fla. 2d Dist.), *cert. denied*, 283 So. 2d 564 (Fla. 1973).

322. *McHaney v. State*, 295 So. 2d 355 (Fla. 1st Dist. 1974); *Kirkland v. State*, 299 So. 2d 54 (Fla. 1st Dist. 1974).

323. *White v. State*, 274 So. 2d 6 (Fla. 4th Dist. 1973); *State v. Conrad*, 243 So. 2d 174 (Fla. 4th Dist. 1971); *Pettigrew v. State*, 295 So. 2d 672 (Fla. 4th Dist. 1974); *Estevez v. State*, 290 So. 2d 138 (Fla. 3d Dist. 1974).

324. *Estevez v. State*, 313 So. 2d 692 (Fla. 1975).

325. 285 So. 2d 12 (Fla. 1973).

326. *Washburn v. State*, 303 So. 2d 67 (Fla. 2d Dist. 1974); *Union v. State*, 301 So. 2d 458 (Fla. 2d Dist. 1974); *Still v. State*, 296 So. 2d 67 (Fla. 1st Dist. 1974).

327. *Mendez v. State*, 280 So. 2d 525 (Fla. 3d Dist. 1973).

*Pearce*<sup>328</sup> are followed. Thus in *Vidal v. State*<sup>329</sup> the court correctly imposed a longer sentence when reopening of the case revealed prior convictions. The trial court set forth the reasons for the longer sentence as required. The decision in *North Carolina v. Pearce* will not be applied retroactively.<sup>330</sup> In *Baggett v. State*<sup>331</sup> the District Court of Appeal, Second District, had remanded the defendant's case for the trial court to resentence the defendant on a breaking and entering charge after finding that the original sentence of 7 years on breaking and entering and 5 years on grand larceny was erroneous. On remand the trial court sentenced the defendant to a 12-year term. The Second District found that the new 12-year term was within the statutory requirements and was not objectionable as an improper increase of the original sentence.

Florida Statutes section 921.161 was amended by the Legislature in 1973 to make allowance of credit for time served mandatory. In *Hollingshead v. State*,<sup>332</sup> the District Court of Appeal, First District, held that the defendant was entitled to credit for time served, even though the credit did not become mandatory until after he was sentenced. In *Manning v. State*,<sup>333</sup> defendant was found guilty of manslaughter. The court sentenced him to 15 years and expressly denied credit for time served prior to sentencing. The District Court of Appeal, First District, held this to be error, noting that Florida Statute Section 775.084 (1973), which allows for extending sentences, could not be relied on since the court did not make the required findings of facts.<sup>334</sup>

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328. 395 U.S. 711 (1969). The Supreme Court was cognizant of potential vindictiveness by the trial court that was to retry the case. To protect the defendant from the chilling effect of such actions, the court held that when a trial judge imposes a more severe sentence he must affirmatively state his reasons for doing so.

329. 300 So. 2d 688 (Fla. 3d Dist. 1974).

330. *Tucker v. State*, 286 So. 2d 607 (Fla. 4th Dist. 1973), citing *Michigan v. Payne*, 412 U.S. 47 (1973).

331. 302 So. 2d 206 (Fla. 2d Dist. 1974).

332. 292 So. 2d 617 (Fla. 1st Dist. 1974).

333. 299 So. 2d 632 (Fla. 1st Dist. 1974).

334. FLA. STAT. § 775.084 (1973), as amended, FLA. STAT. § 775.084 (Supp. 1974), effective as amended, July 1, 1975. The amended version of this statute allows the court, after notice and opportunity to be heard has been given to the parties, to impose extended sentences on subsequent felony offenders after making certain findings enumerated in the statute. These include findings (a) that imposition of an extended sentence is necessary to protect the public; (b) that defendant has previously committed a felony or twice been convicted of a class A misdemeanor since his eighteenth birthday; (c) that the felony for which defendant is being sentenced was committed within 5 years of the date of the last prior felony or

Florida Statutes section 921.161 applies to sentences arrived at through plea bargaining. After the defendant was sentenced to 8 years he filed a motion to correct sentence to give him credit for time served. The court denied the motion stating that a consideration of time served was made when the sentence was given. The District Court of Appeal, First District, reversed, holding that the statute requires that the sentence specify the period of time for which credit was given.<sup>335</sup> In *Miller v. State*<sup>336</sup> the defendant urged an interesting interpretation of the time served statute. Defendant was sentenced to four 60-day terms to run consecutively. He was credited with 33 days time served to be applied against his total sentence. The District Court of Appeal, First District, rejected defendant's contention that the credit should be subtracted from each 60-day sentence.

