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Criminal Law and Procedure

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CRIMINAL LAW AND PROCEDURE

THOMAS A. WILLS* AND ALBERT G. CARUANA**

I.	CRIMINAL PROCEDURE RULE 1.850	291
	A. <i>Matters Subject to Direct Appeal</i>	291
	B. <i>In-Custody Requirement</i>	292
	C. <i>Hearings on Motions Under Rule 1.850</i>	293
	D. <i>Successive Motions</i>	294
	E. <i>Appeal From Rule 1.850 Hearings</i>	294
II.	RIGHT TO COUNSEL	295
	A. <i>Adequacy of Representation</i>	295
	B. <i>Waiver</i>	297
	C. <i>Critical Stages</i>	298
	1. PRELIMINARY HEARING	298
	2. ARRAIGNMENT	299
	3. AFTER FORMAL CHARGE BUT BEFORE TRIAL— IDENTIFICATION OF DEFENDANT	299
	4. SENTENCING	300
	5. DIRECT APPEAL	301
	6. COLLATERAL ATTACK	302
	7. PROBATION AND PAROLE HEARINGS	302
	D. <i>Offenses Less Than Felonies</i>	303
III.	CONFESSIONS	303
	A. <i>Right to Counsel and Right to be Silent</i>	304
	B. <i>Illegal Detention-Interrogation</i>	306
	C. <i>Voluntary</i>	307
	D. <i>Use of Confession at Trial</i>	308
IV.	SEARCH AND SEIZURE	310
V.	CONSTITUTIONALITY OF STATUTES AND ORDINANCES	317
VI.	RIGHT TO CONFRONTATION—RIGHT TO CROSS-EXAMINATION	321
VII.	APPEAL	322
VIII.	BAIL	325
IX.	CHARGE TO THE JURY	325
X.	SENTENCE	329
XI.	METROPOLITAN COURT	332
XII.	FORMER JEOPARDY	333
XIII.	DEFENDANT'S RIGHT TO BE PRESENT	335
XIV.	PRELIMINARY HEARING	336
XV.	FAIR TRIAL	337
XVI.	GRAND JURY	341
XVII.	HABEAS CORPUS	341
XVIII.	IMMUNITY	342
XIX.	INDICTMENT AND INFORMATION	343
XX.	ARREST	345
XXI.	EVIDENCE	345

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XXII.	CONFIDENTIAL INFORMANTS	350
XXIII.	PLEA OF GUILTY	350
XXIV.	NOLO CONTENDERE	353
XXV.	SELF-INCRIMINATION	354
XXVI.	JURY TRIAL	355
	A. <i>The Right to Trial by Jury</i>	355
	B. <i>Jurors</i>	357
XXVII.	DISQUALIFICATION OF JUDGE	357
XXVIII.	SPEEDY TRIAL	358
XXIX.	STIPULATIONS AS TO LIE DETECTOR TESTS	361
XXX.	PROBATION	361
XXXI.	EXPUNGING OF ARREST RECORDS	362
XXXII.	CUSTODIAL TREATMENT	363
XXXIII.	SPECIFIC CRIMES AND DEFENSES	363
	A. <i>Crimes</i>	363
	1. ACCESSORY	363
	2. AGGRAVATED ASSAULT	363
	3. BURGLARY AND POSSESSION OF BURGLARY TOOLS	363
	4. CONTEMPT	364
	5. CONSPIRACY	365
	6. DRUNK DRIVING	365
	7. ESCAPE	366
	8. EXPLOSIVES	367
	9. FORGERY-BAD CHECKS	367
	10. LARCENY	368
	11. PERJURY	368
	12. HOMICIDE—FELONY—MURDER RULE	369
	13. NARCOTICS AND MARIJUANA	370
	14. OBSCENITY	372
	15. RECEIVING STOLEN PROPERTY	373
	B. <i>Defenses</i>	373
	1. ALIBI	373
	2. INSANITY	374
	3. ENTRAPMENT	375
	4. STATUTE OF LIMITATIONS	376
XXXIV.	RULES OF CRIMINAL PROCEDURE	377
	A. <i>Discovery</i>	377
	1. PRETRIAL DISCOVERY OF STATEMENTS MADE BY THE DEFENDANT ..	378
	2. PRETRIAL DISCOVERY OF STATEMENTS OF STATE WITNESSES	378
	3. DISCOVERY OF POLYGRAPH TEST RESULTS	379
	4. EXCHANGE OF WITNESS LISTS	379
	B. <i>Motion to Dismiss</i>	380
	C. <i>New Trial</i>	380
	D. <i>Severance</i>	381
	E. <i>Continuance</i>	381
XXXV.	LEGISLATION	382

This survey¹ is a continuation of previous articles² on the topic of Florida criminal law and procedure.

1. This survey covers cases reported in 222 So.2d through 247 So.2d and laws enacted by the 1970 and 1971 Regular and Special Sessions of the Florida Legislature.

2. Wills, *Criminal Law Survey*, 14 U. MIAMI L. REV. 521 (1960); Wills, *Criminal Law, 1959-1961 Survey of Florida Law*, 16 U. MIAMI L. REV. 225 (1961); Wills, *Criminal Law, 1961-1963 Survey of Florida Law*, 18 U. MIAMI L. REV. 381 (1963); Wills, *Criminal Law and Procedure, 1963-1965 Survey of Florida Law*, 20 U. MIAMI L. REV. 246 (1965); Wills, *Criminal Law and Procedure, 1965-1967 Survey of Florida Law*, 22 U. MIAMI L. REV. 240 (1967); Wills and Wisotsky, *Criminal Law and Procedure, 1967-1969 Survey of Florida Law*, 24 U. MIAMI L. REV. 215 (1970).

I. CRIMINAL PROCEDURE RULE 1.850³

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

A. *Matters Subject to Direct Appeal*

Because rule 1.850 was designed for collateral attack, it may not ordinarily be used as a substitute for appeal nor to review matters which could have been raised on direct appeal. Thus, rule 1.850 was used to review the following non-appealable matters: where one of the prosecuting attorneys was formerly employed by the prisoner's defense counsel,⁴ and where there was a failure to give the required statutory notice of charges to the parents of a minor child.⁵ On the other hand, the following matters could have been raised by appeal and thus were not subject to review by rule 1.850: the alleged failure of a judge to include a charge on lesser included offenses,⁶ contentions that the trial court erred in denying a motion for severance⁷ or in denying a motion for jail time credit,⁸ and where defendant's attorney was not notified and was not present at a pre-trial photographic identification.⁹

Complementing the rule that 1.850 may not be used as a substitute for appeal, the court in *State v. Biesendorfer*¹⁰ held that the correctness *vel non* of matters actually decided on direct appeal may not be the subject of further review under rule 1.850.

3. Subsequent to the period covered by this survey, the Supreme Court of Florida amended the Florida Rules of Criminal Procedure by substituting for the existing number system, which had a prefix of "1" followed by a decimal and additional numbers, a numbering system which has a prefix of "3" followed by a decimal and the numbers following the decimal remaining as they were. For example, rule 1.850 has been changed to rule 3.850. *In re* Florida Rules of Criminal Procedure, 253 So.2d 421 (Fla. 1971). For the purposes of this survey, however, the numbering system in effect during the biennium under review will be used.

4. *Jackson v. State*, 234 So.2d 708 (Fla. 3d Dist. 1970), *citing* *Young v. State*, 177 So.2d 345 (Fla. 2d Dist. 1965).

5. *Stewart v. Wainwright*, 225 So.2d 410 (Fla. 1969). FLA. STAT. § 932.38 (1969) requires that the parents of any unmarried minor be notified when the minor is charged with an offense.

6. *Moses v. State*, 242 So.2d 145 (Fla. 2d Dist. 1970); *Tafero v. State*, 242 So.2d 470 (Fla. 3d Dist. 1971).

7. *Nelson v. State*, 227 So.2d 533 (Fla. 3d Dist. 1969) (*distinguishing* *Reddick v. State*, 190 So.2d 340 (Fla. 2d Dist. 1966) which allowed the denial of a motion for severance to be raised under rule 1.850 because of the "exceptional" and "extraordinary situation" presented).

8. *Lowman v. State*, 242 So.2d 750, 751 (Fla. 2d Dist. 1971), wherein the court *ex mero motu* dismissed an appeal from an order denying jail time credit on the grounds that review of such an order was "impermissible under either F.S. 924.06 . . . or Cr. Pr. 1.850"

9. *Powell v. State*, 244 So.2d 746 (Fla. 1st Dist. 1971).

10. 244 So.2d 147 (Fla. 4th Dist. 1971), *cert. denied*, 247 So.2d 439 (Fla. 1971) (defendant appealed and appellate court affirmed verdict but remanded for resentencing; held, upon remand that defendant may not attack the verdict via rule 1.850).

The conflict¹¹ over whether rule 1.850 is a proper remedy for relief from the deprivation or frustration of direct appeal was addressed in *State v. Wooden*,¹² wherein the Supreme Court of Florida held that the proper way to raise the issue of deprivation of direct appeal is by habeas corpus, not by rule 1.850. Rule 1.850 is limited to review of errors "going to the validity of the judgment and sentence"¹³ and is not available to review matters pertaining to appellate procedure since the trial judge has no power to order the correction of any errors at the appellate level.¹⁴

The scope of the rule was also limited in *Hamilton v. State*,¹⁵ wherein it was held that postconviction relief based on newly discovered evidence was obtainable only through a petition for a writ of coram nobis and not through rule 1.850.

B. In-Custody Requirement

During the period surveyed liberal interpretation of the in-custody requirement of rule 1.850 has resulted in significant broadening of the scope of the rule. Relying on *Peyton v. Rowe*,¹⁶ the Supreme Court of Florida in *Lawson v. State*¹⁷ overruled its decision in *Fretwell v. Wainwright*¹⁸ and held that a prisoner serving consecutive sentences is "in custody" under *any* one of them for the purposes of rule 1.850. In *State v. Reynolds*¹⁹ the supreme court, overruling prior decisions of the district courts of appeal,²⁰ went on to add that a prisoner in the custody of a state *other than Florida* who seeks postconviction relief from a Florida judgment is "in custody" within the meaning of rule 1.850.²¹ Thus, a prisoner incarcerated in Georgia may seek postconviction relief from a

11. Compare *Flores v. State*, 240 So.2d 816 (Fla. 2d Dist. 1970) (which held that an allegation that a public defender promises to appeal but did not appeal would support a 1.850 hearing) with *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).

12. 246 So.2d 755 (Fla. 1971), *overruling* *Wooden v. State*, 236 So.2d 137 (Fla. 1st Dist. 1970).

13. *Id.* at 757. The court held that "a finding of frustration of direct appeal does not bring into question the validity of the judgment and sentence." *Id.*

14. *Id.* The fact that the purpose of rule 1.850 is to facilitate factual determinations does not necessarily render it a more appropriate remedy than habeas corpus since on petition for habeas corpus an appellate court may appoint a commissioner to make factual findings if that measure is found to be necessary. *Id.* at 756.

15. 237 So.2d 255 (Fla. 2d Dist. 1970).

16. 391 U.S. 54 (1968).

17. 231 So.2d 205 (Fla. 1970), *aff'g* *Lawson v. State*, 225 So.2d 581 (Fla. 3d Dist. 1969).

18. 185 So.2d 701 (Fla. 1966).

19. 238 So.2d 598 (Fla. 1970), *aff'g* Judge Mann's well-reasoned opinion in *Reynolds v. State*, 224 So.2d 769 (Fla. 2d Dist. 1969).

20. *Holstein v. State*, 205 So.2d 6 (Fla. 1st Dist. 1967); *Hill v. State*, 184 So.2d 457 (Fla. 3d Dist. 1966).

21. Whether such a prisoner will be brought before the Florida court to participate in the postconviction relief hearing, if one is deemed proper, is a matter of judicial discretion, tempered by the minimal requirements of due process. *State v. Reynolds*, 238 So.2d 598, 600 (Fla. 1970). See section I, C, *infra*.

Florida judgment under rule 1.850 even though he is not in custody under the sentence being attacked.²²

Formerly, rule 1.850 review of the first of consecutive sentences was denied if the sentence had already been served.²³ However, the rule that is now emerging is that

a prisoner is "in custody" for the purpose of applying for post-conviction relief from a judgment, the sentence for which has been satisfied, if the motion shows some relationship between the current confinement and the judgment to which the motion for relief is addressed such as would result in the prisoner's receiving credit in some degree on the current confinement.²⁴

Thus, under the *Rose* decision, a prisoner may, by rule 1.850, attack a sentence already served if relief from that judgment has "some relationship" to current confinement.

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 conclusively show that the prisoner is entitled to no relief." This language has been judicially interpreted to mean that if the motion is defective in form or substance and insufficient to state a prima facie case entitling the prisoner to relief, the court may deny a hearing; if the motion is sufficient but the files and records *conclusively* refute the allegations, the court may deny a hearing; if the motion reflects substance and "there is nothing conclusively in the record to the contrary" a hearing should be granted.²⁵

Rule 1.850 provides that the court may "determine such motion without requiring the production of the prisoner at the hearing." Thus, it is not error for a judge to deny a motion under rule 1.850 when a prisoner was not present but was represented by a public defender if there are no substantial issues of fact as to events in which the defendant participated or no other reasons which *require* the presence of the defendant.²⁶

22. *Lowe v. State*, 226 So.2d 430 (Fla. 2d Dist. 1969), *cert. denied*, 238 So.2d 601 (Fla. 1970) (defendant escaped from custody in Florida and incarcerated in Georgia on different charge).

23. *Barnett v. State*, 229 So.2d 890 (Fla. 2d Dist. 1970). However, Judge Mann, in his dissenting opinion, urged that:

To the extent that prior decisions of Florida courts purport to deny meaningful relief on grounds of excessively technical definitions of mootness inconsistent with present constitutional standards they ought to be overruled.

Id.

24. *Rose v. State*, 235 So.2d 353 (Fla. 3d Dist. 1970), *citing* *Cappetta v. Wainwright*, 406 F.2d 1238 (5th Cir. 1969); *State v. Reynolds*, 238 So.2d 598 (Fla. 1970); *Lawson v. State*, 231 So.2d 205 (Fla. 1970).

25. *State v. Reynolds*, 238 So.2d 598, 600 (Fla. 1970). *See also* *Lawson v. State*, 231 So.2d 205, 208 (Fla. 1970).

26. *Van Eaton v. State*, 226 So.2d 265 (Fla. 2d Dist. 1969), *citing* *King v. State*, 157 So.2d 440 (Fla. 2d Dist. 1963).

Similarly, a prisoner "in custody" in another state who files for post-conviction relief from a Florida judgment pursuant to rule 1.850 need not be brought to Florida for the hearing if there are no questions of fact within the personal knowledge of the prisoner to be resolved, the prisoner is represented by counsel, and his absence would not otherwise prejudice the petitioner.²⁷

Although the rule does not mention the quantum of proof necessary for realization of relief, it has been held that where a 1.850 petition raises the issue of innocence on the basis of a confession to the crime by a third party, the movant—who pleaded guilty and did not resist the state's case against him—must establish on collateral attack "at least some clear showing by competent substantial evidence" that there was a significant insufficiency in the state's evidence before a new trial is warranted.²⁸

D. Successive Motions

Rule 1.850 provides that a court "shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." However, if a change in the applicable law has occurred, the movant is not precluded from raising allegations which had been previously rejected in prior motions.²⁹ Further, if the petitioner alleges grounds for relief not previously relied upon ("new grounds") the court may entertain the motion.³⁰

E. Appeal From Rule 1.850 Hearings

An appeal from an adverse order under Rule 1.850 will be dismissed *sua sponte* as moot if, while the appeal is pending, the petitioner completes the sentence and is discharged from custody.³¹

The right to appeal from an adverse order entered in a 1.850 hearing applies to the state as well as to the defendant. If a defendant's conviction is vacated in a rule 1.850 hearing and a new trial is ordered, and the state appeals from that order, the defendant's application for bail pending the determination of the state's appeal may be denied.³²

Although the rule of *Anders v. California*³³ applies to direct appeals,

27. *State v. Reynolds*, 238 So.2d 598 (Fla. 1970) (dictum), citing *Bryant v. State*, 204 So.2d 9 (Fla. 3d Dist. 1967); *Ballard v. State*, 200 So.2d 597 (Fla. 3d Dist. 1967); *Dickens v. State*, 165 So.2d 811 (Fla. 2d Dist. 1964).

28. *State v. Pitts*, 241 So.2d 399, 414 (Fla. 1st Dist. 1970), *vacated on other grounds*, 247 So.2d 53 (Fla. 1971).

29. *Lawson v. State*, 231 So.2d 205 (Fla. 1970).

30. See generally *State v. Pitts*, 227 So.2d 880 (Fla. 1st Dist. 1969).

31. *Lee v. State*, 230 So.2d 478 (Fla. 4th Dist. 1970).

32. *State v. Pitts*, 227 So.2d 880 (Fla. 1st Dist. 1969). Rule 1.850 provides that the reviewing judge shall "vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial . . ." (Emphasis added).

33. 386 U.S. 738 (1967) which held that if counsel, after conscientious examination of his client's case, finds the appeal to be "wholly frivolous," he should so advise the court and request permission to withdraw; provided, however, that such a request must be accompanied by a brief referring to anything in the record that might support the appeal.

where a public defender filed an *Anders*-type brief stating there was no error in the denial or relief under 1.850, and the appellate court itself found no error in the record, the denial of relief was affirmed.³⁴

II. RIGHT TO COUNSEL

In *Gideon v. Wainwright*³⁵ the Supreme Court stated that "any person haled into court, who is *too poor* to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."

In Florida, the test for indigency is whether the defendant *personally* has the means, or property which can be converted to the means, to employ an attorney to represent him; the financial abilities of a defendant's relatives have no bearing on the question of the defendant's solvency.³⁶ Unless it appears that the defendant can obtain counsel with his own resources, the state is obliged to furnish counsel and attempt to collect later, if it can, for the cost of doing so.³⁷

A. Adequacy of Representation

The right to counsel implies the right to *adequate* representation. The question of adequacy of representation has often been raised in cases wherein one lawyer represents two indigent codefendants. The rule that has emerged is that representation by a single attorney of indigent codefendants is legally permissible (1) if there has been no request for separate counsel *and* the record reveals no prejudice has resulted from the failure to appoint a separate lawyer for each defendant; or (2) if there has been a request for separate counsel, but the state clearly demonstrates that prejudice would not result from the denial.³⁸ Thus, a defendant who did not request separate counsel prior to or during trial must establish that prejudice resulted from the failure to appoint separate counsel before relief will be granted on collateral attack.³⁹ On the other hand, a codefendant's request for separate counsel made *during* the trial should be honored by the trial judge unless the state can clearly demonstrate that there is no prejudice or conflict of interest in having the codefendants jointly represented by one public defender.⁴⁰ If a request for separate counsel has been made and the state

34. *Williams v. State*, 246 So.2d 791 (Fla. 2d Dist. 1971).

35. 372 U.S. 335, 344 (1963) (emphasis added).

36. *Sapio v. State*, 223 So.2d 759 (Fla. 3d Dist. 1969) (defendant earned \$75 per week; the trial court, in noting that the defendant's mother posted a \$3,000 bond for him, erroneously ruled that the defendant was not eligible for the services of the public defender).

37. *Bowen v. State*, 236 So.2d 16 (Fla. 2d Dist. 1970), *citing* FLA. STAT. § 27.56 (1967).

38. *Powell v. State*, 222 So.2d 464 (Fla. 2d Dist. 1969), *citing* *State v. Youngblood*, 217 So.2d 98 (Fla. 1968). *See also* *Jenkins v. State*, 228 So.2d 114 (Fla. 3d Dist. 1969), *citing* *Belton v. State*, 217 So.2d 97 (Fla. 1968). The rule established by these cases is not retroactive in application. *Keith v. State*, 222 So.2d 186 (Fla. 1969).

39. *Parker v. State*, 239 So.2d 121 (Fla. 2d Dist. 1970), *citing* *Dunbar v. State*, 220 So.2d 366 (Fla. 1969).

40. *Pearson v. State*, 223 So.2d 736 (Fla. 1969) (the court held, however, that the

has failed to demonstrate for the record that prejudice would not result from joint representation, the case should be remanded to the trial court for an evidentiary hearing on whether prejudice actually resulted from the denial of separate counsel.⁴¹

The question of adequate representation has been raised in other contexts. In *Berriel v. State*,⁴² the denial of a continuance in a case where the court-appointed attorney had only five days from time of appointment to prepare for trial was held not to be an abuse of discretion nor a denial of effective representation of counsel. In *Simmons v. Wainwright*,⁴³ the defendant, claiming that his public defender ignored requests for visits in the jail, requested that a private attorney be appointed. The request was refused and the defendant represented himself and was convicted. Defendant's subsequent petition for habeas corpus relief was denied on the ground that there was "no allegation of incompetence nor conflict of interest."⁴⁴ The court stated that although adequate representation is essential, representation will not be deemed inadequate unless it amounts to a "farce." The court stated further that:

The number of visits or consultations between a member of the public defender's office and a defendant is not a proper criteria for determining whether proper representation is being afforded.⁴⁵

It has been held that an attorney's failure to raise the defense of former jeopardy, thereby causing a waiver of that defense, does not result in the denial of adequate representation.⁴⁶ The rule that has emerged is that the test of ineffective assistance of counsel is not any specified aptitude test in point of professional skill nor whether the attorney committed common mistakes of judgment, strategy, trial tactics or policy, but

trial judge's refusal to grant separate counsel was not reversible error since the record established that no prejudice resulted from the joint representation of the codefendants).

41. *Beucher v. State*, 239 So.2d 122 (Fla. 2d Dist. 1970).

42. 233 So.2d 163 (Fla. 4th Dist. 1970).

43. 237 So.2d 5 (Fla. 1st Dist. 1970).

44. *Id.* at 6. Ironically, although relief was in part denied on the *technical* ground that there was "no allegation of incompetence nor conflict of interest" in the defendant's *pro se* petition, the court itself evidenced impatience with what it termed "technical" defenses:

[W]e are further of the strong opinion that these defendants, who don't even deny guilt, but allege only some technical violation of an imagined constitutional right, are not entitled to the right of selection of probably the best and highest paid, experienced criminal trial lawyer.

Id.

45. *Id.* Rather than establishing any objective criteria as to exactly what constitutes inadequate representation, the court offered the following nebulous subjective test:

The trial court is fully aware of the obligations of attorneys and *when it appears* that a public defender or a member of his staff are *failing to do their job* for an indigent defendant, then it is proper and necessary for the court to appoint other counsel.

Id. (emphasis added).

46. *Robinson v. State*, 239 So.2d 282 (Fla. 2d Dist. 1970).

whether it is such a substandard level of services that the trial becomes a mockery and farcical.⁴⁷

Notwithstanding the fact that the previous tradition in Dade County was to appoint private counsel in capital cases, it is not error for the public defender to represent defendants in capital cases.⁴⁸

Usually an accused may not raise the issue of the competency of his privately retained counsel.⁴⁹ Thus, where a conviction was based on a guilty plea entered pursuant to advice of privately employed counsel, and the court examined the defendant as to the nature and consequences of his guilty plea before accepting such plea, the conviction would not be set aside on the claim of incompetency of counsel.⁵⁰ However, one Florida case considered the competency of privately retained counsel. In *Humphries v. State*,⁵¹ subsequent to the defendant's conviction, his privately retained counsel was prohibited from practicing law by the Supreme Court because he was adjudged to be suffering from a mental disorder. Defendant thereupon filed for 1.850 relief on the grounds that at the time of his trial and conviction, his attorney was incompetent. The motion was denied without hearing and an appeal therefrom was affirmed on the ground that the record conclusively established that the attorney was competent at the time of the defendant's trial. Nonetheless, the court, by necessary implication, established that a movant may obtain postconviction review of incompetency due to mental disease of privately retained counsel.

B. *Waiver*

The constitutional right to the assistance of counsel may be voluntarily waived by the defendant.⁵² However, waiver may not be presumed from a silent record;⁵³ the defendant must knowingly, willfully and intelligently waive the right to counsel before a waiver will be deemed valid.⁵⁴ Thus, mere conversation at an arraignment wherein the defendant stated that he discussed a guilty plea with an attorney and also indicated that he did not need counsel at that time, does not constitute intelligent waiver of the right to be represented by an attorney at arraignment and sentencing.⁵⁵ Also, the fact that a defendant chooses to use his money for food

47. See *State v. Pitts*, 241 So.2d 399 (Fla. 1st Dist. 1970), *vacated on other grounds*, 247 So.2d 53 (Fla. 1971).

48. *Barker v. State*, 239 So.2d 278 (Fla. 2d Dist. 1970).

49. See, e.g., *Brown v. State*, 223 So.2d 337 (Fla. 3d Dist. 1969), *cert. denied*, 229 So.2d 866 (Fla. 1969), 397 U.S. 969 (1970).

50. *Belsky v. State*, 231 So.2d 256 (Fla. 3d Dist. 1970) (defendant attacked the competency of his lawyer on the ground that he had previously represented another individual when that individual had been questioned by the authorities concerning the very crime for which defendant had been convicted).

51. 232 So.2d 23 (Fla. 1st Dist. 1970), *cert. denied*, 237 So.2d 752 (Fla. 1970).

52. See, e.g., *Brumit v. State*, 220 So.2d 659 (Fla. 2d Dist. 1969), *appeal dismissed*, 225 So.2d 908 (Fla. 1969).

53. *Miller v. State*, 246 So.2d 169 (Fla. 3d Dist. 1971), *cert. denied*, 92 S. Ct. 340 (1971).

54. *Fassenmyer v. State*, 233 So.2d 642 (Fla. 2d Dist. 1970).

55. *Id.*

and rent with none left over for hiring counsel does not necessarily constitute a waiver of the right to counsel.⁵⁶

A defendant who seeks postconviction relief under rule 1.850 on the ground that he was denied the right to counsel at time of trial must allege that, at time of trial, he was insolvent and unable to procure counsel, or the motion will be fatally defective.⁵⁷

C. Critical Stages

The general rule operative in this area of the law is that the defendant is entitled to an attorney at all critical stages, but deprivation of the assistance of counsel at a non-critical stage is not reversible error unless there is a showing of special prejudice to the defendant.

1. PRELIMINARY HEARING

Florida courts continue to hold that the preliminary hearing is not a critical stage of the proceedings.

In *Harrison v. Wainwright*⁵⁸ it was held that the failure to appoint counsel at the preliminary hearing was not error notwithstanding the United State's Supreme Court decision in *Coleman v. Alabama*,⁵⁹ since "[t]he reasons advanced by the court in *Coleman* for invoking the resultant rule in Alabama [that defendant has the right to counsel at preliminary hearing] do not obtain under Florida law."⁶⁰ Moreover, even if *Coleman* were deemed applicable in Florida, the defendant must still establish that the absence of counsel at the preliminary hearing resulted in prejudicial error since the "harmless error" rule would apply.⁶¹ In *Brown v. State*⁶² it was held that the denial of counsel at a preliminary hearing was not reversible error since the hearing occurred *prior* to the Supreme Court's decision in *Coleman v. Alabama*.⁶³ This decision suggests, perhaps, that the question of whether *Coleman* is applicable in

56. *Bowen v. State*, 236 So.2d 16, 17 (Fla. 2d Dist. 1970) (defendant, who made \$63 per week and used same for food and rent, was erroneously told by the lower court judge "[i]f you prefer to spend your money on other matters, the court will deem that as a waiver of counsel.").

57. *Rose v. State*, 235 So.2d 353 (Fla. 3d Dist. 1970).

58. 243 So.2d 427 (Fla. 1st Dist. 1971).

59. 399 U.S. 1 (1970) [hereinafter cited as *Coleman*] (which held that in Alabama, a defendant is entitled to representation by counsel at the preliminary hearing). [Subsequent to the period covered by this survey, the Supreme Court of the United States in *Adams v. Illinois*, 92 S. Ct. 916, 917 (1972), reaffirmed that "a preliminary hearing is a critical stage of the criminal process at which the accused is constitutionally entitled to the assistance of counsel." In *Adams* the Court held that *Coleman v. Alabama* is not retroactive].

60. *Harrison v. Wainwright*, 243 So.2d 427, 428 (Fla. 1st Dist. 1971). See also *State ex rel. Williams v. Purdy*, 242 So.2d 498 (Fla. 3d Dist. 1971), *appeal dismissed*, 248 So.2d 171 (Fla. 1971).

61. *Miller v. State*, 246 So.2d 169 (Fla. 3d Dist. 1971), *cert. denied*, 92 S. Ct. 340 (1971).

62. 246 So.2d 151 (Fla. 3d Dist. 1971).

63. 399 U.S. 1 (1970).

Florida is not as settled as the decision in *Harrison v. Wainwright*⁶⁴ represents.

2. ARRAIGNMENT

Being deprived of counsel at the arraignment, without any showing of prejudice therefrom, is not a valid ground for reversal.⁶⁵ Thus, where a defendant plead not guilty at arraignment and was later represented by counsel at trial, it was not reversible error to deny counsel at the arraignment since no prejudice resulted therefrom.⁶⁶

In *Baker v. Wainwright*⁶⁷ the defendant, who was not represented by counsel at the arraignment, plead not guilty and waived his right to trial by jury. At trial, the defendant was represented by court-appointed counsel who made no motion to withdraw the waiver of jury, but proceeded to try the case. The court, although stating that "[t]he arraignment was a critical stage in the felony prosecution,"⁶⁸ held that the deprivation of the right to counsel (which was held not to have been waived by the defendant) at the arraignment was harmless error. The court based its finding of harmless error on the fact that the subsequently appointed counsel did not request leave to withdraw the defendant's waiver of jury trial and thus served as "counsel-advised affirmation of the [defendant's] prior action."⁶⁹ Thus, the court, which found the arraignment to be a critical stage, held that the deprivation of counsel was harmless error and suggested that the lack of counsel at a *critical* stage is subject to the harmless error rule.

3. AFTER FORMAL CHARGE BUT BEFORE TRIAL— IDENTIFICATION OF DEFENDANT

Although the rule established in *United States v. Wade*⁷⁰ (that the line-up is a critical stage of the proceedings to which the right of counsel attaches) has been followed in Florida, the Florida courts are reluctant to extend the rule beyond postindictment line-up identifications.⁷¹ Thus,

64. See note 58 *supra* and accompanying text.

65. *Barnett v. State*, 222 So.2d 30 (Fla. 2d Dist. 1969).

66. *Id.*

67. 245 So.2d 289 (Fla. 4th Dist. 1971).

68. *Id.* at 290, *citing* *Sardinia v. State*, 168 So.2d 674 (Fla. 1964) which, contrary to the implication of the instant decision, holds that there is a right to counsel at arraignment only if special circumstances make the arraignment a critical stage. See also *Machwart v. State*, 222 So.2d 38, 40 (Fla. 2d Dist. 1969) which states that

[i]n Florida an arraignment is a 'critical stage' of a criminal proceeding, and the accused is entitled to have an attorney with him unless he intelligently waives that right.

Machwart also cites *Sardinia v. State*, *supra*.

69. *Baker v. Wainwright*, 245 So.2d 289, 290 (Fla. 4th Dist. 1971).

70. 388 U.S. 218 (1967).

71. *Perkins v. State*, 228 So.2d 382 (Fla. 1969) (absence of defendant's counsel at pre-indictment photographic identification, and custodial identification of the accused by viewing him through a window in the jail where he was confined held not to be reversible

where a robbery victim was shown photographs of potential suspects from which he identified the defendant, the fact that defendant's counsel was not present at the photographic identification was held not violative of the defendant's rights,⁷² and an in-court identification which was based on a prior photographic identification was admissible.⁷³ The rule that has emerged is that a display of photographs for identification purposes is not violative of due process even though defendant's counsel was not present at the identification, unless there is a demonstration that the circumstances under which the display was made were unfair or untrustworthy.⁷⁴ Evidently, a pretrial identification by photograph will be set aside only if the photographic identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."⁷⁵

The safeguards which *Wade* prescribes for line-up identification have been held not to apply to a pre-indictment custodial identification of an accused occasioned by viewing him through a window in the jail where he was confined,⁷⁶ or to a field identification of defendant which occurs shortly after the alleged crime.⁷⁷ An in-court identification which is based on what the witness saw at the scene of the offense is admissible, even though there may have been a subsequent line-up at which counsel was not present.⁷⁸

The rule established in *United States v. Wade* is prospective only⁷⁹ as of June 12, 1967, the date of decision. Thus, a line-up identification made in November 1966 is not affected by *Wade*, notwithstanding the fact that the trial at which the evidence was introduced occurred in December 1967, six months after the *Wade* decision.⁸⁰

4. SENTENCING

Sentencing is a critical stage of the criminal process; thus, the right to counsel at sentencing is a constitutional right. Therefore, to be valid, a waiver must be voluntarily, knowingly, and intelligently made.⁸¹ Accordingly, where both revocation of probation and sentencing occur in

error). For a recent case *contra*, see *United States v. Ash*, 40 U.S.L.W. 2568 (D.C. Cir. filed March 1, 1972), *citing* *United States v. Zeiler*, 427 F.2d 1305 (3d Cir. 1970).

72. *Jenkins v. State*, 228 So.2d 114 (Fla. 3d Dist. 1969), *citing* *Simmons v. United States*, 390 U.S. 377 (1968) (finding any error to be harmless).

73. *Wilson v. State*, 235 So.2d 10 (Fla. 3d Dist. 1970); *Marshall v. State*, 238 So.2d 445 (Fla. 1st Dist. 1970).

74. *Tafero v. State*, 223 So.2d 564 (Fla. 3d Dist. 1969).

75. *Id.* at 567, *quoting from* *Simmons v. United States*, 390 U.S. 377, 384 (1968).

76. *Perkins v. State*, 228 So.2d 382 (Fla. 1969).

77. *Robinson v. State*, 237 So.2d 268 (Fla. 4th Dist. 1970).

78. *Aiuppa v. State*, 228 So.2d 615 (Fla. 2d Dist. 1969).

79. *Paige v. State*, 227 So.2d 727 (Fla. 2d Dist. 1969), *citing* *Stovall v. Denno*, 388 U.S. 293 (1967).

80. *Lamb v. State*, 223 So.2d 772 (Fla. 4th Dist. 1969).

81. *Machwart v. State*, 222 So.2d 38 (Fla. 2d Dist. 1969) (counsel not intelligently waived).

the same proceeding, both the sentence imposed and the order revoking probation are void if the defendant was not afforded the opportunity to be represented by counsel.⁸²

5. DIRECT APPEAL

Direct appeal is a critical stage of criminal proceedings.⁸³ While it is not *constitutionally* necessary that the trial judge initiate action toward the appointment of appellate counsel by advising a convicted person of his rights or by making inquiry as to his indigency,⁸⁴ Florida Rule of Criminal Procedure 1.670 provides in pertinent part that

[w]hen a judge renders a final judgment of conviction, imposes a sentence, grants probation or revokes probation, he shall forthwith inform the defendant concerning his rights of appeal therefrom, including the time allowed by law for taking an appeal.

Since the purpose of the rule is to give the defendant *notice* of his right to appeal, the failure of a trial judge to advise a defendant of his right to appeal is not a frustration of the right to appeal, *if* the defendant was not "completely ignorant of the existence of the appellate process."⁸⁵ If the defendant proves that he "did not know of the appellate process" then the failure of the trial judge to comply with rule 1.670 will entitle the defendant to a full appellate review by habeas corpus.⁸⁶ Similarly, the failure of court-appointed counsel to advise the defendant of the right to appeal does not constitute incompetency on the part of counsel sufficient to constitute a denial of fundamental due process.⁸⁷

If the record shows that the defendant was advised of his right of appeal on the day of sentencing, and if his failure to appeal was not due to any action by the state, a habeas corpus petition for release based on the failure to be so advised will be dismissed.⁸⁸ However, if the petitioner establishes that he was not at any time informed by the trial court that he had the right to appeal the judgment and sentence entered against him, and that he did not discover the existence of appellate machinery until well beyond the time permitted for direct appeal, a *prima facie* case for habeas corpus relief is shown.⁸⁹

82. *Id.*

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

84. *Nichols v. Wainwright*, 243 So.2d 430 (Fla. 2d Dist. 1971), *citing* *Baggett v. Wainwright*, 229 So.2d 239 (Fla. 1969). See also *Baggett v. Wainwright*, 235 So.2d 486 (Fla. 1970).

85. *Nichols v. Wainwright*, 243 So.2d 430, 431 (Fla. 2d Dist. 1971) which held, rather remarkably, that since the defendant expressed a *desire* to appeal he must have *known* that he had a right to appeal. *Contra*, *Baker v. State*, 224 So.2d 331 (Fla. 1st Dist. 1969). See note 89 *infra*.

