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Criminal Law and Procedure

Peter Chatilovicz

Jeffrey Berkowitz

David Frisch

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CRIMINAL LAW AND PROCEDURE

PETER CHATILOVICZ,* JEFFREY BERKOWITZ**
and DAVID FRISCH***

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* Editor-in-Chief, University of Miami Law Review; Coordinator and Student Instructor of the Program in Freshman Research and Writing I and II.

** Member, Editorial Board, University of Miami Law Review.

*** Member, Editorial Board, University of Miami Law Review.

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This survey¹ is a continuation of previous articles on the topic of Florida criminal law and procedure.

I. CONFESSIONS

A. *Right to Counsel and Right to be Silent*

The principles of *Miranda v. Arizona*² and *Escobedo v. Illinois*³ were applied by the District Court of Appeal, Fourth District, in *Staterwright v. State*.⁴ Defendant was taken to the police station and advised that he did not have to say anything; that anything he said could be used against him; that he had a right to an attorney, and if he did not have one, the state would furnish him one at no cost to him. The defendant then waived his rights and gave a statement. In reversing defendant's conviction, the court held that a suspect must be clearly informed that he has the right to have a lawyer with him during interrogation and that the warnings given were insufficient to clearly inform the defendant of this right.

The District Court of Appeal, Third District, has held that charges of careless driving resulting in an accident and of operating a motor vehicle while under the influence of an intoxicating beverage are petty offenses for which the *Miranda* warnings need not be given.⁵

1. This survey covers cases reported in 248 So. 2d through 278 So. 2d and laws enacted by the 1972 and 1973 Regular and Special Sessions of the Florida Legislature. Professor Willis who usually writes this survey was on a leave of absence and will continue to write future surveys.

2. 384 U.S. 436 (1966).

3. 378 U.S. 478 (1964), which held that the right to counsel applies at the police station when an investigation ceases to be general in nature and begins to "focus in" on the defendant. Although it is still a viable case, *Escobedo* has largely been superseded by and incorporated into *Miranda*.

4. 278 So. 2d 652 (Fla. 4th Dist. 1973).

5. *County of Dade v. Callahan*, 259 So. 2d 504 (Fla. 3d Dist. 1971). The court relied on

The court in *Weinstein v. State*,⁶ held that the dictates of *Miranda* are not confined to hardened criminals, but apply to all citizens regardless of age. However, a juvenile may both assert and intelligently waive rights to remain silent and to have counsel.⁷

Cases frequently arise where a defendant has made two confessions, one having been coerced and the other free from coercion, after the proper *Miranda* warnings had been given. The Supreme Court of Florida has stated that in cases such as these,

questions arise as to (1) whether coercive influences actually exist in the first instance, (2) whether those influences have abated, or persist, up to the time of the statement being given and (3) whether such influences as have persisted did, in fact, render the statement involuntary. These questions are mixed questions of fact and law to be determined initially by the trial court in ruling on admissibility of the statement and ultimately by the jury.⁸

A statement should be excluded if the attending circumstances are calculated to delude the accused as to his true position or to exert improper or undue influences over him. However, where an agent of the Bureau of Narcotics advised defendant of his rights at the time of his arrest, then told him there was nothing to fear and that he would be protected, was not a deluding of the defendant since he was again advised of his rights at a later time by other officials.⁹ A similar result was reached in *Grimley v. State*,¹⁰ where defendant was given the proper *Miranda* warnings but indicated that she did not know if she should waive an attorney and asked the officer for his opinion. He said "I don't know." She then asked, "Well, do you think I should tell the truth?" The officer said, "Yes, by all means."¹¹ Defendant then signed a waiver of rights. The court held that the waiver was valid and the testimony of her admissions to the police officer was properly admitted.

In *Myers v. State*,¹² the police twice attempted to give the *Miranda* warnings but were stopped by the defendant who stated that he knew and understood his rights and then freely gave a statement. The court in holding that the statement was admissible, stated that "where the state makes every reasonable effort to inform a defendant of his rights and the

Wright v. Worth, 83 Fla. 204, 91 So. 87 (1922), which held that offenses against municipal ordinances were not criminal in nature as contemplated by the state constitutional provisions relating to the rights of an accused in a criminal prosecution.

6. 269 So. 2d 70 (Fla. 1st Dist. 1972). Defendant, a 17-year-old was not told of his right to counsel or that anything he said could be used against him.

7. *Arnold v. State*, 265 So. 2d 64 (Fla. 3d Dist. 1972).

8. *State v. Oyarzo*, 274 So. 2d 519, 521 (Fla. 1973).

9. *Id.*

10. 251 So. 2d 671 (Fla. 2d Dist. 1971).

11. *Id.* at 672.

12. 256 So. 2d 400 (Fla. 3d Dist. 1972).

defendant refuses to listen . . . it is not necessary to hold him down and read them to him."¹³

Where defendant claimed that he didn't completely understand when the police informed him of his rights and yet told the officers that he did understand, the District Court of Appeal, Second District, held that the confession was admissible.¹⁴

In *Colocado v. State*,¹⁵ a police officer entered the premises in question with a search warrant and asked who was in charge. Defendant answered that he was. This statement was held admissible even though no prior *Miranda* warnings were given. The court reasoned that the officer was merely discharging his statutory obligation of determining the identity of the person in charge so that a copy of the warrant and inventory could be read and delivered to him. The court also noted that the inquiry did not in any sense constitute an in-custody interrogation of one suspected of a crime.

B. *Illegal Detention and Interrogation*

In *In re A.J.A.*,¹⁶ a confession was obtained from a 16 year-old after several hours of interrogation at the police station. The court held that the confession was inadmissible because it was obtained in violation of Florida Statutes section 39.03(3) (1971)¹⁷ which requires notification, without delay of the child's parents. A different result was reached under similar circumstances by the District Court of Appeal, First District, in *State v. Roberts*.¹⁸ That court held that the *McNabb-Mallory* rule did not require the exclusion of a confession despite a violation of Florida Statutes sections 39.03(3), 901.06 or 901.23. The confession is admissible if the *Miranda* warnings were administered prior to the statement or confession. The District Court of Appeal, First District, has also held that Florida Statutes section 39.03(6), which requires that a juvenile be fingerprinted and photographed, should be read in conjunction with section 39.03(3) so that a confession obtained during this process before the juvenile is taken to a magistrate is admissible.¹⁹

Where the defendant was arrested in the early morning and his confession was obtained before noon on that day, it was held that there

13. *Id.* at 402.

14. *Hall v. State*, 260 So. 2d 881 (Fla. 2d Dist. 1972).

15. 251 So. 2d 721 (Fla. 1st Dist. 1971).

16. 248 So. 2d 690 (Fla. 3d Dist. 1971).

17. FLA. STAT. § 39.03(3) (1971), provided that:

The person taking and retaining a child in custody shall notify the parents or legal custodians of the child and the principal of the school in which said child is enrolled at the earliest practicable time, and shall, without delay for the purpose of investigation or any other purpose, deliver the child, by the most direct practicable route, to the court of the county or district where the child is taken into custody

This section is revised significantly in Florida Statutes section 39.03(3) (1973).

18. 274 So. 2d 262 (Fla. 1st Dist. 1973).

19. *Cooper v. State*, 257 So. 2d 614 (Fla. 1st Dist. 1972).

was no unnecessary delay in presenting him before the committing magistrate and thus his confession was admissible.²⁰

In *Jetmore v. State*,²¹ the defendant was illegally arrested, taken to the police station and read the *Miranda* warnings. He confessed within 45 minutes. Defendant argued that because the arrest was illegal the ensuing confession was inadmissible.²² The District Court of Appeal, Fourth District, held that the confession was freely and voluntarily given after the *Miranda* warnings, and that it was independent of the illegal arrest.²³

The District Courts of Appeal, Third and Fourth districts, have held that a defendant's initial request for an attorney during interrogation by a police officer does not preclude taking statements from the defendant at any future time before an attorney is furnished.²⁴

C. Voluntary Confessions

If a defendant is informed of all of his constitutional rights, and then knowingly and intelligently waives them, his statement is not inadmissible on the ground that at the time of his arrest the defendant told the arresting officer that he wanted to talk to an attorney.²⁵ If the statement was voluntarily made by the defendant after a full warning of his constitutional rights, the confession was valid despite the fact that it was made orally.²⁶

When the state attempts to introduce a confession given during in-custody interrogation, the question of voluntariness need only be determined by a preponderance of the evidence.²⁷ A statement by the accused that he fully understands and waives his rights is not an essential link in the chain of proof; waiver may be shown by attendant circumstances.²⁸ It is also not necessary that the defendant waive each separate item of the *Miranda* warnings as they are given as long as there is evidence of a clear manifestation of a knowing intent to waive.²⁹

Where a defendant has employed his own counsel, or one has been appointed for him, the presence of his counsel is not essential to the

20. *Hughes v. State*, 272 So. 2d 21 (Fla. 3d Dist. 1973).

21. 275 So. 2d 61 (Fla. 4th Dist. 1973).

22. *See Wong Sun v. United States*, 371 U.S. 471 (1963).

23. It is submitted that the *Miranda* warnings themselves are not sufficient to show attenuation for the illegal arrest. It is only one piece of evidence to consider. The facts of this case do not seem sufficient to constitute the attenuation required by *Wong Sun*.

24. *Barker v. State*, 271 So. 2d 790 (Fla. 3d Dist. 1973); *see McDougald v. State*, 275 So. 2d 259 (Fla. 4th Dist. 1973), holding that a statement made by defendant after requesting counsel but before request is honored, is not per se inadmissible.

25. *James v. State*, 263 So. 2d 284 (Fla. 2d Dist. 1972).

26. *Ashley v. State*, 265 So. 2d 685 (Fla. 1972).

27. *State v. Harris*, 276 So. 2d 845 (Fla. 4th Dist. 1973).

28. *Fowler v. State*, 263 So. 2d 202 (Fla. 1972), *citing United States v. Hayes*, 385 F.2d 375 (4th Cir. 1967), *cert. denied*, 390 U.S. 1006 (1968).

29. *Davis v. State*, 275 So. 2d 575 (Fla. 1st Dist. 1973).

validity or effectiveness of defendant's waiver of the right to have counsel present at an interrogation.³⁰

In *Anglin v. State*,³¹ a 15-year-old defendant made a confession after his mother told him to tell "the truth" or "she would clobber him." The court held that the mother's statement did not amount to a threat or coercion although it recognized that other jurisdictions might agree that such an admonition by a parent might deprive a teenager of his constitutional rights.

In *Foster v. State*,³² defendant on a boat radioed the Coast Guard that he had killed two people and had thrown their bodies overboard. He was then taken into custody and inadequate *Miranda* warnings were given. Defendant again admitted the murders and also re-enacted them. The court found that the initial statements made by the defendant were not made as a result of any custodial situation. Under these circumstances, compliance with the *Miranda* requirements was not necessary because defendant voluntarily admitted his crime before he was taken into custody.

D. Use of Confession at Trial

The introduction into evidence of a co-defendant's confession implicating the defendant does not constitute reversible error, even though the co-defendant elected not to testify and was unavailable for cross-examination, if there was ample corroborative evidence as to defendant's guilt, particularly if it was given by the victim.³³ It is upon this latter point that this situation can be distinguished from *Bruton v. United States*.³⁴ In *Brown v. State*,³⁵ the court held that *Bruton* does not apply in a non-jury case but, if it did apply, the state could nevertheless urge that the conviction is valid, notwithstanding error in considering incriminating statements made by the co-defendant, on the ground that the case against the defendant is so overwhelming that the error is harmless beyond a reasonable doubt.

The fact that a confession was oral and not written or recorded, would go only to the weight to be given it by the trial judge in determining its voluntariness and by the jury in its findings of fact.³⁶

In *Williams v. State*,³⁷ defendant's written confession was not admitted because the state was unable to produce the stenographer who took the confession. Yet statements made to a police officer which re-

30. *Johnson v. State*, 268 So. 2d 544 (Fla. 3d Dist. 1972).

31. 259 So. 2d 752 (Fla. 1st Dist. 1972).

32. 266 So. 2d 97 (Fla. 3d Dist. 1972).

33. *Blackwell v. State*, 269 So. 2d 737 (Fla. 1st Dist. 1972).

34. 391 U.S. 123 (1968).

35. 252 So. 2d 842 (Fla. 3d Dist. 1971). See also *Pressley v. State*, 261 So. 2d 522 (Fla. 3d Dist. 1972).

36. *Ashley v. State*, 265 So. 2d 685 (Fla. 1972).

37. 261 So. 2d 855 (Fla. 3d Dist. 1972).

lated to facts contained in the written confession were admitted into evidence. The court held that since there was no evidence of duress or inducement, and the oral statements were made at another place and time, it was not error to admit them even if the written confession was inadmissible.

The District Court of Appeal, First District, stated in *Hernandez v. State*³⁸ that:

[T]he admissibility of a confession shall be determined by the trial court from a preliminary consideration of evidence offered by either party bearing on the circumstances, conditions and surroundings under which the confession was made, which may include evidence as to age, sex, disposition, experience, character, education, training, intelligence and the mental condition of the defendant.³⁹

This determination should be made in the absence of the jury, so as to prevent it from being prejudiced against a defendant if the confession was not voluntarily made.⁴⁰

The rule that it is error to show that the defendant remained silent during interrogation has been held to be subject to the harmless error rule. In *Wright v. State*,⁴¹ the court upheld as harmless error, the admission of a police officer's testimony that defendant had no explanation for stolen items in an automobile after he had been advised of his rights to counsel and to remain silent.

When the defendant and the police officers give different versions of the same event, the defendant's version is not binding on the court. The police officer's version may satisfy the state's burden to prove that the confession was voluntary.⁴²

In *Richardson v. State*,⁴³ a psychiatrist testified that during the course of a mental examination defendant said that he had been picked up for various things but had not been convicted and that he had beaten a robbery charge. The court held that, although it is not proper for a psychiatrist to repeat at trial the statements of the accused taken during his mental examination, it was harmless error since the evidence of guilt was overwhelming and the prejudicial effect could have been removed by a request to strike the statement and an instruction that the jury disregard it.

In *State v. Retherford*,⁴⁴ the Supreme Court of Florida, adopting the holding in *Harris v. New York*,⁴⁵ ruled that once a defendant has volun-

38. 273 So. 2d 130 (Fla. 1st Dist. 1973).

39. *Id.* at 133, citing *Brown v. State*, 135 Fla. 30, 184 So. 518 (1938).

40. *Hernandez v. State*, 237 So. 2d 130 (Fla. 1st Dist. 1973).

41. 251 So. 2d 890 (Fla. 1st Dist. 1971).

42. *Barker v. State*, 271 So. 2d 790 (Fla. 3d Dist. 1973).

43. 248 So. 2d 530 (Fla. 3d Dist. 1971).

44. 270 So. 2d 363 (Fla. 1972).

45. 401 U.S. 222 (1971).

tarily taken the stand, his credibility may be impeached by the introduction of prior conflicting statements made before he was given the *Miranda* warnings.

It is incumbent upon the state to prove the corpus delicti in every case. In so doing it must rely on proof other than the confession of the defendant. Thus, where only hearsay evidence could establish the corpus delicti, the conviction had to be set aside even though the defendant had confessed.⁴⁶

II. SEARCH AND SEIZURE

A search warrant is invalid if it fails to require the person executing the warrant to bring the property found and the person in possession thereof before either the magistrate who issued the warrant or some other court having jurisdiction of the offense.⁴⁷ An 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 is stolen property.⁴⁸ Accordingly, where a search warrant sufficiently described certain of the items seized, but did not describe a sufficient amount, the property was properly seized since the thieves accompanied the police officers during the search and identified the property received by the defendant as stolen.⁴⁹

It was held that a search warrant which failed to show the specific time or times when an informant allegedly obtained narcotics from the defendant's premises was fatally defective.⁵⁰ In *State v. Henderson*,⁵¹ the District Court of Appeal, Fourth District, held that if the original search warrant was signed by the proper officer and was read to the defendant in toto before the search was commenced, the ministerial act of leaving an unsigned and undated duplicate of the original search warrant, would not be prejudicial error. The state in such a situation has the burden of producing the original warrant and showing that it had been read to the defendant. If a search warrant leaves out the date of execution, but that date can be indisputably deduced from other dates in the documents, the evidence obtained will not be suppressed if the error is not prejudicial.⁵²

The issue in search warrant proceedings is not guilt beyond a reasonable doubt, but probable cause for believing that a crime has been committed and that evidence has been secreted in a specific place.⁵³ Thus, hearsay evidence may provide the probable cause necessary for the issu-

46. *Smart v. State*, 274 So. 2d 577 (Fla. 2d Dist. 1973).

47. *State v. Dawson*, 276 So. 2d 65 (Fla. 1st Dist. 1973).

48. *Partin v. State*, 277 So. 2d 847 (Fla. 3d Dist. 1973).

49. *State v. Hutchins*, 269 So. 2d 377 (Fla. 2d Dist. 1972).

50. *State v. Mills*, 267 So. 2d 44 (Fla. 2d Dist. 1972).

51. 253 So. 2d 158 (Fla. 4th Dist. 1971).

52. *State v. Cain*, 272 So. 2d 549 (Fla. 2d Dist. 1972).

53. *Anderson v. State*, 265 So. 2d 404 (Fla. 1st Dist. 1972).

ance of a search warrant.⁵⁴ In *Ingram v. State*,⁵⁵ the District Court of Appeal, Fourth District, held that where an officer approached the defendant for the purpose of obtaining information and recognized him as the person who, according to hearsay reports, was armed with a revolver, the officer properly conducted a search of the defendant for a weapon.

Probable cause cannot be based on mere suspicion; it must be based on facts known to exist. However, the test for probable cause is not whether the evidence would be admissible for the purpose of proving guilt at trial, but whether the information would lead a man of prudence and caution to believe that the offense has been committed.⁵⁶ The District Court of Appeal, Second District, has stated that justification for seizure need not be established by proof beyond and to the exclusion of reasonable doubt but may be proven by clear and convincing evidence.⁵⁷

A warrantless search must be founded on probable cause.⁵⁸ Under the "open view" doctrine it is not an unreasonable search for an officer to move to a position where he has a legal right to be, and look for things he may have reason to believe will be seen.⁵⁹ Accordingly, in *Moore v. Wainwright*,⁶⁰ the District Court of Appeal, First District, held that a warrantless seizure of stolen television sets and other items of property from an abandoned farmhouse was not illegal since the television set was placed near an open door of the house, was clearly visible, and was found by the officers without the necessity of searching the premises. Also, once the privacy of a dwelling has been lawfully invaded, the police are not required to obtain an additional warrant to seize items that they discover in a lawful search.⁶¹

In *Chavis v. State*,⁶² the defendant was stabbed. While in the emergency room of the hospital, a police officer made an inventory search of his clothing without a warrant and found a package of heroin. The court held that the actions of the police officer were justified because the search was made with the preservation of evidence in mind, a valid procedure in investigating a crime. Compare the facts in *Johnson v. State*:⁶³ A police officer had helped to carry defendant's wife up the stairs to their apartment. While placing the wife upon the bed, the officer pulled out a small automatic weapon from defendant's coat pocket. The court held that the officer had no probable cause to justify the search and seizure of the gun since defendant was in his own home, had committed

54. *Id.*

55. 264 So. 2d 109 (Fla. 4th Dist. 1972).

56. *Suiero v. State*, 248 So. 2d 219 (Fla. 4th Dist. 1971).

57. *State v. Ansley*, 251 So. 2d 42 (Fla. 2d Dist. 1971).

58. *State v. Miller*, 267 So. 2d 352 (Fla. 4th Dist. 1972).

59. *Id.*

60. 248 So. 2d 262 (Fla. 1st Dist. 1971).

61. *Partin v. State*, 277 So. 2d 847 (Fla. 3d Dist. 1973).

62. 274 So. 2d 544 (Fla. 3d Dist. 1973).

63. 253 So. 2d 732 (Fla. 2d Dist. 1971).

no act involving a violation of the law, and had not threatened anyone and was at the time of the search cooperating with the police officer.

In *State v. Olson*,⁶⁴ the court held Florida Statutes, section 465.131 (1971),⁶⁵ valid as a reasonable exercise of the state's police power. A warrantless administrative search is constitutional and neither probable cause nor suspicion that illegal activity is or has been going on is required. In addition, the court held that the instant search was not made on pretext merely because another law enforcement agency had a concurrent or common interest in the search and had either encouraged the search by authorized agents or accompanied the agent in a search limited to areas incident to the licensed activity.⁶⁶

Abandoned property is not subject to the constitutional safeguards against unreasonable search and seizures. Thus, where a police officer had stopped the defendant and inquired about a bulge in defendant's trousers and the defendant produced a vial from his pocket and threw it into an adjacent waterway, there was an abandonment of possession. The vial, which was found to contain marijuana, was admissible, notwithstanding the fact that the officer had no valid basis to stop and interrogate the defendant.⁶⁷

The constitutional protection against unreasonable searches and seizures applies in cases involving governmental action only and does not apply to searches and seizures made by private individuals.⁶⁸ Thus, where a police officer was told by the operator of a service station that he had observed defendant with narcotics paraphernalia through an opening in the restroom wall, the officer had probable cause to arrest the defendant, notwithstanding the alleged violation of defendant's privacy by the service station operator.⁶⁹

An automobile may be searched without a warrant where the officers have probable cause to believe that the automobile contains articles which they are entitled to seize. In *State v. Sanders*,⁷⁰ police officers arrested the defendant in his car on a charge of rape. The police then searched the car for the gun thought to have been used in the rape although he was already in custody. The court reasoned that it would have

64. 267 So. 2d 878 (Fla. 2d Dist. 1972).

65. The Florida Pharmacy Act authorizes agents of the Board of Pharmacy to inspect, in a lawful manner at all reasonable hours, any retail drug establishment or manufacturer for the purpose of determining a violation of any regulation promulgated pursuant to the Act.

66. The court would probably not condone searches so frequently undertaken as to constitute undue harassment.

67. *Riley v. State*, 266 So. 2d 173 (Fla. 4th Dist. 1972). The court disregarded the "fruits of the poisonous tree" doctrine on the basis that the evidence was not produced through means of a search. The court did not consider the fact that the officer had no authority to stop the defendant initially.

68. *Bernovich v. State*, 272 So. 2d 505 (Fla. 1973).

69. *Werley v. State*, 271 So. 2d 814 (Fla. 3d Dist. 1973); see also note 54 *supra* and accompanying text, relating to searches based on hearsay.

70. 266 So. 2d 79 (Fla. 4th Dist. 1972).

taken too long to obtain a search warrant and the gun might have been lost, or perhaps taken by the employees of the car-towing company.

When police officers are lawfully in possession of a vehicle after its owner has been placed under arrest and are responsible for protecting it, it is reasonable to conduct a search for the purpose of making an inventory of the contents of the vehicle.⁷¹ Although a minor traffic violation cannot be used as a pretext to search a vehicle for evidence of other crimes, a defendant, who was stopped by policemen because he had exceeded the speed limit by about 15 miles per hour, was properly arrested for drinking and careless driving after the policemen detected alcohol on his breath.⁷² Before impounding the automobile, an inventory search was made which uncovered evidence leading to defendant's conviction for breaking and entering. The court held that the evidence should not be suppressed since this was a routine inventory of a car which had been taken into custody.

In *Gustafson v. Florida*,⁷³ defendant was arrested for driving his automobile without having the proper operator's license in his possession. During the course of a pat-down search of defendant the officer found a box containing marijuana cigarettes. The United States Supreme Court held that the officer was entitled to make a full search of defendant's person incident to the lawful arrest. It made no difference that there was no evidentiary purpose for the search and that the officer did not indicate any subjective fear of the defendant. The Court relied heavily on *United States v. Robinson*,⁷⁴ which was decided on the same day. In *Robinson*, the Court also held that in the case of a lawful custodial arrest, a full search of the defendant's person is not only an exception to the warrant requirement of the fourth amendment, but is also a "reasonable" search.

Before *Gustafson* was decided by the United States Supreme Court, the Florida courts began to apply the holding of the Supreme Court of Florida in *State v. Gustafson*.⁷⁵ In *State v. Foust*,⁷⁶ defendant was stopped by a police officer without probable cause. The officer then discovered that a bench warrant had been issued against the defendant. The officer then arrested the defendant and conducted a search which disclosed marijuana. The court held the search valid under *State v. Gustafson*.⁷⁷

71. *State v. Cash*, 275 So. 2d 605 (Fla. 1st Dist. 1973).

72. *Urquhart v. State*, 261 So. 2d 535 (Fla. 2d Dist. 1971).

73. 94 S. Ct. 488 (1973).

74. 94 S. Ct. 467 (1973). This case is noted at 28 U. MIAMI L. REV. 974 (1974).

75. 258 So. 2d 1 (Fla. 1972). The court held that a search which reasonably ensues after a legal arrest is proper, without regard to whether there is a nexus between the offense in question and the object sought.

76. 262 So. 2d 686 (Fla. 3d Dist. 1972).

77. 258 So. 2d 1 (Fla. 1972). There was no discussion of the reasonableness of the search. The court also felt that it was immaterial that the officers had no probable cause for stopping the defendant originally. This is another case in which a Florida court has disregarded the "fruits of the poisonous tree" doctrine. See also *State v. Hatten*, 264 So. 2d 16 (Fla. 3d Dist. 1972).

Advising one of his right not to consent to a search is not required either to validate a consent or to establish (*prima facie*) that the search was voluntary.⁷⁸ Instead, all surrounding circumstances must be considered in deciding the question of voluntariness.⁷⁹ In *Earman v. State*,⁸⁰ the Supreme Court of Florida held that a search conducted by officers following their illegal entry into a house for the purpose of arresting the defendant did not lose its unconstitutional taint even though the defendant had consented to the search. Consent to the search had taken place after one of the officers drew a gun, made a preliminary search of the house, illegally arrested and searched the defendant and took him to an upstairs bedroom where he signed the consent while sitting on a bed beside an open box of marijuana.

Conversely, one who voluntarily turns his car keys over to the police cannot later complain about the legality of the search.⁸¹ The District Court of Appeal, Third District, has held that where the police searched defendant's briefcase at the jail prior to delivering it to him in his cell, the search was reasonable and had to be considered as having been made with defendant's implied consent. The court noted that defendant could not expect the police to give him his suitcase without first examining it.⁸² In *Powers v. State*,⁸³ a female undercover agent and a friend entered the defendant's house as guests. The agent observed the smoking of marijuana and asked that a cigarette be rolled for her which she kept as evidence. The court held that the evidence should not be suppressed since the agent's entry was legal, creating an implied consent to the seizure of the evidence. The fact that the entry into the house was accomplished by fraud did not negate the consent where, as here, the entry was not forcible.

In executing a search warrant an officer must attempt to call his presence to the attention of those within the residence by knocking or other reasonable means before entering the residence. He must also announce his authority and the purpose of his visit at the residence.⁸⁴ If the officer fails to do this, the items seized are not admissible into evidence.⁸⁵ However, an officer's entry without first announcing his presence and purpose is justified if the officer's safety would otherwise be imperiled.⁸⁶ In *State v. Kelly*,⁸⁷ the District Court of Appeal, Second Dis-

78. *State v. Spanierman*, 267 So. 2d 102 (Fla. 2d Dist. 1972).

79. *Id.*

80. 265 So. 2d 695 (Fla. 1972).

81. *State v. Custer*, 251 So. 2d 287 (Fla. 2d Dist. 1971).

82. *State v. Kircheis*, 269 So. 2d 16 (Fla. 3d Dist. 1972).

83. 271 So. 2d 462 (Fla. 1st Dist. 1973).

84. *State v. Collier*, 270 So. 2d 451 (Fla. 4th Dist. 1972), *construing* FLA. STAT. § 933.09 (1973).

85. *Id.*

86. *State v. Bell*, 249 So. 2d 748 (Fla. 4th Dist. 1971). *See also* *Benefield v. State*, 160 So. 2d 706 (Fla. 1964).

87. 260 So. 2d 903 (Fla. 2d Dist. 1972).

strict, held that the statutory "knock and announce" requirements were violated when police officers, with a search warrant, stepped into the defendant's house without first announcing their presence even though the drugs seized could have been easily destroyed by the defendants had they known that police officers were present.

Rule 3.190(h) of the Florida Rules of Criminal Procedure requires that the trial court hold a hearing on a motion to suppress and rule on the motion before the trial begins, upon the basis of the evidence adduced at the hearing on the motion.⁸⁸ It is error to fail to suppress in-court testimony concerning an article of evidence when an in-court motion to suppress the evidence was not ruled on, notwithstanding the fact that the articles were not received in evidence.⁸⁹ Where defendant's motion to suppress is denied and for this reason he pleads nolo contendere, he has preserved for appeal the issue on his motion to suppress even though the plea of nolo contendere was not expressly made on condition that the error be preserved.⁹⁰ In *Paulson v. State*,⁹¹ the court, affirming defendant's conviction, distinguished the case of *Davis v. Mississippi*,⁹² which had recognized that the prohibitions of the fourth amendment apply to the taking of fingerprints. In the present case, the initial arrest for drunkenness was not for the purpose of obtaining fingerprints, or investigating other crimes.

The statute⁹³ providing that the state attorney may authorize an application for a court order permitting the interception of wire or oral communications permits the delegation of such authority to any assistant state attorney.⁹⁴ The justices of the Supreme Court of Florida have jurisdiction to issue an interception order.⁹⁵ A witness who has been summoned to appear and testify before a grand jury during an investigation concerning matters related to intercepted communications has no standing to challenge the legality of court authorized wiretaps by a preindictment and preinterrogation motion to suppress the communications.⁹⁶ If a wire tap is made without first securing the permission of a magistrate and is based on the consent of one of the parties to the conversation, the state must produce that party in order that the defendant have the opportunity to cross-examine him.⁹⁷

A defendant who complains of an unlawful search must claim and prove that he was, at the time of the search, the owner, tenant, or lawful

88. *Foster v. State*, 255 So. 2d 533 (Fla. 1st Dist. 1971).

89. *Id.*

90. *Ackles v. State*, 270 So. 2d 39 (Fla. 4th Dist. 1972).

91. 257 So. 2d 303 (Fla. 3d Dist. 1972).

92. 394 U.S. 721 (1969).

93. FLA. STAT. § 934.07 (1973).

94. *State v. Angel*, 261 So. 2d 198 (Fla. 3d Dist. 1972).

95. *State ex rel. Kennedy v. Lee*, 274 So. 2d 881 (Fla. 1973).

96. *In re Grand Jury Investigation Concerning Evidence Obtained by Court Authorized Wiretaps*, 276 So. 2d 234 (Fla. 1st Dist. 1973).

97. *Tollett v. State*, 272 So. 2d 490 (Fla. 1973).

occupant of the premises searched.⁹⁸ It is doubtful whether one who is not the owner of a vehicle could object to the search of the vehicle after being stopped for speeding.⁹⁹

III. CONSTITUTIONALITY OF STATUTES AND ORDINANCES

In *Furman v. Georgia*,¹⁰⁰ the United States Supreme Court held that capital punishment as a discretionary sentence was unconstitutional. Responding to this decision, the Supreme Court of Florida,¹⁰¹ in a very comprehensive opinion, examined the effect that *Furman* would have upon the various aspects of Florida law. Subsequent to this decision, the Florida Legislature revised sections 175.082 and 921.141 and reinstated the death penalty. Following conviction for a capital offense, a separate sentencing proceeding must now be held during which any evidence may be presented which the court deems relevant, including matters relating to certain enumerated aggravating and mitigating circumstances. An advisory sentence is rendered by the jury to the court which may enter a sentence of either death or life imprisonment. A written opinion must be given in support of a death sentence. These revisions were held constitutional by the Supreme Court of Florida in *State v. Dixon*.¹⁰² The rationale of the court was that the *Furman* decision did not totally prohibit the use of discretion in the sentencing procedure. The court reasoned that if the discretion necessary in the statute is "reasonable and controlled" and not "capricious and discriminatory," the test of *Furman* is fulfilled.¹⁰³

It was held that despite elimination of authorization from the 1968 Florida Constitution, a grand jury is still proper as it is founded in common law, and since the constitution¹⁰⁴ continues to imply its propriety.¹⁰⁵

Florida Statutes section 867.01 (1973), prohibiting the exhibition for pay or compensation of any crippled or physically-distorted, malformed or disfigured person in any circus, sideshow, etc., was found unconstitutional in that it failed to set forth reasonable standards to be followed in its application.¹⁰⁶

In contrast, the statutory provision that "[w]hoever commits such acts as are of the nature to corrupt the public morals or outrage the sense of public decency . . . shall be guilty of a misdemeanor . . ." ¹⁰⁷ is suffi-

98. *Russell v. State*, 270 So. 2d 462 (Fla. 3d Dist. 1972).

99. *State v. Patterson*, 252 So. 2d 398 (Fla. 2d Dist. 1971).

100. 408 U.S. 238 (1972). Because there were a number of varying opinions in *Furman*, the door still appears open for states to promulgate statutes providing capital punishment in certain cases. See FLA. STAT. § 775.082(1) (1973).

101. *Donaldson v. Sack*, 265 So. 2d 499 (Fla. 1972).

102. 283 So. 2d 1 (Fla. 1973).

103. This case is noted at 28 U. MIAMI L. REV. 723 (1974).

104. FLA. CONST. art. I, § 15(a).

105. *Reed v. State*, 267 So. 2d 70 (Fla. 1972).

106. *World Fair Freaks & Attractions, Inc. v. Hodges*, 267 So. 2d 817 (Fla. 1972).

107. FLA. STAT. § 877.03 (1973).

ciently clear in that all the terms are of general understanding and, therefore, the statute is valid.¹⁰⁸

In *Orlando Sports Stadium, Inc. v. State ex rel. Powell*,¹⁰⁹ the Supreme Court of Florida found that any person who maintains a place where the law is violated shall be guilty of maintaining a nuisance, that a place in which drugs are continually being used is a nuisance and that such a nuisance may properly be enjoined. Those statutes which provide for declaration of nuisance and subsequent injunction were found to be constitutionally acceptable.¹¹⁰

The validity of Florida Statutes chapter 790, covering weapons and firearms,¹¹¹ was upheld in a number of cases during the survey period. It is unlawful for felons to possess firearms under this chapter.¹¹² However, a number of felonies were exempted (*e.g.*, antitrust violations, unfair labor practices, nonsupport) as well as "other similar offenses" until the exceptions were eliminated in 1971.¹¹³ In *Driver v. Van Cott*,¹¹⁴ it was held that the "other similar offenses" clause was unconstitutionally vague and should be deleted from the statute, but such a finding did not render the rest of the statute invalid. Defendants Van Cott and Smith,¹¹⁵ who had previously been convicted of forgery and lottery violations respectively, did not come within the excepted felonies and were subject to prosecution under the statute.

In *Rinzler v. Carson*,¹¹⁶ it was held that the prohibition of possession of short-barreled rifles, shotguns, or machine guns¹¹⁷ does not violate the Florida Constitution, which gives a person the right to keep and bear arms.¹¹⁸ Although the legislature may not totally prohibit the right to keep and bear arms, the court held that it was within the police power to prohibit possession of certain weapons which are ordinarily used for criminal and improper purposes. Semi-automatic pistols, semi-automatic shotguns and rifles are commonly used by citizens for hunting and protection and are not banned by the statute.¹¹⁹ The *Rinzler* decision went on to state that where possession of a weapon was authorized by filing under the National Firearms Act,¹²⁰ it was an exception to the Florida

108. *State v. Magee*, 259 So. 2d 139 (Fla. 1972).

109. 262 So. 2d 881 (Fla. 1972).

110. See FLA. STAT. §§ 60.05, 828.05, 823.10 (1973).

111. FLA. STAT. ch. 790 (1973).

112. FLA. STAT. § 790.23 (1973).

113. FLA. STAT. § 790.23(2) (1969). The exceptions were eliminated in FLA. STAT. § 790.23(2) (1971).

114. 257 So. 2d 541 (Fla. 1971). See also *State ex rel. Jones v. Morphonios*, 258 So. 2d 42 (Fla. 3d Dist. 1972).

115. This case was a consolidation of two prosecutions.

116. 262 So. 2d 661 (Fla. 1972).

117. FLA. STAT. § 790.221 (1973).

118. FLA. CONST. Decl. of Rights § 8.

119. *Rinzler v. Carson*, 262 So. 2d 661 (Fla. 1972). See also *State v. Astore*, 258 So. 2d 33 (Fla. 2d Dist. 1972), holding FLA. STAT. §§ 790.001(14), .221, .221(3) (1973) (dealing with short-barreled rifles), not to be an infringement on the right to bear arms.

120. 26 U.S.C. § 5801 *et seq.* (1970).

statute. Where a municipal ordinance¹²¹ in that case failed to provide for such an exception, it was contrary and inferior to the state statute and could not be used to confiscate those weapons.

Those sections which make carrying a concealed weapon a third degree felony¹²² and the shooting or throwing of deadly missiles into vehicles, for example,¹²³ were held valid.¹²⁴

The Sex Offender Act¹²⁵ which provides a hearing to determine whether a defendant is a mentally disordered person after conviction¹²⁶ is not invalid as the statute meets the usual test of reasonable classification.¹²⁷

The statute which prohibits armed trespass upon a ranch with intent to commit larceny, depredation or other offenses¹²⁸ was held valid¹²⁹ as was the statute prohibiting lotteries.¹³⁰

Florida Statutes section 836.05 (1973), dealing with extortion, does not contain more than one subject and is thus constitutional.¹³¹ The bribery statute,¹³² which prohibits the offering to a public officer of a reward or compensation, is sufficient to withstand constitutional challenge.¹³³

The robbery statute,¹³⁴ which provides for a penalty ranging from imprisonment for life to any lesser term of years given at the discretion of the court, is not an improper delegation to the court by the legislature.¹³⁵

In a federal district court decision,¹³⁶ the term "lewdness" defined in the prostitution statute, Florida Statutes section 796.07 (1973), as any indecent or obscene act, was found to be unconstitutionally vague.

In *Roe v. Wade*,¹³⁷ the United States Supreme Court declared the Texas criminal abortion statute to be unconstitutional and set forth a "trimester" test for examining the validity of any similar statute. During

121. JACKSONVILLE, FLA., ORDINANCE CODE § 26-69 (1973).

122. FLA. STAT. § 790.01. (1973).

123. FLA. STAT. § 790.19 (1973).

124. *Bruno v. State*, 270 So. 2d 353 (Fla. 1972), and *Zachary v. State*, 269 So. 2d 669 (Fla. 1972), respectively.

