Criminal Law and Procedure

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

I. CRIMINAL PROCEDURE RULE 1.850

There continues to be litigation on the scope of rule 1.850, i.e., what alleged errors may properly be raised by motion under the rule.

1. This survey covers cases reported in 200 So.2d 161 through 221 So.2d and laws enacted by the 1969 General Session of the Florida Legislature.

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, 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.
A. Matters Subject to Direct Appeal

Because 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, failure of a judge to give requested charges to the jury or failure to instruct the jury as to lesser included offenses is not reviewable under rule 1.850. On the other hand, an alleged abuse of discretion by a judge in failing to credit the defendant with time already served before sentencing or a subsequent confession by a third party to the crime for which the defendant was convicted may be raised under the rule.

The prohibition against raising under the rule matters which could have been reviewed upon direct appeal is not absolute. If an appeal was difficult or impossible to perfect, as where the public defender refuses to prosecute an appeal, a post-conviction hearing may be held to determine the merits of the defendant's allegations. Nevertheless, the bare allegation that an attempted appeal was frustrated is not sufficient to require a post-conviction hearing to be held; it is essential to allege that reversible error occurred in the trial.

Related to the rule that matters subject to direct appeal should not be brought by motion under rule 1.850 is the holding of Grizzell v. State that a motion under the rule will not be entertained during the pendency of a direct appeal. This principle was extended in Brooks v. State to the effect that a motion under the rule will not lie while a petition for certiorari to the United States Supreme Court is pending.

B. In-Custody Requirement

Rule 1.850 has been judicially interpreted to restrict the scope of attack to the sentence being served by the prisoner, with the proviso that future consecutive sentences may be attacked if the prisoner would be entitled to be released if he prevailed on his motion. A motion under

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7. Fast v. State, 221 So.2d 203 (Fla. 3d Dist. 1969). The denial of the motion was affirmed on appeal, however, on the ground that it is within the discretion of the trial judge to reject the confession of a third person.
8. Jackson v. State, 166 So.2d 194 (Fla. 3d Dist. 1964). But cf. Powe v. State, 216 So.2d 446 (Fla. 1968), holding that the matter of a frustrated appeal resulting from the failure of the trial court to appoint counsel for an indigent should not be heard under rule 1.850 but by habeas corpus.
10. 187 So.2d 342 (Fla. 1st Dist. 1966).
11. 209 So.2d 271 (Fla. 1st Dist. 1968).
12. Johnson v. State, 185 So.2d 466 (Fla. 1966). Where the prisoner is serving the first of two consecutive sentences, the principle of immediate release does not preclude an attack by federal habeas corpus on the sentence currently being served; otherwise a prisoner could never attack the first of a series of consecutive sentences until he had already served it. Walker v. Wainwright, 390 U.S. 355 (1968).
the rule is also proper to attack consecutive sentences entered by the same court, but not where the sentences are entered by different courts. ¹³

The principle of the prisoner's right to be released has also been applied to past sentences already served. Thus, where the petitioner was convicted of possession of firearms by a convicted felon under Florida Statutes section 790.23, he was permitted to attack by rule 1.850 his original felony conviction (on the basis of the denial of representation by counsel); for even though the prior sentence had already been served, if the first conviction could be overturned, his possession of firearms would not be a crime and he would be entitled to be released. ¹⁴ In a similar situation, the prisoner attacked an enhanced sentence for second offenders under Florida Statutes section 775.09 because at his first trial he was without counsel. The lower court denied a hearing because the first sentence had already been served. The appellate court reversed and remanded for a hearing with instructions that if the lower court found the first conviction invalid, then the sentence under Florida Statutes section 775.09 should be vacated and the sentence imposed for the second crime be reinstated with credit for time served. ¹⁵

C. Hearings on Motions Under Rule 1.850

Rule 1.850 provides that the court "shall" grant a hearing on a motion "unless the motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief." It is thus error to deny a hearing where the prisoner alleges that his plea of guilty was coerced by threats of a higher sentence if he were to plead not guilty and where there is no denial by the state nor refutation by the record of this contention. ¹⁶

Despite the affirmative language of the rule requiring a hearing on a motion unless it is conclusively shown to be without merit, the courts have evidenced their impatience with frivolous motions by putting the burden on the prisoner to make out a prima facie case for relief before granting an evidentiary hearing. Thus, in Gibson v. State, ¹⁸ it was held that a naked assertion that a plea of guilty was coerced, without supporting factual allegations, was insufficient to require an evidentiary hearing. Similarly, Conyers v. State ¹⁹ held that a mere allegation that the state

¹³. Holstein v. State, 205 So.2d 6 (Fla. 1st Dist. 1967), following Johnson v. State, 185 So.2d 466 (Fla. 1966); Johnson v. State, 184 So.2d 161 (Fla. 1966).
¹⁵. Lee v. State, 217 So.2d 861 (Fla. 4th Dist. 1969).
¹⁶. Tillman v. State, 203 So.2d 46 (Fla. 2d Dist. 1967).
¹⁷. See, e.g., Thomas v. State, 210 So.2d 488 (Fla. 2d Dist. 1968), wherein the court suggests that contempt proceedings or even perjury prosecutions might be resorted to in cases of flagrant abuse of judicial processes by filing capricious and irresponsible petitions for relief under the rule, citing Nelson v. State, 208 So.2d 506 (Fla. 4th Dist. 1968), which upheld an adjudication of contempt in a proceeding under rule 1.850.
¹⁸. 213 So.2d 8 (Fla. 4th Dist. 1968).
¹⁹. 215 So.2d 616 (Fla. 3d Dist. 1968).
knowingly used perjured testimony, without substantiating facts or documents, does not require a full evidentiary hearing on the motion.

D. Successive Motions

The rule provides that a court is not required to entertain a motion which does not differ materially from a prior one; but where the record did not refute the prisoner's allegation that the state knowingly used perjured testimony, he was entitled to a hearing on the motion because it raised issues different from those presented previously on direct appeal.20

E. Appeal From Rule 1.850 Hearings

When a hearing on a motion under the rule is denied, no evidence is taken. Consequently, the allegations contained in the motion are taken as true for purposes of an appeal from a denial of a hearing.21

II. Right to Counsel

A. Adequate Representation

In the period surveyed, there was recurrent litigation on the question of whether the appointment of one attorney to represent indigent co-defendants constitutes a denial of the effective assistance of counsel.

In Baker v. State,22 the Florida Supreme Court laid down the rule that it is error to deny the requests of indigent codefendants for separate, independent counsel, regardless of any showing of actual prejudice. The question then arose whether the lack of separate counsel is so fundamental as to require reversal in the absence of a request, and the appellate courts responded with conflicting answers. The fourth district held that the error is fundamental and is not waived by failure to object to the lack of separate counsel.23 The third district declined to follow this rule and held that there is no reversible error in the absence of a request.24 The first district agreed.25 The second district took an intermediate position and held that the trial court should appoint separate counsel regardless of a request, but that its failure to do so is not reversible error unless there is actual prejudice.26

Upon a writ of public-interest certiorari, the Supreme Court of

21. Bartz v. State, 221 So.2d 7 (Fla. 2d Dist. 1969). The prisoner claimed that his plea of guilty was coerced. If true, he would be entitled to be released, and a hearing was accordingly ordered.
22. 202 So.2d 563 (Fla. 1967).
24. Belton v. State, 211 So.2d 238 (Fla. 3d Dist. 1968).
Florida in Belton v. State,\textsuperscript{27} approving the position of the third district, held that codefendants have the right to separate, independent counsel when there is an objection or request made during the trial "unless it can be demonstrated to the trial judge that no prejudice will result or that no conflict will arise as an incident of joint representation."\textsuperscript{28} In the absence of such a request, however, the trial court's "failure to appoint separate counsel will not be held to constitute error unless it is demonstrated that prejudice results from such failure."\textsuperscript{29} The conflict among the district courts of appeal was then formally laid to rest in State v. Youngblood,\textsuperscript{30} wherein the Supreme Court, by review upon conflict certiorari, reiterated the views expressed in Belton v. State.\textsuperscript{31}

The Baker, Belton, and Youngblood decisions of the Supreme Court of Florida are not applicable to prior holdings of the district courts of appeal that joint representation is not error where both codefendants plead guilty,\textsuperscript{32} or where the codefendants choose joint representation.\textsuperscript{33} In addition, the rule of Baker v. State\textsuperscript{34} and its progeny is not retroactive in application.\textsuperscript{35}

The adequacy of representation was also in issue in Williams v. State,\textsuperscript{36} where the petitioner under rule 1.850 alleged that counsel did not interview him prior to trial. The court held that the competence of counsel is not determined by the amount of time spent on the case. On the other hand, in Bush v. State,\textsuperscript{37} where the defendant tried unsuccessfully to speak to the public defender assigned to handle his case because the latter was too busy, and then plead guilty at his arraignment, the court held that the defendant had been deprived of the effective assistance of counsel.

\textsuperscript{27} 217 So.2d 97 (Fla. 1968).
\textsuperscript{28} Id. at 98.
\textsuperscript{29} Id.
\textsuperscript{30} 217 So.2d 98 (Fla. 1968), followed by Wilson v. State, 221 So.2d 1 (Fla. 1st Dist. 1969); Rushing v. State, 218 So.2d 514 (Fla. 4th Dist. 1969); Garner v. State, 218 So.2d 460 (Fla. 2d Dist. 1969).
\textsuperscript{31} 217 So.2d 97 (Fla. 1968), followed by Baker v. State, 217 So.2d 880 (Fla. 1st Dist. 1969); Dennis v. State, 217 So.2d 867 (Fla. 4th Dist. 1969).
\textsuperscript{32} Gardner v. State, 214 So.2d 786 (Fla. 2d Dist. 1968); Williams v. State, 214 So.2d 29 (Fla. 2d Dist. 1968); Wellington v. Wainwright, 214 So.2d 28 (Fla. 1st Dist. 1968); Mitchell v. State, 213 So.2d 289 (Fla. 2d Dist. 1968). The rationale of these cases is that a plea of guilty waives a trial, without which there can be no conflicting interests, strategies, or defenses to prejudice either of the defendants. Logically, this rule should apply to the case where only one of the codefendants pleads guilty; since only one defendant is tried, counsel need not sacrifice the interests of one codefendant in order to protect those of the other.
\textsuperscript{33} Davis v. State, 209 So.2d 701 (Fla. 3d Dist. 1968).
\textsuperscript{34} 202 So.2d 563 (Fla. 1967).
\textsuperscript{35} Dunbar v. State, 220 So.2d 366 (Fla. 1969). The Florida Supreme Court thus approved the position of the second district in Dunbar v. State, 214 So.2d 52 (Fla. 2d Dist. 1968), and rejected that of the fourth district in Youngblood v. State, 206 So.2d 665 (Fla. 4th Dist. 1968).
\textsuperscript{36} 215 So.2d 617 (Fla. 3d Dist. 1968).
\textsuperscript{37} 209 So.2d 696 (Fla. 4th Dist. 1968).
B. Waiver

The constitutional right to the assistance of counsel may be voluntarily waived by the defendant. Nevertheless, a waiver should not be presumed from the defendant’s silence because the right to counsel does not depend upon request. Accordingly, the defendant was entitled to a hearing on his motion under rule 1.850 where the record did not show whether he was informed of his right to hire counsel at trial. Where, however, a police officer’s testimony that he had informed the defendant of his constitutional rights by reading a “Miranda card” was disputed, the court took judicial notice of the contents of the card, although it was not introduced into evidence.

C. Critical Stages

The general rule operative in this area of the law is that deprivation of the assistance of counsel is not reversible error unless the denial occurred at a critical stage of criminal prosecution or unless there is a showing of special prejudice to the defendant at a noncritical stage.

1. OUT-OF-CUSTODY INTERROGATION

Where the relator signed a waiver of immunity and testified to incriminating matters before the grand jury, his later claim that the waiver was void on the ground that he had not been given the Miranda warnings was rejected in State ex rel. Lowe v. Nelson. The court held that Miranda is not applicable to a grand jury hearing because the proceedings are not conducted in the isolated setting of the police station. “[T]here are impartial observers to guard against intimidation and trickery being employed to compel the witness to give evidence against himself.”

2. IN-CUSTODY INTERROGATION

Arrest is a critical stage of criminal prosecution under the holding of Miranda, which requires that the police inform the accused of his right to counsel, inter alia, before they may question him.

38. Brumit v. State, 220 So.2d 659 (Fla. 2d Dist. 1969). A waiver of counsel at one stage of the proceedings does not necessarily imply a waiver at all subsequent stages. See note 53 infra.
40. Hamilton v. State, 214 So.2d 26 (Fla. 4th Dist. 1968).
41. Tudela v. State, 212 So.2d 387 (Fla. 3d Dist. 1968).
42. 202 So.2d 232 (Fla. 1st Dist. 1967).
44. See Section III, CONFESSIONS, pp. 225-30 infra for a discussion of the relationship between the right to counsel and the admissibility of a confession.
3. PRELIMINARY HEARING

Generally, the preliminary hearing is not considered a critical stage of the proceedings in the absence of a special showing of prejudice to the defendant.45

4. ARRAIGNMENT

The arraignment is not a critical stage of the proceedings unless prejudice to the defendant is shown. For example, a conviction based upon a plea of guilty entered at an arraignment without the assistance of counsel46 or without the effective assistance of counsel47 will be reversed.

5. AFTER FORMAL CHARGE BUT BEFORE TRIAL

Under the rule established in United States v. Wade,48 the line-up is a critical stage of the proceedings to which the right of counsel attaches. Wade has been followed in Florida. For example, where, instead of a physical confrontation, a video tape recording of the defendant was shown to the victim, the court held that the defendant had the right to the presence of counsel at such a showing.49 Wade is not retroactive, however, and does not affect convictions obtained before it was decided.50 Nor does it require reversal where the in-court identification is not the product of the line-up, for example, where the witness observed the defendant at some other place.51

6. SENTENCE

Sentencing is a critical stage of criminal prosecution at which the defendant has the constitutional right to the assistance of counsel.52 Furthermore, a waiver of representation by counsel and entry of a plea of guilty at the arraignment does not imply a waiver of counsel at the sentencing stage.53

45. See, e.g., Harris v. State, 208 So.2d 108 (Fla. 1st Dist. 1968).
51. Avis v. State, 221 So.2d 235 (Fla. 1st Dist. 1969); Anderson v. State, 215 So.2d 618 (Fla. 4th Dist. 1968); Shepard v. State, 213 So.2d 11 (Fla. 2d Dist. 1968).
52. See, e.g., Evans v. State, 163 So.2d 520 (Fla. 3d Dist. 1964).
53. Wingard v. State, 200 So.2d 630 (Fla. 2d Dist. 1967).
7. DIRECT APPEAL

Direct appeal is a critical stage of criminal proceedings. Accordingly, where the defendant's request for counsel to represent him on appeal was denied and the appeal period had expired, the defendant was afforded full appellate review by way of habeas corpus. Similarly, where appointed counsel was permitted to withdraw from the case and the appellate court dismissed the appeal, collateral review under rule 1.850 was ordered. In addition, when the public defender refuses to file a timely notice of appeal, relief may be had by collateral review under the rule unless an appeal would have been frivolous.