86. *Nichols v. Wainwright*, 243 So.2d 430, 432 (Fla. 2d Dist. 1971).

87. *Id.*

88. *Myrick v. Wainwright*, 243 So.2d 179 (Fla. 2d Dist. 1971).

89. *Robinson v. Wainwright*, 245 So.2d 867 (Fla. 1971). In *Robinson*, the supreme

The policy of some of the Florida courts is that if an attorney wishes to withdraw as counsel at the appellate level only because he sees no merit in the appeal, the motion will be denied.⁹⁰

Where an indigent defendant appeals he is entitled to have the state furnish a transcript of record. If he seeks postconviction relief under rule 1.850 he is entitled to have the state furnish a transcript of that portion of the trial proceeding to which the motion is directed. However, an accused who does not appeal from his judgment of conviction and who does not move to vacate, set aside or correct his sentence is not entitled to be supplied with a transcript of the trial proceeding even though he may be an indigent.⁹¹

6. COLLATERAL ATTACK

There is no absolute right to counsel on a motion for postconviction relief under rule 1.850, but when the assistance of counsel is essential to a competent presentation of the motion, counsel should be appointed for an indigent.⁹²

7. PROBATION AND PAROL HEARINGS

Under the rule of *Mempa v. Rhay*,⁹³ a hearing to determine whether probation should be revoked and the defendant sentenced is considered a critical stage.

However, a probation supervisor is not required to advise the probationer of his rights to counsel and to remain silent before asking probationer about alleged violations of his probation.⁹⁴

court expressly refused to settle the conflict between *Nichols v. Wainwright*, 243 So.2d 430 (Fla. 2d Dist. 1971) and *Baker v. State*, 224 So.2d 331 (Fla. 1st Dist. 1969) as to whether the trial court's failure to advise a defendant of his right to appeal under rule 1.670 is *ipso facto* reversible error. See note 85 *supra* and accompanying text.

90. *Schuler v. State*, 229 So.2d 667 (Fla. 1st Dist. 1969). The reason is to assure that the federal court will "have a record replete with all the constitutional safeguards . . ." *Id.*

91. *Cassoday v. State*, 237 So.2d 146 (Fla. 1970).

92. See *Wills and Witsosky, Criminal Law and Procedure, 1967-1969 Survey of Florida Law*, 24 U. MIAMI L. REV. 215, 224 (1970). See also *Harper v. State*, 201 So.2d 65 (Fla. 1967).

93. 389 U.S. 128 (1967), followed by *Gargan v. State*, 217 So.2d 578 (Fla. 4th Dist. 1969).

94. *Clark v. State*, 222 So.2d 766 (Fla. 2d Dist. 1969). In the author's opinion, this decision cannot be reconciled with the language of the United States Supreme Court in *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964):

We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system. (footnotes omitted).

D. Offenses Less Than Felonies

In *State ex rel. Argersinger v. Hamlin*,⁹⁵ the Supreme Court of Florida, receding somewhat from its former position in *Fish v. State*,⁹⁶ held that an indigent defendant is entitled to court-appointed counsel when the offense carries a possible penalty of more than six months imprisonment.⁹⁷ The court extended this right rather reluctantly,⁹⁸ stating that it was satisfied with the rule of *Fish v. State*,⁹⁹ but was caught on "the horns of a dilemma" in that indigent state misdemeanants were obtaining relief by federal habeas corpus.¹⁰⁰ Thus, to avoid the specter of state misdemeanants obtaining instant relief by federal habeas corpus, the Supreme Court of Florida adopted the rule announced in *Brinson v. Florida*,¹⁰¹ that indigent misdemeanants are entitled to court-appointed counsel when the offense carries a possible penalty of more than six months imprisonment.

In *Boyer v. Orlando*,¹⁰² the Supreme Court, relying on *Argersinger*, refused to extend the right to counsel to a misdemeanant who was sentenced on each of two charges to sixty days.¹⁰³

III. CONFESSIONS

Florida courts continue to resist the principles of *Miranda v. Arizona*¹⁰⁴ by admitting, except in cases of flagrantly illegal police con-

95. 236 So.2d 442 (Fla. 1970), cert. granted, 401 U.S. 908 (1971) [After this article had gone to press, the Supreme Court of the United States held that all indigent including misdemeanants are entitled to counsel. *Argersinger v. Hamlin*, 92 S. Ct. 2006 (1972), rev'g 236 So.2d 442 (Fla. 1970)].

96. 159 So.2d 866 (Fla. 1964).

97. The six month rule was patterned after the rule established in *Duncan v. Louisiana*, 391 U.S. 145 (1968) which held that the right to jury trial extends only to trials of serious offenses punishable by more than six months imprisonment. *State ex rel. Argersinger v. Hamlin*, 236 So.2d 442, 443 (Fla. 1970). But see note 103 *infra*.

98. The *Argersinger* court pointed out that the United States Supreme Court has denied certiorari in three cases involving a denial of counsel in misdemeanor cases. 236 So.2d at 443.

99. *Id.* *Fish v. State*, 159 So.2d 866 (Fla. 1964) held that the right to counsel does not extend to indigent defendants charged with misdemeanors.

100. See, e.g., *McDonald v. Moore*, 353 F.2d 106 (5th Cir. 1965) (6 months and \$250); *Harvey v. Mississippi*, 340 F.2d 263 (5th Cir. 1965) (90 days or \$500). For a good discussion of the conflict between the Florida and federal courts in this regard, see Comment, *Will the Trumpet of Gideon Be Heard in All the Halls of Justice?*, 25 U. MIAMI L. REV. 450 (1971).

101. 273 F. Supp. 840 (S.D. Fla. 1967).

102. 238 So.2d 84 (Fla. 1970). See Judge Adkins well-reasoned dissent at 238 So.2d 84, 85, citing *Bohr v. Purdy*, 412 F.2d 321 (5th Cir. 1969); *James v. Headley*, 410 F.2d 325 (5th Cir. 1969).

103. Subsequent to *Brinson* and *Argersinger* the Fifth Circuit in *Alvis v. Kimbrough*, 446 F.2d 548 (5th Cir. 1971) held that the sixth and fourteenth amendment right to counsel applies to state misdemeanants if the crime carries a possible penalty as great as 90 days' imprisonment or a fine of \$500, regardless of the sentence actually imposed.

104. 384 U.S. 436 (1966). The gist of the holding in *Miranda* is that:

Prior to any questioning [during custodial interrogation] the person must be

duct,¹⁰⁵ confessions obtained in contravention of *Miranda* which are otherwise voluntary.¹⁰⁶

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

The principles of *Miranda v. Arizona*¹⁰⁷ and *Escobedo v. Illinois*¹⁰⁸ were applied in *State v. Alford*¹⁰⁹ to invalidate a confession obtained from a defendant who was not advised of his right to counsel or to remain silent and who was denied access to his available attorney while being held incommunicado for 27 hours during which time he was asked to strip naked in front of police officers. On the other hand, the principles of *Miranda* were held not to apply to invalidate a "voluntary" confession which was obtained from an accused who was in custody and who had not been advised of his constitutional rights, on the theory that the confession was not made in response to an interrogation.¹¹⁰ Moreover, while statements made in response to an interrogation which was not preceded by *Miranda* warnings are themselves inadmissible, the fact that the victim was able to make a voice identification of the defendant by listening to those inadmissible statements is admissible.¹¹¹

Since the constitutional rights enunciated by *Miranda* do not attach until there is custodial interrogation of the defendant by the police,¹¹² it has been held that a defendant's response to a police officer's on the scene inquiry of "how did it happen" is admissible.¹¹³ Similarly, where police upon arriving at the scene of a homicide, asked the defendant where the gun was and how did it happen, defendant's responses were held admis-

warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.

Id. at 444-45.

105. See note 109 *infra* and accompanying text.

106. See note 110 *infra* and accompanying text.

107. 384 U.S. 436 (1966). See note 104 *supra*.

108. 378 U.S. 478 (1964) which held that the right to counsel applies at the police station when an investigation ceases to be general in nature and begins to "focus in" on the defendant. Although it is still a viable case, *Escobedo* has largely been superseded by and incorporated into *Miranda*.

109. 225 So.2d 582 (Fla. 2d Dist. 1969).

110. Putman v. State, 227 So.2d 60 (Fla. 2d Dist. 1969), *cert. denied*, 237 So.2d 178 (Fla. 1970). See also Brown v. State, 222 So.2d 793 (Fla. 1st Dist. 1969).

111. Howard v. State, 230 So.2d 1 (Fla. 1969).

112. See James v. State, 223 So.2d 52 (Fla. 4th Dist. 1969) (pre-arrest statements made before defendant was taken into custody held admissible).

113. State v. Barnes, 245 So.2d 108 (Fla. 3d Dist. 1971), *cert. denied*, 248 So.2d 170 (Fla. 1971). The court held that the officer's question "who stabbed him" was equivalent of asking "what happened" or "how did it happen," which is acceptable as being within the range of "on-the-scene questioning as to facts surrounding a crime." *Id.* at 109.

sible notwithstanding the fact that *Miranda* warnings were not given until later.¹¹⁴

Florida courts have held that *Miranda* does not apply to all forms of interrogation. For example, in *Clark v. State*,¹¹⁵ it was held that a probation officer need not give *Miranda* warnings prior to asking a parolee about an alleged violation of probation, even though the information so obtained is used against the defendant at a revocation hearing. Also, where one freely waives immunity and appears before a grand jury, the responses to questions asked are admissible despite the fact that the witness was not warned of his right to remain silent and to have assistance of counsel.¹¹⁶

The fact that an otherwise "voluntary" confession was induced by deception practiced by police officers, or that the confession was induced by suggestions of leniency or reduction in penalty does not render the confession inadmissible.¹¹⁷

In *Dixon v. State*,¹¹⁸ it was held that an instruction to the jury that a person in unexplained possession of recently stolen property permits an inference of guilt of stealing does not amount to an impermissible comment on the defendant's failure to take the stand and is not proscribed by *Miranda* or the fifth amendment.

In those instances where *Miranda* does apply, the question of the adequacy of the warnings has often arisen. In *Irvin v. State*,¹¹⁹ it was held that advising the defendant that if he could not afford to retain his own attorney one would be appointed for him was an adequate warning, notwithstanding the omission of the statement that the counsel would be appointed "at state expense."

The *Miranda* decision does not require the interrogator to give legal advice (*i.e.*, recommend to the defendant that he should have a lawyer), but only that the defendant be told of his right to obtain legal advice.¹²⁰ It has been held that when the question of whether the warnings were in fact given is in issue, the law does not give greater credence to defendant's statement denying the warning than it does to the police officer's contradictory statement that the warnings were given.¹²¹ However, where

114. *Hill v. State*, 223 So.2d 548 (Fla. 2d Dist. 1969). The court held there was an unexpressed waiver of *Miranda* warnings. See note 141 *infra* and accompanying text.

115. 222 So.2d 767 (Fla. 2d Dist. 1969).

116. *State v. Chadroff*, 234 So.2d 412 (Fla. 3d Dist. 1970).

117. See generally *Paramore v. State*, 229 So.2d 855 (Fla. 1969).

118. 227 So.2d 740 (Fla. 4th Dist. 1969), *cert. denied*, 237 So.2d 179 (Fla. 1970), citing *State v. Young*, 217 So.2d 567 (Fla. 1968), *cert. denied*, 396 U.S. 853 (1969). In *State v. Young*, the supreme court reversed *Young v. State*, 203 So.2d 650 (Fla. 4th Dist. 1967) wherein the District Court of Appeal, Fourth District, held that such an instruction conflicted with *Miranda v. Arizona*.

119. 246 So.2d 592 (Fla. 4th Dist. 1971), *cert. denied*, 251 So.2d 878 (Fla. 1971).

120. *State v. Craig*, 237 So.2d 737 (Fla. 1970), *rev'g Craig v. State*, 216 So.2d 19 (Fla. 4th Dist. 1968).

121. *Simmons v. State*, 227 So.2d 84 (Fla. 2d Dist. 1969).

Miranda warnings are given informally and without being preserved in the record, the state runs the risk that its officers will be disbelieved; thus, the state's burden of proof in establishing that the warnings were adequately given and/or intelligently waived is by *clear and convincing evidence*.¹²² Accordingly, where the police officer who allegedly advised an accused of his constitutional rights did not take the stand and the "Miranda Card" from which the rights were allegedly read was not entered into evidence, the burden of showing that the accused was advised of his rights prior to interrogation was not met and the confession was inadmissible, notwithstanding the fact that another police officer testified to overhearing the interrogating officer advise the accused of his rights.¹²³

B. *Illegal Detention-Interrogation*

Statements made by a defendant after an illegal arrest are inadmissible under the "fruits of the poisonous tree" doctrine.¹²⁴

The rule of *State v. Outten*¹²⁵ that a second or subsequent confession is admissible unless it can be shown that it was tainted by the coercive influences exerted in obtaining a previous confession, was followed in *Rhome v. State*.¹²⁶

In *Rivera Nunez v. State*,¹²⁷ it was held that an accused in custody, who wished to remain silent and requested an attorney, thereby stopping the interrogation, may, 30 hours later, *wave* his right to counsel and right to remain silent and thereafter make statements without the presence of counsel which can be later used against him.

Although the Supreme Court of Florida has heretofore refused to apply the *McNabb-Mallory* rule in Florida,¹²⁸ the court in *Perkins v. State*¹²⁹ has intimated that a change may be forthcoming. In *Perkins* the

122. *State v. Graham*, 240 So.2d 486 (Fla. 2d Dist. 1970). The clear and convincing evidence standard is less demanding than the exclusion of every reasonable doubt and requires more than a preponderance. *Id.* at 490-91. See also *Perkins v. State*, 228 So.2d 382, 390-91 (Fla. 1969).

123. *Long v. State*, 231 So.2d 33 (Fla. 3d Dist. 1970).

124. *Betancourt v. State*, 224 So.2d 378 (Fla. 3d Dist. 1969). (There was no probable cause for arrest, thus, incriminating statements made by the defendant subsequent to arrest pertaining to whereabouts of marijuana were inadmissible.)

125. 206 So.2d 392 (Fla. 1968).

126. 222 So.2d 431 (Fla. 3d Dist. 1969) (first officer without giving *Miranda* warnings promised the defendant it would work in his favor if he cooperated; subsequent interrogation by second police officer, who gave warnings and did not know of other's promise, was held admissible on the theory that the taint from the first interrogation had dissipated).

To have this contaminating effect, the first confession must be the product of an overbearing physical or mental pressure. Even then, a second confession will be admissible if it can be clearly demonstrated that the coercive pressures have terminated and freedom of will has been restored.

Id. at 433, quoting *State v. Outten*, 206 So.2d 392 (Fla. 1968).

127. 227 So.2d 324 (Fla. 4th Dist. 1969).

128. In this regard see Wills, *Criminal Law and Procedure, 1965-1967 Survey of Florida Law*, 22 U. MIAMI L. REV. 240, 252 (1967). See also *Dawson v. State*, 139 So.2d 408 (Fla. 1962). But see note 131 *infra*.

129. 228 So.2d 382 (Fla. 1969).

court reasoned that strict compliance with Florida Statutes section 901.23 (1969) (which requires that persons arrested without a warrant be taken "without unnecessary delay" before a magistrate) would help insure that the proper safeguards and warnings will be afforded an accused who is subject to custodial interrogation. Thus, the time has arrived to "reexamine these procedures and study their full measured implications and importance to our judicial system."¹³⁰ Since the defendant in *Perkins* did not raise the issue the court could not rule on it, but it nonetheless extended an invitation to hear the issue "in an appropriate proceeding."¹³¹

C. Voluntary

When the state desires to introduce a confession into evidence it has the burden of making a prima facie showing that the confession was the voluntary act of the defendant.¹³² If the state establishes a prima facie case of voluntariness, the burden is then cast on the defendant to show it was in fact not a voluntary confession.¹³³ The determination of voluntariness must be based upon facts rather than opinions of witnesses which simply express a conclusion that a given confession was voluntarily made.¹³⁴ Thus, a police officer's opinions as to the defendant's physical or mental condition is not sufficient to establish a prima facie case.¹³⁵ Moreover, the defendant has the right to have the question of the voluntariness of the confession determined by the judge in the absence of the jury.¹³⁶ However, it is not reversible error if the trial judge determines voluntariness in the presence of the jury and defense counsel makes no objection to such procedure.¹³⁷ This is true even though the defendant represented himself.¹³⁸

If it is established that at the time of making the confession the accused was insane, the confession is inadmissible.¹³⁹ The test is whether the defendant would be competent as a witness, and whether he is capable of understanding the meaning and effect of his confession.¹⁴⁰

130. *Perkins v. State*, 228 So.2d 382, 391 (Fla. 1969).

131. *Id.* at 391.

Subsequent to the period covered by this survey, the Supreme Court of Florida held that the "rationale" of the McNabb-Mallory rule was applicable in Florida. *Oliver v. State*, 250 So.2d 888 (Fla. 1971).

132. *Dodd v. State*, 232 So.2d 235 (Fla. 4th Dist. 1970), *cert. discharged*, 241 So.2d 384 (Fla. 1970).

133. *Brown v. State*, 245 So.2d 68 (Fla. 1971).

134. *Dodd v. State*, 232 So.2d 235 (Fla. 4th Dist. 1970).

135. *Id.*

136. *Allen v. State*, 239 So.2d 33 (Fla. 1st Dist. 1970), *citing* *Jackson v. Denno*, 378 U.S. 368 (1964). *See also* *State v. Prosser*, 235 So.2d 740 (Fla. 1st Dist. 1970), *cert. dismissed*, 243 So.2d 419 (Fla. 1971).

137. *Coleman v. State*, 245 So.2d 642 (Fla. 1st Dist. 1971).

138. *Id.* (defendant discharged his appointed counsel and represented himself; he failed to request a hearing on voluntariness in absence of jury, as was done in *Allen v. State*, note 136 *supra*).

139. *Brown v. State*, 245 So.2d 68 (Fla. 1971).

140. *Id.*

A defendant who has been advised of his right to counsel and right to remain silent may intelligently waive those rights and thereafter make a "voluntary" confession. The waiver need not be an *expressed* affirmative response.¹⁴¹ Thus, where a defendant who has been read the *Miranda* warnings indicated that she had an attorney but would talk then and discuss it with her attorney later, the interrogator was not bound to end the interrogation since a waiver was deemed to have occurred.¹⁴² On the other hand, in *State v. Prosser*,¹⁴³ it was held that where a defendant, when asked by police whether he wanted counsel, gave an ambiguous answer which could be interpreted as a request for representation, the trial court's determination that the interrogation should have ceased was deemed correct.

D. Use of Confession at Trial

The Supreme Court of Florida has taken the position that voluntary statements which are inadmissible in the state's case-in-chief because *Miranda* warnings have not been given may not be used at trial for purposes of impeaching a defendant who testifies in his own behalf.¹⁴⁴ The United States Supreme Court, in *Harris v. New York*,¹⁴⁵ has recently held otherwise, however, and thus the question may arise as to whether the Florida court will continue to follow its former position.¹⁴⁶

The use of a confession which implicates a codefendant at a joint trial continues to be the subject of litigation. The rule announced in *Bruton v. United States*,¹⁴⁷ that codefendants are entitled to a severance when the prosecution uses the confession of a non-testifying codefendant which also implicates the non-confessors, is applicable in Florida.¹⁴⁸ The rule of *Bruton* is retroactive.¹⁴⁹ The Florida district courts of appeal have

141. *Thompson v. State*, 235 So.2d 354 (Fla. 3d Dist. 1970), *appeal dismissed*, 239 So.2d 828 (Fla. 1970). *See also* *Hill v. State*, 223 So.2d 548 (Fla. 2d Dist. 1969), discussed at note 114 *supra* and accompanying text.

142. *Thompson v. State*, 235 So.2d 354 (Fla. 3d Dist. 1970).

143. 235 So.2d 740 (Fla. 1st Dist. 1970), *cert. dismissed*, 243 So.2d 419 (Fla. 1971).

144. *See, e.g.*, *State v. Galasso*, 217 So.2d 326 (Fla. 1968). *See also* *Young v. State*, 234 So.2d 341 (Fla. 1970).

145. 401 U.S. 422 (1971), *noted in* 25 U. MIAMI L. REV. 531 (1971). In *Harris* the court held that statements otherwise trustworthy but which are inadmissible in the state's case-in-chief because of the failure to advise the defendant of his right to counsel and to remain silent are admissible for the purposes of impeaching the defendant should he take the stand in his own behalf.

146. In the opinion of the authors, the position announced in *State v. Galasso* and *Young v. State*, note 144 *supra*, is the better view and should continue to be followed in Florida.

147. 391 U.S. 123 (1968). The theory of *Bruton* is that if a codefendant does not testify, his confession adds weight to the case against the defendant in a form not subject to cross-examination thereby violating the sixth amendment right to confrontation. *See* section VI *infra*. *See also* note 151 *infra* and accompanying text.

148. *Jones v. State*, 223 So.2d 790 (Fla. 3d Dist. 1969). *See also* *Sturgis v. State*, 233 So.2d 166 (Fla. 4th Dist. 1970), *cert. denied*, 238 So.2d 109 (Fla. 1970).

149. *Roberts v. Russell*, 392 U.S. 293 (1968). *See also* *Jones v. State*, 223 So.2d 790 (Fla. 3d Dist. 1969).

held that a court's instruction to the jury that a codefendant's statement can only be considered against the defendant making the statement does not vitiate the constitutional error in a *Bruton* type situation.¹⁵⁰ However, the Supreme Court of Florida has held that if the evidence of guilt is otherwise "overwhelming," the admission of a codefendant's testimony at a joint trial is considered "harmless error."¹⁵¹ Thus, the use of confessions of a non-testifying codefendant does not require reversal where the evidence supplied through such confession was merely cumulative and the other evidence against the defendant was so overwhelming that the court could conclude *beyond a reasonable doubt* that the violation of the defendant's constitutional rights constituted harmless error.¹⁵² Applying this rule in *State v. Stubbs*,¹⁵³ the Supreme Court of Florida, despite a well reasoned dissent by Chief Justice Ervin,¹⁵⁴ held that where a defendant's confession was voluntarily given before his codefendant confessed, and the confessions were substantially alike, and the trial judge instructed the jury that admission of the codefendant's confession at the joint trial was only to be used against the individual codefendant, there was sufficient independent proof of guilt so that "the risk of 'prejudicial spill-over' incrimination without cross-examination is reduced to an insignificant level."¹⁵⁵

It is incumbent upon the state to prove the corpus delicti in every case, and in so doing it must rely on proof other than the confession of the defendant.¹⁵⁶ Thus, where there is no evidence that the defendant was driving except his confession, it is error to admit the defendant's confession since there is no other proof of the corpus delicti.¹⁵⁷ However, if a confession is admitted before the corpus delicti is established and the

150. *Garcia v. State*, 226 So.2d 17 (Fla. 3d Dist. 1969); *Stubbs v. State*, 222 So.2d 228 (Fla. 4th Dist. 1969).

151. *State v. Garcia*, 240 So.2d 633 (Fla. 1970); *State v. Stubbs*, 239 So.2d 241 (Fla. 1970). See also *Jones v. State*, 227 So.2d 326 (Fla. 4th Dist. 1969), cert. dismissed, 237 So.2d 533 (Fla. 1970), citing *Harrington v. California*, 395 U.S. 250 (1969). See also *Schneble v. Florida*, 40 U.S.L.W. 4299 (U.S. filed March 21, 1972), decided subsequent to the period covered by this survey.

152. *Collins v. State*, 230 So.2d 711 (Fla. 4th Dist. 1970), citing *Harrington v. California*, 395 U.S. 250 (1969) and *Chapman v. California*, 386 U.S. 18 (1967). See also *Schneble v. Florida*, 40 U.S.L.W. 4299 (U.S. filed March 21, 1972).

For an example of when the non-testifying codefendant's confession is not considered merely cumulative and thus reversible error, see *Seidel v. State*, 240 So.2d 521 (Fla. 4th Dist. 1970).

153. 239 So.2d 241 (Fla. 1970).

154. *Id.* at 242 (dissenting opinion).

Justice Ervin points out that

decisions in the wake of *Bruton* have made it clear that the existence of the constitutional error described in *Bruton* is not vitiated where a defendant otherwise deprived of the right of cross-examination due to the introduction of inculpatory statements attributed to his non-testifying codefendant, himself confesses.

Id. at 243 (dissenting opinion).

155. *Id.* at 242 (majority opinion).

156. *Farley v. City of Tallahassee*, 243 So.2d 161 (Fla. 1st Dist. 1971), citing *Sciortino v. State*, 115 So.2d 93 (Fla. 2d Dist. 1959).

157. *Id.*

corpus delicti is established by subsequent testimony independent of the confession, there is no reversible error.¹⁵⁸

IV. SEARCH AND SEIZURE

A search warrant must conform strictly to statutory requirements and must particularly describe the place to be searched.¹⁵⁹ Accordingly, where a building contains multiple dwelling units, and the state knows or reasonably should have known that a more particular description can be had, it is the duty of the state to give a particular description; a general description of the building will not suffice.¹⁶⁰ However, a search warrant authorizing a search of a named building or house and "all persons therein . . . suspected of being connected with . . . gambling" is not void for failure to identify persons to be searched,¹⁶¹ and a search of "suspected" persons therein will be valid even though the search preceded arrest.¹⁶² Also where the return of a search warrant does not comply with the ten day limitation of Florida Statutes section 933.05 (1969), it does not become void unless there has been prejudice to the defendant.¹⁶³

Florida has adopted the general rule that a subpoena duces tecum which requires production of every book, paper, document and record of a corporation is overly broad and violative of the fourth and fifth amendments.¹⁶⁴ Such a subpoena may not be used for discovery or as a "fishing expedition" with the hope that something incriminating may result therefrom.¹⁶⁵

Contraband which is seized pursuant to a valid search warrant issued by a municipal court may be used in evidence in a prosecution for the same offense in the state court, provided that the requirements for

158. *Darrigo v. State*, 243 So.2d 171 (Fla. 2d Dist. 1971) (when confession was offered into evidence defense objected on ground that corpus delicti had not been established, the court reserved ruling on the objection allowing the state to proceed and subsequently establish corpus delicti independent of confession).

159. *State v. Gordillo*, 245 So.2d 898 (Fla. 3d Dist. 1971), *citing Fance v. State*, 207 So.2d 331 (Fla. 3d Dist. 1968).

160. *Id.* Where the premises in question contained two separate unconnected apartments, one downstairs and one upstairs, the search warrant, which described such premises as a two-story dwelling house occupied or under the control of certain persons, was not specific enough.

161. *Samuel v. State*, 222 So.2d 3 (Fla. 1969), *citing Lemus v. State*, 158 So.2d 143 (Fla. 2d Dist. 1963). However, if an owner or operator of a building is *known* he may be named in the warrant. *Church v. State*, 151 Fla. 24, 9 So.2d 164 (Fla. 1942).

162. *Poole v. State*, 247 So.2d 443 (Fla. 1st Dist. 1971), *cert. denied*, 251 So.2d 879 (Fla. 1971). A "suspected" person therein is one who police have probable cause to believe is suspected of being connected with the illegal activity described in the warrant.

163. *State v. Featherstone*, 246 So.2d 597 (Fla. 3d Dist. 1971). In the opinion of the authors, the failure of the state to comply strictly with statutory requirements should automatically invalidate the warrant and make any evidence obtained thereby inadmissible. *See, e.g., State v. Gordillo*, note 159 *supra*.

164. *Imparato v. Spicola*, 238 So.2d 503 (Fla. 2d Dist. 1970).

165. *Id.*

obtaining the warrant in municipal court are not less strenuous than the state requirements.¹⁶⁶

Florida Rule of Criminal Procedure 1.90(h)(2) provides that:

The motion to suppress shall be made prior to trial unless opportunity thereof did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion or an appropriate objection at the trial.

In *Davis v. State*¹⁶⁷ this rule was interpreted to mean that a judge, in his discretion, may entertain a motion to suppress at trial even if the opportunity to move prior to trial did exist, and that a decision whether to entertain such a motion will not be set aside unless there has been an abuse of discretion. However, if the opportunity to so move prior to trial did not exist or the defendant was not then aware of the grounds for the motion, the judge *must* entertain the motion when the opportunity arises or when the defendant learns that there are grounds therefore.

A general objection to the admission of evidence will not suffice. The specific grounds must be alleged.¹⁶⁸

A justice of the peace has no jurisdiction to determine the validity of a search at a preliminary hearing, and his finding is not *res judicata* as to the issue of admissibility at the subsequent criminal trial.¹⁶⁹

The "safe procedure" suggested in *Carter v. State*¹⁷⁰ of securing an arrest or search warrant in all cases if there is a reasonable opportunity to obtain one was held not to apply in *Sheehan v. State*¹⁷¹ (where the police one day before arrest had "set-up" a sale of narcotics) on the theory that there is no need to obtain a warrant for a crime which is about to be committed. Moreover, the rule of *Carter v. State*¹⁷² has been expressly overruled by the Supreme Court of Florida in *Falcon v. State*,¹⁷³ wherein it was held that the requirements for arresting without a warrant

166. *State v. Williams*, 227 So.2d 331 (Fla. 4th Dist. 1969) (citing no Florida cases).

167. 226 So.2d 257 (Fla. 2d Dist. 1969).

168. *Darrigo v. State*, 243 So.2d 171 (Fla. 2d Dist. 1971).

169. *State v. Everly*, 228 So.2d 923 (Fla. 4th Dist. 1969).

170. 199 So.2d 324 (Fla. 2d Dist. 1967). In this regard see Wills, *Criminal Law and Procedure, 1965-1967 Survey of Florida Law*, 22 U. MIAMI L. REV. 240, 253-54 (1967).

171. 228 So.2d 444 (Fla. 2d Dist. 1969).

172. See note 170 *supra*. In *Carter* the district court stated:

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

199 So.2d 324, 334 (Fla. 2d Dist. 1967) (emphasis added).

173. 226 So.2d 399 (Fla. 1969), *citing* *United States v. Rabinowitz*, 339 U.S. 56 (1950). See also *State v. Browning*, 233 So.2d 866 (Fla. 2d Dist. 1970) wherein it was held that a warrantless search of a car 15-20 minutes after the defendant had been arrested in his car was not invalid even though there was a reasonable opportunity to obtain a search warrant.

are prescribed by Florida Statutes chapter 901 (1969) which does not require that a warrant be obtained if probable cause exists.

The general rule in Florida is that if there is probable cause to arrest a warrantless search may be conducted incident to the arrest.¹⁷⁴ Under certain circumstances a warrantless search may be conducted though not incidental to a lawful arrest; if, for example, the officer has probable cause to believe a vehicle contains contraband.¹⁷⁵ Similarly, where an officer legally sees contraband in plain sight he may seize it before arrest or warrant, and the evidence so seized is admissible.¹⁷⁶ This rule applies when a police officer picks up and inspects a bag dropped by a defendant, finds it to contain narcotics, and thereafter arrests the defendant;¹⁷⁷ or when a police officer shines a flashlight in a car and spots a weapon in plain view.¹⁷⁸

The test of probable cause is whether a prudent and cautious police officer on the scene, conditioned by observation and information and guided by his police experience, reasonably could have believed that a crime had been committed by the person to be arrested.¹⁷⁹ Accordingly, it has been held that when a police officer sees a man taking money from his wallet and offering it in exchange for a "baggie type" bag, there is probable cause to arrest and thereafter search.¹⁸⁰ Similarly, in *Trivette v. State*,¹⁸¹ an officer observed someone on a deserted street late at night who took special notice of the officer and thereafter turned to put something in his pocket. The officer further observed that the person had dilated eyes and appeared to have an unclear mind. The court held that these observations constituted probable cause to arrest for public intoxication, and a subsequent search of the defendant's person which produced evidence of marijuana was held to be valid. If the police officer had probable cause to believe a felony had been committed, the fact that the arrest was ultimately labeled a misdemeanor would not render the arrest and subse-

174. *State v. Sanders*, 239 So.2d 120 (Fla. 2d Dist. 1970).

175. *Id.*, citing FLA. STAT. § 933.19 (1969) which specifically adopts the rule of *Carroll v. United States*, 267 U.S. 132 (1925). In *State v. Sanders*, the person fitting defendant's description had threatened to burn down a tavern. A person fitting defendant's description was seen in the vicinity of the tavern in the company of two people, one of whom had a "molotov cocktail" type of bottle. The defendant's car was searched and a bomb and guns were found. Held, evidence admissible.

176. *State v. Ashby*, 245 So.2d 225 (Fla. 1971); *State v. Jackson*, 240 So.2d 88 (Fla. 3d Dist. 1970).

177. *State v. Jackson*, 240 So.2d 88 (Fla. 3d Dist. 1970).

178. *State v. Bass*, 240 So.2d 90 (Fla. 1st Dist. 1970), *cert. denied*, 244 So.2d 433 (Fla. 1971), wherein it was held that shining a flashlight to see things in plain view is not a search. What constitutes "plain view" was discussed by the Supreme Court in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

179. *State v. Profera*, 239 So.2d 867 (Fla. 4th Dist. 1970).

180. *Id.*

181. 244 So.2d 173 (Fla. 4th Dist. 1971). The court's decision that there was probable cause to arrest is somewhat surprising in view of the officer's answer on cross-examination that the fact that the defendant had long hair and bell bottoms added to his reasons for stopping them. *Id.* at 174. With reference to limiting the search of the defendant's person in a case such as this, see *Gustafson v. State*, note 192 *infra* and accompanying text.

quent search invalid under the theory that according to statute an officer may not make a warrantless arrest for a misdemeanor not committed in his presence.¹⁸² Where police officers observed occupants of a car passing around a small cigarette and thereafter detained them for questioning, seizure of a plastic bag of marijuana thrown into street while the occupants were being detained but before they were arrested was proper.¹⁸³ Similarly, where police had probable cause to believe narcotics had been used, and it was necessary to put a choke-hold on the defendant to prevent him from destroying the evidence, there was no violation of the defendant's constitutional rights.¹⁸⁴

To effect a valid warrantless search the arresting officer does not have to have firsthand knowledge in order to have probable cause; it is sufficient that the officer initiating the chain of communication either have firsthand knowledge or receive information from some person who it seems reasonable to believe is telling the truth.¹⁸⁵ Thus, an officer has probable cause to arrest on the basis of a description he has received over his radio,¹⁸⁶ or on the basis of information received from a confidential informer.¹⁸⁷ However, whenever an arrest is made without a warrant and probable cause for the arrest is based on information provided by a confidential informant, there should be present in the circumstances preceding the arrest facts which give rise to a reasonable inference: (a) that the informant is reliable; and (b) that his information with respect to the defendant's criminal activity is likewise reliable.¹⁸⁸ The state is privileged to refuse to disclose the identity of the confidential informant, and the burden is on the defendant to show why exception should be invoked; where disclosure of identity is relevant and helpful to the defense or essential to a fair determination of the cause, the privilege must give way.¹⁸⁹ However, if the only part the confidential informant played was furnishing information which provided a lead in preliminary investigation, and the informer was not a participant in crime or connected with the offense in any manner, there is no duty to disclose.¹⁹⁰

In those instances where there is probable cause to arrest there remains the problem of whether the subsequent search was "incident to"

182. *Chaney v. State*, 237 So.2d 281 (Fla. 4th Dist. 1970), *cert. denied*, 242 So.2d 461 (Fla. 1970), 403 U.S. 904 (1971); *West v. State*, 239 So.2d 611 (Fla. 2d Dist. 1970), *appeal dismissed*, 243 So.2d 420 (Fla. 1971).

183. *State v. Padilla*, 235 So.2d 309 (Fla. 3d Dist. 1970), *cert. denied*, 239 So.2d 830 (Fla. 1970).

184. *Salas v. State*, 246 So.2d 621 (Fla. 3d Dist. 1971).

185. *Id.*

186. *McRae v. State* 245 So.2d 133 (Fla. 1st Dist. 1971).

187. *State v. Lewis*, 225 So.2d 170 (Fla. 2d Dist. 1969), *cert. denied*, 232 So.2d 178 (Fla. 1969) (search warrant issued based on allegedly reliable informant). *See also* section XXII *infra*.

188. *State v. Doherty*, 240 So.2d 332, 335 (Fla. 4th Dist. 1970). *See also* *State v. Smith*, 233 So.2d 396 (Fla. 1970). *See also* section XXII *infra*.

189. *State v. Matney*, 236 So.2d 166 (Fla. 1st Dist. 1970).