A defendant is entitled to credit for time served when he is incarcerated for violation of probation. The District Court of Appeal, Fourth District, in *Sharp v. State*<sup>337</sup> gave the defendant credit for the period of time spent in jail between the original incarceration and the time he was placed on probation. The credit for time served likewise applies to persons whose parole is revoked. Defendant in *Voulo v. Wainwright*<sup>338</sup> was paroled from the state prison and later arrested and sentenced on a new charge. His parole was subsequently revoked. The court held that the defendant was entitled to credit for time served dating from his arrest. This credit was to be applied to both the new sentence and the original sentence. Similarly, in *Kelley v. Wainwright*<sup>339</sup> the supreme court held that a parolee was entitled to credit against his initial sentence for time spent in jail after his arrest and before his transfer to the state prison after revocation of parole. However, when a defendant's parole is revoked,

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misdemeanor; (d) that the defendant has not been pardoned on the ground of innocence for any offense necessary for the operation of this section; (e) that conviction of an offense necessary to the operation of this section has not been set aside in any post conviction proceeding.

335. *Larson v. State*, 301 So. 2d 491 (Fla. 1st Dist. 1974).

336. 297 So. 2d 36 (Fla. 1st Dist. 1974).

337. 303 So. 2d 56 (Fla. 4th Dist. 1974).

338. 290 So. 2d 58 (Fla. 1974).

339. 297 So. 2d 561 (Fla. 1974).

340. *Gibbs v. Wainwright*, 302 So. 2d 175 (Fla. 2d Dist. 1974). FLA. STAT. § 947.21 (1973) was amended by Fla. Laws ch. 74-112, effective July 1, 1974, to provide that the Parole and Probation Commission, in its discretion, may credit the violator with any time he has satisfactorily served on parole.

he is not entitled to credit for time on parole and he forfeits any gain time for good conduct he might have earned.<sup>340</sup>

## 2. DEATH PENALTY

By far the most controversial area of criminal procedure today involves the imposition of the death penalty. In 1972 the United States Supreme Court in *Furman v. Georgia*<sup>340</sup> held that the imposition and carrying out of existing death penalties constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments. The *Furman* case was followed by an extensive series of cases involving unexecuted death sentences, including sentences imposed under Florida's death penalty statute.<sup>341</sup> As a result of the *Furman* line of cases, the Florida Legislature enacted Florida Statute section 921.141 (1973) in an attempt to re-establish the death penalty in Florida within the requirements of *Furman*. After conviction for a capital offense, a separate sentencing proceeding is required. All relevant evidence concerning aggravating and mitigating circumstances is to be considered at this hearing. The new statute was challenged in *State v. Dixon*,<sup>342</sup> and upheld as constitutional by the Supreme Court of Florida. The court determined that the discretion in Section 921.141 is controlled by the procedural safeguards established therein and therefore the test of *Furman* is met. The court reaffirmed its decision in *Dixon* in *Alford v. State*<sup>343</sup> and *Spinkellink v. State*.<sup>344</sup> It should be noted that at the time of this survey the United States Supreme Court is again considering the death penalty issue.<sup>345</sup>

In *In re Baker*<sup>346</sup> the Supreme Court of Florida resentenced all persons sentenced to death after convictions for murder and rape to life imprisonment. The rape cases, however, were remanded to their respective circuit courts for reconsideration of the sentence. In

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340. 408 U.S. 239 (1972).

341. *Anderson v. Florida*, 408 U.S. 938 (1972); *Johnson v. Florida*, 408 U.S. 939 (1972); *Thomas v. Florida*, 408 U.S. 935 (1972).

342. 283 So. 2d 1 (Fla. 1973). See 28 U. MIAMI L. REV. 723 (1974) for a detailed discussion of *State v. Dixon*.

343. 307 So. 2d 443 (Fla. 1975).

344. 313 So. 2d 666 (Fla. 1975).