Although it is incumbent upon the trial court under rule 1.670 of the Florida Rules of Criminal Procedure to advise a defendant of his right to appeal his conviction, an indigent does not have the absolute right to the services of counsel for a frivolous appeal. Moreover, the burden is on the defendant, rather than on the trial judge, to indicate his desire to have counsel represent him on appeal. This is especially true when the defendant is represented at trial by privately retained counsel, for then the court may rely upon the presumption, if not rebutted by the defendant, that his own attorney will protect his right to appeal. On the other hand, the failure of an indigent defendant to request the appointment of counsel to take an appeal is not ipso facto a knowing and intelligent waiver of the right. Undoubtedly, the fairest and simplest procedure in this regard would be a statement by the trial court to the convicted defendant that he has the right to the assistance of counsel on appeal:

[I]t now appears highly desirable, if not indispensable, that the record of the trial proceedings affirmatively reflects that at the time of the sentencing the trial judge has fully advised the defendant as to his constitutional right to an appeal if such is desired, and, if indigent, counsel will be appointed by the court to represent him on appeal at state expense.

54. See Douglas v. California, 372 U.S. 353 (1963), holding that if a state affords appellate review of a criminal conviction as a matter of right, it is a denial of equal protection of the laws to refuse to appoint counsel to represent an indigent on his first direct appeal.


56. Walker v. Wainwright, 202 So.2d 850 (Fla. 1967). The Supreme Court of Florida gave no reason for its preference in this case for review under rule 1.850 rather than by habeas corpus, which it had ordered on similar facts in the prior case of Hollingshead v. Wainwright, 194 So.2d 577 (Fla. 1967). Walker does not cite Hollingshead.

57. Coward v. State, 202 So.2d 778 (Fla. 2d Dist. 1967).


59. Mobley v. State, 215 So.2d 90 (Fla. 4th Dist. 1968) ; Lee v. State, 204 So.2d 245 (Fla. 4th Dist. 1967).

60. Burchill v. State, 205 So.2d 9 (Fla. 3d Dist. 1967).


63. State ex rel. Miller v. Wainwright, 213 So.2d 290, 291 (Fla. 1st Dist. 1968).
Although the right to counsel on appeal is not absolute and an attorney is not required to prosecute a frivolous appeal, a court-appointed attorney who files an appeal may not simply dismiss it later. The United States Supreme Court case of *Anders v. California* requires that counsel first submit to the court a brief of all points which might arguably support the appeal and supply a copy to the defendant.

An application for leave to withdraw should be addressed to the appellate court wherein the appeal is lodged. Thus, in *Smith v. State*, it was held that an order by the trial court granting counsel leave to withdraw was a nullity for want of jurisdiction since the appellate court had exclusive jurisdiction over the case.

### 8. Collateral Attack

The Supreme Court of Florida has held that there is no absolute right to counsel on a motion for post-conviction relief under rule 1.850, but where the assistance of counsel is essential to a competent presentation of the motion, counsel should be appointed for an indigent. Similarly, there is no absolute right to the assistance of counsel to appeal an order denying relief sought under rule 1.850, but where the petition appears meritorious or where the interests of justice require it, counsel may be appointed in the discretion of the court.

### 9. Probation and Parole Hearings

While probation and parole hearings are not critical stages per se, a hearing to determine whether probation should be revoked and the defendant sentenced is a critical stage under the rule of *Mempa v. Rhay*. Therefore, the denial of assistance of counsel at such a hearing subjects the entire proceeding to collateral attack under rule 1.850.

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65. This procedure is desirable for reasons of justice and judicial efficiency because it provides the court with specific legal criteria in determining whether the appeal lacks merit and whether counsel should therefore be permitted to dismiss the appeal and withdraw from the case. Thus, even if it is ultimately decided that the appeal is without merit, the defendant will at least have had a preliminary opportunity to be heard by the court. See Lee v. State, 204 So.2d 245 (Fla. 4th Dist. 1967).
66. 208 So.2d 462 (Fla. 1st Dist. 1968).
68. Id. See Hawkins v. State, 221 So.2d 198 (Fla. 1st Dist. 1969).
69. State v. Herzig, 208 So.2d 619 (Fla. 1968), *citing* State v. Weeks, 166 So.2d 892 (Fla. 1964), which held that the *Douglas* requirement of counsel on direct appeal does not apply to an appeal from the denial of a motion for post-conviction relief under rule 1 (now rule 1.850).
D. Juvenile Courts

In *Steinhauer v. State*, the Third District Court of Appeal extended the holding of *In re Gault* and held that a hearing at which a juvenile who is charged with the commission of a crime waives the jurisdiction of the juvenile court is a critical stage of criminal prosecution to which the constitutional right of counsel attaches. The Supreme Court of Florida reversed the case for its retroactive application of *Gault*, “although in futuro the assistance of counsel at such a hearing is required. . .”

E. Offenses Less Than Felonies

The Supreme Court of Florida has not receded from the position first announced in *Fish v. State* that the right to counsel does not extend to indigent defendants charged with misdemeanors.

III. Confessions

On its face, *Miranda v. Arizona* has revolutionized the law of confessions by extending the privilege against self-incrimination and the right to counsel to the arrest stage. The Florida courts, however, have

73. 206 So.2d 25 (Fla. 3d Dist. 1967).
74. 387 U.S. 1 (1967).
75. State v. Steinhauer, 216 So.2d 214, 218 (Fla. 1968), citing Johnson v. New Jersey, 384 U.S. 719 (1966). Under Johnson, the test for the retroactivity of a newly articulated constitutional right is whether it affects the integrity of the fact-finding process. Since a waiver hearing is not a proceeding on the merits but determines jurisdiction only, the Johnson test is not met. See generally Comment, Retroactivity in Criminal Procedure: The Supreme Court as Monday Morning Quarterback, 23 MIAMI L. REV. 139 (1969).
76. 159 So.2d 866 (Fla. 1964). The Fifth Circuit Court of Appeals has taken a contrary position in McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965), and Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965). The former case involved a misdemeanor in the State of Florida, in which the federal court ordered the release of the defendant because he was not represented by counsel. Since the Florida courts refuse to recognize the right of counsel in misdemeanor trials, there arises the bizarre specter of state misdemeanants obtaining instant relief by federal habeas corpus, thus effectively nullifying the state proceedings.
77. 384 U.S. 436 (1966). *Miranda* holds that an accused in the custody of the police must be informed of the constitutional right to remain silent; that anything he says may be used in evidence against him; and that he has the right to the assistance of counsel at the interrogation, and if indigent, to have counsel appointed to represent him at state expense. Moreover, the police may not question the accused on any matter unless he has voluntarily waived these rights.
78. The holding of *Miranda* was foreshadowed by the case of *Escobedo v. Illinois*, 378 U.S. 478 (1964), which held that the right to counsel applies at the police station when an investigation ceases to be general in nature and begins to “focus in” on the defendant. Although it is still a viable case, *Escobedo* has been largely superseded by and incorporated into *Miranda*, which remains the definitive exposition of the constitutional limitations on police interrogation.
stoutly resisted the acceptance of these principles and in general distinguish Miranda whenever possible and continue to hold confessions admissible if they are otherwise voluntary.

A. Right to Counsel and Right to Be Silent

The constitutional rights enunciated by Miranda do not attach until there is custodial interrogation of the defendant by the police. Accordingly, voluntary statements by a defendant prior to arrest, or by a codefendant at the scene of arrest, or immediately after arrest but before questioning by the officer, are admissible. Similarly, when an accused blurts out “I did it” in the midst of being advised by the officer of his constitutional rights, the confession is admissible. In all such cases, the rationale is that spontaneous statements made by an accused who is under arrest, i.e., in custody, but who has not yet been questioned, are not the product of custodial interrogation but are voluntary and thus not subject to the exclusionary rule of Miranda.

For the same reasons, an inculpatory statement made in a phone call placed from jail by the accused is not rendered inadmissible by the fact that it was overheard by a police officer. Neither a recorded conversation obtained by an undercover agent who poses as a fence to buy stolen property from the defendant, nor a written statement obtained from the defendant by another inmate of the prison (a trustee who turned it over to the authorities) is excluded from evidence under Miranda. In the foregoing cases, the exclusionary rule of Miranda is not applicable because the incriminating statements were neither compelled nor extracted by a process of custodial interrogation.

79. See, e.g., Collins v. State, 203 So.2d 28 (Fla. 2d Dist. 1967). In its first opinion in the case, 197 So.2d 574, the second district conceded that Miranda was not per se applicable to the case because it was decided prior to Collins’ trial, and Miranda was held not to be retroactive in Johnson v. New Jersey, 384 U.S. 719 (1966). The court had, however, applied the rationale of Miranda on the theory that it was merely a logical extension of Escobedo, which was decided prior to Collins’ trial and was therefore applicable to it. The case was reversed and remanded by the Supreme Court of Florida for “clarification” of the opinion. State v. Collins, 201 So.2d 225 (Fla. 1967). Accordingly, the second district modified its opinion by deleting the sole reference to Miranda. As a practical matter, of course, this accomplished nothing but a change in the theoretical basis of the reversal of the conviction. The significance of this action by the second district, apparently taken under pressure from the Supreme Court of Florida, is a manifestation of the supreme court’s hostility to Miranda and its corresponding desire to give the case as little currency as possible. In this regard, see Wills, Criminal Law and Procedure, 22 U. MIAMI L. REV. 240, 250 (1967).

80. Traber v. State, 212 So.2d 676 (Fla. 3d Dist. 1968).
81. Clark v. State, 207 So.2d 481 (Fla. 3d Dist. 1968).
82. Cameron v. State, 214 So.2d 370 (Fla. 2d Dist. 1968); Battles v. State, 208 So.2d 150 (Fla. 3d Dist. 1968).
83. Hawkins v. State, 217 So.2d 582 (Fla. 4th Dist. 1969) (citing Miranda for the proposition that any statement given freely and voluntarily by the accused is admissible).
84. Sosa v. State, 215 So.2d 736 (Fla. 1968).
86. Holston v. State, 208 So.2d 98 (Fla. 1968). The court did not intimate whether the result might be different if the prisoner-trustee had acted as an agent of the police to secure a confession.
On the other hand, a confession is inadmissible when the *Miranda* warnings are not given and the defendant is subjected to interrogation while he is in the custody of the police. Thus, once within the context of custodial interrogation, the police must advise the suspect of his constitutional rights in order for his statements to be admissible. Moreover, the accused must be fully informed of his rights; a warning of the right to remain silent without a warning of the right to have counsel before questioning and of the right of an indigent to have counsel appointed at state expense is insufficient. In addition, the burden is on the prosecution to prove that the defendant was fully advised of his constitutional rights prior to interrogation.

*Glover v. State* held that the critical date for the application of the *Miranda* rules is the time the confession is used, not when it was given. Thus, in that case, a confession obtained before the *Miranda* decision but used at a post-*Miranda* trial was held inadmissible.

Although the burden is on the state to prove that the *Miranda* warnings were in fact given to the accused, a defendant is not entitled, as a matter of law, to have a dispute on the issue of warnings resolved in his favor. Thus, in *Tudela v. State*, the court rejected the defendant’s claim that the officer did not fully advise him of his constitutional rights and accepted the officer’s testimony that he had read the warnings from a *Miranda* card. Although the card was not put into evidence, the court took judicial notice that such cards contain a complete list of the required warnings.

### B. Illegal Detention—Interrogation

The case of *Outten v. State*, discussed in the last survey, reached the Florida Supreme Court, which reversed the lower court’s ruling of inadmissibility of the confession. The court’s rationale was that moving the defendant to a different part of the jail, where he was informed of his constitutional rights, dissipated the taint of the first illegal confession and rendered the second one voluntary and therefore admissible.

In *Biglow v. State*, the defendant was put in jail and at first refused...
to speak to the detectives investigating the case. He was advised of some of his constitutional rights but not that any statements he made could be used against him. Finally, he asked to speak to a detective and confessed. On appeal, his conviction was affirmed, the court holding that the confession was not given as a result of the custody but was entirely voluntary.\textsuperscript{97}

In a flagrant case of unlawful police action, the defendant was kept in custody for four days during which time police interrogated him in an attempt to secure a confession. The defendant was driven around in a police car and subjected to elaborate trickery, such as a bogus attack simulated by fireworks, in order to frighten him. Because the defendant did not confess until twelve hours after this incident, the Supreme Court of Florida concluded that the misconduct of the police had not induced the confession and that the defendant's constitutional rights had not, therefore, been violated.\textsuperscript{98}

C. Voluntary

In the light of \textit{Miranda}, voluntariness properly refers to the waiver of the constitutional rights of which an accused is informed. The waiver, however, need not be express;\textsuperscript{99} if, after arrest, an accused is given all the \textit{Miranda} warnings, his subsequent confession, voluntarily made, waives his constitutional rights and is admissible into evidence.\textsuperscript{100}

A plea of guilty is tantamount to a judicial confession. Therefore, the fact that a voluntary confession is obtained under circumstances which might render it inadmissible, \textit{i.e.}, the absence of counsel, does not preclude a conviction where the defendant subsequently enters a voluntary plea of guilty on the advice of counsel.\textsuperscript{101} Moreover, the voluntariness of a plea of guilty is determined independently of that of a confession. Thus, the fact that the defendant had previously confessed cannot be said to have induced or rendered involuntary a subsequent plea of guilty entered on the advice of counsel.\textsuperscript{102}

D. Use of Confessions at Trial

The problem of the use of a confession which implicates a codefendant at a joint trial has engendered much litigation. The traditional view

\textsuperscript{97} The court cited Davidson v. United States, 371 F.2d 994 (10th Cir. 1966), for the proposition that any confession made without solicitation is voluntary and concluded, therefore, that even those warnings which were given by the detective were unnecessary.

\textsuperscript{98} Schneble v. State, 201 So.2d 891 (Fla. 1967). The case was decided with reference to \textit{Escobedo}. Amazingly, the court stated its belief that the conviction would be valid even under the principles of \textit{Miranda}.

\textsuperscript{99} Colebrook v. State, 205 So.2d 675 (Fla. 3d Dist. 1968).

\textsuperscript{100} Rolison v. State, 202 So.2d 791 (Fla. 1st Dist. 1967); Brisbon v. State, 201 So.2d 832 (Fla. 3d Dist. 1967).

\textsuperscript{101} Hiedd v. State, 201 So.2d 235 (Fla. 4th Dist. 1967).

\textsuperscript{102} Camacho v. State, 203 So.2d 23 (Fla. 2d Dist. 1967).
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was that the granting of a motion for severance is discretionary and that use of such a confession is permissible so long as a cautionary instruction is given to the jury that the confession be considered only against its maker, and not against the nonconfessing defendant. Even where the cautionary instruction is not given, there is no reversible error if the defendant fails to object.

Now, however, this area of the law is governed by the United States Supreme Court decision in Bruton v. United States, which held that the use of the confession of one defendant at a joint trial violates the sixth-amendment right of confrontation of the other defendant. Accordingly, the use of a confession of a codefendant, even with a cautionary instruction, was held to be error in Schneble v. State, Cappetta v. State, and Branch v. State. The result is that the confession must be totally excluded or the codefendants must have separate trials in order to preserve the right of confrontation of a nonconfessing defendant.

Bruton was extended in Gelis v. State to cover statements of a codefendant made at trial. It was held that if one defendant makes a statement about his own involvement which would have been inadmissible against the codefendant were the latter tried alone, a severance must be granted, whether or not one is requested.

Once a confession is given and its voluntariness is put into issue, the better procedure is to hear evidence on the issue out of the presence of the jury; but if the defendant does not object to the jury's presence, it is not reversible error. Even where the request is made and denied, the defendant's subsequent testimony as to the same facts contained in the confession renders the error, if any, harmless.

