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Criminal Law and Procedure

Thomas A. Wills

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CRIMINAL LAW AND PROCEDURE

THOMAS A. WILLS

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Since this survey¹ is a continuation of previous articles,² the same policies of selection will be used and developments in the various areas will be presented as an integrated continuum.

1. This survey includes cases reported in 177 So.2d through 200 So.2d 160 and laws enacted by the 1967 General Session of the Florida Legislature and the 1967 Extraordinary Session of the Florida Legislature.

I. CRIMINAL PROCEDURE RULE NO. 1.850³

In previous surveys⁴ all cases which dealt with the Rule were discussed together in order to emphasize its scope and function.⁵ In the present survey only the procedural aspects of the rule will be discussed in this section.

A. *Matters Subject to Direct Appeal*

Since the rule was designed for collateral attack, ordinarily it may not be used to review matters which could have been raised on direct appeal. Thus the issue of the involuntary nature of a confession,⁶ an alleged error in jury instructions,⁷ and an alleged error for failing to

2. Wills, *Criminal Law, Survey of Florida Law*, 14 U. MIAMI L. REV. 521 (1960); Wills, *Criminal Law, Survey of Florida Law*, 16 U. MIAMI L. REV. 225 (1961); Wills, *Criminal Law, Survey of Florida Law*, 18 U. MIAMI L. REV. 381 (1963); Wills, *Criminal Law and Procedure, Survey of Florida Law*, 20 U. MIAMI L. REV. 246 (1965).

3. MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE; HEARING; APPEAL:

A prisoner in custody under Sentence of a court established by the Laws of Florida claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or Laws of the United States, or of the State of Florida, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting attorney of the court, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the appropriate appellate court from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this rule, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Note: Formerly Criminal Procedure Rule No. 1.

4. Wills, *Criminal Law, Survey of Florida Law*, 18 U. MIAMI L. REV. 381 (1963); Wills, *Criminal Law and Procedure, Survey of Florida Law*, 20 U. MIAMI L. REV. 246 (1965).

5. For excellent related material see *Roy v. Wainwright*, 151 So.2d 825 (Fla. 1963); *United States v. Hayman*, 342 U.S. 205 (1951); *FED. R. CRIM. P. 35*; 4 *Barron & Holtzoff, FEDERAL PRACTICE AND PROCEDURE* § 2306; *Bowman, Processing a Motion Attaching Sentence Under Section 2255 of the Judicial Code*, 111 U. PA. L. REV. 788 (1963) and an excellent discussion by Justice Barns in *Tolar v. State*, 196 So.2d 1 (Fla. 4th Dist. 1967).

6. *Coyner v. State*, 177 So.2d 715 (Fla. 3d Dist. 1965).

7. *Williams v. State*, 184 So.2d 525 (Fla. 4th Dist. 1966).

grant a severance⁸ are not reviewable under the rule. However the prohibition is not absolute. If an appeal was difficult or impossible, and reversible error might have occurred, appellate courts have ordered hearings so that the issue may be determined on the merits.⁹ Therefore, hearings have been ordered upon the following allegations: that the patent failure of the attorney to file a timely notice of appeal prevented an appeal;¹⁰ that the failure to file a timely notice of appeal was due to confusion in the Public Defender's Office;¹¹ that the Public Defender refused to file a notice of appeal.¹²

The degree of prejudice is also a material factor. In *Reddick v. State*¹³ a hearing was ordered where an accumulation of errors resulted in a substantial deprivation of due process. The petitioner had plead guilty under the reasonable impression that he would be sentenced to life but instead received the death sentence. The court noted that the criterion of whether a defendant was entitled to a hearing under the rule was whether the entire record indicated that the defendant was denied a fair trial.

B. *In Custody Requirement*

The rule provides that the petitioner must be in custody under the sentence attacked. The courts have had some difficulty applying this provision to consecutive sentences. Early appellate court decisions held that if the first of the consecutive sentences had not been served completely the second could not be attacked.¹⁴ This position was later reversed by the appellate courts on the theoretical basis that a prisoner could be considered in custody under both sentences and on the practical basis that the interests of all would be served by an early determination of the issue.¹⁵ The problem ultimately reached the Supreme Court of Florida in a case which involved eleven consecutive sentences.¹⁶ The court held that the rule required that the prisoner claim the right to be released. Since all eleven sentences were under attack and the prisoner would be released if he prevailed, the rule was satisfied.¹⁷ This principle prevented relief in several cases where the prisoner would not begin to serve the sentence under attack until the expiration of a prior sentence.¹⁸

8. *Robinson v. State*, 194 So.2d 29 (Fla. 2d Dist. 1967).

9. *Jackson v. State*, 166 So.2d 194 (Fla. 3d Dist. 1964).

10. *Miller v. State*, 193 So.2d 647 (Fla. 3d Dist. 1967).

11. *Cannon v. State*, 181 So.2d 584 (Fla. 4th Dist. 1966), citing *Lane v. Brown*, 372 U.S. 477 (1963).

12. *Hinton v. State*, 177 So.2d 522 (Fla. 2d Dist. 1965).

13. 190 So.2d 340 (Fla. 2d Dist. 1966).

14. *Barnes v. State*, 173 So.2d 515 (Fla. 1st Dist. 1965); *Cummings v. State*, 166 So.2d 775 (Fla. 2d Dist. 1964); *White v. State*, 165 So.2d 799 (Fla. 2d Dist. 1964).

15. *Dovico v. State*, 178 So.2d 340 (Fla. 2d Dist. 1965); *Brawn v. State*, 177 So.2d 547 (Fla. 2d Dist. 1965); *Jones v. State*, 174 So.2d 452 (Fla. 2d Dist. 1965); *Falagon v. State*, 167 So.2d 62 (Fla. 2d Dist. 1964).

16. *Johnson v. State*, 184 So.2d 161 (Fla. 1966).

17. *Johnson v. State*, 185 So.2d 466 (Fla. 1966).

18. *McDowell v. State*, 195 So.2d 586 (Fla. 1st Dist. 1967) (even though the sentences were

C. *Successive Motions*

The rule that the court is not required to entertain a second motion which is not materially different from the first¹⁹ was followed rather closely during the period surveyed. For example, the Supreme Court of Florida²⁰ rejected the argument that a second motion should be allowed because the record did not contain a copy of the first motion nor an order denying it.²¹ However, exceptions occurred where the former denial was not based on the merits and the record did not conclusively show that the prisoner was not entitled to relief.²²

D. *Appeal from Rule No. 1.850 Hearings*

Since a prisoner has no absolute right to counsel at Rule No. 1.850 hearings or appeals therefrom, the courts have granted several motions for leave to withdraw where attorneys found no justifiable issue for appeal.²³

The Supreme Court of Florida²⁴ held that an appeal from Rule No. 1.850 hearings should be brought to the district courts of appeal even where the prisoner was sentenced to death.²⁵

Ordinarily the court will not consider an issue on appeal which was not raised previously.²⁶

II. RIGHT TO COUNSEL²⁷

A. *Adequate Representation*

Although the right to counsel implies the right to *adequate* representation, courts are extremely reluctant to afford relief on the basis of inadequate representation. The announced criteria is: "[T]he standard level of the attorney's efforts reduced the trial to a mockery or

issued from different courts); *Pritchett v. State*, 193 So.2d 185 (Fla. 4th Dist. 1966); *Escue v. State*, 192 So.2d 524 (Fla. 2d Dist. 1966) (an excellent analysis of the problem); *Ervin v. State*, 189 So.2d 374 (Fla. 4th Dist. 1966); *Hill v. State*, 184 So.2d 457 (Fla. 3d Dist. 1966) (prior sentence being served in another state).

19. *Peterson v. State*, 184 So.2d 503 (Fla. 2d Dist. 1966); *Johnson v. State*, 181 So.2d 667 (Fla. 1st Dist. 1966).

20. *State v. Piehl*, 184 So.2d 417 (Fla. 1966).

21. A dissenting opinion was based upon the view that the state failed to sustain the burden of proving that the records conclusively showed that the prisoner was not entitled to relief.

22. *Coleman v. State*, 189 So.2d 415 (Fla. 1st Dist. 1966); *Taylor v. State*, 181 So.2d 589 (Fla. 4th Dist. 1965).

23. *Falagan v. State*, 182 So.2d 61 (Fla. 1st Dist. 1966); *Morris v. State*, 187 So.2d 368 (Fla. 1st Dist. 1966); *Price v. State*, 184 So.2d 681 (Fla. 1st Dist. 1966); *Stewart v. State*, 184 So.2d 489 (Fla. 4th Dist. 1966).

24. *Roberts v. State*, 181 So.2d 646 (Fla. 1966).

25. Justice Erwin dissented.

26. *Adams v. State*, 179 So.2d 369 (Fla. 2d Dist. 1965).

27. Cases where the right to counsel bears upon the admissibility of a confession will be discussed in the "Confession" section.

[farce.]”²⁸ The application of this test is no less stringent than the test itself. Where the petitioner alleged that his attorney spent little time in preparation, relief was denied. The court stated: “We think the issue—would be that of *opportunity* for study and investigation rather than actual performance of those duties by counsel.”²⁹ Relief was denied where petitioners alleged that counsel advised a change of plea to guilty³⁰ and where petitioner alleged that preparation time was inadequate.³¹ However, where the petitioner alleged both inadequate time for preparation and denial of his motion for continuance, a new trial was ordered.³²

B. *Waiver*

The law in this area³³ is designed to afford maximum protection to the petitioner, and the courts have construed ambiguities in favor of the petitioner. For example, in *McKinsie v. State*³⁴ the record showed that the trial judge had instructed to the petitioner as follows:

You understand that you are entitled to have a jury sit over there and hear the evidence and decide whether or not you are guilty or innocent and a lawyer to represent you. The State will pay for the lawyer if you are unable to hire one.

After an affirmative reply from the petitioner the court continued, “Or you can plead guilty and let the court investigate it, throw yourself on the mercy of the court.” The petitioner plead guilty without assistance of counsel. The applicable rule is that a plea of guilty at an arraignment without the assistance of counsel and the failure to request counsel does not necessarily constitute a waiver.³⁵ However, if the petitioner were informed of his right to counsel and appointment if he could not afford counsel, he must bear the burden of proving that he did not waive his rights. A literal interpretation of this rule could place the burden upon the petitioner. However, the court in *McKinsie* felt that an intelligent waiver implied a choice between having representation at all stages or not, and that the trial judge’s remarks could be construed as a choice between a jury trial with counsel or plea of guilty without. Further, the court considered that the remarks of the trial judge gave the petitioner the impression that counsel would be unnecessary if he pleaded guilty. Therefore, the court held that the defendant had not waived his right to counsel and that the dismissal of his petition without a hearing was error.

28. *Simpson v. State*, 164 So.2d 224, 227 (Fla. 3d Dist. 1963).

29. *State v. Barton*, 194 So.2d 241, 243 (Fla. 1967).

30. *Simpson v. State*, 181 So.2d 185 (Fla. 1st Dist. 1965).

31. *McCray v. State*, 181 So.2d 729 (Fla. 1st Dist. 1966); *State v. Daniels*, 178 So.2d 44 (Fla. 2d Dist. 1965); *Coyner v. State*, 177 So.2d 715 (Fla. 3d Dist. 1965).

32. *Grizzell v. State*, 189 So.2d 367 (Fla. 1st Dist. 1966).

33. Cases discussing the development of this area of law were discussed in Wills, *Criminal Law and Procedure, Survey of Florida Law*, 20 U. MIAMI L. REV. 253 (1965).

34. 187 So.2d 69, 70 (Fla. 2d Dist. 1966).

35. *Trepanier v. State*, 181 So.2d 161 (Fla. 1965).

In *Stone v. State*³⁶ the petitioner hired an attorney, and the trial judge after discussion with all parties, appointed the same attorney to defend the co-defendant. The court held that the petitioner had waived his right to the undivided services of the attorney.

C. Critical Stages

Deprivation of assistance of counsel is reversible error only if the deprivation occurred at a critical stage of criminal prosecution or on a showing of special prejudice at non-critical stages. Therefore, the central issue in many of the cases surveyed was the determination of which stages are critical or what events are prejudicial.