345. *Fowler v. North Carolina*, cert. granted, 419 U.S. 963 (1975). Although decision of this case has been postponed, it has been restored to the calendar for reargument. 422 U.S. 1039 (1975).

346. 267 So. 2d 331 (Fla. 1972).

*McDole v. Wainwright*<sup>347</sup> the Supreme Court of Florida reviewed the treatment of one of the persons affected by *Baker*. The court held that it was within the trial court's discretion not to conduct a hearing to reconsider the sentence.

The supreme court in *Taylor v. State*<sup>348</sup> considered the portion of section 921.141 which affords a trial court the discretion to disregard the jury's recommendation after the sentencing proceeding:

Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes the sentence of death, it shall set forth in writing its findings upon which the sentence of death is based

. . . .

The defendant was tried by jury and found guilty of murder in the first degree. At the sentencing hearing no additional evidence was given, either showing aggravation or mitigation. The jury returned a recommendation of mercy. Immediately, the trial judge imposed a sentence of death in the electric chair. The supreme court reversed the death sentence and directed that a sentence of life imprisonment be imposed. The court felt that the immediate rejection of the jury's recommendation was contrary to the intent of the statute. In reviewing the record, the supreme court found sufficient mitigating factors to support the jury's recommendation. It is submitted that this decision illustrates how precarious the "controlled discretion" is under the new Florida statute.

In a situation where a defendant pleads guilty to a crime punishable under section 921.141, that defendant has a right to a sentencing hearing. In *Lamadline v. State*<sup>349</sup> defendant pled guilty to first degree murder and the court determined that the plea was intelligently and voluntarily entered. However, the record was silent as to whether defendant was advised of his right to have a jury render an advisory opinion concerning the sentence. The supreme court held that this right was essential, and while it could be waived, such waiver could not be presumed. The case was remanded with instructions to impanel a sentencing jury unless the defendant knowingly and intelligently waived that right.

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347. 293 So. 2d 35 (Fla. 1974).

348. 294 So. 2d 648 (Fla. 1974).

349. 303 So. 2d 17 (Fla. 1974).



### C. Appeals

#### 1. GENERALLY

The Supreme Court of Florida has consistently held that a question of sufficiency of the evidence is not reviewable by direct appeal unless the issue was presented to the trial court by means of proper motions.<sup>350</sup> Florida Appellate Rule 6.16, which allows the court in its discretion to review anything said or done in the cause which appears in the record on appeal, has been construed to require this. In *Chester v. State*<sup>351</sup> the District Court of Appeal, Second District, similarly held that the question of inadequate representation could not properly be raised for the first time on direct appeal. In *State v. Barber*<sup>352</sup> these issues were both present. Defendants were convicted of breaking and entering with intent to commit grand larceny. On appeal they attempted to raise the issue of insufficiency of the evidence as to the value of the property involved in the larceny. Since this question was not preserved at trial by their attorney, the defendants raised the issue of insufficiency of the ineffective assistance of counsel. The District Court of Appeal, First District, had decided that the best interests of justice required an interpretation of Florida Appellate Rule 6.16 contrary to the supreme court's construction.<sup>353</sup> As the court so aptly stated: "The defendants-appellants find themselves in a maze of the Rules of Procedure and construction thereof by case law, and in a quandary as to how to reach the appellate level with reviewable points of appeal without violating the rules and decisions mentioned. . . ."<sup>354</sup> Under the discretionary provision of Florida Appellate Rule 6.16, the court reviewed the evidence and reversed the trial court.

On conflict certiorari, the Supreme Court of Florida in *State v. Barber* found the actions of the appellate court to be erroneous and reaffirmed its prior position on these questions.<sup>355</sup> The court did point out that the defendants were entitled to review on the point of inadequate representation, but not by direct appellate review. The proper procedure to raise such an issue was collateral attack

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350. *Mancini v. State*, 273 So. 2d 371 (Fla. 1973); *State v. Owens*, 233 So. 2d 389 (Fla. 1970); *State v. Wright*, 224 So. 2d 300 (Fla. 1969).

351. 276 So. 2d 76 (Fla. 2d Dist. 1973).

352. 301 So. 2d 7 (Fla. 1974).