125. FLA. STAT. ch. 917 (1973).

126. FLA. STAT. § 917.14 (1973).

127. *Dean v. State*, 265 So. 2d 15 (Fla. 1972), *reaffirmed*, 277 So. 2d 13 (Fla. 1973).

128. FLA. STAT. § 822.23 (1973).

129. *Holmes v. State*, 272 So. 2d 149 (Fla. 1973). *But see* the dissent of Ervin, J.

130. *Barron v. State*, 271 So. 2d 115 (Fla. 1972), *construing* FLA. STAT. § 849.09 (1971).

131. *Honchell v. State*, 257 So. 2d 889 (Fla. 1971).

132. FLA. STAT. § 838.071 (1973).

133. *DuCoff v. State*, 273 So. 2d 387 (Fla. 1973). The case continued to say that despite the statute's validity, the defendant's acceptance of money was not in violation of the law where he conformed to a municipal ordinance providing for distribution to charity where it is inappropriate to refuse a gift.

134. FLA. STAT. § 813.011 (1973).

135. *Byrd v. State*, 253 So. 2d 494 (Fla. 3d Dist. 1971).

136. *Miami Health Studios, Inc. v. City of Miami Beach*, 353 F. Supp. 593 (S.D. Fla. 1972).

137. 410 U.S. 175 (1973).

the first trimester of pregnancy, the abortion decision must be left to the medical judgment of the pregnant woman's physician. For the second trimester period, regulations which are reasonably related to the health of the mother may be promulgated by the state. Finally, in the last trimester (or period subsequent to the fetus' viability), the state may regulate and even proscribe abortions in order to promote the state's interest in human life, unless appropriate medical judgment deems abortion necessary for the preservation of the life or health of the mother. It is interesting to note that the Supreme Court of Florida had previously found Florida's abortion statute¹³⁸ to be unconstitutional.¹³⁹

The United States Supreme Court¹⁴⁰ upheld Florida's loyalty oath statute¹⁴¹ but found the statute's summary dismissal provision a denial of due process.

Florida Statutes chapter 800, which sets forth offenses for "crimes against nature" and "indecent exposure" was the subject of a number of decisions. In *Franklin v. State*,¹⁴² the Supreme Court of Florida struck down section 800.01, which had made "a crime against nature" a felony. The court urged the legislature to delineate clearly those acts that it wishes prohibited and found that their failure to do so made the present statute unconstitutionally vague. The court went on to hold valid section 800.02, making unnatural and lascivious acts punishable as a misdemeanor.¹⁴³ Those defendants prosecuted under the invalid section 800.01 would have their cases remanded for prosecution and sentence for the lesser offense set forth in section 800.02.¹⁴⁴ The statutory provisions relating to indecent exposure¹⁴⁵ were held to be constitutional.¹⁴⁶

The *Franklin* decision was held not to have retroactive effect. The United States Supreme Court¹⁴⁷ found this prospective interpretation to be a valid exercise of the Florida court's power.

In *Papachristou v. City of Jacksonville*,¹⁴⁸ the United States Supreme Court held that the Jacksonville vagrancy ordinance¹⁴⁹ was un-

138. Comp. Gen. Laws §§ 7144, 7579, [1927] (repealed 1972) (now FLA. STAT. § 458.22 (1973)).

139. *State v. Barget*, 262 So. 2d 431 (Fla. 1972); see also *Medlin v. State*, 267 So. 2d 823 (Fla. 1972); *Girona v. State*, 263 So. 2d 193 (Fla. 1972).

140. *Connell v. Higgenbotham*, 403 U.S. 207 (1971).

141. FLA. STAT. §§ 876.05-.10 (1973).

142. 257 So. 2d 21 (Fla. 1971).

143. See also *Witherspoon v. State*, 278 So. 2d 611 (Fla. 1973); *Parisi v. State*, 265 So. 2d 699 (Fla. 1972).

144. See *Parisi v. State*, 265 So. 2d 699 (Fla. 1972); *Robitaille v. State*, 266 So. 2d 675 (Fla. 1st Dist. 1972). See also *Christian v. State*, 272 So. 2d 852 (Fla. 4th Dist. 1973); *Morris v. State*, 261 So. 2d 563 (Fla. 2d Dist. 1972).

145. FLA. STAT. § 800.03 (1973) (prohibiting exposure of sexual organs in public places), and FLA. STAT. § 800.04 (1973) (prohibiting lewd and lascivious acts in the presence of a child).

146. *State v. Petillo*, 250 So. 2d 264 (Fla. 1971), upholding FLA. STAT. § 800.03 (1971); *Chesebrough v. State*, 255 So. 2d 675 (Fla. 1971), upholding FLA. STAT. § 800.04 (1971).

147. *Wainwright v. Stone*, 94 S. Ct. 190, rev'g 478 F.2d 390 (5th Cir. 1973).

148. 405 U.S. 156 (1972).

149. JACKSONVILLE, FLA., ORDINANCE CODE § 26-57 (1973).

constitutionally vague in that it "failed to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute."¹⁵⁰ Justice Douglas found that the statute "encourages arbitrary and erratic arrests."¹⁵¹ Florida's vagrancy statute,¹⁵² very similar to the Jacksonville statute, failed to meet constitutional muster as well in an accompanying decision.¹⁵³

The disorderly conduct and unlawful assembly ordinances of the City of Daytona Beach¹⁵⁴ were found to be sufficiently clear and not overly broad.¹⁵⁵ In examining the language of the statute, the District Court of Appeal, First District, found that the words "riot," "riotous," "tumultuous," etc., could be defined so as to inform persons of the conduct which is prohibited and not to infringe upon their freedom of speech.¹⁵⁶ This case was so decided despite a holding by the United States Court of Appeals for the Fifth Circuit that the disorderly conduct ordinance¹⁵⁷ of the Miami Code was void for vagueness.¹⁵⁸

In reversing a district court opinion, the Supreme Court of Florida found a city ordinance¹⁵⁹ proscribing "verbal abuse" of a police officer while he is performing his duties to be valid because it was sufficiently precise in describing the offense and gave fair warning to the citizen.¹⁶⁰

In *Miller v. California*,¹⁶¹ the United States Supreme Court once again attempted to formulate a test for obscene literature. It was held that material is subject to state prohibition if, when taken as a whole: 1.) it appeals to the prurient interest; 2.) it is patently offensive in depicting sexual conduct specifically defined by applicable state law; and, 3.) the work, taken as a whole, lacks serious literary, artistic, political or scientific value.¹⁶² The court attempted to provide a more concrete, workable standard for use by the states and, in fact, permitted the states to define "obscenity" according to local standards. Whether this will truly provide a better test or result in an incomprehensible variety of standards within the state itself, is yet to be determined.¹⁶³

150. 405 U.S. at 162.

151. *Id.* citing *Thornhill v. Alabama*, 310 U.S. 88 (1940) and *Herndon v. Lowry*, 301 U.S. 242 (1937).

152. Comp. Gen. Laws § 1655, [1927] (repealed 1972).

153. *Smith v. Florida*, 405 U.S. 172 (1972), *rev'g* 239 So. 2d 250 (Fla. 1970); see *Russo v. State*, 270 So. 2d 428 (Fla. 4th Dist. 1972), relying on *Smith* and *Papachristou* to hold Plantation's vagrancy statute unconstitutional.

154. DAYTONA BEACH, FLA. MUN. ORDINANCE § 28-15(1)(b) (1973) (disorderly conduct), and § 28-58 (unlawful assembly).

155. *City of Daytona Beach v. Brown*, 273 So. 2d 124 (Fla. 1st Dist. 1973).

156. *Id.* at 126.

157. MIAMI, FLA., CITY CODE § 38-10(a) (1967) (breach of peace) and § 38-10(f) (obscene or profane language in another's presence).

158. *Livingston v. Garmire*, 437 F.2d 1050 (5th Cir. 1971).

159. ST. PETERSBURG, FLA., CITY ORDINANCE § 25.43.1 (1969).

160. *City of St. Petersburg v. Waller*, 261 So. 2d 151 (Fla. 1972), *cert. denied*, 409 U.S. 989 (1973), *rev'g* 245 So. 2d 685 (Fla. 2d Dist. 1971).

161. 93 S. Ct. 2607 (1973).

162. *Id.* at 2615.

163. See 28 U. MIAMI L. REV. 238 (1973).

Prior to *Miller*, the Florida courts had consistently upheld various obscenity statutes in a number of decisions.¹⁶⁴

IV. RIGHT TO CONFRONTATION AND RIGHT TO CROSS-EXAMINATION

The District Court of Appeal, First District, has held that the admission into evidence of a transcript of testimony given by a state's witness at the preliminary hearing is proper should the witness die prior to trial. The defendant was present with counsel at the preliminary hearing and the witness was fully cross-examined, although the transcript furnished the only evidence implicating the defendant.¹⁶⁵

The trial court must exercise its discretion in determining the non-availability of a witness or the degree of diligence the state exercised in attempting to locate that witness before admitting at trial, a transcript of the missing witness's testimony at the preliminary hearing.¹⁶⁶ The failure of the state to have a witness subpoena issued and delivered to the sheriff's department does not necessarily preclude admission of such a transcript.¹⁶⁷ Where the defense procured an affidavit from a witness, absent at the retrial in order to impeach his testimony for the state at a prior mistrial and which the state sought to reintroduce, such affidavit was properly excluded because it was taken without the state's knowledge and defendants could have taken steps to preserve the witness's testimony before he left the country.¹⁶⁸

Judicial notice of a statute, taken at the defendant's request, will not be construed as introduction of evidence on behalf of the accused for the purpose of depriving him of his right to the concluding argument before the jury.¹⁶⁹ Denial of the right to opening and closing arguments

164. *Mitchem v. State*, 250 So. 2d 883 (Fla. 1971); *May v. Harper*, 250 So. 2d 880 (Fla. 1971); *Paris Follies, Inc. v. State*, 259 So. 2d 532 (Fla. 3d Dist. 1972); *Little Beaver Theatres, Inc. v. State*, 259 So. 2d 217 (Fla. 3d Dist. 1972); *United Theatres of Fla., Inc. v. State ex rel. Gerstein*, 259 So. 2d 210 (Fla. 3d Dist. 1972); *State ex rel. Little Beaver Theatres, Inc. v. Tobin*, 258 So. 2d 30 (Fla. 3d Dist. 1972) (Miami obscenity ordinance not vague); *Mitchum v. State*, 251 So. 2d 298 (Fla. 1st Dist. 1971); all holding FLA. STAT. § 847.011 (1971) valid; *Davidson v. State*, 251 So. 2d 841 (Fla. 1971) (holding FLA. STAT. § 847.013 (1971) valid and using community standards test). *But see* the opinion of the Supreme Court of the United States in *Jenkins v. Georgia*, 94 S. Ct. 2750 (1974), reversing a conviction under the Georgia obscenity statute and holding that states do not have unbridled discretion to determine what is obscene because only the depiction of "hard core" sexual conduct is excluded from constitutional protection.

165. *James v. State*, 254 So. 2d 838 (Fla. 1st Dist. 1971).

166. *Outlaw v. State*, 269 So. 2d 403 (Fla. 4th Dist. 1972). The dissent strongly emphasized the abrogation of the defendant's constitutional right to confront witnesses in the presence of the jury where the state has failed to sustain its burden regarding the unavailability of the witness and has failed to employ the power and experience of the sheriff's department which was characterized as the "very machinery available to the court for this express purpose." *Id.* at 405.

167. *Outlaw v. State*, 269 So. 2d 403 (Fla. 4th Dist. 1972).

168. *Newton v. State*, 272 So. 2d 15 (Fla. 3d Dist. 1973).

169. *Wyatt v. State*, 270 So. 2d 47 (Fla. 4th Dist. 1972). Such a right accrued pursuant to Florida Statutes section 918.09 (1971), which is no longer in force although rule 3.250, Florida Rules of Criminal Procedure, provides for the same rights.

on the ground that testimony of a witness called by a co-defendant accrued to the benefit of all the defendants was reversible error.¹⁷⁰

V. APPEAL

In *Earnest v. State*,¹⁷¹ defendant sought by certiorari to review the trial court's refusal to suppress evidence in a criminal prosecution. The court held that "the discretionary writ of certiorari will be granted to review an interlocutory order . . . only in those cases in which it clearly appears that there is no full, adequate and complete remedy available . . . after final judgment."¹⁷² When appeals to the circuit court from a judgment of a municipal court have been exhausted, appeal to the district courts of appeal by writ of certiorari is not authorized unless the actions of the circuit court resulted in a clear miscarriage of justice.¹⁷³

If a petition for a writ of certiorari is not the proper remedy, the appellate court will consider the petition and determine whether another remedy is available. Thus, in *Thompson v. Dilley*¹⁷⁴ the Supreme Court of Florida held that under the new provision in the Florida Constitution,¹⁷⁵ it was required to "consider the petition—no matter its label or the remedy sought—if it has merit and if we have jurisdiction upon any proper basis."¹⁷⁶ The court thereupon issued the writ of habeas corpus.

Although a defendant has an absolute right to appeal, an appeal is not automatic.¹⁷⁷ A court will grant delayed appellate review only where it is shown by defendant that his right to appeal has been frustrated by state action.¹⁷⁸ Thus, where a court-appointed counsel fails to prosecute a requested appeal, defendant cannot be denied his constitutional right of appeal.¹⁷⁹ It is not permissible for a defendant to file successive appeals, stating a different ground in each one.¹⁸⁰

In *City of Miami v. Brown*¹⁸¹ no stenographic report was made of the proceedings in the municipal court. The defendant and the City would not agree on the contents of a record on appeal and the trial judge could not remember the case. The district court held that the defendant "should not be deprived of the benefit thereof by refusal of the appellee

170. *Davis v. State*, 256 So. 2d 22 (Fla. 2d Dist. 1971).

171. 253 So. 2d 458 (Fla. 1st Dist. 1971).

172. *Id.* at 459, citing *Simpson v. Broward County*, 241 So. 2d 193, 194 (Fla. 4th Dist. 1970).

173. *Sossin Sys., Inc. v. City of Miami Beach*, 262 So. 2d 28 (Fla. 3d Dist. 1972).

174. 275 So. 2d 234 (Fla. 1973).

175. "[N]o cause shall be dismissed because an improper remedy has been sought." FLA. CONST. art. V, § 2(a).

176. 275 So. 2d at 234.

177. *Harrell v. Wainwright*, 268 So. 2d 184 (Fla. 2d Dist. 1972).

178. *Id.*

179. *Thompson v. Dilley*, 275 So. 2d 234 (Fla. 1973). The court relied on its decision in *Baggett v. Wainwright*, 229 So. 2d 239 (Fla. 1970).

180. *Palmer v. State*, 273 So. 2d 135 (Fla. 3d Dist. 1973).

181. 256 So. 2d 78 (Fla. 3d Dist. 1971).

or its counsel to co-operate"¹⁸² and that the circuit court was entitled to consider the appeal on the record as it then stood.¹⁸³

The District Court of Appeal, Fourth District, has held, that where the transcript of instructions given to the jury was not available due to the death of the court reporter and the disappearance of his notes, judgment against the defendant must be reversed.¹⁸⁴

In *Hooks v. State*,¹⁸⁵ the Supreme Court of Florida held that though an indigent defendant has an absolute right to counsel on his first appeal no such right exists in subsequent proceedings. The court stated that:

The question in each proceeding of this nature before this Court should be whether, under the circumstances, the assistance of counsel is essential to accomplish a fair and thorough presentation of petitioner's claims. Of course, doubts should be resolved in favor of the indigent petitioner when a question of the need for counsel is presented.¹⁸⁶

The filing of a notice of appeal is jurisdictional, but a dismissal of an appeal for lack of jurisdiction does not prohibit a defendant from filing a petition for habeas corpus in the same court.¹⁸⁷ If notice of appeal was filed prior to the entry of the judgment and sentence, the notice does not confer jurisdiction upon the district court of appeal and, absent proper filing, the appeal must be dismissed.¹⁸⁸

The Florida Appellate Rules provide that a decision, judgment, order or decree shall not be deemed rendered until any proper and timely post-trial motion is disposed of.¹⁸⁹ Thus, in *White v. State*,¹⁹⁰ where a proper post-trial motion for discharge in the nature of a petition for rehearing was made, the case was reviewable since the judgment was not more than 30 days old when the appeal was taken. Since the time for filing a notice of appeal is measured from the rendition of the order appealed, appellate jurisdiction will not be conferred unless it is clear to the appellate court at what date the order was rendered.¹⁹¹

VI. BAIL

In *Gustafson v. State*,¹⁹² it was held that in the absence of statutory authorization, a defendant's bail money may not be withheld to satisfy

182. *Id.* at 79.

183. *Id.*

184. *Yancey v. State*, 267 So. 2d 836 (Fla. 4th Dist. 1972).

185. 253 So. 2d 424 (Fla. 1971).

186. *Id.* at 426.

187. *Evans v. State*, 255 So. 2d 711 (Fla. 1st Dist. 1971).

188. *Holmes v. State*, 267 So. 2d 344 (Fla. 4th Dist. 1972).

189. FLA. APP. R. 1.3.

190. 267 So. 2d 360 (Fla. 2d Dist. 1972).

191. *Sparks v. State*, 262 So. 2d 251 (Fla. 4th Dist. 1972). The judge endorsed on the motion an order denying it, dated the motion and signed it, but the appellate court held that there was no basis for determining the date on which the order was rendered.

192. 251 So. 2d 689 (Fla. 4th Dist. 1971).

any fines or costs of the court as long as defendant has appeared at the time specified. Although the court cited no Florida cases, it held void a sheriff's "cash appearance bond" form that had been signed by the defendant which authorized such a deduction.

Florida courts continued to follow the principles set forth in *Younghans v. State*¹⁹³ as to the handling of bail applications. In *Wells v. Wainwright*,¹⁹⁴ the Supreme Court of Florida held that the granting of supersedeas bond following conviction was within the court's discretion but that such discretion could not be exercised arbitrarily. In *Wells*, it was clear that the court had not followed the standards enunciated in *Younghans* in denying bail to the defendant.

A rehearing of a defendant's bail application was ordered following a denial without explanation when a rubber stamp which stated "Motion Heard, Considered and . . ." had been affixed to the application, to which someone had added "Denied." The application was then signed by the judge.¹⁹⁵

The granting of post-conviction bail is not subject to article I, section 14 of the Florida Constitution, which concerns itself with bail prior to adjudication.¹⁹⁶ Thus, in *Hedden v. State*,¹⁹⁷ the court found that it was within the trial court's discretion to grant bail after conviction despite the fact that defendant had been given a mandatory life sentence.

Bail as a matter of right is only available prior to conviction, except in cases involving capital offenses or offenses punishable by life imprisonment where proof of guilt is evident or its presumption is great.¹⁹⁸ The Supreme Court of Florida has held that the prohibition of capital punishment by the United States Supreme Court¹⁹⁹ does not affect the constitutional bail provision in Florida, even though there are no longer any "capital offenses."²⁰⁰

A habeas corpus petition challenging bail as excessive was held to be best brought in the circuit court which could more ably deal with such matters. The circuit court has concurrent jurisdiction with the district courts of appeal even though it has no true supervisory or appellate jurisdiction over a circuit court which set bail.²⁰¹ It had been previously stated that, as a general rule, circuit courts are not empowered to deal by habeas corpus with the propriety of an order of court over which the court has

193. 90 So. 2d 308 (Fla. 1956).

194. 260 So. 2d 196 (Fla. 1972).

195. *Miller v. State*, 272 So. 2d 544 (Fla. 2d Dist. 1973), citing *Younghans v. State*, 90 So. 2d 308 (Fla. 1956).

196. *Wells v. Wainwright*, 260 So. 2d 196 (Fla. 1972), cited with approval, *Hedden v. State*, 275 So. 2d 52 (Fla. 2d Dist. 1973).

197. 275 So. 2d 52 (Fla. 2d Dist. 1973).

198. FLA. CONST. art. I, § 14; FLA. STAT. ch. 903 (1973); FLA. R. CRIM. P. 1.130, 3.130(c)-(f).

199. *Furman v. Georgia*, 408 U.S. 238 (1972).

200. *Donaldson v. Sack*, 265 So. 2d 499 (Fla. 1972).

201. *State ex rel. Renaldi v. Sandstrom*, 276 So. 2d 109 (Fla. 3d Dist. 1973).

no appellate jurisdiction; nevertheless, it is proper to do so when questioning the legality of a detention or the granting of bail.²⁰²

VII. JURY INSTRUCTIONS

During the survey period, the law concerning the need for jury instructions on lesser included offenses, as set down in *Brown v. State*,²⁰³ was the subject of several clarifying decisions. The Supreme Court of Florida in *Brown* classified the situations where instructions on lesser included offenses need be given:

- (1) Crimes divisible into degrees.
- (2) Attempts to commit offenses.
- (3) Offenses *necessarily* included in the offense charged.
- (4) Offenses which *may* or may not be included in the offense charged, depending on the accusatory pleading and the evidence.²⁰⁴

In *State v. Anderson*,²⁰⁵ the Supreme Court of Florida further elaborated on the discretion of the trial court with respect to the above-stated fourth category:

[I]t means that he may be convicted of any lesser offense, which, although not an essential ingredient of the major crime, is spelled out in the accusatory pleading in that it alleges all of the elements of the lesser offense and the proof at trial supports the charge.²⁰⁶

The key consideration as to the propriety of any given instruction concerning lesser included offenses is whether the defendant was apprised of all of which he might be convicted.²⁰⁷ Thus, where the record did not support the lesser included offenses of selling or offering for sale an interest in a lottery, it is not error for the trial court to refuse to instruct thereon.²⁰⁸

The refusal of the trial court to charge the jury upon the offense of aggravated assault as a lesser included offense in a homicide prosecution was error where the accusatory pleading charged the use of a deadly weapon and, therefore, encompassed aggravated assault.²⁰⁹ Similarly, it was error to refuse a request for an instruction on simple assault where

202. *Janes v. Heidtman*, 272 So. 2d 207 (Fla. 4th Dist. 1973).

203. 206 So. 2d 377 (Fla. 1968).

204. *Id.* at 381 (emphasis in original).

205. 270 So. 2d 353 (Fla. 1972), *rev'g* 255 So. 2d 550 (Fla. 2d Dist. 1971). The District Court of Appeal, Second District, applied different criteria testing the necessity of giving a requested lesser included offense charge, depending on whether the defendant or the state requested the instruction. *See Rodriguez v. State*, 257 So. 2d 81 (Fla. 2d Dist. 1972) which adheres to the rationale as set forth by the Second District in *Anderson*.

206. 270 So. 2d at 356.

207. *Id.*

208. *Id. Accord*, *State v. Fernandez*, 270 So. 2d 358 (Fla. 1972).

209. *Appell v. State*, 250 So. 2d 318 (Fla. 4th Dist. 1971).

the information alleged that the defendant did, by force, violence and assault, put the robbery victim in fear and where such allegation was supported by the evidence.²¹⁰ Where the display of a deadly weapon was adduced by the evidence and the pleadings, a charge on aggravated assault as a lesser included offense of robbery was justified.²¹¹ A charge on the offense of wilfully or wantonly unnecessarily or excessively chastising a child or ward was warranted in a prosecution for torturing or unlawfully punishing children.²¹² A simple assault and battery cannot be viewed as a lesser included offense within an aggravated assault accusation where the state's position rested entirely upon the shooting.²¹³ Where the information is silent as to allegations of assault with a deadly weapon and as to allegations of battery, neither a charge of aggravated assault nor of assault and battery would have been appropriate in a prosecution for robbery.²¹⁴ The offense of carrying a concealed weapon is not a lesser one included in the greater offense of assault with intent to commit murder.²¹⁵

In *Wilson v. State*,²¹⁶ the District Court of Appeal, Fourth District, held that the failure of the trial court to instruct the jury on bare assault which was a lesser included offense of robbery but not a necessarily included offense was reversible error. In doing so, the court refused to declare the error harmless because it was too difficult to determine "whether the failure of the trial judge to give the requested instruction resulted in injury to the substantial rights of the defendant."²¹⁷ However, the Supreme Court of Florida²¹⁸ reversed, holding that the error was harmless. The court rejected the rationale of the District Court of Appeal, Fourth District, that it is difficult for an appellate court to determine whether the failure to give the requested instructions resulted in injury to the substantial rights of the defendant by noting that such a determination is precisely what is required under Florida Statutes section 924.33 (1973).

The Supreme Court of Florida, in *Rayner v. State*,²¹⁹ interpreted Florida Rule of Criminal Procedure 3.150 as requiring a trial judge to instruct on necessarily included offenses. Such an instruction is mandatory notwithstanding the defendant's affirmative attempt to waive the giving of the instruction or defendant's objection thereto. Thus, the fail-

210. *Stephens v. State*, 279 So. 2d 331 (Fla. 2d Dist. 1973). *Accord*, *Bryan v. State*, 279 So. 2d 332 (Fla. 2d Dist. 1973).

211. *Morrison v. State*, 259 So. 2d 502 (Fla. 3d Dist. 1972).

212. *Robinson v. State*, 254 So. 2d 379 (Fla. 3d Dist. 1971).

213. *Richardson v. State*, 251 So. 2d 570 (Fla. 4th Dist. 1971).

214. *State v. Wilson*, 276 So. 2d 45 (Fla. 1973).

215. *Glaze v. State*, 249 So. 2d 742 (Fla. 1st Dist. 1971).

216. 265 So. 2d 411 (Fla. 4th Dist. 1972).

217. *Id.* at 414.

218. *State v. Wilson*, 276 So. 2d 45 (Fla. 1973).

219. 273 So. 2d 759 (Fla. 1973), *rev'g* 264 So. 2d 74 (Fla. 2d Dist. 1972), where it was held, in effect, that it was permissible for a defendant to affirmatively waive the giving of such instructions. *Accord*, *Henry v. State*, 277 So. 2d 78 (Fla. 2d Dist. 1973).

ure of the trial court to instruct the jury on a necessarily included offense constituted reversible error, although it was omitted pursuant to the defendant's request. Similarly, in *State v. Washington*,²²⁰ the supreme court held that the trial court had properly given instructions on necessarily included offenses over the objections of the defendant, and affirmed the conviction. However, the refusal of the trial court to give a requested charge of larceny in a robbery prosecution warranted reversal.²²¹ It has also been held that in a robbery prosecution, where no charge on a necessarily included offense of larceny was requested, and none was given, it was not reversible error.²²²

Absent a request for a lesser included offense instruction, the trial court is not required to give it.²²³ Neither is a trial judge precluded by an objection of the defendant from charging the jury on a lesser offense, which although not necessarily included, is embodied in the accusatory pleading and supported by the evidence.²²⁴ Where the evidence would not support a charge of first-degree murder, the giving of instructions on lesser included offenses was not error, notwithstanding defense counsel's objections.²²⁵ Instructions to the jury on lesser included offenses must be given even though it is the opinion of the trial judge that the proofs clearly established the major crime charged.²²⁶ However, a defendant may waive his right to have the jury charged as to lesser included offenses, where such charge is not mandatory.²²⁷

The Supreme Court of Florida held in *DeLaine v. State*²²⁸ that the only lesser included offenses in the crime of rape are assault with intent to commit rape, assault and battery and bare assault, and that the failure to so charge the jury constituted error. Accordingly, the court expressly decided that fornication is an offense separate and distinct from rape and is not necessarily an included offense.

It has been held that it is reversible error to deny a requested instruc-

220. 268 So. 2d 901 (Fla. 1972). The trial court had instructed the jury in a rape prosecution on the necessarily included offenses of assault with intent to commit rape, assault and battery, and simple assault. The District Court of Appeal, First District, in *Washington v. State*, 247 So. 2d 743 (Fla. 1st Dist. 1971) had reversed and its decision was quashed by the Supreme Court.

221. *Miles v. State*, 258 So. 2d 333 (Fla. 3d Dist. 1972), citing *Hand v. State*, 199 So. 2d 100 (Fla. 1967).

222. *Branam v. State*, 265 So. 2d 555 (Fla. 2d Dist. 1972). *Accord*, *Henry v. State*, 277 So. 2d 78 (Fla. 2d Dist. 1973). See note 223 *infra* and accompanying text.

223. *Burney v. State*, 276 So. 2d 520 (Fla. 2d Dist. 1973).

224. *Morrison v. State*, 259 So. 2d 502 (Fla. 3d Dist. 1972).

225. *Smith v. State*, 259 So. 2d 498 (Fla. 1st Dist. 1972). *Accord*, *Morrison v. State*, 259 So. 2d 502 (Fla. 3d Dist. 1972). The charge was held to be mandatory where the crime charged was not necessarily included, but where the evidence supported the lesser crime in a particular case.

226. *Lewis v. State*, 269 So. 2d 692 (Fla. 4th Dist. 1972).

227. *Black v. State*, 279 So. 2d 909 (Fla. 3d Dist. 1973).

228. 262 So. 2d 655 (Fla. 1972). It was held to be a harmless error where the trial court gave a charge on assault with intent to commit rape only but the jury convicted the defendant of rape. *Contra*, *Miles v. State*, 258 So. 2d 333 (Fla. 3d Dist. 1972). See also *Logan v. State*, 264 So. 2d 461 (Fla. 4th Dist. 1972).

tion on conspiracy to commit petit larceny, a misdemeanor, where the defendants were charged with conspiracy to commit robbery, a felony.²²⁹

Where the defendant was charged merely with illegal possession of a firebomb, the court erred in instructing the jury on conspiracy to possess the firebomb as a lesser included offense.²³⁰ Possession of an hallucinogenic drug is not an offense which is necessarily included in the offense of illegally selling an hallucinogenic drug.²³¹

An attempt to commit a crime must be classified as a lesser included offense if the crime charged is an offense prohibited by law.²³² Thus, an attempt to receive stolen property is a lesser included offense of a charge for receipt of stolen property.²³³ The provision of the rule stating that the trial judge *shall* charge the jury as to attempts to commit the offenses charged is mandatory, not merely permissive.²³⁴

A request for an instruction which has been denied, or an objection to a failure to give an instruction is a prerequisite to raising error on appeal.²³⁵ Despite the fact that the defendant's counsel did not submit a written request for instructions on the law of lesser included offenses at any time during the trial, this objection to the court's failure to so charge the jury was held to be adequate notice to the trial court, and the refusal to give the requested charges at that time constituted reversible error.²³⁶ Where the defendant did not request a cautionary instruction before the reception of evidence of prior convictions until most of the evidence had been admitted, there was no error.²³⁷ Where the defense fails to submit a request for a charge that the uncorroborated testimony of an accomplice in a capital case should be received with great caution, and does not object if it is not given, a new trial based on a finding of fundamental error is not warranted.²³⁸

A defendant is entitled to the standard jury instruction upon the

229. *Edwards v. State*, 275 So. 2d 265 (Fla. 4th Dist. 1973).

230. *Swindle v. State*, 254 So. 2d 811 (Fla. 2d Dist. 1971). The District Court of Appeal, Second District, relied on *Kinchen v. State*, 235 So. 2d 749 (Fla. 3d Dist. 1970), where it was held that conspiracy to commit a robbery is not an offense included under the charge of robbery, and that the trial judge could not properly adjudge the defendant guilty of conspiracy unless it was so alleged in the information.

231. *McPhee v. State*, 254 So. 2d 406 (Fla. 1st Dist. 1971), *citing* *Parker v. State*, 237 So. 2d 253 (Fla. 1st Dist. 1970). *See* note 263 *infra* and accompanying text. Each is a separate and independent offense and proof of one does not necessarily include the charge and proof of the other.

232. *Lewis v. State*, 269 So. 2d 692 (Fla. 4th Dist. 1972), *citing* *Brown v. State*, 206 So. 2d 377 (Fla. 1968).

233. *Lewis v. State*, 269 So. 2d 692 (Fla. 4th Dist. 1972).

234. *Henry v. State*, 277 So. 2d 78 (Fla. 2d Dist. 1973).

235. *Id. Accord*, *Ashley v. State*, 265 So. 2d 685 (Fla. 1972); *Williams v. State*, 247 So. 2d 425 (Fla. 1971); *McPhee v. State*, 254 So. 2d 406 (Fla. 1st Dist. 1971).

236. *Baker v. State*, 254 So. 2d 25 (Fla. 1st Dist. 1971).

237. *Ashley v. State*, 265 So. 2d 685 (Fla. 1972).

238. *Boykin v. State*, 257 So. 2d 251 (Fla. 1971). The court held that error harmless due to the cumulative effect of the general witness charge, the revealing cross-examination of the accomplice, and the inclusion of the content of the charge by counsel in their presentation to the jury.

defense of alibi in every case where there is sufficient evidence to take the issue to the jury, and it is not the function of the trial judge to weigh the evidence and decide on the basis when or whether the charge should be given.²³⁹

The District Court of Appeal, Second District, in *Kilgore v. State* held that "if *any* evidence of a substantial character is adduced, either upon cross-examination . . . or [directly] . . . the element of self-defense becomes an issue, and the jury, as the trier of the facts, should be duly charged as to the law thereon . . ." ²⁴⁰ Regardless of the quantum or the quality of the proof of self-defense, the existence of self-defense as an issue requires the charge to be given and the failure to do so constitutes error.²⁴¹

If there is any evidence to support a defense of entrapment,²⁴² or where there is conflicting evidence,²⁴³ the trial court must instruct the jury on the issue of entrapment. Where the instructions given by the trial court on the defense of entrapment were consistent with the law, the court did not err when it refused to give the defendant's requested charge.²⁴⁴

In *Willcox v. State*,²⁴⁵ the District Court of Appeal, Second District, found fault with instruction 2.13, Standard Jury Instruction in Criminal Cases, as promulgated by the Supreme Court of Florida, but held that the error was harmless. The challenge to the circumstantial evidence instruction was based upon objections to the phrase "if the circumstances are susceptible of two *equally* reasonable constructions, one indicating guilt and the other innocence, you must accept the construction indicating innocence."²⁴⁶ The court found the instruction erroneous in that once having heard it, the jury might exclude a hypothesis of innocence if it was equally as probative as the hypothesis of guilt, even though it might otherwise be reasonable; instead, the court noted that, it is the exclusion of all reasonable hypotheses of innocence which lends a reasonable hypothesis of guilt the force of proof. Where the state relies solely on circumstantial evidence, or when circumstantial evidence constitutes the substantial thrust of the state's case, a proper jury charge thereon should be given.²⁴⁷

239. *Davis v. State*, 254 So. 2d 221 (Fla. 3d Dist. 1971). The defendant had presented four alibi witnesses.

240. 271 So. 2d 148, 152 (Fla. 2d Dist. 1972). In *Jackson v. State*, 251 So. 2d 702 (Fla. 2d Dist. 1971), the district court held that the defendant's claim that he acted in self-defense was insufficient to warrant an instruction on self-defense. *Accord*, *Brosi v. State*, 263 So. 2d 849 (Fla. 3d Dist. 1972), where the evidence did not warrant an instruction on the law of entrapment.

241. *Kilgore v. State*, 271 So. 2d 148 (Fla. 2d Dist. 1972).

242. *Stiglitz v. State*, 270 So. 2d 410 (Fla. 4th Dist. 1972), *citing* *Stinson v. State*, 245 So. 2d 688 (Fla. 1st Dist. 1971).

243. *Avilia v. State*, 278 So. 2d 298 (Fla. 4th Dist. 1973).

244. *Evenson v. State*, 277 So. 2d 587 (Fla. 4th Dist. 1973).

245. 258 So. 2d 298 (Fla. 2d Dist. 1972).

246. STANDARD JURY INSTRUCTION IN CRIMINAL CASES 2.13.

247. *Anderson v. State*, 255 So. 2d 550 (Fla. 2d Dist. 1971).

The admission into evidence of impeachment statements with instructions that the statements were admitted solely for impeachment and not as substantive testimony is proper²⁴⁸ and the failure to so instruct constitutes reversible error.²⁴⁹

Where a case is submitted to the jury on a two-fold theory of premeditated murder and felony-murder, and the trial court fails to charge the jury on the various elements of the substantive felony, the failure to so charge is reversible error.²⁵⁰ In *Anderson v. State*,²⁵¹ the supreme court held that the failure of the trial court to define or explain to the jury the meaning of "premeditation" as used in an instruction for murder in the first degree was reversible error, even absent an objection by the defendant.

Despite the fact that the trial court tracked the applicable statute in defining murder in the second degree and manslaughter to the jury, the use of an instruction in which the technical phrases "evincing a depraved mind" and "culpable negligence" were given without further definition or explanation was considered grounds for reversal, even though the defendant had not requested additional explanatory instructions.²⁵²

Following a request by the jury that the court reread the instructions on first and second degree murder, the defendant asked the court to also give the instruction as to self-defense when the trial court repeated the requested instructions, and objected when the court failed to do so.²⁵³ The District Court of Appeal, First District,²⁵⁴ reversed the judgment of conviction, holding that the failure to repeat the self-defense instruction erroneously left the jury with an incomplete and potentially misleading instruction.

In *Walsingham v. State*,²⁵⁵ the Supreme Court of Florida held that an instruction defining the offense of abortion was prejudicial and misleading where it failed to include a statement to the effect that abortion is not unlawful if it is necessary to preserve the life of the mother. The court further held that where a trial court attempts to define the crime under which the accused is charged, it must define each and every element, and if it fails to do so, the charge is misleading and necessarily prejudicial to the accused.

248. *Walter v. State*, 272 So. 2d 180 (Fla. 3d Dist. 1973).

249. *Johnson v. State*, 249 So. 2d 470 (Fla. 3d Dist. 1971).

250. *Wright v. State*, 250 So. 2d 333 (Fla. 2d Dist. 1971).

251. 276 So. 2d 17 (Fla. 1973).

252. *Bryan v. State*, 271 So. 2d 197 (Fla. 1st Dist. 1972). The court, commenting on the standard jury instructions noted that "any substantial deviation from use of these instructions will almost always end in error on the part of the trial court." *Id.* at 199.

253. *Stills v. State*, 272 So. 2d 174 (Fla. 1st Dist. 1973), *citing* *Hedges v. State*, 172 So. 2d 824 (Fla. 1965).

254. *Id.*

255. 250 So. 2d 857 (Fla. 1971). The failure of the court to furnish the jury with a standard upon which to determine the lawfulness of the acts was reversible error.

Where the evidence established that the defendant, who was present prior to the crime, was apprehended in another city two weeks after the crime, the court properly submitted the issue to the jury of whether the defendant fled after the crime.²⁵⁶ Similarly, an instruction on flight was proper where the evidence showed that the defendant left his home after shooting his wife and was found by police crouched behind a dresser in the bedroom of a friend's apartment.²⁵⁷

In a perjury prosecution, a requested instruction on the question of inadvertence or mistake is not warranted when the defense presented is contrary to and inconsistent with the content of such instruction.²⁵⁸

The District Court of Appeal, Fourth District, held in *Joseph v. State*²⁵⁹ that the trial court's instruction on burglary: "in this case . . . the pushing open of a door entirely closed . . . is a sufficient breaking to sustain a conviction," was harmless error in light of the fact that the evidence sustaining a breaking was uncontroverted and that a corrected version of the instructions was given subsequently by the trial court.