1. OUT OF CUSTODY INTERROGATION

In *Gordon v. Gerstein*,³⁷ the petitioner was called to testify before the State Attorney at a hearing authorized by Florida Statutes, section 27.04 (1965).³⁸ The investigating officer proceeded without waiting for the petitioner to arrange for counsel. The petitioner refused to testify in absence of counsel and was cited for contempt. The Supreme Court of Florida sustained the citation because: such hearings are open; the petitioner's attorney could have been present; the petitioner had a duty to speak and the fact that his testimony might have provided a basis for criminal charges against him did not mean that he had a constitutional right to the assistance of counsel. A federal case decided in 1957 was cited as authority for the latter point.³⁹

2. IN CUSTODY INTERROGATION

Arrest is not a critical stage. Thus, the failure to provide a defendant an attorney immediately after arrest and prior to investigation was not error,⁴⁰ nor was interrogation during three months detention in the absence of proof of prejudice.⁴¹

The courts have recognized that prejudicial error might result if an interrogation after arrest in the absence of counsel produces incriminating statements which in turn lead to a plea of guilty.⁴² However, such an argument has not been sustained on appeals in Florida. Therefore, relief

36. 196 So.2d 445 (Fla. 4th Dist. 1966).

37. 189 So.2d 873 (Fla. 1966).

38. The state attorney shall have summoned all witnesses required on behalf of the state; and he is allowed the process of his court to summon witnesses from throughout the state to appear before him in or out of term time at such convenient places in the state attorney's judicial circuit and at such convenient times as may be designated in the summons, to testify before him as to any violation of the criminal law upon which they may be interrogated, and he is empowered to administer oaths to all witnesses summoned to testify by the process of his court or who may voluntarily appear before him to testify as to any violation or violations of the criminal law.

39. *In re Groban*, 352 U.S. 330 (1956).

40. *Gray v. State*, 184 So.2d 206 (Fla. 2d Dist. 1966).

41. *Irving v. State*, 192 So.2d 52 (Fla. 2d Dist. 1966).

42. *Wright v. Dickson*, 336 F.2d 878 (9th Cir. 1964).

was denied where the plea was changed to not guilty,⁴³ and where the petitioner failed to allege that the plea of guilty was induced solely by the confession.⁴⁴ In a recent decision,⁴⁵ the petitioner alleged that an interrogation in the absence of counsel by the arresting officer and by the trial judge, led to incriminating statements and a plea of guilty. Relief was denied on the basis that the petitioner did not sustain the burden of proving that the plea of guilty, made after the appointment of a Public Defender, was "the product of a will overborne."⁴⁶

3. PRELIMINARY HEARING

Generally, the preliminary hearing is not considered a critical stage, but two cases⁴⁷ following the principle announced in *Harris v. State*⁴⁸ found prejudice where the petitioner confessed without benefit of counsel at the preliminary hearing and the magistrate testified at the trial that the petitioner had admitted that the confession was true.

4. ARRAIGNMENT

The arraignment is not viewed as a critical stage but accepting a plea of guilty at an arraignment without the assistance of counsel is prejudicial.⁴⁹ However, relief was denied in one case where the petitioner alleged that the Public Defender was not present at the arraignment but the record showed that the petitioner stated that the Public Defender had been appointed to represent him.⁵⁰ The portion of the record which appeared in the appellate opinion showed dialogue between the trial judge and the petitioner and did not reveal the presence of the Public Defender. The court was not explicit, but apparently the decision was based upon the view that the appointment of an attorney was sufficient.

Conviction of possession of firearms by a felon was reversed where the prior felony conviction was based upon a plea of guilty made without benefit of counsel.⁵¹

5. AFTER FORMAL CHARGE BUT BEFORE TRIAL

Although no Florida cases were noted in the period covered by this survey, the police practice in this area will no doubt be influenced by *United States v. Wade*⁵² which held that after indictment and appoint-

43. *Taylor v. State*, 169 So.2d 861 (Fla. 3d Dist. 1964).

44. *Thompson v. State*, 176 So.2d 564 (Fla. 3d Dist. 1965).

45. *Dovico v. State*, 199 So.2d 308 (Fla. 4th Dist. 1967).

46. See FLA. R. CRIM. P. 1.150(e).

47. *Murray v. State*, 191 So.2d 278 (Fla. 2d Dist. 1966); *Williams v. State*, 184 So.2d 525 (Fla. 4th Dist. 1966).

48. 162 So.2d 262 (Fla. 1964).

49. *Sardinia v. State*, 168 So.2d 674 (Fla. 1964).

50. *Ramsey v. State*, 198 So.2d 849 (Fla. 2d Dist. 1967).

51. *Davis v. State*, 191 So.2d 440 (Fla. 3d Dist. 1966).

52. 87 S. Ct. 1926 (1967).

ment of counsel the defendant had the right of assistance of counsel at a lineup.

6. SENTENCE

Sentencing was held to be a critical stage even though the proceeding was merely to correct a clerical error in the calculation of credit time.⁵³ Waiver of counsel at arraignment does not imply waiver at sentencing.⁵⁴

7. DIRECT APPEAL

Direct appeal is a critical stage.⁵⁵ Where the defendant's request for counsel on appeal was denied and the appeal period had run, the Supreme Court of the United States ordered that measures be taken to afford appellate review.⁵⁶ The Supreme Court of Florida complied by ordering review by means of habeas corpus.⁵⁷ However, the right to counsel on appeal is not absolute. Attorneys have petitioned for leave to withdraw where they found no justiciable issue for appeal. Moreover, withdrawals have been allowed where no attorney was appointed and the court, not an attorney, decided that an appeal would be frivolous.

The position of the Florida courts is that the defendant does have the right of appointment of counsel, but the right does not extend to requiring the attorney to continue with an appeal that he considers to be without merit.⁵⁸ However, the courts are not prone to grant withdrawals lightly. In *Bashlor v. Wainwright*⁵⁹ Justices Drew and Erwin expressed some reservations, and in *Smith v. State*⁶⁰ the court stated:

It is becoming difficult to justify the difference between a need for counsel in the trial court and finding that there is no need of counsel in the appellate court . . . in the future . . . this court will be more strict in permitting withdrawal of counsel of record . . . to indigent defendants

Furthermore, in *Gossett v. State*⁶¹ the court pointed out:

This court has, in the past, permitted defense attorneys to with-

53. *Thacker v. State*, 185 So.2d 202 (Fla. 3d Dist. 1966).

54. *Fulmore v. State*, 198 So.2d 101 (Fla. 2d Dist. 1967).

55. *Douglas v. California*, 372 U.S. 353 (1963).

56. *Hollingshead v. Wainwright*, 384 U.S. 31 (1966).

57. *Hollingshead v. Wainwright*, 194 So.2d 577 (Fla. 1967).

58. *Baker v. Wainwright*, 197 So.2d 290 (Fla. 1967); *Smith v. State*, 192 So.2d 346 (Fla. 2d Dist. 1966); *Morris v. State*, 189 So.2d 901 (Fla. 1st Dist. 1966); *Williams v. State*, 186 So.2d 824 (Fla. 1st Dist. 1966); *McNealy v. State*, 183 So.2d 738 (Fla. 1st Dist. 1966); *Carr v. State*, 180 So.2d 381 (Fla. 2d Dist. 1965). However Fla. Laws 1967, ch. 67-502 provides that appeal *shall* be taken by appointed attorney where an indigent receives the death sentence.

59. 189 So.2d 800 (Fla. 1966).

60. 192 So.2d 41, 42 (Fla. 2d Dist. 1966).

61. 191 So.2d 281, 282 (Fla. 2d Dist. 1966).

draw. . . . As a result, we have had a large number of cases lodged here without representation. . . . [B]ecause of . . . the confusion caused thereby, we are finding it necessary to refuse to permit defense counsel to withdraw

8. PROBATION AND PAROL HEARINGS

Probation and parol hearings are not critical stages.⁶² A rather interesting application of this policy occurred in *Randall v. State*.⁶³ In the absence of counsel the petitioner's sentence was set aside and he was placed on probation. After revocation of probation he was resentenced in the presence of counsel. The court rejected his argument that his right to counsel at the probation hearing was violated and therefore time on probation should be credited against his subsequent sentence.

D. Juvenile Courts

The court in *In Re T.W.P.*⁶⁴ held that failing to advise an indigent juvenile of his right to counsel was not error because proceedings in juvenile courts are not criminal in nature. The court circumvented *Shioutakon v. District of Columbia*⁶⁵ by noting that this decision was based upon a statute rather than upon constitutional grounds. This issue was resolved by the Supreme Court of the United States in *Application of Gault*.⁶⁶ The Court held that the due process clause of the fourteenth amendment requires that in proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them or if they are unable to afford counsel that counsel will be appointed to represent the child.⁶⁷

E. Offenses Less than Felonies

The Supreme Court of Florida in *Fish v. State*⁶⁸ held that the right to counsel does not extend to those charged with misdemeanors. However, the federal courts have recognized the defendant's right to counsel when accused of a federal misdemeanor,⁶⁹ a state misdemeanor in Mississippi,⁷⁰ and a state misdemeanor in Florida.⁷¹

62. *Shipllett v. Wainwright*, 198 So.2d 647 (Fla. 1st Dist. 1967); *Bryant v. State*, 194 So.2d 21 (Fla. 3d Dist. 1967).

63. 188 So.2d 334 (Fla. 2d Dist. 1966).

64. 184 So.2d 507 (Fla. 3d Dist. 1966), *cert. dismissed*, 188 So.2d 813 (Fla.1966), *appeal dismissed*, 192 So.2d 482 (Fla. 1966), *cert. denied*, 388 U.S. 912 (1967).

65. 236 F.2d 666 (D.C. Cir. 1956).

66. 87 S.Ct. 1428 (1967).

67. The Court fortified its position by recommendations from the President's Crime Commission.

68. 159 So.2d 866 (Fla. 1964).

69. *Evans v. Rives*, 126 F.2d 633 (D.C. Cir. 1942).

70. *Harvey v. State of Mississippi*, 340 F.2d 263 (5th Cir. 1965).

71. *McDonald v. Moore*, 353 F.2d 106 (5th Cir. 1965).

In *Rutledge v. City of Miami*⁷² the court in habeas corpus proceedings discharged the petitioner, who, without benefit of counsel, had been convicted and sentenced to 60 days in jail and ordered to pay a fine of \$500.00 or be jailed an additional 60 days by a municipal court for violations of a municipal ordinance. The federal court stated that it took jurisdiction even though the petitioner had not sought relief in the state courts because the decisions of the Supreme Court of Florida clearly showed that the petitioner had no adequate avenue of relief in the state courts.

The Supreme Court of Florida considered the problem in *Watkins v. Morris*⁷³ and in *State ex rel Taylor v. Warden of Orange County Prison Farm*.⁷⁴ In both cases the court denied the right to counsel. In the latter case which involved incarceration totaling 360 days for a violation of a municipal ordinance, Justice Erwin dissented and suggested that the right to counsel be recognized where the offense authorized a sentence of 30 days or more.

III. CONFESSIONS

The major operative rules in Florida have been that a voluntary confession is admissible and an extra-judicial confession is not necessarily rendered involuntary by the failure to advise the defendant of his right to remain silent. Significant changes have occurred due to the influence of *Escobedo v. Illinois*,⁷⁵ *Miranda v. Arizona*,⁷⁶ *Massiah v. United States*⁷⁷ and *Wong Sun v. United States*.⁷⁸

A. Right to Counsel and Right to be Silent

Application of the principles of *Escobedo*⁷⁹ and *Miranda*⁸⁰ has been resisted. The courts have been reluctant to exclude confessions because

72. 267 F. Supp. 885 (S.D. Fla. 1967).

73. 179 So.2d 348 (Fla. 1965).

74. 193 So.2d 606 (Fla. 1967).

75. 378 U.S. 478 (1964).

76. 384 U.S. 436 (1966).

77. 377 U.S. 201 (1964).

78. 371 U.S. 471 (1963).

79. *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964):

We hold therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment of the Constitution "as made obligatory upon the States by the Fourteenth Amendment." *Gideon v. Wainwright*, 372 U.S. at 342 and that no statement elicited by the police during interrogation may be used against him at a criminal trial.