353. *Barber v. State*, 286 So. 2d 23 (Fla. 1st Dist. 1973).

354. 286 So. 2d at 26.

355. 301 So. 2d 7 (Fla. 1974).

through the post-conviction proceedings prescribed by Rule 3.850 of the Florida Rules of Criminal Procedure. Confusion over Rule 3.850 relief and appellate review also arose in *Paige v. State*.<sup>356</sup> Defendant, in *proper persona*, appealed his conviction but the court affirmed. Subsequently, defendant filed a motion to vacate which was denied by the circuit court. On appeal of this denial, the District Court of Appeal, Second District, held that the issues that were or could have been raised in a direct appeal are inappropriate issues for 3.850 relief.

## 2. "HOLLINGSHEAD APPEALS"

Florida Appellate Rule 6.2 prescribes a 30-day mandatory limit on taking an appeal from a final judgment or order. The United States Supreme Court decided in *Douglas v. California*<sup>357</sup> that an indigent defendant was constitutionally guaranteed the right to state-appointed counsel for a direct appeal. In view of the *Douglas* decision, the Supreme Court of Florida ruled that the time limit of 30 days will not bar an appeal if the delay was the result of state action. This view was first promulgated in *Hollingshead v. Wainwright*.<sup>358</sup> The remedy afforded the aggrieved defendant is by way of habeas corpus relief, and is frequently referred to as a "Hollingshead Appeal". The supreme court developed a two-pronged test in *Baggett v. Wainwright*:<sup>359</sup> first, whether the defendant made his indigency and desire to appeal known to the court; and second, whether the facts showed a deprivation of guaranteed rights by state action.

During this survey period several cases dealt with "Hollingshead Appeals". In *Pinkins v. Wainwright*,<sup>360</sup> the defendant represented himself and pled guilty. The trial judge failed to inform the defendant of his right to appeal. The court, by applying the principles of *Baggett*, held that the defendant was entitled to a delayed appeal and appointed counsel for him. On a cautionary note the court stated that appeal would be heard only if it was not frivolous and if the matter could be reached on direct appeal rather than through petition for post conviction relief under Rule 3.850. The

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356. 282 So. 2d 192 (Fla. 2d Dist. 1973). See notes 346-47 *supra*.

357. 372 U.S. 353 (1963).

358. 194 So. 2d 577 (Fla. 1967).

359. 229 So. 2d 239 (Fla. 1969).

360. 283 So. 2d 577 (Fla. 2d Dist. 1973).

District Court of Appeal, First District, allowed a belated appeal in *Riley v. State*<sup>361</sup> where the defendant had requested within 30 days that his court-appointed attorney file an appeal. The attorney, however, failed to move for an order appointing the public defender until 41 days had elapsed. The court held that the defendant's right to appeal was frustrated by state action. In *Pickett v. State*,<sup>362</sup> the same court granted a delayed appeal going beyond the guidelines set in *Baggett*. In *Pickett*, while defendant had not made known his wish to appeal to a state functionary, the trial court's order adjudged the defendant insolvent for the purposes of appeal and obtaining a transcript. The District Court of Appeal, First District, reasoned that the tone of this order might easily have misled the criminal defendant into believing that nothing further was required of him to perfect his appeal, and was therefore entitled to full appellate review. However, failure of the defendant to request an appeal until the 30th day constitutes grounds for dismissing a petition for a "Hollingshead Appeal."<sup>363</sup>

An unusual question relating to timing of appeals, unrelated to the *Hollingshead* issue, was presented in *State ex rel. Shevin v. Mann*.<sup>364</sup> Defendant tendered a plea of nolo contendere, preserving the right to appeal the denial of his pre-trial motion to suppress. When the trial judge refused his plea, he tendered a plea of guilty asking to preserve for review the denial of his first plea. Although he had pled guilty and never had a trial, defendant filed a motion for a new trial, and subsequent to denial of this motion filed notice of appeal. The State contended the District Court of Appeal, Second District, did not have jurisdiction since the time for appeal had passed. The Supreme Court of Florida held that the motion for a new trial was proper within Florida Appellate Rule 1.3, and thus delayed the time within which an appeal must be commenced. The court stated a defendant should not be penalized when a permissible post trial motion is filed, even where the motion is without merit or even frivolous.