An instruction is not erroneously refused where it is an improper statement of the law.²⁶⁰ Nor is it improper to refuse to give a requested instruction which is a correct statement of the applicable law if the subject was fully covered in the general charges given by the court.²⁶¹ A reviewing court will generally look to the entire charge rather than to one statement out of context in determining whether a charge is erroneous.²⁶²

Where the defendant, through his representations that under Florida law possession of an illegal drug was a lesser offense necessarily included in the greater offense of the sale of such drug misleads the state and the trial judge, he is estopped to assert error where the judge incorrectly included possession of a hallucinogenic drug as a lesser offense of selling the drug and he failed to object thereto.²⁶³

VIII. SENTENCE

During the period surveyed, numerous cases have dealt with the question of whether a defendant is entitled to credit for time served prior to sentencing. Under Florida Statutes section 921.161(1) (1973), the allowance of credit for time served prior to sentencing is a matter within the discretion of the trial court and a defendant is not entitled to credit

256. *Hargrett v. State*, 255 So. 2d 298 (Fla. 3d Dist. 1971).

257. *Williams v. State*, 268 So. 2d 566 (Fla. 3d Dist. 1972).

258. *Hirsch v. State*, 268 So. 2d 441 (Fla. 1st Dist. 1972). Had the court given the requested instruction, it would have been error.

259. 252 So. 2d 262, 263 (Fla. 4th Dist. 1971).

260. *Wells v. State*, 270 So. 2d 399 (Fla. 3d Dist. 1972), *citing* *Gordon v. State*, 119 So. 2d 753 (Fla. 2d Dist. 1960).

261. *Wells v. State*, 270 So. 2d 399 (Fla. 3d Dist. 1972), *citing* *Mackiewicz v. State*, 114 So. 2d 684 (Fla. 1959).

262. *Yanks v. State*, 261 So. 2d 533 (Fla. 3d Dist. 1972).

263. *McPhee v. State*, 254 So. 2d 406 (Fla. 1st Dist. 1971). *See* note 231 *supra* and accompanying text.

for presentence jail time as a matter of right.²⁶⁴ The question of whether credit for time served was appropriate for a defendant awaiting court action in an escape trial was addressed by the Supreme Court of Florida in *Law v. Wainwright*.²⁶⁵ The supreme court determined that the fact that the trial court withheld adjudication on the escape charge could have been dispositive of the issue. If there had been an order which either allowed credit for time served, expressly denied it, or was silent on the issue and, thus, tantamount to a denial, the sentence order would be binding; however, given the fact that nothing in the record indicated whether the trial judge had reached the question, the court held as a matter of law that the defendant was entitled to credit for the time served while awaiting the trial court's decision.

The court subsequently modified its holding in *Law* to permit a court to substitute its judgment where a sentence order had been issued, but the order was silent on the question of credit for time served.²⁶⁶ In *Adams v. Wainwright*,²⁶⁷ the supreme court held that time spent in a county jail prior to the completion of a trial for escape from state prison counts toward the original prison sentence. The court reasoned that the existing, uncompleted prison term travelled with the escaped prisoner and that the moment he was detained, the sentence resumed by operation of law. Additionally, the court decided that the defendant was entitled to credit toward his original prison sentence for time served in the county jail following his conviction for escape and prior to his return to the custody of the Division of Corrections.

In *Blackmon v. State*,²⁶⁸ the District Court of Appeal, Second District, held that a trial court lacks jurisdiction to grant a defendant credit for time served on a sentence imposed by another court which was subsequently vacated.

The United States Supreme Court, in *Tate v. Short*,²⁶⁹ held that a statute which required defendants who were unable to pay a fine to remain in prison for a period sufficient to satisfy the fine denied equal protection of the law. The Florida courts have adopted *Tate* and invalidated sentences of imprisonment imposed on indigent defendants who were unable to pay the fines assessed against them.²⁷⁰ Where the defendants received the maximum sentences permissible and, in addition, were

264. *Miller v. State*, 270 So. 2d 774 (Fla. 3d Dist. 1972), citing *Richardson v. State*, 243 So. 2d 598 (Fla. 2d Dist. 1971). Under Florida Statutes section 921.161 (1973), a sentence shall not begin to run before the date it is imposed, but the court imposing a sentence may allow a defendant credit for all or a part of the time spent in the county jail before sentence.

265. 264 So. 2d 3 (Fla. 1972).

266. *Adams v. Wainwright*, 275 So. 2d 235 (Fla. 1973). See also *Falagan v. Wainwright*, 195 So. 2d 562 (Fla. 1967).

267. 275 So. 2d 235 (Fla. 1973).

268. 253 So. 2d 272 (Fla. 2d Dist. 1971).

269. 401 U.S. 395 (1971).

270. *Colocado v. State*, 251 So. 2d 721 (Fla. 1st Dist. 1971); *Johnson v. State*, 250 So. 2d 347 (Fla. 2d Dist. 1971); *Martin v. State*, 248 So. 2d 643 (Fla. 1971); *Gary v. State*, 239 So. 2d 523 (Fla. 4th Dist. 1970).

assessed costs, the portions of the sentences imposing additional imprisonment in the event of non-payment of costs have been held constitutionally invalid by Florida courts²⁷¹ under the decision of the United States Supreme Court in *Williams v. Illinois*.²⁷² In *City of Orlando v. Cameron*,²⁷³ the Supreme Court of Florida interpreted the United States Supreme Court's prohibition against giving defendants the option to pay a fine or serve a term of imprisonment,²⁷⁴ to apply only to those who are unable to pay due to indigency. Thus, there is no constitutional infirmity in the imprisonment of a defendant with the financial ability to pay a fine who refuses or neglects to do so. However, in order to invoke the constitutional protection, a defendant who wishes to avoid imprisonment but is unable to pay a fine, must assume the burden of proving his indigency pursuant to Florida Statutes section 27.52 (1973).²⁷⁵

In *Phillips v. Allen*,²⁷⁶ the defendant petitioned the Supreme Court of Florida for a writ of habeas corpus following the imposition of alternative sentences requiring the defendant to either pay a fine or serve time in jail. After granting the writ, the court relinquished jurisdiction temporarily to the Municipal Court of Orlando which proceeded to vacate the sentences and reduce the period of confinement. The supreme court reassumed jurisdiction and held that the subsequent modifications of the municipal court vitiated the violations of *Tate* and *Williams* and discharged the writ.²⁷⁷

A number of cases have held that that portion of a sentence requiring probation after a prison term is illegal.²⁷⁸ However, when the defendant was convicted on four charges, he could properly be sentenced on two and placed on probation on the remaining charges to commence at the conclusion of the imprisonment.²⁷⁹

It appears to be well settled in Florida that where convictions are entered on two offenses, each of which constitutes a facet of the same transaction, it is improper to impose sentence on each.²⁸⁰ Thus, where the first count of the information charges possession of heroin and the second

271. *Dancer v. State*, 259 So. 2d 764 (Fla. 1st Dist. 1972); *accord*, *Bell v. State*, 249 So. 2d 706 (Fla. 1st Dist. 1971).

272. 399 U.S. 235 (1970). *Williams* held that an indigent criminal defendant may not be imprisoned for default in payment of a fine beyond the maximum authorized by statute regulating the substantive offense.

273. 264 So. 2d 421 (Fla. 1972).

274. *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970).

275. *City of Orlando v. Cameron*, 264 So. 2d 421 (Fla. 1972).

276. 255 So. 2d 528 (Fla. 1971). In his dissenting opinion, Justice Ervin argued that the majority opinion was patently discriminatory in that it indirectly authorizes trial judges to impose alternative imprisonments after it is discovered that indigents cannot pay their fines.

277. *Id.*

278. *Boyd v. State*, 272 So. 2d 858 (Fla. 3d Dist. 1973); *Martinez v. State*, 266 So. 2d 392 (Fla. 3d Dist. 1972); *Dancy v. State*, 259 So. 2d 208 (Fla. 3d Dist. 1972); *Robinson v. State*, 256 So. 2d 390 (Fla. 3d Dist. 1972).

279. *Harris v. State*, 278 So. 2d 306 (Fla. 4th Dist. 1973).

280. *Hunt v. State*, 264 So. 2d 855 (Fla. 1st Dist. 1972); *accord*, *Moore v. State*, 260 So. 2d 243 (Fla. 4th Dist. 1972).

count charges sale on the same day, each offense constituted a facet of a single transaction.²⁸¹ Similarly, where a defendant is convicted on separate counts of possession and sale of marijuana, and the record establishes that each of the offenses occurred the same day and that the marijuana sold was the same marijuana on which the possession charge was based, each conviction represented a facet of a single transaction and therefore justified only one sentence for the highest offense charged.²⁸² The same has been held to apply in cases of possession and sale of narcotics,²⁸³ barbiturates,²⁸⁴ amphetamines,²⁸⁵ cocaine²⁸⁶ and LSD.²⁸⁷ Additionally, charges of robbery and extortion²⁸⁸ represented offenses arising out of the same transaction as did breaking and entering with intent to commit a misdemeanor and petit larceny.²⁸⁹ It has been held that aggravated assault and resisting arrest with violence constituted facets of the same transaction and as such warranted only one conviction.²⁹⁰

Separate sentences were improper for convictions of both sale of unregistered securities and sale by an unregistered dealer where the separate offenses were part of a single transaction.²⁹¹ Where the defendant was charged with and convicted of obtaining credit through the unauthorized use of a credit card under three separate informations, the fact that such conduct occurred during his possession of the credit card on a single day indicated that the three transactions should be treated as different facets of the same criminal offense and sentences on more than one conviction were not warranted.²⁹² While a conviction for displaying a firearm during the commission of a robbery was proper, only one sentence could be imposed if the defendant was also convicted of the robbery in which he used the weapon.²⁹³

Conversely, it has been held that robbery and carrying a concealed firearm are separate and distinct offenses and, therefore, a sentence imposed upon both under two counts of an information was valid.²⁹⁴ Similarly, where the defendant shot and killed the victim in the process of

281. *Johnson v. State*, 260 So. 2d 212 (Fla. 1st Dist. 1972); *Martin v. State*, 251 So. 2d 283 (Fla. 1st Dist. 1971).

282. *Keenan v. State*, 253 So. 2d 273 (Fla. 2d Dist. 1971), *citing Yost v. State*, 243 So. 2d 469 (Fla. 3d Dist. 1971); *accord*, *Walker v. State*, 261 So. 2d 514 (Fla. 1st Dist. 1972).

283. *Brown v. State*, 264 So. 2d 28 (Fla. 1st Dist. 1972); *Torres v. State*, 262 So. 2d 458 (Fla. 3d Dist. 1972); *Martin v. State*, 251 So. 2d 283 (Fla. 1st Dist. 1971); *Lietch v. State*, 248 So. 2d 203 (Fla. 4th Dist.), *cert. denied*, 253 So. 2d 875 (Fla. 1971).

284. *Warren v. State*, 266 So. 2d 114 (Fla. 1st Dist. 1972).

285. *Weeks v. State*, 253 So. 2d 459 (Fla. 3d Dist. 1971).

286. *Caivano v. State*, 276 So. 2d 245 (Fla. 2d Dist. 1973).

287. *Farrell v. State*, 259 So. 2d 540 (Fla. 1st Dist. 1972).

288. *Davis v. State*, 277 So. 2d 300 (Fla. 2d Dist. 1973).

289. *Id.*

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

291. *Sparks v. State*, 256 So. 2d 537 (Fla. 4th Dist. 1972), *citing Easton v. State*, 250 So. 2d 294 (Fla. 2d Dist. 1971).

292. *Lore v. State*, 267 So. 2d 699 (Fla. 4th Dist. 1972), *citing Lietch v. State*, 248 So. 2d 203 (Fla. 4th Dist.), *cert. denied*, 253 So. 2d 875 (Fla. 1971).

293. *Hernandez v. State*, 278 So. 2d 307 (Fla. 2d Dist. 1973).

294. *Cooper v. State*, 261 So. 2d 859 (Fla. 3d Dist. 1972).

escaping after having committed a robbery, the crimes of robbery and assault with intent to murder were considered two separate transactions for the purpose of sentencing.²⁹⁵ Manslaughter and driving while under the influence of alcohol were held to be separate offenses and separate sentences were thus warranted.²⁹⁶ Separate sentences following convictions for breaking and entering with intent to commit a felony and for possession of burglary tools were permitted to stand on the rationale that one could be found guilty of possessing burglary tools but not guilty of breaking and entering.²⁹⁷

Where the offense was committed by the same person, at the same time, in the same place, under the same circumstances and with the same intent, the only offense was that of receiving stolen property, thus, there could only be one sentence even though the property was owned by four different entities.²⁹⁸

The law permitting only one sentence for multiple convictions on a single transaction applied even though the sentences were for identical terms and were to run concurrently.²⁹⁹ However, where a sentence on one count was erroneous, the court could not set aside both sentences in order to impose a greater sentence on the remaining and still valid count, as the validity of each must be determined separately.³⁰⁰

If a sentence is proper under the law, it is not subject to appeal on the grounds that it was excessive under the circumstances of the case.³⁰¹ Nor is the imposition of the maximum sentence grounds to allege cruel and unusual punishment.³⁰² Thus, where the defendant rejected the state's offer to recommend to the court a sentence of 15 years in return for a plea of guilty, he could not claim that a sentence of 130 years was meted out as a penalty for going to trial, absent a conclusive showing that such was the case.³⁰³ A lawful sentence of 35 years' imprisonment to a defendant who sought a jury trial was not error, even though a co-defendant who chose to plead guilty received only five years on a properly negotiated plea.³⁰⁴ A statement by the trial court during plea negotiations in open court that it "wouldn't be thinking of less than 50 years"

295. *Tarpley v. State*, 258 So. 2d 301 (Fla. 3d Dist. 1972), *citing* *Footman v. State*, 203 So. 2d 356 (Fla. 2d Dist. 1967).

296. *Dawson v. State*, 266 So. 2d 116 (Fla. 1st Dist. 1972).

297. *Foster v. State*, 276 So. 2d 512 (Fla. 1st Dist. 1973), *citing* *Washington v. State*, 51 Fla. 137, 40 So. 765 (1906).

298. *Avilia v. State*, 278 So. 2d 298 (Fla. 4th Dist. 1973).

299. *Carr v. State*, 264 So. 2d 871 (Fla. 1st Dist. 1972).

300. *Brown v. State*, 264 So. 2d 28 (Fla. 1st Dist. 1972).

301. *Id. Accord*, *Godfrey v. State*, 278 So. 2d 325 (Fla. 3d Dist. 1973).

302. *Cole v. State*, 262 So. 2d 902 (Fla. 3d Dist. 1972).

303. *Id.*

304. *Weathington v. State*, 262 So. 2d 724 (Fla. 3d Dist. 1972). The court commented that "while such a diversity in results between the two paths pursued by the convicted actors may be quite shocking to the judicial conscience of the appellate court . . ." it found that the record did not support the contention that such a sentence constituted a gross penalty placed on the defendant's right to choose a trial by jury. *Id.* at 725.

was not binding on the judge following the defendant's refusal to plead guilty. The defendant's subsequent conviction by the court was not subject to appeal absent a showing that the sentences of 101 years was vindictive in nature.³⁰⁵

Where a portion of the sentence exceeds the maximum allowable, the excess is automatically vacated without the necessity of resentencing.³⁰⁶ Although there are a number of alternatives³⁰⁷ available to a trial judge in imposing a sentence, he may not sentence a convicted criminal for a term less than the minimum prescribed by law.³⁰⁸

Florida Statutes section 775.14 (1973) provides:

Any person receiving a withheld sentence upon conviction for a criminal offense, and such withheld sentence has not been altered for a period of five years, shall not thereafter be sentenced for the conviction of the same crime for which sentence was originally withheld.

The Supreme Court of Florida, in *State v. Gazda*,³⁰⁹ held that this statute was tolled for the time during which the defendant was absent from the court's jurisdiction, and extended the five year deadline for imposing sentence. Where the defendant was convicted on three separate counts, the trial court was justified in imposing sentence on one count and withholding sentence on the remaining two from day to day.³¹⁰ However, the trial court must exercise its power to sentence before the statutory time limit expires.³¹¹

Before one may be sentenced as a second offender pursuant to Florida Statutes section 775.09 (1973), there must be a constitutionally valid prior conviction.³¹² Thus, where the defendant's allegation that his prior conviction was constitutionally invalid under *Gideon v. Wainwright*³¹³ was not refuted, he was entitled to an evidentiary hearing.³¹⁴

It has been held that a trial court may take into consideration the contents of a pre-sentence investigation report prior to sentencing.³¹⁵ Further, a sentence is not invalid merely because a pre-sentence investigation was not held or because the court failed to afford a defendant an

305. *Blackman v. State*, 265 So. 2d 734 (Fla. 3d Dist. 1972).

306. *Chaires v. State*, 265 So. 2d 529 (Fla. 1st Dist. 1972).

307. In *State v. Dull*, 249 So. 2d 758 (Fla. 1st Dist. 1971), the court noted that the fact that the trial judge might have withheld adjudication of guilt and/or placed the defendant on probation, or might have imposed an indeterminate sentence, did not operate to legitimize a sentence imposed contrary to law.

308. *Id.*, citing *Dean v. State*, 83 So. 2d 777 (Fla. 1955).

309. 257 So. 2d 242 (Fla. 1971), quashing *Grada v. State*, 244 So. 2d 454 (Fla. 4th Dist. 1971).

310. *Smith v. State*, 259 So. 2d 498 (Fla. 1st Dist. 1972).

311. *Id.*

312. *Jackson v. State*, 252 So. 2d 241 (Fla. 4th Dist. 1971), citing *Lee v. State*, 217 So. 2d 861 (Fla. 4th Dist. 1969).

313. 372 U.S. 335 (1963).

314. *Jackson v. State*, 252 So. 2d 241 (Fla. 4th Dist. 1971).

315. *Mincey v. State*, 256 So. 2d 545 (Fla. 3d Dist. 1972).

evidentiary hearing on mitigation, even though the court was informed of circumstances which were worthy of consideration.³¹⁶ Similarly, the trial court was not in error in failing to inquire about mitigation where the defendant's counsel was permitted to state fully into the record the matter which he would urge on mitigation, and was not prevented from presenting evidence thereon.³¹⁷

The trial court is without jurisdiction to mitigate a defendant's sentence by withdrawing adjudication and sentence and placing him on probation, after more than 60 days have elapsed from the imposition of sentence.³¹⁸

In taking a plea of *nolo contendere*, character evidence is material and properly admissible for consideration by the trial judge in determining sentence.³¹⁹ While it is permissible to allow a judge who did not preside at the trial to pass sentence, the failure of the substitute judge to familiarize himself thoroughly with the case prior to sentencing constitutes an insufficient basis to determine the defendant's sentence.³²⁰

Florida Statutes section 922.051 (1973) provides:

When a statute expressly directs that imprisonment be in a state prison, the court may impose a sentence of imprisonment in the county jail if the total of the prisoner's cumulative sentences is not more than (1) year.

Pursuant to the above statute, where a defendant was charged upon two separate informations, and convicted on both, the trial court's sentence of one year in the county jail on each charge, with the second sentence to begin at the expiration of the first, was not permissible.³²¹ The statute was construed to prohibit imprisonment in the county jail if any combination of sentences would result in imprisonment in the county jail for a period of more than one year.³²²

The United States Supreme Court, in *Furman v. Georgia*, held that the imposition and carrying out of the death penalty constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments.³²³ The opinion was rendered per curiam and each member of the court contributed a separate opinion. Justices Stewart and White rejected

316. *Cole v. State*, 262 So. 2d 902 (Fla. 3d Dist. 1972).

317. *Holland v. State*, 258 So. 2d 515 (Fla. 3d Dist. 1972).

318. *Sayer v. State*, 267 So. 2d 42 (Fla. 4th Dist. 1972), citing *Ware v. State*, 231 So. 2d 872 (Fla. 3d Dist. 1970).

319. *Chesebrough v. State*, 255 So. 2d 675 (Fla. 1971), cert. denied, 406 U.S. 976 (1972).

320. *Caplinger v. State*, 271 So. 2d 780 (Fla. 3d Dist. 1973). The sentencing judge availed herself of neither the benefit of a presentence investigation ordered by the presiding judge, nor the record of the trial itself, but instead, relied solely upon the statements of counsel to familiarize herself with the case.

321. *Dade County v. Baker*, 265 So. 2d 700 (Fla. 1972), adopted the dissent of Judge Carroll in *Dade County v. Baker*, 258 So. 2d 511, 512-14 (Fla. 3d Dist. 1972), as the proper interpretation of the statute.

322. *Id.*

323. 408 U.S. 238 (1972).

the death penalty as being capriciously applied without a meaningful basis for distinguishing the few cases in which it is imposed from the many in which it is not. Justice Douglas found the discretionary statutes unconstitutional in their operation because they were "pregnant with discrimination." It remains to be seen whether a statute can be drafted with a degree of specificity and with sufficiently objective criteria to satisfy the diverse objections of the members of the Supreme Court.

The Supreme Court of Florida, in the wake of *Furman*, recognized the elimination of the death penalty and held that the only sentence which could be imposed upon conviction of murder in the first degree is life imprisonment.³²⁴ Thus, death sentences previously imposed for first degree murder were reduced automatically to life imprisonment while those imposed upon convictions for rape were remanded for resentencing consistent with the Court's holding in *Furman*.³²⁵ In *Baxter v. Stack*, it was held that the court which sentenced the defendant to death had jurisdiction to correct its sentence and to impose a sentence of imprisonment for life.³²⁶

IX. FORMER JEOPARDY

In *Waller v. Florida*,³²⁷ the United States Supreme Court established that cities, and states, including their respective courts, are not separate sovereignties. Consequently, a defendant's prosecution in a state court for a felony arising out of the same acts for which he had been convicted in a municipal court, would constitute double jeopardy, providing the former conviction was a lesser included offense of the felony. Upon remand to the Florida courts, however, the District Court of Appeal, Second District, held that the municipal offense was not a lesser included offense of the state larceny charge and, therefore, no question of former jeopardy was involved.³²⁸

There was also no former jeopardy in the following instances of successive prosecution because the charges in the second action were not lesser offenses included in those charged in the first action: where the defendant was convicted of carrying a concealed weapon following acquittal of assault with intent to commit murder;³²⁹ where defendant was

324. *Anderson v. State*, 267 So. 2d 8 (Fla. 1972); *accord, In re Baker*, 267 So. 2d 331 (Fla. 1972).

325. *Anderson v. State*, 267 So. 2d 8 (Fla. 1972). *See Donaldson v. Sack*, 265 So. 2d 499 (Fla. 1972), where the Supreme Court of Florida, in an attempt to provide guidance during the interim period following *Furman* and prior to the enactment of new legislation, held that inasmuch as *Furman* eliminated capital punishment, it would eliminate capital offenses as well. See section III *supra* for a further discussion of the *Furman* case and its effect in Florida.

326. 270 So. 2d 419 (Fla. 4th Dist. 1972).

327. 397 U.S. 387 (1970).

328. *Waller v. State*, 270 So. 2d 26 (Fla. 2d Dist. 1972).

329. *State v. Williams*, 254 So. 2d 798 (Fla. 1st Dist. 1971); *Glaze v. State*, 249 So. 2d 742 (Fla. 1st Dist. 1971).

prosecuted for possession of marijuana after a municipal court convicted him of driving while under the influence of drugs;³³⁰ where the conviction in a city court for profanity was followed by prosecution for resisting arrest;³³¹ where a conviction following a guilty plea of possession of less than one gallon of whiskey for which no tax had been paid was followed by a charge of concealment of 3 1/2 quarts of such whiskey and possession of a container intended for bottling the illegal whiskey;³³² where a municipal court convicted a defendant of performing an obscene play and defendant was later prosecuted under a state statute for performing the same play on another date,³³³ where the defendant had been acquitted of careless driving in a metropolitan court and was then prosecuted by the state for leaving the scene of an accident.³³⁴

Although there were similar elements involved in the two offenses for which the defendant was prosecuted, a defendant could properly be prosecuted for manslaughter resulting from operating a motor vehicle while intoxicated after he had been convicted of driving while under the influence of alcoholic beverages.³³⁵ The District Court of Appeal, Second District, then held that in order for the defense of former jeopardy to apply, it is necessary that the second prosecution arise out of the same facts and that it be for the same offense.³³⁶ Proof of additional facts in one charge is the determining factor in deciding whether each charge may be prosecuted separately.

In *Bernard v. State*,³³⁷ it was held that jeopardy attached in a non-jury case only when evidence is heard by the judge prior to the time that the state has entered a *nolle prosequi*. In affirming the District Court of Appeal, Third District's decision,³³⁸ the court required actual presentation of proof by the state for commencement of jeopardy. Jeopardy does not attach if a case is dismissed for failure to prosecute within the statutory period after it had been transferred from municipal to state court. Therefore, the state is allowed to file a subsequent information in state court.³³⁹ Where the court required the state to proceed on two counts (III and IV) of a four-count information, and the state used evidence of other crimes, *i.e.*, the other two counts to show intent and motive,

330. *State v. Lampley*, 250 So. 2d 911 (Fla. 3d Dist. 1971).

331. *State v. Lamons*, 251 So. 2d 907 (Fla. 2d Dist. 1971).

332. *State v. Hart*, 253 So. 2d 150 (Fla. 1st Dist. 1971).

333. *State v. Ell-Gee, Inc.*, 255 So. 2d 542 (Fla. 3d Dist. 1971), *citing* *Ashe v. Swenson*, 397 U.S. 436 (1970). *See also* *State ex rel. McCausland v. Rowe*, 272 So. 2d 216 (Fla. 3d 1973).

334. *State v. Jackson*, 248 So. 2d 663 (Fla. 3d Dist. 1971).

335. *State v. Stiefel*, 256 So. 2d 581 (Fla. 2d Dist. 1972).

336. *Id.* at 583, *citing* *State v. Shaw*, 219 So. 2d 49, 50 (Fla. 2d Dist. 1969).

337. 261 So. 2d 133 (Fla. 1972).

338. *State v. Bernard*, 254 So. 2d 38 (Fla. 3d Dist. 1971). Judge Pearson dissented, saying that jeopardy attaches when the nonjury trial begins and that the majority confused the taking of testimony with the taking of evidence since evidence had already been offered and rejected at trial. *Id.* at 40.

339. *State v. Ressler*, 257 So. 2d 620 (Fla. 4th Dist. 1971).

that evidence did not place the defendant in jeopardy for a new prosecution of counts I and II since the evidence was first used simply to strengthen the state's case under counts III and IV.³⁴⁰

A defendant's failure to raise the defense of former jeopardy at trial constituted a waiver of that defense.³⁴¹

It has been held that a plea of guilty raises the bar of former jeopardy against another prosecution for an offense based upon the same transaction and the state can not *nolle prosequi* such a case and recharge the defendant for a higher offense.³⁴² However, where defendant pleaded guilty and then withdrew his plea, it was as if the plea had never been made, and the state was free to file a new information.³⁴³ The state's *nolle prosequi* of an information which has been brought within the two-year limitation period but which has been dismissed more than two years after the offense, prevented further prosecution for the same offense.³⁴⁴

The fifth amendment guarantee against double jeopardy is a limitation on the states through the fourteenth amendment.³⁴⁵ Therefore *Ashe v. Swenson*,³⁴⁶ holding that the doctrine of collateral estoppel is imbedded in the fifth amendment, is also applicable to the states. The United States Supreme Court indicated that *Ashe* would be given retroactive effect.³⁴⁷ Nevertheless, in *Brewer v. State*,³⁴⁸ the Supreme Court of Florida found *Ashe* to be prospective only, in a case where defendant's conviction had become final prior to that decision. Since the collateral estoppel rule does not raise serious questions concerning the actuality of guilt, according to the court it must be treated in this manner, unlike the retroactive status given to other rules.³⁴⁹

In a case in which the defendant's conviction was not final, the criteria for collateral estoppel were given effect where the defendant was convicted of forcible rape following an acquittal for a felony-murder which had occurred while the victim was being raped.³⁵⁰ Since the state had initially failed to prove the fact that the defendant had raped the victim, it was estopped from proving this necessary fact for the latter conviction. A defendant's acquittal of robbery for lack of identity estopped the state from retrying the defendant for conspiracy to commit robbery where identification of the defendant was again a crucial issue.³⁵¹ The collateral estoppel rule was not applicable, however, where

340. *State v. Fisher*, 264 So. 2d 857 (Fla. 3d Dist. 1972).

341. *Bell v. State*, 262 So. 2d 244 (Fla. 4th Dist. 1972); *Suiero v. State*, 248 So. 2d 219 (Fla. 4th Dist. 1971).

342. *Ray v. State*, 231 So. 2d 813 (Fla. 1970).

343. *Bell v. State*, 262 So. 2d 244 (Fla. 4th Dist. 1972).

344. *Ball v. Goodwin*, 249 So. 2d 481 (Fla. 3d Dist. 1971).

345. *Benton v. Maryland*, 395 U.S. 784 (1969).

346. 397 U.S. 436 (1970).

347. *Id.* at 437 n.1.

348. 264 So. 2d 833 (Fla. 1972), *aff'g* 253 So. 2d 165 (Fla. 1st Dist. 1971).

349. *E.g.*, *Jackson v. Denno*, 378 U.S. 368 (1964) (voluntariness of confessions).

350. *Eagle v. State*, 249 So. 2d 460 (Fla. 1st Dist. 1971).

351. *Martin v. State*, 260 So. 2d 896 (Fla. 2d Dist. 1972).

the defendant was convicted of breaking and entering with intent to commit rape following a previous acquittal of rape and assault to commit rape charges, in that the ultimate facts needed for conviction were not common to the other offenses.³⁵² Neither collateral estoppel nor double jeopardy bars the state from introducing evidence at trial after that evidence was suppressed in a previous proceeding in another county.³⁵³

The District Court of Appeal, Second District,³⁵⁴ held that the denial of defense counsel's motion for a mistrial followed by a later motion for dismissal by the state, which was granted with a statement by the judge that both parties had moved for a mistrial, could not be deemed a waiver by the defendant of a double jeopardy claim since he was not a party to the state's motion.

Juvenile proceedings are not of a criminal nature, and, therefore, an adjudication of a delinquent in a juvenile court is not a bar to criminal prosecution on the same facts.³⁵⁵

Former jeopardy is not an issue where the court holds a retrial to determine defendants' penalty where a federal court had set aside the death penalty sentence which defendants had received following a conviction of murder.³⁵⁶

In *Roberson v. State*,³⁵⁷ the Supreme Court of Florida required that a recommendation of mercy which had been granted at the first trial, also be given for the defendant who obtained a retrial, unless the record in the second trial was significantly different from the first. The court cited *North Carolina v. Pearce*³⁵⁸ for the proposition that a more harsh sentence in these circumstances requires that some justification be noted in the record. After a mistrial following defendant's conviction for aggravated assault, it was improper on retrial to amend the information to assault with intent to commit murder as an accused can only be retried for the offense for which he was convicted before mistrial.³⁵⁹

A minor traffic offender was immune from prosecution by juvenile court where she had already been convicted and fined in another jurisdiction.³⁶⁰

X. DEFENDANT'S RIGHT TO BE PRESENT

To warrant a new trial under Florida Statutes section 920.05(1)(a) (1973), it must be established that the defendant's absence at a proceeding where the jury was present operated to substantially prejudice

352. *McDonald v. State*, 249 So. 2d 451 (Fla. 4th Dist. 1971).

353. *Suiero v. State*, 248 So. 2d 219 (Fla. 4th Dist. 1971).

354. *Fugett v. State*, 271 So. 2d 28 (Fla. 2d Dist. 1972).

355. *State v. R.E.F.*, 251 So. 2d 672 (Fla. 1st Dist. 1971).

356. *Barlow v. Taylor*, 249 So. 2d 437 (Fla. 1971).

357. 258 So. 2d 257 (Fla. 1971).

358. 395 U.S. 711 (1969).

359. *Kilpatrick v. State*, 262 So. 2d 472 (Fla. 3d Dist. 1972), citing *Ray v. State*, 231 So. 2d 813 (Fla. 1970 [*sic*]) (decided in 1969).

360. *In re S.S.Y.*, 273 So. 2d 430 (Fla. 3d Dist. 1973).

his rights.³⁶¹ Thus, if there is no objection to the absence of the defendant it is harmless error if the jury returns to the courtroom during deliberations to make inquiries of the trial judge.³⁶² If a defendant voluntarily absents himself from the courtroom once a trial proceeding has commenced, the trial need not be interrupted, and a denial of a continuance will, at most, constitute harmless error where the sentence is not capital.³⁶³ There is no requirement under rule 3.180 of the Florida Rules of Criminal Procedure that the defendant be present at a hearing on a motion for a new trial.³⁶⁴

XI. PRELIMINARY HEARING

There is an abundance of Florida cases holding that even a complete denial of a preliminary hearing does not deprive a defendant of due process, because it is not an essential stage in a criminal proceeding,³⁶⁵ nor is it essential to a fair trial.³⁶⁶ Given the fact that article one, section 15(a) of the Florida Constitution authorizes the state attorney, as a constitutional officer, to initiate criminal prosecutions for felonies by filing an information under oath, the Supreme Court of Florida held that, in so filing, the state attorney conclusively determines that the evidence is adequate to establish probable cause.³⁶⁷ A preliminary hearing is not required where an information charging the commission of a felony has been filed. Thus, the requirement in Florida Statutes section 901.06³⁶⁸ that one arrested by virtue of a warrant be taken without unnecessary delay before a committing magistrate does not apply to those arrested on a *capias* issued upon an indictment or direct information.³⁶⁹

Where approximately five hours had elapsed between the time of arrest and the time the defendant was taken before a committing magistrate, such delay was neither unreasonable nor violative of his constitutional rights.³⁷⁰ Further, it has been held that an inculpatory statement, otherwise admissible, is not rendered inadmissible solely because the defendant has not been taken before a committing magistrate for a preliminary hearing.³⁷¹

361. *Stephan v. State*, 251 So. 2d 30 (Fla. 4th Dist. 1971).

362. *Id.*

363. *Barcia v. State*, 249 So. 2d 514 (Fla. 3d Dist. 1971).

364. *Luster v. State*, 262 So. 2d 910 (Fla. 3d Dist. 1972).

365. *See, e.g., Conner v. State*, 253 So. 2d 160 (Fla. 2d Dist. 1971).

366. *Lovell v. State*, 250 So. 2d 915 (Fla. 2d Dist. 1971), *citing* *Baugus v. State*, 141 So. 2d 264 (1962), *cert. denied*, 371 U.S. 879 (1962).

367. *State ex rel. Hardy v. Blounts*, 261 So. 2d 172 (Fla. 1972), *aff'g* *Maxwell v. Blount*, 250 So. 2d 657 (Fla. 1st Dist. 1971). *See* *DiBona v. State*, 121 So. 2d 192 (Fla. 2d Dist. 1960).

368. Section 901.06 was repealed in 1973 to the extent that it conflicts with FLA. R. CRIM. P. 3.125.

369. *Karz v. Overton*, 249 So. 2d 763 (Fla. 2d Dist. 1971); *accord*, *Bradley v. State*, 265 So. 2d 533 (Fla. 1st Dist. 1972).

370. *Stevens v. State*, 251 So. 2d 565 (Fla. 1st Dist. 1971), *citing* *Pettyjohn v. United States*, 419 F.2d 651 (D.C. Cir. 1969).

371. *Robinson v. State*, 254 So. 2d 379 (Fla. 3d Dist. 1971), *citing* *State ex rel. Carty v.*

It is thus apparent that constitutional objections to incarceration based on the filing of an information, with no judicial scrutiny prior to arraignment, have gone largely unrecognized in the Florida courts³⁷² despite statutory law³⁷³ mandating an appearance before a magistrate without "unnecessary delay." In *Pugh v. Rainwater*,³⁷⁴ the United States District Court for the Southern District of Florida held that an incarcerated suspect must be afforded a preliminary hearing within a reasonable time following arrest and directed the defendants to submit a plan for the implementation of a committing magistrate system in all cases where the prosecution is initiated by direct information. The district court later adopted a plan which required that persons arrested in Dade County be afforded expeditious preliminary hearings before a magistrate and imposed certain sanctions, including the immediate release of those arrestees who were not provided with a timely preliminary hearing.³⁷⁵ Although implementation of the plan was stayed pending appeal, the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision and held that the fourth and fourteenth amendments require that arrestees held for trial upon informations filed by the state attorney must be afforded a preliminary hearing before a judicial officer without unnecessary delay.³⁷⁶

Additionally, the court extended the preliminary hearing protection to misdemeanants, except when they "are out on bond or are charged with violating ordinances carrying no possibility of pretrial incarceration."³⁷⁷ The court of appeals vacated that portion of the district court's decision which required that the preliminary hearing be held within four days of the initial appearance, as well as the portion establishing a different time schedule, because they discriminated against those accused of capital offenses in violation of the Equal Protection Clause.³⁷⁸ Finally, the court vacated those provisions of the plan adopted by the district court imposing sanctions to insure compliance with the requirements of probable cause and preliminary hearings.³⁷⁹ At the time of this writing,

Purdy, 240 So. 2d 480 (Fla. 1970). The court found an additional ground for refusing to reverse in that the defendant did not object at trial to the admission of the statement.

372. *State ex rel. Carty v. Purdy*, 240 So. 2d 480 (Fla. 1970); *Sangaree v. Hamlin*, 235 So. 2d 729 (Fla. 1970); *State v. Hernandez*, 217 So. 2d 107 (Fla. 1968); *Palmieri v. State*, 198 So. 2d 633 (Fla. 1967).

373. FLA. STAT. §§ 901.06, .23 (1973) dictate that when an arrest occurs, with or without a warrant, the officer making the arrest "shall without unnecessary delay take the person before a magistrate." Section 901.06 was repealed in 1973 to the extent that it conflicts with FLA. R. CRIM. P. 3.125.

374. 332 F. Supp. 1107 (S.D. Fla. 1971), *aff'd*, 483 F.2d 778 (5th Cir. 1973).

375. *Pugh v. Rainwater*, 355 F. Supp. 1286 (S.D. Fla. 1972).

376. *Pugh v. Rainwater*, 483 F.2d 778 (5th Cir. 1973).

377. *Id.* at 789.