80. *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966):

To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to

the right to counsel and right to remain silent were violated. Since *Escobedo* and *Miranda* are not retroactive, the rules they announced were not applied to any of the cases decided early in the period under survey.⁸¹ Nor were the principles of *Escobedo* applied in cases where counsel was neither requested nor refused,⁸² or where the defendant waived his right to counsel,⁸³ or where the defendant testified that the statements in his confession were true.⁸⁴ In one case⁸⁵ the defendant had been advised that if he talked about any aspect of the case he would have to do so freely and voluntarily. His request to call his attorney was granted. He confessed after calling his attorney but before his attorney arrived. The majority distinguished the facts from *Escobedo* on the basis that the defendant knew that he had a right to wait for his attorney if he wished.

The principles of *Escobedo* and *Miranda* were applied in *Collins v. State*⁸⁶ to effect a reversal. The defendant's confession was ruled inadmissible since it was made without benefit of counsel and under extreme mental duress. The case is particularly interesting because the court could have circumvented the issue in three ways. First, the court could have distinguished the case because the police had offered to procure counsel for the defendant but he refused and preferred to call his father and requested him to obtain counsel. Secondly, the court could have avoided *Miranda* because the interrogation and trial occurred before *Miranda*. The court said by way of footnote:

. . . Escobedo is clearly applicable to the instant case in point of time. And to all intents and purposes while the trial in the instant case was held before the *Miranda* opinion, the holdings in *Miranda* are likewise applicable here for the reason that everything said in *Miranda* was based directly upon previous cases handed down by that Court . . .

questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waivers are demonstrated by the prosecution at the trial, no evidence obtained as a result of interrogation can be used against him.

81. *Watson v. State*, 190 So.2d 161 (Fla. 1966); *Broome v. State*, 194 So.2d 31 (Fla. 2d Dist. 1967); *Hilson v. State*, 191 So.2d 90 (Fla. 2d Dist. 1966); *Carter v. State*, 183 So.2d 883 (Fla. 3d Dist. 1966); *Lawrence v. State*, 182 So.2d 467 (Fla. 3d Dist. 1966).

82. *McCumber v. State*, 182 So.2d 627 (Fla. 3d Dist. 1966); *Dampier v. State*, 180 So.2d 183 (Fla. 1st Dist. 1965); *Moffett v. State*, 179 So.2d 408 (Fla. 2d Dist. 1965); *Nixon v. State*, 178 So.2d 620 (Fla. 3d Dist. 1965); *Myrick v. State*, 177 So.2d 845 (Fla. 1st Dist. 1965).

83. *Schneider v. State*, 183 So.2d 593 (Fla. 4th Dist. 1966).

84. *McLain v. State*, 178 So.2d 208 (Fla. 1st Dist. 1965).

85. *Male v. State*, 189 So.2d 521 (Fla. 3d Dist. 1966).

86. 197 So.2d 574 (Fla. 2d Dist. 1967).

Thirdly, *Escobedo* and *Miranda* could have been circumvented because the court considered that the state's evidence that the confession was voluntary was insufficient. A dissenting opinion did not consider *Escobedo* to be applicable.

A very significant change in this area resulted from the Florida courts' adoption of the principle of *Massiah v. United States*.⁸⁷ In *Williams v. State*⁸⁸ the defendant's confession was obtained by interrogation in absence of counsel after the defendant had been indicted and had obtained counsel, but he had not requested that counsel be present at the time he confessed. The court reversed the defendant's conviction and stated that it must adopt the principles of *Massiah* because,

While the *Massiah* case involved a federal court conviction and the court's opinion derived from the Fifth and Sixth Amendments, the conclusion is inescapable that the same result would have been arrived at, through utilization of the Fourteenth Amendment, if the criminal conviction had been in a state court.

B. *Illegal Detention—Interrogation*

The change in the law of confessions as a result of *Wong Sun*⁸⁹ is illustrated by *Outten v. State*.⁹⁰ The defendant was arrested on suspicion of automobile theft, taken to jail and charged with vagrancy. He made incriminating statements. After he was moved to a different part of the jail and informed of his constitutional rights, he confessed. Since the trial court held that his initial statements were illegally obtained and inadmissible, the admissibility of the subsequent confession was in issue on appeal. The court reversed and remanded holding that: (1) the result of illegal detention is to exclude verbal as well as tangible evidence, provided the improper influences had not been effectively removed and (2) even though the confession followed some time after the illegal detention the debilitating influences are presumed to carry over and permeate subsequent interrogation unless the improper influences had been ef-

87. 377 U.S. 201, 206 (1964):

We hold that the petitioner was denied basic protections when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.

88. 188 So.2d 320 (Fla. 2d Dist. 1966).

89. 371 U.S. 463, 471 (1963):

Thus verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest . . . is no less the "fruit" of official illegality than the more common tangible fruits of the unwarranted intrusion. . . . We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

90. 197 So.2d 594 (Fla. 2d Dist. 1967).

fectively removed. (3) The evidence did not indicate effective removal of improper influences.⁹¹

The court in *French v. State*⁹² following the aforementioned principles held that where the defendant confessed after confrontation with tangible evidence illegally obtained, the confession was inadmissible as "fruit of the poisonous tree."

In spite of the general trend indicated above, Florida courts continue to reject the *McNabb-Mallory* Rule, and have held that an unreasonable delay in bringing the defendant before a magistrate does not render the confession inadmissible unless the defendant can prove that the delay induced the confession.⁹³

C. Voluntary

A confession is inadmissible if involuntary, and the state bears the burden of proving that the confession was voluntary.⁹⁴ However, a confession made in a weakened condition has been held to be admissible.⁹⁵ The court distinguished the case from *Reddish v. State*⁹⁶ where the defendant was not alert due to the effects of demerol. Admission of a confession made while under the influence of tranquilizers was not error where the defendant testified to the same facts at the trial.⁹⁷

D. Miscellaneous

Where, contrary to the usual procedure, the trial judge heard evidence relative to the admissibility of the confession in the presence of the jury, the appellate court held that no prejudicial error occurred since the confession was admitted into evidence.⁹⁸

Admitting into evidence a portion of a co-defendant's confession was not reversible error where the defendant admitted to an officer that the portion admitted was true.⁹⁹

Since granting a motion for severance or exclusion of a co-defendant's confession is a matter of discretion, ordinarily refusal is not grounds

91. The court cited *Wong Sun v. United States*, 371 U.S. 471 (1963); *Silverman v. United States*, 365 U.S. 505 (1961); *Hoffman v. McGinnes*, 277 F.2d 598 (3d Cir. 1960); *Nueslein v. District of Columbia*, 115 F.2d 690 (D.C. Cir. 1940) and *Upshaw v. United States*, 335 U.S. 410 (1948).

92. 198 So.2d 668 (Fla. 3d Dist. 1967).

93. *Barton v. State*, 193 So.2d 618 (Fla. 2d Dist. 1967); *Nixon v. State*, 178 So.2d 620 (Fla. 3d Dist. 1965).

94. *Williams v. State*, 188 So.2d 320 (Fla. 2d Dist. 1966).

95. *Myrick v. State*, 177 So.2d 845 (Fla. 1st Dist. 1965).

96. 167 So.2d 858 (Fla. 1964).

97. *Kimmons v. State*, 178 So.2d 608 (Fla. 1st Dist. 1965).

98. *Brown v. State*, 181 So.2d 578 (Fla. 1st Dist. 1965).

99. *Seely v. State*, 191 So.2d 78 (Fla. 2d Dist. 1966).

for reversal in absence of prejudice.¹⁰⁰ Where a co-defendant's confession was admitted, courts have considered that the defendant was adequately protected by an instruction to disregard the confession while considering the guilt or innocence of the defendant.¹⁰¹

The necessary constitutional safeguards were satisfied where the juvenile court had jurisdiction over the juvenile, and juvenile authorities granted the city police permission to interrogate, and the juvenile was advised of his constitutional rights before he confessed.¹⁰²

*State v. Hodges*¹⁰³ announced the principle that the error of introducing a confession before extraneous evidence established prima facie proof of the corpus delicti may be cured by subsequent sufficient evidence of the corpus delicti. Subsequently the Supreme Court of Florida in *Hodges v. State*¹⁰⁴ found that the subsequent evidence was insufficient.¹⁰⁵

In *Bogan v. State*¹⁰⁶ the court held that no reversible error occurred where the state failed to introduce a confession which contained statements beneficial to the defendant when the defendant testified to such statements.

IV. SEARCH AND SEIZURE

In the past Florida courts have not been quick to adopt federal views regarding search and seizure. A case decided by the Second District Court of Appeal,¹⁰⁷ is particularly interesting for the opinion quotes liberally from federal cases¹⁰⁸ to support a "federal" position not required by Florida precedent nor the facts of the case. In the past a valid arrest and search could be based upon probable cause. A previous decision¹⁰⁹ had indicated that the *safer* procedure would be to secure a search warrant preliminary to stopping a motorist and searching his car. Acting Chief Judge Pierce in *Carter v. State* stated:

We think the time has come when it is not only "safer procedure" but it should be required procedure for an officer to comply with the constitution and statutory provisions . . . and court decisions construing them before making a search provided always, that he had reasonable opportunity, both in point

100. *Campfield v. State*, 189 So.2d 642 (Fla. 2d Dist. 1966).

101. *Coney v. State*, 193 So.2d 57 (Fla. 3d Dist. 1966); *Kinsey v. State*, 193 So.2d 437 (Fla. 1st Dist. 1967) (a myth in the writer's opinion).

102. *State v. Francois*, 197 So.2d 492 (Fla. 1967).

103. 169 So.2d 361 (Fla. 3d Dist. 1964).

104. 176 So.2d 91 (Fla. 1965).

105. *Accord*, *Manuel v. State*, 190 So.2d 1 (Fla. 1st Dist. 1966).

106. 188 So.2d 28 (Fla. 2d Dist. 1966).

107. *Carter v. State*, 199 So.2d 324, 334 (Fla. 2d Dist. 1967).

108. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Henry v. United States*, 361 U.S. 98 (1959); *Walker v. United States*, 125 F.2d 395 (5th Cir. 1942).

109. *Collins v. State*, 65 So.2d 61 (Fla. 1953).

of time and circumstances to do so. We, therefore, hold that where an arrest or search is made by an officer without a warrant, the State must be prepared to show, not only the factual existence at such time of probable cause, but also that the officer or officers had no reasonable opportunity to previously apply for and be issued an arrest warrant; otherwise the evidence as to the fruits of the search goes out.¹¹⁰

It is important to note that the court could have limited its decision to its finding that the officers did not have probable cause to arrest. The officers had kept a house under surveillance and had seen no illegal activity nor any indication that the occupants were intending to leave. The officers, without a warrant stopped the defendant while driving his truck, arrested and searched him. On petition for rehearing the state requested the court to recede from the holding quoted above. The petition was denied, Associate Judge Stephenson dissenting.

A similar problem arose in the Third District Court of Appeal.¹¹¹ Officers in a patrol car received a message that a car of a certain description contained stolen property, a stolen license plate and that the occupants were en route to commit a crime. The officers saw a car of that description, noticed that it was being driven in an erratic fashion, and arrested the defendant for careless driving, driving without a license and driving while under the influence of alcohol. The officers searched the car and found a stolen license plate under the hood. The conviction for concealing stolen property was appealed on the basis that the car was to be towed away, and thus a search warrant should have been obtained prior to searching the car. The conviction was affirmed. The court reasoned that the officers had probable cause to arrest and search, and the fact that a search warrant could have been obtained after the car was towed away was immaterial¹¹² because "[t]he relevant test is not whether it is reasonable to procure a search warrant but whether the search was reasonable."¹¹³ No doubt the future cases which deal with the importance of warrants will be of great interest to the profession.

The usual presumption has been that the arrest which validates a search must be made for some stated crime. The court in *Chippas v. State*,¹¹⁴ citing federal authority,¹¹⁵ found no reversible error in admitting evidence obtained by a search after an arrest for "investigation." The

110. 199 So.2d 334 (Fla. 2d Dist. 1967). This view is stated particularly well by Justice Douglas in *Wong Sun v. United States*, 371 U.S. 471 (1963).

111. *Fountain v. State*, 199 So.2d 738, 740 (Fla. 3d Dist. 1967).