A practice has developed, supported by a decision of the United

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361. 298 So. 2d 193 (Fla. 1st Dist. 1974).

362. 303 So. 2d 80 (Fla. 1st Dist. 1974).

363. *Haines v. State*, 297 So. 2d 604 (Fla. 1st Dist. 1974). In *Pickett* the tone of the judges order led defendant to believe he had no further right to appeal. In the instant case the delay was due solely to defendant's failure to appeal in a timely manner.

364. 290 So. 2d 1 (Fla. 1974).

States Court of Appeals for the Fifth Circuit,<sup>365</sup> of allowing a defendant who has received an adverse pre-trial ruling to plead nolo contendere and specifically preserve an objection to the ruling. Since the trial court has discretion whether to accept such a plea, any conditional plea with specific reservation should be made explicit. Such was the holding of *Jackson v. State*<sup>366</sup> where the District Court of Appeal, Fourth District, clarified its prior position regarding appeals from pleas.

We hold that if a defendant pleading nolo contendere desires to appeal from pre-trial rulings, he must make specific reservation of that intention. The trial court and all concerned must understand and agree upon the record that the plea is conditional upon the appeal and its outcome.<sup>367</sup>

Similarly, the District Court of Appeal, Third District, found that a defendant had not failed to reserve the right to appeal where the defendant had informed the court of his intention to appeal and asked to be declared indigent for the purposes of the appeal.<sup>368</sup>

### 3. TRANSCRIPTS

While the due process and equal protection clauses of the United States Constitution require that indigents be furnished transcripts for purposes of a criminal appeal,<sup>369</sup> the issue still arises as to when the defendant is entitled to have the transcript prepared at the public's expense. In *Moore v. State*,<sup>370</sup> defendants filed a timely notice of appeal, and the cases were assigned to a public defender. As a routine matter the attorney filed directions with the clerk to prepare the record on appeal and moved that the trial court direct the court reporter to transcribe notes of all the proceedings. The trial court denied the motion for the reason that the requested transcripts were not within the scope of any assignment of error. The District Court of Appeal, First District, affirmed the trial court's

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365. *U.S. v. Caraway*, 474 F.2d 25 (5th Cir. 1973). The court indicated that while under normal circumstances a plea of nolo contendere is the legal equivalent of a guilty plea, when a defendant and the trial court explicitly agree that such a plea preserves objections to the admissibility of evidence, the appellate court has felt constrained to honor such agreements.

366. 294 So. 2d 114 (Fla. 4th Dist. 1974).

367. *Id.* at 115.

368. *Perry v. State*, 296 So. 2d 505 (Fla. 3d Dist. 1974).

369. *Griffin v. Illinois*, 351 U.S. 12 (1956).

370. 298 So. 2d 561 (Fla. 1st Dist. 1974).

action, holding that there was no basis in the record to support the defendant's motion because it appeared that no assignment of error had been filed in the trial court. The court felt that the problem in *Moore* could largely be avoided if criminal courts adopted an administrative rule whereby the public defender who represented the indigent at trial would not be relieved of his duties until he filed a notice of appeal, if an appeal is desired, and also filed assignments of error, directions to the clerk, and designations to the reporter.<sup>371</sup> In *Cueni v. State*<sup>372</sup> the District Court of Appeal, First District, held that there was no need to prepare a transcript for an indigent at public expense when the only error raised was that the trial court abused its discretion in imposing the maximum sentence allowed by law. In reaching this decision the court considered the United States Supreme Court cases of *Griffith v. Illinois*<sup>373</sup> and *Draper v. Washington*.<sup>374</sup> In light of these decisions the court held that an indigent is entitled to a free transcript only when such transcript is necessary for the appellate court to properly consider the errors raised.

#### D. Probation

##### 1. REVOCATION

A hearing for the revocation of probation need not meet the strict requirements of a criminal trial. It is sufficient if evidence is taken and the probationer has a reasonable opportunity to present his position.<sup>375</sup> However, while the proceedings may be informal in nature, and are not rendered erroneous by the admission of hearsay, a judgment of revocation may not be entered where there is no evidence except hearsay.<sup>376</sup>

##### 2. SENTENCE UPON REVOCATION

The question of the allowable sentence which may be imposed upon a defendant upon revocation of probation has been one which

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371. *Id.* at 563.