378. *Id.*

379. *Id.* The court of appeals, while noting that "[t]hese paragraphs were at the time considered necessary by the court as a means for overcoming Florida's longstanding practice of denying preliminary hearings to criminal defendants," vacated the sanctions on the assumption that the adoption of the Amended Rules of Criminal Procedure by the Supreme Court of Florida would obviate the need for such "onerous" sanctions. *Id.* at 790.

Pugh has been argued before the Supreme Court of the United States and a rehearing has been scheduled for the fall of 1974.

XII. FAIR TRIAL

In *Smith v. State*,³⁸⁰ the prosecutor stated in his closing argument that if the defendant was found not guilty by reason of insanity he would be on the street in 30, 60, or 90 days and that there was no possibility of keeping him off for longer than that. The court in reversing defendant's conviction held that the first part of the prosecutor's argument was permissible but that the last phrase incorrectly stated the law, was highly prejudicial to the defendant and denied him his right to a fair trial. Also, where the prosecutor appealed to the sympathies of the jury for the victim's family, and commented several times on defendant's desire to remain silent, it was held that the defendant was denied a fair trial.³⁸¹ In determining whether a statement made by the prosecutor is prejudicial, a court will look to the entire charge rather than to one statement out of context.³⁸² If the prosecutor's argument was a fair comment on the evidence the reviewing court will not reverse.³⁸³

In *Price v. State*,³⁸⁴ the court held that the defendant was denied his fundamental right to a fair trial when the prosecutor stated in his closing argument that the "jury must believe in the integrity of the system and that if defendant had been named and not identified in another confession defendant would not be on trial because the state had no reason to prosecute an innocent man."³⁸⁵ The Supreme Court of Florida held that it is improper for the prosecutor to refer to "mug books" or "mug shots" during a criminal trial, but that such a statement does not deny the defendant a fair trial where there is other clear evidence of defendant's identification.³⁸⁶

Rule 3.250, Florida Rules of Criminal Procedure, which entitles the prosecution to the concluding argument before the jury if the defendant calls witnesses, is not constitutionally objectionable under the sixth and fourteenth amendments.³⁸⁷ Rule 3.250³⁸⁸ gives the defendant the right to the concluding closing argument when he has not called any witnesses on his behalf. A denial of this right is a denial of a fair trial. The courts are not concerned with whether a denial of this right is prejudicial to the defendant. As the court in *Raysor v. State*³⁸⁹ stated:

380. 273 So. 2d 414 (Fla. 2d Dist. 1973).

381. *Breniser v. State*, 267 So. 2d 23 (Fla. 4th Dist. 1972).

382. *Yanks v. State*, 261 So. 2d 533 (Fla. 3d Dist. 1972).

383. *Wade v. Wainwright*, 266 So. 2d 378 (Fla. 4th Dist. 1972).

384. 267 So. 2d 39 (Fla. 4th Dist. 1972).

385. *Id.* at 40.

386. *Loftin v. State*, 273 So. 2d 70 (Fla. 1973).

387. *Preston v. State*, 260 So. 2d 501 (Fla. 1972).

388. "[A] defendant offering no testimony in his own behalf, except his own, shall be entitled to the concluding argument before the jury." FLA. R. CRIM. P. 3.250.

389. 272 So. 2d 867 (Fla. 4th Dist. 1973).

[W]e are at a loss as a practical matter to know just how any criminal defendant could in fact make a demonstration of error because of the refusal of the trial court to follow the dictates of the Rule. It is inherent in the procedure . . . that the right to address the jury finally is a fundamental advantage which simply speaks for itself.³⁹⁰

The District Court of Appeal, Fourth District, has held that the harmless error rule is inapplicable when the rule prohibiting comment on the failure of the defendant to testify has been violated.³⁹¹ In *Jones v. State*³⁹² the prosecutor stated, "[t]here is not one word from the stand that says they did not participate in this crime." The court held that this was reversible error although it was susceptible to differing constructions. The statement could have been regarded by the jury as having reference to the failure of the defendants to testify on their own behalf.

Neither the prosecutor nor the defendant should question prospective jurors as to the kind of verdict they would render under any given state of facts or circumstances. It was held to be reversible error when the state asked prospective jurors whether or not they would convict on the testimony of a person who has been granted immunity if the state proved the case beyond a reasonable doubt.³⁹³

In *Cole v. State*³⁹⁴ the defendant argued that he was denied his right to a fair trial when his defense counsel's final argument to the jury was limited to 20 minutes. The District Court of Appeal, Third District, held that in the absence of prejudice to the defendant, a court may impose reasonable restrictions on defense counsel's argument. In another case, a ruling of the trial court cutting off the defense counsel's effort to attack the credibility of a detective who produced an incriminating statement signed by the defendant was held not to constitute reversible error.³⁹⁵ When the trial court limits the type of questions which the defense counsel may ask of a witness, a reviewing court will not reverse unless prejudice is shown.³⁹⁶

Where it was clear from the record that the jury could not have deliberated free from outside influence and that a juror had engaged in a conversation with someone outside of the courtroom concerning the case, there was prejudice to the defendant's right to receive a fair trial, and a new trial was ordered.³⁹⁷

Whether a defendant has received a fair trial may depend on whether he was able to obtain information important to his defense. In *Carnivale*

390. *Id.* at 869.

391. *Mathis v. State*, 267 So. 2d 846 (Fla. 4th Dist. 1972).

392. 260 So. 2d 279 (Fla. 3d Dist. 1972).

393. *Smith v. State*, 253 So. 2d 465 (Fla. 1st Dist. 1971).

394. 262 So. 2d 902 (Fla. 3d Dist. 1972).

395. *Lane v. State*, 264 So. 2d 55 (Fla. 4th Dist. 1972).

396. *Girtman v. State*, 270 So. 2d 380 (Fla. 3d Dist. 1972).

397. *Durano v. State*, 262 So. 2d 733 (Fla. 3d Dist. 1972).

v. State,³⁹⁸ the defendant had deposed all of the witnesses listed in the statement of particulars and discovery, but defense counsel had no opportunity to depose the co-defendant because counsel was not informed that the co-defendant had turned state's evidence the morning of the trial. In reversing defendant's conviction the court held that the purpose of discovery is to eliminate the likelihood of surprise at trial. The opinion further stated that if the trial court rules that no prejudice resulted to the defendant, it is essential that "the circumstances establishing non-prejudice to the defendant affirmatively appear in the record."³⁹⁹ Where a shirt worn by the victim, which was not listed on the bill of particulars and discovery, was admitted into evidence, the defendant was entitled to a new trial.⁴⁰⁰ Allowing an unlisted witness to testify is not reversible error in the absence of prejudice.⁴⁰¹ A withholding by the state of knowledge of evidence known to be useful to the defendant, even though useful only for impeachment purposes, can be grounds for a new trial.⁴⁰² If certain testimony is introduced and the state has failed to comply with pretrial orders relating to discovery, defendant is deprived of a fair and impartial trial.⁴⁰³

A defendant can be denied his right to a fair trial if he is surprised by other than evidentiary matters. In *Robinson v. State*,⁴⁰⁴ the information was amended after the jury was sworn in. In reversing the conviction, the court stated, "[w]e believe this was a matter of substance which constituted prejudicial error because of its potential for surprise which would infringe upon the defendant's right of a fair trial."⁴⁰⁵ A defendant is not entitled as a matter of right to a pretrial copy of a complete and detailed report on any and all prospective jurors or to copies of all written statements made by witnesses to police officers and to the state attorney's office.⁴⁰⁶

A defendant could be denied a fair trial when the trial judge makes an unreasonably large number of statements, comments, suggestions and innuendos. Though each alone may not constitute reversible error, in their totality they could well have been the influencing factor in the jury's verdict.⁴⁰⁷

In *Moncur v. State*,⁴⁰⁸ a co-defendant entered a guilty plea which the trial court received in the presence of the venire from which defendants' jury was to be selected. The judge at that time spoke critically

398. 271 So. 2d 793 (Fla. 3d Dist. 1973).

399. *Id.* at 795.

400. *Garcia v. State*, 268 So. 2d 575 (Fla. 3d Dist. 1972).

401. *Lopez v. State*, 264 So. 2d 69 (Fla. 3d Dist. 1972).

402. *Matera v. State*, 254 So. 2d 843 (Fla. 3d Dist. 1971).

403. *Lowell v. State*, 253 So. 2d 448 (Fla. 2d Dist. 1971).

404. 266 So. 2d 694 (Fla. 4th Dist. 1972).

405. *Id.* at 695.

406. *Robertson v. State*, 262 So. 2d 692 (Fla. 2d Dist. 1972).

407. *Rockett v. State*, 262 So. 2d 242 (Fla. 2d Dist. 1972).

408. 262 So. 2d 688 (Fla. 2d Dist. 1972).

of a jury which had acquitted another co-defendant. Defendant's motion for a continuance until a new venire could be summoned was denied. The District Court of Appeal, Second District, reversed and held that the defendant "is entitled to a fair trial before an impartial jury, excluding even those whose minds have been tainted by newspaper publicity long before they have been called, much less sworn."⁴⁰⁹

XIII. GRAND JURY

The Supreme Court of Florida declared in *State v. Silva*⁴¹⁰ that the selection procedure of the Dade County Jury Commission was improper and illegal. Following a mandate of the United States Supreme Court,⁴¹¹ the Florida court held that prospective jurors must be selected at random without systematic and intentional exclusion of any economic, social, religious, racial, political or geographical group.⁴¹² In forbidding proportional racial limitations in the selection process, the court further warned that by designating a prospective juror as black or white, the state assumes a greater burden of showing that there was no racial discrimination in the selection of the jury venire. Additionally, the court upheld the Florida Statute⁴¹³ providing for the selection of grand and petit jurors from male and female persons over the age of 21, and held that it was not violative of the twenty-sixth amendment, since each state has the power to establish qualifications for jurors to serve in its courts.⁴¹⁴

The Supreme Court of Florida in *Portee v. State*⁴¹⁵ rejected the contention that as a result of the elimination of the authorization for a grand jury in the 1968 revision of the Florida Constitution, the Dade County Grand Jury was illegally constituted. The court found that the grand jury was based on common law principles and was therefore not affected by the constitutional revision.

As a constitutional officer, the state attorney is authorized to initiate criminal prosecutions by filing an information even though the grand jury has failed or refused to issue an indictment.⁴¹⁶ He has concurrent authority with the grand jury to file a formal accusation, by indictment or information, of a felony not involving capital punishment.⁴¹⁷ A circuit court judge has the power pursuant to Florida Statutes section 905.21 (1973), to transfer a grand jury investigation to another county without

409. *Id.* at 688.

410. 259 So. 2d 153 (Fla. 1972).

411. *Shepard v. Florida*, 341 U.S. 50 (1951); *Cassell v. Texas*, 339 U.S. 282 (1950).

412. *State v. Silva*, 259 So. 2d 153 (Fla. 1972).

413. FLA. STAT. § 40.01(1) (1969).

414. 259 So. 2d at 153. The qualifying age for jury service was subsequently lowered to 18 years. FLA. STAT. § 743.07 (1973).

415. 253 So. 2d 866 (Fla. 1971); *accord*, *Reed v. State*, 267 So. 2d 70 (Fla. 1972).

416. *State ex rel. Hardy v. Blount*, 261 So. 2d 172 (Fla. 1972), *citing State ex rel. Latour v. Stone*, 135 Fla. 816, 185 So. 729 (1939).

417. *State ex rel. Hardy v. Blount*, 261 So. 2d 172 (Fla. 1972).

the necessity of an adversary hearing if he determines that conditions in that county make it impractical to convene a grand jury.⁴¹⁸

If an in camera examination of the transcript of grand jury testimony by a trial judge fails to reveal any material discrepancies in the testimony of a witness, the defendant is not entitled to review that transcript for cross-examination purposes.⁴¹⁹ A defendant was not prejudiced by the fact that two witnesses allegedly gave false testimony to the grand jury, notwithstanding their refusal to testify at the defendant's trial after having been advised of their constitutional rights.⁴²⁰

In *Branzburg v. Hayes*,⁴²¹ the United States Supreme Court held that a grand jury is not required to show "sufficient grounds" for believing that a reporter has information relevant to a crime being investigated, that the information is unavailable from other sources, or that the need for the information is sufficiently compelling to override first amendment interests. The case has the effect of requiring reporters to give up confidential sources of information to the grand jury unless they can meet the burden of showing an abuse of discretion by the investigating body.⁴²²

The District Court of Appeal, Fourth District, in *In re Brevard County Grand Jury Interim Report*⁴²³ warned that the grand jury may not single out persons in civil or official positions to impugn their motives, or hold them to scorn or criticism by word, imputation or innuendo without presenting them for indictment.

XIV. IMMUNITY

The United States Supreme Court recently held that a claim asserting the fifth amendment privilege against self-incrimination was adequately met by granting a witness immunity from use of the compelled testimony and any evidence derived from such testimony since the immunity was "coextensive with the privilege."⁴²⁴ The Court rejected the defendant's claim that the privilege could only be maintained by immunity from prosecution for offenses to which the testimony related. In another immunity decision,⁴²⁵ the Court upheld as "responsive" any answers sub-

418. *McCall v. Askew*, 262 So. 2d 887 (Fla. 2d Dist. 1972); see *Higginbotham v. State*, 88 Fla. 26, 101 So. 233 (1924).

419. *Williams v. State*, 275 So. 2d 284 (Fla. 3d Dist. 1973), citing *Minton v. State*, 113 So. 2d 361 (Fla. 1959).

420. *Simpson v. State*, 276 So. 2d 554 (Fla. 3d Dist. 1973).

421. 408 U.S. 665 (1972).

422. See, e.g., *United States v. Doe*, 455 F.2d 1270 (1st Cir. 1972); *Levinson v. Attorney Gen.*, 321 F. Supp. 984 (E.D. Pa. 1970).

423. 249 So. 2d 709 (Fla. 4th Dist. 1970), citing *State ex rel. Brautigam v. Interim Report of Grand Jury*, 93 So. 2d 99 (Fla. 1957). Such an official is entitled to an order ex-punging such a report from the public records.

424. *Kastigar v. United States*, 406 U.S. 441 (1972). The Court adopted "use and derivative use immunity" as opposed to transactional immunity which the defendant was claiming.

425. *Zicarelli v. New Jersey Comm'n of Inves.*, 406 U.S. 472 (1972). *But see United States*

mitted by a witness under a good faith belief that they were demanded, and held that the witness had the right of counsel's advice in making the determination.

In *Brinson v. State*,⁴²⁶ the appellant had been given immunity from drug prosecution after she gave sworn testimony as to another's involvement. However she was found to be in contempt because she failed to testify at the trial.

XV. INDICTMENT AND INFORMATION

If an information wholly fails to charge a defendant with a crime it is fundamental error. Thus, a conviction founded upon such an information is void and must be set aside although the defendant pleaded guilty to the charge. However, if the insufficiency of the information is such that it does not wholly fail to charge a crime, the failure to timely raise the defect by motion to dismiss constitutes a waiver of the insufficiency.⁴²⁷ It is not necessary that the indictment or information state the exact date of the offense if it is not known; it is adequate to state that the crime was committed within two specifically stated points in time. Also, it is not essential that the date of the offense proved at trial be the same date stated in the indictment or information.⁴²⁸ In *Howlett v. State*,⁴²⁹ the information and bill of particulars reported the date of the crime as January 11 or thereafter. The evidence at trial proved that the crime took place on January 6. The court, upholding defendant's conviction, stated:

There may be some variance between the date alleged in the information as being the date the offense charged was committed and that proven on the trial, *which variance is immaterial if the proof shows that the crime was committed before the filing of the information* and that prosecution therefore was begun within the [statute of limitations] period, except in those rare cases . . . where the exact time enters into the nature or legal existence of the offense.⁴³⁰

It is reversible error to require the defendant to go immediately to trial after allowing the prosecutor to substantially amend the information to charge a felony after having originally charged defendants with a misdemeanor. Instead, the information should be re-filed with a new arraignment for the defendants.⁴³¹ After a jury has been accepted and sworn, any amendment of an information which affects a matter of sub-

v. Meyers, 339 F. Supp. 1154 (E.D. Pa. 1972); *Davis v. Wainwright*, 342 F. Supp. 39 (M.D. Fla. 1972).

426. 269 So. 2d 373 (Fla. 1st Dist. 1972).

427. *Catanese v. State*, 251 So. 2d 572 (Fla. 4th Dist. 1971). See also FLA. R. CRIM. P. 3.190(c), 3.610(a)(1).

428. *Sparks v. State*, 273 So. 2d 74 (Fla. 1973). See also FLA. R. CRIM. P. 3.140(d)(3).

429. 260 So. 2d 878 (Fla. 4th Dist. 1972).

430. *Id.* at 880, quoting *Horton v. Mayo*, 153 Fla. 611, 15 So. 2d 327 (1943) (emphasis in original).

431. *Lawson v. State*, 251 So. 2d 683 (Fla. 3d Dist. 1971).

stance constitutes prejudicial error because of its potential for surprise and thus infringes upon the right to a fair trial.⁴³²

In *Wilcox v. State*⁴³³ the state filed an information charging the defendant with having received or aided in the concealment of certain property. The state then obtained leave to file an amended information which described different property. It then withdrew the amended information, requiring the defendant to proceed to trial on the original information. The court, in reversing the conviction, held that when the state abandoned the amended information it was left without a charge against the defendant since the amended information vitiated and replaced the original.

Where the state amended the bill of particulars on the morning of the trial, changing the scene of the alleged crime from the Youth Hall to defendant's apartment, after the state attorney and the defense counsel had discussed the change, the court held that the defendant had not been prejudiced and affirmed his conviction.⁴³⁴

One may be convicted of any crime which is "necessarily included" in the offense charged or which is included within the allegations of the accusatory pleading and shown by the proofs. A "necessarily included" offense of which a defendant may be convicted is one which is necessarily proven by proof of another offense.⁴³⁵ Thus, in *King v. State*,⁴³⁶ the court reversed a conviction of conspiracy to commit robbery based on an information charging robbery because conspiracy to commit robbery is not an offense included under a charge of robbery.

In *Kilgore v. State*⁴³⁷ defendant was charged in two separate informations with homicide and carrying a concealed weapon. The court proposed to try the charges jointly. The District Court of Appeal, Second District, held that this was error. At the time the case was decided, the Rules of Criminal Procedure⁴³⁸ required that only the state or the defendant could move for a consolidation. Also, a consolidation could take place only if the charges could have been joined in a single information.⁴³⁹

XVI. ARREST

A warrantless arrest for violation of a municipal ordinance is valid only if such violation is committed in the presence of the arresting officer

432. *Robinson v. State*, 266 So. 2d 694 (Fla. 4th Dist. 1972).

433. 248 So. 2d 692 (Fla. 4th Dist. 1971).

434. *Hale v. State*, 273 So. 2d 145 (Fla. 3d Dist. 1973).

435. *Payne v. State*, 275 So. 2d 261 (Fla. 4th Dist. 1973).

436. 267 So. 2d 351 (Fla. 4th Dist. 1972).

437. 271 So. 2d 148 (Fla. 2d Dist. 1972).

438. The applicable rule at the time the case was adjudicated was rule 3.190(g), (k). This rule was subsequently amended by FLA. R. CRIM. P. 3.151(b) which provides that only the defendant may move for consolidation of related offenses. Related offenses are those triable in the same court and based on the same or connected acts or transactions. FLA. R. CRIM. P. 3.151(a).

439. 271 So. 2d at 151. Again, this requirement has been changed by FLA. R. CRIM. P. 3.151(a), (b). See note 438 *supra*.

and there is sufficient evidence to show that the arrest was made immediately or on fresh pursuit as required by Florida Statutes section 901.15(1) (1971).⁴⁴⁰

A conviction for resisting arrest is dependent upon the state's proving that the officer was making a lawful arrest.⁴⁴¹ The legality of the arrest and the justification for resisting arrest are determined by whether or not the officer had substantial reason to believe that the defendant was committing a misdemeanor.⁴⁴²

Where an officer observed the defendant in the commission of a felony and filed for an arrest warrant with the state attorney, the arrest was valid because it was based upon the mistaken belief that the warrant was outstanding.⁴⁴³

The Supreme Court of Florida, in *Shadwick v. City of Tampa*,⁴⁴⁴ upheld the constitutionality of a municipal ordinance which authorized the city clerk to issue arrest warrants and, impliedly, to make a determination of probable cause. The decision that a determination of probable cause need not be confined to strictly judicial officers was affirmed by the United States Supreme Court,⁴⁴⁵ which required only that the issuer be neutral, detached and capable of determining probable cause.⁴⁴⁶

XVII. EVIDENCE

A. *Other Crimes*

It is well settled in Florida that evidence of other crimes⁴⁴⁷ is admissible if it casts light on the character of the act under investigation by showing either motive, intent, absence of mistake, common scheme, identity or general pattern of criminality, such that it has a relevant or material bearing on some essential aspect of the offense being tried.⁴⁴⁸ Evidence relating to similar but separate crimes is admissible if relevant for any purpose except that of showing bad character or propensity towards criminal conduct.⁴⁴⁹ The application and interpretation of the relevancy limitation have been the subject of numerous cases during the survey period.

In *Ashley v. State*,⁴⁵⁰ the Supreme Court of Florida reaffirmed the principle that

440. *City of Miami v. Crouch*, 249 So. 2d 739 (Fla. 3d Dist. 1971).

441. *Rosenberg v. State*, 264 So. 2d 68 (Fla. 4th Dist. 1972).

442. *Id.*

443. *Murphy v. State*, 252 So. 2d 261 (Fla. 3d Dist. 1971). The court justified the arrest under FLA. STAT. §§ 901.15(3), (4) (1973).

444. 250 So. 2d 4 (Fla. 1971), *aff'g* 237 So. 2d 231 (Fla. 2d Dist. 1970).

445. *Shadwick v. City of Tampa*, 407 U.S. 345 (1972).

446. *Id.*

447. For a thorough analysis of the constitutional issues relating to this type of evidence, see *Bray, Evidence of Prior Uncharged Offenses and the Growth of Constitutional Restrictions*, 28 U. MIAMI L. REV. 489 (1974).

448. *William v. State*, 110 So. 2d 654 (Fla. 1959), *cert. denied*, 361 U.S. 847 (1959).

449. *Id.*

450. 265 So. 2d 685 (Fla. 1972), *citing* *Williams v. State*, 117 So. 2d 473 (Fla. 1960).

the state, in introducing testimony concerning other crimes committed by a defendant, may not make such crimes a feature of the trial instead of an incident, so that the effect is to devolve from development of facts pertinent to the main issue of guilt or innocence into an attack on the character of the defendant.⁴⁵¹

Thus, in *Reyes v. State*,⁴⁵² a trial for possession and sale of drugs, extensive testimony as to the defendant's prior drug transactions was characterized as a "side-show of unrelated past activities" and held inadmissible. Similarly, proof of a prior robbery was termed "overkill" by the state and was held to be reversible error.⁴⁵³ Testimony concerning prior instances of breaking and entering were found not relevant in a prosecution for arson.⁴⁵⁴ The introduction of the testimony concerning the discovery of burglary tools in the defendant's possession subsequent to the events on which the information was based, prompted the court to note that "the prosecution is not permitted to adduce every description of evidence which according to their own notions may be supposed to elucidate the matter in dispute."⁴⁵⁵

In a prosecution for possession and sale of a narcotic drug, the introduction of evidence concerning the defendant's subsequent criminal conduct warranted a reversal, despite the fact that the evidence of the defendant's guilt was almost conclusive.⁴⁵⁶ In another case the testimony of two witnesses who claimed that the defendant had subsequently performed similar abortions on them was not relevant and was therefore inadmissible to prove the prior abortion.⁴⁵⁷

Evidence tending to place the defendant's automobile at the scene of another crime on the same night as the robbery with which the defendant was charged was held inadmissible as not showing a pattern, motive or manner of operation.⁴⁵⁸ However, testimony concerning a robbery committed by the defendant subsequent to the subject rape was relevant where the automobile used in the robbery was proven to have belonged to the rape victim's father.⁴⁵⁹

In a prosecution for incest, the admission of testimony concerning two alleged incestual acts was held not to be reversible error.⁴⁶⁰ Similarly,

451. 265 So. 2d at 693.

452. 253 So. 2d 907 (Fla. 1st Dist. 1971).

453. *Davis v. State*, 276 So. 2d 846 (Fla. 2d Dist. 1973).

454. *Machara v. State*, 272 So. 2d 870 (Fla. 4th Dist. 1973).

455. *Simmons v. Wainwright*, 271 So. 2d 464, 465 (Fla. 1st Dist. 1973). The court further characterized the introduction of such evidence as "one more example of overzealous prosecutors submitting evidence of collateral acts . . . that are not relevant to the issue being tried." *Id.*

456. *Denson v. State*, 264 So. 2d 442 (Fla. 1st Dist. 1972).

457. *Lucas v. State*, 57 So. 2d 261 (Fla. 1st Dist. 1971). "A citizen accused of committing a crime, no matter how heinous . . . is entitled to be informed as to the nature of the charge against him and afforded an opportunity to prepare his defense . . ." *Id.* at 263.

458. *Walker v. State*, 273 So. 2d 137 (Fla. 2d Dist. 1973).

459. *Brown v. State*, 250 So. 2d 13 (Fla. 3d Dist. 1971), *citing* *Gragnon v. State*, 212 So. 2d 337 (Fla. 3d Dist. 1968).

460. *Clark v. State*, 266 So. 2d 687 (Fla. 1st Dist. 1972). Judge Rawls, dissenting, stated

in a rape prosecution, evidence of four prior rapes, where the defendant had approached each victim in a manner identical to the subject case, was held relevant and thus admissible.⁴⁶¹ Testimony concerning a prior assault by the defendant was deemed relevant where it tended to prove a similarity between the crime the defendant was tried for and conduct toward others at or about the same time and place.⁴⁶² Evidence of four prior murders was held to be relevant to the issues of the motive, intent, identity, and modus operandi of the defendant.⁴⁶³ Additionally, evidence dealing with certain events which transpired at a rape victim's home some 300 yards from the scene of a first-degree murder was sufficiently tied to the subject murder to warrant admission.⁴⁶⁴

Where a proper predicate is laid by a showing of some overt act by the deceased at or about the time of the slaying that would reasonably suggest the need for self-defense, evidence of prior specific acts of violence by the deceased, known to the defendant at that time, are admissible for the limited purpose of proving the reasonableness of the defendant's fear of the deceased at the time of the slaying.⁴⁶⁵

In *Reams v. State*,⁴⁶⁶ the Supreme Court of Florida, noting that evidence relating to a similar crime is admissible in limited circumstances, imposed the additional requirement that before such evidence may be admitted there must be clear and convincing proof of a connection between the defendant and the collateral occurrences.

B. Character of the Accused

The state cannot introduce evidence attacking the character of the accused unless the accused first puts his good character in issue.⁴⁶⁷ Thus, the trial court committed reversible error when it allowed the state to prove, over the defendants' objections, that the defendants were drug

that the evidence admitted was not relevant under the Williams test and that, in effect, the defendant was tried for an incestuous relationship with his daughter which took place over a period of 16 years. *Accord*, *Nathy v. State*, 275 So. 2d 589 (Fla. 1st Dist. 1973). Again, in a dissenting opinion, Judge Rawls lamented that to admit a "tornado" of irrelevant and immaterial evidence relating to the reconstruction of a depraved family life over a 20 year period, "is to obliterate all concepts of due process granted by the Constitutions of the United States and the State of Florida." *Id.* at 590.

461. *Dean v. State*, 277 So. 2d 13 (Fla. 1973).

462. *Booth v. State*, 257 So. 2d 901 (Fla. 1st Dist. 1972).

463. *Ashley v. State*, 265 So. 2d 685 (Fla. 1972).

464. *Williams v. State*, 249 So. 2d 743 (Fla. 2d Dist. 1971).

465. *Williams v. State*, 252 So. 2d 243 (Fla. 4th Dist. 1971). The court detailed the evolution in Florida of judicial thought as to the admissibility of evidence of prior acts of violence by the deceased when offered in support of a defense of self-defense citing *Garner v. State*, 28 Fla. 113, 9 So. 835 (1891) (limiting such proof to evidence of the defendant's reputation for violence in the community); *Palm v. State*, 135 Fla. 258, 184 So. 881 (1938) (first case which permitted evidence of specific acts of violence by deceased known to the defendant at the time of the slaying).

466. 279 So. 2d 839 (Fla. 1973).

467. *Mann v. State*, 22 Fla. 600 (1886).

addicts when that fact was not raised initially by the defendants.⁴⁶⁸ Similarly, in a murder prosecution, the state's line of questioning concerning the defendant's alleged reputation for homosexual behavior was improper. The defendant's failure to object, however, precluded a reversal on that issue.⁴⁶⁹

C. Photographs, Tapes, Voiceprints and Fingerprints

During the period surveyed the Florida courts considered numerous cases concerning the admissibility of voiceprints, tape recordings, photographs and fingerprints. In *Worley v. State*,⁴⁷⁰ a case of first impression, the District Court of Appeal, Fourth District, held that voiceprints were admissible to corroborate testimony identifying the defendant as the person who had made false bomb threats by telephone. In holding that voiceprints were competent evidence the court expressly refrained from deciding whether voiceprint identification, standing alone, would be sufficient to sustain the identification and conviction of the defendant.⁴⁷¹ Similarly, the admission of expert testimony concerning a spectrographic voiceprint identification and the voiceprints upon which the opinions were based was held to be proper.⁴⁷² Thus, the introduction of tape recordings of extortionary telephone conversations to a prosecution witness to corroborate the witness's testimony was proper.⁴⁷³

The consent of one participant in a conversation to its interception is a condition precedent to its admissibility, absent a duly authorized warrant.⁴⁷⁴ The testimony of a police officer that he was given consent to make the wiretap was not sufficient, where such hearsay was not corroborated or authenticated by the competent in-court testimony of the consenting party.⁴⁷⁵ Additionally, where the quality of a tape recording is so defective and distorted as to render the conversation unintelligible, it is reversible error to allow such a recording to be heard by the jury, since the individual jurors might speculate upon the various portions of the recording which can be understood.⁴⁷⁶

Gruesome and inflammatory photographs are admissible into evi-

468. *Machara v. State*, 272 So. 2d 870 (Fla. 4th Dist. 1973).

469. *Statewright v. State*, 278 So. 2d 652 (Fla. 4th Dist. 1973).

470. 263 So. 2d 613 (Fla. 4th Dist. 1972), *citing* *United States v. Raymond*, 337 F. Supp. 641 (D.D.C. 1972); *United States v. Wright*, 17 U.S.C.M.A. 183, 37 C.M.R. 447 (1967); *State ex rel. Trimble v. Hedman*, 192 N.W.2d 432 (Minn. 1971). The court interpreted these cases and the available expert testimony and found that sufficiently impressive scientific data had been amassed to verify the voiceprint's accuracy and reliability.

471. *Worley v. State*, 263 So. 2d 613 (Fla. 4th Dist. 1972).

472. *Alea v. State*, 265 So. 2d 96 (Fla. 3d Dist. 1972).

473. *Id.*, *citing* *Walker v. State*, 222 So. 2d 760 (Fla. 3d Dist. 1969).

474. *Tollett v. State*, 272 So. 2d 490 (Fla. 1973), *quashing* 244 So. 2d 458 (Fla. 1st Dist. 1971).

475. *Tollett v. State*, 272 So. 2d 490 (Fla. 1973).

476. *Carter v. State*, 254 So. 2d 230 (Fla. 1st Dist. 1971).

dence if relevant to any issue which must be proved in a case.⁴⁷⁷ In *State v. Wright*,⁴⁷⁸ the supreme court held that the exceptional nature of the proffered evidence is not to be considered in testing the relevancy thereof but rather the determination of relevancy is to be made in the "normal manner." Thus, photographs, even though clearly inflammatory and prejudicial, are relevant and admissible to show decedent's position at the time of death;⁴⁷⁹ to establish the cause of death and identity of the deceased;⁴⁸⁰ to refute defendant's claim of self-defense;⁴⁸¹ to prove that force had been used against the victim during the attack;⁴⁸² to illustrate or explain the testimony of a witness;⁴⁸³ to support or refute the defense of suicide;⁴⁸⁴ or to reveal the nature and appearance of injuries.⁴⁸⁵

However, in *Beagles v. State*,⁴⁸⁶ the court held that where the defendant had admitted the victim's identity, her death and the fact that a bullet had entered her brain and did not come out, it was error for the trial court to allow into evidence more than 30 gruesome photographs of the victim because there remained no pertinent issues to be resolved by the use of such photographs. Additionally, the court noted that photographs should be received in evidence with great caution and those which show nothing more than a gory or gruesome portrayal should not be admitted. Further, gruesome photographs should not ordinarily be admitted if made after the body has been removed from the scene unless they have some particular relevance.⁴⁸⁷

The admission into evidence of several police photographs from which the defendant was identified prior to trial was not error where the numbers thereon were obliterated, they were not referred to as "mug shots" and they were introduced without objection.⁴⁸⁸ In *Loflin v. State*,⁴⁸⁹ the supreme court refused to grant an automatic reversal upon the mere use of the words "mug shots" and chose instead to require a consideration by the appellate court of the entire record and surrounding circumstances. Thus, without defendant's objection, the prosecutor's reference to "mug books" and "mug shots" in connection with the initial photo identifica-

477. *State v. Wright*, 265 So. 2d 361 (Fla. 1972), *quashing* 250 So. 2d 333 (Fla. 2d Dist. 1971).

478. 265 So. 2d 361 (Fla. 1972), *citing* *Henninger v. State*, 251 So. 2d 862 (Fla. 1971). The court rejected the District Court of Appeal, Second District's reasoning that, to be admissible, such photographs must tend to resolve a conflict in evidence relating to a disputed vital issue, not merely to prove a "technically relevant" issue.

479. *Baker v. State*, 251 So. 2d 329 (Fla. 1st Dist. 1971), *citing* *Williams v. State*, 228 So. 2d 377 (Fla. 1969).

480. *Jones v. State*, 257 So. 2d 296 (Fla. 3d Dist. 1972).

481. *Henninger v. State*, 251 So. 2d 862 (Fla. 1971).

482. *Stevens v. State*, 251 So. 2d 565 (Fla. 1st Dist. 1971).

483. *Pressley v. State*, 261 So. 2d 522 (Fla. 3d Dist. 1972).

484. *Jones v. State*, 257 So. 2d 296 (Fla. 3d Dist. 1972).

485. *Maness v. State*, 262 So. 2d 716 (Fla. 3d Dist. 1972).

486. 273 So. 2d 796 (Fla. 1st Dist. 1973).

487. *Id.*

488. *Greenwood v. State*, 270 So. 2d 427 (Fla. 3d Dist. 1972).

489. 273 So. 2d 70 (Fla. 1973), *aff'g* *Loflin v. State*, 258 So. 2d 834 (Fla. 1st Dist. 1972).

tion of the defendant constituted harmless error where there was other clear evidence of the defendant's identification, the prosecution stated that the defendant's photograph was not among the "mug shots" and the defendant expressly testified that he had never been convicted of a crime.⁴⁹⁰

Fingerprints alone are sufficient to clearly establish that an accused committed a given crime if the circumstances are such that the print could have been made only at the time the crime was committed.⁴⁹¹ Thus, fingerprints are sufficient to sustain a conviction where the crime occurred in a private house and no other plausible explanation existed for the presence of the defendant's prints at the scene of the crime.⁴⁹² However, in *Dargans v. State*,⁴⁹³ the court declined to apply the well settled rule and held that fingerprints found on a carton of beer were admissible notwithstanding the defendant's contention that the prosecution failed to prove that such prints could have been made only at the time of the commission of the subject crime.

D. Circumstantial Evidence

A person charged with a crime may be convicted solely on the basis of circumstantial evidence.⁴⁹⁴ However, the circumstances must be consistent with guilt and inconsistent with innocence and must be of such a conclusive nature and tendency that there can be no reasonable hypothesis other than that the defendant is guilty.⁴⁹⁵ Circumstantial evidence is insufficient to sustain a conviction as a matter of law if it produced nothing more than a suspicion of guilt.⁴⁹⁶ It is the actual exclusion of every other reasonable hypothesis which clothes circumstances with the force of proof.⁴⁹⁷

E. Identification of the Defendant

The propriety of the in-court identification of the defendant which was preceded by a pretrial lineup or photo identification, has been the subject of several cases during the survey period. Where the in-court

490. *Loftin v. State*, 273 So. 2d 70 (Fla. 1973).

491. *Wilkerson v. State*, 232 So. 2d 217 (Fla. 2d Dist. 1970); *Ivey v. State*, 176 So. 2d 611 (Fla. 3d Dist. 1965); *Tirko v. State*, 138 So. 2d 388 (Fla. 3d Dist. 1962).

492. *Roberts v. State*, 268 So. 2d 578 (Fla. 3d Dist. 1972), *citing* *Anderson v. State*, 241 So. 2d 390 (Fla. 1970).

493. 259 So. 2d 782 (Fla. 2d Dist. 1972).

494. *Miller v. State*, 270 So. 2d 423 (Fla. 3d Dist. 1972); *Navarro v. State*, 262 So. 2d 729 (Fla. 3d Dist. 1972).

495. *Camporeale v. State*, 270 So. 2d 49 (Fla. 4th Dist. 1973); *accord*, *Weinstein v. State*, 269 So. 2d 71 (Fla. 1st Dist. 1972); *Jacobs v. State*, 268 So. 2d 548 (Fla. 2d Dist. 1972); *Navarro v. State*, 262 So. 2d 729 (Fla. 3d Dist. 1972); *Lockett v. State*, 262 So. 2d 253 (Fla. 4th Dist. 1972).

496. *Whitehead v. State*, 273 So. 2d 146 (Fla. 2d Dist. 1973).