112. To the same effect another decision from the Third District, *Lowe v. State*, 191 So.2d 303 (Fla. 3d Dist. 1966).

113. *United States v. Rabinowitz*, 339 U.S. 56, 66 (1949).

114. 180 So.2d 355 (Fla. 3d Dist. 1965).

115. *Ralph v. Peppersach*, 335 F.2d 128 (4th Cir. 1964); *Bell v. United States*, 254 F.2d 82 (D.C. Cir. 1958).

court maintained that the facts, not the label, are critical and that the evidence supported probable cause that a felony had been committed.¹¹⁶

Contrary to a previous trend,¹¹⁷ during the period surveyed, the courts have closely adhered to the principle that an arrest may not be used as a ruse to conduct an exploratory search. In one instance officers with an arrest warrant could have arrested the defendant elsewhere, but preferred to arrest him in his home and search the premises as an incident to the arrest. The court¹¹⁸ held that the evidence was inadmissible because the arrest was a pretext to satisfy the primary purpose—a search of the home. The court cited *Jones v. United States*¹¹⁹ and *Prather v. State*¹²⁰ which states:

Law officers may not make a valid search by entry upon the premises ostensibly for the purpose of making an arrest but in reality for the purpose of conducting a general exploratory search for evidence of crime. Such search is unreasonable even though supported by probable cause or arrest warrant.

Similarly, in *O'Neil v. State*¹²¹ the court, citing federal¹²² and Florida authority,¹²³ held evidence obtained by searching the defendant's room inadmissible where the officers could have arrested the defendant in the lobby of his hotel but waited until he entered his room.

The same policy prevented the use of an arrest for one crime (a minor traffic violation) to be used as a ruse to search for evidence of an unrelated offense (possession of firearms by a felon).¹²⁴ But, of course, where after an arrest for one crime, a reasonable search related to that crime leads to evidence which supports probable cause that another crime had been committed, continued search is permitted.¹²⁵ The fact that the arrest was made outside an automobile did not preclude officers from taking bolita tickets in plain sight on the seat of the car.¹²⁶ Search of an automobile in absence of the owner was upheld where the officers had probable cause to believe that it contained stolen property.¹²⁷

Probable cause must precede any search. Police officers in one case

116. *Walker v. State*, 196 So.2d 8 (Fla. 3d Dist. 1967) and *Gossett v. State*, 188 So.2d 836 (Fla. 2d Dist. 1966) were decided on difficult questions of the sufficiency of the evidence as to probable cause.

117. Wills, *Criminal Law and Procedure, Survey of Florida Law*, 20 U. MIAMI L. REV. 266 (1965).

118. *Stanley v. State*, 189 So.2d 898 (Fla. 1st Dist. 1966).

119. 357 U.S. 493 (1958).

120. 182 So.2d 273, 275 (Fla. 2d Dist. 1966).

121. 194 So.2d 40 (Fla. 3d Dist. 1967).

122. *Henderson v. United States*, 12 F.2d 528 (4th Cir. 1926).

123. *Chapman v. State*, 158 So.2d 578 (Fla. 3d Dist. 1963).

124. *Riddlehoover v. State*, 198 So.2d 651 (Fla. 3d Dist. 1967).

125. *Gibson v. State*, 180 So.2d 685 (Fla. 3d Dist. 1965).

126. *State v. Smith*, 193 So.2d 23 (Flad 3d Dist. 1966).

127. *Beck v. State*, 181 So.2d 659 (Fla. 2d Dist. 1966).

saw the defendant carrying a package. They questioned him and he indicated that the package contained clothes. When the officers asked to inspect it, the defendant admitted that it was a radio and handed it to the officers. The radio was not admissible because a search made prior to an arrest without probable cause is unlawful.¹²⁸

In *Rodriguez v. State*¹²⁹ the majority held that when entering a home without a warrant, an initial announcement of authority was sufficient and need not be repeated at inner doors.

In *Treverrow v. State*¹³⁰ the court, citing *Jones v. United States*,¹³¹ held that evidence supplied by an unnamed confidential informant was sufficient to support a search warrant without the benefit of additional evidence if there was a substantial basis for crediting the information given. The case reached the Supreme Court of Florida¹³² on an alleged conflict of decisions.¹³³ The court found no conflict because each case is determined by the balance of interests rather than by a fixed rule. The court held that disclosure of the identity of the informant was not necessary and noted that the defendant made no allegations of what could be accomplished by disclosure, made no motion for disclosure before trial, and did not make disclosure an issue in his motion for a new trial. The officer had stated that the informant was reliable and had had direct observation of the evidence.

*Paula v. State*¹³⁴ reaffirmed the view that evidence which might be inadmissible at trial may be used to support a search warrant.

The court in *Boim v. State*,¹³⁵ citing federal authority,¹³⁶ held that the commission of a trespass while obtaining evidence to support an arrest warrant would not invalidate the warrant where the evidence was clearly visible without the necessity of the trespass. The validity of a warrant was upheld where the signature of the magistrate was made by someone else by use of a rubber stamp where such practice was authorized by the magistrate and done in his constructive presence.¹³⁷

The property interest necessary to contest the validity of a search has been of special concern in Florida since *State v. Leveson*¹³⁸ in which

128. *Moore v. State*, 181 So. 2d 164 (Fla. 3d Dist. 1965).

129. 189 So.2d 656 (Fla. 3d Dist. 1966).

130. 184 So.2d 473 (Fla. 1st Dist. 1966).

131. 362 U.S. 257 (1960).

132. *Treverrow v. State*, 194 So.2d 250 (Fla. 1967).

133. *Chacon v. State*, 102 So.2d 578 (Fla. 1957); *Cooper v. State*, 143 So.2d 217 (Fla. 1932); *Harrington v. State*, 110 So.2d 495 (Fla. 1st Dist. 1959).

134. 188 So.2d 388 (Fla. 2d Dist. 1966).

135. 194 So.2d 313 (Fla. 3d Dist. 1967).

136. *Mosco v. United States*, 301 F.2d 180 (9th Cir. 1962); *Teasley v. United States*, 292 F.2d 460 (9th Cir. 1961).

137. *State v. Hickman*, 189 So.2d 254 (Fla. 2d Dist. 1966).

138. 151 So.2d 283, 285 (Fla. 1963).

the court declined to adopt the federal standard that anyone legitimately on the premises has sufficient standing to contest the legality of the search.¹³⁹ The problem arose recently where the defendant was arrested in the apartment searched. He had a key, had spent nights and left a few personal articles in the apartment, but lived elsewhere. The court¹⁴⁰ held that he did not have standing to contest because he was not the owner, lessee nor lawful occupant.¹⁴¹

In a case of considerable interest the state argued that the defendant had waived his right to contest the admissibility of evidence by failing to move to suppress evidence prior to trial. The court¹⁴² pointed out that the diversity of opinion on the point could be harmonized on the following basis: a motion before trial is necessary when, as in the instant case, the issue is a controversial question of fact, but not necessary if the illegality appears from an admitted fact or from the face of the warrant or affidavit and thus raises a question of law.

In *Talavera v. State*¹⁴³ the court held that merely failing to object to officers "looking around" did not clearly show unqualified consent rather than submission to authority. Consent given by a co-tenant was held to be binding upon the defendant.¹⁴⁴ The court cited cases holding that an agent,¹⁴⁵ a father,¹⁴⁶ and a mistress¹⁴⁷ may consent to a search for another.

V. CONSTITUTIONALITY LAW OF STATUTES AND ORDINANCES

An attorney was informed against and arrested in connection with fees charged in an adoption. In an appeal from habeas corpus proceedings Florida Statutes, section 72.40(2)(a) (1965) allowing reasonable fees or costs in adoption suits was held to be unconstitutional because it failed to establish an ascertainable standard of guilt. The court considered that neither decisions of the courts nor the practice of attorneys furnished adequate guidelines as to reasonable fees.¹⁴⁸

Chapter 63-752 and Chapter 63-753 dealing with selection of Grand Juries in counties having a population of 750,000 or more were declared unconstitutional.¹⁴⁹

139. *Jones v. United States*, 362 U.S. 257 (1960).

140. *Ruiz v. State*, 199 So.2d 478 (Fla. 3d Dist. 1967).

141. To same effect *Robinson v. State*, 194 So.2d 29 (Fla. 2d Dist. 1967).

142. *Moffett v. State*, 179 So.2d 408 (Fla. 2d Dist. 1965).

143. 186 So.2d 811 (Fla. 2d Dist. 1966).

144. *Myrick v. State*, 177 So.2d 845 (Fla. 1st Dist. 1965).

145. *Fuller v. State*, 31 So.2d 259 (Fla. 1947).

146. *Tomlinson v. State*, 176 So. 543 (Fla. 1937).

147. *Baugus v. State*, 141 So.2d 264 (Fla. 1962).

148. *State v. Buchanan*, 191 So.2d 33 (Fla. 1966).

149. *State v. Cannon*, 181 So.2d 346 (Fla. 1966).

In *Inman v. City of Miami*¹⁵⁰ the court upheld a City of Miami Ordinance¹⁵¹ which prohibits liquor licensees from allowing homosexuals to congregate or buy liquor in their business establishments. The court considered that the ordinance was designed to prevent recruitment into unlawful activity.

The following statutes and ordinances were upheld in the period surveyed: Section 43-10-(7) Code of the City of Miami (profane language),¹⁵² Florida Statutes, section 317.201 (1965) (driving while intoxicated),¹⁵³ Florida Statutes, section 832.05 (1965) (worthless check),¹⁵⁴ Florida Statutes, section 790.23 (possession of weapons by felons),¹⁵⁵ Florida Statutes, section 877.02(11) (solicitation of legal business),¹⁵⁶ (vagrancy in Coral Gables.)¹⁵⁷

A trial judge granted the defendant's motion to quash holding sections of Florida Statutes, section 323.29 (1965)¹⁵⁸ to be unconstitutional. Subsequently the same sequence occurred before the same trial judge. The state appealed and the Florida Supreme Court¹⁵⁹ upheld the statute but decided that it should not be applied retroactively against the defendant.

VI. THE ACCUSED AS A WITNESS¹⁶⁰

The question of whether the prosecution may state that the unexplained possession of recently stolen property raises an inference of guilt, without by inference commenting upon the defendant's failure to testify was decided for the first time in Florida in *Miley v. State*.¹⁶¹ The court ruled such comment was not error because the statement referred solely to the court's instructions. Moreover, the context of the statement made it clear that the silence referred to was at the time the defendant was found in possession.¹⁶²

150. 197 So.2d 50 (Fla. 3d Dist. 1967).

151. MIAMI, FLA. CODE § 4-13.

152. *Nixon v. State*, 178 So.2d 620 (Fla. 3d Dist. 1965).

153. *McArthur v. State*, 191 So.2d 429 (Fla. 1966).

154. *Major v. State*, 180 So.2d 335 (Fla. 1965); *Snyder v. State*, 196 So.2d 217 (Fla. 2d Dist. 1967).

155. *Nelson v. State*, 195 So.2d 853 (Fla. 1967).

156. *State v. Williams*, 183 So.2d 537 (Fla. 1966).

157. *Snow v. State*, 179 So.2d 99 (Fla. 3d Dist. 1965).

158. Regulating motor carriers.

159. *State v. White*, 194 So.2d 601 (Fla. 1967).

160. FLA. STAT. § 918.09 (1965)

In all criminal prosecutions the accused may at his option be sworn as a witness in his own behalf, and shall in such case be subject to examination as other witnesses, but no accused person shall be compelled to give testimony against himself, nor shall any prosecuting attorney be permitted before the jury or court to comment on the failure of the accused to testify in his own behalf, and a defendant offering no testimony in his own behalf, except his own, shall be entitled to the concluding argument before the jury.

161. 186 So.2d 299 (Fla. 2d Dist. 1966).

162. See also *Ard v. State*, 108 So.2d 38 (Fla. 1959).

The following statements were held to be comments upon the defendant's failure to testify:

That is uncontradicted because they can't contradict it. . . .
They don't deny that at all.¹⁶³

I want to point out to you, however, that the defendant in every criminal case has a constitutional right not to testify and this is a right that he has and it cannot be held against him because of this constitutional right, and I want to state that if the defendant does object to not having this evidence, they have the same subpoena power as does the state. They can come in here too¹⁶⁴

[T]here has been nothing to rebut the evidence introduced by the state, and defense counsel has not come forward with an explanation.¹⁶⁵

Previous cases have held that interrogation of the defendant by the prosecution at trial upon his failure to testify at the preliminary hearing was error.¹⁶⁶ The question was certified¹⁶⁷ to the Supreme Court of Florida¹⁶⁸ which expressly repudiated the earlier cases.