190. *Id.*

the arrest, *i.e.*, within the scope of the arrest. The search of the trunk of a car without a warrant while the defendant was being held for a traffic charge¹⁹¹ or an extensive search of defendant's person when arrested for driving without a license¹⁹² have been held invalid as being outside the scope of the arrest. Similarly, a defendant arrested without a warrant for robbery may not then be taken to his home where a search is conducted, the fruits of which result in an additional unrelated charge for which there had been no probable cause.¹⁹³ In *Ashby v. State*,¹⁹⁴ the District Court of Appeal, Second District, applied the rule of *Chimel v. California*¹⁹⁵ to invalidate a search of an entire house which occurred after the defendant was arrested outside the front door.¹⁹⁶ The rule of *Chimel* is that for a warrantless search to be "incidental to" the lawful arrest, it must be limited to the defendant's person and to the immediate area around the defendant in which he might obtain a weapon or something of an evidentiary nature which could have been destroyed or concealed.¹⁹⁷

The District Court of Appeal, First District,¹⁹⁸ has expressed disapproval of the rule of *Chimel v. California* and has deemed it a "windfall for criminals." The First District intimates a hope that with the present composition of the United States Supreme Court the "pendulum will again swing toward" the rule that a warrantless search of the entire premises is proper as incident to a lawful arrest in or on the premises.¹⁹⁹ *Chimel* has been held to be not retroactive; moreover, it does not apply if the defendant consented to the search of his home.²⁰⁰

191. *Smith v. State*, 228 So.2d 613 (Fla. 2d Dist. 1969), citing *Chimel v. California*, 395 U.S. 752 (1969). However, if the search is an "inventory" search as opposed to an "exploratory" search, it may be held valid. See *Godbee v. State*, note 204 *infra* and accompanying text.

192. *Gustafson v. State*, 243 So.2d 615 (Fla. 4th Dist. 1971) (held that while a "custodial search" of arrested defendant's person—a "pat-down search"—for purpose of determining if he is armed is allowable, the search is limited to a search for weapons or instrumentalities, none of which are likely to be found inside the defendant's package of cigarettes).

Subsequent to the period covered by this survey the Supreme Court of Florida reversed the Fourth District's decision in *Gustafson*. See *State v. Gustafson*, 258 So.2d 1 (Fla. 1972). The supreme court held that the search in *Gustafson* was a proper, incidental search that reasonably enues after a legal arrest (citing FLA. STAT. § 901.21 (1969)). The court reasoned that since the officer had a reasonable suspicion that the defendant driver was intoxicated, it was proper to conduct a thorough search of his person for drugs, notwithstanding the fact that the arrest was for driving without a license.

The authors submit that the decision of the Fourth District is by far the better view.

193. *Betancourt v. State*, 224 So.2d 378 (Fla. 3d Dist. 1969).

194. 228 So.2d 400 (Fla. 2d Dist. 1969).

195. 395 U.S. 752 (1969). See also *Vale v. Louisiana*, 394 U.S. 30 (1970).

196. The decision of the Second District in *Ashby v. State*, 228 So.2d 400 (Fla. 2d Dist. 1969) was reversed by the supreme court, wherein *Chimel* was distinguished. *State v. Ashby*, 245 So.2d 225 (Fla. 1971).

197. *Chimel v. California*, 395 U.S. 752, 768 (1969) (warrantless search of an entire house after arrest of defendant held invalid).

198. *State v. O'Steen*, 238 So.2d 434 (Fla. 1st Dist. 1970).

199. *Id.* at 437. (In the opinion of the authors, such a regression would be highly undesirable.)

200. *Grimes v. State*, 244 So.2d 130 (Fla. 1971). See notes 207-216 *infra* and accompanying text.

The requirement that a warrantless search to be valid must be "incidental" to an arrest has sometimes been relaxed if the search can be considered reasonable under the circumstances. In *Adams v. State*,²⁰¹ for example, the defendant was arrested for drunk driving. Twelve hours after her arrest she was taken to a hospital and during preparation for a physical examination, marijuana fell from her brassiere. The court held the evidence admissible on the theory that preparing the defendant for the physical exam was reasonable under the circumstances and evidence inadvertently obtained therefrom is accordingly admissible. Similarly, when a valid arrest is made on the highway and the search of the car, originally begun on the highway, is continued at the station, the evidence obtained from the search is admissible under the theory that it would be unreasonable to conduct a thorough and exacting search on the highway.²⁰² The rationale of the reasonable search was extended to its limits, or perhaps beyond its limits, in *State v. Mitchell*.²⁰³ In *Mitchell* the Supreme Court of Florida held that an unconscious driver who had been involved in an automobile accident may be made the subject of a blood test to determine intoxication under the "implied consent" law (Florida Statutes section 322-261 (1969)) even though the driver was not under arrest and had not consented to the test. This case, in effect, permits a search of the person *before arrest* and allows the evidence so obtained to serve as the basis for the subsequent criminal charge of driving while under the influence.

The question of whether a station house search of a vehicle is invalid as not being incidental to a lawful arrest has been further complicated by the holding in *Godbee v. State*.²⁰⁴ In *Godbee* the rule was established that where reasonable routine procedures justify an "inventory" of the contents of the vehicle,²⁰⁵ evidence obtained from the warrantless inventory search is admissible, irrespective of whether there was any probable cause to believe such contraband was present. Although the court limited the rule to "inventory" searches as opposed to "exploratory searches" which are motivated by a desire to "hunt" for incriminating evidence, the effect

201. 240 So.2d 529 (Fla. 3d Dist. 1970).

202. *State v. Aiken*, 228 So.2d 442 (Fla. 4th Dist. 1969). See also *State v. Browing*, 233 So.2d 866 (Fla. 2d Dist. 1970) wherein it was held that a search of defendant's car conducted at the station 15 to 20 minutes after defendant's arrest on the road was reasonable. Accord, *Chambers v. Maroney*, 399 U.S. 90 (1970).

203. 245 So.2d 618 (Fla. 1971) *overruling* the well-reasoned opinion of the District of Appeal, Second District, in *Mitchell v. State*, 227 So.2d 728 (Fla. 2d Dist. 1969). See also *Shores v. State*, 233 So.2d 434 (Fla. 1st Dist. 1970) which was in accord with the decision of the Second District in *Mitchell*. Nowhere in the Supreme Court's decision in *Mitchell* was the case of *Shores v. State* even acknowledged.

Moreover, both FLA. STAT. § 322.261(1) (1969) and FLA. STAT. § 322.261(1) (Supp. 1970) provide that "[t]he [chemical] test shall be incidental to a lawful arrest . . ."

For a case contra to *Mitchell* see *People v. Hawkins*, 40 U.S.L.W. 2607 (Cal. Sup. Ct. filed March 3, 1972).

204. 224 So.2d 441 (Fla. 2d Dist. 1969).

205. An "inventory" of the contents of an abandoned or impounded car is deemed reasonable because it is deemed necessary to insulate police and pound operators from liability for theft or destruction. *Id.* at 443.

of the rule is to make admissible any incriminating evidence which is found by police officers who in good faith are discharging their official duties by making an inventory of impounded vehicles.²⁰⁶

A warrantless search which is not incidental to an arrest is nonetheless lawful if the defendant consented thereto.²⁰⁷ And, while the state has the burden of proving consent,²⁰⁸ it is not necessary that the consent be in writing²⁰⁹ or that the police inform the defendant that he has a right to refuse to consent.²¹⁰ Consent to a warrantless search of the defendant's premises may be given by a third party who himself has an ownership interest or dominion and control over the premises, such as a grandmother²¹¹ or a grandfather.²¹² However, in *State v. Blakely*,²¹³ the District Court of Appeal, Second District, held that the mere existence of a husband-wife relationship, without more, did not impute authority to the wife, after the husband's arrest, to consent to a warrantless search of the couple's apartment. Although not expressly receding from this position, the Second District, in a subsequent case,²¹⁴ held that a wife has the right to invite FBI agents into her home, and a search warrant obtained on the basis of what they saw when inside the house is not defective or violative of the husband's constitutional rights. The effectiveness of the holding in *Blakely*²¹⁵ was further limited in *Dinkins v. State*.²¹⁶ In *Dinkins* the District Court of Appeal, Fourth District, held that for the purpose of consenting to a search, a car and a dwelling are distinguishable, and where a husband gives the keys to his car to his wife, without specific instructions, she had sufficient control to authorize a search of the car notwithstanding the fact that she did not drive and did not have any ownership interest in the car.

The issue of an owner's consent to the search of a tenant's apartment was avoided in the alarming decision of *State v. Clark*.²¹⁷ In *Clark* the police had been called by the owner to investigate the use of drugs in one of the apartments. With the owner's "implied consent" the police peered into the defendant's room from the fire escape. The court, while giving lip-service to the rule that "[a] person has a right to have his own home

206. The authors submit that the better rule is that such inventory checks are permissible, but should be limited only to the listing and storage of articles and should not be used as an inadvertent method of gathering evidence.

207. *See, e.g., Moss v. State*, 247 So.2d 327 (Fla. 1st Dist. 1971).

208. *Id.*

209. *Davis v. State*, 226 So.2d 257 (Fla. 2d Dist. 1969).

210. *Cockerham v. State*, 237 So.2d 32 (Fla. 1st Dist. 1970); *James v. State*, 223 So.2d 52 (Fla. 4th Dist. 1969).

211. *Addison v. State*, 243 So.2d 238 (Fla. 4th Dist. 1971) (defendant had exclusive occupancy of room in his grandmother's house, but as a guest and not a tenant).

212. *Rivers v. State*, 226 So.2d 337 (Fla. 1969) (defendant had non-exclusive use of a room in his grandfather's house).

213. 230 So.2d 698 (Fla. 2d Dist. 1970). For an analysis of the wife consent issue see *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

214. *State v. Coryell*, 247 So.2d 87 (Fla. 2d Dist. 1971).

215. *See* note 213 *supra*.

216. 244 So.2d 148 (Fla. 4th Dist. 1971).

217. 242 So.2d 791 (Fla. 4th Dist. 1970), *cert. denied*, 246 So.2d 112 (Fla. 1971).

or residence reasonably secure from invasion, visual or otherwise, by the police or anyone else,"²¹⁸ held that since the fire escape was open to everyone's use, the defendants had no right to expect any privacy with respect to what they did inside the window within the view of anyone on the fire escape, and thus there was no "search" or "invasion of privacy." The court also upheld the officer's subsequent action of breaking down the door, without warning or announcement, entering and forcibly seizing "relatively small amounts" of marijuana.²¹⁹

In the area of electronic surveillance, *Walker v. State*²²⁰ affirmed the view that a tape recording of a meeting between the defendant and a police informant who wore a microphone and transmitter is admissible even though some portions of the tape were inaudible and unintelligible.

The problem of determining who has standing to contest the validity of a search continues to arise. In *Dycus v. State*,²²¹ a defendant charged with possession and sale or delivery of drugs to another on the day prior to the seizure of the drugs in another's apartment was held to have no standing to contest the validity of the search since he did not own or possess the seized property at the time of the search, had no ownership or possessory interest in the premises searched, and was not present on the premises when they were searched. In *Perkins v. State*,²²² the court implied that a defendant would not have standing to contest a search of the backyard of his father's premises.²²³ However, since the holding was based on the fact that the defendant failed to show that the backyard of his father's house was constitutionally protected against unreasonable search and seizure, the court did not expressly rule on the issue of standing.

V. CONSTITUTIONALITY OF STATUTES AND ORDINANCES

Florida Statutes section 317.981 (1969), which requires motorcyclists to wear crash helmets, has been upheld as constitutional on the theory that the public has a valid interest in the protection of the individ-

218. *Id.* at 793.

219. *Id.* at 795. The court relied on FLA. STAT. § 901.19(1) (1969) and *Benefield v. State*, 160 So.2d 706 (Fla. 1964), neither of which, in the authors' opinion, permit the action taken in the instant case. FLA. STAT. § 901.19(1) (1969) permits an officer to break in "if he is refused admittance after he has announced his authority and purpose." *Benefield v. State* lists four additional situations wherein the police may forcibly enter without announcement, but none of those purport to allow the police action taken in the instant case.

220. 222 So.2d 760 (Fla. 3d Dist. 1969), *cert. denied*, 232 So.2d 181 (Fla. 1969). See also *Tollett v. State*, 244 So.2d 458 (Fla. 1st Dist. 1971) (tape recording of telephone conversation between informer and accused admissible at defendant's trial if monitoring and recording was with express or implied consent of informer).

221. 238 So.2d 493 (Fla. 2d Dist. 1970), *citing* *Jones v. United States*, 362 U.S. 257 (1960). See also *Brown v. State*, 245 So.2d 68 (Fla. 1971), *citing* *Simmons v. United States*, 390 U.S. 377 (1968). *Brown* held that a person legitimately on the premises the day before the search does not have standing to contest the search.

222. 228 So.2d 382 (Fla. 1969).

223. This implication is surprising in light of fact that issues of consent to search by a third party and whether the search itself was incidental to the arrest were lurking in the case.

ual.²²⁴ Florida Statutes section 317.221 (1969), which makes it unlawful to operate a motor vehicle on the highway at a speed greater than is reasonable and prudent under conditions—having regard to the actual and potential hazards there existing, is not so vague as to be unconstitutional.²²⁵ Florida Statutes section 828.04 (1969), which prohibits child abuse, has been held not constitutionally vague by use of words “unnecessarily and excessively” since men of common intelligence could comprehend the meaning of these words when taken in the context of the statute.²²⁶ Also, the section of the Florida Vagrancy Statute (Florida Statutes section 856.02 (1969)) which prohibits “wandering and strolling around from place to place without any lawful purpose or object” was held not so broad and vague in nature as to violate due process.²²⁷ Moreover, a decision by the federal district court²²⁸ invalidating the Jacksonville vagrancy ordinance on constitutional grounds was held not binding on the Florida courts.²²⁹

In *Van Cott v. Driver*,²³⁰ Florida Statutes section 790.23 (1969),

224. *State v. Eitel*, 227 So.2d 489 (Fla. 1969). *Accord*, *Bogue v. Faircloth*, 316 F. Supp. 486 (S.D. Fla. 1970). *But see* *Carter v. Town of Palm Beach*, 237 So.2d 130 (Fla. 1970) (ordinance prohibiting surfing on the 13 miles of town's beachfront held arbitrary, unreasonable and invalid). *See also* Fla. Laws 1971, ch. 71-351, requiring that headlights of motorcycles be turned on at all times while being operated on public highways.

225. *Smith v. State*, 237 So.2d 139 (Fla. 1970).

226. *Campbell v. State*, 240 So.2d 298 (Fla. 1970), *appeal dismissed*, 402 U.S. 936 (1971).

227. *Smith v. State*, 239 So.2d 250 (Fla. 1970), *noted in* 25 U. MIAMI L. REV. 345 (1971). *But see* Justice Boyd's dissent at 239 So.2d 251, which regards the vagrancy statute as vague, outdated and abusive. [Subsequent to the period covered by this survey the Supreme Court invalidated Florida's vagrancy laws. *See Papachristou v. City of Jacksonville*, 92 S. Ct. 839 (1972); *Smith v. Florida*, 92 S. Ct. 848 (1972)].

228. *Lazarus v. Faircloth*, 301 F. Supp. 266 (S.D. Fla. 1969).

229. *Brown v. City of Jacksonville*, 236 So.2d 141 (Fla. 1st Dist. 1970), *cert. granted sub nom. Papachristou v. City of Jacksonville*, 403 U.S. 917 (1971). In *Brown* the court stated that

[a] decision of a Federal District Court, while persuasive if well reasoned, is not by any means binding on the courts of a state. The Supreme Court of Florida is the apex of the judicial system of the State of Florida, and its decisions are binding upon this court. *Id.* at 142.

The federal district court may, by affording habeas corpus relief to state defendants who have been convicted under the vagrancy state, indirectly force the Florida courts to submit to the federal ruling. *Cf. State ex rel. Argersinger v. Hamlin*, 236 So.2d 442 (Fla. 1970). *See also* notes 95-100 *supra* and accompanying text. For a discussion of the relationship between Florida courts and lower federal courts in Florida see L. LEVINSON & C. ALLOWAY, *FLORIDA CONSTITUTIONAL LAW CASEBOOK* 103-105 (D & S Pub. 1972 ed.)

[Subsequent to the survey period the Supreme Court declared the Jacksonville vagrancy ordinance unconstitutional and suggested that the Florida Statute is also unconstitutional. *Papachristou v. City of Jacksonville*, 92 S. Ct. 839 (1972); *Smith v. Florida*, 92 S. Ct. 848 (1972).]

230. 243 So.2d 457 (Fla. 2d Dist. 1971). The court also held that the extraordinary writ of prohibition will lie where jurisdiction was never conferred because the statute under which the action was brought was void for being unconstitutional. [Subsequent to the period covered by this survey the Supreme Court of Florida ruled that although the phrase “other similar offenses” was constitutionally vague, the unconstitutionality of that phrase did not render the remainder of the statute unconstitutional. *Driver v. Van Cott*, 257 So.2d 541 (Fla. 1971).]

which made it unlawful for felons to possess firearms, was held invalid on the grounds that the phrase "or other similar offenses" did not inform those persons subject to it exactly what conduct is prohibited and was therefore unconstitutionally vague.

In *Hearns v. State*,²³¹ the statute²³² requiring the taking, in open court, of the fingerprints of a person convicted of a felony was held not to be an unconstitutional legislative imposition of non-judicial duties on the judiciary in violation of the separation of powers doctrine.

A city ordinance which prohibited "verbal abuse" of police officers was held invalid as being overbroad and not sufficiently precise to describe an offense so as to give fair warning to the citizen that certain speech is prohibited.²³³ In *Carlson v. City of Tallahassee*,²³⁴ the defendant was arrested for disturbing the peace in violation of a city ordinance when he attempted to forcibly enter, with a protest sign, a facility rented by a political candidate. The arrest and conviction were held valid on the theory that by his actions, the defendant was violating the first amendment rights of those who reserved the facility for their meeting, and was thus guilty of disturbing the peace.

In *Wilson v. State*,²³⁵ the court held that the power of the jury to determine death or mercy in capital cases is neither a denial of due process nor cruel and unusual punishment, and is not void due to lack of standards or guidelines for application.

A statutory presumption²³⁶ that one who is in possession of guns and lights during hours of darkness in a place where deer might be found and who uses the light in a manner capable of disclosing the presence of deer *intends* to violate the statute proscribing illegal taking and possession of deer and wild turkey, has been held constitutional.²³⁷ The statutory presumption of Florida Statutes section 500.151(2) (1969), which provides that possession of certain drugs without a label indicating a valid prescription is prima facie evidence that the possession is unlawful, was upheld as constitutional in *State v. Kahler*.²³⁸ The court stated that the presumption is rebuttable, and constitutional guarantees are not violated as long as: (1) "there is a rational connection between the fact proven and the ultimate fact presumed;" and (2) there is reasonable opportunity to rebut the presumption.²³⁹

231. 223 So.2d 738 (Fla. 1969), *cert. denied*, 399 U.S. 929 (1970).

232. FLA. STAT. § 921.025 (1969), *repealed by* Fla. Laws 1970, ch. 70-339, § 180. The subject matter is covered in FLA. R. CRIM. P. 1.670.

233. *Waller v. City of St. Petersburg*, 245 So.2d 685 (Fla. 2d Dist. 1971). [Subsequent to the period of this survey *Waller* was reversed by the supreme court. *City of St. Petersburg v. Waller*, case no. 41,080 (Fla. Sup. Ct. filed April 12, 1972).]

234. 240 So.2d 866 (Fla. 1st Dist. 1970), *cert. denied*, 244 So.2d 431 (Fla. 1971), 403 U.S. 910 (1971).

235. 225 So.2d 321 (Fla. 1969), *rev'd on other grounds*, 403 U.S. 947 (1971).

236. *See* FLA. STAT. § 372.99 (1969).

237. *Williams v. State*, 239 So.2d 583 (Fla. 1970).

238. 232 So.2d 166 (Fla. 1970).

239. *Id.* at 168. For a discussion of the constitutionality of statutory presumptions, see

Also in the area of narcotics law, the Supreme Court of Florida in *Raines v. State*,²⁴⁰ held that marijuana is a harmful, mind-altering drug which endangers the health of the user and is highly detrimental to the public welfare, and is therefore a "dangerous drug" which may be properly regulated by the legislature.²⁴¹ Also, Florida Statutes section 398.20 (1969), which provides that the burden of proof of any exception to the narcotics law shall be on the defendant, has been held constitutional.²⁴² Further, in *Borras v. State*,²⁴³ the Supreme Court of Florida held that the United States Supreme Court decision in *Stanley v. Georgia*²⁴⁴ did not apply so as to render the Florida statute prohibiting the private possession of marijuana unconstitutional since there are no first amendment rights involved in the use of marijuana and "the possession of marijuana poses a much greater threat to society" than does possession of obscene material.²⁴⁵ The court stated:

The interest of the state in preventing harm to the individual and to the public at large amply justifies the outlawing of marijuana, in private and elsewhere.²⁴⁶

In *State ex rel Jones v. Wiseheart*²⁴⁷ it was held that the statutes which authorize the transfer of criminal cases from the criminal court of record to the circuit court are constitutional. Also, it has been held that the statute which provides for a \$1.00 assessment against persons convicted of a crime (which is used to improve the Florida Bureau of Law Enforcement) is not unconstitutional as a tax or as a violation of the separation of power doctrine, but rather is valid as a court cost since there is a direct relationship between persons convicted of a crime and agencies designed to protect society against such acts.²⁴⁸

In *Miller v. State*,²⁴⁹ a special act allowing the public defender to subpoena witnesses was held unconstitutional in that it violated article V,

Fuller and Urich, *An Analysis of the Constitutionality of Statutory Presumptions that Lessen the Burden of the Prosecution*, 25 U. MIAMI L. REV. 420 (1971).

240. 225 So.2d 330 (Fla. 1969), citing *Commonwealth v. Leis*, 355 Mass. 189, 243 N.E.2d 898 (1969).

241. See, e.g., FLA. STAT. ch. 398 (1969) and § 398.18 (Supp. 1970).

242. *Falcon v. State*, 226 So.2d 399 (Fla. 1969)

243. 229 So.2d 244 (Fla. 1969), *appeal dismissed*, 400 U.S. 808 (1971).

244. 394 U.S. 557 (1969), noted in 24 U. MIAMI L. REV. 179 (1969). (Georgia statute which prohibited the possession of obscene material was an unconstitutional violation of first and fourteenth amendments insofar as it punished mere private possession of obscene matter.)

245. *Borras v. State*, 229 So.2d 244, 246 (Fla. 1969), *cert. denied*, 400 U.S. 808 (1970).

246. *Id.* at 246, citing *State v. Eitel*, 227 So.2d 489 (Fla. 1969), discussed at note 224 *supra* and accompanying text. For a good discussion of the right to privacy and how it pertains to the private use of drugs, etc., see Doss and Doss, *On Morals, Privacy and the Constitution*, 25 U. MIAMI L. REV. 395 (1971).

247. 245 So.2d 849 (Fla. 1971).

248. *State v. Young*, 238 So.2d 589 (Fla. 1970), *appeal dismissed*, 400 U.S. 962 (1970).

249. 225 So.2d 409 (Fla. 1969).

section 3 of the constitution which provides that the practice and procedure in all courts shall be governed by rules adopted by the supreme court.

In *Municipal Court v. Patrick*,²⁵⁰ the defendant was convicted in municipal court for violation of a curfew ordered by the mayor. The mayor's curfew order was issued pursuant to a charter provision which authorized him to take command of police and government during emergencies. The court held that the provision could not authorize the mayor to establish a curfew with penalties for its violation since another provision of the city charter vested the legislative power in the city commission and provided that all enactments of a *penal* nature should be made by ordinance. Further, it was held that there was nothing in the city charter which would authorize the municipal court to try a person for violation of a proclamation issued by the mayor.

VI. RIGHT TO CONFRONTATION—RIGHT TO CROSS-EXAMINATION²⁵¹

In *Talavera v. State*,²⁵² it was held that a defendant in a joint trial who wishes to call his codefendant as a witness is entitled to a severance if he can satisfy the trial judge that the testimony he expects to elicit is valuable. This "right to confrontation" is limited, however, and it will not apply unless the trial judge is satisfied that the motion was made in good faith and that valuable testimony will result therefrom.²⁵³

When a police officer testified as to incriminating evidence given to him by the defendant's codefendant, the defendant's right to confrontation was held to have been violated even though the jury was instructed to apply the testimony to only the one codefendant.²⁵⁴

The right to cross-examination was held to be violated in *Allen v. State*,²⁵⁵ when a defense lawyer who was cross-examining a police officer was not allowed to examine the notes from which the witness was refreshing his memory. In *Brown v. State*,²⁵⁶ the right to cross-examination was not violated when the defense counsel was given permission to leave the courtroom to meet an appointment, and in his absence and while being represented by a codefendant's counsel, a confession from the codefendants, implicating the defendant, was introduced into evidence.

250. 241 So.2d 195 (Fla. 4th Dist. 1970) (at the conclusion of its opinion the District Court of Appeal stated that it "intended to certify the matter to the Supreme Court" as one of great public interest; the Supreme Court of Florida accepted certification and affirmed, 254 So.2d (Fla. 1971)).

251. See section III, D, and notes 147-155 *supra* and accompanying text for cases dealing with the rights of a defendant at a joint trial when a non-testifying codefendant's confession has been admitted into evidence.

252. 227 So.2d 493 (Fla. 2d Dist. 1969), *aff'd in part*, 243 So.2d 595 (Fla. 1971).

253. *Id.* See note 722 *infra* and accompanying text.

254. *Seidel v. State*, 240 So.2d 521 (Fla. 4th Dist. 1970). See also section III, D, and notes 147-55 *supra* and accompanying text. *Contra Schneble v. Florida*, 40 U.S.L.W. 4299 (U.S. filed March 21, 1972).

255. 243 So.2d 448 (Fla. 1st Dist. 1971).

256. 233 So.2d 337 (Fla. 3d Dist. 1969), *cert. denied*, 229 So.2d 866 (Fla. 1969), 397 U.S. 969 (1970).

When a defense attorney invokes "the rule" and a witness for the defense (his mother) is present in violation of the rule, it is not a denial of the sixth amendment to refuse to allow the witness to testify.²⁵⁷

VII. APPEAL

Court-appointed counsel who regards his client's request for appeal to be frivolous must accompany his request for permission to withdraw with a brief referring to anything in the record that might arguably support the appeal.²⁵⁸ A copy of said brief and a copy of the motion to withdraw must be served on the defendant by certified mail, return receipt requested.²⁵⁹ If there are no debatable points and counsel accordingly presents no points for the court's consideration in the brief, the court may, after reviewing the record, allow counsel to withdraw.²⁶⁰ On the other hand, where a public defender's *Anders* type brief suggests the defendant's appeal is frivolous, but a cursory inspection of the record by the appellate court indicates there are non-frivolous points, the defendant is entitled to counsel on full appeal even though the points raised may ultimately be decided against the defendant.²⁶¹

If the defendant's right to direct appeal has been frustrated, the appellate court which would have been empowered to hear the direct appeal may, in appropriate circumstances, grant a defendant a delayed appeal through the remedy of habeas corpus.²⁶² In this regard, "appropriate circumstances" include instances wherein the defendant was deprived of direct appeal by the actions of a state functionary.²⁶³ Thus, a belated appeal by way of the remedy of habeas corpus is appropriate where an indigent was not represented by court-appointed appellate counsel because of the failure of the trial court clerk to enter an order adjudging the defendant insolvent,²⁶⁴ or where a frustrated appeal results from the failure of a court-appointed counsel or public defender to file a timely notice of appeal.²⁶⁵ On the other hand, the procedure suggested by *Hollingshead* and *Ervin*²⁶⁶ was held not to apply in *Mapp v. State*.²⁶⁷ In

257. *Pieze v. State*, 243 So.2d 442 (Fla. 3d Dist. 1971), cert. denied, 92 S. Ct. 121 (1971). *Contra*, *Braswell v. Wainwright*, 330 F. Supp. 281 (S.D. Fla. 1971).

258. *State v. Wooden*, 246 So.2d 755 (Fla. 1971), citing *Anders v. California*, 386 U.S. 738 (1967). *Wooden* overrules *Frizzell v. State*, 238 So.2d 67 (Fla. 1970).

259. *Daniel v. State*, 233 So.2d 405 (Fla. 2d Dist. 1970). A copy of the *Anders* brief must be served on the defendant whether counsel moves to withdraw or not.

260. *See* *Wilson v. State*, 245 So.2d 693 (Fla. 1st Dist. 1971).

261. *Smith v. State*, 222 So.2d 45 (Fla. 2d Dist. 1969). For the subsequent history of the case *see* *Smith v. State*, 228 So.2d 613 (Fla. 2d Dist. 1969) (conviction reversed).

262. *State v. Wooden*, 246 So.2d 755 (Fla. 1971), citing *Baggett v. Wainwright*, 229 So.2d 239 (Fla. 1969).

263. *See e.g.*, *State ex rel. Ervin v. Smith*, 160 So.2d 518 (Fla. 1964); *Hollingshead v. Wainwright*, 194 So.2d 577 (Fla. 1967).

264. *Betts v. State*, 237 So.2d 191 (Fla. 1st Dist. 1970), citing *Hollingshead v. State*, 194 So.2d 577 (Fla. 1967).

265. *State ex rel. Arnold v. State*, 233 So.2d 173 (Fla. 3d Dist. 1970).

266. *See* note 263 *supra*.

267. 224 So.2d 431 (Fla. 1st Dist. 1969).

Mapp, the defendant-prisoner delivered his notice of appeal to prison officials four days before it was required to be filed in the clerk of the trial court's office. The prison officials did not mail the notice of appeal until four days later, the very day the notice had to be filed. The court denied the petition for a habeas corpus belated appeal and held that the late filing of the notice of appeal was due to the defendant's own lack of diligence and was not the result of state action by prison officials.²⁶⁸

In a case where appellate counsel, who was appointed nine days before the running of the appeal period, did not file a timely notice of appeal because he was under the impression that trial counsel had already so filed, the court treated the pleadings as a petition for a writ of habeas corpus.²⁶⁹

In *Cole v. State*,²⁷⁰ the trial court considered a motion for new trial although the motion had not been timely made. Nineteen days after the denial of the motion for a new trial (which was 110 days entry of the judgment appealed from) a notice of appeal was filed. The court held that since the motion for a new trial was not timely it could not serve to toll the running of the appeal period. The appeal was therefore dismissed for want of jurisdiction.

A motion for a new trial is a prerequisite to an appeal based on insufficiency of evidence.²⁷¹ In *Horsted v. Wainwright*,²⁷² it was held that in the absence of an actual *allegation* of insufficiency of evidence in the habeas corpus petition, a petitioner who sought appellate review of the sufficiency of evidence underlying his conviction was not entitled to habeas corpus relief. The court rejected the claim that failure of his appointed counsel to file a motion for new trial deprived the defendant of a right to appeal the sufficiency of the evidence and thereby constituted a denial of due process.

In *Jenkins v. Lyles*²⁷³ the Supreme Court of Florida held that the state's failure to serve a copy of notice of appeal on the defendant does not divest the appellate court of jurisdiction. In such a case appropriate sanctions may be imposed, but dismissal of the appeal is not proper unless the defendant can show he has been substantially prejudiced by the state's failure to serve notice. Further, it was held that since Florida Rule of Criminal Procedure 1.030(a) provides that orders not entered in open court shall be in writing, the state could not appeal from an *oral*

268. In the opinion of the authors, the result in *Mapp* is inconsistent with the dicta in *State ex rel. Ervin v. Smith*, 160 So.2d 518 (Fla. 1964).

269. *Henninger v. State*, 230 So.2d 149 (Fla. 1970) (appellate counsel did timely file motions for preparation of trial transcript, but the court held this did not constitute actual notice of appeal).

270. 224 So.2d 349 (Fla. 1st Dist. 1969).

271. *Rice v. State*, 243 So.2d 226 (Fla. 4th Dist. 1971). See also notes 717-720 *infra* and accompanying text.

272. 239 So.2d 153 (Fla. 2d Dist. 1970).

273. 223 So.2d 740 (Fla. 1969).

order granting a motion to quash an information.²⁷⁴ A similar problem arose in *State v. Kahler*,²⁷⁵ wherein the trial judge orally quashed an information but refused to enter a written order to that effect. The Supreme Court of Florida remanded the case to the trial court with the instruction that a written order be entered stating the grounds for the decision to quash.

The rule requiring the state to appeal pretrial orders suppressing evidence "before trial" applies when the defendant pleads *nolo contendere* as well as when he pleads guilty or not guilty.²⁷⁶

In *Lowman v. State*²⁷⁷ it was held that the denial of a motion to grant jail time credit is not appealable.

In *Rushing v. State*,²⁷⁸ the defendant argued that his right to appeal had been thwarted because the court reporter had lost her notes and was therefore unable to prepare a trial transcript. In response the court restated the rule that:

It is not a necessary prerequisite to appellate review that the record on appeal contain a verbatim transcript of the evidence and events transpiring at the trial. On the contrary, a summarized statement in narrative form [certified by the trial judge] may furnish a substantially accurate account of the rulings of the trial judge and the basis on which they were invoked. Such statement may be prepared from notes kept by counsel; from the judge's notes; from the recollection of counsel, the judge and witnesses as to what occurred at the trial; and from any and all sources which will contribute to an accurate reflection of the trial proceedings. . . . [T]he parties may agree upon a condensed statement in narrative form of all or any part of the testimony.²⁷⁹

The question of whether a defective but timely notice of appeal ousts the appellate court of jurisdiction was addressed, via conflict certiorari, in *Gissendanner v. State*.²⁸⁰ In *Gissendanner* the court held that although the minute book references in the notice of appeal were to entry and filing of verdicts rather than final judgment, such defects were not jurisdictional since the notice of appeal, considered in context, was sufficient to indicate an intent to appeal an appealable order and was not misleading or prejudicial to the adverse party.²⁸¹ The court relied on Florida Appellate Rule 3.2(c) which provides:

274. *Id.*, citing *State v. Shedaker*, 190 So.2d 429 (Fla. 3d Dist. 1966). *Contra*, *Gossett v. State*, 188 So.2d 836 (Fla. 2d Dist. 1966).

275. 224 So.2d 272 (Fla. 1969).

276. *State v. Budnik*, 237 So.2d 825 (Fla. 2d Dist. 1970).

277. 242 So.2d 750 (Fla. 2d Dist. 1971).

278. 233 So.2d 137 (Fla. 3d Dist. 1970).

279. *Id.* at 138, quoting from *Thomas v. State*, 160 So.2d 119 (Fla. 2d Dist. 1964).

280. 241 So.2d 162 (Fla. 1970).

281. *Accord*, *Eggers v. Narron*, 238 So.2d 72 (Fla. 1970) (civil case).

Deficiencies in form or substance in the notice of appeal shall not be jurisdictional and shall not be ground for dismissal of the appeal unless it be clearly shown that the complaining party was misled or prejudiced by such deficiencies.

VIII. BAIL

In *Ackies v. Purdy*,²⁸² the United States District Court for the Southern District of Florida held that the mandatory use of master bond lists by the county sheriff's office was violative of the due process and equal protection clauses of the fourteenth amendment. The court stated: "The right to pre-trial release under reasonable conditions is a fundamental right, both under the Florida and Federal Constitutions."²⁸³ The court concluded that an accused may, after having been fully advised of his right to have the conditions of his release set by a magistrate, waive his right to such a hearing and post bond in compliance with the master bond schedule.

In *Williams v. State*,²⁸⁴ it was held that where the defendant had previously committed a crime while free on supersedeas bond, it was not an abuse of discretion to deny a subsequent supersedeas bond.

In *State ex rel. Smith v. Untreiner*,²⁸⁵ the defendant argued that bail set at \$100,000 pending his trial for allegedly committing three non-capital felonies was excessive. The court stated that the purpose of bail is not to punish the accused but rather to secure his attendance at trial. However, the greater the number of charges the greater likelihood the defendant will not appear for trial; therefore it was held that the court did not abuse its discretion in setting a high bail, even though the defendant established that he had a previous history of appearing when out on bail in other cases.

The Supreme Court of Florida, in *Greene v. State*,²⁸⁶ held that Florida Statute section 903.131 (1969), which denies bail upon appeal to persons previously convicted of a felony, was not an unconstitutional denial of equal protection. However, the statute is prospective only and therefore may not be invoked to deny bail on appeal if the offenses for which the defendant is charged were committed *before* the effective date of the statute. This is so even though a *conviction* for one of the offenses came *after* the effective date of the statute.

IX. CHARGE TO THE JURY

The Supreme Court of Florida has authorized the publication of standard jury instructions by the Committee on Standard Jury Instruc-

282. 322 F. Supp. 38 (S.D. Fla. 1970).

283. *Id.* at 41.

284. 229 So.2d 2 (Fla. 1st Dist. 1969).

285. 246 So.2d 158 (Fla. 1st Dist. 1971), *cert. denied*, 250 So.2d 643 (Fla. 1971).