Another problem in the area of the law is the use at trial of inadmissible confessions, not for their truth, but for purposes of impeachment. Ordinarily, an involuntary confession may not be so used, but where the defendant took the stand and his prior statements to the police were elicited by his own counsel, the defendant had opened the door and cross-examination by the prosecutor was proper. The question of the use for impeachment of a statement which is voluntary and otherwise admissible except for the fact that Miranda warnings were not given was before the

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103. Colebrook v. State, 205 So.2d 675 (Fla. 3d Dist. 1968).
104. Grace v. State, 206 So.2d 225 (Fla. 4th Dist. 1968).
105. 391 U.S. 123 (1968). Bruton was held to be retroactive in application and binding upon the states through the fourteenth amendment in Roberts v. Russell, 392 U.S. 293 (1968).
106. 392 U.S. 298 (1968), vacating and remanding to the Florida Supreme Court, which reversed. Schneble v. State, 215 So.2d 661 (Fla. 1968).
107. 218 So.2d 440 (Fla. 2d Dist. 1969).
108. 212 So.2d 29 (Fla. 2d Dist. 1968).
109. Id.
110. 215 So.2d 86 (Fla. 2d Dist. 1968).
111. Wade v. State, 204 So.2d 235 (Fla. 2d Dist. 1967).
112. Mathew v. State, 209 So.2d 234 (Fla. 2d Dist. 1968).
113. See, e.g., Morris v. State, 100 Fla. 850, 130 So. 582 (Fla. 1930).
114. Kiraly v. State, 212 So.2d 311 (Fla. 3d Dist. 1968).
Florida Supreme Court in *State v. Galasso.* Although the court chose to align itself with those cases which exclude "tainted" statements for all purposes, it held that on the facts of the case the error was innocuous and did not require reversal.

**IV. SEARCH AND SEIZURE**

When applying to a magistrate for a search warrant, the supporting affidavits must set forth the facts constituting probable cause and not merely conclusory allegations. The reliability of the facts set forth, however, may be inferred from all the circumstances; it is thus not a fatal defect to fail to allege that the informant is reliable.

A search warrant must describe the place to be searched and the things to be seized with particularity; a warrant which is vague in terms and leaves discretion to the executing officer is void as a general warrant. Nevertheless, a warrant to search a named building and "all persons therein who shall be connected with, or suspected of being connected with . . . gambling. . . ." was held sufficiently specific. On the other hand, a warrant authorizing the search of an entire building, containing a pool room and dwelling units upstairs, was deemed too general, in the absence of a showing by the state that it had no reason to believe the building contained multiple units.

In the execution of an arrest warrant, the officer must first announce his purpose and seek peaceful entry before pushing his way into a room. This is not necessary, however, when the accused's living quarters are visible from his place of business which is a store open to the public.

A search warrant must be executed only for the seizure of the articles described therein; it may not be used as a ruse for an exploratory search. But if the officers discover stolen property in the course of a fruitless search with a warrant for lottery paraphernalia, they may seize that property and arrest its possessor.

It is well established in the law of search and seizure that no warrant

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115. 217 So.2d 326 (Fla. 1968).
117. Parnell v. State, 204 So.2d 910 (Fla. 3d Dist. 1967).
118. Ludwig v. State, 215 So.2d 898 (Fla. 3d Dist. 1968).
119. State v. Cook, 213 So.2d 18 (Fla. 3d Dist. 1968).
120. *Id.* at 19.
121. Fance v. State, 207 So.2d 331 (Fla. 3d Dist. 1968).
122. Urquhart v. State, 211 So.2d 79 (Fla. 2d Dist. 1968).
123. Hutchinson v. State, 201 So.2d 485 (Fla. 3d Dist. 1967).
124. Urquhart v. State, 211 So.2d 79 (Fla. 3d Dist. 1968).
125. Hall v. State, 219 So.2d 757 (Fla. 3d Dist. 1969). The principle is the same with respect to a consensual search without a warrant. Thus, where police officers without a warrant sought and were granted permission to enter and search for stolen property, the marijuana that they discovered during the course of the search was admissible into evidence. *Diaz v. State,* 206 So.2d 37 (Fla. 3d Dist. 1968).
is necessary to authorize a search made incident to a lawful arrest. There is the problem, however, of determining what is "incident" to the arrest, i.e., reasonably related in time and scope. This, in turn, depends to a large extent on the area or place that is to be searched. Special restrictions apply to limit the permissible scope of a search of a private dwelling house made without a warrant but incident to an arrest. Thus, where the defendant was arrested upon alighting from his car in his driveway, the warrantless search of his house could not be justified as incident to the arrest.

Where the defendant is arrested for having an improperly licensed vehicle, objects discovered during the course of an inventory of the car's contents are admissible into evidence. Similarly, where the defendant was being questioned in the police station after arrest, and his car was parked outside the station, the police search of the car a few minutes after the arrest was incident to an arrest for a crime.

Where, at the scene of a crime, the officer saw a radio in plain sight on the seat of the car and could have lawfully seized it at that time, his subsequent seizure of the radio was not rendered unlawful by his failure to get a warrant; the seizure was still closely connected to the prior arrest of the defendant. A warrant is also unnecessary for an officer to investigate an emergency.

A gun or other evidence discovered as a result of a search of a

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126. See Chimel v. California, 395 U.S. 752 (1969) and its companion case, Von Cleef v. New Jersey, 395 U.S. 814 (1969). Chimel holds that a warrantless search of the defendant's entire house upon an arrest of the defendant in his house on a burglary charge is unreasonable in scope and thus unconstitutional. Chimel reviews the case law on the issue and concludes that there are only two justifications for a warrantless search incident to an arrest: the removal of weapons from the person arrested; and the seizure of evidence to prevent its concealment or destruction by the person arrested. Accordingly, the sphere of permissible search is circumscribed by the area "within his immediate control." Id. at 764. A search which extends beyond that perimeter is unlawful unless judicially authorized by a search warrant. The Von Cleef case, a per curiam decision, is illustrative of the same principle.

127. Shipley v. California, 395 U.S. 818 (1969). Shipley, decided the same day as Chimel and Von Cleef, holds that "a search 'can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest.'" Id. at 819, quoting Stoner v. California, 376 U.S. 483, 486 (1964) (emphasis supplied by Shipley).

128. Knight v. State, 212 So.2d 900 (Fla. 3d Dist. 1968); cf. Gagnon v. State, 212 So.2d 337 (Fla. 3d Dist. 1968), where the defendant was stopped for traffic violations and the police impounded his car for lack of proof of ownership. The search of the car was upheld as incident to an arrest for a crime.


130. Avis v. State, 221 So.2d 235 (Fla. 1st Dist. 1969); cf. Chance v. State, 202 So.2d 825 (Fla. 2d Dist. 1967), where the officer stopped the defendant's car and observed evidence of a crime through a window. He then drew his gun, handcuffed the defendant, and searched the car. The court held that the arrest was not effected at the moment the officer stopped the car, but at the time that the defendant was handcuffed. Therefore, there was probable cause to arrest based on the officer's observation of the contents of the car.

131. Webster v. State, 201 So.2d 789 (Fla. 4th Dist. 1967).

132. Echols v. State, 201 So.2d 89 (Fla. 2d Dist. 1967).

133. Williams v. State, 210 So.2d 497 (Fla. 2d Dist. 1968).
person lawfully arrested for vagrancy is admissible into evidence at trial. The same is true of the discovery of a match box of marijuana upon a person arrested for public drunkenness.\textsuperscript{134} Even where the defendant was arrested for “prowling” and later tried for rape, the evidence was admissible because the arrest was valid, \textit{i.e.}, based upon probable cause, although it was mislabeled.\textsuperscript{135}

An arrest can be constructive detention. Thus, a legal arrest and search occurred where the officers informed the defendant that she was under arrest for possession of stolen goods but left her at home to take care of her small children until the following day.\textsuperscript{136}

A lawful arrest for carrying a concealed weapon can be made by municipal police, acting outside of their jurisdictional territory, in the capacity of private citizens arresting for a breach of the peace.\textsuperscript{137}

Probable cause to arrest can be supplied by second-hand information. Thus, where a description of a robber was relayed over the police radio, the officer had probable cause to arrest a person fitting that description.\textsuperscript{138} Similarly, there was probable cause to arrest when a motel switch-board operator overheard the defendant’s calls and reported them to the police.\textsuperscript{139} The court further stated that this was not an unconstitutional invasion of privacy because the fourth amendment applies only to governmental action, not to that of private citizens.\textsuperscript{140}

In \textit{Baker v. State},\textsuperscript{141} the defendant wrote a letter which indicated his guilt. The letter was intercepted by the jailor and used as evidence at trial. The court, by way of obiter dictum,\textsuperscript{142} stated that the seizure of the letter was not illegal because it was part of the regular security measures of the jail’s operation. Nor was it an unlawful invasion of privacy for an undercover agent, posing as a fence so that he could buy stolen property from the defendant, to record the contents of the conversation for use as evidence at trial. Since the officer had been a party to the conversation, his testimony was based on first-hand knowledge, and the tape served merely as corroborative evidence of the incriminating statements which were spoken freely by the defendant.\textsuperscript{143}

In order to raise the issue of an unlawful search\textsuperscript{144} or an arrest with-

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\textsuperscript{134} Farmer v. State, 208 So.2d 266 (Fla. 3d Dist. 1968). The court failed to raise the issue of the scope of the search, \textit{i.e.}, whether it was reasonable in the context of an arrest for drunkenness.
\textsuperscript{135} Hoskins v. State, 208 So.2d 145 (Fla. 3d Dist. 1968).
\textsuperscript{136} State v. Parnell, 221 So.2d 129 (Fla. 1969).
\textsuperscript{137} Marden v. State, 203 So.2d 638 (Fla. 3d Dist. 1967).
\textsuperscript{139} Bateh v. State, 208 So.2d 846 (Fla. 1st Dist. 1968).
\textsuperscript{140} \textit{Id.}
\textsuperscript{141} 202 So.2d 563 (Fla. 1967).
\textsuperscript{142} The court reversed the conviction on other grounds.
\textsuperscript{144} Kelley v. State, 202 So.2d 901 (Fla. 2d Dist. 1967).
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out probable cause, a motion to suppress must be made before trial. A motion to suppress at trial may be entertained when there is no opportunity to so move before trial or where it appears from the face of the warrant or uncontroverted facts that the search or seizure was unlawful as a matter of law.

V. CONSTITUTIONALITY OF STATUTES AND ORDINANCES

In *McKee v. State*, the Child Molester Act, Florida Statutes chapter 801, was held valid.

In *Johnson v. State*, the Supreme Court of Florida upheld the constitutionality of the vagrancy statute, Florida Statutes section 856.02. The defendant then petitioned the United States Supreme Court, which reversed his conviction, without passing on the statute's constitutionality, for failure of the state to prove an actual violation of the statute.

In *Hilliard v. City of Gainesville*, the constitutionality of a municipal ordinance prohibiting driving while intoxicated was alleged to be in violation of Florida Statutes section 317.043, which forbids the enactment of municipal ordinances which are in conflict with state statutes. Although the ordinance provided for a penalty different from that of the statute, it was held not to be in conflict with the statute and was therefore upheld.

In a rather unusual case, a prisoner in a federal penitentiary in Kansas sought a writ of mandamus to compel the Circuit Court of Gadsen County to initiate proceedings to have him returned to Florida to stand trial for a charge of violating a Florida statute. It was held that one who is accused of crime in Florida and who is in the custody of another sovereign has the right, under section 11 of the Declaration of Rights of the Florida Constitution and under Florida Statutes section 915.02, to demand that Florida seek his return in order to afford him a speedy trial.

VI. THE ACCUSED AS A WITNESS

Florida Statutes section 918.09 prohibits the prosecution from commenting upon a defendant's failure to testify, but a comment will not

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145. Law v. State, 204 So.2d 741 (Fla. 2d Dist. 1967).
146. Kelley v. State, 202 So.2d 901 (Fla. 2d Dist. 1967).
147. 203 So.2d 321 (Fla. 1967).
148. 202 So.2d 852 (Fla. 1967).
150. 213 So.2d 689 (Fla. 1968).
151. Dickey v. Circuit Court, 200 So.2d 521 (Fla. 1967). Section 915.02 of the Florida statutes provides for a speedy trial for an accused who is serving a prison term.
152. FLA. STAT. § 918.09 (1967) provides as follows:

In all criminal prosecutions the accused may at his option be sworn as a witness in his own behalf, and shall in such cases 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.
be reviewed on appeal in the absence of an objection by the defendant.\(^{158}\)

The application of the statute, moreover, often involves a delicate interpretation of the language used by the prosecution in order to determine whether the reference is a prohibited one. Thus, in *Williams v. State*,\(^{154}\) the prosecutor’s statement that “the defense counsel for Jesse Williams having put on no testimony or evidence is entitled to opening . . . and . . . closing statement” was held not to be a comment prohibited by Florida Statutes section 918.09.\(^{155}\)

The proscription of the statute has also been applied to the trial judge by the Florida Supreme Court, which held it to be reversible error for the judge to call attention to the defendant’s failure to testify.\(^{166}\) Nevertheless, it is proper for the judge to instruct the jury not to indulge in a presumption unfavorable to the defendant because he did not testify.\(^{167}\)

VII. Appeal

The state may not appeal from an oral order quashing an information, even though it has been docketed in the Minute Book of the Clerk, because such oral order is not a formal entry of judgment.\(^{158}\)

In a case which was reviewed by public-interest certiorari, the Florida Supreme Court held that when the state takes an appeal from an interlocutory order, the defendant may file a cross-assignment of error attacking the same order.\(^{159}\)

An unusual factual situation was presented in *Simmons v. State*\(^{160}\) when the responsible state officials were unable to produce the trial transcript because the court reporter had died after the trial and his notes were illegible. The usual procedures for correction or supplementation

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\(^{153}\) State v. Jones, 204 So.2d 515 (Fla. 1967). *Jones* reversed the prior decisional law which held that a prohibited comment was fundamental error which thus required no objection. See notes 167 and 168 infra and accompanying text.

\(^{154}\) 200 So.2d 636 (Fla. 4th Dist. 1967).

\(^{155}\) *Id.* at 637-38. The prosecutor also referred to the fact that the State’s evidence was not controverted by the defendant. *Id.* at 638.

\(^{156}\) Diecidue v. State, 131 So.2d 7 (Fla. 1961).

\(^{157}\) Edwards v. State, 216 So.2d 47 (Fla. 2d Dist. 1968); cf. Bridges v. State, 207 So.2d 48 (Fla. 3d Dist. 1968), where the judge mistakenly charged the jury that the defendant had testified. The court was then apprised of its error and gave a cautionary charge to the jury not to draw any unfavorable inference from the defendant’s failure to testify. The appellate court found no reversible error.

\(^{158}\) State v. Malone, 215 So.2d 892 (Fla. 3d Dist. 1968); accord, State v. Shedaker, 190 So.2d 429 (Fla. 3d Dist. 1966), holding that the time for filing a notice of appeal does not commence to run until the entry of a written order. *Contra*, Gosset v. State, 188 So.2d 836 (Fla. 2d Dist. 1966).

\(^{159}\) State v. McKinney, 212 So.2d 761 (Fla. 1968).

\(^{160}\) 200 So.2d 619 (Fla. 1st Dist. 1967).
of the record\textsuperscript{161} or agreement by the parties to a condensed form\textsuperscript{162} were inapplicable, so a new trial was ordered in lieu of the appeal.