Where an accomplice testified that he and the defendant had committed two robberies, defense counsel was not permitted to show by cross-examination that the defendant had been acquitted because the record was the best evidence.¹⁶⁹

Refusing to allow the defendant to make the closing argument himself rather than through his counsel was held to be an acceptable use of discretion.¹⁷⁰

VII. APPEAL

The court in *Woolley v. State*¹⁷¹ held that where the defendant was convicted in one trial under five informations, a separate notice of appeal

163. *Kolsky v. State*, 182 So.2d 305, 309 (Fla. 2d Dist. 1966).

164. *Carter v. State*, 199 So.2d 324, 336 (Fla. 2d Dist. 1967).

165. *Flaherty v. State*, 183 So.2d 607, 608 (Fla. 4th Dist. 1966).

166. *Simmons v. State*, 139 Fla. 645, 190 So.756 (1939); *Hathaway v. State*, 100 So.2d 662 (Fla. 3d Dist. 1958).

167. *Hines v. State*, 186 So.2d 820 (Fla. 1st Dist. 1966).

168. *State v. Hines*, 195 So.2d 550 (Fla. 1967).

169. *Chippas v. State*, 194 So.2d 593 (Fla. 1967); *contra*, *Watson v. State*, 134 So.2d 805 (Fla. 2d Dist. 1961) which previously had held *contra* to preserve the defendant's closing argument was expressly overruled. *Urga v. State*, 104 So.2d 43 (Fla. 2d Dist. 1958), not mentioned in the opinion, is related to the issue (though not directly in point) and supports *Watson*. There, in an abortion charge, the defendant wanted to impeach the prosecutrix by showing that she had made statements at the trial which were inconsistent with statements that she had made previously. According to the best evidence rule the defendant would be required to introduce evidence of the previous statements, and lose closing argument. To avoid this result the court held that the best evidence rule does not apply where the purpose is impeachment rather than proof.

170. *Thompson v. State*, 194 So.2d 649 (Fla. 2d Dist. 1967).

171. 193 So.2d 706 (Fla. 2d Dist. 1966).

for each judgment was required, but followed the previous Florida practice of allowing him to elect one judgment which he wished to be considered. The court stated that no law authorized this permissive practice and implied that it might not be continued. On the other hand where several defendants were tried for a single offense at a consolidated trial and the issues were identical, one notice of appeal was sufficient for all defendants.¹⁷²

In *Kinsey v. State*¹⁷³ the defendant filed a motion for an order allowing notice of appeal nunc pro tunc, alleging that the defendant's attorney at the direction of the defendant's mother filed a voluntary dismissal of appeal. Attached to the defendant's motion was an order of the United States District Court of the Middle District of Florida which stated that the dismissal of appeal was without the defendant's consent, and that the defendant should be afforded an appeal, and if not the conviction would be held invalid. In spite of this order the court denied the motion on the basis of the Florida Appellate Rules¹⁷⁴ which make the attorney the defendant's agent and stated that otherwise "there would be little or no stability or certainty in any court decision."

In *Ramey v. State*¹⁷⁵ the state moved to dismiss the defendant's appeal because the defendant had entered a plea of guilty. The state

172. *Lowe v. State*, 184 So.2d 164 (Fla. 1966).

173. 179 So.2d 108 (Fla. 1st Dist. 1965).

174. Florida Appellate Rule 3.13(b)

VOLUNTARY DISMISSAL OF CAUSES. The moving party in any proceedings, original or appellate, may procure dismissal of such proceedings at any time by filing with the clerk of the Court a notice for dismissal. Where the opposing party or parties have filed responsive pleadings or assignments of error or cross-petition, such notice for dismissal shall be by all such parties.

Florida Appellate Rule 2.3(d)

ATTORNEY AS AGENT OF CLIENT.

(1) *Service Upon Attorney.* In all matters relating to the prosecution or defense of any matter in the Court, the attorney of record shall be accepted as the agent of his client, and any notice by or to such attorney, act of his, or step taken by him in the prosecution or defense of such proceeding, shall be accepted as the act, notice to, or step of the client.

(2) *Withdrawal of Attorney.* An attorney of record will not be permitted to withdraw from a cause unless his withdrawal is sanctioned by the Court. He may file his motion for that purpose in the Court setting up the reasons for his withdrawal. A copy of said motion or petition shall be served on the client and the attorney for the adverse party.

(3) *Additional Attorneys.* After an appeal or other proceeding has been filed or docketed in the Court, additional authorized attorneys may appear and participate, prior to the time the cause is presented to the Court for decision on the merits, without the necessity of securing permission of the Court on filing written appearance in the office of the clerk of the Court and serving a copy thereof upon opposing counsel prior to its filing.

(4) After the date any cause in the Court is presented to the Court for a decision on the merits, no additional attorneys other than the original attorneys of record or those who have noted their appearance in said cause prior to the date the same is presented to the Court for a decision on the merits shall be permitted to appear or participate therein except upon leave of the Court for good cause shown, and provided a copy of the application for leave to appear shall have been served upon opposing counsel at least five days prior to the entry of any order allowing such appearance.

175. 199 So.2d 104 (Fla. 2d Dist. 1967).

cited several cases¹⁷⁶ for the proposition that a plea of guilty by the defendant constitutes a waiver of all defects not jurisdictional, and that a judgment on a plea of guilty is not subject to appellate review. The court noted that each previous case was decided on the merits and that the above proposition was mere obiter dictum. The court denied the motion to dismiss and declared that all matters in *Gibson v. State* which were contrary to the present decision were superseded.

The Supreme Court of Florida in *Harrell v. State*¹⁷⁷ held that when the defendant filed a notice of appeal and subsequently moved for a new trial, the appellate court retained complete and exclusive jurisdiction. This decision resolved an apparent conflict which had existed in the district courts of appeal.¹⁷⁸

After revocation of probation, the defendant, could not appeal the judgment of conviction because 90 days had passed. However, the court noted that the revocation could be appealed within 90 days.¹⁷⁹

When the appellant escaped during the pendency of an appeal, dismissal of appeal without prejudice was granted as a matter of discretion.¹⁸⁰ The court felt that the escape deprived the defendant's attorney of the opportunity of conferring with his client relative to prosecution of the appeal.

VIII. CHARGE TO THE JURY

Florida Statutes, section 919.14 (1965) requires that in all cases where the indictment or information charges an offense which is divided into degrees the court shall charge the jury as to the degrees of the offense. A series of cases have held that failure to charge the jury as to lesser included offenses is not fundamental error where there was no request for such a charge and no evidence presented relevant to a lesser included offense.¹⁸¹ In *Brown v. State*¹⁸² the defendant made an oral request for such an instruction. The appellate court held that regardless of whether the request was oral or written, instruction on lesser included offenses is not required unless all the essential elements of the lesser included offense are alleged in the charge and established by the evidence, and

176. *Gibson v. State*, 173 So.2d 666 (Fla. 3d Dist. 1965); *Cole v. State*, 172 So.2d 607 (Fla. 3d Dist. 1965); *Perez v. State*, 151 So.2d 865 (Fla. 3d Dist. 1963); *Baggs v. Frederick*, 168 So.2d 52 (Fla. 1936).

177. 197 So.2d 505 (Fla. 1967).

178. *Padgett v. State*, 197 So.2d 864 (Fla. 1st Dist. 1967); *Bannister v. Hart*, 144 So.2d 853 (Fla. 2d Dist. 1962).

179. *Burgess v. State*, 194 So.2d 698 (Fla. 2d Dist. 1967).

180. *Decree v. State*, 180 So.2d 667 (Fla. 1st Dist. 1965).

181. *Johnson v. State*, 130 So.2d 599 (Fla. 1961); *Jefferson v. State*, 128 So.2d 132 (Fla. 1961); *Toler v. State*, 193 So.2d 651 (Fla. 1st Dist. 1967); *Flagler v. State*, 189 So.2d 212 (Fla. 4th Dist. 1966); *Silver v. State*, 174 So.2d 91 (Fla. 1st Dist. 1965); *State v. Brown*, 118 So.2d 574 (Fla. 2d Dist. 1960).

182. 191 So.2d 296 (Fla. 1st Dist. 1966).

unless the evidence is susceptible of the inference that the defendant committed the lesser offense but not the greater. Therefore, the court held that the failure to instruct was not error because evidence which established violence was obvious and the jury could not have inferred that the defendant had committed larceny but not robbery.¹⁸³ However, the Supreme Court of Florida in *McClendon v. State*¹⁸⁴ adopted a less restrictive view to the effect that an instruction was required only on lesser offenses that the record would support.

Decisions have been in conflict as to whether the duty to instruct should be based upon the allegations in the charge or the evidence in the record.¹⁸⁵

In *Hand v. State*¹⁸⁶ the court held that the instruction is not required if the evidence supports the higher offense. The problem was brought to the Supreme Court of Florida in *Hand v. State*¹⁸⁷ as a consolidation of the *Hand* case and *Raulerson v. State*.¹⁸⁸ The court held that matters of evidence should rest with the jury rather than the judge and noted that a verdict of guilty of a lesser homicide will not be disturbed even though there was no evidence of that degree of homicide.¹⁸⁹ The court specifically held that the trial judge's refusal to charge in the *Hand* case was error and that the court should have instructed the jury that if they were unable to find from the evidence beyond a reasonable doubt that the defendants were guilty of the crime charged—robbery—that they could consider the evidence to determine if they were guilty of the lesser included offense of larceny, and that the court should define and explain the crime. The court's opinion was buttressed by the fact that as a matter of law every robbery includes the offense of larceny. The court noted that both defendants had requested the instruction.

The instructions should include and define all the essential elements of the crime. Therefore, new trials were ordered where the judge refused to instruct as to premeditated design¹⁹⁰ and where the judge in an instruction on burglary neglected to specify the particular felony involved.¹⁹¹

183. *Cf. Flagler v. State*, 198 So.2d 313 (Fla. 1967); *Siekman v. State*, 198 So.2d 352 (Fla. 2d Dist. 1967).

184. 196 So.2d 905 (Fla. 1967).

185. *Goswick v. State*, 143 So.2d 817 (1962) (instruction based on evidence in the record); *Allison v. State*, 162 So.2d 922 (Fla. 1st Dist. 1964) (instruction based on allegations in the charge).

186. 188 So.2d 364 (Fla. 1st Dist. 1966).

187. 199 So.2d 100 (Fla. 1967). The court overruled *Brown v. State*, 191 So.2d 296 (Fla. 1st Dist. 1966) and *Silver v. State*, 174 So.2d 91 (Fla. 1st Dist. 1965).

188. 188 So.2d 586 (Fla. 1st Dist. 1966).

189. *Killen v. State*, 92 So.2d 825 (Fla. 1957). This view supports arguments previously made by Justice Drew in his dissenting opinion in the *Brown* case.

190. *Polk v. State*, 179 So.2d 236 (Fla. 2d Dist. 1965).

191. *Robles v. State*, 188 So.2d 789 (Fla. 1966).

Two cases held that where the defendant was charged solely with the direct commission of a crime, instructions to the jury on aiding and abetting were proper and convictions for aiding and abetting were affirmed,¹⁹² when supported by reasonable inferences of the evidence.

The transmission of written instructions by the trial judge to the jury after the jury had received oral instructions and retired was held not to be reversible error in absence of a showing of prejudice.¹⁹³

IX. SENTENCE

The Supreme Court of Florida in *Drayton v. State*¹⁹⁴ affirmed per curiam the appellate court decision which held that the trial court did not lose jurisdiction by entering an unlawful suspended sentence, and may subsequently enter a lawful sentence.¹⁹⁵

Where the defendant challenged the validity of a life sentence alleging that the trial judge indicated that he would sentence the defendant to death unless he stated the facts of the case in open court, the court held that no prejudice resulted because a life sentence was the minimum penalty possible for the conviction entered.¹⁹⁶

The court in *Tirko v. Wainwright*¹⁹⁷ interpreted Florida Statutes, section 944.40 (1965), which provides that the sentence for escape shall be in addition to any former sentence, to imply that the sentences should run consecutively rather than concurrently.