497. *Weinstein v. State*, 269 So. 2d 71 (Fla. 1st Dist. 1972); *Navarro v. State*, 262 So. 2d 729 (Fla. 3d Dist. 1972).

identification has a basis completely independent of the questioned line-up or other identification confrontation, its admission is proper.⁴⁹⁸ Such testimony will be set aside only if the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.⁴⁹⁹ Thus, in *Chaney v. State*,⁵⁰⁰ the supreme court held that the identification of a defendant in a rape prosecution was not fatally tainted despite the fact that, prior to any arrests, the victim was shown a single photograph of the defendant who had admitted to her that he had been jailed for rape previously. The victim had ample opportunity to see her assailant over a protracted period of time and her in-court identification was clearly of independent origin. The court further held that an accused is entitled to counsel only at a post-indictment lineup.⁵⁰¹

Similarly, it is not necessary that the defendant be represented by counsel at a pre-information, out-of-court photographic identification to have the evidence of identification properly admitted.⁵⁰² *Paschal v. State*,⁵⁰³ dealt with a prosecution for murder in the first degree in which the witnesses clearly saw the faces of the gunmen at the time of the crime. Prior to the inquest, they identified the gunmen from photographs. The court held that the identification at the inquest, conducted without the defendants being represented by counsel, did not prejudice the defendants who argued that the witnesses' observations at the inquest bolstered their subsequent identification at trial. The testimony of a police officer concerning an extra-judicial photographic⁵⁰⁴ or lineup⁵⁰⁵ identification which the victim made of the defendant was not competent original or substantive evidence to identify the accused, and was not properly admitted where there was no corroborative in-court identification by the victim.⁵⁰⁶

F. Hearsay

An otherwise inadmissible hearsay declaration is not rendered admissible merely because it is stated in the presence of the defendant.⁵⁰⁷ Such a statement is admissible under the hearsay exception of admission by silence only under circumstances where it was so accusatory in character that the defendant's silence may be inferred to have been an assent

498. *Wilson v. State*, 265 So. 2d 411 (Fla. 4th Dist. 1972); *Hearns v. State*, 262 So. 2d 907 (Fla. 4th Dist. 1972); *Daniels v. State*, 262 So. 2d 725 (Fla. 3d Dist. 1972).

499. See cases cited at note 498 *supra*.

500. 267 So. 2d 65 (Fla. 1972).

501. *Id.*

502. *Staten v. State*, 248 So. 2d 697 (Fla. 3d Dist. 1971).

503. 251 So. 2d 257 (Fla. 1971).

504. *Johnson v. State*, 249 So. 2d 452 (Fla. 4th Dist. 1971).

505. *Stevens v. State*, 251 So. 2d 565 (Fla. 1st Dist. 1971).

506. *Id.*

507. *Daugherty v. State*, 269 So. 2d 426 (Fla. 1st Dist. 1972), *citing Johnson v. State*, 249 So. 2d 452 (Fla. 4th Dist. 1971).

to its truth.⁵⁰⁸ Thus, the testimony of a police officer as to the identification of an accused made by an unknown second party was clearly inadmissible to prove the truth of the assertion, notwithstanding the fact that the defendant was present during the testimony.⁵⁰⁹ Further, the admission by silence exception has doubtful application to those situations where the party is accused of a crime in the presence of the arresting officer.⁵¹⁰

The testimony of a police officer that a third party, who was not allowed to testify, had told him that he saw the defendant's automobile at the scene of another crime on the same night as the subject robbery was inadmissible.⁵¹¹ Similarly, testimony grounded upon information from two unidentified sources who were not present and unavailable for cross-examination, was highly prejudicial to the defendant in that it deprived him of his rights to confront those witnesses who were directly contradicting his alibi defense.⁵¹² Testimony sought to be elicited from the arresting officer as to what time the complaining witness had told the officer that the alleged crime took place was held inadmissible under the hearsay rule.⁵¹³

In *Appell v. State*,⁵¹⁴ the court held that a statement must be spontaneous and made with little or no opportunity for reflection to be admissible under the res gestae exception to the hearsay rule. The four main factors to be evaluated in gauging the spontaneity of a res gestae statement were listed by the court as: (1) the time gap between the statement and the event, (2) the voluntary nature of the declaration, (3) the self-serving nature of the statement, and (4) the declarant's physical and mental condition at the time of the statement.⁵¹⁵

Under an exception to the hearsay rule, extra-judicial declarations of one conspirator made outside the presence of the co-conspirator may be admitted into evidence against the latter when the declarations were made in furtherance of and during the existence of a conspiracy.⁵¹⁶ However, before the co-conspirator rule may be invoked, there must first be independent evidence of the existence of a conspiracy and of the defendant's participation therein.⁵¹⁷ A determination as to whether or not a prima facie case has been established as a predicate for the admission of co-conspiratorial declarations is a question for the trial judge and normally must be established before such statements are introduced,⁵¹⁸

508. *Johnson v. State*, 249 So. 2d 452 (Fla. 4th Dist. 1971).

509. *Id.*

510. *Id.*

511. *Walker v. State*, 273 So. 2d 137 (Fla. 2d Dist. 1973).

512. *Webb v. State*, 253 So. 2d 715 (Fla. 4th Dist. 1971).

513. *Jones v. State*, 256 So. 2d 46 (Fla. 3d Dist. 1971).

514. 250 So. 2d 318 (Fla. 4th Dist. 1971).

515. *Id.*

516. *Hudson v. State*, 276 So. 2d 89 (Fla. 4th Dist. 1973).

517. *Id.*, citing *Farnell v. State*, 214 So. 2d 753 (Fla. 2d Dist. 1968). *Accord*, *Honchell v. State*, 257 So. 2d 889 (Fla. 1971).

518. *Hudson v. State*, 276 So. 2d 89 (Fla. 4th Dist. 1973), citing *Carbo v. United States*, 314 F.2d 718 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964).

but the trial judge in his discretion may permit the order of proofs to be reversed.⁵¹⁹

If at the time a dying declaration implicating the defendant was made, the circumstances were such that a jury might infer that the declarant entertained no hope of recovery and felt that death was imminent, such question was properly submitted to the jury.⁵²⁰

In *Rollins v. State*,⁵²¹ the court held that it was not an abuse of discretion to permit testimony by two state witnesses who had violated the court's order for sequestration of witnesses, where the record disclosed that after a voir dire examination the trial court determined that the violation was unintentional and did not substantially affect the ability of the witness to make an in-court identification.

Although a trial court has discretion to order the separation of witnesses, such discretion cannot be exercised arbitrarily. In *County of Dade v. Callahan*, a refusal to invoke "the rule," absent any inquiry into the identity of the witnesses or the nature of their prospective testimony, constituted an abuse of discretion.⁵²² Where the defendant failed to object to the presence of two officers in the court room during the trial, the argument that the trial judge "allowed" the rule on exclusion of witnesses to be violated thereby depriving the defendant of due process, was without merit.⁵²³ Additionally, the court reasoned that it is not error to permit a witness who is a police officer to remain in the courtroom during trial since such witnesses are "distinterested in the outcome of the trial."⁵²⁴

While it is a well-established rule in Florida that a member of the deceased victim's family may not testify for the purpose of identifying the victim where non-related witnesses are available to make such identification,⁵²⁵ the court in *Scott v. State*,⁵²⁶ held that any error in so doing was harmless, where the mother who identified the deceased also formed an essential link in the chain of custody of additional critical evidence. Similarly where the defendant failed to make a timely objection to the testimony of the victim's father although non-related witnesses were

519. *Honchell v. State*, 257 So. 2d 889 (Fla. 1971).

520. *Mills v. State*, 264 So. 2d 71 (Fla. 1st Dist. 1972), citing *Johnson v. State*, 113 Fla. 461, 152 So. 176 (1934), for the proposition that the apprehension of imminent death need not be established by statements of the declarant, but may be proved by facts and circumstances from which the jury might conclude that the declarant must have known and believed that he was on the threshold of death. In the subject case, the serious nature of the wound, a slashed throat, and an enormous loss of blood warranted submission of the issue to the jury.

521. 256 So. 2d 541 (Fla. 4th Dist. 1972).

522. 259 So. 2d 504 (Fla. 3d Dist. 1971).

523. *Ratliff v. State*, 256 So. 2d 262 (Fla. 1st Dist. 1972).

524. *Id.*, citing *Spencer v. State*, 113 So. 2d 729 (Fla. 1961).

525. *Abram v. State*, 242 So. 2d 215 (Fla. 1st Dist. 1970), cert. denied, 245 So. 2d 870 (Fla. 1971).

526. 256 So. 2d 19 (Fla. 4th Dist. 1971).

available for that purpose, the violation of the well-established rule did not constitute fundamental error.⁵²⁷

The supreme court, in *Freimuth v. State*,⁵²⁸ held that courts may take judicial notice of official records of administrative agencies without requiring the introduction of an authenticated copy of the rule. Thus, the trial court can take judicial notice of a Federal Register listing hallucinogenic drugs.⁵²⁹ Further, a trial court may, in its own discretion, take judicial cognizance of a municipal ordinance which the court is charged with enforcing.⁵³⁰ Judicial cognizance of a domestic statute does not constitute introduction of evidence by the defendant and thus does not abrogate the defendant's procedural right to open and close.⁵³¹

During the survey period there were numerous decisions considering miscellaneous evidentiary issues. Competent evidence as to value is essential in a larceny prosecution and thus the jury cannot be permitted to consider only the nature of the articles stolen.⁵³² While the victim is a competent witness as to value, the defendant is entitled to cross-examine him regarding current value.⁵³³ Moreover, cost is not to be considered the equivalent of value.⁵³⁴ In *Ashford v. State*,⁵³⁵ the supreme court held that a cross-examination of the defendant based on an "FBI report," which was secondary evidence of the information contained therein, was not fundamental error and thus not a proper subject on appeal where it was not raised before the trial court.⁵³⁶ It was error for the trial court to refuse to permit the defendant to testify as to whether he committed the crime for which he was charged, as it is basic to a defendant's "right to be heard" to so testify.⁵³⁷ A pretrial order that witnesses, who may be used by the state for purposes of identification, shall be examined for visual acuity was improper and nothing in the common law or the Florida Rules of Criminal Procedure authorizes a trial court to grant a motion compelling witnesses to submit to a physical examination of any sort.⁵³⁸ A comment on the defendant's silence contained within a hypothetical question going to the issue of sanity was harmless

527. *Barrett v. State*, 266 So. 2d 373 (Fla. 4th Dist. 1972); *accord*, *Russell v. Wainwright*, 266 So. 2d 375 (Fla. 4th Dist. 1972).

528. 272 So. 2d 473 (Fla. 1972), *aff'g* 249 So. 2d 754 (Fla. 1st Dist. 1971).

529. *Freimuth v. State*, 272 So. 2d 473 (Fla. 1972).

530. *Holmes v. State*, 273 So. 2d 753 (Fla. 1972).

531. *Wyatt v. State*, 270 So. 2d 47 (Fla. 4th Dist. 1972), *citing* FLA. STAT. § 918.09 (1969). The court drew a distinction between evidence and proof, with judicial notice constituting the latter.

532. *Smart v. State*, 274 So. 2d 577 (Fla. 2d Dist. 1973).

533. *Singleton v. State*, 258 So. 2d 313 (Fla. 2d Dist. 1972).

534. *Id.*

535. 274 So. 2d 517 (Fla. 1973).

536. *Id.*

537. *Moore v. State*, 276 So. 2d 504 (Fla. 4th Dist. 1973).

538. *State v. Smith*, 260 So. 2d 489 (Fla. 1972), *quashing* 254 So. 2d 402 (Fla. 1st Dist. 1971).

error where it was stricken from the record and the jury was properly admonished.⁵³⁹ Testimony concerning a conversation in which the defendant spoke of having refused to plead guilty because of his confidence in his ability to convince the jury of his innocence was wholly immaterial and irrelevant where its only purpose was to discredit the defendant's anticipated testimony.⁵⁴⁰ The testimony of an accomplice, even though uncorroborated, is sufficient to sustain a verdict of guilty.⁵⁴¹

XVIII. CONFIDENTIAL INFORMANTS

The disclosure at trial of the identity of a confidential informant who drove a police officer to a pool hall outside which defendant was standing, was not required following a sale of drugs to that police officer by the defendant.⁵⁴² The informant's participation was deemed minimal and there was no evidence that he had done anything to pave the way for the sale to the policeman. The court also distinguished this case from those where the sale is made to a confidential informant rather than a police officer.⁵⁴³ There was no error in refusing to provide the name of a confidential informant where one defendant actually knew the name of the confidential informant despite an allegation by the defendant's counsel that the state had told him that he would be given the name of the confidential informant at trial.⁵⁴⁴

XIX. PLEA OF GUILTY

Since the decision of the United States Supreme Court in *Boykin v. Alabama*,⁵⁴⁵ holding that a plea of guilty must be made knowingly, intelligently and voluntarily, the courts in Florida have interpreted and applied it under a broad range of circumstances. In *Alexander v. Wainwright*,⁵⁴⁶ the court held that the defendant's right to be thoroughly interrogated by the trial judge as to the voluntariness of his plea is not retroactive. Thus, there was no error when the trial court failed to inquire as to the defendant's understanding of the nature and consequence of his guilty plea since it was a pre-*Boykin* case.⁵⁴⁷ In *Hall v. State*,⁵⁴⁸ the District Court of Appeal, Fourth District, interpreted *Boykin* to require only "an affirmative record showing that a guilty plea is entered

539. *Zerega v. State*, 260 So. 2d 1 (Fla. 1972).

540. *Owens v. State*, 273 So. 2d 788 (Fla. 4th Dist. 1973).

541. *Kellerman v. State*, 261 So. 2d 555 (Fla. 3d Dist. 1972).

542. *Doe v. State*, 262 So. 2d 11 (Fla. 3d Dist. 1972), citing *Harrington v. State*, 110 So. 2d 495 (Fla. 1st Dist. 1959).

543. *Monserrate v. State*, 232 So. 2d 444 (Fla. 3d Dist. 1970).

544. *Rabreau v. State*, 269 So. 2d 64 (Fla. 3d Dist. 1972).

545. 395 U.S. 238 (1969).

546. 262 So. 2d 890 (Fla. 1st Dist. 1972), citing *Odle v. State*, 241 So. 2d 184 (Fla. 1st Dist. 1970).

547. *Alexander v. Wainwright*, 262 So. 2d 890 (Fla. 1st Dist. 1972).

548. 273 So. 2d 90 (Fla. 4th Dist. 1973). The court adopted the reasoning of *People v. Sepulvado*, 27 Mich. App. 66, 183 N.W.2d 327 (1970).

voluntarily, intelligently and understandingly” and rejected the necessity of having the record demonstrate a specific enumeration and waiver of federal constitutional rights in order for the plea to have been voluntarily made. A defendant need not be informed of his right to remain silent nor of his right not to testify against himself as a condition precedent to a voluntary guilty plea.⁵⁴⁹ A guilty plea is valid despite the finding that the trial court did not advise the defendant of his right to remain silent or his right to confrontation.⁵⁵⁰ In *Davis v. State*,⁵⁵¹ the court rejected the contention that *Boykin* requires the pronouncement of the exact words to the defendant that he has the “opportunity to confront his accusers if he went to trial and that he could not be compelled to testify against himself.”⁵⁵² In *Kelly v. State*,⁵⁵³ the District Court of Appeal, First District, held that *Boykin* “does not require a step-by-step recitation of each and every [one] of the defendant’s rights” where the defendant was represented by counsel and where the guilty plea was the product of plea-bargaining negotiations between the defendant and the state. Further, it is not a requirement in Florida that, prior to acceptance of a plea of guilty, the trial court must undertake an investigation as to the existence of a factual basis for the guilty plea; all that is required is that the court determine that the plea is made voluntarily with an understanding of the nature of the charge.⁵⁵⁴

If a plea of guilty is to be sustained as voluntary, it must be entered by a defendant competent to understand the consequences and must not be induced by fear, misapprehension, persuasion, promises, inadvertence or ignorance.⁵⁵⁵ Thus the contention that the defendant was psychologically coerced by his attorney to enter a plea of guilty did not warrant an order to vacate where the record demonstrated that the defendant specifically denied that anyone had done anything by way of duress, pressure, influence, force or any other method to cause him to plead guilty, or that anyone had promised him anything.⁵⁵⁶ However, where the trial court is notified immediately following pronouncement of a 10-year sentence that the defendant had pleaded guilty after having been advised by his counsel that he would receive a sentence of 3 years, the trial judge should have set aside the finding of guilt as well as the sentence and, *ex mero motu*, if necessary, set a hearing to determine the voluntariness of the plea.⁵⁵⁷

549. *Hill v. State*, 256 So. 2d 239 (Fla. 2d Dist. 1972).

550. *Kelly v. State*, 254 So. 2d 22 (Fla. 1st Dist. 1971).

551. 277 So. 2d 300 (Fla. 2d Dist. 1973).

552. *Id.* at 306.

553. 254 So. 2d 22 (Fla. 1st Dist. 1971), *citing* *Wilson v. Wainwright*, 248 So. 2d 249 (Fla. 1st Dist. 1971), and *Johnson v. State*, 248 So. 2d 225 (Fla. 3d Dist. 1971).

554. *Boyd v. State*, 255 So. 2d 705 (Fla. 4th Dist. 1971).

555. *Stovall v. State*, 252 So. 2d 376 (Fla. 4th Dist. 1971).

556. *Scarborough v. State*, 278 So. 2d 657 (Fla. 2d Dist. 1973).

557. *Kirlis v. State*, 262 So. 2d 713 (Fla. 2d Dist. 1972), *citing* FLA. R. CRIM. P. § 3.170 (a), (f).

The fact that the defendant was represented by competent counsel at the time he entered his guilty plea was a factor which strongly militated against a conclusion that the plea was involuntary.⁵⁵⁸ However, the bare allegation that defendant was without counsel at the time he pleaded guilty was insufficient to warrant vacating the judgment and sentence.⁵⁵⁹ Nor does the mere fact that multiple defendants were represented by a single attorney necessarily warrant a finding of reversible error based on a claim that defendants were denied effective assistance of counsel where the defendants pleaded guilty.⁵⁶⁰ Where the defendant was informed by the court and advised by counsel as to the effect and consequences of his guilty plea, the plea was voluntarily made.⁵⁶¹

In *State v. Pinto*,⁵⁶² the court noted that a defendant often pleads guilty after consultation and advice from his attorney and held that such decision was a tactical one which may not be whimsically revoked at a later time. A plea of guilty that is otherwise entered knowingly and voluntarily is not vitiated when entered for the expressly stated reason that the defendant had no witnesses and did not believe that he could "beat the charge."⁵⁶³ The court in *Scarborough v. State* held that "even where a defendant pleads guilty to avoid a death sentence and upon entering his plea testifies that he is innocent, such a plea is not involuntary where, upon the advice of counsel, he was pleading guilty to limit the penalty that he might receive."⁵⁶⁴

The mere fact that a defendant had a prior history of mental illness did not serve to invalidate a guilty plea where the record affirmatively demonstrated that the trial court accepted the plea following a detailed inquiry sufficient to support a finding that it was entered voluntarily and that there was nothing which would raise a doubt as to the defendant's sanity.⁵⁶⁵ The fact that the state obtained the defendant's confidential psychiatric report in contravention of a protective order, did not constitute sufficient influence to nullify a plea, absent evidence that such information was used by the state in an attempt to encourage the defendant to enter a plea of guilty.⁵⁶⁶ The contention that the promises of psychiatric care were used as an inducement to obtain a plea was without merit where there was no showing that the defendant relied upon the promise or that it in any way influenced his decision.⁵⁶⁷

558. *Williams v. State*, 259 So. 2d 753 (Fla. 1st Dist. 1972).

559. *McClendon v. State*, 260 So. 2d 255 (Fla. 4th Dist. 1972).

560. *Williams v. State*, 268 So. 2d 543 (Fla. 3d Dist. 1972).

561. *Johnson v. State*, 248 So. 2d 225 (Fla. 2d Dist. 1971).

562. 273 So. 2d 408 (Fla. 3d Dist. 1973), *citing* *Belsky v. State*, 231 So. 2d 256 (Fla. 3d Dist. 1970).

563. *Carter v. State*, 253 So. 2d 731 (Fla. 1st Dist. 1971).

564. 273 So. 2d 657, 658 (Fla. 2d Dist. 1973), *citing* *North Carolina v. Alford*, 400 U.S. 25 (1970).

565. *Betts v. State*, 255 So. 2d 708 (Fla. 4th Dist. 1971).

566. *Surette v. State*, 251 So. 2d 149 (Fla. 2d Dist. 1971).

567. *Id.* at 152-53.

Where the files and records did not conclusively establish that a plea was voluntarily made free from any threat, intimidation, coercion, promise or inducement of any kind, and that the defendant was advised that he was waiving certain constitutional rights, the defendant was entitled to an evidentiary hearing on a motion to vacate sentence.⁵⁶⁸ Absent any indication in the record that a plea was entered voluntarily, an evidentiary hearing is required notwithstanding the fact that the defendant was represented by a public defender.⁵⁶⁹ The mere fact that a defendant who entered a plea of guilty was represented by counsel of his own choosing does not negate the need for an evidentiary hearing on a motion to vacate and set aside judgment and sentence where the defendant alleged that he was coerced into confessing by the arresting officers, that no one explained to him the penalty for five counts of robbery, that he did not know that he was entitled to a trial and that he was both questioned by the police for hours and identified in a lineup without the aid of an attorney.⁵⁷⁰ Where the record is devoid of any inquiry by the trial judge into the voluntary nature of the defendant's plea, the judgment will be vacated and the trial judge must either inquire into the voluntariness of the plea or allow the defendant to withdraw it.⁵⁷¹

During the survey period several cases dealt with the problem of unfulfilled promises, pursuant to which pleas of guilt were entered. In *Santobello v. New York*,⁵⁷² the United States Supreme Court held that when a guilty plea rests in any significant degree on a promise or agreement of the prosecutor, such promise must be fulfilled to the extent that it constitutes part of the inducement. Thus, where the prosecutor inadvertently breached an agreement that he would refrain from making a sentence recommendation, the Supreme Court remanded the case for further consideration and left the ultimate disposition thereof to the discretion of the state court. Such discretion was to be exercised in accordance with the options outlined by the Supreme Court to either grant specific performance of the agreement on the plea or afford the defendant the opportunity to withdraw the plea.⁵⁷³

In *Dade County v. Baker*,⁵⁷⁴ the Supreme Court of Florida held that where cumulative sentences of imprisonment in the county jail were bargained for so that the defendant could benefit from a drug rehabilitation program offered by the county, the defendant would be given the opportunity to withdraw the guilty plea as a result of the court's finding

568. *Clark v. State*, 256 So. 2d 551 (Fla. 4th Dist. 1972).

569. *Williamson v. State*, 273 So. 2d 784 (Fla. 2d Dist. 1973).

570. *Gayle v. State*, 265 So. 2d 389 (Fla. 2d Dist. 1972).

571. *Cheever v. State*, 272 So. 2d 875 (Fla. 3d Dist. 1973).

572. 404 U.S. 257 (1971). The Court concluded that the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiations of pleas of guilty could be best served by remanding the case.

573. *Id.*

574. 265 So. 2d 700 (Fla. 1972).

that felonies could not cumulatively exceed one year in the county jail. However, the fact that during plea negotiations the trial court indicated that it would consider a shorter sentence does not preclude that court from imposing a harsher sentence following a full jury trial where the court becomes better informed of the circumstances of the particular crimes involved.⁵⁷⁵ Nor was the trial court's informal statement in open court, during plea negotiations, that it would not be thinking in terms of less than a 50-year sentence, binding on the court.⁵⁷⁶ In *Taylor v. State*,⁵⁷⁷ the defendant was entitled to reversal and remand with directions that he be allowed to withdraw his plea of guilty where the sentencing judge overlooked a condition of his plea bargain that he be allowed to withdraw his plea if he should be found not to be a proper candidate for probation.

The District Court of Appeal, Second District, in *Barker v. State*,⁵⁷⁸ rejected the employment of specific performance⁵⁷⁹ to enforce plea bargains on the ground that to do so would bind the trial judge in his final disposition of the case. However, the court did indicate that the status of a specifically enforceable contract might be recognized upon a clear showing of irrevocable prejudice to either the prosecution or defense.⁵⁸⁰ Additionally, where the trial court concurs in a plea bargain or enters into plea negotiations which contemplate sentence or charge concessions if defendant enters a guilty plea, and if the judge later decides that the final disposition of the case shall not include such concessions, he has an affirmative duty to so advise the defendant before sentencing and to provide the defendant with the opportunity to either affirm or withdraw his plea as entered.⁵⁸¹

While an agreement by the state to recommend probation does not bind the trial court to accept such recommendation, the state is bound either to make the recommendation as promised or to advise the defendant prior to the withdrawal of the plea of not guilty of its intention not to uphold the bargain.⁵⁸² The state's failure to maintain its part of the bargain renders the plea involuntary and the trial court must vacate the judgment and permit the defendant to withdraw the plea.⁵⁸³ Where a plea of guilty is predicated on a promise by the state not to prosecute other pending charges arising from the same criminal transaction, and the state, notwithstanding the promise to the contrary, files an information

575. *Gause v. State*, 270 So. 2d 383 (Fla. 3d Dist. 1972).

576. *Blackman v. State*, 265 So. 2d 734 (Fla. 3d Dist. 1972).

577. 275 So. 2d 307 (Fla. 4th Dist. 1973).

578. 259 So. 2d 200 (Fla. 2d Dist. 1972).

579. *Id.* at 204.

580. Absent such extraordinary circumstances, under rule 3.170(f), and *Brown v. State*, 245 So. 2d 41, 44 (Fla. 1971), if a trial judge decides that the final disposition of the case should not include the concession of leniency contemplated by the negotiated plea bargain, he should be most liberal in permitting a withdrawal of the guilty plea.

581. *Enos v. State*, 272 So. 2d 847 (Fla. 4th Dist. 1973).

582. *Crossin v. State*, 262 So. 2d 250 (Fla. 4th Dist. 1972), citing *Ward v. State*, 156 Fla. 185, 22 So. 2d 887 (1945).

583. *Crossin v. State*, 262 So. 2d 250 (Fla. 4th Dist. 1972).

based on the pending charges, that information may properly be dismissed.⁵⁸⁴

The Supreme Court of Florida, in *Costello v. State*,⁵⁸⁵ after noting that guilty pleas are voided when judges or prosecutors promise defendants that they will be given lesser sentences than they actually receive,⁵⁸⁶ held that

[w]e do not believe the result should be different when a defendant has a reasonable basis for relying upon his attorney's mistaken advice that the judge will be lenient. The effect upon the defendant is the same; in each case he exchanges his constitutional right to a jury trial for a promise of leniency.⁵⁸⁷

The court qualified its holding by noting that it is not enough for a defendant to argue that he was under an impression that a promise had been made; a reasonable basis for such an impression must be shown. Thus, allegations by a defendant that he had entered guilty pleas in reliance on his attorney's statement that the most the defendant would receive was five years in prison, did not warrant vacation of the plea where such contention was not supported by the record.⁵⁸⁸ In *State v. Pinto*,⁵⁸⁹ the defendant's motion to vacate judgment and sentence on the ground that he had entered a plea on the basis of promises made by defense counsel after plea negotiations was not sufficient in the absence of an allegation or showing that, at the time the guilty plea was made, the trial judge was aware of the bargain or had been a party thereto.

The withdrawal of a plea of guilty is a matter properly addressed to the sound discretion of the trial court.⁵⁹⁰ A defendant should be allowed to withdraw a plea given inadvisedly when application is duly made in good faith and sustained by proofs and a proper offer is made to go to trial on a plea of not guilty.⁵⁹¹ In *Facion v. State*,⁵⁹² the court held that the exercise of discretion should be based upon considerations and facts bearing only upon the merits of the motion to change the plea. The accused's guilt or innocence, or the probable cause to believe he was guilty were not proper subjects for consideration by the trial judge on the motion to withdraw the plea. Additionally, the court held that permission to withdraw "may not be refused where it is in the least evident that the ends of justice will be subserved by allowing a plea of not guilty

584. *State v. Drake*, 276 So. 2d 73 (Fla. 1st Dist. 1973). Although the court avoided characterizing it as such, the result approaches specific performance.

585. 260 So. 2d 198 (Fla. 1972).

586. *Id.* at 201.

587. *Id.*

588. *Robinson v. State*, 270 So. 2d 51 (Fla. 2d Dist. 1972).

589. 273 So. 2d 408 (Fla. 3d Dist. 1973).

590. *Stovall v. State*, 252 So. 2d 376 (Fla. 4th Dist. 1971). See FLA. R. CRIM. P. 3.170 (f).

591. *Stovall v. State*, 252 So. 2d 376, 378 (Fla. 4th Dist. 1971).

592. 258 So. 2d 28 (Fla. 2d Dist. 1972).

to be entered in place of a guilty plea."⁵⁹³ However, where the defendant failed to make a timely motion to withdraw his guilty plea, the trial court did not err in failing to allow him to do so.⁵⁹⁴ When a plea has been withdrawn with the approval of the court, it is as if a plea had never been entered.⁵⁹⁵

An uncoerced guilty plea cures all non-jurisdictional defects preceding the acceptance of such plea.⁵⁹⁶ The effect of a guilty plea is to waive trial on the merits and preclude attack on the validity of any search and seizure of evidence or the admissibility thereof,⁵⁹⁷ by way of post-conviction motion to vacate judgment of conviction and sentence. Similarly, a defendant who entered a plea of guilty had no standing to urge that the speedy trial rule should operate to discharge him.⁵⁹⁸ The failure of the information to state the specific amount of marijuana allegedly possessed constituted a jurisdictional defect which could not be cured by consent or be waived in a guilty plea.⁵⁹⁹ Similarly in *Catanese v. State*,⁶⁰⁰ the court held that where the information wholly fails to charge the defendant with a crime, it is fundamental error and a conviction founded thereon is void and must be set aside even though the defendant entered a plea of guilty to such charge.

Despite their acknowledgement of the general rule that voluntary guilty pleas cure all non-jurisdictional defects, the court in *State v. Pitts*,⁶⁰¹ held that a guilty plea does not cure the defect of a state's suppression or concealment of evidence favorable to the accused,⁶⁰² and that matters going to the credibility of a state's witness are cognizable in a post-conviction proceeding notwithstanding a guilty plea.

It is not necessary for a defendant to make a motion to withdraw his plea as a condition precedent to an appeal based on an allegation that the plea was involuntary.⁶⁰³

XX. NOLO CONTENDERE

A plea of nolo contendere has the same effect as a plea of guilty such that one who is sentenced to imprisonment upon such a plea is prosecuted and convicted under the same information.⁶⁰⁴ A nolo plea

593. *Id.* at 30.

594. *Schaefer v. State*, 264 So. 2d 121 (Fla. 4th Dist. 1972).

595. *Bell v. State*, 262 So. 2d 244 (Fla. 4th Dist. 1972).

596. *Williams v. State*, 259 So. 2d 753 (Fla. 1st Dist. 1972); *Morris v. State*, 255 So. 2d 704 (Fla. 4th Dist. 1971).

597. *Whitlow v. State*, 256 So. 2d 48 (Fla. 2d Dist. 1971).

598. *White v. State*, 273 So. 2d 782 (Fla. 2d Dist. 1973).

599. *Pope v. State*, 268 So. 2d 173 (Fla. 2d Dist. 1972).

600. 251 So. 2d 572 (Fla. 4th Dist. 1971).

601. 249 So. 2d 47 (Fla. 1st Dist. 1971).

602. *Brady v. Maryland*, 373 U.S. 83 (1963).

603. *Enos v. State*, 272 So. 2d 847 (Fla. 4th Dist. 1973), *citing* *Boykin v. Alabama*, 395 U.S. 238 (1969).

604. *Chesebrough v. State*, 255 So. 2d 675 (Fla. 1971).

may be conditioned upon the reservation of a question of law;⁶⁰⁵ if it is not so conditioned, the defendant may not question the validity of a judge's denial of a motion to suppress.⁶⁰⁶ However, where the record showed that the defendant's *nolo contendere* plea was entered solely in light of the court's denial of a motion to suppress, defendant could appeal the denial of his motion despite the *nolo* plea.⁶⁰⁷

Where the state had promised to make a recommendation to the court in return for a plea of *nolo contendere*, failure to make that recommendation following such a plea is error because the state may not gain an advantage in this way.⁶⁰⁸ The court recommended that if the state decides against making its recommendation, it should advise the defendant prior to the entry or charge of the plea.⁶⁰⁹

The Supreme Court of Florida later held that once the state attorney's office has agreed to accept a plea of a lesser included offense, and the plea has been made by the defendant, the state is estopped from claiming that its representative had erred in making the offer unless the defendant or his counsel caused the error.⁶¹⁰

Whether a plea of *nolo contendere* was voluntary should be determined to see if withdrawal of such a plea should be allowed where a defendant alleged that his plea was made upon advice of counsel that he would get a three-year jail sentence in return.⁶¹¹

A plea of *nolo contendere* must be made knowingly and understandingly without threat, intimidation, promise or inducement of any kind.⁶¹² Although a *per curiam* decision without opinion did not permit withdrawal of a *nolo* plea,⁶¹³ the dissent argued that the case's facts, including the exchange between counsel and the court, clearly warranted permission to withdraw the plea in view of earlier cases on point.⁶¹⁴

XXI. SELF-INCRIMINATION

The United States Supreme Court⁶¹⁵ upheld a California statute which required a driver who was involved in an accident to stop immediately at the scene and to give the driver of the other vehicle his name and address as not violative of the fifth amendment privilege against self-incrimination. Evidence of a defendant's physical condition in a

605. *State v. Ashbey*, 245 So. 2d 225 (Fla. 1971).

606. *Chesebrough v. State*, 255 So. 2d 675 (Fla. 1971).

607. *Ackles v. State*, 270 So. 2d 39 (Fla. 4th Dist. 1972).

608. *Crossin v. State*, 262 So. 2d 250 (Fla. 4th Dist. 1972).

609. *Id.*

610. *State ex rel. Gutierrez v. Baker*, 276 So. 2d 470 (Fla. 1973).

611. *Kirlis v. State*, 262 So. 2d 713 (Fla. 2d Dist. 1972).

612. *Hall v. State*, 273 So. 2d 90 (Fla. 4th Dist. 1973). *See also* *Cheever v. State*, 272 So. 2d 875 (Fla. 3d Dist. 1973).

613. *McCarroll v. State*, 264 So. 2d 428 (Fla. 4th Dist. 1972).

614. *Id.* at 428, *citing* *Banks v. State*, 136 So. 2d 25 (Fla. 1st. Dist. 1962); *Costello v. State*, 260 So. 2d 198 (Fla. 1972); *Brown v. State*, 234 So. 2d 161 (Fla. 4th Dist. 1970).

615. *California v. Byers*, 402 U.S. 424 (1971).

drunk driving case also does not violate the constitutional provisions which protect a defendant against self-incrimination.⁶¹⁶

The reasonable seizure of a handwritten note which stated that the defendant had killed the victim was inadmissible since such evidence, which is "testimonial" or "communicative" in nature, would compel the defendant to become a witness against himself in violation of the privilege against self-incrimination.⁶¹⁷

The exercise of one's privilege against self-incrimination by remaining silent during interrogation⁶¹⁸ prohibits the prosecution from introducing that fact in evidence.⁶¹⁹

The District Court of Appeal, First District, restated that under Florida law, a defendant who raises the defense of insanity in a criminal case, and requests and is granted an examination, must cooperate with court-appointed experts to the fullest.⁶²⁰ However, the court went on to state that the psychiatrist used by the court may be questioned only as to his conclusion regarding the defendant's sanity, and any questions by the state regarding incriminating statements made by the defendant during his examination would violate his right against self-incrimination.⁶²¹

XXII. JURY TRIAL

A. *Right to Trial by Jury*

Having already decided that a six-man jury in non-capital cases did not violate the sixth or fourteenth amendments,⁶²² the United States Supreme Court continued to expand upon what procedures were allowable in meeting this constitutional right to trial by jury. In the companion cases of *Apodaca v. Oregon*⁶²³ and *Johnson v. Louisiana*,⁶²⁴ the Court held that state convictions for felonies by less than unanimous juries were violative neither of the constitutional right to trial by jury nor of due process under the fourteenth amendment. Although Florida has implemented trial by a six-man jury, it retains the common law requirement of a unanimous verdict in all cases.

A valid waiver of jury trial was found in *Quartz v. State*⁶²⁵ where the defendant had signed an information providing for waiver of trial by jury and where counsel for the defendant had made an oral waiver. Citing two

616. *County of Dade v. Callahan*, 259 So. 2d 504 (Fla. 3d Dist. 1971).

617. *State v. Kircheis*, 269 So. 2d 16 (Fla. 3d Dist. 1972), citing *Maryland Pen. v. Hagden*, 387 U.S. 294 (1967), and *Schmerber v. California*, 384 U.S. 757 (1966).

618. *Miranda v. Arizona*, 384 U.S. 436 (1966).

619. *Brenisir v. State*, 267 So. 2d 23 (Fla. 4th Dist. 1972).

620. *McMunn v. State*, 264 So. 2d 868 (Fla. 1st Dist. 1972), citing *Parkin v. State*, 222 So. 2d 457 (Fla. 1st Dist. 1969) and *Parkin v. State*, 238 So. 2d 817 (Fla. 1970).

621. *McMunn v. State*, 264 So. 2d 868, 870 (Fla. 1st Dist. 1972).

622. *Williams v. Florida*, 399 U.S. 78 (1970).

623. 406 U.S. 404 (1972).

624. 406 U.S. 356 (1972).

625. 258 So. 2d 283 (Fla. 3d Dist. 1972).

federal cases, the court found that although interrogation of the defendant is a better practice, a waiver may meet the requirement of voluntariness if the defendant knowingly signs a written document.⁶²⁶ In a later case, the District Court of Appeal, Third District, held that even absent a waiver in an information signed by the defendant, a method of waiver prescribed by Florida Statutes section 912.01 (1971), it was enough that the record reflected that the defendant did in fact otherwise waive jury trial.⁶²⁷

The Florida statutes⁶²⁸ providing for the transfer of cases from municipal to state courts in order to obtain trial by jury were the subject of a number of cases during the survey period. Such a transfer is not permitted when the municipal court provides for jury trial.⁶²⁹ The District Court of Appeal, Fourth District, disallowed a motion for transfer of a "speeding" case from municipal to state court under Florida Statutes section 932.61 (1973), where there was no clear evidence showing that the municipal violation was also a violation of state law.⁶³⁰

The requirement in Florida Statutes section 932.61(4) (1973), that, upon a judge's order that a case be transferred to a state court, all record materials must be sent to that court within three days, must be strictly adhered to. Failure to follow this provision resulted in proper dismissal of the case in *State v. Cook*.⁶³¹ However, a dismissal for failure to follow these statutory sections does not prevent refile of an independent information by the proper authorities, as jeopardy has not yet attached.⁶³²

The District Court of Appeal, First District, found no right to trial by jury in a contempt of court conviction, and rule 3.840(a)(4), providing that all issues of law and fact be heard and determined by the judge, was held valid under the state and federal constitutional provisions for jury trial.⁶³³

Where it was apparent at a hearing for a new trial that the sole material prosecution witness swore to two conflicting stories as to the guilt of the defendant, one at trial and one thereafter, it was error for

626. See *Baker v. State*, 269 So. 2d 767 (Fla. 3d Dist. 1972), citing *Quartz v. State*, 258 So. 2d 283 (Fla. 3d Dist. 1972). In *Baker*, the court held that full concurrence with counsel as to waiver at arraignment amounted to a knowing waiver.