Several recent cases deal with the question of jurisdiction. Where the defendant was charged with grand larceny but convicted by the jury in the circuit court of a misdemeanor—the unauthorized use of a motor vehicle—the district court of appeal had appellate jurisdiction. Although appeals in misdemeanor cases ordinarily go to the circuit court from a subordinate court, if the circuit court properly had trial jurisdiction in the first instance, any appeal arising from the circuit court prosecution and conviction goes properly to the district court.\textsuperscript{163}

In order to perfect appellate jurisdiction, the defendant must file a separate notice of appeal for each conviction. Thus, where the defendant was convicted of charges contained in three separate informations which had been consolidated for trial and filed only one notice of appeal, he could appeal only one conviction and was given thirty days in which to elect the one for appeal.\textsuperscript{164}

The filing of a notice of appeal confers complete jurisdiction on the appellate court. Thus, if a notice of appeal is filed while a motion for a new trial is still pending, the trial court should strike the motion because the appellate court has acquired exclusive jurisdiction over the case.\textsuperscript{165}

Alleged errors with respect to the admission of evidence will not be considered on appeal in the absence of a timely objection at trial, even where the defendant is not represented by counsel, unless the error is fundamental or jurisdictional.\textsuperscript{166} A similar rule prevailed in regard to comments by the prosecution on the defendant's failure to testify, \textit{i.e.}, a timely objection at trial was necessary to preserve the alleged error for appeal. This rule was qualified by an exception for fundamental errors, the taint of which could not be dispelled by an instruction from the judge even if an objection were made. In \textit{State v. Jones},\textsuperscript{167} however, the Supreme Court of Florida abolished this exception on the inapposite basis of the right to counsel guaranteed by \textit{Gideon v. Wainwright}.\textsuperscript{168}

There is a conflict of authority in regard to an appeal taken on the issue of the insufficiency of the evidence. \textit{Wilson v. State}\textsuperscript{169} held that a

\begin{footnotesize}
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\item FLA. APP. R. 6.9(d) (1962).
\item FLA. APP. R. 6.7(f) (1962).
\item Wright v. State, 216 So. 2d 229 (Fla. 2d Dist. 1968).
\item Bass v. State, 215 So.2d 628 (Fla. 1st Dist. 1968).
\item Sosa v. State, 215 So.2d 736 (Fla. 1968).
\item Fitzgerald v. State, 203 So.2d 511 (Fla. 2d Dist. 1967).
\item 204 So.2d 515 (Fla. 1967).
\item 372 U.S. 335 (1963). \textit{Jones} is deficient in judicial craftsmanship for two reasons. First, the presence or absence of counsel is totally irrelevant to a justification of the exception because the exception applied only to those remarks that were "in eradicable from the minds of the jury." For such remarks, of course, objection would be futile, and the law should not require purposeless action. Second, the abolition of the exception was gratuitous in that it was unnecessary to a disposition of the case: the court concluded that the prosecutor's remark was not a comment upon the defendant's failure to testify.
\item 221 So.2d 1 (Fla. 1st Dist. 1969).
\end{enumerate}
\end{footnotesize}
motion for a new trial is a prerequisite to raising the issue on appeal. *Wright v. State,* on the other hand, held that a motion for a new trial is not an indispensable prerequisite so long as the alleged insufficiency of evidence is included in the assignments of error.

In the period surveyed, there were several cases litigated on the issue of the failure of trial counsel to appeal the defendant's conviction. In *Schaeffer v. Wainwright,* the issue presented was whether a defendant whose privately retained counsel failed to file a timely notice of appeal could obtain relief by habeas corpus on the basis of the trial court's failure to appoint counsel to take an appeal. The court denied relief, holding that it may be assumed that a defendant's privately retained attorney will protect his client's right to appeal in the absence of a showing that the defendant notified the court of his desire to appeal.

The rule is otherwise with respect to appointed counsel. In *Platt v. Wainwright,* the defendant's court-appointed attorney failed to file a timely notice of appeal. The defendant had unsuccessfully sought relief under rule 1.550 and had thereafter filed a petition for a writ of habeas corpus. The federal district court then held that counsel was incompetent in the post-trial state for failure to file a timely notice of appeal, and that the petitioner must be granted a new trial unless afforded an opportunity to raise on collateral attack all issues which would have been open to him on appeal. The Florida Second District Court of Appeal responded by ordering a hearing on the habeas corpus petition, which it found to be without merit.

Similarly, in *Williams v. Wainwright,* the Supreme Court of Florida held that full appellate review could be had by way of habeas corpus where direct appeal was no longer available because the petitioner had not received timely notice that his court-appointed counsel had been permitted to withdraw from the case after trial.

In the foregoing cases which deal with the failure of counsel to effect appellate review for the defendant, the underlying issue of whether there is an absolute right to appeal a conviction is not squarely met. The first district had once implied the existence of such an absolute right by ordering the appointment of counsel to represent on appeal a defendant who had waived counsel and plead guilty at trial. In *Robertson v. State,*

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170. 216 So.2d 229 (Fla. 2d Dist. 1968).
171. The decision was based upon Fl. App. R. 6.16(b) (1962), which provides that "[u]pon an appeal by the defendant from the judgment the appellate court shall review the evidence to determine if it is insufficient to support the judgment where this is a ground of appeal."
172. 218 So.2d 442 (Fla. 1969).
173. 208 So.2d 666 (Fla. 2d Dist. 1968).
174. The order of the federal district court appears in full in 208 So.2d at 667.
175. 208 So.2d 666 (Fla. 2d Dist. 1968).
176. 217 So.2d 317 (Fla. 1969).
177. The Supreme Court of the United States has never held that the due process clause of the fourteenth amendment requires a state to afford appellate review to persons convicted of crime. See *Griffin v. Illinois*, 351 U.S. 12 (1956).
179. 219 So.2d 456 (Fla. 1st Dist. 1969).
however, the first district chose to retreat from that position and to follow its own subsequent decision in Pierson v. State\(^\text{180}\) and the fourth district case of Nelson v. State,\(^\text{181}\) which held that an attorney is not required to file a frivolous appeal and that "some error that is at least arguable as to its merits must be shown in the motion before relief should be granted on a constitutional ground such as the failure of defense counsel to appeal."\(^\text{182}\)

VIII. Bail

Section 9 of the Florida Declaration of Rights provides that "all persons shall be bailable by sufficient sureties except for capital offenses where the proof is evident or the presumption great." In Nix v. McCallister,\(^\text{183}\) the defendant who was charged with first-degree murder was admitted to bail upon a writ of habeas corpus after his trial resulted in a mistrial. The court stated the rule that a mistrial does not ipso facto establish that the accused is entitled to bail, but is merely one factor to be considered by the court in the exercise of its discretion. Bail should not be denied, however, where the evidence is wholly circumstantial; it is proper to deny bail only if the evidence of guilt is so strong as to exclude every hypothesis other than guilt.\(^\text{184}\)

The situation is different with respect to bail pending appeal. Here, the "right" to appeal is subject to many qualifications. Thus, it is not an abuse of discretion to deny bail pending appeal where the appeal is frivolous and for the purpose of delay,\(^\text{185}\) or where the defendant might flee the jurisdiction.\(^\text{186}\) On the other hand, Waller v. State\(^\text{187}\) held that bail should not be denied on the mere possibility that the accused might commit a similar offense if freed on bail, because it is too remote a contingency and not within the standards of judicial action laid down by Younghans v. State.\(^\text{188}\) Boatright v. State,\(^\text{189}\) however, is to the contrary, apparently

\(^{180}.\) 214 So.2d 17 (Fla. 1st Dist. 1968).
\(^{181}.\) 208 So.2d 506 (Fla. 4th Dist. 1968).
\(^{182}.\) 214 So.2d at 19. In regard to frivolous appeals, Judge Barns suggests in Coleman v. State, 215 So.2d 96 (Fla. 4th Dist. 1968) and Nobley v. State, 215 So.2d 90 (Fla. 4th Dist. 1968) that the Florida Rules of Criminal Procedure be amended to permit counsel to file with the trial court a notice of intention not to appeal, setting forth the reasons therefore, with a copy to the defendant.
\(^{183}.\) 202 So.2d 1 (Fla. 1st Dist. 1967).
\(^{184}.\) Id.
\(^{185}.\) Dawkins v. State, 205 So.2d 691 (Fla. 1st Dist. 1969).
\(^{186}.\) Younghans v. State, 90 So.2d 308 (Fla. 1956).
\(^{187}.\) 208 So.2d 147 (Fla. 2d Dist. 1968).
\(^{188}.\) 90 So.2d 308 (Fla. 1956); cf. Sellers v. United States, 89 S. Ct. 37 (1968):

The idea that it would be 'dangerous' in general to allow the applicant to be at large must—if it is ever a justifiable ground for denying bail . . .—relate to some kind of danger that so jeopardizes the public that the only way to protect against it would be to keep the applicant in jail. Id. at 38.

The 1969 General Session of the Florida Legislature has enacted three important restrictions on bail pending appeal, Fla. Laws 1969, chs. 69-1, 2, 307; for a discussion of these new provisions, see Section XXVIII, Legislation, pp. 260-63 infra.
\(^{189}.\) 213 So.2d 622 (Fla. 1st Dist. 1968).
holding that bail pending appeal may be denied if it is likely that the defendant will commit further offenses.

Where an order, pursuant to a motion under rule 1.850, which grants a new trial is pending appeal to the district court, the trial court retains jurisdiction to grant bail.180

IX. CHARGE TO THE JURY

Florida Statutes section 919.16 requires that the court charge the jury that it may convict the defendant of any offense which is necessarily included in the offense charged. Nevertheless, judicial application of the statute consistently holds that the failure of the court to charge the jury as to lesser-included offenses is not reversible error where the defendant makes no request for such instructions.191 Furthermore, the defendant must submit written requested instructions and object if they are refused in order to preserve the error for appeal.192

It had formerly been held in Brown v. State193 that even where the defendant requested a charge on the lesser-included offense, it was not error to refuse the request where no evidence was presented as to such lesser offense. The case reached the Florida Supreme Court194 and was reversed on the basis that Florida Statutes section 919.16 permits a jury to convict a defendant of any offense which is necessarily included in the offense charged and therefore requires the court to so instruct, regardless of whether such lesser-included offenses are charged or proved at trial.195 Although Brown contains the definitive exposition of the law in regard to jury instructions on lesser-included offenses, the supreme court had previously reached the same result in Hand v. State,196 wherein it was held that the trial court erred in refusing to instruct the jury that it could

190. State v. Clayton, 214 So.2d 506 (Fla. 3d Dist. 1968).
191. Simmons v. State, 214 So.2d 729 (Fla. 3d Dist. 1968); Jerry v. State, 213 So.2d 440 (Fla. 2d Dist. 1968); Burkhead v. State, 206 So.2d 690 (Fla. 3d Dist. 1968).
192. Blatch v. State, 216 So.2d 261 (Fla. 3d Dist. 1968); Egantoff v. State, 208 So.2d 843 (Fla. 2d Dist. 1968).
193. 191 So.2d 296 (Fla. 1st Dist. 1966).
194. 206 So.2d 377 (1968). Certiorari was granted because of conflict with Jimenez v. State, 158 Fla. 719, 30 So.2d 292 (Fla. 1947).
195. The court further held that the trial judge must similarly instruct as to crimes divisible into degrees and as to attempts to commit crimes which themselves constitute substantive offenses. The court also stated that counsel's requested instructions should be in writing.
196. 199 So.2d 100 (Fla. 1967), followed by Little v. State, 203 So.2d 48 (Fla. 1st Dist. 1967). The first district expressed reluctance to follow Hand in Griffin v. State, 202 So.2d 602 (Fla. 1st Dist. 1967), and Adams v. State, 201 So.2d 494 (Fla. 1st Dist. 1967). Not surprisingly, therefore, it in effect ignored Hand in Rafuse v. State, 209 So.2d 260 (Fla. 1st Dist. 1968), where a defendant charged with assault with intent to commit murder was refused a requested instruction on assault and battery. The court's rationale was that since a deadly weapon was used, "there is no evidentiary basis in the record which would support a conviction of assault and battery." Id. at 261. This is in direct conflict with the mandate of Hand that the requested instructions be given regardless of whether there is an evidentiary basis to support a conviction of a lesser included offense.
consider the evidence to determine if the defendants charged with robbery were guilty of the necessarily lesser-included offense of larceny.

As stated above, a lesser-included offense is one which is necessarily included in the offense charged, i.e., one which contains all the essential elements constituting the major offense. The coextensiveness of the elements of the major and minor offenses was in issue in McCullers v. State, wherein the defendant claimed that it was error for the judge to charge the jury that aggravated assault was a lesser-included offense of manslaughter by culpable negligence, the offense charged. The appellate court affirmed the conviction by a process of impressive mental gymnastics, reasoning that a car is a dangerous weapon (the "aggravated" element) and that the general intent necessary to commit an assault can be subsumed under reckless indifference to human life.

Miscellaneous cases on jury instructions in the period surveyed include decisions that an instruction on alibi is warranted if the evidence raises a reasonable doubt as to the defendant's presence, although it does not preclude the possibility, and that an instruction that the offense must be proved beyond a reasonable doubt instead of every reasonable doubt is not error.

X. Sentence

In State v. Fitz, the defendant was convicted of attempting to break and enter a building with intent to commit a misdemeanor, an offense punishable by imprisonment "not exceeding five years." Florida Statutes section 776.04 provides that the penalty shall be five years if the offense attempted is punishable, were it actually accomplished, by imprisonment for five years or more, but only one year if the offense attempted is punishable by imprisonment for "less than five years." The supreme court reversed the decision of the appellate court and held that the five-year penalty was applicable.

Credit for time served prior to and during trial is a matter of discretion because a sentence does not begin to run, within the meaning of Florida Statutes section 921.161(1), until the time of actual incarceration. On the other hand, when a defendant serves time under a void judgment and sentence, credits for time served plus gain time is a matter

197. 206 So.2d 30 (Fla. 4th Dist. 1968).
198. Watson v. State, 200 So.2d 270 (Fla. 2d Dist. 1967).
199. Thomas v. State, 220 So.2d 650 (Fla. 3d Dist. 1969).
200. 202 So.2d 841 (Fla. 1967).
201. FLA. STAT. § 810.05 (1967).
202. State v. Fitz, 202 So.2d 841 (Fla. 1967), rev'g Fitz v. State, 196 So.2d 762 (Fla. 1st Dist. 1967). The holding of the court thus posits an equivalence between the phrases "five years or more" and "not exceeding five years."
203. Presha v. State, 216 So.2d 790 (Fla. 2d Dist. 1968).
204. Miles v. State, 214 So.2d 101 (Fla. 2d Dist. 1968).
of right at the resentencing.\textsuperscript{205} Time passed on parole, however, is not credited toward sentencing when parole is revoked.\textsuperscript{208}

When a defendant is sentenced and put on probation, he may be sentenced to a longer term than the original sentence after a violation of probation.\textsuperscript{207}

Enhanced punishment meted out to a second offender under Florida Statutes section 775.09 must be predicated upon a prior valid conviction and thus should be revoked after the first conviction is reversed for a violation of the defendant's constitutional rights.\textsuperscript{208}

Florida Statutes section 921.16 provides that when a defendant has been convicted of two or more offenses charged in the same indictment or information or in a consolidated indictment or information, the sentences shall run concurrently unless the sentencing judge expressly directs that they be served consecutively. Thus, in \textit{Wicker v. McCall},\textsuperscript{209} where the defendant plead guilty to seventeen separate charges and was sentenced to three months on each, his petition for a writ of habeas corpus was granted after three months on the grounds that the sentences were concurrent. But where the defendant was sentenced to consecutive terms, the defendant's claim that the sentences for two crimes which, although distinct, were committed in the course of one criminal transaction and charged in one information must run concurrently was rejected.\textsuperscript{210}

In \textit{Martino v. State},\textsuperscript{211} it was held that it is not error for the judge to refuse to disclose the contents of the confidential presentencing report on the defendant.