Florida Statutes, section 776.04(2) (1965) provides that if the crime attempted is

[P]unishable by imprisonment in the state prison for life, or for five years or more, the person convicted of such attempt shall be punished by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding one year.

Florida Statutes, section 776.04(3) provides that if the crime attempted

[I]s punishable by imprisonment in the state prison for a term of less than five years . . . the person convicted of such an attempt shall be imprisoned in the county jail not exceeding one year.

The defendant was convicted of an attempt to break and enter with intent to commit a misdemeanor for which the maximum sentence is five years.

192. *Newman v. State*, 196 So.2d 897 (Fla. 1967), Justice Drew dissenting; *Jacobs v. State*, 184 So.2d 711 (Fla. 1st Dist. 1966).

193. *Kimmons v. State*, 178 So.2d 608 (Fla. 1st Dist. 1965). This decision overruled *Holton v. State*, 2 Fla. 476 (1849).

194. 181 So.2d 348 (Fla. 1966).

195. *Drayton v. State*, 177 So.2d 250 (Fla. 3d Dist. 1965).

196. *Williford v. State*, 181 So.2d 372 (Fla. 3d Dist. 1966).

197. 178 So.2d 697 (Fla. 1965).

The court¹⁹⁸ stated that the problem of which section of the statute should apply had produced conflicting decisions¹⁹⁹ and decided that the most logical conclusion was to apply Florida Statutes, section 776.04(3) since the conviction was punishable by less than five years.²⁰⁰

The court in *Watson v. State*²⁰¹ held that a sentence of death was not error where the jury was evenly split on a recommendation of mercy.

In *Wyche v. State*²⁰² the court held that enhanced punishment was permissible for multiple violations of Florida Statutes, section 849.09—the Florida lottery statute—even though the violations were of different sections of the statute. The court noted that when a defendant is convicted on more than one count of the same information, but each is a part of the same transaction, only one sentence may be imposed.

X. METROPOLITAN COURT

In *Trujillo v. State*²⁰³ the court held that where the defendant was convicted under section 30-15A of the Code of Metropolitan Dade County which provides for a maximum sentence of 60 days or a fine of \$500 *or both*, he was not entitled to a jury trial under section 6.15D of the Home Rule Charter and section 11-14 of the Code of Metropolitan Dade County which provides for a jury trial if the offense is punishable by a fine exceeding \$500 or imprisonment for more than 60 days. Judge Swann dissented on the basis that ambiguities should be construed to protect the right of trial by jury. The writer agrees.

The Third District Court of Appeal²⁰⁴ held that a Metro ordinance may provide for a higher penalty than state law for the same offense.

XI. FORMER JEOPARDY

Ordinarily the defense of former jeopardy applies after one has been acquitted of the same crime. However an acquittal of a charge of attempted bribery under Florida Statutes, section 838.011 was a bar to prosecution for an offer of reward to a public officer under Florida Statute section 838.071 because the offenses were so closely related and involved the same evidence.²⁰⁵

198. *Fitz v. State*, 196 So.2d 762 (Fla. 1st Dist. 1967).

199. *Edge v. State*, 170 So.2d 596 (Fla. 2d Dist. 1964) (applying FLA. STAT. § 776.04(2) (1965)); *Floyd v. State*, 170 So.2d 599 (Fla. 2d Dist. 1964) (applying FLA. STAT. § 776.04(2) (1965)); *Williams v. State*, 101 So.2d 877 (Fla. 1st Dist. 1958) (applying FLA. STAT. § 776.04(3) (1965)).

200. In the writer's opinion this decision is contra to the wording of the statute.

201. 190 So.2d 161 (Fla. 1966).

202. 178 So.2d 875 (Fla. 2d Dist. 1965).

203. 187 So.2d 390 (Fla. 3d Dist. 1966).

204. *State v. Buchanan* 190 So.2d 594 (Fla. 3d Dist. 1966).

205. *State v. Carroll*, 189 So.2d 273 (Fla. 2d Dist. 1966).

In *State ex rel. Glenn v. Klein*,²⁰⁶ the court held that a conviction of manslaughter based on the homicide-felony rule where the death which occurred during a robbery was not committed by the defendant implied a conviction for robbery and barred subsequent prosecution for robbery.

In the presence of defense counsel but in the absence of the defendant an alternate juror told the judge that his wife was ill. The judge told the attorneys that unless the defense would stipulate that the alternate juror be discharged he would give consideration to a declaration of mistrial. The defense attorney suggested that the prosecution move for a mistrial. The state attorney indicated that he would. The judge asked the defense counsel if he had any comment and received a negative reply. The judge on his own motion declared a mistrial. The appellate court held that the mistrial was declared for insufficient reasons but the defense attorney by his conduct had consented, thereby precluding the defendant from raising the defense of double jeopardy in a subsequent prosecution on the same indictment.²⁰⁷

The defendant's defense of res judicata to a manslaughter charge due to an acquittal of a "hit and run" charge failed. The court held²⁰⁸ that he did not show that the acquittal of the first offense was based on a particular issue or fact which would preclude conviction for the second but merely alleged acquittal of the misdemeanor. Under a plea of res judicata the same facts and issues must be involved, while under a plea of former jeopardy only a prior acquittal for the same offense need be shown. There was no intimation that he was acquitted of the "hit and run" charge because he was not the driver. If such were the case and if the point had been proven his defense might have been successful.

XII. DEFENDANT'S RIGHT TO BE PRESENT

The court in *Cole v. State*²⁰⁹ held that a defendant's right to be present²¹⁰ could not be waived by defense counsel in the absence of the defendant's knowledge and consent. Therefore, where a defendant, who had plead not guilty by reason of insanity was not present at the request of defense counsel when a physician testified, his conviction was reversed.

XIII. PRELIMINARY HEARING

Holding a defendant without preliminary hearing²¹¹ for two days while evidence was obtained was held not to be harmful error.²¹² Some of the evidence obtained was identification of the defendant during a line up.

206. 184 So.2d 904 (Fla. 3d Dist. 1966).

207. *Adkins v. Smith*, 197 So.2d 865 (Fla. 4th Dist. 1967).

208. *Busbee v. State*, 183 So.2d 27 (Fla. 1st Dist. 1966).

209. 181 So.2d 698 (Fla. 3d Dist. 1966).

210. FLA. STAT. § 914.01 (1965).

211. FLA. STAT. § 901.23 (1965).

212. *Palmieri v. State*, 189 So.2d 512 (Fla. 3d Dist. 1966).

The decision affirmed the Florida position that a preliminary hearing under Florida Statutes, section 901.23 is not a necessary step in criminal prosecution.²¹³ This view was extended to preliminary hearings under Florida Statutes, section 909.04 (1965)²¹⁴ by *Evans v. State*.²¹⁵ The court held that where no harmful error was shown, the omission of the hearing would not be cause for reversal.

XIV. FAIR TRIAL

After "the Rule" had been invoked, a detective heard the defendant testify that he had not confessed. Subsequently the detective voluntarily testified that the defendant had confessed to him. Such procedure was held to be reversible error,²¹⁶ for evidently the detective's testimony had been prompted by what he overheard.

Prejudicial error resulted from a wife and sister testifying to their relationship with the deceased when this evidence was prejudicial and not necessary for identification and where the evidence was merely cumulative.²¹⁷

An accomplice testified that the state had promised to mitigate one sentence if he would testify. In fact he had been promised mitigation in a second sentence unrelated to the crime involved in the instant case. The court²¹⁸ stated it would not speculate on the jury's reaction had it known the true facts as to both sentences and ordered a new trial.²¹⁹ The policy behind the decision was that an accomplice's testimony should be cautiously received by a jury. Therefore, they should be aware of *all* the factors bearing on credibility.

Where a witness restated testimony he had given in counsel's absence, the conviction was affirmed.²²⁰

A death sentence for rape was affirmed in *Craig v. State*²²¹ without discussion. The case is of interest because of the view expressed in Justice

213. However, the court stated that it did not condone bypassing the process.

214. ARREST ON CAPIAS BASED ON INDICTMENT OR INFORMATION; HABEAS CORPUS; MOTION TO QUASH; PRELIMINARY HEARING.—When an indictment or information is filed and a defendant is in custody under a capias he may apply for a writ of habeas corpus, attacking said indictment or information; or he may move to quash the indictment or information and bring it on to be heard before the trial court having jurisdiction. If a defendant so in custody upon a capias as aforesaid is confined in jail for thirty days after his arrest, without trial, he may apply to the trial court having jurisdiction for and be allowed a preliminary hearing.

215. 197 So.2d 323 (Fla. 3d Dist. 1967).

216. *Jackson v. State*, 177 So.2d 353 (Fla. 3d Dist. 1965). "The Rule" referred to is that which requires sequestration of witnesses.

217. *Gibson v. State*, 191 So.2d 58 (Fla. 1st Dist. 1966).

218. *Wolfe v. State*, 190 So.2d 394 (Fla. 1st Dist. 1966).

219. *Accord*, *Sanders v. State*, 190 So.2d 398 (Fla. 1st Dist. 1966).

220. *Childs v. State*, 190 So.2d 605 (Fla. 3d Dist. 1966).

221. 179 So.2d 202 (Fla. 1965).

Ervin's dissenting opinion that the jury should first determine guilt or innocence and then consider mercy. He proposed that this two-stage procedure is necessary to give "constitutional operation" to the rape statute²²² and that Florida Statutes, section 919.23²²³ could be interpreted to allow for such procedure.

The unfortunate rule that perjured evidence is grounds for reversal only if the state knew it to be false was affirmed.²²⁴

The following remarks by the prosecution were held to be prejudicial:

Do you want to give this man less than first degree murder and the electric chair and have him get out and come back and kill somebody else, maybe you?²²⁵

referring to the defendant's father,

[W]ho was convicted last week . . .²²⁶

When you go home tonight . . . if your wife wasn't there because she had been murdered . . . I ask you what you would feel about that?²²⁷

The following remark by the judge was held to be prejudicial:

I realize some people don't believe in it [capital punishment] and I also realize that some of those people that say they don't believe in it, if their little daughter or their wife was raped, they would believe in it fast.²²⁸

A hearing under Rule 1.850 was ordered where the petitioner alleged

222. FLA. STAT. § 794.01 (1965)

RAPE AND FORCIBLE CARNAL KNOWLEDGE; PENALTY.—Whoever ravishes and carnally knows a female of the age of ten years or more, by force and against her will, or unlawfully or carnally knows and abuses a female child under the age of ten years, shall be punished by death, unless a majority of the jury in their verdict recommend mercy, in which event punishment shall be by imprisonment in the state prison for life, or for any term of years within the discretion of the judge. It shall not be necessary to prove the actual emission of seed, but the crime shall be deemed complete upon proof of penetration only.

223. RECOMMENDATION TO MERCY.—(1) In all criminal trials, the jury, in addition to a verdict of guilty of any offense, may recommend the accused to the mercy of the court or to executive clemency, and such recommendation shall not qualify the verdict except in capital cases. In all cases the court shall award the sentence and shall fix the punishment or penalty prescribed by law.

(2) Whoever is convicted of a capital offense and recommended to the mercy of the court by a majority of the jury in their verdict, shall be sentenced to imprisonment for life; or if found by the judge of the court, where there is no jury, to be entitled to a recommendation to mercy, shall be sentenced to imprisonment for life, at the discretion of the court.

224. *Wade v. State*, 193 So.2d 459 (Fla. 4th Dist. 1967); *Smith v. State*, 191 So.2d 618 (Fla. 4th Dist. 1966); *Brown v. State*, 177 So.2d 518 (Fla. 3d Dist. 1965).

225. *Grant v. State*, 194 So.2d 612, 613 (Fla. 1967).

226. *Smith v. State*, 194 So.2d 310, 312 (Fla. 1st Dist. 1966).

227. *Adams v. State*, 192 So.2d 762; 763 (Fla. 1966).