286. 238 So.2d 296 (Fla. 1970).

tions in Criminal Cases.²⁸⁷ Further, the court amended the Florida Rules of Criminal Procedure to include Form 1.985 authorizing the use of such standard instructions when applicable and allowing for modification or amendment by the trial judge.²⁸⁸

Although Florida Statutes section 917.10(2) (1969) made it mandatory for jury instructions in a capital case to be written, it was not error that the trial judge failed to make those written instructions available to the jurors for the purposes of deliberation.²⁸⁹ Also, when the charges as to degrees of homicide and the fact that the jury could recommend mercy were in writing, the fact that the judge extemporaneously added to the charge by orally instructing as to the possible verdicts returnable on a recommendation of mercy was not error and the requirements of Florida Statutes section 918.10(2) (1969) were satisfied.²⁹⁰

Where a judge refers to four specific crimes and then charges the jury to return one of "five forms of verdicts" (the fifth presumably being not guilty), it is not error that the judge did not specifically instruct the jury that its verdict could be "not guilty," since the defense counsel did not timely object to the incomplete charge, thereby waiving the point.²⁹¹ The question of misleading instructions was also raised in *Beckton v. State*²⁹² and was also summarily dismissed on the ground that there was no timely objection to preserve the error. In *Beckton*, the judge, pursuant to the jury's request for a repeat of the instructions, repeated the instructions on degrees of homicide but failed to repeat the instructions on justifiable or excusable homicide. Judge Rawls, in his dissenting opinion,²⁹³ argued that such error was so fundamental that a new trial should have been granted even though the error was not objected to at trial. Support for such an argument may be found in *Stinson v. State*²⁹⁴ which held that when the trial judge purports to give a charge on justifiable homicide, every essential element of justifiable homicide, justified by any of the evidence, should be given. Further, the omission of an essential element of the charge is fundamental error, requiring a reversal even though the charge was not objected to.

The question of how far a judge may go in an attempt to encourage deliberating jurors to reach a verdict was addressed in *Lee v. State*.²⁹⁵

287. *In re* Standard Jury Instructions in Criminal Cases, 240 So.2d 472 (Fla. 1970).

288. *Id.*

289. *Matire v. State*, 232 So.2d 209 (Fla. 4th Dist. 1970).

FLA. STAT. § 918.10(2) (Supp. 1970) provides that *all* charges, including those in a capital case, shall be orally given and transcribed by the court reporter.

290. *Baker v. State*, 247 So.2d 495 (Fla. 2d Dist. 1971).

291. *Lindsey v. State*, 230 So.2d 689 (Fla. 2d Dist. 1970).

292. 227 So.2d 223 (Fla. 1st Dist. 1969).

293. *Id.* (dissenting opinion), *citing* *Hedges v. State*, 172 So.2d 824 (Fla. 1965). The authors agree with the dissent, and submit that the defendant was denied a fair trial.

FLA. STAT. § 918.10 (Supp. 1970) does not require that a party object at trial before appealing an instruction, as was the case under FLA. STAT. § 918.10(4) (1969).

294. 245 So.2d 688 (Fla. 1st Dist. 1971).

295. 239 So.2d 136 (Fla. 1st Dist. 1970), *cert. denied*, 240 So.2d 642 (Fla. 1970).

In *Lee* a near midnight "Allen"²⁹⁶ or "blockbuster" type charge given to a jury which had been deliberating for six hours accompanied with information which implied that the jury of mixed sexes would be lodged as a group overnight, was held to be reversible error. It was held that the court, although anxious for a verdict, should not instruct the jury in a manner which tends to embarrass a juror who is holding to his honest convictions. The minority must not be led to believe it is their duty to acquiesce with the majority or with the wishes of the court.

Nothing should be said by the trial court . . . likely to influence the decision of a single juror to abandon his conscientious belief as to the correctness of his position.²⁹⁷

During the period surveyed there has been much litigation concerning charges on degrees of an offense²⁹⁸ and lesser included offenses.²⁹⁹ In *Sloan v. State*,³⁰⁰ the failure to instruct on lesser included offenses was held not to be reversible error (1) where there was no request to so instruct, and (2) where the appellant failed to show that the error was prejudicial. In *State v. Smith*³⁰¹ the Supreme Court of Florida reaffirmed the view of *Brown v. State*³⁰² and held that a *lesser included offense* may or may not be necessarily included in the offense charged depending on the *accusatory pleading and the evidence*.³⁰³ Thus, if the record in a rape case does not support the lesser included offense of assault, it is not error for the judge to refuse to instruct on assault and battery.³⁰⁴ On the other hand, upon request, the judge must charge the jury as to *lesser degrees* of the charge whether the evidence will support the elements or not.³⁰⁵

296. So named from the case of *Allen v. United States*, 164 U.S. 492 (1896).

297. *Lee v. State*, 239 So.2d 136, 139 (Fla. 1st Dist. 1970).

298. FLA. STAT. § 919.14 (1969), which required that the judge should charge the jury on all lesser *degrees* of a crime, was *repealed* by Fla. Laws 1970, ch. 70-339, § 180, because the same rule was covered by FLA. R. CRIM. P. 1.490.

299. FLA. STAT. § 919.16 (1969), which required the judge to charge the jury as to all necessarily included lesser offenses, was *repealed* by Fla. Laws 1970, ch. 70-339, § 180, because the same rule was covered by FLA. R. CRIM. P. 1.510.

300. 226 So.2d 863 (Fla. 4th Dist. 1969), *cert. denied*, 234 So.2d 124 (Fla. 1969), 397 U.S. 1056 (1970). *See also* *Grizzell v. State*, 233 So.2d 669 (Fla. 1st Dist. 1970), *cert. denied*, 237 So.2d 762 (Fla. 1970), *motion for leave to file petition for writ of habeas corpus denied*, 400 U.S. 915 (1970).

301. 240 So.2d 807 (Fla. 1970), *disapproving* *Goswick v. State*, 143 So.2d 817 (Fla. 1962).

302. 206 So.2d 377 (Fla. 1968).

303. Thus, in *Smith v. State*, note 301 *supra*, it was established that if, in a prosecution for conspiracy to commit murder, the *pleadings and the evidence* will support a verdict of conspiracy to commit assault and battery, the latter is a lesser included offense of the former.

304. *DeLaine v. State*, 230 So.2d 168 (Fla. 2d Dist. 1970). However, if it is proper to charge on lesser included offenses, it is also proper to instruct the jury on the *penalty* for each of the lesser included crimes. *Pinkney v. State*, 241 So.2d 380 (Fla. 1970), *citing* FLA. STAT. § 918.10(1) (1969).

305. *Bailey v. State*, 224 So.2d 296 (Fla. 1969).

Here is a difference between § 919.16,—the necessarily included offense statute— and § 919.14,—the divisibility into degrees statute. Under the former the lesser

It has been held that where a defendant is charged with homicide it is not necessary that the judge instruct the jury that it may find the defendant guilty of aggravated assault, since assault is not a lesser necessarily included offense of murder.³⁰⁶ Similarly, attempt to commit armed robbery is not a lesser included offense of homicide.³⁰⁷ On the other hand, aggravated assault is a necessarily included lesser offense of the charge of assault with a deadly weapon with intent to commit murder.³⁰⁸ Also, in a murder charge, the evidence may be such as to justify a charge of shooting into a building in violation of Florida Statutes section 790.19 (1969).³⁰⁹ Where a defendant is charged with second degree murder, a conviction of the lesser included offense of manslaughter might result; therefore, the judge should instruct the jury as to the elements of justifiable homicide since justifiable homicide is specifically excludable as an offense under the manslaughter statute.³¹⁰

A person who is charged in an indictment or information with commission of a crime may be convicted on proof that he aided or abetted in the commission of such crime.³¹¹ Thus, the refusal to grant the state's request for an aiding and abetting instruction is erroneous if the evidence supported the charge.³¹²

In *Dames v. State*³¹³ the District Court of Appeal, Third District, held that since the language of Florida Statutes section 919.14 (1969) is mandatory, a charge on lesser degrees of homicide in a prosecution for second degree murder is proper even though the defendant requested that the court not so charge. However, in *Washington v. State*³¹⁴ the District Court of Appeal, First District, held an instruction on lesser included offenses should not have been given where the defendant charged with rape objected to such instruction. The court in *Washington* reasoned that since the instructions on lesser included offenses are waiv-

offense must *necessarily* be included in the offense charged. Hence it is necessary to prove the lesser in order to prove the greater. Under § 919.14, the lesser degrees of the major crime are not necessarily included in it, and, therefore, are not essential elements of proof in establishing it. Nevertheless, the statute, § 919.14, *permits a jury to convict of the lesser degree regardless of the accusations and proofs.*

Id. at 297, quoting *Brown v. State*, 206 So.2d 377, 381-82 (Fla. 1968), (emphasis supplied by *Bailey* court).

306. *Sadler v. State*, 222 So.2d 797 (Fla. 2d Dist. 1969); *Anderson v. State*, 235 So.2d 738 (Fla. 1st Dist. 1970). See also *Brown v. State*, 245 So.2d 68 (Fla. 1971).

307. *Brown v. State*, 245 So.2d 68 (Fla. 1971).

308. *Moses v. State*, 242 So.2d 145 (Fla. 2d Dist. 1970).

309. *Anderson v. State*, 230 So.2d 39 (Fla. 3d Dist. 1970).

310. *Whitehead v. State*, 245 So.2d 94 (Fla. 2d Dist. 1971), citing FLA. STAT. § 782.07 (1969).

311. *State v. Roby*, 246 So.2d 566 (Fla. 1971), quashing *Roby v. State*, 229 So.2d 604 (Fla. 2d Dist. 1969); *Anderson v. State*, 241 So.2d 390, 395-96 (Fla. 1970).

312. *State v. Roby*, 246 So.2d 566 (Fla. 1971).

313. 222 So.2d 52 (Fla. 3d Dist. 1969).

314. 247 So.2d 743 (Fla. 1st Dist. 1971). [Subsequent to the period covered by this survey, the First District distinguished its holding in *Washington*. See *Smith v. State*, 259 So.2d 498 (Fla. 1st Dist. 1972).]

able,³¹⁵ the defendant has the right to be tried upon the charges set out in the charging instrument.

X. SENTENCE

In *North Carolina v. Pearce*³¹⁶ the United States Supreme Court established that (1) punishment already exacted must be fully credited in imposing sentence upon a new conviction for the same offense, and (2) due process requires that vindictiveness against the defendant must play no part in the sentence he receives after a new trial. Thus, where a defendant who originally received a ten year term was subsequently sentenced to fifteen years at his new trial, the subsequent sentence was invalid because (1) the defendant was not credited with time served under the original sentence, and (2) there was no factual data in the record which affirmatively supported the more severe sentence.³¹⁷

The rule that has developed is that regardless of how meritorious a trial judge's reasons might be for imposing a more severe sentence after a new trial, such reason *must* be made part of the record so that the appellate court may review the question of vindictiveness, or the sentence will be vacated.³¹⁸

Although time served *must* be credited in imposing a sentence upon a new conviction for the same offense,³¹⁹ awarding credit for time served in jail while awaiting the original trial is within the discretion of the trial judge.³²⁰

315. See note 300 *supra* and accompanying text.

316. 395 U.S. 711 (1969).

Due process of law, then, requires that vindictiveness against defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Id. at 725-26.

317. *Stonom v. Wainwright*, 235 So.2d 545 (Fla. 1st Dist. 1970), *citing* *North Carolina v. Pearce*, 395 U.S. 711 (1969).

318. *Standifer v. State*, 241 So.2d 205 (Fla. 2d Dist. 1970) (trial court increased sentence on basis of presentence investigation report which was not part of the record). *Accord*, *Cox v. State* 243 So.2d 611 (Fla. 3d Dist. 1971) (upon original conviction defendant was sentenced to five years, at new trial he was sentenced to life; *held*, sentence reversed).

319. *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Stonom v. Wainwright*, 235 So.2d 545 (Fla. 1st Dist. 1970).

320. *Richardson v. State*, 243 So.2d 598 (Fla. 2d Dist. 1971), *citing* FLA. STAT. § 921.161 (1969) which says that the judge *may* allow credit for time served awaiting trial; *Albury v. State*, 246 So.2d 141 (Fla. 2d Dist. 1971). The federal rule is *contra*. *Dunn v. United States*, 376 F.2d 191 (4th Cir. 1967) (mandatory requirement).

In *Durham v. State*,³²¹ the defendant argued that the refusal of the trial judge to give him credit for jail time spent awaiting trial was a denial of his constitutional right to equal protection as guaranteed by the Fourteenth Amendment of the United States Constitution. The court dismissed the constitutional issue by holding that since the most credit the defendant could have received was 8-1/2 months of a 99 year sentence, the doctrine of *de minimis non curat lex* applied.

During the period surveyed numerous cases have dealt with the jurisdiction of the trial judge to modify a sentence. The trial judge has no power to set aside a sentence already partially served and increase the punishment.³²² Moreover, once sentence has been imposed and the time provided for mitigation of sentence has run,³²³ the trial judge no longer has jurisdiction to mitigate the sentence.³²⁴ Thus, in *Ware v. State*,³²⁵ a defendant who had been convicted and sentenced to two years, and later placed on parole by the trial judge pursuant to an untimely motion for mitigation, could not upon revocation of parole, be sentenced to a term longer than the original sentence.

If the maximum sentence a municipal court has jurisdiction to impose is 90 days, a defendant who received a suspended sentence with an order to leave town may not, after the expiration of 90 days, be incarcerated for being present in the town in violation of the order.³²⁶

Florida Statutes section 775.14 (1969) provides:

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

This statute was applied in the interesting case of *Gazda v. State*.³²⁷ In *Gazda* the defendant plead guilty but sentence and adjudication were withheld pending a medical examination of the defendant who had symptoms of tuberculosis. After having been sent to the hospital for treatment, the defendant disappeared and was not returned to the trial court until five years and three months after he had entered his guilty plea. The court held that the five year period of limitation of Florida Statutes section 775.14 (1969) must be measured from *conviction*,³²⁸ not from

321. 235 So.2d 753 (Fla. 1st Dist. 1970).

322. *Beckom v. State*, 227 So.2d 232 (Fla. 2d Dist. 1969), citing *Smith v. Brown*, 135 Fla. 830, 185 So. 732 (1938).

323. FLA. STAT. § 921.25 (1969) and FLA. R. CRIM. P. 1.800(b) establish the time within which a motion for mitigation of sentence can be made.

324. *See State v. Evans*, 235 So.2d 548 (Fla. 3d Dist. 1969), cert. denied, 229 So.2d 261 (Fla. 1969).

325. 231 So.2d 872 (Fla. 3d Dist. 1970).

326. *State ex rel. Baldwin v. Alsbury*, 223 So.2d 546 (Fla. 1969).

327. 244 So.2d 454 (Fla. 4th Dist. 1970). The decision was certified to the Supreme Court of Florida as a question of great public interest.

328. "[T]he term 'conviction' means the finding of guilt either by the jury or by the judge sitting as trier of fact or the establishment of guilt by a proper plea of guilty." *Gazda v. State*, 244 So.2d 454, 456 (Fla. 4th Dist. 1970).

time of *adjudication*.³²⁹ Thus, because the defendant was sentenced after more than five years had elapsed from the date of conviction, the district court held it had no jurisdiction to sentence the defendant.³³⁰

It has been held that a sentence which is suspended "from day to day and term to term until further order of the court" is illegal.³³¹ However, in such a situation if the sentence is actually imposed within the five year period fixed by Florida Statutes section 775.14 (1969), any error is corrected.³³²

Where an information contains more than one count, but each is a facet or phase of the same transaction, only one sentence may be imposed, and the sentence which should be imposed is for the highest offense charged.³³³ Thus, where the defendant, in the same information, is charged with two counts of possession of marijuana and two counts of sale of marijuana, and the possession and sale for each pair of counts occurred on the same day, each pair of counts represented a facet or phase of a single transaction, and therefore there should be one sentence as to each pair of counts.³³⁴

The rule of *Williams v. Illinois*,³³⁵ that an indigent defendant who has been sentenced to the maximum period fixed by statute for the substantive offense may not be imprisoned beyond the maximum term specified by statute because of his inability to satisfy the monetary provisions of the sentence, has been adopted in Florida³³⁶ and has been held to apply to court costs as well as to fines.³³⁷

Miscellaneous cases on sentencing in the period surveyed include

329. *Contra*, McCloud v. State, 237 So.2d 818 (Fla. 1st Dist. 1970), *citing* Bateh v. State, 101 So.2d 869 (Fla. 1st Dist. 1958), *cert. discharged*, 110 So.2d 7 (Fla. 1959); Rodriguez v. State, 119 So.2d 681 (Fla. 1960); Helton v. State, 106 So.2d 79 (Fla. 1958). The *Gazda* court held these cases not applicable since they dealt with situations arising before the effective date of FLA. STAT. § 775.14 (1969). *Gazda v. State*, 244 So.2d 454, 457 (Fla. 4th Dist. 1970).

330. In the dissenting opinion of *Gazda v. State*, 244 So.2d 454, 457, Justice Walden offered a number of interpretations which would support a result contrary to that of the majority, one of which being that the defendant should not, by his own flight, escape sentencing. In the authors' opinion, it is likely that the suggestions found in Justice Walden's dissent will be the basis for a reversal of the majority opinion by the Supreme Court of Florida.

[Subsequent to the preparation of this survey *Gazda* was reversed by the Supreme Court of Florida on the grounds that by leaving the state, the defendant tolled the running of the five year limitation statute. *State v. Gazda*, 257 So.2d 242 (Fla. 1971).]

331. *Stallworth v. State*, 237 So.2d 328 (Fla. 1st Dist. 1970).

332. *Id.* [Subsequent to the period of this survey, *Stallworth* was reversed by the Supreme Court of Florida. *State v. Stallworth*, 251 So.2d 847 (Fla. 1971) *citing* Rodriguez v. State, 119 So.2d 681 (Fla. 1960). *See also* Smith v. State, 259 So.2d 498 (Fla. 1st Dist. 1972).]

333. *Yost v. State*, 243 So.2d 469 (Fla. 3d Dist. 1971). *See also* Farrell v. State, 259 So.2d 540 (Fla. 1st Dist. 1972) (decided subsequent to the survey period) which follows *Yost*. *But see* Parker v. State, 237 So.2d 253 (Fla. 1st Dist. 1970); note 431 *infra* and accompanying text.

334. *Yost v. State*, 243 So.2d 469 (Fla. 3d Dist. 1971).

335. 399 U.S. 235 (1970).

336. *Dunn v. State*, 247 So.2d 26 (Fla. 2d Dist. 1971); *Booth v. State*, 246 So.2d 791 (Fla. 2d Dist. 1971); *Schreck v. State*, 240 So.2d 873 (Fla. 4th Dist. 1970).

337. *Gary v. State*, 239 So.2d 523 (Fla. 4th Dist. 1970).

decisions which held: the court may not sentence the defendant in his absence;³³⁸ the crime of breaking and entering with intent to commit a misdemeanor may be a felony or misdemeanor depending upon the penalty actually imposed;³³⁹ a presentence investigation under Florida Statutes section 948.01(2) (1969) is not mandatory, and the refusal of the trial judge to order a presentence investigation before imposing sentence is not error.³⁴⁰ In those cases where the statute defining the crime provides for increased punishment for the commission of successive related offenses, one may not be given the enhanced sentence of a second or third or subsequent offender without having been so charged and the allegation proven in an adversary proceeding conducted with all due process safeguards.³⁴¹

XI. METROPOLITAN COURT

Pursuant to a petition by The Florida Bar, the Supreme Court of Florida compiled a set of rules which govern all proceedings involving traffic offenses for which a penalty may be imposed.³⁴² The Florida Rules of Practice and Procedure for Traffic Courts supersede all conflicting rules and statutes and are applicable in municipal courts and in any mayor's courts, magistrates courts, county courts, county judge's courts, justice of the peace courts, and metropolitan courts having jurisdiction of traffic cases.³⁴³ Local rules of any court which supplement these rules must be published and approved by the Supreme Court of Florida.³⁴⁴ If, in the trial of a traffic offense, a jury is requested, the Traffic Rules provide that the Florida Rules of Criminal Procedure shall apply.³⁴⁵ The Traffic Court Rules are set out in Volume 247 of the Southern Reporter, Second Series, page 281 and should be consulted prior to the litigation of traffic offenses in the Metropolitan Court.

*Goldstein v. State*³⁴⁶ held that the metropolitan court has jurisdic-

338. *Wellington v. State*, 226 So.2d 432 (Fla. 2d Dist. 1969), citing FLA. STAT. § 921.07 (1969) [This statute was repealed by Fla. Laws 1970, ch. 70-339, § 180, because the same rule is contained in FLA. R. CRIM. P. 1.720].

339. *Brown v. State*, 237 So.2d 129 (Fla. 1970), overruling *Adams v. Elliot*, 128 Fla. 79, 174 So. 731 (1937). See FLA. STAT. § 810.05 (1969) [amended by FLA. STAT. § 810.05 (Supp. 1970)].

340. *Johnson v. State*, 242 So.2d 876 (Fla. 1st Dist. 1971), citing *Morgan v. State*, 142 So.2d 308 (Fla. 2d Dist. 1962).

341. *Johnson v. State*, 229 So.2d 13 (Fla. 4th Dist. 1969).

In *Dallas v. State*, 229 So.2d 891 (Fla. 2d Dist. 1969) the defendant, while represented by counsel, was convicted of a felony. There was, however, no attorney at sentencing. Since the lack of an attorney at sentencing does not invalidate the conviction, it was held that an increased punishment as a second offender may be given on the basis of the prior conviction.

342. *In re Florida Traffic Court Rules*, 247 So.2d 281 (Fla. 1971). The Florida Traffic Court Rules are abbreviated "Tr. CR."

343. FLA. Tr. CR. 6.01.

344. FLA. Tr. CR. 6.03.

345. FLA. Tr. CR. 6.13.

346. 223 So.2d 354 (Fla. 3d Dist. 1969), interpreting section 30-15(a) of the Code of Metropolitan Dade County, Florida.

tion to convict a defendant of violating a county ordinance which prohibits driving while intoxicated "within this county," where the defendant was found, while under the influence, driving her vehicle on the *private property* of a third person which was situated within the county of Dade.

XII. FORMER JEOPARDY

A plea of guilty entered to a valid criminal charge does, upon acceptance, raise the bar of former jeopardy against another prosecution for an offense based on the same transaction.³⁴⁷ Thus, where the court accepts defendant's plea of guilty to murder in the second degree, jeopardy has attached, and the state may not nolle prosequi the charge of murder in the second degree and charge the defendant with first degree murder, since the same transaction was the basis for both charges.³⁴⁸ On the other hand, cases have distinguished between "same offense" and "same transaction" and have held that the test for double jeopardy is whether the defendant has been twice in jeopardy for the same identical crime, not whether he has been tried before upon the same acts, circumstances or situation, the facts of which may sustain a conviction for a separate crime.³⁴⁹ Thus, a conviction in municipal court of unauthorized use of an automobile did not constitute former jeopardy with regard to a subsequent prosecution in the county court of record for breaking and entering with intent to commit larceny of such automobile.³⁵⁰ Also, conviction for operating a motor vehicle without a valid driver's license did not bar a subsequent prosecution for driving while the license is under suspension since the charges did not constitute the "same offense," and the latter charge requires proof of additional facts which the former does not.³⁵¹

The defense of former jeopardy must be raised by a motion to dismiss. Failure to move to dismiss constitutes waiver of the defense.³⁵²

Double jeopardy does not bar all retrials. For example, the retrial of an accused is not barred by double jeopardy if the original conviction was set aside because of error in the proceedings leading to the conviction.³⁵³

In the case of a mistrial, it has been held that if the judge declared a mistrial over the objection of the defendant, and there was no "urgent

347. Ray v. State, 231 So.2d 813 (Fla. 1969).

348. Reyes v. State, 224 So.2d 303 (Fla. 1969), *cert. denied*, 397 U.S. 958 (1970). See also Ray v. State, 231 So.2d 813 (Fla. 1969).

349. State v. Conrad, 243 So.2d 174 (Fla. 4th Dist. 1971).

350. *Id.*

The fact that the same set of facts will support a charge under a municipal ordinance as well as a violation of a state statute does not constitute double jeopardy. State v. Malone, 227 So.2d 896 (Fla. 3d Dist. 1969). *But see* Waller v. Florida, 397 U.S. 387 (1970) (cities and states are not "separate sovereignties" for purpose of double jeopardy rule).

351. Lanier v. State, 226 So.2d 37 (Fla. 1st Dist. 1969).

352. Robinson v. Wainwright, 240 So.2d 65 (Fla. 2d Dist. 1970).

353. Ray v. State, 231 So.2d 813 (Fla. 1969).

necessity" for a mistrial, the doctrine of double jeopardy precluded a retrial.³⁵⁴ However, the requirement that the mistrial be "urgently necessary" was relaxed in *Goodman v. State ex rel. Furlong*.³⁵⁵ In *Goodman* a codefendant asked for a severance because he would be introducing evidence which would prejudice his codefendant. The court granted a mistrial as to both defendants. The non-moving codefendant argued his subsequent prosecution was barred in that there was no necessity to declare a mistrial as to him. The Supreme Court of Florida held that the test for determining the effect of a mistrial is not whether a legally sufficient reason existed for granting the mistrial, but whether the "trial judge exercised his *sound discretion* in determining that the mistrial was for good cause."³⁵⁶ Since there was no showing that the trial judge abused his discretion, the plea of double jeopardy was not substantiated.

In a somewhat unique case, the accuseds were found guilty of murder in the first degree, but the Supreme Court of Florida reversed the conviction because "the evidence was definitely lacking in establishing guilt beyond a reasonable doubt."³⁵⁷ The court remanded the case for a new trial. The defendants thereupon filed a suggestion for a writ of prohibition, arguing that a reversal based on insufficiency of evidence is tantamount to a finding of not guilty, and therefore the doctrine of double jeopardy should bar a retrial. The District Court of Appeal, Second District, disagreed. The district court interpreted the supreme court's finding to be that the evidence, although weak, was legally sufficient to withstand a motion for directed verdict of acquittal and therefore double jeopardy did not apply.³⁵⁸

In *Ashe v. Swenson*,³⁵⁹ the United States Supreme Court held that the doctrine of "collateral estoppel"³⁶⁰ is embodied in the fifth amendment guarantee against double jeopardy. This rule applies to the states through the fourteenth amendment.³⁶¹ Thus, when a jury determines by

354. *State ex rel. Richmond v. Tyson*, 226 So.2d 345 (Fla. 4th Dist. 1969) (after hearing state's witnesses the judge resigned and the new judge who was assigned the case declared a mistrial; *held*, since the new judge could have recalled the witnesses, there was no need for a mistrial).

355. 247 So.2d 47 (Fla. 1971), *quashing State ex rel. Furlong v. Goodman*, 238 So.2d 150 (Fla. 3d Dist. 1970).

356. *Id.* at 50 (emphasis added).

357. *Sosa v. State*, 215 So.2d 736, 737 (Fla. 1968), *quoted in Sosa v. Maxwell*, 234 So.2d 690 (Fla. 2d Dist. 1970), *cert. denied*, 240 So.2d 640 (Fla. 1970), 402 U.S. 951 (1971).

358. *Sosa v. Maxwell*, 234 So.2d 690, 691-92 (Fla. 2d Dist. 1970), *cert. denied*, 240 So.2d 640 (Fla. 1970), 402 U.S. 951 (1971).

359. 397 U.S. 436 (1970).

360. "Collateral estoppel" . . . means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.
Ashe v. Swenson, 397 U.S. 436, 443 (1970).

361. In *Benton v. Maryland*, 395 U.S. 784 (1969), the United States Supreme Court held the fifth amendment guarantee against double jeopardy was enforceable against the states through the fourteenth amendment. In *Ashe* the Court held the *Benton* rule to be retroactive. *Ashe v. Swenson*, 397 U.S. 436, 437n.1 (1970). *See also Sosa v. Maxwell*, 234 So.2d 690 (Fla. 2d Dist. 1970), *cert. denied*, 240 So.2d 640 (Fla. 1970), 402 U.S. 951 (1971).

its verdict that a defendant was not one of a group of robbers, the state may not bring him before a new jury to relitigate that issue.³⁶²

Florida courts, however, have been reluctant in accepting the rule of *Ashe v. Swenson*. In *Simpson v. State*,³⁶³ the defendant, after having his first conviction for robbery reversed because of a defective instruction, was acquitted of the charge of armed robbery of a store. The defendant was subsequently prosecuted (for the third time) for robbing a different individual at the same time and place. The court refused to apply the collateral estoppel principle of *Ashe* to the third prosecution, arguing that since the state had proved that the defendant was involved in the robbery in the first prosecution, which had been reversed only because of the defective instruction, the defendant should not be allowed to use his subsequent acquittal as a bar to future prosecution for the same offense. In *Christopher v. State*,³⁶⁴ the District Court of Appeals, First District, after quoting a substantial portion of the *Ashe* decision, suggested that the collateral estoppel doctrine did not apply when the testimony identifying the defendant in the second case was stronger than at the first trial.³⁶⁵

XIII. DEFENDANT'S RIGHT TO BE PRESENT

In *Melendez v. State*³⁶⁶ the District Court of Appeals, Third District, held that because the defendant had not been notified that trial proceedings were to begin when they did, and because the defendant was not present when counsel selected the jury, defendant's subsequent in-court waiver of any objection to selection of jurors in his absence was not freely or competently given, and the statute prescribing the defendant's right to presence during empanelling of jury was violated. However, in *State v. Melendez*³⁶⁷ the Supreme Court of Florida reversed the Third District and held: (1) that the defendant had ratified his counsel's waiver of the defendant's right to be present by subsequently appearing without objection, and (2) the defendant had "constructive knowledge" of the proceedings because he was represented by counsel

362. *Ashe v. Swenson*, 397 U.S. 436, 446 (1970).

363. 237 So.2d 341 (Fla. 1st Dist. 1970). [Subsequent to the period covered by this survey *Simpson* was reversed by the Supreme Court of the United States. *Simpson v. Florida*, 403 U.S. 384 (1971), *citing Ashe v. Swenson*, 397 U.S. 436 (1970).]

364. 240 So.2d 316 (Fla. 1st 1970). (Defendant was acquitted of robbing a bar and was later prosecuted for robbing a package store which, although in a different room, was in the same building and was robbed at the same time as the bar.)

365. *Id.* at 317. The court also suggested that since the defendant did not move to dismiss the second prosecution on the grounds of collateral estoppel he could not raise the defense of collateral estoppel for the first time on appeal. The court failed to delineate which theory served as the basis for its decision.

366. 231 So.2d 251 (Fla. 3d Dist. 1970), *citing* FLA. STAT. § 914.01(3) (1969). *See also* notes 541-42 *infra* and accompanying text.

367. 244 So.2d 137 (Fla. 1971), *citing* FLA. R. CRIM. P. 1.180(a)(3) [FLA. STAT. § 914.01 (1969) was *repealed* by Fla. Laws 1970, ch. 70-339, § 180, because the statute was superseded by FLA. R. CRIM. P. 1.180].

(who was not objected to by the defendant) who had waived the defendant's right to be present. Thus, in essence, the mandatory language of criminal rule 1.180 is subject to waiver by a defendant who fails to object to his counsel's unilateral waiver of the right of the defendant to be present.

XIV. PRELIMINARY HEARING

During the period surveyed the Florida courts continued to cling to the position that a preliminary hearing is not a necessary step in due process of law.³⁶⁸ The Supreme Court of Florida, however, indicated that the continued practice of failing to bring a defendant before a magistrate in compliance with Florida Statutes section 901.23 (1969) would result in strong action by the court.³⁶⁹ As it predicted it would, the Supreme Court of Florida, in a recent case,³⁷⁰ held that the "rationale" of the *McNabb-Mallory* rule was applicable in Florida and thus the failure to bring a defendant before a magistrate without unreasonable delay *could* result in the inadmissibility of any confession obtained in the interim.

Notwithstanding the Florida courts' refusal to find that a preliminary hearing is a necessary step in due process, the United States District Court for the Southern District of Florida has ruled that due process demands that an incarcerated defendant be afforded a preliminary hearing within a reasonable time after arrest.³⁷¹ In *Pugh v. Rainwater*³⁷² the federal district court judge directed the defendants to submit, within 60 days, a plan providing for preliminary hearings before a judicial officer empowered to act as committing magistrate in all cases wherein prosecution is to be upon direct information.³⁷³

The defendant, upon request, is entitled to have a transcript of the proceedings at a preliminary hearing; if the defendant fails to request that the proceedings be transcribed, the failure to transcribe is not error.³⁷⁴

368. *Sanagree v. Hamlin*, 235 So.2d 729 (Fla. 1970); *Anderson v. State*, 241 So.2d 390 (Fla. 1970); *State ex rel. Shailer v. Booher*, 241 So.2d 720 (Fla. 4th Dist. 1970).

369. *See, e.g., State ex rel. Carty v. Purdy*, 240 So.2d 480 (Fla. 1970); *Sanagree v. Hamlin*, 235 So.2d 729 (Fla. 1970); *Perkins v. State*, 228 So.2d 382 (Fla. 1969).

370. *Oliver v. State*, 250 So.2d 888 (Fla. 1971). Although this case was not decided within the time period covered by this survey, its importance requires its mention here. *See* note 131 *supra* and accompanying text.

371. *Pugh v. Rainwater*, 332 F. Supp. 1107 (S.D. Fla. 1971).

372. *Id.* *Pugh* does not affect the holding of *Dibona v. State*, 121 So.2d 192 (Fla. 2d Dist. 1960), that a denial of a preliminary hearing does not constitute grounds for reversal of a conviction. In the authors' view, one solution to this problem is to prohibit the state attorney from filing informations directly, and to require a showing of probable cause before an indictment or information is issued.

373. At the time of this writing, the court is considering proposals submitted by the named defendants in *Pugh v. Rainwater*.

374. *Richardson v. State*, 247 So.2d 296 (Fla. 1971).

XV. FAIR TRIAL

In *Baker v. State*³⁷⁵ the defendant argued that he was denied his constitutional right to a fair trial when the trial judge refused to grant a mistrial after the prosecutor, at voir dire, asked prospective jurors questions which implied that the defense attorneys were members of the NAACP. The court held that since no blacks were involved, there was no prejudice to the defendant, and therefore the refusal to grant a mistrial was not error. Also, where the prosecutor, on voir dire, commented on the fact that the accused's codefendant had been found guilty, there was no denial of a fair trial.³⁷⁶ However, where the state called a codefendant to the stand with knowledge that he will claim the fifth and refuse to testify, thereby implicating the defendant in the jury's eyes, the non-testifying defendant was denied a fair trial since the jury was not instructed that the codefendant's silence should not implicate the defendant.³⁷⁷ Similarly, where a codefendant plead guilty and made a statement to the judge implicating the defendant, the subsequent trial of the defendant before the same judge was not a fair trial.³⁷⁸

In *Majors v. State*³⁷⁹ the defendants were jointly charged with the crime of aggravated assault and the state forced them into the position of each trying to prove that the other was the guilty party. The court held that allowing the prosecutor to sit back and watch the defendants "fight it out" was a denial of a fair trial and a violation of due process of law. More significantly, the court in *Majors* also held that where some of the state's witnesses testified that the defendant *did not* commit the crime for which he was being tried, the state's case itself "created a reasonable doubt as a matter of law" and since the state is bound by its own evidence, due process requires a reversal of the conviction.³⁸⁰

As previously indicated,³⁸¹ comments by the prosecutor have often raised the issue of whether there has been a denial of a fair trial. Statements made by the prosecutor in summation to the jury which charged that the defendant had not produced certain witnesses in his behalf were prejudicial and required a reversal since the defendant has no burden of proving a case or producing witnesses.³⁸² Similarly, where a prosecutor,

375. 241 So.2d 683 (Fla. 1970).

376. *Sanders v. State*, 241 So.2d 430 (Fla. 3d Dist. 1970).

377. *Richardson v. State*, 246 So.2d 771 (Fla. 1971).

378. *Mackey v. State*, 234 So.2d 418 (Fla. 3d Dist. 1970). The defendant was granted a new trial even though he did not move to disqualify the trial judge after his codefendant made the implicating statement.

379. 247 So.2d 446 (Fla. 1st Dist. 1971), *cert. denied*, 250 So.2d 898 (Fla. 1971) (there were two defendants, one gun, one bullet fired, and one victim; each was charged with the crime).

380. *Majors v. State*, 247 So.2d 446, 446-48 (Fla. 1st Dist. 1971), *citing* *Jackson v. State*, 12 Okl. Cr. 446, 158 P. 292 (1916); *State v. Haynes*, 64 Idaho 627, 135 P.2d 300 (1943); *Leavine v. State*, 109 Fla. 447, 147 So. 897 (1933); *Gustine v. State*, 86 Fla. 24, 97 So. 207 (1923).