In capital cases the jury has the power to recommend mercy.\textsuperscript{212} In considering such a recommendation, however, the jury should not concern itself with the possibility of parole of the defendant if not sentenced to death.\textsuperscript{213}

\textbf{XI. Metropolitan Court}

There is no right to a trial by jury in a municipal court on the charge of driving while intoxicated, which carries a maximum penalty of sixty days in jail and/or a 500 dollar fine.\textsuperscript{214}

\begin{itemize}
  \item \textsuperscript{205} Milligan v. State, 207 So.2d 24 (Fla. 2d Dist. 1968).
  \item \textsuperscript{206} Porter v. State, 212 So.2d 828 (Fla. 1st Dist. 1968).
  \item \textsuperscript{207} Ruiter v. State, 205 So.2d 556 (Fla. 2d Dist. 1967).
  \item \textsuperscript{208} Lee v. State, 217 So.2d 861 (Fla. 4th Dist. 1969).
  \item \textsuperscript{209} 203 So.2d 342 (Fla. 2d Dist. 1967).
  \item \textsuperscript{210} Footman v. State, 203 So.2d 356 (Fla. 2d Dist. 1967).
  \item \textsuperscript{211} 215 So.2d 495 (Fla. 3d Dist. 1968).
  \item \textsuperscript{212} FLA. STAT. \textit{\textsuperscript{213}} § 919.23(2) (1967) provides: “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.”
  \item \textsuperscript{213} See, e.g., Van Eaton v. State, 205 So.2d 298 (Fla. 1967).
  \item \textsuperscript{214} Hilliard v. City of Gainesville, 213 So.2d 689 (Fla. 1968), \textit{citing} Cheff v. Schnackenberg, 384 U.S. 373 (1966). See note 321 and accompanying text infra.
\end{itemize}
XII. FORMER JEOPARDY

Where the trial judge, in order to protect the defendant’s right to have a fair trial, exercises his discretion upon good cause to declare a mistrial on his own motion, a plea of former jeopardy will not be sustained as a defense to a subsequent prosecution on the same indictment.\(^2\) The defense of former jeopardy is sustained, however, when the trial judge, without the consent of the defendant, declares a mistrial for legally insufficient reasons;\(^2\) such discharge is considered to be tantamount to a judgment of acquittal.\(^2\)

Double jeopardy is not a bar to separate trials for the same conduct by different governmental entities when a municipal ordinance and a state statute both prohibit the conduct of the defendant.\(^2\)

It is not double jeopardy for the defendant to be subjected to two trials for two deaths arising out of the same automobile accident.\(^2\) Neither is it double jeopardy for the defendant to be tried for assault with intent to commit murder of the mother after having been convicted of manslaughter of the fetus; even though both charges arose out of the same "transaction," the offenses are different and require different proofs, particularly as to the element of intent.\(^2\)

In *Reyes v. Kelly*,\(^2\) the defendant was arrested for first-degree murder and subsequently agreed to plead guilty to second-degree murder. At trial, the court refused to accept the plea because of the possibility that the defendant had been acting in self-defense. The state then obtained an indictment for first-degree murder and the defendant moved to quash on the grounds that his prior plea of guilty put him in double jeopardy. The district court rejected the argument because his plea of guilty had not been accepted by the judge and was therefore not effective. Accordingly, the prior plea did not constitute former jeopardy.

XIII. DEFENDANT’S RIGHT TO BE PRESENT

In noncapital cases, a defendant may waive his right to be present, and voluntary absence from court constitutes a waiver.\(^2\)

Rule 1.850 of the Rules of Criminal Procedure provides that "[a] court may entertain and determine such motion [a collateral attack upon

\(^{215}\) Adkins v. Smith, 205 So.2d 530 (Fla. 1968).

\(^{216}\) Bryant v. Stickley, 215 So.2d 786 (Fla. 2d Dist. 1968); State v. Smith, 209 So.2d 876 (Fla. 2d Dist. 1968); State v. Lanier, 205 So.2d 671 (Fla. 2d Dist. 1968).

\(^{217}\) State v. Lane, 209 So.2d 873 (Fla. 2d Dist. 1968); State v. Lanier, 205 So.2d 671 (Fla. 2d Dist. 1968).

\(^{218}\) Hiliard v. City of Gainesville, 213 So.2d 689 (Fla. 1968); Waller v. State, 213 So.2d 623 (Fla. 2d Dist. 1968).

\(^{219}\) Hanemann v. State, 221 So.2d 228 (Fla. 1st Dist. 1969).

\(^{220}\) State v. Shaw, 219 So.2d 49 (Fla. 2d Dist. 1969).

\(^{221}\) 204 So.2d 534 (Fla. 2d Dist. 1967).

\(^{222}\) Henzel v. State, 212 So.2d 92 (Fla. 3d Dist. 1968).
the conviction] without requiring production of the prisoner at the hear-
ing." Accordingly, in *Bryant v. State*, the court held that although the better procedure is to have the movant present when there are questions of fact to be resolved, such presence is a matter of discretion.

**XIV. PRELIMINARY HEARING**

The purpose of a preliminary hearing is to determine whether there is probable cause to hold an accused for trial. Despite the mandatory language of Florida Statutes section 901.23 that "[a]n officer who has arrested a person without a warrant shall without unnecessary delay take the person arrested before the nearest or most accessible magistrate . . . ," the courts continue to adhere to the position that a preliminary hearing is not a necessary step in a criminal prosecution.

**XV. FAIR TRIAL**

It was error for the prosecution to ask the defendant if he had bragged to a barmaid that he was going to steal a safe when the state had no such statement from the barmaid, and the error was not cured by an instruction from the judge that the jury should disregard the question.

The defendant was not denied a fair trial when no timely objection was made to the prosecution’s eliciting on cross-examination that an accomplice had plead guilty. On the other hand, the defendant was denied a fair trial where the prosecutor in closing argument commented on the defendant’s testimony about a previous conviction by saying that "[1]ess than forty-four days after he got out of prison, he is back robbing." It was also error for the prosecutor to tell the jury that, if convicted, the defendant could still be put on probation, but the error was cured by an instruction from the judge.

Where an identification witness other than a member of the deceased’s family was available, the use of a relative was prejudicial error.

No reversible error was committed where the defendant was forced to stand trial in jail clothes and the trial judge instructed the jury that the clothes should not be considered evidence of guilt. On the other hand, it

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223. 204 So.2d 9 (Fla. 3d Dist. 1967).
224. See, e.g., Di Bona v. State, 121 So.2d 192 (Fla. 3d Dist. 1960).
226. Walters v. State, 217 So.2d 615 (Fla. 2d Dist. 1969). But cf. Thomas v. State, 202 So.2d 883 (Fla. 3d Dist. 1967), where in the presence of the jury the prosecution stated that the defendant’s accomplice had been convicted. The judge denied a motion for a mistrial, but did not give the jury instructions to disregard the remark. On appeal, the conviction was reversed.
227. Davis v. State, 214 So.2d 41, 42 (Fla. 3d Dist. 1968).
228. Zide v. State, 212 So.2d 788 (Fla. 3d Dist. 1968).
230. Atkins v. State, 210 So.2d 9 (Fla. 1st Dist. 1968). The practice is strongly con-
demned, however, by Shultz v. State, 131 Fla. 757, 179 So. 764 (1938), although in the instant case *Shultz’s* disapproval was considered to be dictum.
was prejudicial error for the judge to refer to "the scene of the crime," even though he later instructed the jury that the correct phrase was "scene of the alleged crime."^{231}

The defendant was denied a fair trial where the judge was not present during the whole time that the jury was viewing the scene.^{232}

An interesting decision was rendered in *O'Brien v. State*,^{233} which, in apparent conflict with the usual rule that only the State's *knowing* use of perjured testimony requires reversal, held that a new trial should be granted when there is serious doubt as to the truth of the testimony of a key witness for the state.

When the judge threatened the defense counsel with contempt for his obstreperous conduct in questioning witnesses, the court held that although such rebuke should have been made outside the presence of the jury, it was not so prejudicial as to deny the defendant a fair trial.^{234}

The defendant was denied a fair trial where, among other errors, a juror gave false answers on *voir dire* and a material witness for the state, a sheriff, had charge of the jury.^{235}

The defendant was not denied a fair trial, although the judge, in a nonjury trial, adjudicated him guilty before defense counsel made his closing argument, as after objection thereto the judge offered to vacate judgment and hear closing argument but the attorney declined.^{236}

Where the three offenses charged in the same information arose from related circumstances and would require similar proof, the defendant was not entitled to six peremptory challenges, under Florida Statutes section 918.08 (2), for each offense.^{237}

In *Bell v. State*,^{238} the trial court denied the indigent defendant's motion to have the court reporter transcribe the closing arguments of the prosecution, and the defendant claimed that this was a denial of due process and equal protection under the fourteenth amendment. On appeal, the court ruled that although an indigent's motion to record closing arguments should be granted, conviction should not be reversed unless the defendant can demonstrate, by having objections and the judge's rulings thereon made part of the record, that the prosecution made prejudicial remarks in his closing argument.

231. Beckham v. State, 209 So. 2d 687 (Fla. 2d Dist. 1968). The appellate court also concluded that prejudicial error was committed by the judge in giving the instruction on manslaughter because it confused the jury.
233. 206 So. 2d 217 (Fla. 2d Dist. 1968).
235. Langston v. State, 212 So. 2d 51 (Fla. 3d Dist. 1968).
236. Rissler v. State, 212 So. 2d 44 (Fla. 3d Dist. 1968).
237. Costantino v. State, 203 So. 2d 647 (Fla. 3d Dist. 1967); cf. Johnson v. State, 206 So. 2d 673 (Fla. 2d Dist. 1968). In *Johnson*, however, there were two separate informations for passing two different checks on different days, and the charges were merely consolidated for trial.
238. 208 So. 2d 474 (Fla. 1st Dist. 1968), followed by Thomas v. State, 214 So. 2d 890 (Fla. 1st Dist. 1968).
Separate trials should be held where the interests of the codefendants are in conflict, but a motion for severance need not be granted where there is no showing that the testimony of one or his failure to testify would implicate the other.\textsuperscript{239}

XVI. GRAND JURY

In \textit{Dawkins v. State},\textsuperscript{240} the defendant was held in contempt, notwithstanding the first amendment, for attempting to influence the grand jury in its deliberations by distributing circulars in close proximity to the grand jury room.

Unauthorized presence at a grand jury deliberation is a violation of Florida Statutes section 905.17, but it does not require a ruling of contempt since the matter is one of discretion.\textsuperscript{241}

In \textit{Martin v. State},\textsuperscript{242} the defendant was subpoenaed to appear before the grand jury and was granted immunity under Florida Statutes section 932.29, but he refused to answer any questions. The court held that if a witness has a \textit{bona fide} fear of self-incrimination despite the grant of immunity, he should specifically state his objection and let the court rule on it; where, however, the witness has no intention of answering any questions, he may properly be held in contempt.

In \textit{State v. Demetree},\textsuperscript{243} the Supreme Court of Florida reversed an order of the trial judge which quashed the indictment on the grounds that the grand jury had not been selected in conformity with the provisions of Florida Laws 1957, Chapter 57-550. The court ruled that the procedure whereby each commissioner selected people whom he considered qualified under the law and who were then reviewed by the full commission was sufficient compliance.\textsuperscript{244}

XVII. HABEAS CORPUS

In \textit{Powe v. State},\textsuperscript{245} the Supreme Court of Florida held that habeas corpus, rather than a motion under rule 1.850, is the appropriate remedy for the failure of the trial court to appoint an attorney to take an appeal for an indigent. The Florida Supreme Court has also held that where

\begin{itemize}
\item \textsuperscript{239} Sosa v. State, 215 So.2d 736 (Fla. 1968).
\item \textsuperscript{240} 208 So.2d 119 (Fla. 1st Dist. 1968).
\item \textsuperscript{241} Harper v. State, 217 So.2d 591 (Fla. 4th Dist. 1968).
\item \textsuperscript{242} 208 So.2d 630 (Fla. 4th Dist. 1968). The court also stated that a witness has no right to confer with an attorney in the hall outside the grand jury room.
\item \textsuperscript{243} 213 So.2d 709 (Fla. 1968). The supreme court also rejected the trial judge's conclusion that the method of grand jury selection was not calculated to produce a fair cross-section of the community as required by the fourteenth amendment because there was no attempt to exclude any segment of the community from the grand jury list.
\item \textsuperscript{244} See also Shifrin v. State, 210 So.2d 18 (Fla. 3d Dist. 1968), which held that Florida Laws 1957, ch. 57-550 authorized, but did not require, the grand jury commission to make investigations to determine the fitness of grand jurors. Since investigation was discretionary, there was no abuse of discretion where there was no showing that any juror was not qualified.
\item \textsuperscript{245} 216 So.2d 446 (Fla. 1968). See note 8 supra.
\end{itemize}
direct appeal was no longer available because the petitioner had not received timely notice that his court-appointed attorney had been permitted to withdraw, full appellate review could be had by way of habeas corpus.\footnote{248}{Rule 1.850 provides that an application for a writ of habeas corpus shall not be entertained in behalf of a prisoner who has failed to apply for relief by motion under the rule. In \textit{Ward v. State};\footnote{247}{this provision was apparently extended to require the discharge of a writ of habeas corpus where the prisoner had filed a motion under the rule but had failed to appeal the adverse decision. Nor is relief by way of habeas corpus available to test the legality of an arrest where the petitioner fails to take a direct appeal from his conviction.}\footnote{248}{XVIII. IMMUNITY

A promise of immunity from prosecution for homicide given by the prosecuting attorney in order to force the defendant to testify is not within the immunity statute\footnote{249}{because murder is not one of the crimes listed therein. Thus, it is merely a contractual immunity, and there is a conflict of authority as to whether the court must approve such a promise in order for it to be effective.}\footnote{250}{The immunity statute applies even when the defendant is charged with a crime before testifying at the grand jury hearing; otherwise, such testimony would be an unconstitutional, compelled self-incrimination.}\footnote{251}{When a public employee is required by law to testify before a grand jury or lose his employment, his subsequent dismissal on the basis of facts about which he testified under subpoena is a prohibited "penalty" within the meaning of Florida Statutes section 932.29.\footnote{252}{The employee's waiver of immunity is, in effect, compelled and therefore involuntary.}} because murder is not one of the crimes listed therein. Thus, it is merely a contractual immunity, and there is a conflict of authority as to whether the court must approve such a promise in order for it to be effective.\footnote{250}{The case was decided on other grounds, i.e., that immunity was granted for homicide and not breaking and entering, and that no testimony was given at the grand jury hearing that could be considered a link in the chain of evidence.}\footnote{251}{State v. O'Toole, 203 So.2d 527 (Fla. 4th Dist. 1967), approving the view of State \textit{ex rel. Mitchell v. Kelly, 71 So.2d 887 (Fla. 1954).}}\footnote{252}{Headley v. Baron, 211 So.2d 223 (Fla. 3d Dist. 1968)}}
since the alternative to a refusal is loss of employment.\textsuperscript{253} This forced choice between loss of livelihood and self-incrimination is a violation of the fifth amendment.\textsuperscript{254}