228. *Coley v. State*, 185 So.2d 472, 473 (Fla. 1966).

that the prosecuting attorney previously had been a Public Defender and interrogated the petitioner about the case.²²⁹

Instructions by the judge to the jury to disregard evidence were held to preserve a fair trial²³⁰ where evidence showed that the defendant had pleaded guilty to a magistrate. Moreover, where the judge first admitted items of personal property and subsequently decided they were the product of an illegal search and instructed the jury to disregard them, no error was shown.²³¹

A denial of severance was held not to be an abuse of discretion when the co-defendants accused each other but neither testified.²³² However, precluding the defendant from presenting closing arguments²³³ and unduly limiting the defense attorney's cross-examination²³⁴ was error.

It was not error to exclude jurors opposed to capital punishment²³⁵ nor to exclude jurors who stated that they would recommend mercy if they found the defendant guilty of rape.²³⁶

Since conviction of aiding and abetting does not depend upon conviction of the principal, the trial judge's instruction that the co-defendant pled guilty was error.²³⁷

The failure of the state to disclose the identity of an informant may be relevant to the validity of the warrant or to the preparation of the defense. The latter point was in issue in *Spataro v. State*.²³⁸ Both the female defendant and a female witness for the state had access to the room in which narcotics were found. The only inference of possession by the defendant was testimony that the drugs did not belong to the witness. The informant, according to the affidavit for the search warrant, had bought the drugs from a female. Citing federal and foreign authority,²³⁹ the court held disclosure was necessary for proper preparation of a defense.

In *Simmons v. State*²⁴⁰ the court held that a motion to quash should

229. *Young v. State*, 177 So.2d 345 (Fla. 2d Dist. 1965). *Accord*, *State v. Leigh*, 178 KAN. 549, 289 P. 2d 774 (1955); *State v. Burns*, 322 S.W.2d 736 (Mo. 1959).

230. *Rollins v. State*, 179 So.2d 377 (Fla. 2d Dist. 1965).

231. *Lee v. State*, 191 So.2d 84 (Fla. 4th Dist. 1966).

232. *Hawkins v. State*, 199 So.2d 276 (Fla. 1967).

233. *Ruffin v. State*, 195 So.2d 26 (Fla. 3d Dist. 1967).

234. *Kirkland v. State*, 185 So.2d 5 (Fla. 2d Dist. 1966).

235. *Sims v. State*, 184 So.2d 217 (Fla. 2d Dist. 1966).

236. *Pitts v. State*, 185 So.2d 164 (Fla. 1966). The court relied heavily on FLA. STAT. § 932.20 (1941) which states:

No person whose opinions are such as to preclude him from finding any defendant guilty of an offense punishable with death shall be allowed to serve as a juror on the trial of any capital case.

237. *Moore v. State*, 186 So.2d 56 (Fla. 3d Dist. 1966).

238. 179 So.2d 873 (Fla. 2d Dist. 1965).

239. *Rugendorf v. United States*, 376 U.S. 528 (1964); *Roviaro v. United States*, 353 U.S. 53 (1957); *People v. Durazo*, 52 Cal. 2d 354, 340 P.2d 594 (1959).

240. 182 So.2d 442 (Fla. 1st Dist. 1966).

have been granted where common laborers as a class were systematically and intentionally excluded from the venire.

XV. IMMUNITY

The defendant and the State Attorney entered into an agreement whereby the defendant would not be prosecuted if the results of the polygraph test showed him to be innocent. The court held that the trial judge implied approval by removing the case from the docket so that the test might be conducted,²⁴¹ and that such action was a pledge of public faith which could not be lightly disregarded.

XVI. EVIDENCE

Under the rule that evidence of prior criminal activity is not admissible if the sole relevancy is bad character or propensity, statements of previous homosexual activity were held to be inadmissible in a trial for a crime against nature.²⁴²

The following statements were held to be inadmissible: a statement by a juvenile in response to a request by the court whereby he admitted involvement in the crime in order to mitigate sentence;²⁴³ a statement by the defendant to an officer that he would either not be convicted or be placed on probation;²⁴⁴ a statement by the prosecution that:

[T]he police got a picture of the defendant in this case and mixed it in with . . . other mug shots²⁴⁵

A statement of a witness referring to a picture,

[T]hat was taken immediately after . . . he murdered my nephew.²⁴⁶

Moreover, the placing of guns and shells, which were not introduced into evidence, before the jury was error.²⁴⁷

The court in *Roberts v. State*,²⁴⁸ relying on *Johnson v. State*²⁴⁹ held that although the results of polygraph tests may be excluded from evidence, statements voluntarily made by the defendant to the polygraph operator are admissible. The opinion was not explicit as to whether defense counsel was present nor was the defendant advised of his constitu-

241. *State v. Davis*, 188 So.2d 24 (Fla. 2d Dist. 1966).

242. *Harris v. State*, 183 So.2d 291 (Fla. 2d Dist. 1966).

243. *Brooks v. State*, 183 So.2d 550 (Fla. 3d Dist. 1966).

244. *Jenkins v. State*, 177 So.2d 756 (Fla. 3d Dist. 1965).

245. *Jones v. State*, 194 So.2d 24 (Fla. 3d Dist. 1967).

246. *Gibbs v. State*, 193 So.2d 460, 463 (Fla. 2d Dist. 1967).

247. *Williams v. State*, 188 So.2d 320 (Fla. 2d Dist. 1966).

248. 195 So.2d 257 (Fla. 2d Dist. 1967).

249. 166 So.2d 798 (Fla. 2d Dist. 1964).

tional rights.²⁵⁰ However, if the parties stipulate to a polygraph test, use of the results in ruling on a motion for a new trial is discretionary.²⁵¹

The introduction of evidence connecting the defendant with the crime before the introduction of evidence of the corpus delicti was held not to be error.²⁵²

In *Cox v. State*²⁵³ the court held that although Florida Statutes, section 932.31 and section 90.04 made spouses competent witnesses against each other, these statutes did not make confidential communications between spouses admissible.

The court in *Gentile v. State*,²⁵⁴ citing federal authority,²⁵⁵ held that fingerprints may be taken of a person charged with a crime (robbery) and may be used as evidence for a different crime (possession of firearms by a felon).

Since Florida Statutes, section 317.171 provides that all accident reports shall be without prejudice and shall not be used as evidence in any trial, civil or criminal, introduction of the alcoholic content of blood taken for the purpose of the accident report in a manslaughter charge was held to be error.²⁵⁶

The admissibility of evidence obtained by recordings has become a most important issue. In Florida, recordings of telephone conversations made with the consent of one party are admissible. Telephone conversations are admissible in Florida if made over a party line, provided the lines belonging exclusively to the defendant were not tapped, and the defendant knew or could have known that his conversation could be heard over the party line.

In accordance with these principles evidence was held to be admissible where the telephone company refused the defendant's request for a private line and provided a party line with facilities for the police to record conversations.²⁵⁷

In *Hajdu v. State*²⁵⁸ the court, relying on federal authority,²⁵⁹ held that where a woman went for a medical examination with a radio trans-

250. The date of the events was not disclosed. In light of the trend in the law of confessions and right to counsel, decisions such as this may be open to question.

251. *State v. Brown*, 177 So.2d 532 (Fla. 2d Dist. 1965).

252. *Feldman v. State*, 195 So.2d 242 (Fla. 4th Dist. 1967).

253. 192 So.2d 11 (Fla. 3d Dist. 1966).

254. 190 So.2d 200 (Fla. 3d Dist. 1966).

255. *Smith v. United States*, 324 F.2d 879 (D.C. Cir. 1963).

256. *Cooper v. State*, 183 So.2d 269 (Fla. 1st Dist. 1966) (See Fla. Laws 1967, ch. 67-308).

257. *Lee v. State*, 191 So.2d 84 (Fla. 4th Dist. 1966).

258. 189 So.2d 230 (Fla. 3d Dist. 1966).

259. *Silverman v. United States*, 365 U.S. 505 (1961); *Gould v. United States*, 255 U.S. 298 (1921).

mitter concealed in her purse so that the conversation could be heard by a private detective, the woman could testify but the detective could not.

A general exploratory search upon persons in private circumstances is prohibited²⁶⁰ but where police observed, from a place of hiding, homosexual acts done in a public toilet without privacy, their testimony was admissible.²⁶¹

XVII. PLEA OF GUILTY

Generally, an allegation, not refuted by the record, that the plea of guilty was coerced, warrants a hearing under Rule 1.850 even though the petitioner was represented by counsel.²⁶² However, a hearing was denied where the alleged coercion occurred prior to a plea of not guilty, and the petitioner pled guilty after appointment of counsel.²⁶³ The court felt that the petitioner's allegations of coercion were negated by the subsequent plea of not guilty.

The court in *Ostermann v. State*²⁶⁴ held that refusing to allow a defendant to withdraw his plea of guilty was not an abuse of discretion when originally the defendant pled not guilty and subsequently with the assistance of counsel changed the plea to guilty.

XVIII. NOLO CONTENDERE

The court in *Smith v. State*²⁶⁵ held that a plea of nolo contendere was not acceptable in a capital case. The court distinguished *Peel v. State*²⁶⁶ on the basis that the death sentence was not involved in that case. In *Roberts v. State*²⁶⁷ the court held that the plea was not acceptable in a capital case whether the death sentence was received or not, and remanded with directions to permit withdrawal of the plea and to proceed as if no plea had been made. The court so ruled even though the plea had not been put in issue on appeal by the defendant.

XIX. SELF-INCRIMINATION

The right against self-incrimination was held not to be violated by requiring the defendant to wear a particular jacket in a lineup,²⁶⁸ or to speak in a line up,²⁶⁹ (in neither case was presence or absence of counsel

260. *Bielicki v. Superior Court of Los Angeles County*, 21 Cal. 2d. 598, 371 P.2d 288, 21 CAL. RPT. 552 (1962).

261. *State v. Coyle*, 181 So.2d 671 (Fla. 2d Dist. 1966).

262. *Williams v. State*, 186 So.2d 279 (Fla. 1st Dist. 1966).

263. *Hamilton v. State*, 186 So.2d 316 (Fla. 2d Dist. 1966).

264. 183 So.2d 873 (Fla. 2d Dist. 1966).

265. 197 So.2d 497 (Fla. 1967).

266. 150 So.2d 281 (Fla. 2d Dist. 1963).

267. 199 So.2d 340 (Fla. 2d Dist. 1967).

268. *Morris v. State*, 184 So.2d 199 (Fla. 4th Dist. 1966).

269. *Boyer v. State*, 182 So.2d 19 (Fla. 4th Dist. 1966).

mentioned) or to instruct the jury that possession by the defendant of stolen property: "without reasonable . . . explanation . . . may be sufficient to warrant a verdict of guilty . . ."270

XX. SPECIFIC CRIMES

In *State v. Houghtaling*²⁷¹ the court held that scienter need not be alleged nor proved in prosecutions under Florida Statutes, section 517.07 (1965) (sales of unregistered securities).

In *State v. Peterson*²⁷² the court held that changing the marginal figures of a check but not the words expressing the amount payable does not constitute a forgery under Florida Statutes, section 831.02. The court suggested that a charge of larceny or cheating and fraud might have been more applicable.

In an embezzlement case²⁷³ the court reluctantly considered that the statute of limitations began to run at the time of conversion, rather than the time payment was demanded.

In the period surveyed the courts held that knowledge must be proven to convict a defendant under Florida Statutes, section 398.03 (possession of narcotics) even though not expressly required by the statute.²⁷⁴

Lack of competence or gross ignorance of medical science was held to be sufficient criminal negligence to convict for manslaughter even though the treatment by a chiropractic physician conformed to the generally accepted practice of that profession and was administered in good faith.²⁷⁵

XXI. RULES OF CRIMINAL PROCEDURE

The Supreme Court of Florida has adopted a set of Rules of Criminal Procedure which will become operative December 31, 1967, and will supersede all conflicting rules and statutes. These rules appeared in 196 So.2d 124 (1967) along with an explanation of the changes made. Some rules are substantially the same as previous statutes, while others make significant modifications. The scope of this paper does not permit an exhaustive analysis of these rules, and only those deemed significant will be highlighted.

Rule 1.110 prohibits televising, photographing or broadcasting judicial proceedings in court.²⁷⁶

270. *McClain v. State*, 185 So.2d 707, 708 (Fla. 2d Dist. 1966).

271. 181 So.2d 636 (Fla. 1965). The decision overruled the appellate court decision of *State v. Smith*, 151 So.2d 889 (Fla. 1st Dist. 1963).