381. See notes 375 and 376 *supra* and accompanying text.

382. *Kirk v. State*, 227 So.2d 40 (Fla. 4th Dist. 1969).

in his closing argument, said that the defendant "by his own testimony has spent the better part of his life in jail," reversible error has occurred and a new trial was ordered because such a comment was not a reasonable inference from the facts established.³⁸³ In *Thompson v. State*,³⁸⁴ the prosecutor, in closing argument, made a statement to the effect that the defendant, because there was no evidence to support the defense, would not look him in the eye when he said "you were justified in shooting that man down." The court held that the statement constituted prejudicial interjection of personalities which, when taken together with other remarks, impaired the defendant's right to a fair and impartial trial. On the other hand, where the prosecuting attorney, in summation, stated his personal belief as to the defendant's guilt, there was no denial of a fair trial since the other evidence of defendant's guilt was strong.³⁸⁵ Also, a comment as to the defendant's failure to testify made by the attorney for a codefendant was not a comment by the prosecutor and thus not reversible error.³⁸⁶

Since reference to "mug shots" implies that the defendant was a criminal, such a reference by the prosecutor in his opening statement was prejudicial and required a reversal.³⁸⁷ However, when a witness for the state makes the reference to "mug shots" of the defendant on cross-examination and there was no motion to strike, reversible error has not occurred.³⁸⁸

Where a trial judge, after ruling correctly on a particular objection by the prosecution, went into a tirade to rebuke the defense counsel in the presence of the jury, prejudice to the defendant's right to receive a fair trial was held to have occurred, and a new trial was ordered.³⁸⁹

In *Esposito v. State*,³⁹⁰ a defense attorney, on cross-examination, attempted to discredit a state's witness by suggesting that the witness' agreement to testify in exchange for receiving a sentence to run concurrently with a longer sentence was equivalent to "[getting] nothing" as a sentence. The court's instruction to the jury that defense counsel's

It is the duty of the trial judge to carefully control the trial and zealously protect the rights of the accused so that he shall receive a fair and impartial trial. The trial judge must protect the accused from improper or harmful statements, or conduct by a witness or by a prosecuting attorney during the course of a trial. It is also the duty of a prosecuting attorney in a trial to refrain from making improper remarks or committing acts which would or might tend to affect the fairness and impartiality to which the accused is entitled.

Id. at 43.

383. *Fitzgerald v. State*, 227 So.2d 45 (Fla. 3d Dist. 1969).

384. 235 So.2d 354 (Fla. 3d Dist. 1970), *cert. denied*, 239 So.2d 828 (Fla. 1971).

385. *Roundtree v. State*, 229 So.2d 281 (Fla. 1st Dist. 1969), *appeal dismissed*, 242 So.2d 136 (Fla. 1970).

386. *Smith v. State*, 238 So.2d 120 (Fla. 3d Dist. 1970), *cert. denied*, 242 So.2d 136 (Fla. 1970).

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

388. *Anderson v. State*, 230 So.2d 704 (Fla. 2d Dist. 1970), *citing Gagnon v. State*, 212 So.2d 337 (Fla. 3d Dist. 1968).

389. *Tyndall v. State*, 234 So.2d 154 (Fla. 4th Dist. 1970).

390. 243 So.2d 451 (Fla. 2d Dist. 1970).

statement was "incorrect" and thus should not be considered by the jury was held to be a violation of the defendant's right to a fair trial and an infringement of the jury's duty to determine the credibility of a witness. Although the court may have been correct in its ruling that a concurrent sentence was not a "nullity," it was the duty of the prosecutor rather than the court to rehabilitate a state witness.

In *State v. Bryan*,³⁹¹ the court held that the mere fact that the prosecutor had previously served as the defendant's public defender in an unrelated case would not disqualify him from prosecuting the defendant for a subsequent crime.³⁹² However, in *Jackson v. State*,³⁹³ the court held that an allegation that one of the defendant's prosecuting attorneys was previously employed by defendant's counsel entitled the defendant to an evidentiary hearing under rule 1.850. The court added that if the allegation were well founded, a new trial would be required.

In applying the decision of the United States Supreme Court in *Witherspoon v. Illinois*,³⁹⁴ Florida courts have had to determine when the exclusion of a juror because of his beliefs concerning the death penalty has resulted in denial of a fair trial. The Supreme Court of Florida has emphasized that the state as well as the defendant is entitled to a jury that is impartial as to penalty.³⁹⁵ Thus, if a prospective juror's scruples against capital punishment were such as to preclude him from returning a verdict of guilty if it might mean the imposition of the death penalty, then the court may properly exclude the venireman.³⁹⁶ If the juror says that, because of his views on capital punishment, he can render a verdict of guilty *only if* accompanied by a recommendation of mercy, the Florida courts deem him to be not qualified.³⁹⁷ In *Hallihan v. State*,³⁹⁸ the District Court of Appeal, First District, held that even though the trial court systematically excluded all prospective jurors with scruples

391. 227 So.2d 221 (Fla. 2d Dist. 1969).

392. [T]he State Attorney can only be disqualified if it were shown that as Public Defender he had actually gained confidential information from a prior attorney-client relationship with the defendant, which information would be useable in the new matter to defendant's prejudice. Such confidential information, however, must go beyond general information about defendant's personal characteristics tactically useable in any subsequent trial against him.

Id. at 223.

393. 234 So.2d 708 (Fla. 3d Dist. 1970).

394. 391 U.S. 510 (1968), *noted in* 23 U. MIAMI L. REV. 631 (1969). In *Witherspoon* the Court held that a prospective juror who professes scruples against capital punishment may not be automatically disqualified from serving in a capital case unless his beliefs are such as to bias his determination of the primary issue of guilt or innocence or prevent him from *considering* the death penalty as a possible punishment upon a finding of guilt. *See also* *Boulden v. Holman*, 394 U.S. 478 (1969), *cited in* *Watson v. State*, 234 So.2d 143, 144 (Fla. 3d Dist. 1970) (dissenting opinion) discussed in section XXVI, B, *infra*.

395. *Williams v. State*, 228 So.2d 377 (Fla. 1969).

396. *Perkins v. State*, 228 So.2d 382 (Fla. 1969). *Cf.* *Boulden v. Holman*, 394 U.S. 478 (1969).

397. *Campbell v. State*, 227 So.2d 873 (Fla. 1969), *citing* *Piccot v. State*, 116 So.2d 626 (Fla. 1959). *See also* *Paramore v. State*, 229 So.2d 855 (Fla. 1969).

398. 226 So.2d 412 (Fla. 1st Dist. 1969).

against capital punishment, there was no need for a reversal or new trial since the jury convicted but recommended mercy.³⁹⁹

The question of whether a defendant has received a fair trial may hinge on whether he has been frustrated in his attempt to secure information which may be important to his defense. In *State ex rel Duncan v. Crews*,⁴⁰⁰ it was not error for the trial court to allow the defendant, who was charged with manslaughter, to inspect and copy the traffic homicide report prepared by the Florida Highway Patrol after the accident. The state argued that the report was "confidential" and the privileged "work product" of the prosecution. In affirming the trial court, the appellate court noted that although the information sought to be obtained might be elicited by deposition of the reporting officer, it was not error to allow the defendant to copy the original report.⁴⁰¹

In *State v. Pitts*⁴⁰² the court responded to the defendants' allegation that they had been denied a fair trial because the state had withheld information favorable to the defense, by holding that since the defendants plead guilty and did not contest the state's case at trial, the question of state suppressed evidence was "immaterial." Also, in *Lawrence v. State*,⁴⁰³ at the preliminary hearing a witness testified that the defendant was not the perpetrator of the crime. This testimony was unknown to the defense but known to the police and magistrate. After conviction the defendant moved to vacate his sentence on the ground that the failure to disclose this beneficial information to the defense was error according to *Brady v. Maryland*.⁴⁰⁴ The court held there was no error since the defense knew or should have known that the witness had testified at the preliminary hearing, and therefore could have taken the witness' deposition for use at trial had it so desired.

Although the number of defense witnesses testifying to the defendant's good reputation may be limited in the discretion of the trial judge, it was an abuse of discretion to limit such evidence when the character of the defendant was a vital issue in his trial for rape.⁴⁰⁵

399. It has been argued that a new trial should be ordered in such a case since a jury selected on the basis of their acceptance of the death penalty has a greater propensity to convict than a jury with scruples against the death penalty. See Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute a Denial of Fair Trial on Issue of Guilt?*, 39 TEXAS L. REV. 545 (1961). See also Note, 23 U. MIAMI L. REV. 631, 640-41n.52 (1969).

400. 241 So.2d 754 (Fla. 1st Dist. 1970).

401. *Id.* at 755.

402. 241 So.2d 399, 413 (Fla. 1st Dist. 1970). [Subsequent to the period covered by this survey the District Court of Appeal, First District, modified its position and held that the rule of *Brady v. Maryland*, 373 U.S. 83 (1969) (suppression of evidence favorable to defense by prosecution violated due process) applies even though the defendant plead guilty. *State v. Pitts*, 249 So.2d 47 (Fla. 1st Dist. 1971).]

403. 244 So.2d 446 (Fla. 1st Dist. 1971).

404. 373 U.S. 82, 87 (1963) which held that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of prosecution.

405. *Washington v. State*, 247 So.2d 743 (Fla. 1st Dist. 1971).

In *Rivers v. State*⁴⁰⁶ a witness who was unable to identify the defendant by photographs shown to her at the police station or by lineups or by newspaper pictures, was able to identify the defendant as her assailant *only* after watching him during the duration of the trial. The defendant argued that the delayed, in-court identification was inadmissible. The Supreme Court of Florida held that the fact of last minute identification went to the weight and credibility and not to the admissibility of the identification.

In *Caldwell v. State*⁴⁰⁷ it was not a denial of a fair trial nor an unconstitutional infringement of freedom of religion to refuse to allow the defendant to hold and openly display a Bible during his trial.

XVI. GRAND JURY

The statute⁴⁰⁸ authorizing inspection by a court of testimony given before a grand jury did not provide for an in camera inspection by a criminal court judge where no criminal case was pending before the judge and where it was not shown that the inspection was in the furtherance of justice.⁴⁰⁹ However, in *State v. Drayton*⁴¹⁰ the court allowed "in the furtherance of justice" a pretrial in camera inspection of a prosecutrix' testimony where it was alleged that her statements to police conflicted with statements she made on deposition.

In *State v. Papy*⁴¹¹ it was held that the presence of an unauthorized person in a grand jury hearing at the time of deliberations resulting in indictment was grounds for a dismissal of the charge.

XVII. HABEAS CORPUS⁴¹²

In *Frizzell v. State*⁴¹³ the Supreme Court of Florida expressly receded from its former position and held that a writ of habeas corpus will be considered on its merits even though the petitioner would not be entitled to immediate release if successful in his attack on the conviction and regardless of whether the sentences are concurrent or consecutive.

Habeas Corpus, like rule 1.850, will not be allowed to substitute for an appeal. Thus, a petitioner who plead not guilty to charges contained in a procedurally defective information and who did not move for a new

406. 226 So.2d 337 (Fla. 1969).

407. 243 So.2d 422 (Fla. 1st Dist. 1971), *appeal dismissed*, 247 So.2d 326 (Fla. 1971).

408. FLA. STAT. § 905.27 (1969) [amended by FLA. STAT. § 905.27 (Supp. 1970)] (the statute allows a judge to inspect the testimony before a grand jury so that he may ascertain whether it is consistent with that given by the witness before the court or if such inspection is in the furtherance of justice).

409. *State ex rel. Oldham v. Baker*, 226 So.2d 21 (Fla. 3d Dist. 1969).

410. 226 So.2d 469 (Fla. 2d Dist. 1969). The court also held that there was no constitutional right to a pretrial examination of a witness's testimony notwithstanding the rule of *Brady v. Maryland*, 373 U.S. 83 (1963) that the prosecution must not suppress evidence favorable to the defense. See section XXXIV, A, 2 *infra*.

411. 239 So.2d 604 (Fla. 3d Dist. 1970).

412. See also notes 262-69 *supra* and accompanying text.

413. 238 So.2d 67 (Fla. 1970), noted in 25 U. MIAMI L. REV. 354 (1971).

trial or an appeal could not attack the validity of the information by way of habeas corpus.⁴¹⁴

In *Jackson v. Wainwright*⁴¹⁵ the petitioner, on his sworn petition for habeas corpus, made statements which were contrary to the record. The court deemed the petitioner a perjurer and directed the clerk of the court to forward a copy of the opinion to the Probation and Parole Commission. Such a practice was to be continued in the future whenever *any* collateral attack device reflects perjured statements.

XVIII. IMMUNITY

Immunity under Florida Statutes section 932.29 (1969) accrues if there is compulsory testimony; compulsory appearance by subpoena is not sufficient.⁴¹⁶ Moreover, immunity under the statute can only be conferred by the prosecution; counsel for a codefendant cannot confer immunity upon another codefendant at a deposition where the deponent invokes the fifth amendment and refuses to testify unless given immunity.⁴¹⁷

Where the defendant, who was subpoenaed before a grand jury and refused to waive immunity, gave testimony relating to transactions identified in the indictment and information under which he was subsequently charged, the court held that the defendant had been granted immunity from prosecution for such crimes.⁴¹⁸

Where a defendant appears by subpoena before a grand jury and voluntarily signs a written waiver of the immunities of section 932.29 (1969), the fact that the defendant was not then advised of his *Miranda* rights does not make the defendant immune from prosecution on the charges arising out of the testimony before the grand jury.⁴¹⁹

In *Englander v. State*⁴²⁰ the Supreme Court of Florida held that a county official who waives immunity under the threat of loss of office (city charter provided for loss of job if immunity not waived by commissioner) is considered to have waived immunity involuntarily and, therefore, his testimony may not be used against him. In *Headley v.*

414. *Stack v. State ex rel. LaFratta*, 230 So.2d 15 (Fla. 4th Dist. 1969), *cert. discharged*, 235 So.2d 491 (Fla. 1970). (The court distinguished between a procedurally defective information and an information filed without authority of law. The latter could be attacked by habeas corpus.)

415. 238 So.2d 657 (Fla. 1st Dist. 1970). *See also* note 630 *infra* and accompanying text.

416. *State ex rel. Foster v. Hall*, 230 So.2d 722 (Fla. 2d Dist. 1970).

417. *State v. Schell*, 222 So.2d 757 (Fla. 2d Dist. 1969), *citing* *United States v. Ernest*, 280 F. 515 (D. Mont. 1922). The court in *Schell* pointed out that each codefendant was attempting to confer immunity upon each other and that this absurd result, which would completely frustrate the prosecution, was not contemplated by the statute.

418. *State v. Papy*, 239 So.2d 604 (Fla. 3d Dist. 1970), *citing* FLA. STAT. § 932.29 (1969).

419. *State v. Chadroff*, 234 So.2d 412 (Fla. 3d Dist. 1970). *Accord*, *Englander v. State*, 246 So.2d 746 (Fla. 1971), *cert. denied*, 92 S. Ct. 108 (1971).

420. 246 So.2d 746 (Fla. 1971), [*cert. denied*, 92 S. Ct. 108 (1971)] *citing* *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968). *But see* *Headley v. Baron*, 228 So.2d 281 (Fla. 1969).

Baron,⁴²¹ the Supreme Court of Florida previously held that the immunity under section 932.29 (1969) protects against criminal prosecution only; it does not protect a police chief from loss of position resulting from testimony given under the immunity statute.

Immunity was not afforded in *Davis v. State*⁴²² where the defendant was told by the judge that if he did not answer the prosecutor's questions concerning embezzled funds, defendant's motion for an order declaring him insolvent would be denied.

In *State ex rel. Lurie v. Rosier*,⁴²³ the court held that although receiving stolen property was not one of the crimes listed in section 932.29 (1967), larceny was, and since the subject matter of the investigation bore upon larceny, immunity attached to the transactions even though the subject matter of the investigation also dealt with receiving stolen property.

*Stancel v. Schultz*⁴²⁴ held that contractual immunity given by a state attorney and ratified by the circuit judge is not binding beyond that jurisdiction and, therefore, will not bar a prosecution in a different county.

During the survey period, Florida Statutes section 932.29 (1969) was renumbered as Florida Statutes section 914.04 (Supp. 1970) and was substantially reworded in 1971.⁴²⁵

XIX. INDICTMENT AND INFORMATION

Florida Statutes section 906.04(2) (1969),⁴²⁶ which provided that no objection to any information on the ground that it was not subscribed or verified shall be made after pleading thereto or after moving to dismiss, was held to apply even though the alleged defects were allegedly not apparent from the face of the information.⁴²⁷

In *State v. Rand*⁴²⁸ an information, stated in the disjunctive, charged violations of statutes proscribing the obtaining of property by the unlawful drawing, making, uttering, issuing or delivering of worthless checks, drafts, or other written orders. The information was held not to be

421. 228 So.2d 281 (Fla. 1969).

422. 233 So.2d 641 (Fla. 2d Dist. 1970) (the court suggested that since the defendant was a lawyer and justice of the peace, he would not be allowed to take advantage of the court's remarks so as to force an immunity from the court).

423. 226 So.2d 825 (Fla. 4th Dist. 1969) (the court barred a prosecution for receiving stolen property even though it was not one of the five crimes enumerated in FLA. STAT. § 932.27 (1967); the current codification of the immunity statute does not enumerate specific crimes. See FLA. STAT. § 914.04 (Supp. 1970), amended by Fla. Laws 1971, ch. 71-99, § 1).

424. 226 So.2d 456 (Fla. 2d Dist. 1969).

425. Fla. Laws 1971, ch. 71-99, § 1, amending FLA. STAT. § 914.04 (Supp. 1970).

426. Repealed by Fla. Laws 1970, ch. 70-339, § 180, because the same rule is contained in FLA. R. CRIM. P. 1.140(g).

427. *State v. Polo*, 242 So.2d 457 (Fla. 1970), citing *Champlin v. Cochran*, 125 So.2d 565 (Fla. 1961).

428. 231 So.2d 31 (Fla. 3d Dist. 1970), citing FLA. R. CRIM. P. 1.140(k)(5) and FLA. STAT. § 906.13 (1969) [FLA. STAT. § 906.13 (1969) was repealed by Fla. Laws 1970, ch. 70-339, § 180, because the same rule is contained in FLA. R. CRIM. P. 1.140(k)(5).]

fatally vague on the ground that it did not inform the defendant of the specific offense with which he was charged.

Where an information contains more than one count, but each is a facet or phase of the same transaction, only one sentence may be imposed; and the sentence which should be imposed is for the highest offense charged.⁴²⁹ Thus, in *Yost v. State*,⁴³⁰ the defendant, who was charged with both possession and sale of marijuana, could be sentenced only for the higher offense since both charges were facets of the same transaction. However, in *Parker v. State*⁴³¹ the District Court of Appeal, First District, ruled that it was proper to sentence the defendant on *each* of three counts; namely, possession and sale of marijuana and possession of seconal, even though the charges all stemmed from one transaction. The court in *Parker* ruled that since there were three separate violations of the law, separate sentences were proper notwithstanding the fact that only one transaction was involved.

It is well settled that a defendant cannot be indicted or informed against for one offense and convicted and sentenced for another, even though the offenses are closely related and of the same general nature or character and punishable by the same grade of punishment. Thus, where the information charges the unlawful sale of heroin and the proof is of an unlawful sale of morphine there is a fatal variance between information and proof, and the conviction must be reversed.⁴³² Also, when the state proved that the alleged crime was committed on a specific date which differed from the date alleged in the information and bill of particulars, it was error to allow the state, over the defendant's objection, to amend the bill of particulars to conform to the state's proof.⁴³³

Problems arise when a defendant is convicted of an offense which is not a lesser included offense⁴³⁴ of the charge in the indictment or information. A conviction for receiving stolen property under an information charging larceny of automobile was fundamental error, cognizable on appeal notwithstanding absence of an objection to an erroneous instruction on lesser included offense.⁴³⁵ Also, where the defendant was charged with conspiracy to commit first degree murder but was convicted of conspiracy to commit assault and battery, the conviction was invalid because: conspiracy to commit assault and battery was not a lesser degree

429. *Yost v. State*, 243 So.2d 469 (Fla. 3d Dist. 1971). [See also *Farrell v. State*, 259 So.2d 540 (Fla. 1st Dist. 1972), which was decided subsequent to the survey period.]

430. 243 So.2d 469 (Fla. 3d Dist. 1971).

431. 237 So.2d 253 (Fla. 1st Dist. 1970), *citing* *Simmons v. State*, 151 Fla. 778, 10 So.2d 436 (1942). See note 333 *supra* and accompanying text.

432. *Jiminez v. State*, 231 So.2d 26 (Fla. 3d Dist. 1970) (the court went on to hold that the state was not precluded from a subsequent prosecution for the unlawful sale of morphine).

433. *Crowell v. State*, 238 So.2d 690 (Fla. 3d Dist. 1970).

434. See FLA. R. CRIM. P. 1.510. See also section IX *supra* and notes 299-305 *supra* and accompanying text.

435. *Johnson v. State*, 226 So.2d 884 (Fla. 2d Dist. 1969) (such a result operates as an acquittal of the charge of larceny of an automobile).

nor a necessarily included lesser offense of conspiracy to commit murder; the information did not allege the means or the manner the murder was to be perpetrated, therefore the lesser offense was not established by the pleadings and evidence.⁴³⁶

In *State v. Fattorusso*⁴³⁷ the state, after having its original information dismissed, was ordered by the trial court to refile within twenty days. The state inadvertently failed to refile and the trial court dismissed the information with prejudice. The District Court of Appeal, Third District, held that since the failure to refile was a nondeliberate violation of an oral order involving a procedural matter and since the defendant's constitutional rights had not been violated, the trial court's order of dismissal with prejudice was an abuse of discretion.

XX. ARREST

The fact that the defendant was not informed of the charge against him when arrested does not necessarily render the arrest invalid; being informed of the charge shortly after arrest is sufficient if no prejudice resulted from the initial failure to inform.⁴³⁸

In *Shadwick v. City of Tampa*⁴³⁹ the District Court of Appeal, Second District, held constitutional a municipal ordinance which permitted the city clerk to issue arrest warrants. The ordinance was attacked on the basis of the separation of powers doctrine,⁴⁴⁰ *i.e.*, judicial functions being performed by a non-judicial officer. The court held that the decision whether to issue a warrant is, at most, a quasi judicial function, which is not within "judicial power" reserved by the constitution to the judicial branch. The court further found that there was no indication in the record to support the notion that the clerk was, in essence, nothing more than a "rubber stamp" for the police. Thus, as long as the clerks make objective determinations that probable cause exists before issuing a warrant, such warrants are deemed valid.

XXI. EVIDENCE⁴⁴¹

The rule that is developing in Florida is that evidence of previous crimes is admissible if found to be relevant for any purpose save that of showing bad character or propensity to commit crime.⁴⁴² Moreover, evi-

436. *Smith v. State*, 233 So.2d 870 (Fla. 4th Dist. 1970), *rev'd on other grounds*, 240 So.2d 807 (Fla. 1970). As to the requisites for a conviction for a lesser included offense, see notes 299-305 *supra* and accompanying text.

437. 228 So.2d 630 (Fla. 3d Dist. 1969).

438. *Thomas v. State*, 223 So.2d 318 (Fla. 1969).

439. 237 So.2d 231 (Fla. 2d Dist. 1970), *aff'd*, 250 So.2d 4 (Fla. 1971). *Contra*, *State v. Paulick*, 277 Minn. 140, 151 N.W.2d 591 (1967).

440. See FLA. CONST. art. II, § 3, and art. V, § 1.

441. See also section XV *supra*.

442. *Baker v. State*, 241 So.2d 683 (Fla. 1970) (the evidence concerning other crimes should be carefully scrutinized by the court before it is determined to be admissible). See

dence of crimes other than the crime for which the defendant is charged may be admissible even though the extraneous crime occurred shortly *after* the crime for which the defendant is charged.⁴⁴³ The fact that the defendant was acquitted⁴⁴⁴ of the charge or not arrested⁴⁴⁵ for the charge does not necessarily render evidence of the crime inadmissible. However, if the evidence of a prior crime is stressed, making the prior offense "a feature instead of an incident," reversible error has occurred and a new trial is necessary.⁴⁴⁶

Thus, during the biennium, it has been held that evidence of similar crimes is admissible to show a common scheme or system;⁴⁴⁷ to show a mode of operation;⁴⁴⁸ or to establish the defendant's presence at the scene of the crime.⁴⁴⁹ However, evidence of prior crimes may not be admitted if its sole relevancy is to prove that the defendant had propensity to commit a crime.⁴⁵⁰

In *Coppolino v. State*,⁴⁵¹ the state attempted to strengthen the credibility of its witness by introducing evidence of an illicit intimate relationship between herself and the defendant. The trial court let the evidence in, but the appellate court ruled that evidence of such *unrelated* crimes is not admissible to strengthen or impeach the credibility of the witness. The court went on, however, to rule that the error in admitting such evidence was harmless when considered in light of the total record.

The right of cross-examination was deemed frustrated in *Allen v. State*,⁴⁵² when the court refused to allow the defense attorney the right to inspect notes that the witness (police officer) used to refresh his memory.

also Saxon v. State, 225 So.2d 925 (Fla. 4th Dist. 1969) and *Coppolino v. State*, 223 So.2d 68 (Fla. 2d Dist. 1968) *appeal dismissed*, 234 So.2d 120 (Fla. 1969), *cert. denied*, 399 U.S. 927 (1970), which lists a number of specific circumstances under which evidence of previous crimes is admissible.

443. *Christie v. State*, 246 So.2d 605 (Fla. 2d Dist. 1971). See note 447 *infra*.

444. *Wingate v. State*, 232 So.2d 44 (Fla. 3d Dist. 1970), *cert. denied*, 237 So.2d 764 (Fla. 1970), 400 U.S. 994 (1971). See note 448 *infra* and accompanying text; *Dempsey v. State*, 238 So.2d 446 (Fla. 3d Dist. 1970), *cert. denied*, 240 So.2d 646 (Fla. 1970); *Bryant v. State*, 235 So.2d 721 (Fla. 1970).

445. See *Mims v. State*, 241 So.2d 715 (Fla. 1st Dist. 1970).

446. *Green v. State*, 228 So.2d 397, 399 (Fla. 2d Dist. 1969), *cert. denied*, 237 So.2d 540 (Fla. 1970) (the failure to give a limiting instruction, coupled with the emphasis given the prior crime in relation to the crime charged, resulted in a reversal).

447. *Christie v. State*, 246 So.2d 605 (Fla. 2d Dist. 1971) (this is true even though the extraneous crime occurred the day *after* the crime for which the defendant was charged). *Bogan v. State*, 226 So.2d 110 (Fla. 2d Dist. 1969).

448. *Wingate v. State*, 232 So.2d 44 (Fla. 3d Dist. 1970), *cert. denied*, 237 So.2d 764 (Fla. 1970), 400 U.S. 994 (1971); *Crosby v. State*, 237 So.2d 286 (Fla. 2d Dist. 1970) (crime committed four years before was held to be relevant in that it showed similar mode of operation). See *also* *Bryant v. State*, 235 So.2d 721 (Fla. 1970).

449. *Williams v. State*, 247 So.2d 425 (Fla. 1971).

450. *Franklin v. State*, 229 So.2d 892 (Fla. 3d Dist. 1969), *cert. denied*, 237 So.2d 754 (Fla. 1970).

451. 223 So.2d 68 (Fla. 2d Dist. 1968), *appeal dismissed*, 234 So.2d 120 (Fla. 1969), *cert. denied*, 399 U.S. 927 (1970). See *also* *Rhodes v. State*, 104 Fla. 520, 140 So. 309 (1932).

452. 243 So.2d 448 (Fla. 1st Dist. 1971).

During the biennium there were numerous evidentiary cases dealing with identification, mug shots, photographs and the like. Florida courts have adopted the position that convictions based on eyewitness identification at trial following a pretrial identification by photograph will not be set aside unless the photograph identification procedure was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.⁴⁵³ Thus, the fact that the witness was presented a single photograph at the pretrial identification does not result in reversible error if there is some other basis for the identification.⁴⁵⁴

When shown to be relevant, photographs of a murder victim are admissible into evidence, provided what they depict is not so shocking or inflammatory that it overcomes the value of its relevancy.⁴⁵⁵ The photographs may be admitted in spite of the defendant's offer to stipulate as to the facts the picture may depict.⁴⁵⁶ However, notwithstanding the fact that the photographs may be relevant to the crime charged, the introduction of an unnecessarily large number of photographs constitutes prejudicial error to the defendant when fewer and less gruesome photographs would be sufficient to prove the point.⁴⁵⁷

Although reference to mug shots by the prosecutor may be prejudicial in that it tends to suggest to the jury that the defendant has committed other crimes,⁴⁵⁸ such a reference by the police officer-witness in *Williams v. State*⁴⁵⁹ was deemed to be harmless error since the guilt of the defendant was conclusively established by identification by the victim and arresting officer.

In *Anderson v. State*⁴⁶⁰ the Supreme Court of Florida ruled that fingerprints and palm prints are not evidence of a testimonial or communicative nature and therefore are not protected by the fifth amendment strictures against self-incrimination. Moreover, the taking of a palm print is not a critical stage of the criminal proceeding requiring that the defendant be afforded the right to have counsel present.

Florida courts continue to follow the rule that the use of perjured

453. *Bunk v. State*, 231 So.2d 39 (Fla. 3d Dist. 1970).

454. *Id.*; *Fuller v. Wainwright*, 238 So.2d 65 (Fla. 1970) (where the in-court identification was based on the witness' observations at the scene of the crime as well as on the pretrial photographic identification, the fact that the witness was shown a single photograph was not reversible error).

455. *Williams v. State*, 228 So.2d 377 (Fla. 1969).

456. *Id.* See also *Arrington v. State*, 233 So.2d 634 (Fla. 1970). In *Arrington* it was held that it was not error to allow the state to introduce evidence on a point which was the subject of a stipulation between the lawyers. The parties stipulated to the identification of the body and the cause of death. The court ruled that the breath of the stipulation did not preclude the state from introducing evidence relating to the cause of death.

457. *Young v. State*, 234 So.2d 341, 347-48 (Fla. 1970), citing *Leach v. State*, 132 So.2d 329 (Fla. 1961). In *Young* the state introduced 45 photographs, 22 of which were the victim's partially decomposed torso.

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

459. 233 So.2d 428 (Fla. 3d Dist. 1970).

460. 241 So.2d 390 (Fla. 1970).

or false testimony by a witness for the prosecution is not reversible error unless it is done with the knowledge of the prosecuting attorney.⁴⁶¹

Miscellaneous decisions pertaining to criminal evidence decided during the period of this survey include the following cases. An arresting officer's opinion as to the state of intoxication of the driver is admissible when preceded by a description of the defendant's acts and appearance.⁴⁶² In homicide cases if an identity witness, other than a member of the victim's family, is available, it is error to have the family member testify.⁴⁶³ Corroboration of a prosecutrix' testimony is not necessary to authorize a conviction for rape.⁴⁶⁴ The court may, in its discretion, order a pretrial psychiatric examination of a prosecutrix in a rape case, but such practice is discouraged and should be resorted to only in extreme instances where it is necessary to insure a just disposition of the cause.⁴⁶⁵ It has been held not an abuse of discretion to allow a police officer to testify after "the rule" had been invoked and the officer had been present in court contrary to "the rule."⁴⁶⁶ In establishing the chain of possession of contraband seized from the defendant, the test is whether there is any indication of probable tampering with the evidence; the state need not establish by live witnesses that these witnesses actually had possession or control from the time of arrest to the time of trial.⁴⁶⁷ Reports of psychological testing made by a psychologist for the use and benefit of psychiatrists in diagnosis are hearsay and are properly excluded in a trial for first degree murder.⁴⁶⁸ Although hearsay evidence is admissible at a revocation of probation hearing, revocation should not be based on hearsay alone.⁴⁶⁹ Secondary evidence of an incriminating document in the possession of the defendant is admissible only when a proper foundation has been laid by giving the defendant reasonable notice to produce the original.⁴⁷⁰ Where a defendant's testimony pertained to matters unre-

461. *Fuller v. Wainwright*, 238 So.2d 65 (Fla. 1970), *citing* *Wade v. State*, 193 So.2d 459 (Fla. 4th Dist. 1967).

462. *City of Orlando v. Newell*, 232 So.2d 413 (Fla. 4th Dist. 1970).

463. *Abram v. State*, 242 So.2d 215 (Fla. 1st Dist. 1970), *cert. denied*, 245 So.2d 870 (Fla. 1971), *citing* *Ashmore v. State*, 214 So.2d 67 (Fla. 1st Dist. 1968) and *Gibson v. State*, 191 So.2d 58 (Fla. 1st Dist. 1966). However, if the guilt of the defendant is otherwise clearly established, the harmless error rule applies to prevent a reversal. *But see* *Furr v. State*, 229 So.2d 269 (Fla. 2d Dist. 1970), *cert. denied*, 237 So.2d 538 (Fla. 1970) (manslaughter case).

464. *Smith v. State*, 239 So.2d 284 (Fla. 2d Dist. 1970) [Subsequent to the period of this survey, *Smith* was reversed by the Supreme Court of Florida. *State v. Smith*, 249 So.2d 16 (Fla. 1971)].

465. *Dinkins v. State*, 244 So.2d 148 (Fla. 4th Dist. 1971). The court did not expressly delineate what circumstances must exist before pretrial psychiatric examination would be proper, but it was suggested that a showing that the prosecutrix was suffering from a mental disorder might be sufficient.

466. *Smith v. State*, 243 So.2d 602 (Fla. 3d Dist. 1971).

467. *Stunson v. State*, 228 So.2d 294 (Fla. 3d Dist. 1969), *cert. denied*, 237 So.2d 179 (Fla. 1970).

468. *Hallihan v. State*, 226 So.2d 412 (Fla. 1st Dist. 1969).

469. *Franklin v. State*, 226 So.2d 461 (Fla. 2d Dist. 1969). *See* Section XXX and note 580 *infra* and accompanying text.

470. *Kirk v. State*, 227 So.2d 40 (Fla. 4th Dist. 1969) wherein it was held that admis-

lated to the crime charged, it was not error to strike the defendant's entire testimony, considering the fact that the evidence of guilt was great.⁴⁷¹ Similarly, the admission of evidence concerning a conversation between a police officer and the defendant may have been error, but because of the harmless error statute,⁴⁷² there need not be a reversal.⁴⁷³

In *Diamond v. State*⁴⁷⁴ a codefendant made a pretrial statement to the prosecution which exculpated the defendant. The defendant, who was not informed of the exculpatory statement, was convicted for possession of marijuana. Subsequent to the conviction the defendant learned of the exculpatory statement and thereupon moved to vacate the conviction pursuant to rule 1.850 on the grounds of newly discovered evidence. The petition was denied on the somewhat shallow grounds that: (1) the written document was hearsay and inadmissible; (2) the codefendant was available as a witness had the defense wished to call him to testify; and (3) the exculpatory statement was similar to what the defendant testified to in his own defense and, therefore, the codefendant's statement was "cumulative." The majority in *Diamond* apparently overlooked the rule of the United States Supreme Court in *Brady v. Maryland*,⁴⁷⁵ which holds that it is a denial of due process for the state to suppress evidence which is favorable to the defense.

In *Sutton v. State*⁴⁷⁶ it was held not an abuse of judicial discretion to allow the state to impeach a defense witness by showing that the same witness, at a prior trial of the same cause (which ended in a mistrial), had testified against the defendant.

In *Smith v. State*⁴⁷⁷ the District Court of Appeal, Second District, dealt with the issue of sufficiency of the evidence in a rape case. The rule that was applied was that if the record as a whole discloses a possibility of error, the interest of justice demanded that a new trial be given, notwithstanding the fact that the evidence was technically sufficient to support a conviction.⁴⁷⁸

sion of testimony relating to contents of alleged confession was error where there was no attempt to secure paper from defendant or to inform him in any way that such paper should be produced at trial.

471. *Harris v. State*, 236 So.2d 135 (Fla. 1st Dist. 1970).

472. FLA. STAT. § 924.33 (1969), *reworded by* FLA. STAT. § 924.33 (Supp. 1970).

473. *Parnell v. State*, 233 So.2d 437 (Fla. 3d Dist. 1969), *on remand* from the Florida Supreme Court, see *State v. Parnell*, 221 So.2d 129 (Fla. 1969).

474. 233 So.2d 418 (Fla. 4th Dist. 1970).

475. 373 U.S. 83 (1963).

476. 239 So.2d 644 (Fla. 1st Dist. 1970).

477. 239 So.2d 284 (Fla. 2d Dist. 1970). The majority of the court, led by Judge Mann, could not, in good conscience, affirm a "technically sufficient" conviction for rape where the record as a whole suggested error.