\section*{XIX. Indictment and Information}

A prosecution upon information without a prior determination of probable cause at a preliminary hearing and without an indictment by the grand jury is not a deprivation of due process of law.\textsuperscript{255} On the other hand, it is unlawful to convict a defendant charged with bribery of obstructing an officer in the performance of his duties; the latter is not necessarily a lesser-included offense of the former.\textsuperscript{256}

When a state attorney files an information based upon a grand-jury indictment, he may not expand or enlarge upon the indictment without resubmission to the grand jury unless he abandons the indictment as the basis of the information and files an information under oath as required by Florida Statutes section 923.03(2).\textsuperscript{257} Thus, the state attorney, when filing an information based upon an indictment pursuant to Florida Statutes section 32.18, may not supply essential allegations that were omitted from the indictment but must instead obtain a new one or file an information pursuant to Florida Statutes section 923.03(2).\textsuperscript{258} These are the only two methods by which a state attorney can file an information.\textsuperscript{259}

An information based on Florida Statutes section 847.04, forbidding the use of profane language in public, is void if it fails to specify the words constituting the alleged profanity.\textsuperscript{260} Similarly, the granting of a motion to quash for vagueness was affirmed when the charge alleged that the defendant committed a conspiracy between April 1, 1965, and February 24, 1967.\textsuperscript{261}

\section*{XX. Evidence}

In \textit{Williams v. State},\textsuperscript{262} the Supreme Court of Florida laid down the rule that evidence of previous crimes is admissible, if relevant, to prove

\begin{itemize}
\item \textsuperscript{253} State v. Dayton, 215 So.2d 87 (Fla. 3d Dist. 1968); State v. Buchanan, 207 So.2d 711 (Fla. 3d Dist. 1968).
\item \textsuperscript{254} Garrity v. New Jersey, 385 U.S. 493 (1967), \textit{cited by} State v. Dayton, 215 So.2d 87 (Fla. 3d Dist. 1968); Headley v. Baron, 211 So.2d 223 (Fla. 3d Dist. 1968); State v. Buchanan, 207 So.2d 711 (Fla. 3d Dist. 1968). \textit{Compare} Spevack v. Klein, 385 U.S. 511 (1967), wherein the Supreme Court reversed the disbarment of an attorney who refused to obey a subpoena duces tecum and refused to testify at the judicial inquiry on the ground that to do so would tend to incriminate him.
\item \textsuperscript{255} State v. Hernandez, 217 So.2d 109 (Fla. 1968).
\item \textsuperscript{256} Mangone v. State, 219 So.2d 447 (Fla. 3d Dist. 1969).
\item \textsuperscript{257} State v. Hill, 208 So.2d 867 (Fla. 3d Dist. 1968).
\item \textsuperscript{258} Id.
\item \textsuperscript{259} Id.
\item \textsuperscript{260} Warren v. State, 213 So.2d 609 (Fla. 1st Dist. 1968).
\item \textsuperscript{261} State v. Dayton, 215 So.2d 87 (Fla. 3d Dist. 1968).
\item \textsuperscript{262} 110 So.2d 654 (Fla. 1959).
\end{itemize}
the case on trial by the establishment of a common scheme, identity, motive, intent, or absence of mistake. In *Winkfield v. State*, the *Williams* rule was interpreted to mean that "evidence of other offenses is admissible if:

[1] it is relevant and has probative value in proof of the instant case or some material fact or facts in issue . . . ; and

[2] its sole purpose is not to show the bad character of the accused; and

[3] its sole purpose is not to show the propensity of the accused to commit the instant crime charged; and

[4] its admission is not precluded by some other specific exception or rule of exclusion."

This rule received a questionable application in a case where the defendant was acquitted of the previous alleged crime.

The *Williams* rule was further modified by a subtle distinction between "prior intemperate habits" and "character." The Florida Supreme Court upheld the admissibility of evidence of the defendant's alcoholism, not as direct evidence of his intoxication at the time of the accident, but as evidence of his prior intemperate habits which tended to corroborate the direct evidence of his intoxication.

It has also been held proper for the prosecution to bring out on cross-examination that a defense witness was with the defendant during the event in question and is also under prosecution because it bears upon the credibility of his testimony.

Decisions on hearsay evidence include holdings that the improper admission of hearsay which is merely cumulative of other competent evidence is not reversible error; that a witness may testify as to extra-judicial statements made to him for the purpose of corroborating other direct testimony; that the declaration of a co-conspirator is not admissible against the other conspirators where there is insufficient independent proof of the conspiracy; and that a defendant waives his objection to hearsay evidence when his attorney on cross-examination asks the witness the question that brings it in.

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263. 209 So.2d 468 (Fla. 2d Dist. 1968).
264. *Id.* at 471, quoting *Green v. State*, 190 So.2d 42, 46 (Fla. 2d Dist. 1966). Note that the evidence of another crime introduced was of a subsequent and different charge for which the defendant was not yet tried, whereas the decision in the *Williams* case sustained the admission of evidence of a *previous crime.*
266. *Wadsworth v. State*, 210 So.2d 4 (Fla. 1968). The case was heard upon conflict certiorari, and the Supreme Court of Florida reaffirmed the view of *Locke v. Brown*, 194 So.2d 45 (Fla. 2d Dist. 1967).
270. *Farnell v. State*, 214 So.2d 753 (Fla. 2d Dist. 1968).
Decisions on pictorial evidence include holdings that it is not error to introduce "mug shot" photographs for purposes of identification;\(^{272}\) that motion pictures taken by police of the capture and arrest of the defendant are admissible;\(^ {278}\) that gruesome pictures are not admissible unless particularly relevant;\(^ {274}\) and that pictures are not admissible if offered for the purpose of prejudicing the defendant.\(^ {275}\)

Two recent cases have held that when a witness has refreshed his present recollection by the use of notes or memoranda outside the courtroom, he is not obliged, unless the court in its discretion orders otherwise, to produce them at trial for the defense's inspection.\(^ {277}\) Also, on the issue of inspection, Manon v. State\(^ {277}\) stated the rule that a defendant is not entitled to inspect a transcript of statements of the state's witnesses taken by the prosecution in the course of preparation for trial unless they are taken before a magistrate or used by the prosecution at trial.\(^ {278}\)

A blood test taken as part of an investigation of an automobile accident under Florida Statutes section 317.171\(^ {279}\) is inadmissible in a subsequent prosecution for manslaughter.\(^ {280}\) This is so notwithstanding that, prior to the test, the officer advised the motorist of his right to counsel and that the results of the blood-alcohol test could be used against him in the event manslaughter charges were filed.\(^ {281}\) On similar facts, however, the same district court of appeal construed the blood-alcohol test to be part of an investigation for crime, not an investigation under Florida Statutes section 317.171, and therefore admissible.\(^ {282}\)

Where the defendant is charged with driving while intoxicated, evidence of his refusal to take the optional breath-analysis test is inadmissible because it would impinge upon the fifth-amendment privilege against self-incrimination; if the test were taken, however, its results would be admissible.\(^ {283}\) If, on the other hand, the defendant is given no option to refuse because the test is compulsory, evidence of the defend-

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272. White v. State, 218 So.2d 484 (Fla. 3d Dist. 1969).
274. Dillen v. State, 202 So.2d 904 (Fla. 2d Dist. 1967). The pictures were necessary to prove that death was caused by blows to the body.
276. Kimbrough v. State, 219 So.2d 122 (Fla. 1st Dist. 1969); Williams v. State, 208 So.2d 628 (Fla. 3d Dist. 1968).
277. 220 So.2d 34 (Fla. 3d Dist. 1969).
278. To the same effect is Colebrook v. State, 205 So.2d 675 (Fla. 3d Dist. 1968). Both Manon and Colebrook rely on Jackman v. State, 140 So.2d 627 (Fla. 3d Dist. 1962).
279. "All accident reports made by persons involved in accidents shall be without prejudice to the individual so reporting and shall be for the confidential use of the department. . . . No such report shall be used as evidence in any trial, civil or criminal, arising out of an accident . . . ."
280. State v. Thomas, 212 So.2d 910 (Fla. 1st Dist. 1968).
281. Coffey v. State, 205 So.2d 599 (Fla. 1st Dist. 1967).
CRIMINAL LAW

ant's resistance is admissible because it is relevant to an inference of guilt.\(^{284}\)

In *Cirack v. State*,\(^{285}\) the court held that it was error for the trial court to permit a psychiatrist to testify that the defendant's judgment of right and wrong had been impaired by intoxication when the only evidence of drinking was the defendant's statement to the psychiatrist. An expert may testify as to matters not put into evidence only if such matters are not the major basis for his opinion of the defendant's sanity.

On the subject of privileged communications between husband and wife, *Gates v. State*\(^{286}\) held that a wife could testify as to her husband's prior acts of violence against a child because such acts were not communications and could not therefore be privileged. The same rationale is followed by *Ross v. State*,\(^{287}\) where the defendant was charged with breaking into an automobile, and his wife was permitted to testify that the defendant gave her a sweater alleged to have been stolen from the car.

The rule that fingerprints found in a place open to the public are not admissible unless circumstances are such that the prints could only have been made at the time the crime was committed was interpreted to be limited to cases where there is no other evidence of the identity of the perpetrator.\(^{288}\)

In a case where several witnesses testified that they saw a man running away from the scene of a crime with a limp, the defendant wanted to demonstrate, without being subject to cross-examination, that he ran without a limp. The court ruled that running would be a form of testimony and that the defendant would have to take the stand for cross-examination if he wanted to make the demonstration.\(^{289}\)

In *Koran v. State*,\(^{290}\) the evidence admitted included tapes made by

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\(^{284}\) State v. Esperti, 220 So.2d 416 (Fla. 2d Dist. 1969). A chemical test for traces of gun powder was forcibly administered to the defendant, and both the results of the test and his conduct in resisting it were introduced into evidence at trial. In reaching the latter result, the case of Gay v. City of Orlando, 202 So.2d 896 (Fla. 4th Dist. 1967) was correctly distinguished as involving a noncompulsory test. Nevertheless, the soundness of the Esperti decision is open to question.

\(^{285}\) Dixon v. State, 216 So.2d 85 (Fla. 2d Dist. 1968).

\(^{286}\) Machin v. State, 213 So.2d 499 (Fla. 3d Dist. 1968).

\(^{287}\) 213 So.2d 735 (Fla. 3d Dist. 1968).

an undercover agent who was wired with a concealed-radio transmitter and recorded telephone conversations obtained with the consent of the agent. The defendant claimed that the use of such recordings violated his fourth-amendment rights, but the court held that evidence obtained by a recording device hidden on the person of an informant is admissible under Lopez v. United States\(^{291}\) and that the phone conversations were admissible because one of the parties consented.\(^{292}\)

In Cooper v. City of Fort Lauderdale,\(^{293}\) an ordinance prohibited the destruction of property listed in a search warrant. The destruction of such property is deemed prima facie evidence that it was the object of the search. When presented with a warrant for bolita tickets, the defendant crumpled and swallowed a small piece of paper. He was convicted of a violation of the ordinance, and asserted on appeal that the ordinance violates the holding of Jefferson v. Sweat\(^{294}\) that one presumption cannot serve as the basis for a second. The court rejected this contention, holding that there was prima facie evidence that a crime was committed because of the circulation of bolita tickets within the city.\(^{295}\)

Ramey v. State\(^{296}\) held that it is not an abuse of discretion for the trial judge to permit an eight-year-old girl to testify. Similarly, Hoskins v. State\(^{297}\) held it is not an abuse of discretion to refuse to summon a witness for the defense where the expense is great and the witness would not state in advance the nature of his testimony.

In Wilson v. State,\(^{298}\) on the other hand, it was held to be an abuse of discretion for the trial judge to refuse to permit the defense to call a witness whose name was not furnished in advance because of the neglect of state-appointed defense counsel to supply the prosecution with a list of witnesses after having made a motion for reciprocal discovery pursuant to Florida Rules of Criminal Procedure 1.220(e). Reversal was limited, however, to the conviction on the one count of the information to which the witness' testimony would have been relevant.


\(^{292}\) The fact of consent distinguished the case from Katz v. United States, 389 U.S. 347 (1967), where a public phone had been "bugged" without the consent of any of the parties to the conversations. The court noted, however, that Katz was decided after the defendant's trial, and had not been held retroactive, nor binding on the states. In any event, the Lopez rationale applies with equal force to the phone conversations; since the agent was a party to them, he was able to testify as to their contents from his own personal knowledge. The recording serves merely to corroborate his testimony.

\(^{293}\) 203 So.2d 16 (Fla. 3d Dist. 1967).

\(^{294}\) 76 So.2d 494 (Fla. 1954).

\(^{295}\) The fallacy of this reasoning is, of course, that there is no prima facie evidence of a crime committed by the defendant. It must be remembered that the defendant was charged with destruction, not possession, of bolita tickets. The presumption is thus self-justifying.

\(^{296}\) 202 So.2d 221 (Fla. 3d Dist. 1967).

\(^{297}\) 221 So.2d 447 (Fla. 1st Dist. 1969).

\(^{298}\) 220 So.2d 426 (Fla. 3d Dist. 1969).
XXI. PLEA OF GUILTY

It is not error to deny a motion to withdraw a negotiated plea of guilty obtained by the state without fraud or deceit, although the defendant was neither represented by counsel nor informed of the maximum possible sentence for the offense.299 It is error, however, to deny the defendant's motion for a change of plea to not guilty, although he had already been convicted and sentenced, where an affidavit was submitted to the court that the defendant's accuser had lied.300 Similarly, the denial of a motion to vacate the adjudication of guilt and the plea of nolo contendere (which had been changed from a plea of not guilty) was held to be an abuse of discretion where the ends of justice would be served by permitting the defendant, a former psychiatric patient, to substitute a plea of not guilty by reason of insanity.301

Where the defendant alleges that his plea of guilty was coerced by the police, and the allegation is not rebutted by the state, he is entitled to a hearing on his motion under rule 1.850, although he was represented by counsel at all times.302 Similarly, where the defendant alleges that he had been induced to enter a plea of guilty by false representations of the public defender that a deal for probation had been arranged with the prosecutor, a hearing under rule 1.850 should be held.303 The court further stated that a plea of guilty must be entirely voluntary and not unduly motivated by misapprehension or coercion.304

A judgment upon a voluntary plea of guilty, given with the advise of counsel, is not rendered invalid merely because the defendant had previously confessed under circumstances—without presence of counsel—which might have rendered the confession inadmissible.305

Where the defendant's efforts to consult with the public defender assigned to his case were frustrated because the latter was too busy, the defendant's plea of guilty at his arraignment was given without the effective assistance of counsel, and his conviction was therefore subject to attack under rule 1.850.306 This applies a fortiori to the case where the

299. Aranda v. State, 205 So.2d 667 (Fla. 4th Dist. 1968).
300. Riddle v. State, 212 So.2d 122 (Fla. 2d Dist. 1968).
301. Peterson v. State, 206 So.2d 700 (Fla. 3d Dist. 1967).
302. Bennett v. State, 203 So.2d 211 (Fla. 2d Dist. 1967).
303. Bartz v. State, 221 So.2d 7 (Fla. 2d Dist. 1969).
304. Id., citing Reddick v. State, 190 So.2d 340 (Fla. 2d Dist. 1966). But see Manning v. State, 203 So.2d 360 (Fla. 2d Dist. 1967), wherein the same court affirmed the denial of a motion under rule 1.850 although the defendant alleged that his plea of guilty had been induced by a promise of a lighter sentence.
305. Hield v. State, 201 So.2d 235 (Fla. 4th Dist. 1967). See also Ford v. State, 210 So.2d 33 (Fla. 2d Dist. 1968) and Camacho v. State, 203 So.2d 23 (Fla. 2d Dist. 1967), holding that a plea of guilty with the advice of counsel is not rendered involuntary by the fact that the defendant had previously confessed.
accused was neither represented by counsel nor informed of his right thereto.\textsuperscript{307}

A plea of guilty waives the right to trial by jury\textsuperscript{308} and may be entered even in a capital case.\textsuperscript{309}

XXII. NOLO CONTENDERE

The rule of \textit{Smith v. State}\textsuperscript{310} that a plea of nolo contendere is not acceptable in a capital case was held inapplicable where no death sentence was involved as a consequence of an agreement with the state, approved by the court, that a life sentence would be imposed.\textsuperscript{311}

XXIII. SELF-INCrimINATION

In \textit{Young v. State},\textsuperscript{312} the defendant was convicted of breaking and entering with the intent to commit a felony. At the trial, the judge had instructed the jury that the defendant's failure to explain his possession of stolen goods upon his arrest raised an inference of guilt. On appeal, the defendant claimed that this instruction violated his fifth amendment privilege against self-incrimination. The appellate court agreed, and reversed the conviction upon the authority of \textit{Miranda v. Arizona}:\textsuperscript{313}

\textit{[I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.}\textsuperscript{314}

This decision of the fourth district encountered a hostile reception in the first district in \textit{Shaw v. State}.\textsuperscript{315} The court drew a dubious distinction between apprehension by the police and interrogation, stating that the accused has "ample opportunity" during the hiatus between apprehension and questioning in which to explain his possession of stolen goods.

