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Criminal Law and Procedure

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CRIMINAL LAW AND PROCEDURE

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Since this survey[1] is a continuation of previous articles,[2] the same policies of selection will be used, and developments in the various areas will be presented as an integrated continuum.

I. CRIMINAL PROCEDURE RULE NO. 1

The Supreme Court of the United States in *Gideon v. Wainwright*[3] held that the right to counsel guaranteed by the sixth amendment, which

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1. This survey includes cases reported in 155 So.2d through 177 So.2d 328 and laws enacted by the 1965 General Session of the Florida Legislature.

2. Wills, *Criminal Law Survey*, 14 U. MIAMI L. REV. 521 (1960); Wills, *Criminal Law Survey*, 16 U. MIAMI L. REV. 225 (1961); Wills, *Criminal Law Survey*, 18 U. MIAMI L. REV. 381 (1963).

3. 372 U.S. 335 (1963).

is fundamental and essential to a fair trial, is made obligatory upon the States by the due process clause of the fourteenth amendment.[4] The Supreme Court of Florida expected a large number of petitions for writs of habeas corpus and coram nobis from prisoners who had been tried without the aid of counsel. To expedite consideration of these cases the Supreme Court of Florida adopted Criminal Procedure Rule No. 1.[5]

The Court pointed out that Rule No. 1 is similar to Title 28, section 2255 of the United States Code [hereinafter section 2255][6] and suggested sources of information concerning its construction and application.[7]

A. *Petitions Properly Brought under Rule No. 1*

1. RIGHT TO COUNSEL

a. Critical Stages

The general policy which has emerged from the cases surveyed is that an indigent has an absolute right to appointed counsel at all critical

4. For background and cases prior to period surveyed see Wills, *Criminal Law Survey*, 18 U. MIAMI L. REV. 381 (1963).

5. 151 So.2d 634 (1963). FLA. R. CRIM. P. 1

> A prisoner in custody under Sentence of a court established by the Laws of Florida claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or Laws of the United States, or of the State of Florida, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that a prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting attorney of the court, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.
>
> If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.
>
> The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.
>
> An appeal may be taken to the appropriate appellate court from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.
>
> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this rule, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.
>
> This rule shall not apply to municipal courts.

6. Enacted 1951.

7. Sanders v. United States, 373 U.S. 1 (1963); Hill v. United States, 368 U.S. 424 (1962); Machibroda v. United States, 368 U.S. 487 (1962); United States v. Hayman, 342 U.S. 205 (1951); Barrett v. Hunter, 180 F.2d 510 (10th Cir. 1950); FED. R. CRIM. P. 35; 5 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 2306; Bowman, *Processing a Motion Attacking Sentence Under Section 2255 of the Judicial Code*, 111 U. PA. L. REV. 788 (1963).

stages of prosecution. Whether failure to appoint counsel at non-critical stages is a denial of due process depends upon the circumstances of the particular case. Obviously the characterization of the various steps in criminal prosecution as "critical" or "non-critical" has been an important and sometimes troublesome problem.

Investigation and interrogation by police prior to a formal charge or arraignment have been held to be non-critical.[8] Furthermore, prisoners have had difficulty convincing the courts that the particular treatment they received deprived them of due process. Appellate courts twice found no deprivation where the prisoner had been held incommunicado for several days before seeing a magistrate.[9] Prisoners have attempted to incorporate the view expressed in *Escobedo v. Illinois*[10] to buttress their allegations of deprivation. The *Escobedo* case held that

> where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," *Gideon v. Wainwright*, 372 U.S. at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.[11]

In several cases the prisoner, interrogated without benefit of counsel, had confessed and subsequently pleaded guilty. The prisoner then argued that since he had had no attorney at interrogation, the confession was obtained in a manner violative of his constitutional rights. Since he would not have pleaded guilty if he had not confessed, he argued that he was deprived of due process and a fair trial. The courts have rejected this line of reasoning in several ways. One held that the prisoner had not been denied due process when the plea was changed to not guilty and the confession was not admitted into evidence.[12] In another instance the court distinguished the case from *Escobedo* by pointing out that the prisoner failed to make any of the following essential allegations: That he had requested counsel at the interrogation, that he had been refused counsel, that he had not been advised of his right to remain silent, and that his

8. Ingrim v. State, 166 So.2d 805 (Fla. 3d Dist. 1964).

9. Gillyard v. State, 175 So.2d 798 (Fla. 3d Dist. 1965) (Judge Pearson dissented.); Wooten v. State, 163 So.2d 305 (Fla. 3d Dist. 1964).