627. *Parks v. State*, 263 So. 2d 642 (Fla. 3d Dist. 1972), citing *Ivory v. State*, 184 So. 2d 896 (Fla. 4th Dist. 1966).

628. FLA. STAT. §§ 932.61-.66 (1973).

629. *Nesler v. Hampton*, 260 So. 2d 561 (Fla. 1st Dist. 1972).

630. *Mitchell v. City of Fort Lauderdale*, 254 So. 2d 824 (Fla. 4th Dist. 1971). This decision appears to be unfair in that the defendant is forced to predict the facts to be alleged by the prosecution.

631. 254 So. 2d 560 (Fla. 2d Dist. 1971), *aff'd*, 264 So. 2d 417 (Fla. 1972).

632. *State v. Ressler*, 257 So. 2d 620 (Fla. 4th Dist. 1971).

633. *Aaron v. State*, 261 So. 2d 515 (Fla. 1st Dist. 1972), citing *Cheff v. Schnackenberg*, 384 U.S. 373 (1966) (six month criminal contempt conviction is "petty" and thus no jury necessary), and *Bloom v. Illinois*, 391 U.S. 194 (1968) (adhering to the rule that contempt is "petty" if the sentence is six months or less). See *Baldwin v. New York*, 399 U.S. 66 (1970).

the trial judge to determine at which time the witness was telling the truth, for to do so pre-empted the function of the jury.⁶³⁴

A longer sentence may never be invoked simply because a defendant asks for a trial by jury. However, where a defendant was sentenced to 35 years for robbery following a jury trial, it was not subject to review despite the fact that defendant's cohort was only sentenced to five years following a plea bargain, since the sentence was within the statutory limits.⁶³⁵

B. Jurors

In *State v. Silva*,⁶³⁶ the Supreme Court of Florida addressed the propriety of jury selection using a quota system, and the requirement that jurors be over the age of 21 and that they be of specified character, e.g., law abiding, of good character and sound judgment. A system in which the names of white persons and black persons were placed on jury lists in proportion to the population of their respective classes in the community was found violative of due process and equal protection as such selection limits the number of qualified jurors in each class.⁶³⁷ It is required that selection be made at random. The court suggested that the county use its election data process equipment for that purpose.

Turning to the question of whether a Florida statute⁶³⁸ requiring jurors to be above the age of 21 was in derogation of the twenty-sixth amendment to the United States Constitution, the Supreme Court of Florida⁶³⁹ concluded that the twenty-sixth amendment only provided 18-year-old's with the right to vote, but did not include a provision for jury service at that age. Consequently, the states have the power to set an age requirement for service as a juror. Also, a statutory provision of random selection providing for the listing of only those persons which the selecting officers believe to be law abiding citizens and of good character, was found constitutional and within the power of the selecting body. It should also be noted that an objection to the panel of jurors must be made prior to trial in order for the appellate court to grant relief to one assigning this as error.⁶⁴⁰ Relying on *Silva*, the Supreme Court of Florida held that the mere showing of a certain percentage of eligible black jurors is insufficient to prove that a particular panel was improperly selected, although it may be considered in such a determination.⁶⁴¹ In *Peters v. Kiff*,⁶⁴² the United States Supreme Court held that proof of

634. *Solis v. State*, 262 So. 2d 9 (Fla. 2d Dist. 1972).

635. *Weathington v. State*, 262 So. 2d 724 (Fla. 3d Dist. 1972).

636. 259 So. 2d 153 (Fla. 1972).

637. *Id.*

638. FLA. STAT. § 40.01(1) (1973).

639. *State v. Silva*, 259 So. 2d 153 (Fla. 1972).

640. *Foxworth v. State*, 267 So. 2d 647 (Fla. 1972) (defendant's failure to object to panel prior to examination of individual jurors was found to constitute waiver).

641. *Id.*

642. 407 U.S. 493 (1972).

systematic exclusion of blacks from a grand jury or petit jury was properly challenged by a convicted white even if he could not show that he was himself harmed by such exclusion.

With the apparent elimination of the death penalty by the United States Supreme Court,⁶⁴³ any questions revolving around the exclusion of jurors with opinions against capital punishment have presumably ended.⁶⁴⁴ Nevertheless, prior to that decision, it was held that several jurors were properly excluded when they were found incapable of rendering a verdict which would result in a sentence of capital punishment.⁶⁴⁵ In a similar case, excusal of jurors because they either could not reach an impartial decision on defendant's guilt or would never vote to impose the death penalty was also held proper.⁶⁴⁶

It was improper for a defendant to contest the propriety of a jury venire through rule 3.850 when the issue was properly raised at the trial level, and was a proper subject for direct appeal.⁶⁴⁷

The voir dire process cannot cure the effect of a publication of a confession in the news media has on the jury, and a change of venue should be granted in such a case.⁶⁴⁸ No change of venue is required, however, where a jury may have formed some impression or opinion as to the case's merits through factual news items,⁶⁴⁹ or where newspaper reports of other criminal charges against the defendant had been made, and prospective jurors may have heard of these charges, since such knowledge alone would not disqualify a juror absent a showing of prejudice.⁶⁵⁰

XXIII. DISQUALIFICATION OF JUDGES⁶⁵¹

In *State ex rel. Shelton v. Sepe*,⁶⁵² the court stated that it was "ill advised" for a judge to make a public pronouncement concerning his attitude toward sentencing offenders for specific crimes; nevertheless, since the announcement of a policy of confinement for a conviction of certain offenses pertained to matters after conviction, and was permitted by statute, there was no reasonable basis for defendant's fear that he would not get a fair trial. The Court also held that the judge could not

643. *Furman v. Georgia*, 408 U.S. 238 (1972).

644. Subsequent to the survey period and in view of the Supreme Court's unwillingness to completely forbid capital punishment in *Furman*, the Florida Legislature enacted a new statute allowing capital punishment in certain cases. FLA. STAT. § 775.082(1) (1973). Thus, the problem alluded to in the text may be a reality in the future.

645. *Paramore v. State*, 251 So. 2d 344 (Fla. 3d Dist. 1971), citing *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

646. *Portee v. State*, 253 So. 2d 866 (Fla. 1971). This case presents an interesting examination of the case law on this subject.

647. *Yanks v. State*, 273 So. 2d 401 (Fla. 3d Dist. 1973).

648. *Oliver v. State*, 250 So. 2d 888 (Fla. 1971), quashing 239 So. 2d 637 (Fla. 1st Dist. 1970), *Colbert v. State*, 239 So. 2d 642 (Fla. 1st Dist. 1970).

649. *Gavin v. State*, 259 So. 2d 544 (Fla. 3d Dist. 1972).

650. *Murphy v. State*, 252 So. 2d 385 (Fla. 3d Dist. 1971).

651. See generally FLA. R. CRIM. P. 3.230.

652. 254 So. 2d 12 (Fla. 3d Dist. 1971).

be disqualified because he was employed as an assistant state attorney at the time the defendant was bound over for trial, if he had no dealings with the prosecution of the case.

Where the defendant failed to follow the proper procedure for obtaining disqualification of a judge,⁶⁵³ it was within the discretion of the judge to determine whether he should disqualify himself.⁶⁵⁴

XXIV. SPEEDY TRIAL⁶⁵⁵

During the survey period, there was a great deal of litigation concerning rule 3.191 of the Florida Rules of Criminal Procedure as promulgated by the supreme court.⁶⁵⁶ In *Turner v. State ex rel. Pellerin*,⁶⁵⁷ the Supreme Court of Florida outlined the two basic requirements which must be met by one seeking to perfect his rights under the speedy trial rule. The demand for a speedy trial must be made subsequent to the date of the filing of an indictment, information or trial affidavit against the defendant, and the defendant must be prepared for trial at the time he makes his demand.

In *United States v. Marion*,⁶⁵⁸ the United States Supreme Court held that, on the federal level, the sixth amendment guarantee of a speedy trial is applicable only after a person has been *accused* of a crime, in other words, upon initiation of a criminal prosecution. The function of protecting the defendant from the possibility of prejudicial pre-accusation delays, is performed by the applicable statutes of limitation.

In *State ex rel. Hanks v. Goodman*,⁶⁵⁹ the Supreme Court of Florida held that the 60-day period does not begin to run until a demand for speedy trial has been filed pursuant to the rule, and that such a demand cannot become effective unless it is filed after the defendant has been charged with a crime by indictment,⁶⁶⁰ information⁶⁶¹ or trial affidavit.

653. FLA. STAT. § 38.10 (1973); FLA. R. CRIM. P. 3.230.

654. *In re A.S. v. State*, 275 So. 2d 286 (Fla. 3d Dist. 1973).

655. The authors have dispensed with cases construing the "three terms of court" speedy trial rule of Florida Statutes sections 915.01 and 915.02 (Supp. 1970), which have been superseded by the promulgation by the supreme court of rule 3.191 of the Florida Rules of Criminal Procedure. However, those cases which are analogous to and which might be helpful in interpreting the provisions of the new rule will be discussed.

656. In *State ex rel. Maines v. Baker*, 254 So. 2d 207 (Fla. 1971), the supreme court upheld rule 3.191 as a proper exercise of the court's constitutional power to promulgate rules of practice and procedure. See *In re Fla. R. Crim. P.*, 245 So. 2d 33, *amended*, 251 So. 2d 537 (Fla. 1971).

657. 272 So. 2d 129 (Fla. 1973), *citing* *Hanks v. Goodman*, 253 So. 2d 129 (Fla. 1971).

658. 404 U.S. 307 (1971). The court held that the amendment would not "require the Government to discover, investigate, and accuse any person within any particular period of time." *Id.* at 313.

659. 253 So. 2d 129 (Fla. 1971). *Accord*, *State ex rel. Young v. Willis*, 257 So. 2d 64 (Fla. 1st Dist. 1972). However, Justice Rawls, dissenting, maintained that rule 3.191 as construed in *Hanks* is an unconstitutional denial of equal protection because a person not under indictment or information should be entitled to as great protection as a person just arrested and either jailed or released on bond.

660. See *State v. Gravelle*, 276 So. 2d 480 (Fla. 1973), *rev'g* 272 So. 2d 889 (Fla. 1st Dist.). *Accord*, *State ex rel. Dennis v. Morphonios*, 252 So. 2d 845 (Fla. 3d Dist. 1971).

661. See *State ex rel. Butler v. Cullen*, 253 So. 2d 861 (Fla. 1971); *State ex rel. Hanks*

A demand by the defendant on charges of contempt of court was held ineffective where it predated the rule to show cause.⁶⁶²

The supreme court also elaborated on the second general requirement for activation of the 60-day demand rule in *Goodman*,⁶⁶³ and held that a defendant cannot control the criminal docket merely by filing spurious demands for a speedy trial although he is unprepared. Further, the court warned that before dismissing a defendant at the expiration of the 60-day period, the trial judge must ascertain whether or not the accused had a bona fide desire to obtain a speedy trial and determine whether or not the accused or his attorney has diligently investigated his case and is prepared for trial.⁶⁶⁴ If these prerequisites are not met, the court may strike the demand. Thus, where the defendant had filed two motions to advance the cause, it was not error when the trial court set the trial for two days after the arraignment and within four to six weeks after the filing of the information.⁶⁶⁵

Where the defendant continued discovery proceedings after filing his demand and defense counsel was not ready to proceed when the case was called on at least one occasion, denial of discharge was proper.⁶⁶⁶ Similarly, a motion to dismiss alleging that the information under which the defendant was charged was so vague that he could not prepare an adequate defense, filed subsequent to the filing of his demand for a speedy trial, operated as an admission that he was not prepared for trial and that his demand was spurious.⁶⁶⁷ A defendant who timely filed a demand for a speedy trial was entitled to a trial within 60 days notwithstanding the fact that his case was transferred to a lower court where the new charge, a misdemeanor, was grounded upon the same conduct as the charge originally pending.⁶⁶⁸

Rule 3.191 requires trial within 60 days of the filing of a written demand by an accused charged with a crime, by indictment, information or trial affidavit. The Supreme Court of Florida held that the filing of a trial affidavit is applicable only in cases involving misdemeanors because in such cases the trial affidavit is a sufficient basis for prosecution.⁶⁶⁹

v. *Goodman*, 253 So. 2d 129 (Fla. 1971); *State ex rel. Novak v. Sepe*, 253 So. 2d 455 (Fla. 3d Dist. 1971).

662. *Brinson v. State*, 269 So. 2d 373 (Fla. 1st Dist. 1972).

663. 253 So. 2d 129 (Fla. 1971).

664. *Id.*

665. *Bradley v. State*, 265 So. 2d 532 (Fla. 1st Dist. 1972). The court filed the following caveat: "The defendant's counsel should not have asked for a speedy trial if he was not ready to go to trial."

666. *Savinon v. State*, 277 So. 2d 58 (Fla. 3d Dist. 1973).

667. *State ex rel. Ranalli v. Johnson*, 277 So. 2d 24 (Fla. 1973).

668. *State ex rel. Jenkins v. Maginnis*, 254 So. 2d 11 (Fla. 3d Dist. 1971).

669. *Pitofsky v. State*, 276 So. 2d 163 (Fla. 1973), *aff'g* 267 So. 2d 348 (Fla. 3d Dist. 1972). The court noted that the Florida Constitution provides that no person shall be tried for a non-capital felony without a presentment, indictment or information and, therefore, since a trial affidavit is not a sufficient document upon which to try the accused for a felony, the filing of a demand following the filing of a trial affidavit, but prior to the filing of an information, is ineffective to invoke the demand clause of the speedy trial rule. FLA. CONST. art. I, § 15(a).

The supreme court, in *McCauley v. State ex rel. Fouraker*,⁶⁷⁰ held that a demand for speedy trial which averred that the defendant was available and prepared for trial was insufficient compliance with the rule to warrant the discharge of the defendant, although the demand was dictated into the record, in open court and in the presence of the state attorney. The court held that the rule contemplates that a demand for speedy trial be in writing, filed with the court having jurisdiction, and served upon the prosecuting attorney.⁶⁷¹ Where the defendant included a request for a speedy trial within a written instrument entitled "notice of intention to plead not guilty," such request did not constitute a proper demand within the meaning, spirit and intention of rule 3.191.⁶⁷²

Absent a demand for speedy trial, a defendant is entitled to discharge if not tried within 180 days after being taken into custody for the crime charged.⁶⁷³ Given the fact that proceedings in juvenile courts are not criminal but civil in nature,⁶⁷⁴ the time spent in a juvenile detention home cannot be counted in computing the 180-day period.⁶⁷⁵

Where the first information filed against the defendant was "nolle prossed" by the state, and a second, identical information was filed, the failure of the state to bring the defendants to trial within 180 days of their incarceration warranted discharge.⁶⁷⁶ Subsequently, the state filed a third information charging separate acts taking place within the time span of the dismissed conspiracy charge but differing in times from the specific acts alleged in the two previous informations. The court held that, pursuant to rule 3.191(h)(2), which expressly prohibits avoidance of the rule by prosecuting new or different charges based on the same conduct or criminal episode, the later prosecution was precluded.⁶⁷⁷ Similarly, when separate informations, one charging bribery and the other conspiracy, are based upon the same conduct or criminal episode, they cannot be successfully manipulated by the state to extend the time within which a prosecution can be maintained, despite the fact that the informations were filed in different counties.⁶⁷⁸ Nor can the state enlarge the 180-day period for bringing a defendant to trial by deliberately delaying formal service of the warrant when the defendant is already in custody

670. 273 So. 2d 756 (Fla. 1973), *quashing* 258 So. 2d 453 (Fla. 1st Dist. 1972).

671. *McCauley v. State ex rel. Fouraker*, 273 So. 2d 756 (Fla. 1973).

672. *Harris v. Tyson*, 267 So. 2d 390 (Fla. 4th Dist. 1972). The court, while noting that the speedy trial rule specifically delineates neither the particular form of demand required nor any particular wording therefore, apparently felt that when a "demand is submerged within an instrument unrelated to speedy trial," the state was not capable of noticing the "disguised" demand. *Id.* at 393.

673. *State v. Bryant*, 276 So. 2d 184 (Fla. 1st Dist. 1973), *citing* FLA. R. CRIM. P. 3.191(a)(1).

674. *State v. R.E.F.*, 251 So. 2d 672 (Fla. 1st Dist. 1971).

675. *State v. Bryant*, 276 So. 2d 184 (Fla. 1st Dist. 1973).

676. *State v. Boren*, 273 So. 2d 415 (Fla. 3d Dist. 1973).

677. *Id.*

678. *Bryant v. Blount*, 261 So. 2d 847 (Fla. 1st Dist.), *cert. denied*, 267 So. 2d 82 (Fla. 1972).

and known by the state to be so.⁶⁷⁹ A defendant was first charged with a misdemeanor (driving while intoxicated) after he struck a pedestrian and later charged with manslaughter after the pedestrian died, but the 180-day period was not triggered until the defendant surrendered himself in response to the information on the felony manslaughter count.⁶⁸⁰

The Supreme Court of Florida, in *State ex rel. Maines v. Baker*,⁶⁸¹ dealt with the issue of when a person shall be deemed to have been "brought to trial" within the meaning of rule 3.191. The court held that a jury trial is commenced when the panel is sworn for voir dire examination, prior to the time that any questions are asked on voir dire. A trial before a judge alone begins upon waiver of jury trial when counsel for the defense and the prosecution appear before the judge to present their cases.

In exceptional circumstances, rule 3.191(f), allows the court, on its own motion or the motion of either party to extend the time for trial beyond that established by the rule. Although the rule defines certain circumstances which will justify an extension,⁶⁸² there has been much litigation concerning the propriety of such delays. The fact that the grand jury did not convene until shortly before the expiration of the 180-day period following the defendant's arrest for a capital offense did not constitute an exceptional circumstance within the provision for an extension of time.⁶⁸³ The desire of the state to gain a strategic advantage by delaying the defendant's trial until after that of his co-defendant, is not an exceptional circumstance justifying an extension of time.⁶⁸⁴ A delay in the proceedings was justified, however, when a crucial witness for the state fled after defendant's relatives purportedly made threats on his life.⁶⁸⁵ The unavailability of an essential witness who was still hospitalized with the wounds received as a result of the offense charged in the information, was an exceptional circumstance warranting an extension.⁶⁸⁶ A continuance based on the fact that another case was already

679. *State v. Sutton*, 269 So. 2d 713 (Fla. 2d Dist. 1972).

680. *State ex rel. Lee v. Rose*, 277 So. 2d 66 (Fla. 2d Dist. 1973).

681. 254 So. 2d 207 (Fla. 1971).

682. Rule 3.191(f) lists several exceptional circumstances such as: (1) unexpected illnesses; (2) a showing by the state that specific evidence or testimony is not available, but will become so later; (3) a showing by the state that the accused has caused major delay or disruption of the preparation of proceedings; (4) a showing by the state of developments which could not have been anticipated and which will materially affect the trial; (5) a showing that a delay is necessary to accommodate a codefendant where the cases are not severable; and (6) a showing by the state that the case is so unusual or complex that it is unreasonable to expect adequate preparation within the time periods established by this rule.

683. *Allen v. State*, 275 So. 2d 238 (Fla. 1973).

684. *State ex rel. Harris v. Wehle*, 260 So. 2d 887 (Fla. 1st Dist. 1972).

685. *State ex rel. Fort v. Driver*, 270 So. 2d 38 (Fla. 2d Dist. 1972). The delay was justified under exceptional circumstances pursuant to rule 3.191(f)(iii).

686. *State v. Wolfe*, 271 So. 2d 203 (Fla. 4th Dist. 1972). Consistent with the rule, after justifiably delaying the trial pursuant to such exceptional circumstances, the trial court reset the trial date within a reasonable time as is additionally required under rule 3.191(f).

docketed for trial on the trial date did not operate as an exceptional circumstance to toll the trial period.⁶⁸⁷

In *State ex rel. Boren v. Sepe*,⁶⁸⁸ the trial court extended the trial date beyond the 180-day period in an effort to afford the defendants adequate time to peruse voluminous discovery materials belatedly provided by the state, despite the fact that the state demanded a trial date within the speedy trial period. Although the extension was granted at the urging of the defendant, ostensibly for his benefit, the exceptional circumstance was occasioned by delay on the part of the state, such that the extension was not justified. Where the state moved to disqualify the trial judge and pursued the cause on an appellate level to the supreme court, it was incumbent upon the state to secure an impartial judge, and as long as the pursuit was in good faith, the action tolled the effect of the speedy trial statute.⁶⁸⁹

Additionally, a showing that the defendant was not continuously available for trial will justify an extension of time beyond the periods established by the speedy trial rule.⁶⁹⁰ Thus the failure of the defendant to appear at his arraignment, 60 days after his arrest, and to show by competent proof that he had nevertheless been continuously available for trial operated to excuse the failure of the trial court to bring the defendant to trial within 180 days.⁶⁹¹

The fact that the sheriff's department had an incorrect address for the defendant, was not sufficient to show the non-availability of the accused.⁶⁹² While the state had the initial burden to present evidence demonstrating the non-availability of the defendant, when such burden was satisfied, the defendant was required to establish his continuous availability for trial. He did so by proving that he had lived continuously at the same address up to the time of his arrest, that he had made periodic reports to his probation officer and that he had been regularly employed in a gainful occupation.⁶⁹³

Although the state may not extend the period of time in which a person may be tried by first entering a nolle prosequi to the charges and then filing different charges based on the same conduct,⁶⁹⁴ if the evidence bears out the state's claim of the non-availability of the defendant an extension of time is justified.⁶⁹⁵ Thus, following the refile of an informa-

687. *State ex rel. Reynolds v. Willis*, 255 So. 2d 287 (Fla. 1st Dist. 1971).

688. 256 So. 2d 259 (Fla. 3d Dist.), *cert. discharged*, 271 So. 2d 116 (Fla. 1972).

689. *State v. Wolfe*, 249 So. 2d 736 (Fla. 3d Dist. 1971). Rule 3.191(o)(2) which has superseded FLA. STAT. § 915.01 (1971), which formed the basis of this decision, expressly allows extension of the time period for interlocutory appeals.

690. *Dara v. State*, 278 So. 2d 335 (Fla. 3d Dist. 1973); *State ex rel. Kennedy v. McCauley*, 265 So. 2d 547 (Fla. 4th Dist. 1972); FLA. R. CRIM. P. 3.191(c).

691. *Dara v. State*, 278 So. 2d 335 (Fla. 3d Dist. 1973).

692. *State ex rel. Kennedy v. McCauley*, 265 So. 2d 547 (Fla. 4th Dist. 1972).

693. *Id.*

694. *State ex rel. Green v. Patterson*, 279 So. 2d 362 (Fla. 2d Dist. 1973), *citing* rule 3.191(h)(2).

695. *State ex rel. Green v. Patterson*, 279 So. 2d. 362 (Fla. 2d Dist. 1973).

tion, where the defendant knew that he was being sought by the police who made a diligent effort to locate him and, where the defendant did not make himself available, the running of the 180 days was tolled for such period of non-availability.⁶⁹⁶

A continuance chargeable to the defendant will also operate to toll the running of the speedy trial rule.⁶⁹⁷ Thus, where the defendant received two continuances, the first by stipulation to substitute counsel, and the second by withdrawing his waiver of jury trial on the date set for the non-jury trial, the fact that he was not brought to trial within 180 days was not grounds for discharge.⁶⁹⁸ A defense request for an additional 20 days in which to file appropriate defense motions tolled the operation of the discharge provisions for the amount of time required to dispose of the motions.⁶⁹⁹ However, a defendant was entitled to discharge, notwithstanding six continuances granted in a violation of probation proceeding brought in another county, where there was no showing that they delayed prosecution of the original charges or prevented prompt disposition thereof.⁷⁰⁰ Since a preliminary hearing is not a prerequisite to a criminal prosecution,⁷⁰¹ a defense continuance of the preliminary hearing does not toll the 180-day period.⁷⁰² In *State ex rel. Butler v. Cullen*,⁷⁰³ the Supreme Court of Florida held that where the defendants requested additional time in which to prepare their defense prior to trial, the time limitations of the speedy trial rule were waived by the defendants once the continuance was granted. The court noted that after a continuance has been granted, a defendant may file a demand for speedy trial after completion of his preparation for trial, and must then be brought to trial within 60 days.⁷⁰⁴

Rule 3.191(d)(2) provides, in part, that the periods of time established by the rule may be waived "upon stipulation, signed in proper person or by counsel, by the party against whom the stipulation is sought to be enforced, provided the period of time sought to be extended has not expired at the time of signing . . ." The District Court of Appeal, Second District, held that although the rule contemplates that such waiver or stipulation be in writing, an oral stipulation, entered into in open court by the defendant's counsel in the presence of an official court reporter was sufficient to obviate the writing requirement.⁷⁰⁵ Where the defendant's counsel entered into an oral out-of-court informal understanding

696. *Id.*

697. FLA. R. CRIM. P. 3.191(d)(3); *White v. State*, 273 So. 2d 782 (Fla. 2d Dist. 1973).

698. *Atkins v. State*, 265 So. 2d 72 (Fla. 3d Dist. 1972).

699. *Kniffin v. Hall*, 262 So. 2d 900 (Fla. 2d Dist. 1972).

700. *Ramos v. Amidon*, 263 So. 2d 602 (Fla. 2d Dist. 1972).

701. *Anderson v. State*, 241 So. 2d 390 (Fla. 1970).

702. *Edell v. Blount*, 267 So. 2d 47 (Fla. 1st Dist. 1972).

703. 253 So. 2d 861 (Fla. 1971).

704. *Id.*

705. *Eastwood v. Hull*, 258 So. 2d 269 (Fla. 2d Dist. 1972); accord, *Kniffin v. Hull*, 262 So. 2d 900 (Fla. 2d Dist. 1972).

to defer the setting of a trial until after a controlling question of law was decided in a companion case, such waiver was effective to bind the defendant, notwithstanding the fact that it was entered into without his knowledge, consent or understanding of his right to a speedy trial.⁷⁰⁶ The court explained that a defendant's right to be tried within 180 days is a procedural right, as distinguished from a substantive right, and therefore may be waived by his attorney without his prior knowledge or consent.⁷⁰⁷ In a similar case it was held that even though the assistant public defender who waived the speedy trial limitation had never met the defendant and was not familiar with the case, it was not error for the counsel to waive the defendant's right to trial within 180 days, without consulting with or informing the accused, where in good faith the public defender felt that such delay would or could benefit the accused.⁷⁰⁸

A request for a continuance by a defense counsel who had been rejected by the defendant operated to deprive the defendant of a discharge based upon a denial of his right to a speedy trial.⁷⁰⁹ The failure of the defendant to object to a continuance by the court on its own motion is not a waiver by acquiescence of the right to a speedy trial provided that a proper demand for a speedy trial has been made.⁷¹⁰ In *State ex rel. Allen v. Taylor*,⁷¹¹ the court rejected the argument that the waiver provisions of rule 3.191(d)(2) came into operation where the defendant was released on bail and was not, therefore, continuously available for trial since "he was free to absent himself" under the terms of the bail bond.

Where the defendant has not been brought to trial within 90 days after his arrest on a misdemeanor charge pursuant to rule 3.191(a)(1), he was entitled to discharge upon timely motion.⁷¹² The fact that two misdemeanor counts were joined in an information including a felony count arising out of the same circumstances did not operate to extend the time within which the misdemeanor counts could be tried to the limitations applicable to the felony count.⁷¹³

Where the defendant who was incarcerated in a foreign jurisdiction requested disposition of the charges pending against him in Florida, and where a detainer had been issued based upon an arrest warrant, the failure of the state to bring the defendant to trial for over a year war-

706. *State v. Earnest*, 265 So. 2d 397 (Fla. 1st Dist. 1972).

707. *Id.*

708. *State ex rel. Gutierrez v. Baker*, 276 So. 2d 470 (Fla. 1973). As the court noted, the rule may be waived or extended by order of the court with good cause shown and it is not required that the accused be present when the waiver is made. The determination of the propriety of such a waiver by the public defender depends upon the facts of the individual case.

709. *Llano v. State*, 271 So. 2d 34 (Fla. 3d Dist. 1972).

710. *Harris v. Tyson*, 267 So. 2d 390 (Fla. 4th Dist. 1972).

711. 267 So. 2d 689 (Fla. 1st Dist. 1971).

712. *State ex rel. Jacobsen v. Goodman*, 254 So. 2d 849 (Fla. 3d Dist. 1971), citing FLA. R. CRIM. P. 3.191(a)(1).

713. *Sibert v. Hare*, 276 So. 2d 523 (Fla. 4th Dist. 1973).

ranted discharge pursuant to rule 3.191(b)(2) and (3).⁷¹⁴ One who is so held has a constitutional right to demand that Florida initiate the available procedure to secure his return for a speedy trial.⁷¹⁵ Where the defendant, who was being held in jail on state and federal charges, filed a demand for speedy trial, section (b)(2) of the rule controlled and the state had six months after the service of the demand.⁷¹⁶

XXV. PROBATION

Probation is a privilege afforded certain defendants in criminal proceedings and is discretionary with the trial court.⁷¹⁷ While strict procedural and substantive rights of a defendant need not be fully adhered to in a revocation hearing,⁷¹⁸ the proceedings must meet the minimum criteria of due process.⁷¹⁹ Thus, a revocation hearing held without prior notice to the defendant; without the presence or testimony of the victim and sole witness to the alleged violation; without a full hearing as requested by the defendant; without adequate time to confer with counsel who was appointed at the hearing; and based only upon hearsay evidence offered by police officers and the defendant's oral admission at the time of arrest, denied the defendant his right to due process.⁷²⁰

The discretion of the trial court in revoking probation is dependent upon a finding that the probationer violated the law subsequent to the probation order.⁷²¹ Thus, conduct engaged in by the probationer prior to being placed on probation cannot legally form the basis for the revocation.⁷²² It is also irrelevant that the conviction for such conduct occurred during the period of probation.⁷²³ However, where the defendant was on probation for a previous conviction and was subsequently convicted for arson, the revocation of probation on the prior conviction was proper.⁷²⁴

Although proceedings for revocation of probation are informal in nature, and hearsay evidence is permitted, a judgment revoking probation may not be entered solely on the basis of hearsay testimony.⁷²⁵ Nor may a revocation be permitted to stand where the state is unable flatly to contradict the probationer's testimony which, if true, would justify his conduct.⁷²⁶ A revocation of probation following regular proceedings

714. *Shreves v. State*, 269 So. 2d 390 (Fla. 2d Dist. 1972).

715. *White v. State*, 273 So. 2d 782 (Fla. 2d Dist. 1973).

716. *State v. Featherston*, 267 So. 2d 851 (Fla. 3d Dist. 1972).

717. *Borges v. State*, 249 So. 2d 513 (Fla. 3d Dist. 1971).

718. *Mato v. State*, 278 So. 2d 672 (Fla. 3d Dist. 1973).

719. *Id.*

720. *Id.*

721. *O'Steen v. State*, 261 So. 2d 208 (Fla. 1st Dist. 1972).

722. *Id.*

723. *Id.*

724. *Hoover v. State*, 252 So. 2d 872 (Fla. 3d Dist. 1971).

725. *Hampton v. State*, 276 So. 2d 497 (Fla. 3d Dist. 1973).

726. *Larocco v. State*, 276 So. 2d 538 (Fla. 4th Dist. 1973).

based upon an uncontroverted breach of a condition of the defendant's probation, has been held to be proper.⁷²⁷

In *Borges v. State*,⁷²⁸ the probationer sought a continuance based on the grounds that criminal proceedings, were pending against him and if he were to take the stand at the revocation hearing, his privilege against self-incrimination would be jeopardized. Following denial of the continuance and revocation of his probation, the court emphasized that probation was a privilege and that the probationer could have been denied probation even if he had been acquitted on the subsequent charges.⁷²⁹

The United States Supreme Court, in *Arciniega v. Freeman*,⁷³⁰ held that mere on-the-job contact with fellow employees with police records is insufficient evidence of parole violations, absent a clear Federal Parole Board directive to that effect.

XXVI. EXPUNGING ARREST RECORDS

It had been held that in absence of a statute for equivalent considerations, a court order was an improper method to have an arrest record expunged.⁷³¹ During the survey period, the Court of Appeals for the Fifth Circuit,⁷³² adhered to this rule and vacated a federal district court order which required the expunging of an arrest record after defendant's conviction had been declared unconstitutional. The court held that "public policy requires here that the retention of records of the arrest and of the subsequent proceedings be left to the discretion of appropriate authorities."⁷³³

XXVII. SPECIFIC CRIMES AND DEFENSES

A. *Specific Crimes*

1. ATTEMPTS, AIDING AND ABETTING

In *Robinson v. State*,⁷³⁴ the court held that "an attempt to commit a crime involves the idea of an incomplected act as distinguished from the complete act necessary for the crime."⁷³⁵ *Gustine v. State*⁷³⁶ was quoted for the proposition that

[t]here must be intent to commit a crime coupled with an overt act apparently adopted to effect that intent, carried be-

727. *Granger v. State*, 267 So. 2d 679 (Fla. 3d Dist. 1972).

728. 249 So. 2d 513 (Fla. 3d Dist. 1971).

729. *Id.*

730. 404 U.S. 4 (1971).

731. *Mulkey v. Purdy*, 234 So. 2d 108 (Fla. 1970).

732. *Rogers v. Slaughter*, 469 F.2d 1084 (5th Cir. 1972).

733. *Id.* at 1085.

734. 263 So. 2d 595 (Fla. 3d Dist. 1972).

735. *Id.* at 596.

736. 86 Fla. 24, 97 So. 207 (1923).

yond mere preparation, but falling short of execution of the ultimate design.⁷³⁷

Intent alone as well as mere preparation is insufficient to amount to an attempt.⁷³⁸ The act must constitute an "appreciable fragment" of the crime, reach far enough to constitute an actual beginning of the crime, and be of the nature that it would be consummated were it not for an interruption independent of the will of the attempter.⁷³⁹

Where police officers arranged to buy stolen property from the defendant at a certain time and place, and at the meeting, the defendant refused to sell because he wanted to be paid first and the police had no money, these facts were not enough to constitute an attempt.⁷⁴⁰ Since receipt of stolen property is an offense prohibited by statute, an attempt to receive stolen property is also a punishable and lesser included offense of that crime, and failure to so instruct the jury is reversible error.⁷⁴¹ Attempted possession of marijuana is a crime recognized under Florida Statutes section 776.04 (1971).⁷⁴²

In *State v. Anderson*,⁷⁴³ the Supreme Court of Florida held that it is not necessary to prove the elements of selling a lottery ticket or a share in it in order to prove the offense of aiding and assisting in the promoting of a lottery.⁷⁴⁴ Where the defendant was charged with aiding and abetting⁷⁴⁵ in a shooting death, evidence that the defendant had urged her boyfriend to do something about the victim's alleged spilling of catsup on her, followed by the boyfriend's shooting the victim, did not constitute the offense where the defendant was unaware that her boyfriend was carrying a gun.⁷⁴⁶

Although the defendant and an accomplice entered the house of the victim with intent to commit robbery, the fact that another crime was committed during the period they were in the house does not preclude conviction of the defendant as an aider and abetter on this latter crime.⁷⁴⁷ When the crime charged was committed during the commission of the instructed crime, an accomplice will be held to answer for the crime as an aider and abetter even though he didn't commit the other act.

737. *Id.* at 26, 97 So. at 208.

738. *Robinson v. State*, 263 So. 2d 595, 596 (Fla. 3d Dist. 1972).

739. *Id.* at 596-97.

740. *Id.*

741. *Lewis v. State*, 269 So. 2d 692 (Fla. 4th Dist. 1972).

742. *Nichols v. State*, 248 So. 2d 199 (Fla. 4th Dist. 1971).

743. 270 So. 2d 353 (Fla. 1973).

744. Acts such as "transporting, hiring, procuring, supplying telephones," etc., will constitute aiding and assisting under FLA. STAT. § 776.011 (1973). 270 So. 2d at 355. The most important issue resolved in this case, however, was that the defendant was not entitled to the lesser included offense instruction if the lesser offense is one which is merely comprehended or within the general scope of the charge made.

745. FLA. STAT. § 776.011 (1973).

746. *Casey v. State*, 266 So. 2d 366 (Fla. 1st Dist. 1972).

747. *Davis v. State*, 275 So. 2d 575 (Fla. 1st Dist. 1973).

2. HOMICIDE

Where a defendant killed the victim from his second-floor porch as the victim was leaving the defendant's house, it was neither in self-defense nor justifiable,⁷⁴⁸ despite the fact that shortly before, while in the house, the victim had pulled a gun and threatened to kill the defendant during an argument and also had announced that he would return to rob and kill the defendant.⁷⁴⁹ The District Court of Appeal, Third District, restated that in order to claim self-defense in any homicide, it is necessary for the defendant to believe that he is in imminent danger and that there is an actual necessity for the taking of life.⁷⁵⁰ It is necessary that the person actually or reasonably believe that such force is necessary in order to save his life or the life of a member of his family.⁷⁵¹ Where it was evident that the victim who had assaulted the defendant was both subdued and disarmed, defendant's shooting of the victim was not an act of self-defense.⁷⁵²

In *Hernandez v. State*,⁷⁵³ the element of "premeditation" we examined and the court found:

Though premeditation involves a prior intention to do the act in question, it is not necessary that the intention be conceived for any particular period of time before the act. A moment before the act is sufficient. Premeditation may be inferred from evidence as to the nature of the weapon used, the manner in which the murder was committed and the nature and manner of the wound inflicted.⁷⁵⁴

In *Hernandez*, premeditation was established where evidence showed that the defendant had stabbed the victim 14 times in the back, resulting in her death.

In *Christian v. State*,⁷⁵⁵ a first degree murder conviction was reversed when the jury was instructed that they could find the defendant guilty if the killing was committed with either premeditated design or while perpetrating or attempting to perpetrate a crime against nature. If the jury had found the defendant guilty of first degree murder under the latter instruction, the verdict would have been based on the felony-murder concept. However, in *Franklin v. State*,⁷⁵⁶ Florida Statutes section 800.01 (1973), covering crimes against nature, was found to be illegal and void. Therefore, the defendant in *Christian* could not have been convicted of

748. FLA. STAT. § 782.02(2)(b) (1973).

749. *McKinney v. State*, 260 So. 2d 239 (Fla. 3d Dist. 1972).

750. *Gil v. State*, 266 So. 2d 43 (Fla. 3d Dist. 1972).