The controversy was brought to a close by the Florida Supreme Court, which reviewed \textit{Young} on conflict certiorari and reversed.\textsuperscript{316} The court's two-fold rationale was that (1) Miranda is inapplicable because it was decided in the context of the admissibility of statements procured by custodial interrogation and no statements were elicited from Young;

\textsuperscript{307} Ray v. State, 200 So.2d 529 (Fla. 1967).

\textsuperscript{308} Thomas v. State, 201 So.2d 834 (Fla. 2d Dist. 1967).

\textsuperscript{309} Miller v. State, 217 So.2d 903 (Fla. 2d Dist. 1969).

\textsuperscript{310} 197 So.2d 497 (Fla. 1967).

\textsuperscript{311} Peel v. State, 210 So.2d 14 (Fla. 2d Dist. 1968).

\textsuperscript{312} 203 So.2d 650 (Fla. 4th Dist. 1967), followed by Carpenter v. State, 213 So.2d 738 (Fla. 2d Dist. 1968).

\textsuperscript{313} 384 U.S. 436 (1966).

\textsuperscript{314} \textit{I.d.} at 468, n.37, quoted by Young v. State, 203 So.2d at 651.

\textsuperscript{315} 209 So.2d 477 (Fla. 1st Dist. 1968).

\textsuperscript{316} State v. Young, 217 So.2d 567 (Fla. 1968), followed by Burroughs v. State, 221 So.2d 159 (Fla. 2d Dist. 1969). See Note 24 U. \textsc{miami} L. REV. 200 (1969).
and (2) the Florida rule neither requires the accused to speak nor penalizes him for his failure to do so by creating a presumption of law; it is merely a rule of circumstantial evidence which authorizes a permissible, not a mandatory, inference of guilt.

Justice Thornal, joined by Justices Drew and Ervin, dissented on the grounds that "[a] duty to explain is simply inconsistent with a right to remain silent." Although Thornal concluded that the instruction was erroneous under Miranda, he cleverly devised a method of reconciliation between the two: the simple expedient of eliminating the word "unexplained" from the instruction. Thus, "any possession of recently stolen property would support an inference of guilt."318

Another Miranda-engendered conflict with a Florida rule of evidence arose in Jones v. State,319 which overruled the prior law that permitted the state to introduce evidence that the defendant remained silent in the face of an accusation of crime. The court held that Miranda renders evidence of such silence inadmissible as a penalty upon invoking the privilege against self-incrimination.320 In addition, the court held that the admission of such evidence, even in the absence of objection by the defendant, is fundamental error which requires reversal.

XXIV. JURY TRIAL

A. Right to Trial by Jury

There is no right to a trial by jury in a municipal court on the charge of driving while intoxicated where the maximum penalty is sixty days in jail and/or a $500 fine.321

The right to trial by jury may be waived, even in a capital case, and the waiver is effected by a plea of guilty.322 If the plea of guilty is voluntary, the court need not advise the defendant that he thereby waives his right to a jury trial.323

Trial by jury can, of course, also be waived without a plea of guilty,

317. State v. Young, 217 So.2d 567, 572 (Fla. 1968).
318. Id. This idea was also advanced in Carpenter v. State, 213 So.2d 738 (Fla. 2d Dist. 1968).
319. 200 So.2d 574 (Fla. 3d Dist. 1967).
320. Id. But see Reilly v. State, 212 So.2d 796 (Fla. 3d Dist. 1968), where the court, distinguishing Jones, admitted evidence of the defendant's failure to explain his unauthorized presence in another's apartment on the theory that such explanation would not be a denial of guilt.
321. Hilliard v. City of Gainsville, 213 So.2d 689 (Fla. 1968), citing Cheff v. Schnackenberg, 384 U.S. 373 (1966), which defined a petty offense not requiring a jury trial as one not punishable by more than six months in prison and a $500 fine.
322. Miller v. State, 217 So.2d 903 (Fla. 2d Dist. 1969). An interesting point implicit in the case, but not discussed by the court, is whether a trial judge has the power to impose a life sentence for a capital offense without a recommendation of mercy by a jury as provided by Fla. Stat. § 919.23(2) (1967). See note 212 supra.
323. Thomas v. State, 201 So.2d 834 (Fla. 2d Dist. 1967). The case fails to meet the issue of how a defendant can effect a knowing and intelligent waiver of the right if he is not first informed of it.
but the waiver can be withdrawn if it is not voluntary. Thus, where the trial judge would grant the defendant's request for another continuance only on the condition that he waive trial by jury, the waiver was set aside.\footnote{Berry v. State, 203 So.2d 336 (Fla. 2d Dist. 1967).} In other circumstances, however, the granting of a request to withdraw the waiver is a matter of discretion resting with the trial judge; and it is not an abuse of discretion to deny such a request where it is made on the day of trial and would cause great inconvenience or delay.\footnote{The United States Supreme Court in Witherspoon v. Illinois\footnote{320} held that it is a denial of due process of law and of the right to a trial by an impartial jury to exclude for cause prospective jurors whose objections to capital punishment fall short of unequivocal opposition.\footnote{However, the exclusion of such qualified jurors is not reversible error when the defendant is not actually sentenced to death.\footnote{It is not error to allow jurors to separate during the period between instruction by the court and the retiring of the jury when the jury is not confined during the trial.\footnote{When on voir dire prospective jurors are excused because they admit prejudice against the defendant, it is not necessary to discharge the entire panel if the judge instructs the panel to disregard the statements of those excused.\footnote{When there was no concealment or fraud, it was not error for the judge to refuse to grant a mistrial because a juror became aware during trial that he was a first cousin of a state witness.\footnote{The right to a speedy trial extends to permit a prisoner of another state to be tried within a reasonable time after his arrest.\footnote{334. Berry v. State, 203 So.2d 336 (Fla. 2d Dist. 1967).}}}}}}

B. Jurors

The United States Supreme Court in Witherspoon v. Illinois\footnote{held that it is a denial of due process of law and of the right to a trial by an impartial jury to exclude for cause prospective jurors whose objections to capital punishment fall short of unequivocal opposition.\footnote{However, the exclusion of such qualified jurors is not reversible error when the defendant is not actually sentenced to death.\footnote{It is not error to allow jurors to separate during the period between instruction by the court and the retiring of the jury when the jury is not confined during the trial.\footnote{When on voir dire prospective jurors are excused because they admit prejudice against the defendant, it is not necessary to discharge the entire panel if the judge instructs the panel to disregard the statements of those excused.\footnote{When there was no concealment or fraud, it was not error for the judge to refuse to grant a mistrial because a juror became aware during trial that he was a first cousin of a state witness.\footnote{The right to a speedy trial extends to permit a prisoner of another state to be tried within a reasonable time after his arrest.\footnote{324. Berry v. State, 203 So.2d 336 (Fla. 2d Dist. 1967).}}}}}} held that it is a denial of due process of law and of the right to a trial by an impartial jury to exclude for cause prospective jurors whose objections to capital punishment fall short of unequivocal opposition.\footnote{However, the exclusion of such qualified jurors is not reversible error when the defendant is not actually sentenced to death.\footnote{It is not error to allow jurors to separate during the period between instruction by the court and the retiring of the jury when the jury is not confined during the trial.\footnote{When on voir dire prospective jurors are excused because they admit prejudice against the defendant, it is not necessary to discharge the entire panel if the judge instructs the panel to disregard the statements of those excused.\footnote{When there was no concealment or fraud, it was not error for the judge to refuse to grant a mistrial because a juror became aware during trial that he was a first cousin of a state witness.\footnote{The right to a speedy trial extends to permit a prisoner of another state to be tried within a reasonable time after his arrest.\footnote{324. Berry v. State, 203 So.2d 336 (Fla. 2d Dist. 1967).}}}}}

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XXV. Speedy Trial

In State v. Sokol,\footnote{the state took a nolle prosequi just before the jury was to be sworn in. When a new information was filed, the defendant moved to quash on the grounds that the state's conduct deprived him of the right to a speedy trial. The appellate court reversed the granting of the motion, holding that the state may take a nolle prosequi any time before the jury is sworn.\footnote{The right to a speedy trial extends to permit a prisoner of another state to be tried within a reasonable time after his arrest.\footnote{324. Berry v. State, 203 So.2d 336 (Fla. 2d Dist. 1967).}}}} the state took a nolle prosequi just before the jury was to be sworn in. When a new information was filed, the defendant moved to quash on the grounds that the state's conduct deprived him of the right to a speedy trial. The appellate court reversed the granting of the motion, holding that the state may take a nolle prosequi any time before the jury is sworn.\footnote{The right to a speedy trial extends to permit a prisoner of another state to be tried within a reasonable time after his arrest.\footnote{324. Berry v. State, 203 So.2d 336 (Fla. 2d Dist. 1967).}}

The right to a speedy trial extends to permit a prisoner of another state to be tried within a reasonable time after his arrest.\footnote{324. Berry v. State, 203 So.2d 336 (Fla. 2d Dist. 1967).}
sovereign (the United States Government) to require the proper Florida officials to initiate proceedings for his return to stand trial on charges which form the basis of a detainer warrant. Conversely, one imprisoned in Florida who is charged with a crime in Kansas should seek to vindicate his right to a speedy trial in the courts of Kansas, not in those of Florida.

A delay caused by the defendant's request for a change of venue does not entitle him to discharge because the state has not denied him a speedy trial. Similarly, a defendant is not denied a speedy trial where his motion for a new trial is granted.

An appeal by the state from an order granting a new trial operates to stay that order until the disposition of the appeal, and the required three terms of court under Florida Statutes section 915.01 do not begin to run until the order becomes final. Hence, the defendant in State v. Cook was not entitled to an acquittal.

XXVI. Specific Crimes and Defenses

A. Crimes

A conviction of aggravated assault was reversed in Rogan v. State on the grounds that a flower pot, in the circumstances under which it was thrown, was not a deadly weapon. Similarly, the conviction of aggravated assault was reversed in Forchion v. State, the court holding that a broom handle thrown (accurately) by the defendant was not a deadly weapon. The court stated that the test for a deadly weapon is not whether it is capable of causing death, but whether its use is likely to cause death.

To sustain a conviction for aggravated assault, it is not necessary for the state to prove an actual attempt to carry out the assault with a deadly weapon but only a bare assault upon another with such weapon.

The corpus delicti, i.e., evidence that a crime has been committed by someone, must be proven beyond a reasonable doubt. For homicide, proof of the corpus delicti requires proof of death, criminal agency as a cause of death, and the identity of the deceased. Thus, where the body of the victim was identified only after being shot but while still alive, there was no proof of the identity of the deceased; and the conviction had to be reversed.

335. Floyd v. State, 221 So.2d 433 (Fla. 2d Dist. 1969).
338. 201 So.2d 769 (Fla. 4th Dist. 1969).
339. 203 So.2d 24 (Fla. 3d Dist. 1967).
340. 214 So.2d 751 (Fla. 3d Dist. 1968).
341. Albright v. State, 214 So.2d 887 (Fla. 2d Dist. 1968).
342. Johnson v. State, 201 So.2d 492 (Fla. 4th Dist. 1967).
Proof of the corpus delicti of attempted larceny does not require proof that links the defendant with the crime, but only that a crime was committed by someone. In order to convict, of course, the defendant must be linked with the crime; and this was accomplished in *Pickett v. State* by introduction into evidence of the defendant’s voluntary confession. The corpus delicti, in other words, is an element of the crime and not the identity of the perpetrator.

Further delineation in the law of gambling occurred in *Schell v. State*, which held that bookmaking is not a lesser-included offense of keeping a gambling house. On the contrary, the two are separate and distinct statutory crimes.

There were also several developments in the law of larceny. *McDaniel v. State* held that value is an essential element of grand larceny and therefore must be proved at trial, but it is not an essential element of petit larceny. To determine the value of a stolen article for the purpose of proving grand larceny, the value of the article at the time it was taken, rather than the new purchase price, is controlling. This rule was reaffirmed in *Spencer v. State*, where the court reversed the conviction of grand larceny with directions to enter a judgment of conviction for petit larceny.

The quantum of proof of value was at issue in *Miller v. State*. The only evidence as to value was the estimate of the owner as to what was missing and, as in *Spencer*, the court reversed the conviction of grand larceny and entered judgment for the lesser-included offense.

Proof of value also bears on criminal intent. Thus, in *Gamble v. State*, the court held that a charge of breaking and entering with the intent to commit grand larceny requires proof of an intent to steal goods the value of which is in excess of $100 at the time of the breaking and entering.

In *Burroughs v. State*, the defendant’s contention that the presumption of guilt from the possession of recently stolen goods will not support a conviction of larceny was rejected. His contention that possession four to six weeks after the theft is not “recent” was also rejected.

In a case where the charge was possession of narcotics, it was held that knowledge of the presence of narcotics may be inferred when the defendant has exclusive control of the premises; but when the defendant lacks exclusive control, actual knowledge must be proved. The conviction was accordingly reversed.

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343. 202 So.2d 203 (Fla. 1st Dist. 1967).
344. 211 So.2d 581 (Fla. 2d Dist. 1968).
345. Keeping a gambling house is prohibited by FLA. STAT. § 849.01 (1967); bookmaking is prohibited by FLA. STAT. § 849.25(2) (1967).
346. 221 So.2d 758 (Fla. 4th Dist. 1969).
347. 217 So.2d 331 (Fla. 4th Dist. 1969).
348. 212 So.2d 388 (Fla. 2d Dist. 1968).
349. 210 So.2d 238 (Fla. 2d Dist. 1968).
350. 221 So.2d 159 (Fla. 2d Dist. 1969).
351. Markman v. State, 210 So.2d 486 (Fla. 3d Dist. 1968).
In *Felton v. City of Pensacola*, an officer seized "nudie" magazines from a newstand. His probable cause to believe that the magazines were obscene was based purely on subjective judgment, as indicated by his testimony at trial where he said, "I used no test, sir; I just used my own good judgment that nude men and women in a magazine together would be a violation of law." The court stated that the "procedure used in the present case, in which the police officer merely used 'his own good judgment' in determining whether the publications were obscene, clearly controverted the guarantee of freedom of speech and the press in the First Amendment to the United States Constitution and the guarantee of due process of law in the Fourteenth Amendment." The court further found, however, that the appellants had waived their right to object to the illegal procedure by announcing at trial that they had no objection to the admission of the magazines into evidence. *Felton* reached the United States Supreme Court, which rendered a per curiam reversal on the authority of *Redrup v. New York*.