We conclude that judges have historically granted new trials in the interest of justice where the record, though technically sufficient, raises so much doubt that the conviction cannot in conscience be upheld.

Id. at 290.

478. The prevailing view, as stated by Judge Pierce in his dissent, is that if the evidence for the state is a matter of law, sufficient to convict if believed by the jury and concurred in by the trial judge, the conviction must be sustained even though the appellate

XXII. CONFIDENTIAL INFORMANTS

In *Monserrate v. State*⁴⁷⁹ the defendant was found guilty of possession of marijuana on the strength of a policeman's testimony that the defendant sold marijuana to a confidential informant. The informant did not testify and his identity was kept secret. The District Court of Appeal, Third District, held that under these circumstances it was prejudicial error to refuse to require the state to divulge the name of the police informant, since the right to confront adverse witnesses, which is fundamental to a fair trial, was involved. However, *Monserrate* is an exception to the general rule that the identity of police informants is privileged; thus, the defense is normally not entitled to know the identity of non-testifying confidential informants under criminal rule 1.220(e).⁴⁸⁰

XXIII. PLEA OF GUILTY

In *Boykin v. Alabama*⁴⁸¹ the Supreme Court of the United States held that since a plea of guilty entails a waiver of federal constitutional rights (*e.g.*, privilege against self-incrimination, right to trial by jury, right to confront accusers), the guilty plea must be made knowingly, intelligently and voluntarily; thus, the trial judge must advise the defendant of his constitutional rights and of the consequences of his guilty plea prior to acceptance thereof, and on appeal, the *record must affirmatively show* that the defendant was so advised.

The main thrust of *Boykin*, that a presumption of waiver from a silent record is impermissible, has been reluctantly accepted by the Florida courts. In *Johnson v. Wainwright*⁴⁸² the Supreme Court of Florida established that the "record" rule of *Boykin* did not apply retroactively. In *McPherson v. State*⁴⁸³ the record did not affirmatively establish that the trial court advised the defendant pursuant to *Boykin*, but the District Court of Appeal, First District, held that problem, in and of itself, was not sufficient to reverse; the defendant must do more than allege a "silent record," he must make an affirmative showing of a denial of constitutional rights before a reversal will be ordered.⁴⁸⁴ The District

judge, if on the jury, would have voted for acquittal. *Smith v. State*, 239 So.2d 284, 290 (Fla. 2d Dist. 1970) (dissenting opinion). [Subsequent to the period of this survey, *Smith* was reversed by the Supreme Court of Florida. *State v. Smith*, 249 So.2d 16 (Fla. 1971)].

479. 232 So.2d 444 (Fla. 3d Dist. 1970).

480. *Maycox v. State*, 239 So.2d 851 (Fla. 3d Dist. 1970), *citing* *Treverrow v. State*, 194 So.2d 250 (Fla. 1967). For other cases dealing with confidential informants see notes 187-90 *supra* and accompanying text.

For a discussion of FLA. R. CRIM. P. 1.220(e), see section XXXIV, A, 4, *infra*.

481. 395 U.S. 238 (1969) [hereinafter cited as *Boykin*].

482. 238 So.2d 590 (Fla. 1970). *Accord*, *Odle v. State*, 241 So.2d 184 (Fla. 3d Dist. 1970).

483. 237 So.2d 18 (Fla. 1st Dist. 1970). *Accord*, *Hodge v. State*, 241 So.2d 865 (Fla. 1st Dist. 1970), *cert. denied*, 246 So.2d 113 (Fla. 1971); *Moore v. State*, 241 So.2d 868 (Fla. 1st Dist. 1970); *Anderson v. State*, 245 So.2d 90 (Fla. 1st Dist. 1971); *Williams v. State*, 245 So.2d 267 (Fla. 1st Dist. 1971).

484. This may be done at an evidentiary hearing under rule 1.850. *McPherson v. State*,

Court of Appeal, Second District, in *Young v. State*,⁴⁸⁵ after pointing out that "[w]e have no quarrel with the holding in *Boykin*,"⁴⁸⁶ held that where the court reporter's notes of the proceedings wherein the defendant pleaded guilty were unintentionally destroyed, the "silent record" was overcome by having the principals (trial judge, counsel, petitioner, probation supervisor) testify at a rule 1.850 hearing. In *Bilger v. State*,⁴⁸⁷ however, the Second District unqualifiedly applied *Boykin* and reversed on the grounds that "[t]he trial judge did not follow *Boykin v. Alabama* . . . and the guilty plea received cannot stand without a record supporting its voluntariness."⁴⁸⁸

Criminal rule 1.170(a) requires that the judge not accept a plea of guilty without first determining that the plea is made voluntarily with understanding of the nature of the charge. This requirement is not met when the trial judge asks the defendant's lawyer if he explained the effects of the plea to his client; the trial judge himself must make inquiry of the defendant.⁴⁸⁹

A voluntary plea of guilty which has been entered on the advice of counsel constitutes a waiver of all nonjurisdictional defects in any stage of the proceedings against the defendant occurring prior to the entry of a guilty plea.⁴⁹⁰ Thus, if there is some doubt as to the voluntary nature of a guilty plea, it is an abuse of discretion to refuse to allow a change of plea.⁴⁹¹ However, such a motion must be timely made, and a motion to withdraw a plea of guilty made after sentence has been imposed may, in the absence of compelling circumstances, be properly denied.⁴⁹²

The question of whether a plea of guilty was, in fact, voluntary was discussed in a number of cases. It has been held that a plea of guilty was not rendered involuntary by the fact that it was based on the state's agreement, subsequently fulfilled, to nolle prosequi other charges pending against the defendant.⁴⁹³ A plea of guilty was not rendered invalid because the defendant's attorney conferred with the defendant for only a short time.⁴⁹⁴ On the other hand, where the defendant alleged he entered a plea of guilty without the aid of counsel and without intelligent ex-

237 So.2d 18, 20 (Fla. 1st Dist. 1970). *Accord*, *Williams v. State*, 245 So.2d 267 (Fla. 1st Dist. 1971).

485. 245 So.2d 104 (Fla. 2d Dist. 1971).

486. *Id.* at 106.

487. 247 So.2d 721 (Fla. 2d Dist. 1971).

488. *Id.* See also *Young v. State*, 233 So.2d 178 (Fla. 2d Dist. 1970); *Rudolph v. State*, 230 So.2d 14 (Fla. 2d Dist. 1970). The Florida courts have failed to instruct the defendant as to exactly what he is giving up via the waiver as required by *Boykin*.

489. *Laws v. State*, 235 So.2d 754 (Fla. 4th Dist. 1970).

490. *Ward v. State*, 236 So.2d 187 (Fla. 1st Dist. 1970).

491. *Lopez v. State*, 227 So.2d 694 (Fla. 3d Dist. 1969).

492. *Stapleton v. State*, 239 So.2d 140 (Fla. 1st Dist. 1970). *But see* *Brown v. State*, 245 So.2d 41 (Fla. 1971) discussed at note 505 *infra*.

493. *King v. State*, 233 So.2d 406 (Fla. 4th Dist. 1970). See also *Jones v. State*, 237 So.2d 249 (Fla. 1st Dist. 1970).

494. *Byrd v. State*, 243 So.2d 1 (Fla. 3d Dist. 1971).

planation of the consequences, he was entitled to a rule 1.850 hearing.⁴⁹⁵ Also, where the defendant alleged that he was hard of hearing and that he thought he plead guilty to assault with intent to rape, but in fact he plead guilty to rape, the defendant was entitled to a rule 1.850 hearing to determine whether the plea was voluntarily made.⁴⁹⁶ In *Steinhauser v. State*,⁴⁹⁷ the defendant, who alleged his guilty plea was entered only because he was told it was the only way to save his girl friend, was denied a 1.850 hearing on the grounds that at trial the judge, prior to accepting the guilty plea, asked the defendant whether he had been promised anything or had been coerced, and the defendant, admitting his plea to be voluntary, replied in the negative. In *Brumley v. State*,⁴⁹⁸ however, the fact that the defendant did not allege coercion when the trial judge inquired into the voluntariness of the guilty plea did not preclude a rule 1.850 hearing on voluntariness. If coercion was responsible for the plea, that same coercion may also have motivated the answers to the trial judge's questions with respect to the voluntariness of the pleas.

There has been some conflict in the reported Florida cases as to whether a guilty plea which is given in return for a tacit promise of reduced sentence, subsequently unfulfilled, is deemed voluntary. In *Garcia v. State*⁴⁹⁹ a guilty plea entered pursuant to an understanding between the prosecutor and defense lawyer, subsequently unfulfilled, was deemed voluntary by the District Court of Appeal, Third District. The same result was arrived at in *Flimming v. State*⁵⁰⁰ and *Carter v. State*.⁵⁰¹ On the other hand, the District Court of Appeal, Fourth District, in *Cooley v. State*⁵⁰² held that where a defendant alleged that his guilty plea was rendered in response to a tacit promise from his lawyer of a five year sentence as opposed to a life sentence if no plea, the defendant is entitled to a 1.850 hearing notwithstanding the fact that the record on its face suggested the plea was voluntary. Also, in *Johnson v. State*,⁵⁰³ allegations that a plea of guilty was entered pursuant to the prosecutor's promise to ask the court for a 20 to 30 year sentence, subsequently unfulfilled (the prosecutor did not even appear at sentencing and defendant was sen-

495. *Moret v. State*, 242 So.2d 500 (Fla. 3d Dist. 1971).

496. *Williams v. State*, 245 So.2d 680 (Fla. 4th Dist. 1971).

497. 228 So.2d 446 (Fla. 2d Dist. 1969). See also *Willis v. State*, 236 So.2d 143 (Fla. 2d Dist. 1970); *Hooper v. State*, 232 So.2d 257 (Fla. 2d Dist. 1970).

498. 224 So.2d 447 (Fla. 4th Dist. 1969) (defendant alleged plea of guilty was result of threats of charges of kidnapping and threats that if he failed to plead guilty his gun shot wounds would be made fatal).

499. 228 So.2d 300 (Fla. 3d Dist. 1969). It is interesting to note that in *Garcia* the prosecutor questioned the defendant as to voluntariness and not the judge. This may not satisfy FLA. R. CRIM. P. 1.170. See *Laws v. State*, note 489 *supra* and accompanying text.

500. 242 So.2d 797 (Fla. 3d Dist. 1971).

501. 247 So.2d 332 (Fla. 3d Dist. 1971), citing *Plymale v. State*, 201 So.2d 85 (Fla. 3d Dist. 1967).

502. 245 So.2d 679 (Fla. 4th Dist. 1971), citing *Brumley v. State*, 224 So.2d 447 (Fla. 4th Dist. 1969).

503. 233 So.2d 668 (Fla. 4th Dist. 1970).

tenced to 60 years), was deemed sufficient to require a rule 1.850 evidentiary hearing on the issue of voluntariness. The general problem of unfulfilled promises of reduced sentences was addressed by the Supreme Court of Florida in *Brown v. State*.⁵⁰⁴ In *Brown* it was stressed that the court is never bound by negotiations or understandings between the defendant and the state; however, where the defendant, as a result of misinformation, has honestly misunderstood the plea bargaining process and the sentence he received surprised him, the court should allow the defendant to change his plea from guilty to not guilty.

[A] judge is not bound to grant probation and . . . an accused cannot withdraw his guilty plea merely because the sentence did not conform to what he hoped it might be. However, the facts before us are . . . consistent with actual misunderstanding and mutual mistake resulting to a large extent from statements made at the conference between trial counsel, the prosecutor and the judge. . . . We repeat that a judge is never bound in sentencing by these negotiations . . . however, a judge should be liberal in the exercise of his discretion and allow withdrawal of guilty plea where . . . the plea was based on a failure of communication or misunderstanding of the facts.⁵⁰⁵

The Florida court may recede somewhat from its position that negotiations as to pleas are not binding in light of the recent decision of the Supreme Court of the United States in *Santabello v. New York*.⁵⁰⁶ In *Santabello* the Supreme Court held that when a guilty plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part of the inducement or consideration, such promise must be fulfilled. If such a promise is breached, the case should be remanded and, according to the circumstances of the case, the defendant may obtain specific performance or withdraw his plea of guilty.

In another vein, *Chatman v. State*⁵⁰⁷ held that a defendant may enter a plea of guilty to a capital offense.

XXIV. NOLO CONTENDERE

In *State v. Ashby*⁵⁰⁸ the Supreme Court of Florida ruled that a defendant could enter a plea of nolo contendere, conditional on reservation for appellate review of the question of legality of the evidence seized and used against him. The court stressed, however, that this procedure was acceptable as to questions of law but not as to questions of fact.

504. 243 So.2d 441 (Fla. 1971), *quashing* 234 So.2d 161 (Fla. 4th Dist. 1970).

505. *Brown v. State*, 245 So.2d 41, 43-44 (Fla. 1971).

506. 92 S. Ct. 495 (1971). *See, e.g.*, *Barker v. State*, No. 71-108, 71-109 (Fla. 2d Dist. Filed March 17, 1972) decided subsequent to the period of this survey.

507. 225 So.2d 576 (Fla. 2d Dist. 1969), *cert. denied*, 232 So.2d 176 (Fla. 1969).

508. 245 So.2d 225 (Fla. 1971), *affirming in part and quashing in part* 228 So.2d 400 (Fla. 2d Dist. 1969).

A plea of *nolo contendere*, like a plea of guilty, should not be accepted by a trial judge unless he has determined that it was knowingly, intelligently and voluntarily made.⁵⁰⁹

XXV. SELF-INCRIMINATION

In *Lacy v. State*⁵¹⁰ the District Court of Appeal, Second District, held that requiring a defendant accused of lettering a forged check to give a handwriting exemplar did not violate his fifth amendment right against self-incrimination. In so holding, the court relied on the reasoning in *Schmerber v. California*,⁵¹¹ which distinguished between testimonial or communicative evidence—which may not be compelled—and non-testimonial evidence such as photographs, fingerprints, or blood tests—which may be compelled.

The question of whether a defendant need be advised that he had a right to refuse to take a sobriety test was answered in the negative in *State v. Liefert*.⁵¹² In a somewhat questionable decision, the District Court of Appeal, Second District, relying on *State v. Mitchell*,⁵¹³ held that since such a chemical test may be administered without the defendant's consent, a police officer who has probable cause to arrest a defendant for drunk driving need not inform the defendant that the law allows him to refuse to take such a test.⁵¹⁴

In *Kozerowitz v. Stack*,⁵¹⁵ the Supreme Court of Florida held that the statutory provision⁵¹⁶ requiring the filing of a sworn answer to com-

509. *Russell v. State*, 233 So.2d 148 (Fla. 4th Dist. 1970), citing FLA. R. CRIM. P. 1.170(a).

510. 239 So.2d 628 (Fla. 2d Dist. 1970), cert. denied, 401 U.S. 958 (1971). In *Lacy* the court also intimated that voice print identification would not violate the fifth amendment.

511. 384 U.S. 757 (1966).

512. 247 So.2d 18 (Fla. 2d Dist. 1971).

513. 245 So.2d 618 (Fla. 1971). See note 203 *supra* and accompanying text.

514. It is submitted that the reliance on *Mitchell* is misplaced. *Mitchell* upheld an unconsented test of an *unconscious* driver. Moreover both FLA. STAT. § 322.261 (Supp. 1970) and FLA. STAT. § 322.261 (1969) provide that: "Such a person shall be told that his failure to submit to such a chemical test will result in the suspension of his privilege to operate a motor vehicle . . ." (emphasis added) At first blush it may appear that the consequences attendant to the right of refusal render the right somewhat meaningless, but it is submitted that a choice between a possible three month revocation for refusing to submit to a chemical test, as opposed to a conviction for driving while under the influence, may render the option somewhat less insubstantial. Moreover, in some jurisdictions, the refusal to submit to a chemical test is inadmissible since the refusal is a "testimonial by-product" and is privileged under the fifth amendment prohibition against self-incrimination. See Comment, *Admissibility of Testimonial By-Products of a Physical Test*, 24 U. MIAMI L. REV. 50 (1969); Annot. 87 A.L.R.2d 370 (1963). Florida courts have taken a somewhat divergent view on this point. See *Gay v. City of Orlando*, 202 So.2d 896 (Fla. 4th Dist. 1967), cert. denied, 390 U.S. 956 (1968) (refusal to take non-compulsory chemical test held inadmissible) and *State v. Esperti*, 220 So.2d 416 (Fla. 2d Dist. 1969), cert. dismissed, 225 So.2d 910 (Fla. 1969) (if chemical test is compulsory and admissible, evidence of refusal to take test is admissible as evidence of consciousness of guilt).

515. 226 So.2d 682 (Fla. 1969), cert. denied, 397 U.S. 147 (1970).

516. FLA. STAT. § 475.30(1) (1969).

mission's charges in proceedings brought by Florida Real Estate Commission for license revocation or suspension did not violate the constitutional guarantee against self-incrimination.⁵¹⁷

The Supreme Court of the United States has held that Florida Rule of Criminal Procedure 1.200, which requires the defendant to give notice of an alibi defense and disclose his alibi witnesses, does not violate the privilege against self-incrimination guaranteed by the fifth and fourteenth amendments.⁵¹⁸

In *State v. Carpenter*⁵¹⁹ the Supreme Court of Florida reaffirmed its decision in *State v. Young*⁵²⁰ by holding that it did not violate the defendant's fifth amendment right against self-incrimination to instruct the jury that exclusive possession of recently stolen property raises an inference that the person in possession stole such property unless that person gives a reasonable and credible account of how he came into possession so as to raise a reasonable doubt.

XXVI. JURY TRIAL

A. *The Right to Trial by Jury*

In *Williams v. Florida*⁵²¹ the Supreme Court of the United States held that the sixth and fourteenth amendment right to trial by jury was not violated by Florida's decision to provide a six-person rather than twelve-person jury in noncapital cases.⁵²²

In *Duncan v. Louisiana*⁵²³ the Supreme Court held that the fourteenth amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the sixth amendment guarantee. The Court did not, however, attempt to specifically define the difference between a petty offense and a serious crime. Later, in *Baldwin v. New York*,⁵²⁴ the Court held that no offense can be deemed "petty" for the purposes of the right to trial by jury where imprisonment for more than six months is authorized. In *City of*

517. Chief Justice Ervin dissented in *Kozerwitz* on the basis of *Spevack v. Klein*, 385 U.S. 511 (1967) which prohibits self-incrimination in noncriminal as well as criminal proceedings. *Kozerwitz v. Stack*, 226 So.2d 682, 684 (Fla. 1969) (dissenting opinion).

518. *Williams v. Florida*, 399 U.S. 78 (1970).

519. 222 So.2d 194 (Fla. 1969).

520. 217 So.2d 567 (Fla. 1968), *cert. denied*, 396 U.S. 853 (1969).

521. 399 U.S. 78 (1970), *noted in* 24 U. MIAMI L. REV. 832 (1970). *Accord*, *Heains v. State*, 223 So.2d 738 (Fla. 1969), *cert. denied*, 399 U.S. 929 (1970), *upholding* FLA. STAT. § 913.10 (1969) and FLA. R. CRIM. P. 1.270; *Morgan v. State*, 223 So.2d 801 (Fla. 3d Dist. 1969) *cert. denied*, 399 U.S. 933 (1970); *Williams v. State*, 224 So.2d 406 (Fla. 3d Dist. 1969).

522. FLA. STAT. § 913.10 (Supp. 1970) provides that "[t]welve persons shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases."

523. 391 U.S. 145 (1968).

524. 399 U.S. 66 (1970).

*Ft. Lauderdale v. Byrd*⁵²⁵ the District Court of Appeal, Fourth District, held that the rights extended by *Baldwin* did not apply where three separate offenses, each carrying a less than six month possible sentence, are joined in one trial and the aggregate could exceed six months.

In *Smith v. Davis*⁵²⁶ the Supreme Court of Florida held that the right to trial by jury in drunk driving cases, extended by Florida Statutes section 322.262(4) (1969), did not apply to persons charged with such an offense under a municipal ordinance. In subsequent application of this rule, the Supreme Court of Florida pointed out that defendants charged with such an offense could, under Florida Statutes sections 932.61-.66 (Supp. 1970), transfer such a case to a state court where a jury trial would be obtainable.⁵²⁷ After a suggestion by the Supreme Court of Florida,⁵²⁸ the legislature amended section 322.262(4) to provide for jury trial for all persons charged with driving while under the influence whether the prosecution is in municipal court or state court.⁵²⁹

It has been held that when charges are properly consolidated into a single trial, the defendant is not entitled to double the number of peremptory challenges, but the judge may, in his discretion, grant additional challenges when it appears that the defendant may be prejudiced.⁵³⁰

The question of whether waiver of jury trial is procedural or substantive was addressed in *State v. Garcia*.⁵³¹ In *Garcia* the Supreme Court of Florida held that waiver of a jury trial is procedural; therefore, such a waiver may properly be regulated by court rule,⁵³² and a defendant who was under indictment for a capital offense to which he had not plead guilty was entitled to waive a jury trial pursuant to such rule.

Notwithstanding Chief Justice Ervin's concurring opinion in *Perkins v. State*,⁵³³ wherein the virtues of bifurcated trials were extolled, Florida courts have thus far refused to provide for bifurcated trials whereby one jury determines questions of guilt or innocence, and upon a finding of guilt, a second jury determines the punishment.⁵³⁴

525. 242 So.2d 494 (Fla. 4th Dist. 1970).

526. 231 So.2d 517 (Fla. 1970), *quashing* *Davis v. Smith*, 227 So.2d 342 (Fla. 4th Dist. 1969). *See also* *Purdy v. Evans*, 231 So.2d 836 (Fla. 1970).

527. *Dohm v. O'Connor*, 240 So.2d 636 (Fla. 1970).

528. *Robertson v. Bradford*, 233 So.2d 633 (Fla. 1970) and *Robertson v. State ex rel. Harty*, 233 So.2d 633 (Fla. 1970).

529. FLA. STAT. § 322.262(4) (Supp. 1970); *DeJonge v. Pallotto*, 239 So.2d 252, 253 (Fla. 1970) (special concurring opinion of Justice Adkins).

530. *Johnson v. State*, 222 So.2d 191 (Fla. 1969), *citing* FLA. STAT. § 913.08 (1969) and FLA. R. CRIM. P. 1.350.

531. 229 So.2d 236 (Fla. 1969), *aff'g* *State v. Garcia*, 224 So.2d 395 (Fla. 3d Dist. 1969).

532. FLA. R. CRIM. P. 1.260 provides that "a defendant may, in writing, waive a jury trial with the approval of the court and the consent of the state." This rule supersedes any legislative enactment governing practice and procedure [*see, e.g.*, FLA. STAT. § 912.01 (1967)] to the extent that statute and rule are inconsistent. *State v. Garcia*, 229 So.2d 236, 238 (Fla. 1969).

533. 228 So.2d 382, 393-95 (Fla. 1969).

534. *Sanders v. State*, 241 So.2d 430 (Fla. 3d Dist. 1970). *See* note 641 *infra*.

B. Jurors

Application of the rule of *Witherspoon v. Illinois*⁵³⁵ (pertaining to the exclusion of jurors with opinions against capital punishment) by the Florida courts has been discussed previously in this survey.⁵³⁶

Jurors whose scruples against capital punishment are such that it would *preclude* them from returning a verdict of guilty if it might mean imposition of the death penalty are properly excluded.⁵³⁷ However, as was pointed out by the Supreme Court of the United States in *Boulden v. Holman*.⁵³⁸

[I]t is entirely possible that a person with "a fixed opinion against" or who does not "believe in" capital punishment might nevertheless be perfectly able as a juror to abide by existing law—to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case.

Thus, where the record does not reflect that the juror's beliefs would have precluded an objective evaluation, the exclusion of the juror is error.⁵³⁹

Under Florida Statutes section 919.05 (1969)⁵⁴⁰ and Florida Criminal Rule 1.410, jurors are entitled, upon request, to have testimony read back to them during deliberation. Thus, *Slinsky v. State*⁵⁴¹ held that the judge's summary denial of the deliberating jury's request to have certain testimony read to them was reversible error since the attorneys were not notified of the request, the defendant was not present,⁵⁴² and it could not be determined from the record the effect, if any, that denial may have had in the guilt determination.

XXVII. DISQUALIFICATION OF JUDGE⁵⁴³

In *State ex rel Gerstein v. Stedman*⁵⁴⁴ the state, in its suggestion for a writ of prohibition, urged that Judge Carling Stedman should be disqualified from trying the Milander-Wolfe case because the case involved immunized witnesses and the judge had stated, in a previous case, that

535. 391 U.S. 510 (1968).

536. See notes 394-399 *supra* and accompanying text.

537. *Perkins v. State*, 228 So.2d 382 (Fla. 1969).

538. 394 U.S. 478, 483-84 (1969).

539. See *Watson v. State*, 234 So.2d 143, 144 (Fla. 3d Dist. 1970) (dissenting opinion).

540. Repealed by Fla. Laws 1970, ch. 70-339, § 180, because the same rule is contained in FLA. R. CRIM. P. 1.410.

541. 232 So.2d 451 (Fla. 4th Dist. 1970).

542. FLA. STAT. § 914.01(4) (1969) provides that the defendant is entitled to be present at all proceedings before the court when the jury is present. This statute was repealed by Fla. Laws 1970, ch. 70-399, § 180, because the same rule is contained in FLA. R. CRIM. P. 1.180(4). See also section XIII and notes 366 and 367 *supra* and accompanying text.

543. See generally FLA. R. CRIM. P. 1.230(e).

544. 233 So.2d 142 (Fla. 3d Dist. 1970), *cert. discharged*, 238 So.2d 615 (Fla. 1970).

he would not rely on the testimony of immunized witnesses.⁵⁴⁵ The District Court of Appeal, Third District, pointed out that the fact that a certain statute or principle of law may run counter to the personal views of the judge does not necessarily render that judge disqualified to try a case involving such law or principle.⁵⁴⁶ The court found that the judge had not indicated prejudice against the specific defendants involved, and that the state's allegations concerning the judge's views did not state that the judge would refuse to follow the law.

In *State ex rel. Schmidt v. Justice*,⁵⁴⁷ the fact that the trial judge had, in a previous trial of the same case, expressed a personal feeling as to the guilt or innocence of a defendant was held not legally sufficient to disqualify the judge.

After disqualifying himself a judge should proceed no further in a case; therefore, after disqualifying himself a judge had no legal right or authority to proceed on a motion to revoke probation and to sentence.⁵⁴⁸

XXVIII. SPEEDY TRIAL

During the period surveyed and thereafter there have been significant developments in the law concerning speedy trial. On the federal level, the Supreme Court of the United States in *Smith v. Hoey*⁵⁴⁹ extended the right to a speedy trial by providing that a state has, upon demand, an affirmative duty to secure the presence of an accused for trial when the accused is incarcerated by another sovereign. In *Dickey v. Florida*⁵⁵⁰ the United States Supreme Court reversed a Florida conviction on the grounds that the eight year delay between commission of the alleged offense and trial was a violation of fourteenth amendment due process⁵⁵¹ in light of the repeated efforts by the defendant, who was incarcerated in another sovereign, to secure a trial and because prejudice

545. The affidavit accompanying the suggestion also urged that the Judge's former statement that "[t]here is no such thing as a good grand jury indictment . . . [they] are all bad" indicated prejudice by the judge making disqualification proper. *State ex rel. Gerstein v. Stedman*, 233 So.2d 142, 143 (Fla. 3d Dist. 1970).

546. *Id.* at 144, citing *State ex rel. Sagonias v. Baird*, 67 So.2d 678 (Fla. 1953). *Accord*, *State ex rel. Schmidt v. Justice*, 237 So.2d 827 (Fla. 2d Dist. 1970).

547. 237 So.2d 827 (Fla. 2d Dist. 1970), citing *Nickels v. State*, 86 Fla. 208, 98 So. 497 (1923).

548. *Vaughn v. State*, 226 So.2d 443 (Fla. 3d Dist. 1969), citing FLA. R. CRIM. P. 1.230(d) and FLA. STAT. § 911.01 (1969) [FLA. STAT. § 911.01 (1969) was repealed by Fla. Laws 1970, ch. 70-339, § 180, because the same rule is contained in FLA. R. CRIM. P. 1.230(d)].

549. 393 U.S. 374 (1969). *Accord*, *Dickey v. Circuit Court*, 200 So.2d 521 (Fla. 1967).

550. 398 U.S. 30 (1970), noted in 25 U. MIAMI L. REV. 330 (1971).

551. In *Klopper v. North Carolina*, 386 U.S. 213 (1967) the sixth amendment right to a speedy trial was held binding on the states through the fourteenth amendment. However, both *Klopper* and *Smith v. Hoey*, note 549 *supra*, were not operative law when *Dickey* petitioned Florida to try him. Thus, rather than holding that *Klopper* and *Smith v. Hoey* were retroactive, the Court based its decision on the fourteenth amendment due process clause (rather than the sixth amendment right to a speedy trial) which was the test employed by the federal courts prior to *Klopper*. See Note, 25 U. MIAMI L. REV. 330 (1971).

resulted from the delay (death of witnesses, loss of police records). The Court in *Dickey* correctly prophesied that "the speedy trial guarantee should receive a more hospitable interpretation than it has yet been accorded."⁵⁵²

The "three term of court" speedy trial rule of Florida Statutes sections 915.01 (Supp. 1970) and 915.02 (Supp. 1970) have been repealed⁵⁵³ and in lieu thereof, the rights guaranteed by section 918.015⁵⁵⁴ of the Florida Statutes have been realized by the promulgation by the Supreme Court of rule 1.191 of the Florida Rules of Criminal Procedure⁵⁵⁵ Rule 1.191 provides *inter alia* that a person charged with a misdemeanor be tried within 90 days from the time such person is taken into custody; that a person charged with a felony be tried within 180 days from the time such person is taken into custody; and that any person charged with any crime, upon *demand*, be brought to trial within 60 days of the filing of the demand. At the time of this writing, rule 1.191 is being interpreted by the Florida courts.⁵⁵⁶

Rule 1.191(i)(3) provides that "[a]ny rights which shall have accrued to any defendant under former Fla. Stat. § 915.01 and 915.02 shall not be disturbed by this rule." Applying this rule, the Supreme Court of Florida in *State ex rel. Atwood v. Baker*⁵⁵⁷ held that:

(1) if the demand periods and full terms [under § 915.01 and 915.02 (1969)] were satisfied prior to repeal, then a defendant is entitled to release under operation of the statute; (2) if a defendant's third full-term was completed after repeal, but prior to the effective date of the Rule [1.191], his constitutional right to a speedy trial requires his release; (3) if the third full-term has not been reached, or the term has not expired prior to the effective date of the Rule, then his trial must commence within 180 days of the adoption of the Rule; if a demand was made after the date of the Rule's adoption, then a trial must commence within 60 days.⁵⁵⁸

552. *Dickey v. Florida*, 298 U.S. 30, 57 (1970) (concurring opinion).

553. Fla. Laws 1971, ch. 71-1(B), § 7.

554. (1) In all criminal prosecutions the state and the defendant shall each have the right to a speedy trial.

(2) The supreme court shall, by rule of said court, provide procedures through which the right to a speedy trial as guaranteed by subsection (1) and by Section 16 of Article I of the state constitution shall be realized.

Fla. Laws 1971, ch. 71-1(B), § 6. See *In re Florida Rules of Criminal Procedure*, 245 So.2d 33 (Fla. 1971).

555. FLA. R. CRIM. P. 1.191 (1971), reported in 245 So.2d 33 (Fla. 1971) and amended in 251 So.2d 537 (Fla. 1971).

556. See, e.g., *State ex rel. Hanks v. Goodman*, 253 So.2d 129 (Fla. 1971) holding *inter alia* that the 60 day period mentioned in rule 1.191(a)(2) begins to run from the time the defendant has been charged with a crime by indictment, information or trial affidavit and not from date of arrest. But see *State ex rel. Buono v. Goodman*, 233 So.2d 185 (Fla. 3d Dist. 1970), cert. discharged, 243 So.2d 594 (Fla. 1971) wherein it was stated that the purpose of a speedy trial provision is to prevent the state from *arresting* and then delaying prosecution.

557. 250 So.2d 869 (Fla. 1971).

558. *Id.* at 871-72.

During the biennium there were a number of decisions interpreting the "three term of court" rule of Florida Statutes chapter 915 (1969). Under section 915.01(1) (1969), if the defendant's demands for speedy trial had not been filed on the first day of each term of court, the demand was considered a nullity.⁵⁵⁹ Similarly, failure to comply with the requirements of section 915.02 (1969), that the demand be in writing, rendered the demand ineffective.⁵⁶⁰

The state may not avoid the effect of the three term statute by nolle prosequing in the third term and filing another information.⁵⁶¹ Also, the fact that a crowded docket is the reason for delaying the trial beyond the statutory limit is not sufficient to prevent dismissal of the case.⁵⁶²

The defendant may, by his action or inaction, waive his right to a speedy trial.⁵⁶³ The failure to object to a continuance has been held to constitute a waiver.⁵⁶⁴ Similarly, the failure of the defendant to request a trial has precluded a finding that there has been a denial of the speedy trial right.⁵⁶⁵ On the other hand, it has been held that moving for a change of venue after filing demands does not constitute a waiver of the right to a speedy trial.⁵⁶⁶ The rule is that if the delay is caused by the defendant, that delay cannot be relied upon to support a dismissal under the speedy trial law.⁵⁶⁷ Thus, where the defendant withdrew his waiver of a jury trial shortly before trial time⁵⁶⁸ or moved for a mistrial in a case originally brought in the third term,⁵⁶⁹ the fact that trial commenced subsequent to the statutory period did not entitle the defendant to a dismissal under the three term rule. Also, where the defendant's motion to dismiss the information had been granted within the three term period, the fact that his trial (which came after the reversal of the order dismissing the information) came after the expiration of three terms did not entitle the defendant to a dismissal.⁵⁷⁰

559. *Moore v. Edwards*, 241 So.2d 736 (Fla. 4th Dist. 1970).

560. *State v. Williams*, 230 So.2d 185 (Fla. 4th Dist. 1970) (oral demand held invalid).

561. *State ex rel. Bird v. Stedman*, 223 So.2d 85 (Fla. 3d Dist. 1969). See also *FLA. R. CRIM. P. 1.191(h)(2)*.

562. *State ex rel. Leon v. Baker*, 238 So.2d 281 (Fla. 1970); *Leonard v. McIntosh*, 237 So.2d 809 (Fla. 4th Dist. 1970).

563. See *State ex rel. Leon v. Baker*, 238 So.2d 281 (Fla. 1970).

564. *State ex rel. Leon v. Baker*, 229 So.2d 595 (Fla. 3d Dist. 1969); *Cacciatore v. State*, 226 So.2d 137 (Fla. 3d Dist. 1969). But see *State ex rel. Leon v. Baker*, 238 So.2d 281 (Fla. 1970) wherein this rule was modified. See also *FLA. R. CRIM. P. 1.191(d)(3)*.

565. *Cacciatore v. State*, 226 So.2d 137 (Fla. 3d Dist. 1969).

566. *State ex rel. Johnson v. Edwards*, 233 So.2d 393 (Fla. 1970).

567. *Id.*

568. *Buttler v. State*, 238 So.2d 313 (Fla. 3d Dist. 1970).

569. *Payton v. Edwards*, 226 So.2d 822 (Fla. 4th Dist. 1969), *appeal dismissed*, 237 So.2d 536 (Fla. 1970). (The fact that trial was instituted within the statutory period was sufficient to toll the statute.) The effect of a mistrial on the speedy trial rule is now covered by *FLA. R. CRIM. P. 1.191(g)*.

570. *State v. Carrol*, 240 So.2d 205 (Fla. 3d Dist. 1970) [Subsequent to the period of this survey, this case was reversed by the Supreme Court of Florida. *Carrol v. State*, 251 So.2d 866 (Fla. 1971).].