272. 192 So.2d 293 (Fla. 2d Dist. 1966).

273. *Pierce v. State*, 188 So.2d 44 (Fla. 1st Dist. 1966).

274. *Frank v. State*, 199 So.2d 117 (Fla. 1st Dist. 1967).

275. *Gian-Cursio v. State*, 180 So.2d 396 (Fla. 3d Dist. 1965).

276. Similar to *FED. R. CRIM. P.* 53.

Rule 1.122, dealing with the preliminary hearing and its procedures, omits the provision of Florida Statutes, section 902.11 (1965) which provided that the defendant may sign the record of his testimony and omits all of Florida Statutes, section 902.12 which provided that the record of the hearing be admissible at trial. These provisions were considered to be in conflict with *Escobedo v. Illinois*²⁷⁷ and *White v. Maryland*.²⁷⁸ The rule also requires that the transmission of records to the clerk of the court be within seven days rather than "without delay" as previously required.

Rule 1.150(e) provides that prior to arraignment any person charged with a felony (not *any* crime) not represented by counsel be advised of his right to counsel and his right to appointed counsel if indigent, and provides for appointment or written waiver. The rule is similar to Federal Rule of Criminal Procedure 44. The Federal Rule has no language limiting its application to persons charged with a felony. A proposed amendment would eliminate the limitation.

Rule 1.190 provides that every pre-trial motion be in writing unless waived by the court. To conform to federal terminology the former motion to quash is labeled "motion to dismiss." The rule further provides that the motion to dismiss may be based upon an allegation that the facts are not in dispute and do not establish a prima facie case of guilt, but a dismissal will not be a bar to subsequent prosecution. The rule also provides that the state may traverse or demur to a motion to dismiss which alleges factual matters.²⁷⁹ The rule provides for limiting the time the defendant may be held in custody pending filing of new charges.²⁸⁰

Rule 1.200 provides that upon written demand by the prosecuting attorney, the defendant must serve notice of his intention to claim alibi and the details thereof. If the defendant does not comply the court may exclude all evidence of an alibi except the defendant's testimony. Moreover, the prosecuting attorney is required to send a list of rebuttal witnesses to the defense. If the prosecution fails to send the list the court may exclude the state's rebuttal evidence. This rule was modeled after statutes in several states, notably Ohio, New York and New Jersey.

Rule 1.220 modifies and expands the scope of discovery as follows: the defendant may inspect and copy or photograph results and reports of physical or mental examinations, scientific tests and experiments; reciprocal discovery is available to the state. The defendant may now have a list of all the state's witnesses if the defense will reciprocate.

The defendant may take depositions from any person other than a confidential informant who will not be a witness, on a showing that the testimony of the witness might be material, or assist in preparation of de-

277. 378 U.S. 478 (1964).

278. 373 U.S. 59 (1963).

279. Similar to FED. R. CRIM. P. 41(e).

280. Similar to FED. R. CRIM. P. 12(b).

fense, and that the person will not voluntarily give a signed statement. The deposition should be taken in the manner provided by the Florida Rules of Civil Procedure, and information obtained subsequent to discovery must be disclosed. However, the court may deny or restrict discovery in order to protect witnesses from intimidation. The county will pay costs of discovery for indigents. The rule applies in the County Judges' Court and in Justice of the Peace Courts even though the services of a prosecutor are limited. In such cases the judge or justices of the peace will meet the obligations of the rule in so far as it is reasonable to do so.

Rule 1.260 provides for the consent of the state as well as the court for waiver of a jury trial.²⁸¹

Rule 1.830 deals with criminal contempt proceedings. In direct criminal contempt proceedings, contempt may be punished summarily if the court saw or heard the conduct committed in the actual presence of the court. However the rule provides that the defendant shall have an opportunity to present excusing or mitigating circumstances. In indirect or constructive criminal contempt proceedings the judge on his own motion or upon affidavit of any person knowing the facts may issue a "show cause" order. The rule provides for: answer, arrest, bail, arraignment, disqualification of the judge, jury hearing, judgment and sentence. The defendant also has the right of assistance of counsel and cannot be compelled to testify against himself.²⁸²

XXII. LEGISLATION

Law enforcement in the state has suffered in the past due to the fact that local agencies operated independently without coordination of activities or communications. The Florida Bureau of Law Enforcement was created²⁸³ to: adopt and recommend policies for coordination of the law enforcement work of all state, county and municipal agencies; promote cooperation between all law enforcement agencies in securing efficient and effective law enforcement; eliminate duplication of effort; promote economy of operation, and develop a program of crime prevention.

The Bureau consists of the Governor, the Attorney General, the Treasurer, the Comptroller, two Sheriffs and one Chief of Police. The Bureau shall employ an Executive Director and additional personnel on recommendation of the Executive Director. The Bureau may solicit the assistance of investigative personnel from other agencies with consent of such agencies. All investigators shall be peace officers and enjoy the privileges under Florida Statutes, section 870.05,²⁸⁴ Florida Statutes, sec-

281. Similar to FED. R. CRIM. P. 23(a)

282. Similar to FED. R. CRIM. P. 42(a).

283. Fla. Laws 1967, ch. 67-2207.

284. Killing while suppressing riots.

tion 122.32²⁸⁵ and Florida Laws 1967, ch. 67-408.²⁸⁶ The peace officers may investigate the violation of any criminal law, bear arms, make arrests, apply for, serve and execute search warrants.

The Bureau assumes all the powers, duties, responsibilities, appropriations, personnel and equipment formerly vested in the Florida Sheriffs Bureau and the Narcotics Bureau of the State Board of Health. All powers, duties and authority of the Attorney General to investigate violations of criminal law are vested in the Bureau. The Bureau may investigate any violation of the criminal law of Florida; investigate effective law enforcement with reference to organized crime, vice, racketeering, rioting, inciting to riot and insurrection, and upon written request by the governor, investigate misconduct of public officials in the performance of their duties. The Bureau may establish a system of fingerprint analysis and identification, a criminal analysis laboratory, a system of intrastate communications of vital statistics and information (all state, county and municipal agencies will transmit reports to the Bureau periodically) and may authorize state universities and junior colleges to provide training for peace officers.²⁸⁷

An important procedural change was enacted²⁸⁸ which permits the state to appeal from pre-trial orders quashing a search warrant, or suppressing evidence obtained by search and seizure, or suppressing a confession or admission made by the defendant. The appeal must be taken within thirty days before commencement of trial. The appeal stays the cause, and if the offense is bailable, the defendant is released on his own recognizance.

The legislature has provided²⁸⁹ that no search warrant will be issued to search a private dwelling unless the dwelling is being used for the unlawful sale, possession or manufacture of intoxicating liquor; or contains stolen or embezzled property, or an instrument used to commit a felony; or it is being used unlawfully for gambling, or to perpetrate frauds; or its use is in violation of narcotics laws.

In Florida Laws 1967, ch. 67-355²⁹⁰ the legislature provided that the prosecuting officer may give immunity from prosecution for the violation of beverage laws to any minor testifying in the prosecution of another for the violation of such laws.

Florida Laws 1967, ch. 67-308, on the basis of implied consent, au-

285. Social security and retirement benefits.

286. Death and bodily injury benefits.

287. Fla. Laws 1967, ch. 67-230 is an additional step toward coordination of local agencies by providing for a Police Standards Council to promote statewide standards of qualification and training.

288. Fla. Laws 1967, ch. 67-123.

289. Fla. Laws 1967, ch. 67-348, which amended FLA. STAT. § 933.18 (1965).

290. Amending FLA. STAT. § 562.11 (1965).

thorizes chemical analysis for alcoholic content of breath, urine or saliva. The test must be incidental to a lawful arrest. The results are admissible in civil and criminal actions. Refusal to submit to the test may result in a six months' suspension of the license to drive.

Florida Laws 1967, ch. 67-214 provides that in all felony cases the judgment of the court shall be in writing. If the defendant is found to be guilty, the fingerprints of the defendant shall be affixed to the document.

Florida Statutes, section 909.21 provided that: an appointed attorney *may* appeal the death sentence of an indigent defendant. In Florida Laws 1967, ch. 67-502 the legislature provided that the appeal *shall* be taken in such cases.

There were numerous laws affecting the office of the public defender.

Florida Laws 1967, ch. 67-192 provides that members of the bar may serve as special assistants to the Public Defender to represent indigents. The legislature also passed a bill²⁹¹ providing for representation of indigents in juvenile courts, by the public defender or voluntary representation by members of the bar. Florida Statutes, section 25.59 provides that the public defender shall be empowered to inquire of all persons who are incarcerated for 48 hours or longer in lieu of bond and to tender them advice and counsel.

Florida Laws 1967, ch. 67-451, amending Florida Statute section 917.12, has changed the title from Criminal Sexual Psychopath Act to Mentally Disordered Sex Offenders Act,²⁹² and provided for the right to demand speedy trial and the right to proceed to trial on the criminal charges against him. The Act also provides that where the defendant is found to be insane, he shall be transferred from the division of corrections and placed temporarily in the division of mental health, to await transfer to the Florida Research and Treatment Center. The Center has not yet come into existence though authorized by the Child Molester Act²⁹³ in 1959. The Child Molester Act was also amended to authorize the creation of the Center in more specific terms than did the 1959 law.²⁹⁴

The legislature passed Florida Laws 1967, ch. 67-421, which provides that where a prisoner has been released with at least 180 days of gain time, he shall remain on probation until expiration of the term he was sentenced to serve or such lesser time as may be determined by the Florida Probation and Parole Commission pursuant to Florida Statutes, section 947.1. The court has the discretionary power when sentencing to the county jail to direct that the defendant be put on probation upon the

291. Fla. Laws 1967, ch. 67-539 amended FLA. STAT. § 275 (1965).

292. However the definition of the offender was unchanged.

293. FLA. STAT. § 801 (1959).

294. Fla. Laws 1967, ch. 67-516 (Apparently an effort to catalyze its development).

completion of any specified portion of the sentence.²⁹⁵ Moreover, Florida Laws 1967, ch. 67-151 authorizes the Florida Probation and Parole Commission to recommend to the judge whether the accused should be released on his own recognizance pending trial of a bailable offense. The new laws also provide for incarceration in the county jail if the total cumulative sentences are not greater than one year even though the statute violated provides for incarceration in the state prison.²⁹⁶

Several substantive statutes were amended. The requirement that a stolen vehicle be propelled by electricity, gasoline, or kerosene was eliminated from Florida Statutes, section 811.20²⁹⁷ and Florida Statute section 811 was amended²⁹⁸ to include larceny of shopping carts.

Florida Laws 1967, ch. 67-72 and Florida Laws 1967, ch. 67-435 modified Florida Statutes, section 849.09 (gambling) so as to exempt a nationally advertised contest for prizes unless such contest depends on the results of any horse race, harness race, dog race or jai lai. Florida Laws 1967, ch. 67-178 amended Florida Statutes, section 849 to permit charitable organizations to conduct bingo and guest games under certain circumstances.

Florida Statutes, section 806.05 was amended by Florida Laws 1967, ch. 67-211 to prohibit filing of false claims for fire damage and possession or manufacture of fire bombs with intent that they be used to burn a building.

Florida Statutes, section 870 was amended by Florida Laws 1967, ch. 6407 to increase the maximum sentence for riot to two years.

The law relating to obscene literature was modified and now provides that distribution of obscene material to a person under eighteen years of age shall be punishable by a term not exceeding five years in the state prison.²⁹⁹

Florida Laws 1967, ch. 67-340 prohibits obtaining a credit card by false statements of financial condition; theft; receiving a card known to be lost, mislaid or delivered by mistake; purchase of a credit card from one other than the issuer; receiving a card as security for a debt with intent to defraud the issuer; forgery or false signing, and the fraudulent use of a credit card so obtained.

295. Fla. Laws 1967, ch. 67-29; Fla. Laws 1967, ch. 67-204.

296. Fla. Laws 1967, ch. 67-241, which amended FLA. STAT. § 922.051 (1965).

297. Fla. Laws 1967, ch. 67-27.

298. Fla. Laws 1967, ch. 67-500.

299. Fla. Laws 1967, ch. 67-153 modifying FLA. STAT. § 847 (1965).