Another Florida case with constitutional ramifications is *Johnson v. State*. The defendant was convicted of vagrancy for sitting on a bus bench at a very late hour with little money in his pocket. The constitutionality of the vagrancy statute was not discussed by the United States Supreme Court, which based its reversal solely on the ground that the State had not proven any violation of the statute and that it is a violation of due process of law to convict without evidence of guilt.

In *Bradley v. State*, an indictment for perjury was dismissed because it omitted an essential element of the crime—the allegation that the defendant was under oath.

In *State v. Wolfe*, the defendant argued that he could not be convicted of perjury committed in the course of a previous trial which resulted in a reversal of the conviction because of a due process violation. The court disagreed, saying that the prior trial was not void for all purposes but merely reversed and remanded because of errors committed therein.

The crime of buying, receiving, or concealing stolen property requires proof that someone other than the defendant stole the property. Thus,

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352. 200 So.2d 842 (Fla. 1st Dist. 1967).
353. Id. at 844.
356. 386 U.S. 767 (1967). *Redrup* is somewhat ambiguous, but it apparently stands for the proposition that all written and pictorial material is protected by the first and fourteenth amendments from the reach of federal and state obscenity laws if it is not pandered, sold to juveniles, or communicated so as to intrude upon the privacy of those not wishing to be exposed. If this interpretation is correct, even so-called hard-core pornography is constitutionally protected.
357. 216 So.2d 7 (Fla. 1968).
359. 208 So.2d 140 (Fla. 3d Dist. 1968).
360. 203 So.2d 338 (Fla. 1st Dist. 1967); accord, State v. Sanders, 203 So.2d 340 (Fla. 1st Dist. 1967).
one who committed the theft or who was a principal to it could not be convicted of buying, receiving, or concealing.\footnote{361} Related to this principle that the crime charged must be actually proven is the principle that there must be no variance between the indictment or information and the verdict. Thus, the conviction was reversed where the crime charged was attempted grand larceny and the jury's verdict was "guilty as charged with intent to commit grand larceny."\footnote{382}

The crime of desertion as defined by Florida Statutes section 856.04 requires that the defendant desert from the state of Florida.\footnote{368}

The crime of escape is committed where the defendant escapes from custody prior to trial; conviction prior to the escape is not a necessary element of the offense.\footnote{384}

Proof that the defendant was in possession of a "revolver" is sufficient to support a conviction under Florida Statutes section 790.23, which prohibits the possession of a "pistol" by felons.\footnote{385}

In State v. Davis,\footnote{386} the defendant was charged with the possession of a pistol by a felon and he set up as a defense the invalidity of his prior conviction for lack of representation by counsel. Both the trial and appellate courts rejected this defense, but the Supreme Court of Florida reversed, holding that a prior conviction may not be attacked except where, as here, it is an element of the crime charged.\footnote{387} The court further stated that the proper procedure for asserting the defense is a pre-trial motion to suppress the evidence of the prior conviction.

In George v. State,\footnote{388} the defendant was convicted of passing worthless checks in violation of Florida Statutes section 832.05(3). The statute provides that the drawer is not guilty of a violation if the payee knows or has reason to know that the check is worthless. Since the defendant had made the check out to himself and then endorsed it to the store, he was the payee and knew it was bad. Accordingly, he argued rather disingenuously that he could not be deemed in violation of Florida Statutes section 832.05(3). On appeal, however, his conviction was affirmed. The court held that, in order to accomplish the intent of the legislature, "payee" should be construed broadly to include any person to whom the check is passed.

In State v. Pierce,\footnote{389} the defendant was convicted of embezzlement. The issue was whether the statute of limitations begins to run at the time of the conversion of the funds or at the time that a demand was

\footnotesize{\begin{itemize}
\item \footnote{361} Thomas v. State, 216 So.2d (Fla. 3d Dist. 1968); Ketelsen v. State, 211 So.2d 853 (Fla. 3d Dist. 1968).
\item \footnote{362} Goodman v. State, 203 So.2d 341 (Fla. 3d Dist. 1967).
\item \footnote{363} State v. Darnell, 217 So.2d 127 (Fla. 2d Dist. 1969).
\item \footnote{364} Harris v. State, 217 So.2d 907 (Fla. 2d Dist. 1969).
\item \footnote{365} Davis v. State, 215 So.2d 627 (Fla. 3d Dist. 1968).
\item \footnote{366} 203 So.2d 160 (Fla. 3d Dist. 1967).
\item \footnote{367} Id.
\item \footnote{368} 203 So.2d 173 (Fla. 2d Dist. 1967).
\item \footnote{369} 201 So.2d 886 (Fla. 1967).
\end{itemize}}
made for repayment. The court held that, as a rule of necessity, the statute runs at the time of demand because it is difficult for the state to prove the date of conversion. In effect, then, the statute begins to run at the date of the discovery of the crime.

Parents are not guilty of contributing to the delinquency of a minor under Florida Statutes section 828.21 when their only act is allowing their house to be used for a party at which minor third persons supply liquor to other minors.370

B. Defenses

Entrapment may not be asserted as a defense where the defendant denies that he did the act charged.371

In Van Eaton v. State,372 the Supreme Court of Florida reaffirmed that Florida adheres to the M'Naghten rule of insanity and refused to accept the irresistible impulse theory.

XXVII. Rules of Criminal Procedure

The Florida Rules of Criminal Procedure were amended, effective midnight, September 30, 1968, by the Supreme Court of Florida acting upon a petition of the Florida Bar. The amended rules appear at 211 So.2d 203 (1968). Only selected amendments will be discussed herein.

Rule 1.010 is amended to make the Rules of Criminal Procedure applicable to "all criminal proceedings in State courts including proceedings involving direct and indirect criminal contempt, except direct or indirect criminal contempt of a court acting in any appellate capacity and including proceedings under Rule 1.850 hereof."

Rule 1.120 is amended to permit, inter alia, a committing magistrate to issue both summons and warrants for the arrest of persons against whom a complaint is made.

Rule 1.140(C)(2) is amended to require, inter alia, that all "[a]ffidavits shall state the name of the affiant making the charge."

Rule 1.200 clarifies an ambiguity pertaining to the exchange of witness lists. The rule provides that "[n]ot more than five days after receipt of defendant's witness list . . . the prosecuting attorney shall file and serve upon the defendant the names and addresses . . . of the witnesses the State proposes to offer. . . ." The rule also imposes a continuing duty on both the prosecution and the defense to disclose promptly the names and addresses of additional witnesses which subsequently come to the attention of either party.

Rule 1.790(6) was amended to permit the court to pronounce sentence upon a defendant and to direct that the defendant be placed on

372. 205 So.2d 298 (Fla. 1967).
probation upon completion of any specified period of the sentence of imprisonment in the county jail.

XXVIII. Legislation

The 1969 General Session of the Florida Legislature was extremely active in adopting new legislation falling under the general rubric of crime control. In addition, new offenses have been created, and old ones redefined. Much of this legislation works significant changes in the present system of criminal justice. Because of the volume and extensive-ness of the new enactments, discussion in this survey will necessarily be selective.

Florida Laws 1969, chapter 69-1 amends Florida Statutes chapter 903 by adding the following provision, effective January 1, 1970, which makes bail pending appeal a matter of the court's discretion: "Bail on appeal after conviction shall be denied unless the defendant shall give good and sufficient reasons to the court why such bail on appeal should be granted."

Also taking effect on January 1, 1970, as Florida Laws 1969, chapter 69-2, which provides that if a person admitted to bail pending appeal is convicted of a separate felony while free on bail, "the bail on appeal shall be revoked and the defendant committed forthwith."

A third and perhaps the most important new enactment relating to bail pending appeal is Florida Laws 1969, chapter 69-307, which absolutely prohibits a person once convicted of a felony from admission to bail while appealing a second or subsequent felony conviction. This act amends Florida Statutes section 903.

Florida Laws 1969, chapter 69-10 repealed Florida Statutes chapter 521 and preempted the field, to the exclusion of counties and municipalities, of prohibiting the exhibition of obscene films to minors under the age of seventeen years. Specifically, the act makes it a misdemeanor, punishable by imprisonment in the county jail not exceeding one year and/or a fine not exceeding $2,000 "knowingly to exhibit for a monetary consideration to a minor . . . a motion picture, exhibition, show, representation or other presentation which, in whole or in part, depicts nudity, sexual conduct, sexual excitement or sado-masochistic abuse and which is harmful to minors." The provisions of the act are not applicable when a minor is accompanied by one or both of his parents. The act also provides for injunctive proceedings to prevent such shows or exhibitions upon the relation of a prosecuting attorney.

Florida Laws 1969, chapter 69-41 complements chapter 69-10 by prohibiting the sale or other distribution of books, pamphlets, magazines, or other printed or pictorial matter "which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to juveniles. . . ."

Florida Laws, chapter 69-17 enacted a comprehensive wiretapping and electronic surveillance law which is nearly identical to a recent federal
The act is a two-edged sword. On the one hand, it attempts to protect the privacy of innocent persons by prohibiting the interception and disclosure of wire or oral communications, except when one of the parties consents to such interception. If an unauthorized interception does occur, neither the contents of the communication nor any evidence derived therefrom may be received in evidence in any trial, hearing, or other judicial, quasi-judicial, or administrative proceeding of the state, or any of its political subdivisions. Finally, the act prohibits the manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices.

On the other hand, the legislative findings make it clear that the act is designed as a weapon against organized crime. It therefore authorizes any state attorney to apply to a judge for an order authorizing or approving the interception of wire or oral communications by any law enforcement agency of the state, or any political subdivision thereof, when it may furnish evidence of the commission of or conspiracy to commit enumerated felonies. Any information derived from such authorized interception may be introduced into evidence in any criminal or grand jury proceeding if such testimony is otherwise admissible.

Section 9 of the chapter sets forth in great detail the procedure by which such court authorization may be obtained. The application is required to be very narrow in scope, and an order approving the interception is not to last longer than thirty days. Section 9 is too detailed for full discussion in this survey, but implicit in its provisions, and, indeed, throughout the entire act, is an attempt to comply with the fourth amendment requirements relating to wiretapping and electronic surveillance as set forth in the United States Supreme Court cases of Berger v. New York and Katz v. United States.

Florida Laws 1969, chapter 69-135 is another weapon in the arsenal against organized crime. It prohibits "loan sharking or shylocking" by making the extension of credit at a rate in excess of 25% but not in excess of 45% per annum a misdemeanor; the extension of credit at a rate in excess of 45% per annum a felony; and the extortionate extension of credit a felony punishable by a maximum of ten years in prison.

Florida Laws 1969, chapter 69-91 amends Florida Statutes subsection 849.09(1) by the addition of a provision which makes unlawful the possession of tally sheets and other papers, records, and paraphernalia designed for use in connection with prohibited lotteries and gambling. A violation of this act is a misdemeanor.

Of great importance is Florida Laws 1969, chapter 69-73, which...
enacts a “Florida Stop and Frisk Law.” The act empowers any law enforcement officer of the state to temporarily detain and question a person “under circumstances which reasonably indicate that such person has committed, is committing, or is about to commit a violation of the criminal laws of this state, or the criminal ordinances of any municipality, or of any county....” In addition, the officer may make a search, reasonably limited in scope, to ascertain if the person detained is armed with a dangerous weapon.\footnote{376 See Terry v. Ohio, 392 U.S. 1 (1968), which authorizes a police officer to stop, on “reasonable grounds” less than probable cause, and make a limited search, for weapons only, incident thereto. See also the consolidated companion case to Terry, Sibron v. New York, 392 U.S. 40 (1968).}

Another “law and order” measure is Florida Laws 1969, chapter 69-306, which makes the use of a firearm in the commission of or attempted commission of a felony a felony itself. The provisions of the act also apply to any person under indictment who displays, uses, or carries a concealed weapon. In addition, there is a mandatory minimum ten-year sentence for second offenders under both categories.

Florida Laws 1969, chapter 69-65 provides an interesting amendment to Florida Statutes section 811.021(2), (3) by redefining grand larceny to include the fraudulent taking of property of an aggregate value of 200 dollars or more in any consecutive twelve-month period. If the aggregate value is less than 100 dollars, the offender shall be deemed guilty of petit larceny.

Florida Laws 1969, chapter 69-37 amends Florida Statutes section 404.15 to require mandatory imprisonment of persons convicted of selling drugs to persons under age twenty-one and to prohibit the suspending or deferring of sentence or the granting of probation to persons so convicted.

Florida Laws 1969, chapter 69-318 amends Florida Statutes chapter 398 (The Uniform Narcotic Drug Law) by adding a new section which makes it unlawful for any person to possess, control, sell, or deliver any devices or contrivances or paraphernalia with the intent to use them for unlawfully injecting, smoking, or using any narcotic. An identical act, Florida Laws 1969, chapter 69-270, amends Florida Statutes chapter 404 (Florida Drug Abuse Law) and applies to any drug controlled by chapter 404. Both acts become effective January 1, 1970.

Enforcement of the narcotics laws is facilitated by Florida Laws 1969, chapter 69-364, which declares any place in which narcotic drugs, hallucinogens, etc. are kept or sold to be a public nuisance. Another enforcement tool is Florida Laws 1969, chapter 69-18, which amends Florida Statutes section 933.18 to add the violation of drug abuse laws to the list of conditions for which a warrant may be issued for the search of a private dwelling.

Florida Laws 1969, chapter 69-146 strips the juvenile court of jurisdiction over a child of any age who is charged with a capital offense...
or an offense punishable by life imprisonment. In such cases, the child is to be tried as an adult. Another measure directed at juvenile offenders is Florida Laws 1969, chapter 69-113, which provides for the fingerprinting and photographing of every child taken into custody upon probable cause that he has committed a felony. Such records are to be kept in a confidential file and shall not be public records. If the child is found not to have committed a felony, then his file may be destroyed. The obvious purpose of these two statutes is to maintain the protection accorded juveniles who commit minor offenses, i.e., acts of delinquency, while enabling the police to build up data sources to aid in the apprehension and punishment of juveniles who commit serious crimes.

Florida Laws 1969, chapter 69-332 provides that an escape or attempted escape from any penal institution of the state or subdivision thereof shall be a felony punishable by imprisonment for not more than ten years, such sentence to run consecutive to the prisoner's former sentence.

Florida Laws 1969, chapter 69-25 amends Florida Statutes section 365.16 to include harassing, threatening and abusive phone calls as well as lewd and lascivious ones.

An important change in criminal procedure results from Florida Laws 1969, chapter 69-15, which amends Florida Statutes section 924.07 by adding subsection (7), which permits the state to appeal an order adjudicating a defendant insane under Florida Statutes chapter 917, and subsection (8), which permits the state to appeal "[a]ll other pre-trial orders . . . provided that the state shall pay all costs of such appeal, except for the defendant's attorney's fee."