In *Woodward v. Edwards*⁵⁷¹ the District Court of Appeal, Fourth District, held that Florida Statutes chapter 915 (1969) did not require that an accused necessarily be prepared for trial at the time he filed an initial demand for a speedy trial. This result has been changed by rule 1.191(c) (1971) which provides that:

A demand for speedy trial binds the accused and the State. No demand for speedy trial shall be filed or served unless the accused has a bona fide desire to obtain trial sooner than otherwise might be provided. A demand for speedy trial shall be deemed a pleading by the accused that he is available for trial, has diligently investigated his case, and that he is prepared or will be prepared for trial.⁵⁷²

XXIX. STIPULATIONS AS TO LIE DETECTOR TESTS⁵⁷³

In *Butler v. State*⁵⁷⁴ the defendant and the state, with the tacit approval of the court, entered into an agreement whereby the defendant was to take a lie detector test, with the results therefrom binding both sides. The defendant took the test and the results indicated that the defendant was telling the truth. The state initially dismissed the charge but subsequently recharged and tried the defendant. On appeal the District Court of Appeal, Fourth District, reversed the conviction and held that the court's participation in the agreement was tantamount to approval thereof, and that the state's "promise constituted a pledge of public faith which should not have been repudiated."⁵⁷⁵

XXX. PROBATION

Grant of probation rests within the board discretion of the trial judge and is a matter of grace, not of right.⁵⁷⁶ Also, the power to revoke probation is an inherent power of the trial court which may be exercised at any time upon the court determining that the probationer has violated the law.⁵⁷⁷ Thus, if a defendant is sentenced to a jail term with probation to commence upon release from jail, misdeeds committed while serving the term may be the basis of revocation of the probation. The fact that the misdeed was committed *before* the term of probation com-

571. 244 So.2d 438 (Fla. 4th Dist. 1970), *cert. discharged*, 249 So.2d 16 (Fla. 1971).

572. *In re Florida Rules of Criminal Procedure*, 245 So.2d 33, 35 (Fla. 1971).

573. On stipulations generally see note 456 *supra* and accompanying text. *See also* Section XXIV, A, 3, *infra*.

574. 228 So.2d 421 (Fla. 4th Dist. 1969), *citing* *State v. Davis*, 188 So.2d 24 (Fla. 2d Dist. 1966) *noted in* 21 U. MIAMI L. REV. 896 (1967).

575. *Butler v. State*, 228 So.2d 421, 424 (Fla. 4th Dist. 1969).

576. *See, e.g., Martin v. State*, 243 So.2d 189 (Fla. 4th Dist. 1971), *cert. denied*, 247 So.2d 63 (Fla. 1971), *citing* FLA. STAT. § 948.01(1)(3) and § 948.03 (1969).

577. *Martin v. State*, 243 So.2d 189 (Fla. 4th Dist. 1971), *cert. denied*, 247 So.2d 63 (Fla. 1971), *citing* *Bronson v. State*, 148 Fla. 188, 3 So.2d 873 (Fla. 1941).

menced is irrelevant, inasmuch as the misdeed was committed subsequent to the entry of the order of probation.⁵⁷⁸

To hold otherwise would make a mockery of the very philosophy underlying the concept of probation, namely, that given a second chance to live within the rules of society and the law of the land, one will prove that he will thereafter do so and become a useful member of society.⁵⁷⁹

Revocation of probation hearings are informal in nature, and hearsay evidence is admissible if there is also other evidence upon which the decision can be based.⁵⁸⁰

In *Murphy v. State*⁵⁸¹ a defendant was found guilty by the jury, and the court withheld adjudication and sentencing and entered an order of probation. The defendant appealed and asked for an order staying the terms of probation pending disposition of the appeal. The District Court of Appeal, Fourth District, held that an application for a stay of a probation order is entitled to the same consideration that would accrue to an application for a stay of any other sentence pending an appeal.

After a plea of nolo contendere the judge in *State v. Williams*⁵⁸² placed the defendant on twenty years probation, the terms of which required that the defendant pay \$3,000 in fines and spend 60 days in jail each year. The state appealed, assigning the conditional probation as error. Although the court admitted that the conditions were "unorthodox,"⁵⁸³ the appeal was dismissed on the ground that while the state could appeal a sentence,⁵⁸⁴ it could not appeal from the conditions of probation imposed by the trial court.

XXXI. EXPUNGING OF ARREST RECORDS

In the absence of statutory authority or overriding equitable considerations, records made under legislative authority concerning criminal acts may not, by court order, be expunged or destroyed even when the accused has been acquitted or the charge dismissed.⁵⁸⁵

578. *Martin v. State*, 243 So.2d 189 (Fla. 4th Dist. 1971).

579. *Id.* at 191.

580. *Crossin v. State*, 244 So.2d 142 (Fla. 4th Dist. 1971), *citing* *Brill v. State*, 159 Fla. 682, 32 So.2d 607 (Fla. 1947); *McNeely v. State*, 186 So.2d 520 (Fla. 2d Dist. 1966). *Cf.* *Franklin v. State*, 226 So.2d 461 (Fla. 2d Dist. 1969) (hearsay evidence alone not sufficient). *See generally* FLA. R. CRIM. P. 1.790.

581. 231 So.2d 263 (Fla. 4th Dist. 1970).

582. 237 So.2d 69 (Fla. 2d Dist. 1970).

583. *Id.* at 70.

584. *See* FLA. STAT. § 924.07(5) (1969).

585. *Mulkey v. Purdy*, 234 So.2d 108 (Fla. 1970), *aff'g* *Purdy v. Mulkey*, 228 So.2d 132 (Fla. 3d Dist. 1969) (fingerprints and photographs taken by the sheriff pursuant to FLA. STAT. § 30.31 (1969) not expunged even though eight years had elapsed from the time the defendant, who was 17 years old, plead guilty to the misdemeanor of petty larceny).

XXXII. CUSTODIAL TREATMENT

*Myron v. Wainwright*⁵⁸⁶ the habeas corpus petitioner claimed that the punitive confinement⁵⁸⁷ imposed upon him because of his breach of prison rules constituted cruel and unusual punishment. The court denied the petition and held that such treatment is not violative of the constitution when it is imposed because of a prisoner's violation of prison rules.

XXXIII. SPECIFIC CRIMES AND DEFENSES

A. Crimes

1. ACCESSORY

A defendant charged with robbery but convicted of being an accessory after the fact is entitled to have that conviction reversed, but such reversal is not with prejudice to the state's filing a new information charging the defendant with being an accessory.⁵⁸⁸

2. AGGRAVATED ASSAULT

Aggravated assault differs from simple assault through the addition of one element—the use of a deadly weapon.⁵⁸⁹

In a case of first impression in Florida, the District Court of Appeal, First District, in *Bass v. State*⁵⁹⁰ held that a gun, whether loaded or unloaded, was a "deadly weapon" when pointed at someone; therefore, a conviction for aggravated assault under Florida Statutes section 784.04 (1969)⁵⁹¹ was proper when it was established that the defendant pointed an unloaded gun at another.

3. BURGLARY AND POSSESSION OF BURGLARY TOOLS

The crime of breaking and entering with intent to commit a misdemeanor⁵⁹² has been held to be a felony.⁵⁹³ However, in *Brown v. State*⁵⁹⁴ the Supreme Court of Florida indicated that the crime of break-

586. 225 So.2d 351 (Fla. 1st Dist. 1969).

587. Petitioner was segregated, limited to three minute showers on alternate days, not allowed sunlight, denied reading material and medical and dental care. *Id.*

588. *Mackey v. State*, 223 So.2d 380 (Fla. 3d Dist. 1969), *citing* *Newkirk v. State*, 222 So.2d 435 (Fla. 3d Dist. 1969).

589. *McCullers v. State*, 206 So.2d 30 (Fla. 4th Dist. 1968).

590. 232 So.2d 25 (Fla. 1st Dist. 1970).

591. FLA. STAT. § 784.04 (1969) provides that: "Whoever assaults another with a deadly weapon, without intent to kill, shall be guilty of an aggravated assault . . ."

592. FLA. STAT. § 810.05 (1969) and FLA. STAT. § 810.05 (Supp. 1970).

593. *Grainger v. State*, 239 So.2d 277 (Fla. 1st Dist. 1970); *Brown v. State*, 232 So.2d 55 (Fla. 4th Dist. 1970).

594. 237 So.2d 129 (Fla. 1970).

ing and entering with intent to commit a misdemeanor *may be* a felony depending on the penalty actually imposed. Under Florida Statutes section 810.06 (1969) knowing possession of burglary tools with intent to employ same in a burglary is a felony. In *Mesenbrink v. State*⁵⁹⁵ the District Court of Appeal Third District, reversed a conviction based on section 810.06 because the state failed to demonstrate the felonious intent which the statute requires. The "tools" in *Mesenbrink* were seized as a result of a consented search of the defendant's apartment after the defendant had been arrested for vagrancy in a residential neighborhood. In reversing, the court pointed out that in all prior cases wherein an 810.06 conviction was affirmed on appeal, the defendant was in immediate possession of the "tools."⁵⁹⁶

In *Greene v. State*⁵⁹⁷ it was held that an automobile trunk was a "depository" within the meaning of section 810.06;⁵⁹⁸ therefore possession of tools with an intent to break into an auto trunk will sustain a conviction under section 810.06.

4. CONTEMPT

Under Florida Rule of Criminal Procedure 1.840(a)(6) and (7) the judge, prior to pronouncing sentence for contempt of court, must: inform the contemnor of the accusation and judgment against him; inquire as to whether the contemnor has any cause to show why sentence should not be pronounced; and afford the contemnor the opportunity to present evidence of mitigating circumstances. Moreover, 1.840(a)(6) requires that the judgment "should" contain a recital of the facts constituting the contempt of which the defendant has been found guilty. In *Moore v. State*⁵⁹⁹ the court reversed a contempt judgment even though the evidence was sufficient to support it, on the grounds that the judge failed to comply with rule 1.840(a)(6) and (7) and because the sentence imposed was to be "at hard labor" which is an unlawful sentence for contempt.⁶⁰⁰

In *Goodwin v. State*⁶⁰¹ the defendant was held in contempt and sentenced to six months for giving false testimony before a trial judge. On appeal the defendant argued that it was error to sentence him to six

595. 231 So.2d 852 (Fla. 3d Dist. 1970).

596. *Id.*, citing *Brown v. State*, 98 Fla. 871, 124 So. 467 (1929); *Fitzgerald v. State*, 203 So.2d 511 (Fla. 2d Dist. 1967); *Estevez v. State*, 189 So.2d 830 (Fla. 2d Dist. 1966).

597. 237 So.2d 46 (Fla. 1st Dist. 1970) (the "tool" in question was a fingernail file).

598. FLA. STAT. § 810.06 (1969) provides in pertinent part that whoever . . . knowingly has in his possession any . . . tool . . . designed for cutting through, forcing or breaking open any *building, vault, safe, or other depository*, in order to steal therefrom . . . knowing the same to be adapted and designed for the purpose aforesaid, with intent to use . . . same . . . for such purpose, shall be punished . . . (emphasis supplied).

599. 245 So.2d 880 (Fla. 2d Dist. 1971).

600. *See, e.g., State ex rel. Saunders v. Boyer*, 166 So.2d 694 (Fla. 2d Dist. 1964).

601. 236 So.2d 6 (Fla. 1st Dist. 1970).

months for the contempt charge without first being offered a jury trial on the issue of whether he was in contempt. The District Court of Appeal, First District, affirmed, pointing out that a six month sentence for contempt is "minor" and may be imposed by the trial judge without a trial by jury on the issue of contempt.

5. CONSPIRACY

Conspiracy to commit robbery is not an offense included under the charge of robbery.⁶⁰² Thus, where the information charged robbery, it was error to convict for conspiracy to commit robbery.⁶⁰³

In *Bentancourt v. State*⁶⁰⁴ the District Court of Appeal, Third District, upheld a conviction for conspiracy to sell marijuana. The defendant argued that because an undercover police officer was the one intended to purchase the goods (the purchase was not consummated), a conviction was improper under the rule of *King v. State*.⁶⁰⁵ The court in *Bentancourt* held, however, that an offer to sell was equivalent to a sale under the then existing drug law,⁶⁰⁶ and therefore, since actual purchase was not an essential element of the offense, the holding of *King v. State*⁶⁰⁷ was inapplicable.

6. DRUNK DRIVING⁶⁰⁸

Florida Statutes section 322.261(1)(g) (1969)⁶⁰⁹ provides that any person arrested for driving while under the influence may request to have a chemical test made of his "breath, blood, saliva, or urine" for the purpose of determining the alcoholic content of the arrested person's blood. In *State v. Smith*⁶¹⁰ the defendant was arrested for driving while under the influence. He was requested to take a breathalyzer test⁶¹¹ but

602. *Kinchen v. State*, 235 So.2d 749 (Fla. 3d Dist. 1970), citing *Newkirk v. State*, 222 So.2d 435 (Fla. 3d Dist. 1969).

603. *Id.* A reversal on such grounds does not preclude the state from refileing an information charging conspiracy to commit robbery. See also note 436 *supra* and accompanying text.

604. 228 So.2d 124 (Fla. 3d Dist. 1969).

605. 104 So.2d 730, 733 (Fla. 1958).

[W]here two or more persons conspire with another who is, unknown to them, a government agent acting in the line of duty, to commit an offense under an agreement and an intention that an essential ingredient of the offense is to be performed by, and only by, such government agent, such persons may not legally be convicted of a conspiracy.

Id.

606. FLA. STAT. § 398.02(9) (1967).

607. See note 605 *supra*.

608. See also note 346 *supra*, note 203 *supra*, and notes 526-29 *supra* and accompanying text.

609. FLA. STAT. § 322.261(1)(g) (Supp. 1970) amended the 1969 statute by deleting reference to a blood, saliva, or urine test and providing only for a breath test: "If the arresting officer does not request a chemical test of the person arrested . . . such person may request . . . a chemical test . . . of the arrested person's *breath* . . ." (emphasis added)

610. 241 So.2d 728 (Fla. 2d Dist. 1970).

611. FLA. STAT. § 322.261(1)(a) (1969) provides that any person who accepts the

refused, claiming that section 322.261(1)(g) (1969) allowed him the right to select a blood test instead. The District Court of Appeal, Second District, held that section 322.261(1)(g) (1969) was not intended to allow the accused to select which of the four specific tests, but only to select *a* test. This result was codified in the 1970 revision of section 322.261(1)(g).⁶¹²

In *Perryman v. State*⁶¹³ the defendant was requested to submit to a breathalyzer test pursuant to Florida Statutes section 322.261(1)(a) (1969).⁶¹⁴ He failed to complete the test and thereafter his license was suspended for refusing to submit to a chemical test pursuant to section 322.261(1)(c) (1969). On appeal, the defendant argued that he was too intoxicated to perform the breath test and therefore, he should have been given a blood test. The court rejected the argument and observed that while a blood test *may* be given to an *unconscious* driver pursuant to section 322.261(1)(b), there is nothing that requires such a test under the circumstances of *Perryman*. Moreover, the court stressed that the defendant would not be allowed to circumvent the "implied consent" law by "professing to be too drunk to perform the simple task . . . of blowing breath into a tube or similar device for chemical testing."⁶¹⁵ Evidently, the court believed that the defendant was not, in reality, too drunk to perform the test, and that his argument to that effect was devised to escape the consequences of his refusal to take the test. In other jurisdictions, if it is found that the defendant was, in fact, unable to complete a breath test, the defendant's license may not then be revoked or suspended for "refusal" to take the test.⁶¹⁶

7. ESCAPE

Under Florida Statutes section 843.12 (1969), escape from an officer or person who has or is entitled to lawful custody is a felony. In *Maggard v. State*⁶¹⁷ the District Court of Appeal, Fourth District, held that for a conviction to be valid under section 843.12 it is not necessary to show that the escaped person was being held under a conviction at the time of escape; however, it is necessary to prove that the escaped person was in lawful custody at the time of escape.⁶¹⁸

privilege of operating a motor vehicle in Florida "impliedly consents" to a chemical test for intoxication. The refusal to submit to such a test is grounds for suspension of license. See generally Comment, *Florida's "Implied Consent" Statute: Chemical Tests for Intoxicated Drivers*, 22 U. MIAMI L. REV. 698 (1969).

612. See note 609 *supra*.

613. 242 So.2d 762 (Fla. 1st Dist. 1971).

614. See note 611 *supra*.

615. *Perryman v. State*, 242 So.2d 762, 763 (Fla. 1st Dist. 1971).

616. See, e.g., *In re Scott*, 5 App. Div. 2d 859, 171 N.Y.S.2d 210 (1958).

617. 226 So.2d 32 (Fla. 4th Dist. 1969).

618. In *Maggard* the State did not offer evidence proving that the defendant was in lawful custody at the time of escape; therefore, the court reversed the conviction. [Subsequent to the period covered by the survey, the District Court of Appeal, First District, in

8. EXPLOSIVES

In *State v. Babun*⁶¹⁹ the District Court of Appeal, Third District, held that a prosecution for possession of explosives without a license under Florida Statutes chapter 552 (1969) need not, in all circumstances, be preceded by an exhaustion of the administrative remedies set out in the chapter, since the administrative procedures are intended basically for license revocation proceedings and not for criminal prosecutions.

9. FORGERY-BAD CHECKS

Passing a forged check with intent to defraud is a felony.⁶²⁰

The crime of forgery requires making of a writing which falsely purports to be the writing of another with intent to defraud. The essence of the offense is the intent to defraud; thus, when a man uses an assumed name and persons in the community know him by that assumed name, the writing of a check under that assumed name on an account with insufficient funds does not constitute forgery.⁶²¹

In *Edwards v. State*⁶²² the defendant was charged with forgery of a check and uttering a forged instrument. Defendant was subsequently found guilty of "attempting to utter a forged instrument." On appeal the District Court of Appeal, Third District, affirmed and held that there was no distinction between uttering a forged instrument and attempting to utter a forged instrument; uttering is proved as fully by an attempt to negotiate a forged instrument as it is proved by complete negotiation.

Under Florida Statutes section 832.05(3)(a) (1969) it is a crime to "obtain" goods by means of a check the drawer knows to be drawn on an account with insufficient funds. In *Gill v. State*⁶²³ the defendant had issued such a check for four automobiles, but he did not take actual possession of the cars until after he had reimbursed the auto auctioneer for the bad check. The defendant argued that since he did not take possession of the cars until after the check was made good, the most he could be charged for was uttering a worthless check.⁶²⁴ The District Court of Appeal, Second District, disagreed and affirmed the conviction under section 832.05(3)(a) on the grounds that since the defendant received bills of sale and titles to the cars, as well as a gate release, he was in "constructive possession" of the cars, and therefore he "obtained" them within the meaning of the statute.

Brochu v. State, 258 So.2d 286 (Fla. 1st Dist. 1972) held that in order to be convicted of escape under FLA. STAT. § 944.40 (1969), the state must show the prisoner was "convicted and sentenced" in accordance with the law].

619. 233 So.2d 171 (Fla. 3d Dist. 1970).

620. *Woods v. State*, 239 So.2d 853 (Fla. 2d Dist. 1970), citing *Brown v. State*, 237 So.2d 129 (Fla. 1970).

621. *Walters v. State*, 245 So.2d 907 (Fla. 1st Dist. 1971).

622. 223 So.2d 746 (Fla. 3d Dist. 1969).

623. 235 So.2d 751 (Fla. 2d Dist. 1970).

624. FLA. STAT. § 832.05(2) (1969).

10. LARCENY

In *Adams v. State*⁶²⁵ the defendant was charged with breaking and entering with intent to commit a felony. The television that the defendant allegedly stole was worth \$115.55 when it was originally purchased two years previous to the alleged offense. There was no proof of the television's value at the time of the theft. Nor was there any proof that the premises contained extensive valuable property and that the defendant intended to take as much as he could. Thus, the District Court of Appeal, First District, held that the evidence was insufficient to establish that the defendant had intent to commit grand larceny (taking of property of value of \$100 or more). The conviction was, therefore, reversed, and the case remanded with instruction to the trial court to enter judgment and sentence on the lesser included offense of breaking and entering with intent to commit petit larceny.

It has been held that in a larceny prosecution under Florida Statutes section 811.021, the state must prove that the accused appropriated the money to his own use or that of another person other than the true owner.⁶²⁶ Thus, mere proof that the complaining witness gave the defendant monies to open a bank account, but that no account was ever opened, was insufficient to establish a prima facie case of grand larceny.⁶²⁷

Subsequent to the period covered by this survey there has been some question as to exactly when the statute of limitations begins to run in a larceny case.⁶²⁸ This question is briefly treated in another section of this survey.⁶²⁹

11. PERJURY

In *Goodwin v. State*⁶³⁰ the defendant, in proceedings to vacate a judgment, presented perjured testimony regarding torture, coercion and forced drug use. The trial court held the defendant in contempt for knowingly and willfully presenting false testimony in the presence of a trial judge and sentenced the defendant to six months for contempt.

Florida Statutes section 90.07 (1969), which prohibits convicted perjurers from testifying in court proceedings, was repealed in 1971.⁶³¹

625. 242 So.2d 723 (Fla. 1st Dist. 1971), *citing* Lambert v. State, 111 So.2d 68 (Fla. 1st Dist. 1959).

626. Edwards v. State, 226 So.2d 140 (Fla. 2d Dist. 1969).

627. *Id.*, *citing* Eizenman v. State, 132 So.2d 763 (Fla. 3d Dist. 1961) and Ricard v. State, 181 So.2d 677 (Fla. 3d Dist. 1966).

628. State v. King, Case No. 71-10512 (Dade Co. Crim. Ct. filed Dec. 12, 1971), *appeal filed*, March 27, 1972, Fla. 3d Dist.

629. See section XXXIII, B, 4 and notes 687-90 *infra* and accompanying text.

630. 236 So.2d 6 (Fla. 1st Dist. 1970). See also Jackson v. Wainwright, 238 So.2d 657 (Fla. 1st Dist. 1970), discussed at note 415 *supra*.

631. Fla. Laws 1971, ch. 71-72.

Also, by statute, the fact of prior conviction for perjury is admissible for purposes of impeaching the witness.⁶³²

12. HOMICIDE—FELONY-MURDER RULE

The requirements for establishing the corpus delicti in homicide cases are: (1) the fact of death, (2) the existence of the criminal agency of another person as the cause of death, and (3) the identity of the deceased.⁶³³ Identity testimony regarding the deceased must be preceded by predicate testimony which establishes the basis for the identification, *i.e.*, that the witness had seen, recognized or by some other means identified the body.⁶³⁴

In *Green v. State*⁶³⁵ the court reaffirmed the view that in a prosecution for manslaughter, it is mandatory on the court to instruct on justifiable and excusable homicide.

During the biennium the felony-murder rule⁶³⁶ was the subject of interpretation by the Florida courts. In *Campbell v. State*⁶³⁷ a defendant had participated in a robbery and was apprehended. In an escape attempt he shot and killed a police officer. The Supreme Court of Florida held that the escape after arrest was in furtherance of the felony and, therefore, confederates of the defendant who participated in the robbery were subject to the felony-murder rule and an instruction thereon was proper. The court restated the rule that:

“Whether the felony was technically completed, is not of itself sufficient to take the case out of the category of felony murders. It is a homicide committed during the perpetration of a felony, if the homicide is part of the *res gestae* of the felony.” . . . A person may be said to be engaged in the commission or perpetration of a robbery while he is endeavoring to escape and make away with the property taken in such robbery.⁶³⁸

The *Campbell* court rejected the defendant's argument that the felony-murder instruction was improper because he was not pursued by one specific law officer continuously and uninterruptedly from the time of robbery until apprehension. Also, the court refused to find that the crime of robbery came to an end when defendant was arrested.

632. Fla. Laws 1971, ch. 71-72, amending FLA. STAT. § 90.08 (1969).

633. *Murphy v. State*, 240 So.2d 854 (Fla. 4th Dist. 1970), citing *Johnson v. State*, 201 So.2d 492 (Fla. 4th Dist. 1967).

634. *Murphy v. State*, 240 So.2d 854 (Fla. 4th Dist. 1970), citing *Terzado v. State*, 232 So.2d 232 (Fla. 4th Dist. 1970). *Terzado* also held that in a murder case, circumstantial evidence which did not eliminate all reasonable hypotheses of defendant's innocence was insufficient to sustain conviction.

635. 244 So.2d 167 (Fla. 2d Dist. 1971), citing *Hedges v. State*, 172 So.2d 824 (Fla. 1965).

636. FLA. STAT. § 782.04(3) (1969).

637. 227 So.2d 873 (Fla. 1969), cert. dismissed, 400 U.S. 801 (1970).

638. *Id.* at 878, citing *Jefferson v. State*, 128 So.2d 132 (Fla. 1961).

In *State v. Andrew*⁶³⁹ the District Court of Appeal, First District, in a per curiam decision held that the felony-murder rule did not apply when one police officer was accidentally killed by a second police officer in the course of the latter's attempt to apprehend the defendant. The accidental shooting occurred when the defendant, who was unarmed and who did not know of the officer's presence, was attempting to burglarize a residence.

Chief Justice Ervin in his concurring opinion in *Perkins v. State*⁶⁴⁰ suggested that Florida adopt the bifurcated trial approach in capital cases—one jury for issue of guilt, another to determine punishment. Although there is much to recommend such an approach,⁶⁴¹ at the time of this writing no such system has been adopted.

Subsequent to the period covered by this survey, the Supreme Court of California held the death penalty was cruel and unusual punishment and therefore unconstitutional.⁶⁴² The same issue is currently pending before the Supreme Court of the United States.⁶⁴³

13. NARCOTICS AND MARIJUANA⁶⁴⁴

Marijuana has been held to be a "dangerous drug."⁶⁴⁵ Therefore, the state may, in order to protect the health of its citizens, make its possession unlawful, even when that possession is within the privacy of one's home.⁶⁴⁶

Possession, sale, and delivery of LSD have been held to constitute offenses in violation of statute relating to "barbituates, central nervous

639. 222 So.2d 449 (Fla. 1st Dist. 1969). See also the recent case of *State v. Williams*, 254 So.2d 548 (Fla. 2d Dist. 1971) wherein a co-conspirator was held not responsible for the death of an arsonist co-conspirator who set the fire.

640. 228 So.2d 382, 393 (Fla. 1969) (concurring opinion).

641. For a good example of why a bifurcated trial is recommended, see *Campbell v. State*, 227 So.2d 873 (Fla. 1969), cert. dismissed, 400 U.S. 801 (1970). In *Campbell* the defendant argued that the exclusion of expert testimony relating to defendant's lack of control over his impulsive behavior was error since it may have been relevant to the issue of mercy. However, because the testimony was not properly relative to an insanity defense under the *McNaughten* test, the court held it properly excluded on the theory that it might have confused the jury. [Subsequent to the survey period the Florida Legislature promulgated Fla. Laws 1972, ch. 72-72 creating FLA. STAT. § 921.141(2), which provides for bifurcated trials in capital cases.]

642. *People v. Anderson*, 40 U.S.L.W. 2552 (Cal. Sup. Ct. filed February 18, 1972) (unconstitutional under the California constitution).

643. See 40 U.S.L.W. 3341 (January 25, 1972), citing *Aikens v. California*, No. 68-5027, *Furman v. Georgia*, No. 69-5003, *Jackson v. Georgia*, No. 69-5030, *Branch v. Texas*, No. 69-5031.

644. See also notes 238-46 *supra* and accompanying text. Recent legislative changes in this area are discussed in section XXXV *infra*.

645. *Raines v. State*, 225 So.2d 330 (Fla. 1969).

646. *Borras v. State*, 229 So.2d 244 (Fla. 1969), appeal dismissed, 400 U.S. 808 (1970), distinguishing *Stanley v. Georgia*, 394 U.S. 557 (1969). See also *Buttler v. State*, 238 So.2d 313 (Fla. 3d Dist. 1970) (not a denial of due process that FLA. STAT. ch. 398 (1969) lists marijuana as a narcotic and state did not prove that marijuana is a narcotic).

system stimulants, and other drugs."⁶⁴⁷ In this regard, the legislature has enacted Florida Statutes section 404.015 (Supp. 1970) which provides that:

It is the intent of the legislature that all drugs controlled by the drug abuse laws of the United States, now or in the future, shall, in addition to the drugs specified by the laws of Florida, be controlled by the terms of this chapter [chapter 404 Florida Statutes (1969)].

The question arises as to whether section 404.015 (Supp. 1970) is invalid as being an unlawful delegation of legislative authority.

Whenever drugs are found on premises which are under the control of two or more persons, the question arises as to whether each person enjoying control may be prosecuted for possession. In *Langdon v. State*⁶⁴⁸ the District Court of Appeal, Third District, held that where a defendant has joint control of the premises where contraband is discovered, the evidence must show that the defendant had some knowledge that the contraband was on the premises. In *Langdon* the defendant was one of eight occupants of a bus (he was not the owner) in which a small quantity of marijuana was found. The court ruled that since there was no evidence that the defendant knew of the marijuana, he was entitled to a directed verdict. *Langdon* should be compared with *Zicca v. State*,⁶⁴⁹ wherein the defendant, owner and operator of a bus containing four persons, was convicted of possession of marijuana which was found, in plain view, on a shelf in the bus. The *Zicca* court ruled that since the defendant was the owner and operator of the bus, and since the marijuana was in plain view, the defendant must have had knowledge of the presence of marijuana. In *Kirtley v. State*⁶⁵⁰ the defendant rented motel facilities wherein marijuana, LSD and narcotic paraphenalia were found. The evidence established that a number of people other than the defendant were in and out of the premises during the day the drugs were seized. Since the state failed to show that the defendant knew of the existence of the contraband, the conviction for possession was set aside by the District Court of Appeal, Third District.

In *Eckroth v. State*⁶⁵¹ the District Court of Appeal, Second District, held that a person who receives from another a pipe of marijuana for purposes of taking a puff was not in possession within the meaning of chapter 398 of the Florida Statutes. The Supreme Court thought other-

647. *State v. Hoffman*, 242 So.2d 147 (Fla. 3d Dist. 1970), citing FLA. STAT. § 404.02 (1969); *State v. Hayles*, 240 So.2d 1 (Fla. 1970).

648. 235 So.2d 321 (Fla. 3d Dist. 1970), citing *Frank v. State*, 199 So.2d 117 (Fla. 1st Dist. 1967) and *Markman v. State*, 210 So.2d 486 (Fla. 3d Dist. 1968).

649. 232 So.2d 414 (Fla. 3d Dist. 1970), cert. denied, 238 So.2d 430 (Fla. 1970), citing *Markman v. State*, 210 So.2d 486 (Fla. 3d Dist. 1968).

650. 245 So.2d 282 (Fla. 3d Dist. 1971).

651. 227 So.2d 313 (Fla. 2d Dist. 1969).

wise, however, and in *State v. Eckroth*,⁶⁵² it reversed the Second District and held that a person who takes a drag from a "pot" pipe possessed and controlled the narcotic sufficient to sustain a conviction for unlawful possession under chapter 398.

14. OBSCENITY

Possession of obscene materials is a violation of chapter 847 of the Florida Statutes. In *State v. Reese*⁶⁵³ the Supreme Court of Florida held that the term "immoral" in the statute was unconstitutionally vague, but since the term was severable, the remainder of the statute was constitutional. Moreover, the *Reese* court suggested that notwithstanding the outdated standard for determining obscenity provided for in chapter 847⁶⁵⁴ the state may prosecute for obscenity and the courts are to apply the latest pronouncements of the United States Supreme Court as the standard for determining obscenity. Thus, the Florida courts are to apply the following standard when determining obscenity under chapter 847:

it must be established that (a) the dominant theme of the material taken as a whole appeals to a purient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.⁶⁵⁵

In *Mitchem v. State ex rel. Schaub*⁶⁵⁶ the Supreme Court of Florida again upheld the constitutionality of chapter 847, but ruled that a court could not issue a general permanent injunction against a bookstore owner who had sold materials considered to be pornographic.

In *Collins v. State Beverage Department*,⁶⁵⁷ the District Court of Appeal, First District, upheld the action of the State Beverage Department which suspended the petitioner's liquor license for sale and possession of obscene material, even though no testimonial evidence was adduced at the administrative level that the literature in question met the standards of obscenity as determined by the United States Supreme Court. The court in *Collins* took the "we know hard core pornography when we see it" approach and claimed that the pictures of completely nude women, focused directly upon genitalia, were obviously obscene and were without any social or artistic merit.

652. 238 So.2d 75 (Fla. 1970).

653. 222 So.2d 732 (Fla. 1969). See also *Mitchum v. State*, 244 So.2d 159 (Fla. 1st Dist. 1971).

654. FLA. STAT. ch. 847 (1969) was based on the standard established by *Roth v. United States*, 354 U.S. 476 (1957). The defendant argued the statute was unconstitutional because it did not specifically adopt the standard for obscenity as modified by the United States Supreme Court in cases subsequent to *Roth*. See, e.g., *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass.*, 383 U.S. 413 (1966).

655. *Mitchem v. State ex rel. Schaub*, 250 So.2d 883, 885 (Fla. 1971).

656. 250 So.2d 883 (Fla. 1971), citing *Martin v. State*, 248 So.2d 643 (Fla. 1971).

657. 239 So.2d 613 (Fla. 1st Dist. 1970).

15. RECEIVING STOLEN PROPERTY

It is essential to a conviction for receiving stolen property that the evidence shall show to the exclusion of a reasonable doubt that the accused had knowledge that the property in question was stolen at the time he received it, or that circumstances of the transaction were sufficiently suspicious to put a person of ordinary intelligence and caution on inquiry.⁶⁵⁸ Proof of mere naked possession of property recently stolen, not aided by other proof that the accused received it knowing it to be stolen, is not sufficient to show guilty knowledge.⁶⁵⁹

In *Flowers v. State*⁶⁶⁰ the District Court of Appeal, Second District, found that receiving stolen property was a felony irrespective of the value of the thing stolen. Thus, it was not necessary for the jury to fix the value of the goods received before a conviction will lie for receiving stolen property.

B. *Defenses*1. ALIBI⁶⁶¹

It has been suggested that in order for proof of alibi to be sufficient, it must include and cover the entire time when the presence of the accused was required to commit the offense charged.⁶⁶² However, in *Dixon v. State*⁶⁶³ the District Court of Appeal, Fourth District, held that evidence of an alibi is admissible for the jury's consideration and evaluation even when the alibi evidence falls short of complete proof of absolute impossibility of the accused's presence at the alleged time and place of the act. The court in *Dixon* suggested the following as an appropriate alibi charge:

A defendant may submit evidence that he could not have committed the crime, because he was not present at the place and time where and when it would have been necessary for him to be present in order to be guilty of the crime charged. Such proof constitutes an alibi. If, from all of the evidence, you have a reasonable doubt he was present, you must acquit.⁶⁶⁴

In *Bogan v. State*⁶⁶⁵ the court, in a footnote to its opinion, stated

658. *State v. Graham*, 238 So.2d 618 (Fla. 1970); *Schuster v. State*, 235 So.2d 30 (Fla. 3d Dist. 1970); *Lawrence v. State*, 230 So.2d 160 (Fla. 3d Dist. 1970).

659. *State v. Graham*, 238 So.2d 618 (Fla. 1970).

Proof of possession should be coupled with evidence of unusual manner of acquisition, attempts at concealment, contradictory statements, the fact that the goods were being sold at less than their value, possession of other stolen property

Id. at 621.

See also *Taylor v. State*, 241 So.2d 426 (Fla. 3d Dist. 1970).

660. 222 So.2d 786 (Fla. 2d Dist. 1969).

661. See generally FLA. R. CRIM. P. 1.200.

662. See, e.g., *Jones v. State*, 128 So.2d 754 (Fla. 2d Dist. 1961).

663. 227 So.2d 740 (Fla. 4th Dist. 1969), cert. denied, 237 So.2d 179 (Fla. 1970).

664. *Dixon v. State*, 227 So.2d 740, 742 (Fla. 4th Dist. 1969), cert. denied, 237 So.2d 179 (Fla. 1970).

665. 226 So.2d 110, 113 n.3 (Fla. 2d Dist. 1969).

that even though the state did not file a written demand for a notice of alibi pursuant to rule 1.200 of the Florida Rules of Criminal Procedure, the state nonetheless had the right to anticipate a particular alibi defense and attempt to rebut it.

2. INSANITY⁶⁶⁶

The *McNaughten* Rule⁶⁶⁷ is in effect in Florida.⁶⁶⁸ Accordingly, it is not error to exclude expert testimony as to the defendant's psychological state when that testimony does not show the defendant to be insane under the *McNaughten* test.⁶⁶⁹

In *Collins v. State*⁶⁷⁰ the defendant, in response to a *Miranda* warning, said "I guess I will have to get a lawyer." The statement was admitted into evidence and the defendant objected on the grounds that the statement was privileged because it dealt with his election to avail himself of the constitutional right to counsel. The District Court of Appeal, Third District, admitted the statement, reasoning that it was evidence of the defendant's state of mind and was therefore relevant to the issue of insanity.

In *Parkin v. State*⁶⁷¹ the Supreme Court of Florida addressed itself to the question of whether a defendant who pleads insanity may, consistent with the prohibition against self-incrimination, be ordered to respond to the questions of a court-appointed psychiatrist. At trial, the defendant, who refused to talk to the court-appointed psychiatrist, was ordered to respond to the psychiatrist's questions under pain of forfeiting the testimony of her own privately engaged psychiatrist. On appeal the supreme court held that where insanity is interposed as a defense, compulsory examination of an accused by experts, including eliciting testimony from the defendant, does not violate the prohibition against self-incrimination and does not violate due process. The court went on, however, to limit the use of the results of such an inquiry:

The court should prohibit the psychiatrist from testifying directly as to the facts surrounding the crime, where such facts

666. See generally FLA. R. CRIM. P. 1.210.

667. To be declared insane under the *McNaughten* test it must be proven that the party accused was labouring under such a defect of reason from a disease, of the mind, as not to know the nature and quality of the act he was doing; or, if he had known it, that he did not know what he was doing was wrong.