751. *Id.*; *Raneri v. State*, 255 So. 2d 291 (Fla. 1st Dist. 1971).

752. *Gil v. State*, 266 So. 2d 43 (Fla. 3d Dist. 1972).

753. 273 So. 2d 130 (Fla. 1st Dist. 1973).

754. *Id.* at 133.

755. 272 So. 2d 852 (Fla. 4th Dist. 1973).

756. 257 So. 2d 21 (Fla. 1971).

a felony-murder under the statute. Consequently, premeditation was necessary for a first degree murder conviction, and since the evidence was insufficient in the court's mind to conclude that the jury found the defendant guilty on that basis, reversal was necessary.

Where the defendant had agreed with the deceased to burn certain campsite buildings owned by the defendant, he was not guilty of felony-murder when the deceased was killed attempting to set fire to the buildings while the defendant was out of the county.⁷⁵⁷ The court held that the felony-murder rule has as its purpose, the protection of "innocent persons" and that it is inapplicable under the above factual situation.⁷⁵⁸

The District Court of Appeal, Third District,⁷⁵⁹ found that where the defendant had agreed with another party that the latter would hold the gun while the defendant went through the victim's pockets, the fact that the victim was shot by the other party during the commission of the crime was sufficient to establish knowledge and intent of the defendant and, therefore, conviction for second degree murder. Where the defendant was under the influence of an hallucinogen at the time he killed the victim, it was found that the killing was done while the defendant was committing a felony⁷⁶⁰ and he was guilty of third degree murder.⁷⁶¹

Defendant's conviction warranted reversal where the state failed to prove that the defendant acted with a "depraved mind regardless of human life," a necessary element of second degree murder.⁷⁶² The court found that no such state of mind existed where the defendant stabbed the victim in his own apartment after being hit by the victim and after the victim had assaulted another member of the household.

Where the defendant threatened to shoot an officer if he did not help the defendant escape, the elements necessary for the conviction of the crime of assault with intent to commit murder were present.⁷⁶³ A defendant who, while robbing a store, began to exchange shots with an off-duty policeman was guilty of assault with intent to commit murder.⁷⁶⁴

It was improper to convict a defendant of assault with intent to commit second degree murder *and* robbery since the elements of fear and force necessary for the assault charge, were an integral part of the robbery charge; consequently, the assault was essential to the robbery

757. *State v. Williams*, 254 So. 2d 548 (Fla. 2d Dist. 1971).

758. The decision is well reasoned and gives effect to the true purposes of the rule. It avoids the problems faced by the Pennsylvania courts in their varying interpretations. *See id.*, at 550-51. *See also* the dissent for a strong disapproval of the majority's thinking. 254 So. 2d at 551.

759. *Williams v. State*, 261 So. 2d 855 (Fla. 3d Dist. 1972).

760. FLA. STAT. § 893.13 (1973) (possession of illegal drugs constitutes a felony), *formerly* FLA. STAT. § 404.15 (1971).

761. *Clayton v. State*, 272 So. 2d 860 (Fla. 3d Dist. 1973).

762. *Raneri v. State*, 255 So. 2d 291 (Fla. 1st Dist. 1971).

763. *Gavin v. State*, 259 So. 2d 544 (Fla. 3d Dist. 1972).

764. *Wood v. State*, 251 So. 2d 556 (Fla. 1st Dist. 1971).

and becomes part of the "same offense," thereby allowing prosecution for but one offense.⁷⁶⁵

The Supreme Court of Florida stated that in defendant's murder trial, the determination by one jury of both guilt and punishment was not unconstitutional despite the defendant's claim that such a procedure places the burden on the defendant of choosing between presenting mitigating circumstances on issues of punishment or maintaining his privilege against self-incrimination.⁷⁶⁶

3. AGGRAVATED ASSAULT

The crime of aggravated assault requires general intent⁷⁶⁷ and must be committed under circumstances in which the perpetrator has apparent present ability to carry out the threat, thereby creating a fear of imminent peril.⁷⁶⁸

The District Court of Appeal, Fourth District, held that a deadly weapon is "any instrument which when used in the ordinary manner . . . will or is likely to cause death or great bodily harm. . . . [But] the fact that an instrument actually causes great bodily injury or death does not necessarily characterize it as a deadly weapon."⁷⁶⁹ The court held that a shoe can be a deadly weapon although it is not inherently so, but that where the evidence failed to provide any information regarding the shoe, there could be no conviction of aggravated assault.⁷⁷⁰

Where the defendant pistol-whipped the victim about the head following a robbery, such acts constituted a separate offense of aggravated assault.⁷⁷¹ The allegation that the defendant actually shot a person was not a necessary element of aggravated assault; consequently, the state needn't prove that element to maintain a conviction for that offense.⁷⁷²

a. Weapons and Firearms

The statute prohibiting the possession or use of short-barreled rifles and shotguns⁷⁷³ "does not include weapons made from individual, non-integrated rifle parts, if such weapons are not otherwise 'rifles.'"⁷⁷⁴ It is not unlawful to own and possess a sub-machine gun registered under the

765. *Hernandez v. State*, 278 So. 2d 307 (Fla. 2d Dist. 1973). See also *Cone v. State*, 285 So. 2d 12 (Fla. 1973); *Davis v. State*, 277 So. 2d 300 (Fla. 2d Dist. 1973).

766. *Henninger v. State*, 251 So. 2d 862 (Fla. 1971).

767. *Munday v. State*, 254 So. 2d 33 (Fla. 3d Dist. 1971), citing *McCullers v. State*, 206 So. 2d 30 (Fla. 4th Dist. 1968).

768. *Munday v. State*, 254 So. 2d 33 (Fla. 3d Dist. 1971).

769. *Johnson v. State*, 249 So. 2d 452, 455 (Fla. 4th Dist. 1971).

770. *Id.*

771. *Wade v. Wainwright*, 266 So. 2d 378 (Fla. 4th Dist. 1972), writ discharged, 273 So. 2d 377 (Fla. 1973).

772. *Grimsley v. State*, 251 So. 2d 671 (Fla. 2d Dist. 1971).

773. FLA. STAT. § 790.221 (1973); see also definition at § 790.001 (11). For relevant discussion, see footnotes 860-73 and accompanying text.

774. *State v. Astore*, 258 So. 2d 33 (Fla. 2d Dist. 1972).

National Firearms Act⁷⁷⁵ since the controlling statute⁷⁷⁶ expressly excepts such firearms lawfully owned and possessed under federal law.⁷⁷⁷

The question of whether a shotgun, which had been dismantled and concealed beneath defendant's clothing, could be readily converted to expel a projectile⁷⁷⁸ which would cause death or serious bodily harm, was one of fact and, thus, for the jury to decide.⁷⁷⁹

The throwing of a 12-ounce soft drink bottle at a police van from a distance of less than 15 yards with enough force to that the trajectory of the bottle is flat, is violative of the statute prohibiting the throwing of any missile which could cause great bodily harm into vehicles.⁷⁸⁰

A pistol in possession of a previously convicted felon is "contraband" and possessed in violation of the law.⁷⁸¹ It is not necessary to take fingerprints from a gun found to be in the possession of the defendant in order to sustain a conviction for possession of a firearm by a convicted felon.⁷⁸²

4. FORGERY⁷⁸³ AND WORTHLESS CHECKS

Where there was lack of evidence to show the condition of a will when it was filed, as well as an inability to show who had access to the file from the date of filing, the state could not maintain an action against the defendant for knowingly uttering, forging, publishing or altering⁷⁸⁴ the will, where there was no proof that the will was in the same condition at trial as when it was filed or when the tampering occurred.⁷⁸⁵ Intent is a requisite element for conviction of possession of forged bills.⁷⁸⁶ Although it is not usually the subject of direct proof, it is a question of fact and, when controverted, may not be determined by the court.⁷⁸⁷

In *Robinson v. State*,⁷⁸⁸ the defendant was charged by information with fictitious signature of an officer of a corporation.⁷⁸⁹ After the jury was accepted and sworn, the state was allowed to amend the information to charge the defendant with uttering a forged instrument.⁷⁹⁰ The court held this to be reversible error because of its potential surprise to the

775. 26 U.S.C. §§ 5801-62 (1968).

776. FLA. STAT. § 790.221(3) (1973).

777. *Rinzler v. Carson*, 262 So. 2d 661 (Fla. 1972).

778. FLA. STAT. § 790.001(6) (1973).

779. *State v. Ware*, 253 So. 2d 145 (Fla. 2d Dist. 1971).

780. *Zachary v. State*, 269 So. 2d 669 (Fla. 1972), *construing* FLA. STAT. § 790.19 (1973).

781. *State v. Bryant*, 250 So. 2d 344 (Fla. 2d Dist. 1971), *relying on* FLA. STAT. § 790.23 (1973).

782. *Thomas v. State*, 264 So. 2d 77 (Fla. 2d Dist. 1972).

783. Both FLA. STAT. § 831.01-.02 (1973) (general forgery statute), and FLA. STAT. Ch. 817 (1973) (Credit Crime Act) will be discussed.

784. FLA. STAT. § 831.01-.02 (1973).

785. *Pate v. State*, 256 So. 2d 223 (Fla. 1st Dist. 1972).

786. FLA. STAT. § 831.11 (1973).

787. *State v. West*, 262 So. 2d 457 (Fla. 4th Dist. 1972).

788. 266 So. 2d 694 (Fla. 4th Dist. 1972).

789. FLA. STAT. § 831.06 (1973).

790. FLA. STAT. § 831.02 (1973).

defendant. Forgery requires the making of a writing which falsely purports to be the writing of another, and the crime may exist when an assumed or fictitious name is used as long as the name was used with intent to defraud.⁷⁹¹ But, the signing of a fictitious name is not forgery if it is not intended that the signature be taken as the genuine signature of another, and there is no forgery where the defendant assumed the name on the checking account he opened and proceeded to cash bad checks, so long as the check purports to be the act of the person cashing it and not the act of another.⁷⁹²

The general forgery statute⁷⁹³ and the Florida Credit Card Crime Act⁷⁹⁴ both encompass the offense of forging a credit card, and the Act specifically provides that prosecutions may be had under the general statute.⁷⁹⁵ Thus, although the general statute is broader, there is no inconsistency in the two statutes and the state may elect to proceed under either.⁷⁹⁶ However, the District Court of Appeal, Fourth District,⁷⁹⁷ held that if a defendant is in violation of both statutory provisions, he must be sentenced under the penalty provisions of the more recent Credit Card Crime Act where the penalties under the two statutes are inconsistent. In *Lore v. State*,⁷⁹⁸ the same court found that where the penalty provisions under one section⁷⁹⁹ of the Act are less severe than the penalties under another section⁸⁰⁰ (both sections being substantially similar), the less severe provisions supersede the other provisions. The court also held that the defendant's falsification of several credit card receipts on the same day only constituted different facets of the same offense and should be treated in a single sentence.

The offense of issuing a worthless check⁸⁰¹ is committed despite the fact that the defendant does not get instantaneous value when he presents the check.⁸⁰² Therefore, the defendant's conviction under the statute was upheld because he received something for value when he opened an account with an \$850 worthless check and then wrote another check for \$250 for which he received cash.⁸⁰³

5. CONSPIRACY

The state does not have to charge a co-conspirator in order to proceed against a defendant for conspiracy.⁸⁰⁴ If charges against a co-conspirator

791. *Rapp v. State*, 274 So. 2d 18 (Fla. 4th Dist. 1973).

792. *Id.*

793. FLA. STAT. § 831.01, .02 (1973).

794. FLA. STAT. ch. 817 (1973).

795. FLA. STAT. ch. 817.68 (1973).

796. *State v. McCurdy*, 257 So. 2d 92 (Fla. 2d Dist. 1972).

797. *Strada v. State*, 267 So. 2d 702 (Fla. 4th Dist. 1972).

798. 267 So. 2d 699 (Fla. 4th Dist. 1972).

799. FLA. STAT. § 817.62(2) (1973).

800. FLA. STAT. § 817.481 (1973).

801. FLA. STAT. § 832.05(3)(a) (1973).

802. *Shermar v. State*, 255 So. 2d 263 (Fla. 1971).

803. *Id.*

804. *Di Stefano v. Langston*, 274 So. 2d 533 (Fla. 1973).

are dropped, this alone is insufficient to prevent defendant from being prosecuted for conspiracy.⁸⁰⁵

In order to invoke the "co-conspirator rule" which holds all acts and declarations of each conspirator to be the acts and declarations of all, it is first necessary to prove by independent evidence that a conspiracy did exist.⁸⁰⁶ Evidence is admissible to prove a conspiracy even though the conspiracy is not charged in the indictment.⁸⁰⁷

Conspiracy to commit robbery is not a lesser included offense within a charge of robbery.⁸⁰⁸

6. PERJURY

The elements of the crime of perjury are "(1) the wilful giving (2) of false testimony (3) under lawful oath (4) on a material matter (5) in a judicial proceeding."⁸⁰⁹ Where the defendant's false testimony under oath occurred during the period between the dropping of charges against the defendant's son and the reinstatement of those charges, no perjury had occurred since the defendant did not give false testimony while testifying in the case against his son.⁸¹⁰

In *Wolfe v. State*,⁸¹¹ the Supreme Court of Florida held that if the allegedly false statements were not material to the issue before the court, there can be no conviction for perjury. The determination of whether testimony assigned as perjurious is material when made in a prosecution is a question of law for the judge although it may be a mixed question of law and fact. The court also noted that statements must not be taken out of context and must be viewed with the rest of the testimony.⁸¹² Intent and purpose must be shown to support a perjury conviction; mere inaccuracy is not enough.⁸¹³

If a false statement is capable of influencing the court on the issue that it is considering, it meets the element of materiality and the degree of materiality is irrelevant.⁸¹⁴ The fact that the false testimony was not believed is also of no importance in affecting its material character.⁸¹⁵

Two witnesses are generally required to convict a person of perjury. However, where there is only one witness and other corroborating evidence which is equal to the weight of a second witness, such is also deemed sufficient for conviction.⁸¹⁶

805. *Id.*

806. *Honchell v. State*, 257 So. 2d 889 (Fla. 1971).

807. *Id.* at 890, *citing* *Brown v. State*, 128 Fla. 762, 175 So. 515 (1937).

808. *King v. State*, 267 So. 2d 351 (Fla. 4th Dist. 1972).

809. *Diamond v. State*, 270 So. 2d 460, 461 (Fla. 4th Dist. 1972), *citing* *Gordon v. State*, 104 So. 2d 524 (Fla. 1958).

810. *Diamond v. State*, 270 So. 2d 460 (Fla. 4th Dist. 1972).

811. 271 So. 2d 132 (Fla. 1972), *rev'g* 256 So. 2d 533 (Fla. 3d Dist.).

812. *Wolfe v. State*, 271 So. 2d 132, 135 (Fla. 1972), *quoting* *Van Lien v. United States*, 321 F.2d 674 (5th Cir. 1963).

813. *Wolfe v. State*, 271 So. 2d 132 (Fla. 1972).

814. *Wells v. State*, 270 So. 2d 399 (Fla. 3d Dist. 1972).

815. *Id.*

816. *Id.*, *quoting* *McClerkin v. State*, 20 Fla. 879 (1884).

7. GAMBLING

In *Perlman v. State*,⁸¹⁷ the offense of gambling was thoroughly examined. The court held that Florida Statutes section 849.01 (1973), specifies two separate gambling offenses: (1) maintaining a house for gambling purposes, and (2) permitting gambling in a place under one's control. The state must show that the defendant had either ownership or control of the premises where gambling habitually takes place with his knowledge, direction and consent. The statute prohibits the maintenance of the facility, but does not affect the gambler himself.

Proof of habitual play is necessary to show the purpose for which the house is maintained and to show the requisite intent of the person charged with maintaining the gambling house.⁸¹⁸ Thus, where there was proof that the premises were used in the past, such evidence was admissible to show "purpose and intent" on the dates stated in the information.⁸¹⁹ Where a lease was assigned to a corporation of which defendant was the sole executive officer, and where there was testimony that the defendant referred to himself as manager of the hall, "control" was established, and there was ample evidence for conviction of maintaining a gambling house.⁸²⁰

The court in *Perlman*, went on to state that although bingo is excepted from being a gambling offense by a specific statutory section,⁸²¹ when it is carried on by non-profit organizations within statutory limits, it is still within the gambling statute when carried on outside of the statutory restrictions.⁸²²

Maintaining a gambling house is not established where the state only showed the presence of newspaper racing results, handicap sheets, water-soluble paper and that one person had asked for a "line."⁸²³

8. BURGLARY

In Florida, the felony of burglary requires a showing that there is a breaking and entering of a "building" with felonious intent.⁸²⁴ Therefore, it is necessary to allege and prove that a "building" is involved.

Where a phone booth was in question in a burglary prosecution, the few cases which had dealt with the subject had held that where the booth was outdoors it was a building within the statute,⁸²⁵ but when the booth was inside another building, it was not a building.⁸²⁶ During the survey

817. 269 So. 2d 385 (Fla. 4th Dist. 1972).

818. *Id.* at 387.

819. *Id.* at 388.

820. *Id.* at 388-89.

821. FLA. STAT. § 849.093 (1973).

822. *Perlman v. State*, 269 So. 2d 385 (Fla. 4th Dist. 1972).

823. *Gaetane v. State*, 273 So. 2d 84 (Fla. 4th Dist. 1973).

824. FLA. STAT. § 810.02 (1973). Section 810.01 is identical except that it provides for burglary of a dwelling house.

825. *Perry v. State*, 174 So. 2d 55 (Fla. 1st Dist. 1965).

826. *DaWalt v. State*, 156 So. 2d 769 (Fla. 3d Dist. 1963).

period, the District Court of Appeal, Second District, held that where there was no allegation that the defendant entered a building, and, further, no facts from which it could be determined whether the phone booth involved was outdoors so that prior case law would apply, the information failed to state a cause of action.⁸²⁷ Again, in *Jackson v. State*,⁸²⁸ there was no testimony to show the particulars of the phone booth's location. The district court presumed that it was an indoor booth and not a building. However, the court risked "obiter fever" and stated that a phone booth was not a building whether indoors or outdoors in light of the statute's historical background and in view of the normal definition of a "building." Adding another obstacle in prosecutions for burglary in phone booth cases, the court found that there is implied permission or consent to enter phone booths, and that consent is a valid defense to a breaking and entering charge.⁸²⁹ Relying on *Jackson*, the District Court of Appeal, Second District,⁸³⁰ held that the failure to show non-consent in a case involving an outdoor phone booth required dismissal. These decisions appear to remove the need for the indoor-outdoor test as most cases will involve public phone booths.

Despite the defendant's failure to assault or rape the alleged victim, his conviction for breaking and entering with felonious intent to commit rape was still proper in that the gravamen of the offense—the *intent* to so act was present.⁸³¹ Absent other information, the best evidence of the defendant's intent in a breaking and entering charge is what he actually stole, and when defendant only took \$24 worth of clothing, he should have been convicted of breaking and entering with intent to commit petit larceny, not grand larceny.⁸³²

Possession of burglary tools is a separate offense from breaking and entering with intent to commit a felony. These are not facets of the same crime;⁸³³ therefore, a defendant may be convicted and sentenced separately for each offense.⁸³⁴ However, in *Davis v. State*,⁸³⁵ the court followed the rule that where offenses arise out of the same transaction and criminal act, the defendant must only be sentenced for one offense.⁸³⁶

It was again held during the survey period that breaking and entering with intent to commit a misdemeanor is a felony.⁸³⁷

827. *Catanese v. State*, 251 So. 2d 572 (Fla. 4th Dist. 1971).

828. 259 So. 2d 739 (Fla. 2d Dist. 1972).

829. *Id.*

830. *High v. State*, 260 So. 2d 549 (Fla. 2d Dist. 1972).

831. *Hall v. State*, 260 So. 2d 881 (Fla. 2d Dist. 1972).

832. *Rumph v. State*, 248 So. 2d 526 (Fla. 1st Dist. 1971).

833. *Foster v. State*, 276 So. 2d 512 (Fla. 1st Dist. 1973).

834. *Id. cf. Yost v. State*, 243 So. 2d 469 (Fla. 3d Dist. 1971), *adopted in Walker v. State*, 261 So. 2d 514 (Fla. 1st Dist. 1972).

835. 277 So. 2d 300 (Fla. 3d Dist. 1973).

836. Breaking and entering with intent to commit a misdemeanor and petit larceny are facets of the same criminal act.

837. *Copeland v. State*, 275 So. 2d 258 (Fla. 1st Dist. 1973); *Jenkins v. State*, 267 So. 2d 886 (Fla. 2d Dist. 1972).

9. LARCENY AND RECEIVING STOLEN GOODS

The identity and ownership of property claimed to have been stolen must be proven to support a conviction for larceny.⁸³⁸ Where a television theft from a common carrier was alleged and the serial number on the television in question differed from that on the carrier's shipping papers, the identity and ownership were not proven.⁸³⁹

Competent evidence as to the value of stolen property is required in a larceny prosecution,⁸⁴⁰ and the market value of stolen property may be determined by the owner's opinion, and any conflicts are determined by the jury.⁸⁴¹ An owner's statement that his television set was worth \$160, which was supported by the fact that the set was purchased for that price 30 days prior to the theft, is sufficient proof of value.⁸⁴² But in a grand larceny prosecution, original value of a purse and the articles in it were not to be equated with the value for purposes of conviction.⁸⁴³ Also, where the owner's testimony as to value is unreasonable and contrary to common knowledge, it should not be accepted.⁸⁴⁴ The mere fact that at defendant's apprehension, he had in his possession a color television, a radio and a camera was not in itself sufficient to establish that the property's value was more than \$100.⁸⁴⁵

A material element of the offense of receiving stolen property is knowledge of its stolen character.⁸⁴⁶

10. CONTEMPT

Rule 3.830,⁸⁴⁷ covering direct criminal contempt, provides punishment only for acts of contempt which the court "saw or heard." This allows the judge to govern fully the conduct and procedures that take place before him. Refusal to obey an order which reinstated counsel and his law firm as counsel of record for certain clients was not criminal but civil contempt according to the supreme court.⁸⁴⁸ Because of the difficulty in delineating between criminal and civil contempt, and because of the penalties and summary nature of criminal contempt, any doubt in the area should be resolved in favor of the contemnor.⁸⁴⁹ However, a doctor's failure to appear with his records following service of subpoena from both parties amounted to direct criminal contempt, as the act was

838. *Brinken v. State*, 263 So. 2d 646 (Fla. 4th Dist. 1972).

839. *Id.*

840. *Smart v. State*, 274 So. 2d 577 (Fla. 2d Dist. 1973).

841. *Wright v. State*, 251 So. 2d 890 (Fla. 1st Dist. 1971).

842. *Martin v. State*, 260 So. 2d 238 (Fla. 3d Dist. 1972).

843. *Singleton v. State*, 258 So. 2d 313 (Fla. 2d Dist. 1972).

844. *Id.*

845. *White v. State*, 274 So. 2d 6 (Fla. 4th Dist. 1973).

846. *Eagle v. State*, 270 So. 2d 468 (Fla. 4th Dist. 1972).

847. FLA. R. CRIM. P. 3.830.

848. *Fisher v. State*, 248 So. 2d 479 (Fla. 1971).

849. *Id.*

heard and seen within the court's presence and the doctor was without adequate excuse.⁸⁵⁰

An attorney was found guilty of criminal contempt after he refused to obey a judge's order to sit down and be quiet.⁸⁵¹ The attorney had repeatedly persisted in trying to get the judge to hear his argument on a motion despite the judge's assurance that he would hear the motion later.⁸⁵²

Violation of an injunction brought by or on behalf of the state, which relates to a matter offensive to the public or prohibited by statute constitutes criminal contempt.⁸⁵³ Such action, however, is indirect criminal contempt, governed by rule 3.840, which requires that an order be issued to defendant "stating the essential facts constituting the criminal contempt charge and requiring him to appear before the court to show cause why he should not be held in contempt by the court."⁸⁵⁴ Failure to issue such an order requires reversal of a contempt order.⁸⁵⁵

Defendant's failure at trial to recollect the facts and circumstances of a sworn statement made to a state attorney for which she was granted immunity, amounted to contempt because obviously false or evasive testimony will support such an order.⁸⁵⁶

11. DRUNK DRIVING

Charges of driving while intoxicated and manslaughter resulting from the operation of a motor vehicle while intoxicated are not one offense for the purpose of double jeopardy although they arise out of the same facts.⁸⁵⁷ Thus, a defendant who was convicted of driving while intoxicated was not immune from prosecution for manslaughter charges under former jeopardy principles. Relying on *Shaw v. State*,⁸⁵⁸ the court held that if an additional fact must be proved in one of the charges, there exists a separate offense. Driving while intoxicated was found to be a continuing offense and the charge was not dependent on the accident. In fact, the driving while intoxicated charge could have related to a time prior to the accident. On the other hand, manslaughter is an "instant offense" which begins with an assault and ends in homicide.

Testimony as to a defendant's physical condition, to wit: the results of a breathalyzer test and other physical tests performed on the defendant, does not violate the constitutional protection against self-incrimina-

850. *Aron v. Huttoe*, 258 So. 2d 272 (Fla. 3d Dist. 1972).

851. *Kleinfeld v. State*, 270 So. 2d 22 (Fla. 3d Dist. 1972).

852. See *id.* at 22-23 n.1 for the dialogue between the judge and attorney.

853. *United Theatres, Inc. v. State*, 259 So. 2d 210 (Fla. 3d Dist. 1972).

854. *Id.* at 214, quoting FLA. R. CRIM. P. 3.840.

855. *Id.*

856. *Brinson v. State*, 269 So. 2d 373 (Fla. 1st Dist. 1972). See also *Gilliam v. State*, 267 So. 2d 658 (Fla. 2d Dist. 1972).

857. *State v. Stiefel*, 256 So. 2d 581 (Fla. 2d Dist. 1972).

858. 219 So. 2d 49 (Fla. 2d Dist. 1969).

tion.⁸⁵⁹ Relying on a number of cases from other states stating that *Miranda* warnings do not apply for driving while under the influence of intoxicating beverages or narcotics,⁸⁶⁰ the District Court of Appeal, Third District, held that charges of careless driving resulting in an accident, and operation of a motor vehicle while under the influence of alcohol were petty offenses and the warnings need not be given.

If a municipality provides a jury trial for acts in violation of certain ordinances, which are also violations of a state statute, the provision of the state statute requiring the transfer of such cases to another court is inapplicable.⁸⁶¹

12. RAPE

A victim's submission to sexual intercourse without physical resistance after the defendant had pulled a gun on her and ordered her to undress, supports a conviction of forcible rape, despite a medical examiner's testimony that there was no evidence of force and a psychiatrist's statement that the defendant would have "backed down" had the victim said no.⁸⁶² The testimony of a victim is ample evidence to support a conviction for assault with intent to commit rape even though the defendant's testimony was in direct conflict.⁸⁶³

Assault of a minor under 14 in a lewd and lascivious manner with intent to have sexual intercourse is a separate offense from rape and does not establish the requisite intent to commit rape.⁸⁶⁴ Fornication is a separate offense⁸⁶⁵ from that of rape. The only lesser included offenses in a rape charge are assault with intent to commit rape, assault and battery, and bare assault.⁸⁶⁶

Despite a jury determination that the defendant was not guilty of rape or assault with intent to commit rape, a jury was not precluded from finding the defendant guilty of breaking and entering with intent to commit rape, a felony, in a subsequent prosecution, as the defendant may have intended to commit rape upon entering.⁸⁶⁷ However, where the defendant was acquitted of a felony-murder which occurred while the victim was being raped, the state was collaterally estopped from prosecuting the defendant for the crime of rape.⁸⁶⁸ In the first prosecution, the state had

859. *County of Dade v. Callahan*, 259 So. 2d 504 (Fla. 3d Dist. 1971).

860. *Id.* at 506-07.

861. *Nesler v. Hampton*, 260 So. 2d 561 (Fla. 1st Dist. 1972).

862. *Dean v. State*, 265 So. 2d 15 (Fla. 1972).

863. *Lustin v. State*, 262 So. 2d 910 (Fla. 3d Dist. 1972).

864. *Bass v. State*, 263 So. 2d 611 (Fla. 4th Dist. 1972) (dictum). The case held that failure to include the words "without intent to commit rape" in an information alleging a violation of section 800.04 of the Florida Statutes is harmless error when the defendant is apprised of the crime for which he is being prosecuted. *Id.*

865. FLA. STAT. § 798.03 (1973).

866. *DeLaine v. State*, 262 So. 2d 655 (Fla. 1972).

867. *McDonald v. State*, 249 So. 2d 451 (Fla. 4th Dist. 1971).

868. *Eagle v. State*, 249 So. 2d 460 (Fla. 1st Dist. 1971).

been forced to show that the defendant was the person who had raped or sexually assaulted the victim, and since they failed to make this showing, they were precluded from trying to prove this element in the rape prosecution.

13. ROBBERY

The intent to steal must exist at the time of the taking in order for a conviction of robbery to be sustained.⁸⁶⁹ It was also held that the "gist" of the crime of robbery is assault with a deadly weapon or with a weapon which can cause serious bodily harm, and the fact that only a small amount of money was taken from the victim is of no consequence in determining sentence.⁸⁷⁰ The element of putting the victim in fear of great bodily harm was met when the victim testified that she was "assured that [the defendant] had a revolver or a gun . . . so [she] wasn't going to take any chances," in addition to other evidence showing that the defendant actually had a weapon when apprehended by the police.⁸⁷¹

The penalty for robbery is imprisonment "for life or for any lesser term of years, at the discretion of the court."⁸⁷² The fact that the court rather than the legislature determines the exact sentence is of no consequence.⁸⁷³

When robbery and extortion arise out of the same transaction, the defendant may only be sentenced once for both offenses.⁸⁷⁴

If the state is able to prove that the defendant was guilty of aiding, abetting or procuring the commission of a robbery, such proof will sustain a conviction for robbery.⁸⁷⁵

Aggravated assault, although not always a lesser included offense of attempted armed robbery, may be such where the evidence shows that the assault was made with a deadly weapon.⁸⁷⁶ However, even where the court improperly includes a lesser included offense in its instruction, it is harmless error if the defendant is convicted of the offense (attempted robbery) for which he was charged.⁸⁷⁷

Once again, the court stated that conspiracy to commit robbery was not a lesser included offense to the charge of robbery.⁸⁷⁸

869. *Stevens v. State*, 265 So. 2d 540 (Fla. 2d Dist. 1972), *citing* *Bailey v. State*, 199 So. 2d 726 (Fla. 1st Dist. 1967).

870. *Booth v. State*, 257 So. 2d 901 (Fla. 1st Dist. 1972).

871. *Rolle v. State*, 268 So. 2d 541, 542 (Fla. 3d Dist. 1972).

872. FLA. STAT. § 813.011 (1973).

873. *Byrd v. State*, 253 So. 2d 494 (Fla. 3d Dist. 1971).

874. *Davis v. State*, 277 So. 2d 300 (Fla. 2d Dist. 1973).

875. *Rayne v. State*, 264 So. 2d 74 (Fla. 2d Dist. 1972).

876. *Morrison v. State*, 259 So. 2d 502 (Fla. 3d Dist. 1972).

877. *Id.* See also *State v. Wilson*, 276 So. 2d 45 (Fla. 1973), *quashing* 265 So. 2d 411 (Fla. 4th Dist. 1972).

878. *King v. State*, 267 So. 2d 351 (Fla. 4th Dist. 1972).

B. *Defenses*1. INSANITY⁸⁷⁹

It is initially presumed that the defendant is sane and, therefore, the burden rests with him to establish an insane condition.⁸⁸⁰ However, once there is testimony which raises a reasonable doubt as to the sanity of the defendant, the presumption vanishes and the defendant is entitled to an acquittal if the state is unable to dispel the reasonable doubt.⁸⁸¹

During the survey period, the courts refused to accept another test for insanity, and the "M'Naghten Rule" was once more adopted.⁸⁸² In *Anderson v. State*,⁸⁸³ Justice Ervin presented a lengthy and well-reasoned dissent advocating the adoption of the Model Penal Code⁸⁸⁴ test for insanity in preference to the less realistic M'Naghten Rule.

Rule 3.210(a) which provides the procedure to be followed where insanity is pleaded as a defense, states in part:

If before or during trial the court of its own motion, or upon motion of counsel for the defendant, has reasonable grounds to believe the defendant is insane, the court shall immediately fix a time for a hearing to determine the defendant's mental condition.⁸⁸⁵

In *Fowler v. State*,⁸⁸⁶ the Supreme Court of Florida emphasized that the word "shall" was indicative of the fact that the framers of the rule felt that such a hearing is obligatory when there is reasonable ground to believe that the defendant is insane.⁸⁸⁷ Thus, after two court-appointed psychiatrists had examined the defendant on defense counsel's motion and both felt the defendant to be insane, the trial court must grant a hearing. The court did, however, state that a hearing may be waived even where there is reasonable ground to believe insanity exists. For example, where the defense counsel has no other testimony to offer than that of the psychiatrist, the trial court may decide the issue of competency on reports alone.⁸⁸⁸ Although a hearing is required, a defendant is not entitled to a separate trial on the issue of insanity.⁸⁸⁹ In *Presley v. State*,⁸⁹⁰ a non-jury trial, it was permissible to find the defendant sane where there was con-

879. See generally FLA. R. CRIM. P. 3.210.

880. *Cook v. State*, 271 So. 2d 232 (Fla. 2d Dist. 1973); *French v. State*, 266 So. 2d 51 (Fla. 3d Dist. 1972).

881. *Cook v. State*, 271 So. 2d 232 (Fla. 2d Dist. 1973); *French v. State*, 266 So. 2d 51 (Fla. 3d Dist. 1972).

882. *Anderson v. State*, 276 So. 2d 18 (1973); *Clayton v. State*, 272 So. 2d 860 (Fla. 3d Dist. 1973); *Cook v. State*, 271 So. 2d 232 (Fla. 2d Dist. 1973).

883. 267 So. 2d 17 (Fla. 1973).

884. ALI MODEL PENAL CODE § 4.01 (Tent. Draft No. 4, 1955).

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

886. 255 So. 2d 513 (Fla. 1971).

887. *Accord*, *Pedrerro v. State*, 262 So. 2d 737 (Fla. 2d Dist. 1972).

888. *Fowler v. State*, 255 So. 2d 513 (Fla. 1971), citing *Brown v. State*, 245 So. 2d 68 (Fla. 1971) as an example.

889. *Murphy v. State*, 252 So. 2d 385 (Fla. 3d Dist. 1971).

890. 261 So. 2d 522 (Fla. 3d Dist. 1972).

flicting testimony as to the defendant's ability to aid in the conduct of his defense.

An order declaring defendant competent to stand trial must not be based solely on the competency determination by a state mental hospital just prior to trial; a hearing must be held.⁸⁹¹ A defendant's sister was a proper party to give testimony as to the defendant's sanity in addition to two conflicting psychiatric reports.⁸⁹² Where there is conflicting testimony as to a defendant's insanity, it is within the province of the jury to decide the issue.⁸⁹³ Notwithstanding the testimony of a psychiatrist that the defendant could not determine right from wrong at the time of the offense, it was up to the jury as trier of fact to determine the defendant's sanity.⁸⁹⁴ However, insanity will not be an issue of fact unless rule 3.210 is complied with to properly lay the predicate for the introduction of testimony relating to insanity.⁸⁹⁵

Had the court ruled the other way in *McMunn v. State*,⁸⁹⁶ a plea of insanity could have become very risky business. Nevertheless, in what seems to be a very good decision, the District Court of Appeal, First District, stated that the state may only question a court-appointed psychiatrist as to the issue of sanity or insanity, and, consequently, it is impermissible for a psychiatrist to testify directly as to the facts elicited during a compulsory psychiatric examination. Since the defendant is compelled⁸⁹⁷ to follow a certain procedure and to answer those questions posed by the court-appointed psychiatrist in order to rely on the defense of insanity, such rules must be restricted in order to preserve the defendant's constitutional guarantee against self-incrimination. Any statute which would allow the state to introduce the facts of the defendant's confidential testimony, which could well amount to a confession, would be constitutionally defective.

The fact that the Sex Offender Act provides for a sanity hearing subsequent to trial⁸⁹⁸ is not a denial of equal protection in that it "comes late."⁸⁹⁹ The court held that the statute meets the test of reasonable classification in dealing with offenders.

Before sentencing a defendant to prison, if there is substantial doubt as to his insanity at the time of trial on a sex charge, inquiries should be made pursuant to statute⁹⁰⁰ in order to make such a sanity determination.⁹⁰¹

891. *Butler v. State*, 261 So. 2d 508 (Fla. 1st Dist. 1972).

892. *Id.*, citing *Byrd v. State*, 178 So. 2d 884 (Fla. 2d Dist. 1965). See also *Williams v. State*, 275 So. 2d 284 (Fla. 3d Dist. 1973).

893. *Clayton v. State*, 272 So. 2d 860 (Fla. 3d Dist. 1973).

894. *Ross v. State*, 254 So. 2d 40, 46 (Fla. 2d Dist. 1971).

895. *Pedero v. State*, 271 So. 2d 201 (Fla. 2d Dist. 1973).

896. 264 So. 2d 868 (Fla. 1st Dist. 1972).

897. FLA. R. CRIM. P. 3.210.

898. FLA. STAT. § 917.18 (1973), formerly FLA. STAT. § 917.12 (1971).

899. *Den v. State*, 265 So. 2d 15 (Fla. 1972).

900. Sex Offender Act, FLA. STAT. § 917.14 (1973), formerly FLA. STAT. § 917.01 (1971).

901. *Dorman v. State*, 263 So. 2d 207 (Fla. 1972).

Finally, it is unnecessary for psychiatrists to conduct independent tests, other than interviews with the defendant, in order for them to testify as to the defendant's sanity.⁹⁰²

2. ENTRAPMENT

Entrapment is a question of fact for the jury to decide unless the evidence is so clear and convincing that the judge can rule on the issue as a matter of law.⁹⁰³ Thus, it was improper for the court to dismiss the case against the defendant where the evidence was in conflict regarding the issue of entrapment.⁹⁰⁴

Suggesting their definition as an appropriate jury instruction, the District Court of Appeal, Fourth District, held:

The defense of entrapment . . . is available to (a) one who is instigated, induced or lured by an officer of the law, (b) for the purpose of prosecution into the commission of a crime, (c) which he otherwise had no intention of committing. But such defense is not available where the officer acts in good faith for the purpose of discovering or detecting the crime and merely furnishes the opportunity for the commission thereof by one who already has the requisite intent.⁹⁰⁵

In applying this test, the court found that where there was evidence that the narcotics officer had to repeatedly solicit the defendant in order to get him to sell marijuana, and testimony that the defendant never sold marijuana before, that the marijuana did not belong to the defendant, and that the defendant got no financial benefit from the sale, the defendant was entitled to a jury instruction and decision on the entrapment issue.⁹⁰⁶

In *Spencer v. State*,⁹⁰⁷ the court chastised the use of a female agent who allowed herself to be picked up at a bar and taken to the defendant's apartment with the intent to lure the defendant into smoking marijuana. Such activity carries with it inherent inducement and, in this case, the agent's leaving the apartment to purchase papers so as to be able to smoke the marijuana, was also active participation in the crime. In a factual situation somewhat similar to *Spencer*, the District Court of Appeal,

902. *Murphy v. State*, 252 So. 2d 385 (Fla. 3d Dist. 1971).