372. 303 So. 2d 411 (Fla. 1st Dist. 1974).

373. 351 U.S. 12 (1956).

374. 372 U.S. 487 (1963).

375. *Washington v. State*, 284 So. 2d 236 (Fla. 2d Dist. 1973), *citing* *McNeely v. State*, 186 So. 2d 520 (Fla. 2d Dist. 1966).

376. *White v. State*, 301 So. 2d 464 (Fla. 1st Dist. 1974); *Turner v. State*, 293 So. 2d 771 (Fla. 1st Dist. 1974); *Hampton v. State*, 276 So. 2d 236 (Fla. 2d Dist. 1973).

has caused the courts in Florida some difficulty in the past. It is clear in Florida that "[p]robation is a creature of statute and the courts are limited to the authority afforded thereby."<sup>377</sup> Therefore, the problem is one of statutory interpretation. Florida Statutes section 948.06 (1973) seems clear enough giving the judge, upon revocation of probation, authority to "impose any sentence which it might have originally imposed before placing the probationer on probation." However, section 948.01(4) which authorizes split sentences (both incarceration and probation) has in the past caused some uncertainty in the courts.<sup>378</sup>

In the recent decision of *State v. Jones*<sup>379</sup> the Supreme Court of Florida construed the 1973 version of section 948.01(4). In *Jones* the defendant was convicted of three crimes for which he could have been confined in the state prison. The trial judge, however, sentenced the defendant to 1 year in the county jail followed by 5-years probation on each count to be served concurrently. Later the judge reconsidered the sentences and reduced the jail time to 85 days, but retained the 5-year period of probation. Subsequently the defendant violated his probation and was sentenced to three concurrent sentences of 2 years in the state prison.

On appeal, the District Court of Appeal, Third District, reversed the sentence, and restricted the maximum punishment to the remainder of the previously imposed 1-year jail sentences.<sup>380</sup> The court, however, certified the question of whether, under these cir-

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377. *Brown v. State*, 302 So. 2d 430, 431 (Fla. 1st Dist. 1974).

378. FLA. STAT. § 948.01 (4) states:

Whenever punishment by imprisonment in the county jail is prescribed, the court, in its discretion, may at the time of sentencing direct the defendant to be placed on probation upon completion of any specified period of such sentence. In such case, the court shall stay and withhold the imposition of the remainder of the sentence imposed upon the defendant, and direct that the defendant be placed upon probation after serving such period as may be imposed by the court.

This section was amended by the legislature in 1974. FLA. STAT. § 948.01(4) (Supp. 1974) states:

Whenever punishment by imprisonment for a misdemeanor or a felony, except for a capital felony, is prescribed, the court, in its discretion may, at the time of sentencing, direct the defendant to be placed on probation upon completion of any specified period of such sentence. In such case, the court shall stay and withhold the imposition of the remainder of such sentence imposed upon the defendant, and direct the defendant be placed upon probation after serving such period as may be imposed by the court.

379. 327 So. 2d 18 (Fla. 1976).

380. *Jones v. State*, 296 So. 2d 519 (Fla. 3d Dist. 1974).

cumstances, the trial court upon revocation was limited to imposing the unserved portion of the jail sentences or whether the court could have imposed any sentence it could have imposed originally under section 948.06.

The Supreme Court of Florida, noting various constructions given to the probation statute by the District Courts of Appeal, quashed the decision of the Third District and remanded with instructions to reinstate the sentences of the trial court, holding that the trial court upon revocation was authorized to impose any sentence it originally might have imposed.<sup>381</sup> The supreme court rejected the lower court's interpretation of section 948.01(4), which would have required the trial court to impose the total sentence at the original sentence hearing and to withhold a part thereof for use in the event probation was violated. The court stated the lower court's construction conflicted with section 948.06 and apparently opted for giving trial judges greater freedom in sentencing upon revocation for probation. Judge Boyd dissented, stating that the court had given an interpretation to the statute which was never contemplated by the legislature.

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381. The court also held that a trial court may place a defendant on probation and include as a condition a period of incarceration within the maximum sentence allowed, and that upon revocation the defendant must be given credit for any period of time spent in jail pursuant to a split sentence probation order.