Daniel M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843).

668. Campbell v. State, 227 So.2d 873, 877 (Fla. 1969), cert. denied, 400 U.S. 801 (1970); Grissom v. State, 237 So.2d 57 (Fla. 3d Dist. 1970).

669. Campbell v. State, 227 So.2d 873 (Fla. 1969), cert. denied, 400 U.S. 801 (1970) (evidence that defendant lacked control over his compulsive behavior held properly excluded); Grissom v. State, 237 So.2d 57 (Fla. 3d Dist. 1970) (evidence of exculpatory mental attitude held properly excluded).

670. 227 So.2d 538, 539 (Fla. 3d Dist. 1969).

671. 238 So.2d 817 (Fla. 1970), cert. denied, 91 S. Ct. 1189 (1971), aff'g 222 So.2d 457 (Fla. 1st Dist. 1969).

have been elicited from the defendant during the course of a compulsory mental examination.

In other words, the Court and the State should not in their inquiry go beyond eliciting the opinion of the expert as to sanity or insanity . . . however, if the defendant's counsel opens the inquiry to collateral issues, admissions or guilt, the State's re-direct examination properly could inquire within the scope opened by the defense.⁶⁷²

Another interesting decision by the Supreme Court of Florida involving the defense of insanity is *Daniels v. O'Conner*.⁶⁷³ In *Daniels* the defendant was indicted for rape but was found incompetent to stand trial under Florida Statutes section 917.01 (1969),⁶⁷⁴ and was, therefore, committed to the Florida State Hospital. The defendant attacked the legality of his commitment by a petition for a writ of habeas corpus, alleging that (1) there was no competent evidence upon which to base the indictment for rape returned against him; and (2) section 917.01 was unconstitutional on due process and equal protection grounds. The Supreme Court of Florida upheld the statute as constitutional, pointing out that section 917.01 was designed to "protect the accused" by making "sure that he will be able to assist his counsel" in preparing a defense.⁶⁷⁵ The court, refusing to review the facts upon which the grand jury relied, concluded that whether the defendant was guilty or innocent of the charge was irrelevant; restraint upon the liberty of one *accused* of a crime, because he was found to be incompetent, was held not to be denial of due process.

A judge who adjudicates a defendant incompetent may not commit the accused to an institution that is not a party to the case. A "proper institution," as mentioned in criminal rule 1.210(a), is a state hospital created under chapter 394 of the Florida Statutes.⁶⁷⁶

3. ENTRAPMENT

Entrapment may not be asserted as a defense where the defendant denies that he committed the crime charged.⁶⁷⁷

Entrapment is a question for the jury unless the evidence is so clear and convincing that it can be passed on by the trial judge as a matter of law.⁶⁷⁸

The defense of entrapment was held to apply in *City of Ft. Lauderdale*

672. *Parkin v. State*, 238 So.2d 817, 820 (Fla. 1970), *cert. denied*, 91 S. Ct. 1189 (1971).

673. 243 So.2d 144 (Fla. 1971).

674. *Repealed*, Fla. Laws 1970, ch. 70-339, § 180, because superseded by FLA. R. CRIM. P. 1.210.

675. *Daniels v. O'Conner*, 243 So.2d 144, 147 (Fla. 1971).

676. *Dade County v. Baker*, 237 So.2d 545 (Fla. 3d Dist. 1970).

677. *Pearson v. State*, 221 So.2d 760 (Fla. 2d Dist. 1969).

678. *State v. Rouse*, 239 So.2d 79 (Fla. 4th Dist. 1970). *See also Frady v. State*, 235 So.2d 56 (Fla. 2d Dist. 1970).

dale v. Couts,⁶⁷⁹ wherein a police officer telephoned the defendant, suggested that they could have companionship, and thereafter rented a motel room where the defendant was arrested for offering to commit prostitution.

In *Rouse v. State*⁶⁸⁰ a plainclothes agent who posed as a photographer was invited into the defendant's truck whereupon he indirectly asked the defendants to smoke marijuana for purposes of taking a picture of "somebody sitting on the canal bank smoking marijuana." Pursuant to the suggestion, the defendants displayed marijuana cigarettes and were photographed smoking same. Thereafter they were arrested for possession. The District Court of Appeal, Fourth District, reversed the trial judge's order suppressing the evidence and held that the defense of entrapment is not available to a defendant who has an intention to commit a crime, and an officer, acting in good faith for the purpose of detecting a crime, merely furnishes the opportunity for the commission of such crime.⁶⁸¹

4. STATUTE OF LIMITATIONS

Florida Statutes section 932.05 (1969)⁶⁸² provides that if an information is brought within the two year statute of limitations and it is dismissed after the two years have elapsed because of a defect, omission or insufficiency in the contents of form thereof, the state may file another information within three months after the entry of the order quashing or setting aside the information. In *State v. Garcia*⁶⁸³ the court strictly applied section 932.05 and held that where the initial information was voluntarily dismissed after the defendants' conviction had been set aside, which was more than two years after the date the alleged crime was committed, the state could not file a new information.

In *Harris v. State*,⁶⁸⁴ the state was allowed to amend its information after the two year period of limitation by changing the single count of unlawful sale and possession to two counts, namely (1) unlawful possession, and (2) unlawful sale. The court allowed the amendment under the "linkage theory,"⁶⁸⁵ since the amendment did not change the date, quantum or manner of offenses and did not mislead the defendants.

Where an information is filed within the statutory period but is nolle prossed solely because the state was not ready to go to trial, a trial under a second information filed subsequent to the two year period is barred.⁶⁸⁶

679. 239 So.2d 874 (Fla. 4th Dist. 1970), citing *Thomas v. State*, 185 So.2d 745 (Fla. 3d Dist. 1966).

680. 239 So.2d 79, 80 (Fla. 4th Dist. 1970).

681. See also *Frady v. State*, 235 So.2d 56 (Fla. 2d Dist. 1970).

682. *Transferred and amended*, see FLA. STAT. § 915.03 (Supp. 1970).

683. 245 So.2d 293 (Fla. 3d Dist. 1971).

684. 229 So.2d 670 (Fla. 3d Dist. 1969), cert. denied, 237 So.2d 752 (Fla. 1970).

685. See *State v. Adjmi*, 170 So.2d 340 (Fla. 3d Dist. 1964).

686. *State v. Guerra*, 245 So.2d 889 (Fla. 3d Dist. 1971).

There is some question as to when the statute of limitations begins to run in a larceny case. In *State v. Pierce*⁶⁸⁷ the Supreme Court of Florida held that the two year statute begins to run not when the misappropriation occurred, but rather when demand was made upon the fiduciary to return the funds. The court in *Pierce* ruled that the statutory offense of embezzlement was *committed* when the fiduciary-executor failed to respond to the probate court's demand for the return of the funds. The supreme court's decision in *Pierce* was interpreted by the District Court of Appeal, First District, in *Downing v. Vaine*.⁶⁸⁸ In *Downing* the court interpreted the supreme court's holding in *Pierce* to mean that the statute of limitations in a larceny case begins to run from the date that the person having an interest in the fund knows, or by the exercise of reasonable diligence, should know that there has been a defalcation. The problem with *Downing's* interpretation is that, in close cases, the court is faced with having to determine exactly when a victim "should have known" that another—in most instances a fiduciary—has defalcated by converting the victim's funds. Such a determination is properly a factual question which probably should be determined by the trier of fact and not the judge hearing a motion to dismiss.⁶⁸⁹ Thus, a literal interpretation of *Pierce*, *i.e.*, that the statute of limitations in a larceny or embezzlement case begins to run when demand is made upon the fiduciary, may be the better rule. At the time of this writing this question of law is pending before the appellate courts of Florida in the case of *State v. Larry King*.⁶⁹⁰

XXXIV. RULES OF CRIMINAL PROCEDURE⁶⁹¹

Throughout this survey reference has been made to specific rules of procedure whenever the rule was germane to the topic discussed.⁶⁹² The rules not already so discussed will be covered here.

In many cases where a statute and a rule of criminal procedure were identical, the statute has been repealed, and the rule of procedure, which has superseded the statute, remains as the exclusive statement of law.⁶⁹³

A. *Discovery*

The discovery rule, rule 1.220, has been the subject of much litigation.

687. 201 So.2d 886 (Fla. 1967).

688. 228 So.2d 622 (Fla. 1st Dist. 1969), *appeal dismissed*, 237 So.2d 767 (Fla. 1970).

689. *See generally* Rouse v. State, 239 So.2d 79 (Fla. 4th Dist. 1970); Frady v. State, 235 So.2d 56 (Fla. 2d Dist. 1970). (Defense of entrapment is a question for the jury unless the evidence is so clear and convincing that it can be passed on by the trial judge as a matter of law.)

690. Case. 71-10512 (Dade Co., Crim. Ct. filed December 20, 1971), *appeal filed*, March 27, 1972, Fla. 3d Dist.

691. *See* note 3 *supra*.

692. *See, e.g.*, sections I and XXVIII *supra*.

693. *See* Fla. Laws 1970, ch. 70-399, § 180. *See* note 726 *infra*.

1. PRETRIAL DISCOVERY OF STATEMENTS
MADE BY THE DEFENDANT

Rule 1.220(a)(1) provides that the defendant may, prior to trial, "inspect and copy or photograph the defendant's written or recorded statements or confessions, if any, whether signed or unsigned." In *Dar-rigo v. State*⁶⁹⁴ the court held this rule inapplicable to a statement made by the defendant to agents of the police which was not reduced to a verbatim statement by the police, but rather was reduced only to informal notes outlining what the defendant had stated. The court characterized such non-verbatim notes as "work product" of the prosecution and were, therefore, not discoverable as "statements or confessions."

2. PRETRIAL DISCOVERY OF STATEMENTS OF STATE WITNESSES

Although not specifically provided for in rule 1.220, under certain circumstances the defense may be entitled to pretrial discovery of the statements of prosecution witnesses. Normally, statements of prosecution witnesses are not discoverable *prior to trial*,⁶⁹⁵ although such statements are available to the defense *at trial* for purposes of impeachment under the rule of *Jencks v. United States*.⁶⁹⁶ However, statements of prosecution witnesses may be discoverable prior to trial if the following exceptional circumstances occur: (1) if the accused shows cause to believe that the state possesses evidence materially favorable to the issue of guilt or punishment that it refused to reveal to an accused upon request; and (2) if the accused shows that this evidence cannot be obtained through the utilization of appropriate portions of the Florida Rules of Criminal Procedure or applicable statutes.⁶⁹⁷ The purpose of allowing such pretrial inspection is to prevent violation of the rule of *Brady v. Maryland*,⁶⁹⁸ which prohibits the state from suppressing evidence which is favorable to the defense. Thus, both *State v. Williams*⁶⁹⁹ and *State v. Gillespie*⁷⁰⁰ require that the evidence sought is material to the question of guilt or innocence and is otherwise not discoverable. If the defense establishes the necessary predicate, the court may, in its discretion, order an *in camera* inspection of the state's evidence so that it may review the evidence and decide whether it is properly discoverable prior to trial.⁷⁰¹

694. 243 So.2d 171 (Fla. 2d Dist. 1970).

695. See *State v. Gillespie*, 227 So.2d 550 (Fla. 2d Dist. 1969); *State v. Shouse*, 177 So.2d 724 (Fla. 2d Dist. 1965); *State v. Drayton*, 226 So.2d 469 (Fla. 2d Dist. 1969).

In *Gillespie* the court stated, "[w]e reaffirm first then, that an accused has no constitutional right to pre-trial discovery." *State v. Gillespie*, 227 So.2d 550, 554 (Fla. 2d Dist. 1969).

696. 353 U.S. 657 (1957).

697. *State v. Williams*, 227 So.2d 253 (Fla. 2d Dist. 1969), *cert. denied*, 237 So.2d 180 (Fla. 1970); *State v. Gillespie*, 227 So.2d 550 (Fla. 2d Dist. 1969).

698. 373 U.S. 83 (1963).

699. 227 So.2d 253 (Fla. 2d Dist. 1969), *cert. denied*, 237 So.2d 180 (Fla. 1970).

700. 227 So.2d 550 (Fla. 2d Dist. 1969).

701. *State v. Gillespie*, 227 So.2d 550, 557-59 (Fla. 2d Dist. 1969). See also *State v. Drayton*, 226 So.2d 469 (Fla. 2d Dist. 1969).

3. DISCOVERY OF POLYGRAPH TEST RESULTS

In *Anderson v. State*⁷⁰² the defendant moved for discovery of results or reports of scientific tests made in connection with the case.⁷⁰³ The defense, relying on *Brady v. Maryland*,⁷⁰⁴ specifically asked for the results of a polygraph test performed on a codefendant who had testified against the defendant. The Supreme Court of Florida upheld the denial of the request, reasoning that since the polygraph tests are themselves inadmissible, the results thereof were not subject to pretrial discovery.

4. EXCHANGE OF WITNESS LISTS

Rule 1.220(e) establishes the procedure for an exchange of witness lists. The rule provides that after the defendant files an offer to exchange witness lists, the prosecutor "shall file . . . and furnish to the person charged, a list of all [prosecution] witnesses . . ." whereupon the defendant shall reciprocate with a list of defense witnesses. The rule that has developed is that noncompliance with rule 1.220(e) by the state does not entitle the defendant to have nonlisted witnesses excluded from testifying unless it is shown that prejudice resulted from the noncompliance.⁷⁰⁵ The trial court has discretion to determine whether noncompliance with rule 1.220(e) will prejudice the defendant, but the court's discretion can be properly exercised only after the court has made an adequate inquiry into all the surrounding circumstances.⁷⁰⁶ Thus, the court must inquire: whether the state's violation of the rule was inadvertent or willful, whether the violation was trivial or substantial, and what effect, if any, noncompliance had upon the defendant's ability to prepare for trial.⁷⁰⁷ The circumstances establishing nonprejudice to the defendant must affirmatively appear in the record, or the trial court's discretion in allowing in the testimony of nonlisted witnesses will be considered an abuse of discretion.⁷⁰⁸

When the defendant invokes rule 1.220(e) and later fails to comply with it, it has been held that the exclusion of his nonlisted witnesses was not an abuse of judicial discretion and did not constitute a denial of the sixth amendment right to call witnesses.⁷⁰⁹ Also, the court's refusal to

702. 241 So.2d 390 (Fla. 1970).

703. See FLA. R. CRIM. P. 1.220(b).

704. 373 U.S. 83 (1963). See notes 404 and 698 *supra* and accompanying text.

705. *Richardson v. State*, 246 So.2d 771 (Fla. 1971), *modifying* 233 So.2d 868 (Fla. 2d Dist. 1970); *Salamone v. State*, 247 So.2d 780 (Fla. 3d Dist. 1971); *White v. State*, 243 So.2d 627 (Fla. 3d Dist. 1971); *Ramirez v. State*, 241 So.2d 744 (Fla. 4th Dist. 1970); *Howard v. State*, 239 So.2d 83 (Fla. 1st Dist. 1970); *Buttler v. State*, 238 So.2d 313 (Fla. 3d Dist. 1970); *Rhome v. State*, 222 So.2d 431 (Fla. 3d Dist. 1969). *Contra*, *Rouse v. State*, 243 So.2d 225 (Fla. 2d Dist. 1971). For an example of a case wherein the noncompliance was not prejudicial see *Miranda v. State*, 237 So.2d 228 (Fla. 3d Dist. 1970).

706. *Richardson v. State*, 246 So.2d 771 (Fla. 1971); *Salamone v. State*, 247 So.2d 780 (Fla. 3d Dist. 1971); *Ramirez v. State*, 241 So.2d 744 (Fla. 4th Dist. 1970).

707. *Richardson v. State*, 246 So.2d 771 (Fla. 1971); *Salamone v. State*, 247 So.2d 780 (Fla. 3d Dist. 1971); *Ramirez v. State*, 241 So.2d 744 (Fla. 4th Dist. 1970).

708. *Richardson v. State*, 246 So.2d 771 (Fla. 1971).

709. *Cacciatore v. State*, 226 So.2d 137 (Fla. 3d Dist. 1969).

permit the defendant to call as witnesses police officers who had been listed by the state but not called by the state, has been upheld as not an abuse of discretion.⁷¹⁰ Obviously, the "harmless error" rule of *Richardson v. State*⁷¹¹ should apply to the defendant's noncompliance with 1.220(e) as well as to the state's.

In *State v. Jones*⁷¹² the District Court of Appeal, Third District, affirmed the trial court's dismissal of an information on the grounds that the state's failure to keep records or memoranda reflecting the location or whereabouts of witnesses who were used by the state as informants was in derogation of the defendant's right to a fair trial.

B. Motion to Dismiss

Rule 1.190 pertains to a motion to dismiss. Under rule 1.190(c)(4), the defendant may move to dismiss the indictment or information on the grounds that there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt. When ruling on such a motion, it is proper for the judge to consider the bill of particulars as well as the indictment or information itself.⁷¹³

Rule 1.190(b)(1) provides that all defenses available to a defendant, other than not guilty shall be made by motion to dismiss. Rule 1.190(c) establishes the time within which a motion to dismiss must be made. 1.190(c)(4) provides that the court may "at any time" entertain a motion to dismiss based on double jeopardy. The failure to raise the defense of double jeopardy in the form of a motion to dismiss during the proceedings has been held to be a waiver of that defense.⁷¹⁴

C. New Trial

Florida Rule of Criminal Procedure 1.640(a) provides that when a new trial has been granted, it shall proceed as if there were no former trial except that

when an offense is divided into degrees or the charge includes a lesser offense, and the defendant has been found guilty of a lesser degree or lesser included offense, he cannot thereafter be prosecuted for a higher degree of the same offense or for a higher offense than that of which he was convicted.

In *State v. Miller*⁷¹⁵ the above rule was held not to preclude the imposition of a more severe sentence (death) after retrial of a first degree murder conviction which had resulted in a life sentence.⁷¹⁶

710. *Powers v. State*, 224 So.2d 411 (Fla. 3d Dist. 1969) (a poor result in the authors' opinion).

711. 246 So.2d 771 (Fla. 1971).

712. 247 So.2d 342 (Fla. 3d Dist. 1971).

713. *State v. Davis*, 243 So.2d 587 (Fla. 1971), *aff'g* 234 So.2d 713 (Fla. 2d Dist. 1970).

714. *Robinson v. State*, 239 So.2d 282 (Fla. 2d Dist. 1970).

715. 231 So.2d 260 (Fla. 3d Dist. 1970), *cert. denied*, 238 So.2d 105 (Fla. 1970).

716. It would seem that the Supreme Court's decision in *North Carolina v. Pearce*, 395

Generally, a motion for a new trial is a prerequisite to an appeal based on the insufficiency of the evidence.⁷¹⁷ It has been held, however, that the mere filing of such a motion is not sufficient; the court must rule thereon (*i.e.*, deny the motion) before an appeal based on insufficiency of evidence will lie.⁷¹⁸ In *Owens v. State*,⁷¹⁹ the District Court of Appeal, Fourth District, held that a motion for a directed verdict at the close of all the evidence would give the defendant standing to appeal the sufficiency of evidence notwithstanding the defendant's failure to move for a new trial. This case was reviewed by the Supreme Court of Florida in *State v. Owens*,⁷²⁰ wherein the court reiterated that a motion for a new trial is a prerequisite to an appeal based on insufficiency of evidence in all criminal cases except those where the defendant is sentenced to death.

D. Severance⁷²¹

Although it is generally held that it is within the discretion of the trial judge to grant a severance, the supreme court in *State v. Talavera*⁷²² held that a severance *shall* be granted pursuant to rule 1.190(j) when one of several codefendants files a bona fide motion based on necessity rather than mere convenience. The motion should: (1) show the exculpatory nature of the testimony to be elicited from a codefendant; (2) be accompanied by some assurance that the codefendant is willing to testify; (3) set out the facts indicating that the codefendant would not be willing to testify at a joint trial; and (4) clearly indicate that the testimony sought from the codefendant is relevant, material, competent and non-cumulative.

E. Continuance

Rule 1.190(g)(2) provides that the court "may in its discretion for good cause shown grant a continuance."

It has been held that a continuance is not mandatory simply because the trial was conducted the same day the information was filed.⁷²³ It has, however, been held that it is error to deny a continuance when the defendant alleges that a witness who could establish the defense of entrapment was removed from the jurisdiction by the state.⁷²⁴ Thus, if it is shown

U.S. 711 (1969) would prohibit such a result. See notes 316-20 *supra* and accompanying text.

717. See generally *State v. Wright*, 224 So.2d 300 (Fla. 1969).

718. *Melkun v. State*, 244 So.2d 145 (Fla. 2d Dist. 1971) (defendant filed a motion for new trial but the judge failed to rule thereon; held, appeal precluded). In essence, this case penalizes the defendant for the court's failure to act on a filed motion. It is, therefore, in the authors' judgment, a manifestly unjust result.

719. 227 So.2d 241 (Fla. 4th Dist. 1969).

720. 233 So.2d 389 (Fla. 1970), citing *State v. Wright*, 224 So.2d 300 (Fla. 1969).

721. See notes 147-155 *supra* and accompanying text. See also FLA. R. CRIM. P. 1.190(j).

722. 243 So.2d 595 (Fla. 1971).

723. *Jernigan v. State*, 228 So.2d 273 (Fla. 1969), cert. denied, 397 U.S. 1029 (1970).

724. *Thomas v. State*, 243 So.2d 200 (Fla. 2d Dist. 1971).

that prejudice will result from the denial of a continuance, the continuance should be granted.⁷²⁵

XXXV. LEGISLATION

During the biennium there was much legislative activity in the area of criminal law and procedure, much of it dealing with somewhat minor changes in the wording of a statute. Therefore, this analysis will, of necessity, be selective.

As was mentioned periodically throughout this survey, in many cases where there was duplication between a statute and a rule of criminal procedure, the statute was repealed and superseded by the rule.⁷²⁶ Florida Laws 1970, chapter 70-339, renumbered and amended certain sections of chapters 901 through 932 of the 1969 Florida Statutes. It is therefore advisable to check the 1970 Supplement to the Florida Statutes for the revised "Criminal Procedure Law."⁷²⁷

The statutes dealing with the regulation of bail bondsmen have been transferred to chapter 648 of the Florida Statutes (Supp. 1970).⁷²⁸

Florida Statutes section 27.015 (Supp. 1970) has been added,⁷²⁹ providing that all state attorneys are prohibited from the private practice of law. Also, Florida Statutes section 27.255 (Supp. 1970)⁷³⁰ provides that investigators employed by the state attorney may serve arrest warrants and search warrants and may carry a weapon.

Florida Statutes section 27.52 (Supp. 1970) establishes the method of determining insolvency. Subsection (2)(a)⁷³¹ provides that there is a

725. Cf. *Jernigan v. State*, 228 So.2d 273 (Fla. 1969) (concurring opinion).

726. See Fla. Laws 1970, ch. 70-339, § 180, *repealing* the following sections of the 1969 Florida Statutes: 901.03, 901.05, 901.13, 902.01, 902.02, 902.03, 902.04, 902.05, 902.06, 902.07, 902.08, 902.09, 902.10, 902.11, 902.12, 902.13, 902.14, 902.18, 903.01, 903.04, 903.07, 903.12, 903.13, 903.19, 903.23, 903.24, 903.25, 904.01, 904.02, 906.01, 906.02, 906.03, 906.04, 906.05, 906.06, 906.07, 906.08, 906.09, 906.10, 906.11, 906.12, 906.13, 906.14, 906.15, 906.16, 906.17, 906.18, 906.20, 906.21, 906.23, 906.24, 906.25, 906.26, 906.27, 906.28, 906.29, 907.01, 907.02, 907.03, 908.01, 908.02, 908.03, 909.01, 909.02, 909.03, 909.05, 909.06, 909.07, 909.08, 909.09, 909.10, 909.11, 909.12, 909.13, 909.14, 909.15, 909.16, 909.17, 909.19, 909.20, 909.22, 911.01, 911.02, 911.03, 911.04, 911.05, 911.06, 911.07, 911.08, 911.09, 911.10, 912.01, 913.01, 913.02, 913.04, 913.05, 913.06, 913.07, 913.09, 913.11, 914.01, 916.02, 916.03, 916.04, 916.05, 916.06, 916.07, 916.08, 917.01, 917.02, 918.01, 918.02, 918.08, 918.09, 919.01, 919.02, 919.03, 919.04, 919.05, 919.06, 919.07, 919.08, 919.09, 919.10, 919.11, 919.12, 919.13, 919.14, 919.15, 919.16, 919.17, 919.18, 919.19, 919.20, 919.21, 919.22, 920.01, 920.03, 920.04, 920.05, 920.06, 920.07, 920.08, 920.09, 921.01, 921.02, 921.025, 921.03, 921.04, 921.05, 921.06, 921.07, 921.08, 921.10, 921.11, 921.13, 921.14, 921.17, 921.19, 921.24, 921.25, 922.01, 922.03, 922.05, 922.13, 924.01, 924.10, 924.11, 924.12, 924.13, 924.21, 924.23, 924.24, 924.25, 924.26, 924.27, 924.29, 924.30, 924.32, 924.36, 924.39, 924.40, 925.04, 932.08, 932.09, 932.10, and 932.11 (1969).

727. Chapters 900 through 925 are to be cited as the "Criminal Procedure Law." See FLA. STAT. § 900.01 (Supp. 1970).

728. Fla. Laws 1970, ch. 70-339, § 177.

729. Fla. Laws 1970, ch. 70-79, § 1.

730. Created by Fla. Laws 1970, ch. 70-275, § 1.

731. Created by Fla. Laws 1970, ch. 70-57, § 1.

presumption of solvency, and that the defendant has the burden of rebutting the presumption by competent proof. Section 27.52(b) and (c) (Supp. 1970) set out a list of factors which establish a prima facie case of solvency. Among the items on the list are: if the defendant has \$300 cash, if the defendant has been released on bail in the amount of \$1,500 or more, and if the defendant makes more than \$75 per week gross (if no dependants).

Florida Statutes chapter 372 (Supp. 1970), the "Game and Fresh Water Fish Law," has new sections conferring powers of arrest upon game wardens;⁷³² providing for seizure of property and up to five years imprisonment for poaching alligators;⁷³³ and prohibiting the sale of alligator products and making possession of same in a place of business a misdemeanor.⁷³⁴

Florida Statutes chapter 784 (1969), dealing with assault and battery, has been reworded,⁷³⁵ and a section has been added making aggravated battery an offense punishable by up to two years imprisonment.⁷³⁶

Florida Statutes section 811.30 (Supp. 1970)⁷³⁷ has been added, making larceny of any firearm a felony.

Florida Statutes chapter 814 (Supp. 1970)⁷³⁸ is the new "Auto Theft Statute," and it provides that: possession of a motor vehicle known to be stolen is a felony;⁷³⁹ second and subsequent offenses carry enhanced penalties;⁷⁴⁰ unauthorized temporary use of an auto is a misdemeanor;⁷⁴¹ theft of parts from an auto may be a felony or misdemeanor depending on value of parts taken;⁷⁴² and the driver's license of any person convicted of an offense under chapter 814 shall be automatically revoked. The statute also specifies acts which constitute prima facie evidence of an intent to deprive the owner of his property.⁷⁴³ One of the acts so speci-

732. FLA. STAT. § 372.071 (Supp. 1970), *created by* Fla. Laws 1970, ch. 70-396, § 1.

733. FLA. STAT. § 372.663 (Supp. 1970), *created by* Fla. Laws 1970, ch. 70-1, § 1.

734. FLA. STAT. § 372.6645 (Supp. 1970), *created by* Fla. Laws 1970, ch. 70-3, § 1. A similar act was upheld as constitutional in *A.E. Nettleton Co. v. Diamond*, 27 N.Y.2d 182, 264 N.E.2d 118, 315 N.Y.S.2d 625 (1970), *appeal dismissed sub nom.* *Reptile Products Ass'n v. Diamond*, 401 U.S. 969 (1971).

For a case dealing with the scope of the Game and Fresh Water Fish Commission's power, see *Whitehead v. State*, 223 So.2d 330 (Fla. 1969) (rule of Game and Fresh Water Fish Commission providing open season on hunting between fixed dates controls over Florida statutes proscribing use of firearms on Sunday).

735. Fla. Laws 1970, ch. 70-88, *amending* FLA. STAT. §§ 784.02 and 784.03 (1969).

736. Fla. Laws 1970, ch. 70-63, § 1, *creating* FLA. STAT. § 784.045 (Supp. 1970).

737. *Created by* Fla. Laws 1970, ch. 70-350, § 1.

738. *Created by* Fla. Laws 1970, ch. 70-19 and ch. 70-289, amended by Fla. Laws 1971, ch. 71-342, which provides that the provisions of chapter 814 also apply to the theft of aircraft, boats and boat motors.

739. FLA. STAT. § 814.03(2) (Supp. 1970), *created by* Fla. Laws 1970, ch. 70-19, § 1.

740. FLA. STAT. § 814.03(4) (Supp. 1970), *created by* Fla. Laws 1970, ch. 70-19, § 1.

741. FLA. STAT. § 814.04 (Supp. 1970), *created by* Fla. Laws 1970, ch. 70-19, § 1.

742. FLA. STAT. § 814.03 (Supp. 1970), *created by* Fla. Laws 1970, ch. 70-19, § 1.

743. FLA. STAT. § 814.06 (Supp. 1970), *created by* Fla. Laws 1970, ch. 70-19, § 1.

fied is the failure to return to a rental or leased motor vehicle within 72 hours after due date.⁷⁴⁴

Chapter 870 of the Florida Statutes (Supp. 1970)⁷⁴⁵ gives municipal and county authorities the power to declare emergencies whenever there exists a clear and present danger of a riot or other general public disorder. Whenever a state of emergency is declared to exist, it is unlawful to sell, display, or publicly possess a firearm.⁷⁴⁶ The statute also authorizes the establishment of curfews, the prohibition of the sale of alcohol, and the prohibition of the sale of gasoline.⁷⁴⁷

There has been significant legislation in the area of drug abuse. Chapter 397 of the Florida Statutes (Supp. 1970)⁷⁴⁸ provides for the rehabilitation of drug dependents. Under the statute, a person may apply to the Department of Health and Rehabilitative Service for drug dependence treatment. However, such person may not be confined in any facility, including penal facilities, against his will.⁷⁴⁹ The fee for treatment varies according to the person's ability to pay.⁷⁵⁰ Florida Laws 1971, chapter 71-222, further develops chapter 397 and provides *inter alia* for the licensing and regulation of drug abuse treatment and education centers.

Florida Laws 1971, chapter 71-107,⁷⁵¹ transfers the regulation of cannabis from chapter 398 to chapter 404 and provides that possession or delivery (without consideration) of less than five grams of cannabis is a misdemeanor.

Florida Laws 1971, chapter 71-262,⁷⁵² defines "narcotic drug" as

Cocoa leaves, opium, isonipecaine, cannabis and every substance neither chemically nor physically distinguishable from them, and any and all derivatives of same, and *any other drug to which the narcotics laws of the United States apply*. [emphasis added]

A major revision and reclassification of criminal penalties was effectuated by Florida Laws 1971, chapter 71-136.⁷⁵³ The statute provides that every offense which is punishable by death or imprisonment in the state penitentiary is a felony, and that all offenses not a felony are misdemeanors.⁷⁵⁴ The statute (a) classifies felonies as either a (1) capital

744. FLA. STAT. § 814.06(5) (Supp. 1970), created by Fla. Laws 1970, ch. 70-19, § 1.

745. Created by Fla. Laws 1970, ch. 70-990, §§ 1-9.

746. FLA. STAT. § 870.044 (Supp. 1970), created by Fla. Laws 1970, ch. 70-990, §§ 4-5.

747. FLA. STAT. § 870.045 (Supp. 1970), created by Fla. Laws 1970, ch. 70-990, §§ 4-6.

748. Created by Fla. Laws 1970, ch. 70-183.

749. FLA. STAT. § 397.041(5) (Supp. 1970), created by Fla. Laws 1970, ch. 70-183, § 3.

750. FLA. STAT. § 397.051(3) (Supp. 1970), created by Fla. Laws 1970, ch. 70-183, § 4.

751. Adding FLA. STAT. §§ 404.01(12), 404.15.

752. Amending FLA. STAT. § 398.02.

753. Amending FLA. STAT. § 775.08 (1969); adding §§ 775.081, 775.082, 775.083, 775.084; repealing §§ 775.05-.10 and § 104.40 (1969).

754. Fla. Laws 1971, ch. 71-136, § 1, amending Fla. Stat. § 775.08 (1969).

felony, (2) first degree felony, (3) second degree felony, and (4) third degree felony; and (b) classifies misdemeanors as either (1) first degree misdemeanors, or (2) second degree misdemeanors.⁷⁵⁵ Each classification carries a corresponding maximum penalty.⁷⁵⁶ The statute goes on to amend the hundreds of criminal penalty sections of the Florida Statutes so that they will conform to the classifications and penalties adopted by chapter 71-136.

Florida Laws 1971, chapter 71-30,⁷⁵⁷ provides that shoplifting is one of the enumerated larcenies of chapter 811.

Florida Laws 1971, chapter 71-66,⁷⁵⁸ makes it unlawful for any person to disclose testimony given before a grand jury and provides for certain exceptions.

Florida Laws 1971, chapter 71-115,⁷⁵⁹ designed to "encourage and contribute to the rehabilitation of felons," provides that a person shall not be disqualified from employment by the state or its agencies or political subdivisions (except law enforcement agencies) solely because of a prior conviction of a felony. It provides further that a person whose civil rights have been restored may not be disqualified from any practice, trade or profession requiring a permit solely because of a prior conviction of a felony, unless that felony directly relates to the position, trade or practice.

Florida Laws 1971, chapter 71-110,⁷⁶⁰ deals with eligibility for parole and provides that: inmates who have been sentenced to five years or less shall be interviewed by a number of the parole commission within six months of the initial date of confinement; those sentenced to more than five years shall be interviewed by a member of the commission within one year after the initial date of confinement; and that those inmates convicted of a capital crime shall be interviewed at the discretion of the parole commission. The act further provides that the inmate shall be advised within 30 days of an interview of the decision of the commission and that subsequent to the initial interview, the inmate shall be interviewed for parole at periodic intervals, not less often than annually.

Florida Laws 1971, chapter 71-239,⁷⁶¹ makes it a misdemeanor of the second degree for a person to deposit litter in a public place.

Florida Laws 1971, chapter 71-318,⁷⁶² restricts the class of convicted felons who will be allowed to possess firearms to those whose civil rights have been restored.

Florida Laws 1971, chapter 71-310,⁷⁶³ provides that willfully and

755. Fla. Laws 1971, ch. 71-136, § 2, *adding* FLA. STAT. § 775.081.

756. Fla. Laws 1971, ch. 71-136, § 3, *adding* FLA. STAT. § 775.082.

757. *Amending* FLA. STAT. § 811.021(1) (1969).

758. *Creating* FLA. STAT. §§ 905.27(2),(3),(4).

759. *Creating* FLA. STAT. § 112.011.

760. *Amending* FLA. STAT. § 947.16(1) (1969).

761. *Creating* FLA. STAT. § 403.63(1).

762. *Amending* FLA. STAT. § 790.23(2) (1969).

763. *Amending* FLA. STAT. § 822.18 (1969).

maliciously damaging property of another shall constitute a misdemeanor of the first degree or, if the damage exceeds \$200, a felony of the third degree.

Florida Laws 1971, chapter 71-337,⁷⁶⁴ amends the obscenity law (chapter 847) by providing more severe penalties for second and subsequent offenders and by adding a new subsection providing criminal penalties for a person who knowingly promotes, conducts, performs or participates in an obscene, lewd, lascivious or indecent show, exhibition or performance done before a live audience.

Florida Laws 1971, chapter 71-72,⁷⁶⁵ repealed the statute prohibiting convicted perjurers from testifying in court proceedings and allows the fact of prior conviction for perjury to be submitted in evidence for purposes of impeaching a witness.

Florida Laws 1971, chapter 71-99,⁷⁶⁶ rephrased the statute granting immunity from criminal prosecution to persons required to testify or produce documents in certain specified proceedings.

764. *Amending* FLA. STAT. §§ 847.011(1)(a)(2)(3) (1969) and *creating* FLA. STAT. § 847.011(4).

765. *Repealing* FLA. STAT. § 90.07 (1969) and *amending* FLA. STAT. § 90.08 (1969).

766. *Amending* FLA. STAT. § 914.04 (1969).