903. *State v. Robinson*, 270 So. 2d 761 (Fla. 4th Dist. 1973); *Stiglitz v. State*, 270 So. 2d 410 (Fla. 4th Dist. 1972). See also *Earman v. State*, 253 So. 2d 481 (Fla. 4th Dist. 1971), *quashed on other grounds*, 265 So. 2d 695 (Fla. 1972).

904. *State v. Robinson*, 270 So. 2d 761 (Fla. 4th Dist. 1973). See also *Avilia v. State*, 278 So. 2d 298 (Fla. 4th Dist. 1973).

905. *Stiglitz v. State*, 270 So. 2d 410, 412 (Fla. 4th Dist. 1972), *citing* *Lashley v. State*, 67 So. 2d 648 (Fla. 1963), and *State v. Rouse*, 239 So. 2d 79 (Fla. 4th Dist. 1970).

906. *Stiglitz v. State*, 270 So. 2d 410 (Fla. 4th Dist. 1972).

907. 263 So. 2d 282 (Fla. 1st Dist. 1972). The court stated that "society has always condemned such conduct and that the state ought not condone it, must less have its paid agents out trolling for unsuspecting males whose minds are otherwise occupied than with thoughts of committing heinous crimes." *Id.* at 284.

Third District,⁹⁰⁸ found, as a matter of law, that there was entrapment when a girl working with police officers had offered "personal consideration" in addition to the price in order to purchase drugs. In reversing this decision, the Supreme Court of Florida held that the case presented a situation for the jury and that there was evidence to support a conclusion that the defendant was merely provided an opportunity to commit the crime by the girl's actions, and that the facts did not show, as a matter of law, that the crime was instigated by the girl's acts.⁹⁰⁹ A strong dissent pointed out that the majority had improperly equated the inducement offer with "the mere affording of an opportunity to commit crime."⁹¹⁰ It would appear that the majority has, in effect, eliminated the possibility of the court ruling on an entrapment issue as a matter of law. In *State v. Liptak*⁹¹¹ there was no testimony from the girl who was working with the police and no other evidence to dispute the "personal consideration" offer alleged by the defendants which they claimed induced them to make the sale.

Applying *Liptak*, the District Court of Appeal, Third District, found that the "unconscionable conduct" of the police had implanted the crime in the defendant's mind, thereby inducing the defendant to commit the offense.⁹¹²

The United States Supreme Court⁹¹³ held that the rule prohibiting the instigation of otherwise innocent persons to commit criminal acts, and be prosecuted for them⁹¹⁴ did not prevent conviction if there was a showing that the defendant was involved (had requisite intent) in selling drugs before and after his involvement with narcotics agents. The narcotics agents in this case had supplied the defendant with the chemical needed for the manufacture of the drug in question, but the Court found that the circumstances indicated sufficient independent criminal design to avoid the defense of entrapment.

A call to the defendant to set up a sale simply provides opportunity for the commission of the crime and does not constitute entrapment where the requisite intent existed.⁹¹⁵

Once again, it was held that the defense of entrapment presupposes

908. *Liptak v. State*, 256 So. 2d 548 (Fla. 3d Dist. 1972).

909. *State v. Liptak*, 277 So. 2d 19 (Fla. 1973), *relying on* *Kloptyra v. State*, 172 So. 2d 628 (Fla. 2d Dist. 1965).

910. 277 So. 2d at 23 (Ervin, J., dissenting).

911. *Id.* at 19.

912. *Rogers v. State*, 277 So. 2d 838 (Fla. 3d Dist. 1973).

913. *United States v. Russell*, 94 S. Ct. 1637 (1973).

914. *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932).

915. *Brasi v. State*, 263 So. 2d 848 (Fla. 3d Dist. 1972); *see* *Roundtree v. State*, 271 So. 2d 160 (Fla. 4th Dist. 1972) (finding intent to have originated in the mind of the narcotics agent and not in the defendant as required).

An interesting theory of "entrapment" is presented by the noted California jurist, Chief Justice Traynor, dissenting in *People v. Moran*, 1 Cal. 3d 755, 463 P.2d 763, 83 Cal. Rptr. 411 (1970).

commission of the offense by the defendant, and a defendant who denies participation in the crime is foreclosed from pleading the issue.⁹¹⁶

In *Evenson v. State*,⁹¹⁷ the District Court of Appeal, Fourth District, found that a defendant had to prove the defense of entrapment for each offense of which he was charged because entrapment for one transaction is not effective for all transactions. The court acknowledged the possibility of a "spill-over" effect which might occur in an entrapment situation in which a second transaction may have occurred as a result of entrapment into an initial transaction.⁹¹⁸ However, in *Evenson*, the court found that there was no such "spill-over" immunity in two drug sales approximately a month apart, and that despite the defendant's failure to request an instruction to that effect, the court had done so anyway, thereby giving the defendant the benefit of the instruction.

3. STATUTE OF LIMITATIONS

A further interpretation of when the two-year statute of limitations period for criminal offenses begins was made by the court in *State v. King*.⁹¹⁹ In a prior case involving embezzlement,⁹²⁰ the supreme court found that the statute began to run when demand was made upon a fiduciary-executor by the probate court. This case was interpreted in a larceny case as meaning that the statute begins to run from the date that the act becomes known, or through reasonable diligence should have become known, by the person having an interest in the fund.⁹²¹

In *King*, the defendant was to receive funds from one party which would be transferred to the Dade County State Attorney, and then to the New Orleans District Attorney. In early 1969, the first party learned that the defendant had not delivered all the funds he had received to the state attorney as had been agreed. After some time during which there were contacts between the parties, a demand was made upon the defendant to repay the money by a certain date. The defendant failed to do so and then forestalled prosecution. Later, he tendered payment on December 13, 1971, which was rejected, and finally an information was filed against him on December 20, 1971. The court was faced with deciding whether, as the state contended,⁹²² the statute began only after demand for the funds had been made, or whether counting began when the interested party knew or had reason to know the crime had been committed. In

916. *Earman v. State*, 253 So. 2d 481 (Fla. 4th Dist. 1971), *quashed on other grounds*, 265 So. 2d 695 (Fla. 1972).

917. 277 So. 2d 587 (Fla. 4th Dist. 1973).

918. *Id.* at 592. The court quoted *United States v. Buie*, 407 F.2d 905 (2d Cir. 1969), which supported this proposition.

919. 275 So. 2d 274 (Fla. 3d Dist. 1973).

920. *State v. Pierce*, 201 So. 2d 886 (Fla. 1967).

921. *Downing v. Vaine*, 228 So. 2d 622 (Fla. 1st Dist. 1969), *appeal dismissed*, 237 So. 2d 767 (Fla. 1970).

922. The prosecution relied on *State v. Pierce*, 201 So. 2d 886 (Fla. 1967).

choosing the latter interpretation, the court stated that the interested party certainly should have recognized that the defendant's intention to evade payment of the funds in early 1969 when the state attorney informed him that he had not received funds from the defendant as well as having learned that the defendant had defrauded him in another transaction. Thus, this is an example of the court making the "should have known" determination, an issue which appears to be a question of fact for the jury.

The Supreme Court of Florida passed upon the constitutionality of the limitation provision for state, county or municipal officials⁹²³ which requires that any offense committed by officials, which is within the scope of their duties, be prosecuted within two years after retirement. In *State v. Dreyer*,⁹²⁴ the statute, although different in time from that covering non-officials, was held to be a reasonable classification. However, where the facts of the case presented a defendant who had left his office as deputy constable to run for another position, only to return 66 days later, this termination constituted retirement. Therefore, any prosecution for offenses committed prior to his first leaving office, must be brought within two years of that time.

*Di Stefano v. Langston*⁹²⁵ upheld as timely and sufficient an amended information filed after the two-year statutory period had run because it was properly "linked" to the first information which had been filed within the statutory period. The court stated that this case did not present an "abandonment" of the information by the state with an attempt at subsequent prosecution—a procedure which would be prohibited if the prosecution was not within the time prescribed.⁹²⁶ Relying on *State v. Emanuel*,⁹²⁷ the court found that "the belated subsequent information is saved if that new information makes the necessary recital as here regarding its tie-in with the original commencement of the prosecution within two years."⁹²⁸

XXVIII. RULES OF CRIMINAL PROCEDURE

A. *Discovery*⁹²⁹

1. EXCHANGE OF WITNESS LISTS

Rule 3.220(a)(1)(i) establishes the procedure for an exchange of witness lists. The rule provides that within 15 days after written demand

923. FLA. STAT. § 932.465(3) (1973), transferred from FLA. STAT. § 932.06 (1971).

924. 265 So. 2d 367 (Fla. 1972).

925. 274 So. 2d 533 (Fla. 1973).

926. See *State v. O'Neil*, 174 So. 2d 564 (Fla. 2d Dist. 1965), where the state abandoned the information, then sought prosecution.

927. 153 So. 2d 839 (Fla. 2d Dist. 1963).

928. *Di Stefano v. Langston*, 274 So. 2d 533, 537 (Fla. 1973).

929. The Florida Rules of Criminal Procedure were amended on September 30, 1971, to become effective December 13, 1971, to substitute a "3" for the "1" in the existing numbering system so that rule 1.010 becomes rule 3.010 and so on. *In re Fla. R. Crim. P.*, 253 So. 2d 421 (Fla. 1971).

by the defendant the prosecution "shall disclose to defense counsel . . . the names and addresses of all persons known to the prosecution to have information which may be relevant to the offense charged, and to any defense with respect thereto." Additionally, rule 3.220(b)(3) requires the defense counsel, after receiving the list of prosecution witnesses, to reciprocate and furnish to the state a written list of all witnesses he "expects to call as witnesses at the trial." The rule further authorizes several sanctions, including prohibiting the use of an undisclosed witness, in order to insure compliance. Noncompliance with the provisions of the rule does not by itself constitute reversible error, but it is incumbent upon the trial judge to determine whether the state's noncompliance has resulted in harm or prejudice to the defendant.⁹³⁰ The court must make an adequate inquiry into all of the surrounding circumstances, particularly into the effect of the state's noncompliance on the ability of the defendant to prepare properly for trial. If the circumstances were non-prejudicial, they must affirmatively appear in the record.⁹³¹ Similarly, the testimony of defense witnesses should not be summarily excluded where the defendant did not furnish a witness list pursuant to the rule.⁹³² The court in *Williams v. State* warned that the discovery rule should not be artificially or technically administered but requires instead a "careful and discerning employment of the court's discretion," taking into consideration such factors as the reason for the noncompliance, the extent of prejudice to the state and the feasibility of rectifying that prejudice by some intermediate procedure.⁹³³ While the power to prohibit a witness from testifying is available under the rule, it should be employed only under the most compelling circumstances, where the omission can not be remedied otherwise.⁹³⁴

Thus, a trial court properly exercised its discretion in allowing the state to use a rebuttal witness not previously listed where the need for such testimony was prompted by testimony on behalf of the defendant and where such need reasonably could not have been anticipated.⁹³⁵ Despite the fact that the defendant had invoked reciprocal discovery, where the state failed to inform the defendant of the fact that his co-defendant had turned state's witness and would testify against him, such non-compliance on the part of the state did not warrant reversal, absent inquiry into the surrounding circumstances.⁹³⁶ The exclusion of the testimony of a doctor, offered as a witness for the defendant in a rape prosecu-

930. *Carnivale v. State*, 271 So. 2d 793 (Fla. 3d Dist. 1973), citing *Richardson v. State*, 246 So. 2d 771 (Fla. 1971). Accord, *Ray v. State*, 262 So. 2d 475 (Fla. 3d Dist. 1972).

931. *Carnivale v. State*, 271 So. 2d 793 (Fla. 3d Dist. 1973), citing *Ramirez v. State*, 241 So. 2d 744 (Fla. 4th Dist. 1970).

932. *Williams v. State*, 264 So. 2d 106 (Fla. 4th Dist. 1972).

933. *Id.* at 107-08.

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

935. *Rowan v. State*, 252 So. 2d 851 (Fla. 3d Dist. 1971).

936. *Carnivale v. State*, 271 So. 2d 793 (Fla. 3d Dist. 1973).

tion was proper for want of compliance with the rule requiring that the names of witnesses on the issue of insanity be furnished in advance.⁹³⁷

Where a state's witness was available and not otherwise secreted by the prosecution, and the defendant made no attempt to take the deposition of such witness, the trial court's order refusing to vacate a prior order excluding the testimony of the witness was error and sanctions, if any, should have been imposed against the witness for non-appearance pursuant to rule 3.220(f).⁹³⁸ A trial court did not abuse its discretion in permitting police officers to testify although they had not appeared for discovery depositions, where the officers' failure to respond was not deliberate.⁹³⁹

2. PRETRIAL DISCOVERY OF STATEMENTS OF STATE WITNESSES

Under certain circumstances, provided for in rule 3.220(a)(1)(ii), the defendant is entitled to written statements given to agents of the state by witnesses identified in the exchange of witness lists. Where the defendant was furnished a list of witnesses and could have deposed them, the denial of both a motion to produce statements made by prospective witnesses to the police, and a motion for a copy of investigative reports relating to prospective jurors, did not constitute a denial of the defendant's right to a fair trial.⁹⁴⁰ A defendant is not entitled as of right to a pretrial copy of all written statements made by witnesses to police officers, nor to a complete and detailed report on any and all prospective jurors.⁹⁴¹ A defendant who has failed to pursue the discovery procedures available to him and, additionally, has failed to demonstrate that the information sought was not otherwise available to him, cannot demonstrate reversible error in the state's failure to furnish certain statements made by a co-defendant.⁹⁴²

3. DISCOVERY OF TANGIBLE PAPERS, OBJECTS AND SCIENTIFIC TESTS

Rule 3.220(a)(1)(vi) provides for the discovery of any tangible papers or objects which were obtained from or belonged to the accused. Failure to produce requested items may warrant their exclusion from evidence. Thus, the failure of the state attorney to produce a pair of sunglasses for the defendant's examination in response to the latter's pretrial motion for discovery was reversible error where the existence and dis-

937. *Richardson v. State*, 248 So. 2d 530 (Fla. 3d Dist. 1971).

938. *State v. DeVille*, 258 So. 2d 492 (Fla. 3d Dist. 1972).

939. *Lopez v. State*, 264 So. 2d 69 (Fla. 3d Dist. 1972), *citing* *Richardson v. State*, 246 So. 2d 771 (Fla. 1971) for the proposition that it is the defendant's burden to show prejudicial error.

940. *Dixon v. State*, 261 So. 2d 205 (Fla. 2d Dist. 1972).

941. *Robertson v. State*, 262 So. 2d 692 (Fla. 2d Dist. 1972).

942. *Kelsey v. State*, 267 So. 2d 685 (Fla. 1st Dist. 1972), *citing* *State v. Gillespie*, 227 So. 2d 550 (Fla. 2d Dist. 1969).

covery of such glasses at the scene of the crime was a critical item in contradicting the defendant's alibi defense.⁹⁴³

In *Johnson v. State*,⁹⁴⁴ the defendant moved for production of the fatal bullet in order to afford his own expert an opportunity to examine it. Although the state was unable to produce the bullet, the trial court denied a defense motion to suppress "any testimony from a ballistics expert regarding this bullet." The District Court of Appeal, Third District, reversed, holding that the defendant's right to examine tangible evidence is a part of his right to confront witnesses against him and his right to a full and complete cross-examination of those witnesses. Simply by claiming that they have "lost" the physical evidence, the state cannot prevent the exercise of these rights and then use the "lost" evidence against the defendant.⁹⁴⁵ The admission into evidence of a shirt prejudicial to the defendant, despite the fact that it was not listed on the state's bill of particulars furnished pursuant to the defendant's timely motion, was held to be reversible error.⁹⁴⁶

Additionally, rule 3.220(a)(1)(vi) provides for discovery of reports or statements of experts, including results of physical or mental examinations and scientific tests and experiments. The admission of testimony relating to blood alcohol tests is improper where the state did not comply with an order granting the defendant's motion for production of scientific tests and where there was no showing that the defendant's counsel knew that the results of such tests existed.⁹⁴⁷ Similarly, where the state failed to produce certain pills which were the subject of an alleged sale of LSD, as well as the report of the chemist who analyzed the contents thereof, it was held that the defendant was prejudiced in the preparation of her defense to such extent that she was not accorded her right to a fair and impartial trial.⁹⁴⁸

4. DISCOVERY OF POLICE REPORTS

In response to the defendant's request for production of the criminal and F.B.I. records of the defendant, the victim and all persons whom the

943. *Cunningham v. State*, 254 So. 2d 391 (Fla. 1st Dist. 1971). The court noted that the reception of so critical an item of proof into evidence could have no effect other than to surprise the defendant and present a factual issue which he was unprepared to meet and that, as a result, the defendant's right to due process was violated.

944. 249 So. 2d 470 (Fla. 3d Dist. 1971).

945. *Id.*

946. *Garcia v. State*, 268 So. 2d 575 (Fla. 3d Dist. 1972). The trial court also failed to make adequate inquiry as to why the disclosure was not made as required by *Cunningham v. State*, 254 So. 2d 391 (Fla. 1st Dist. 1971).

947. *Sheridan v. State*, 258 So. 2d 43 (Fla. 4th Dist. 1971). Such a test, administered while the defendant was unconscious, was crucial and material to the charge of manslaughter by intoxication and the testimony regarding the test proved the only incriminating evidence.

Additionally, the court held that a trial judge, faced with the state's failure to disclose, should make careful inquiry as to why disclosure was not made, the extent of the prejudice to the defendant and all other relevant circumstances before it can properly exercise its discretion.

948. *Lowell v. State*, 253 So. 2d 448 (Fla. 2d Dist. 1971).

state intended to call at trial, the Supreme Court of Florida in *State v. Crawford*,⁹⁴⁹ held that the state may be required to disclose to defense counsel any record of prior criminal convictions of the defendant or of any prospective state witnesses, if such material and information is within its possession. If such information is not in the possession of the prosecuting attorney, there is no further duty on the part of the state to secure it. With respect to the conviction records indicated above, if a witness denies having been convicted of a crime and the prosecution knows that such is not the case, then the state has an obligation to provide the defense counsel with the information which would lead him to admissible evidence, but neither a criminal record nor an F.B.I. rap sheet is admissible for that purpose.⁹⁵⁰ The holding of the supreme court in *Crawford* was extended by the District Court of Appeal, First District, in *State v. Coney*,⁹⁵¹ which held that it is the state's duty to furnish the defendant not only those records of criminal convictions which were in their possession, but those which were in the constructive possession of the state attorney as well. The court further held that the state must furnish all pertinent and material information requested by a defendant which is necessary to assure him of a fair trial and which is not otherwise available to him, even if not in its actual possession, if it can be readily procured from the Bureau of Law Enforcement of the State of Florida or the F.B.I.⁹⁵² Before a defendant is entitled to such information, the trial court must decide whether all or any part of the information is readily available to him by the exercise of due diligence, subpoena, deposition or otherwise. If not, the court must make a determination as to whether the information sought may be admissible and useful to the defendant because it is material and exculpatory.⁹⁵³

The District Court of Appeal, First District, in *Johnson v. State*,⁹⁵⁴ held that a police report was admissible for impeachment purposes, as a result of certain discrepancies between the arresting officer's in-court testimony regarding the defendant's jacket which was inexplicably lost by the police, and his report submitted on the night of the commission of the alleged crime. The denial to a probationer of the opportunity to examine a report of the probation and parole commission at his probation revocation hearing did not deprive him of his right to cross-examine and to confront witnesses, since such a report is for the confidential use and consideration of the court and is not a police document.⁹⁵⁵

949. 257 So. 2d 898 (Fla. 1972), *quashing* 245 So. 2d 893 (Fla. 1st Dist. 1971). The supreme court granted certiorari based on conflict between the District Court of Appeal, First District's holding in *Crawford* and prior decisions in *Anderson v. State*, 241 So. 2d 390 (Fla. 1970) and *State v. Gillespie*, 227 So. 2d 550 (Fla. 2d Dist. 1969).

950. *State v. Crawford*, 257 So. 2d 898 (Fla. 1972).

951. 272 So. 2d 550 (Fla. 1st Dist. 1973).

952. *Id.*

953. This provision raised the prospect of a mandatory in camera inspection following each request for discovery in this area.

954. 268 So. 2d 170 (Fla. 1st Dist. 1972), *citing* *Pitts v. State*, 247 So. 2d 53 (Fla. 1971) and *State v. Pitts*, 249 So. 2d 47 (Fla. 1st Dist. 1971).

955. *Blackburn v. State*, 261 So. 2d 861 (Fla. 3d Dist. 1972).

B. *Motion to Dismiss*

Rule 3.190(b) provides that all defenses available to a defendant, other than the plea of not guilty shall be made by a motion to dismiss. The Supreme Court of Florida in *Carroll v. State*,⁹⁵⁶ held that an accused has a right to be charged by an information free from patent defects and that the sufficiency or validity thereof may be tested by a motion to dismiss.

Rule 3.190(c)(4) permits the defendant to move to dismiss the information on the ground that there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant. In *State v. West*,⁹⁵⁷ the District Court of Appeal, Fourth District, held that in a summary judgment proceeding the trial court may not try or determine factual issues, nor consider either the weight of the conflicting evidence or the credibility of the witnesses in determining whether there exists a genuine issue of material fact. Thus the trial court erred in granting a motion to dismiss where it assumed the role of the trier of fact in resolving the issue of the state of mind of the defendant.⁹⁵⁸

A trial judge in a criminal prosecution has been held to have the inherent power to make a finding that a criminal prosecution has been abandoned.⁹⁵⁹

C. *New Trial*

Florida Rule of Criminal Procedure 3.590(a) requires that a motion for a new trial be made within four days, or such greater time as the court may allow, not to exceed 15 days, after the rendition of the verdict or the finding of the court. It appears to be well settled in Florida that this time limit is jurisdictional and strictly enforced, and that the trial court has no discretion to grant the motion after the expiration of the time limit.⁹⁶⁰ Thus, without such jurisdiction, the trial judge could not act upon his own motion.⁹⁶¹ The rule has been interpreted to require that the motion be made within 15 days following the factual determination of guilt as made by the judge when sitting without a jury; it does not run from the date of formal adjudication of guilt.⁹⁶²

The failure to grant a hearing on the motion for new trial before denying the same is not error.⁹⁶³ Further, the defendant need not be present at a hearing on a motion for a new trial.⁹⁶⁴

956. 251 So. 2d 866 (Fla. 1971). Additionally, the court held that a genuine motion testing the validity of an information does not serve to toll the running of the speedy trial rule.

957. 262 So. 2d 456 (Fla. 4th Dist. 1972).

958. *Id.*

959. *State v. Alvarez*, 258 So. 2d 24 (Fla. 3d Dist. 1972).

960. *State v. Pinto*, 273 So. 2d 408 (Fla. 3d Dist. 1973); *Adams v. State*, 250 So. 2d 309 (Fla. 4th Dist. 1971), *citing* *Long v. State*, 96 So. 2d 897 (Fla. 1957).

961. *State v. Pinto*, 273 So. 2d 408 (Fla. 3d Dist. 1973).

962. *Martin v. State*, 262 So. 2d 720 (Fla. 2d Dist. 1972).

963. *Johnson v. State*, 248 So. 2d 208 (Fla. 3d Dist. 1971), *citing* *Tibbits v. State*, 146 Fla. 69, 200 So. 373 (Fla. 1941).

964. *Luster v. State*, 262 So. 2d 910 (Fla. 3d Dist. 1972).

The grounds upon which the court must grant a new trial are listed in rule 3.600. An oral motion where the defendant did not proffer any grounds for a new trial may properly be denied.⁹⁶⁵ Further, a trial judge may not grant a new trial simply because it will do no harm.⁹⁶⁶ Subsection (a)(3) of rule 3.600 authorizes a new trial if new and material evidence is discovered, which "would probably have changed the verdict," and if the defendant could not with "reasonable diligence have discovered and produced [it] at trial." A motion for a new trial is not properly granted upon the ground of newly discovered evidence where the evidence so discovered goes merely to impeach witnesses who testified at the trial.⁹⁶⁷ Absent a showing that the existence of certain witnesses was not known to the defendant prior to trial, a claim that there were new witnesses who would be able to give testimony favorable to the defendant does not constitute a sufficient basis upon which to grant a new trial.⁹⁶⁸ There was no error when a trial judge in the exercise of his discretion determined that due to the unavailability of a witness, justice required a new trial.⁹⁶⁹

It is well settled in Florida that a timely motion for a new trial is a prerequisite to the preservation of appellate review based on insufficiency of the evidence, except in those cases where the defendant is sentenced to death.⁹⁷⁰ The general rule is applicable whether the trial is before a jury or before the court without a jury, despite the argument that by rendering a judgment against a defendant in a non-jury trial, the court necessarily will have determined that the evidence was sufficient.⁹⁷¹ In *Huntley v. State*,⁹⁷² the District Court of Appeal, Fourth District, held that the defendant's filing of a notice of appeal prior to this timely filing of a motion for a new trial, rendered that motion a nullity, and defendant thereby waived his right to file the motion for new trial. Thus, the subsequent filing of the motion for a new trial was useless in preserving the question of the sufficiency of the evidence for appellate consideration.⁹⁷³

D. Severance, Joinder and Consolidation

Rule 3.150(a) permits the joinder of two or more offenses in the same information with a separate count for each offense, when the offenses are based on the same act or transaction or on two or more connected

965. *Quartz v. State*, 258 So. 2d 283 (Fla. 3d Dist. 1972), citing *Silver v. State*, 188 So. 2d 300 (Fla. 1966).

966. *State v. Pinto*, 273 So. 2d 408 (Fla. 3d Dist. 1973).

967. *Weeks v. State*, 253 So. 2d 459 (Fla. 3d Dist. 1971).

968. *Luster v. State*, 262 So. 2d 910 (Fla. 3d Dist. 1972).

969. *State v. Levine*, 258 So. 2d 468 (Fla. 3d Dist. 1972).

970. *State v. Owens*, 233 So. 2d 389 (Fla. 1970); *Huntley v. State*, 267 So. 2d 374 (Fla. 4th Dist. 1972); *Martin v. State*, 262 So. 2d 720 (Fla. 2d Dist. 1972); *Wells v. State*, 249 So. 2d 507 (Fla. 3d Dist. 1971).

971. *Wells v. State*, 249 So. 2d 507 (Fla. 3d Dist. 1971), citing *State v. Wright*, 224 So. 2d 300 (Fla. 1969).

972. 267 So. 2d 374 (Fla. 4th Dist. 1972).

973. *Id.*

acts. The trial court in *Moore v. State*⁹⁷⁴ denied a motion to sever offenses and the defendant was tried upon a two count information which charged separate incidents of robbery and attempted robbery. The District Court of Appeal, Third District, held that the two incidents occurring on the same night and in the same general vicinity were "connected together" within the meaning of the rule,⁹⁷⁵ and thus the trial court did not commit error, despite the defendant's claim that he was prejudiced by their trial together.⁹⁷⁶

Pursuant to rule 3.151, two or more informations charging related⁹⁷⁷ offenses shall be consolidated for trial on a timely motion by a defendant. It is well recognized that consolidation for the trial of criminal cases rests within the sound discretion of the trial court.⁹⁷⁸ In *Ashley v. State*,⁹⁷⁹ the trial court refused to grant the defendant's motion for consolidation of five homicide cases in one trial. The supreme court affirmed, holding that one homicide was committed at a different time and was factually unrelated to the other cases, thereby justifying the refusal to consolidate. Further, the consolidation of two or more separate criminal charges is not a matter of right and must be moved for by the party desiring it.⁹⁸⁰ Thus, it was improper for a trial court to force the defendant to defend two separate informations charging separate and distinct felonies before the same jury.⁹⁸¹

In *Rowe v. State*,⁹⁸² the District Court of Appeal, Second District, upheld the trial court's denial of a motion for severance on the part of a defendant. The court was confronted with evidence concerning the flight of a co-defendant from the scene of the arrest and so ruled notwithstanding the fact that such evidence had been ruled inadmissible against the moving defendant.

E. Continuance

Rule 3.190(g) of the Florida Rules of Criminal Procedure provides that the court may in its discretion grant a continuance for good cause shown. It appears well established in Florida that the granting or denial of a motion for continuance is within the discretion of the trial court and that its decision will not be disturbed on appeal unless there is a clear showing that there has been a palpable abuse of that discretion to

974. 259 So. 2d 179 (Fla. 3d Dist. 1972).

975. FLA. R. CRIM. P. 3.150(a), formerly rule 3.140(d)(4).

976. *Moore v. State*, 259 So. 2d 179 (Fla. 3d Dist. 1972).

977. Rule 3.151(a) defines "related" to mean "if they are triable in the same court and are based on the same act or transaction or on two or more connected acts or transactions."

978. *Hall v. State*, 66 So. 2d 863 (Fla. 1953); *Baker v. Rowe*, 102 Fla. 622, 136 So. 681 (1931).

979. 265 So. 2d 685 (Fla. 1972).

980. *Kilgore v. State*, 271 So. 2d 148 (Fla. 2d Dist. 1972).

981. *Id.* The defendant was forced to admit as the basis for self-defense to the homicide charge that he was carrying a concealed weapon, which was the gravamen of the other charge.

982. 250 So. 2d 920 (Fla. 2d Dist. 1971). Judge Mann, in his dissent, stressed the weakness of limiting instructions and the fact that the inadmissible evidence was prejudicial, not merely cumulative.

the disadvantage of the accused.⁹⁸³ It is not an abuse of discretion to deny a continuance for the purpose of presenting a witness, where the case had been set for trial for a considerable period of time and the defendant failed to take the necessary steps to insure the presence of the witness.⁹⁸⁴ Neither was it an abuse of discretion to deny an oral motion for continuance for additional psychiatric examinations, when that motion was made at the call of the case for trial three months after the reports of the court-appointed psychiatrists were filed.⁹⁸⁵ The trial court did not abuse its discretion in failing to grant a continuance despite the publication of news stories relating to the case shortly before trial was to commence.⁹⁸⁶

The failure of the defendant to retain private counsel until the eve of trial, despite the fact that 11 days intervened between his arraignment and trial did not render the trial court's denial of a continuance an abuse of discretion.⁹⁸⁷ The argument that counsel had not had an opportunity to fully prepare a defense has met with little success in contesting the denial of a continuance, particularly when the defendant contributed to the change of counsel prior to trial.⁹⁸⁸ The denial of a continuance was held to be within the court's discretion where the defendant requested a continuance in order to obtain private counsel after the jury was sworn.⁹⁸⁹ A request for a continuance was not improperly denied where the only ground was dissatisfaction with court-appointed counsel.⁹⁹⁰ There was no abuse of discretion in denying a motion for a continuance on the ground that retained counsel would be out of state on the trial date, where defendant had been represented for two months by a public defender, had retained private counsel only one week before trial and where private counsel was absent only during jury selection, during which the defendant was represented by the public defender.⁹⁹¹

Where the court granted a continuance of the motion to suppress, on the condition that the defendant inform the court when he was ready to proceed, the court was not in error in proceeding to trial, absent objection or a request for a hearing on the motion.⁹⁹²

XXIX. LEGISLATION

Florida Statutes section 910.035 (Supp. 1972),⁹⁹³ has been added to permit a person who is held in custody in a county other than the county

983. *Mills v. State*, 280 So. 2d 35 (Fla. 3d Dist. 1973); *Angell v. State*, 271 So. 2d 37 (Fla. 3d Dist. 1972); *Harrelson v. State*, 259 So. 2d 526 (Fla. 1st Dist. 1972).

984. *Coney v. State*, 258 So. 2d 497 (Fla. 3d Dist. 1972).

985. *Girtman v. State*, 270 So. 2d 380 (Fla. 3d Dist. 1972).

986. *Harrelson v. State*, 259 So. 2d 526 (Fla. 1st Dist. 1972).

987. *Palladino v. State*, 267 So. 2d 837 (Fla. 3d Dist. 1972).

988. *Gause v. State*, 270 So. 2d 383 (Fla. 3d Dist. 1972).

989. *Fuller v. Wainwright*, 268 So. 2d 431 (Fla. 4th Dist. 1972).

990. *Tilly v. State*, 256 So. 2d 547 (Fla. 3d Dist. 1972).

991. *Angell v. State*, 271 So. 2d 37 (Fla. 3d Dist. 1972).

992. *Dickenson v. State*, 261 So. 2d 561 (Fla. 3d Dist. 1972).

993. *Created by Fla. Laws 1972, ch. 72-45.*

in which an indictment or information is pending against him, to waive trial on a charge pending in the other county and have his case disposed of in the county in which he is being held. But he must agree in writing to plead guilty or nolo contendere and the prosecuting attorney of the county in which the charge is pending must consent. The statute also provides that if the defendant pleads not guilty after the transfer, the case will be transferred for disposition to the court of the county in which the prosecution was commenced.

Florida Statutes sections 404.01(3) and 404.02(1) (Supp. 1972),⁹⁹⁴ have been amended to include marijuana (cannabis) within the scope of the Florida drug abuse law. Cannabis is now included within the definition of an "hallucinogenic drug."

Florida Statutes subsections 775.082(2) and (3) (Supp. 1972),⁹⁹⁵ provide that if the death penalty is held unconstitutional by the Supreme Court of Florida or the United States Supreme Court, persons previously sentenced to death shall be brought before the appropriate court and re-sentenced to life imprisonment with no eligibility for parole. Florida Laws 1972, chapter 72-724,⁹⁹⁶ creates a category of life felonies less serious than capital felonies but more serious than felonies of particular degrees. It provides that capital felonies be punished either by death or life imprisonment with a minimum of 25 years' service before parole consideration. It also provides that life felonies be punished by life imprisonment or a term of not less than 30 years.

Florida Statutes section 939.17 (Supp. 1972),⁹⁹⁷ provides that in criminal prosecutions any judgment against the defendant for costs or a fine may be satisfied from any cash bond deposited by the defendant.

Florida Statutes section 776.04 (Supp. 1972),⁹⁹⁸ reduces the penalty for an attempt to commit a misdemeanor from misdemeanor of the first degree to misdemeanor of the second degree. The crime of larceny has been redefined to include, specifically, the stealing of real or personal property and a second conviction for petit larceny is now punishable as a misdemeanor of the first degree.⁹⁹⁹

Florida Statutes section 837.021 (Supp. 1972),¹⁰⁰⁰ provides that the wilful making of two or more contradictory material statements under oath in trials, depositions, affidavits and the like is punishable as a felony of the third degree. Other newly created felonies of the third degree are tampering with jurors,¹⁰⁰¹ tampering with or fabricating physical evi-

994. Amended by Fla. Laws 1972, ch. 72-97.

995. Created by Fla. Laws 1972, ch. 72-118.

996. Amending FLA. STAT. §§ 775.081(1), 779.07, 782.04, 790.16, 790.161, 794.01, 805.02 (1971).

997. Created by Fla. Laws 1972, ch. 72-235.

998. Created by Fla. Laws 1972, ch. 72-245.

999. FLA. STAT. § 811.021 (Supp. 1972), created by Fla. Laws 1972, ch. 72-252.

1000. Created by Fla. Laws 1972, ch. 72-314.

1001. FLA. STAT. § 918.12 (Supp. 1972), created by Fla. Laws 1972, ch. 72-315.

dence,¹⁰⁰² tampering with a witness¹⁰⁰³ and, as to a witness, to solicit or accept a bribe to testify or inform falsely or to withhold information.¹⁰⁰⁴

Florida Statutes sections 27.51(1) and 27.54(2) (Supp. 1972),¹⁰⁰⁵ now authorize public defenders to represent indigents accused of misdemeanors or violations of county or municipal ordinances. Counties and municipalities are authorized to provide funds for this service.

Florida Laws 1973, chapter 73-27,¹⁰⁰⁶ provides that persons accused of misdemeanors, violations carrying civil penalties, or violations of municipal or county ordinances may be released upon issuance of a "notice to appear" in lieu of being arrested.

Florida Laws 1973, chapter 73-71,¹⁰⁰⁷ requires trial judges to provide credit in a defendant's sentence for all time spent in the county jail prior to sentencing.

Florida Laws 1973, chapter 73-120,¹⁰⁰⁸ makes unlawful the distribution of obscene materials, as well as requiring purchasers of other goods or services to accept obscene materials as a condition to delivery or performance.

Florida Laws 1973, chapter 73-271,¹⁰⁰⁹ allows peace officers to make arrests for shoplifting, either on or off the store premises, if based on probable cause.

Florida Laws 1973, chapter 73-257,¹⁰¹⁰ makes it a felony of the third degree to attempt to break and enter with the intent to commit a misdemeanor.

Florida Laws 1973, chapter 73-194,¹⁰¹¹ provides that a grand jury report or presentment not accompanied by a true bill or indictment shall not be made public until the individual concerned has received a copy and has been given 15 days to move that any improper or unlawful part be expunged. The motion shall stay public announcement until the circuit court's ruling thereon is affirmed or denied by the district court of appeal.

1002. FLA. STAT. § 918.13 (Supp. 1972), *created by* Fla. Laws 1972, ch. 72-315.

1003. FLA. STAT. § 918.14 (Supp. 1972), *created by* Fla. Laws 1972, ch. 72-315.

1004. FLA. STAT. § 914.14 (Supp. 1972), *created by* Fla. Laws 1972, ch. 72-315.

1005. *Amended by* Fla. Laws 1972, ch. 72-722.

1006. *Creating* FLA. STAT. §§ 901.27-.32, *repealing* FLA. STAT. §§ 901.06, .23 (1971).

1007. *Amending* FLA. STAT. § 921.161(1) (1971).

1008. *Creating* FLA. STAT. § 847.07-.09 (1973).

1009. *Amending* FLA. STAT. § 811.022(2) (1973).

1010. *Creating* FLA. STAT. § 810.05(2) (1973).

1011. *Creating* FLA. STAT. § 905.28 (1973).