10. 378 U.S. 478 (1964).

11. *Id.* at 491.

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

confession had been considered by the trial court.[13] Relief was denied twice on the basis that *Escobedo* is not retroactive.[14] Judge Pearson dissented.

One variation of the above argument came a little closer to judicial approval. The prisoner alleged that he had been interrogated without benefit of counsel, that his confession had been coerced, and that he would not have pleaded guilty had he not confessed. The appellate court indicated that these allegations stated grounds for relief and since the record did not resolve the issue of coercion, a hearing should be conducted. On rehearing, the court found the petition to be inadequate, for lack of an allegation that the plea of guilty "was induced *solely*" by the confession.[15] Furthermore, the court found that material evidence other than the confession was presented by the state or was available.

Long before *Gideon*, courts held that the preliminary hearing was not a necessary or essential step in criminal proceedings.[16] Therefore, after *Gideon*, the courts have had no difficulty in characterizing the preliminary hearing as non-critical.[17] Of course, failure to offer counsel to an indigent at the preliminary hearing may, under special circumstances, amount to a denial of due process.[18]

One such instance occurred where the prisoner confessed during the investigation. At the preliminary hearing, held without defense counsel, the magistrate examined and initialed the confession. Subsequently the magistrate testified before the trial jury that the prisoner had admitted that the confession was true. A new trial was ordered because the testimony of the magistrate "might well have been persuasive if not conclusive in the jury's acceptance of the credibility of the confession."[19]

The arraignment has been held to be non-critical.[20] Since so many defenses may be waived at arraignment, prisoners have argued that a

13. Turvey v. State, 174 So.2d 609 (Fla. 1st Dist. 1965). To the same effect, Montgomery v. State, 176 So.2d 331 (Fla. 1965) heard by appeal rather than Rule No. 1.

14. Thompson v. State, 176 So.2d 564 (Fla. 3d Dist. 1965); Bell v. State, 175 So.2d 80 (Fla. 3d Dist. 1965).

15. Thompson v. State, 176 So.2d 564 (Fla. 3d Dist. 1965). (Emphasis added.)

16. DiBona v. State, 121 So.2d 192 (Fla. 2d Dist. 1960).

17. Carey v. State, 176 So.2d 603 (Fla. 3d Dist. 1965); Clark v. State, 174 So.2d 773 (Fla. 3d Dist. 1965); Gibson v. State, 173 So.2d 766 (Fla. 3d Dist. 1965); Murray v. State, 172 So.2d 487 (Fla. 3d Dist. 1965); Shannon v. State, 172 So.2d 479 (Fla. 3d Dist. 1965); Mathis v. State, 168 So.2d 77 (Fla. 2d Dist. 1965); Jackson v. State, 167 So.2d 903 (Fla. 3d Dist. 1964); Howard v. State, 164 So.2d 229 (Fla. 3d Dist. 1964); Wooten v. State, 163 So.2d 305 (Fla. 3d Dist. 1964); Blake v. State, 163 So.2d 20 (Fla. 3d Dist. 1964); Webster v. State, 156 So.2d 890 (Fla. 1st Dist. 1963).

18. Courts have not assumed prejudice from a silent record. Fauls v. State, 164 So.2d 35 (Fla. 2d Dist. 1964).

19. Harris v. State, 162 So.2d 262 (Fla. 1964) (The supreme court heard the case on direct appeal, rather than Rule No. 1, but the principle is nonetheless applicable.).

20. A plea of not guilty makes the denial of due process by special circumstances more difficult to prove. Williams v. State, 174 So.2d 775 (Fla. 3d Dist. 1965); Ingrim v. State, 166 So.2d 805 (Fla. 3d Dist. 1964).

plea of guilty made without benefit of counsel is a "special circumstance" which amounts to a deprivation of due process. One court thought these circumstances did not cause deprivation because the prisoner was represented at the trial and counsel could then have moved to change the plea.[21] Judge Carroll, in a dissenting opinion, expressed the view that deprivation of due process could nonetheless result because after a plea of guilty the adjudication of guilt is usually perfunctory. He pointed out that the change of plea is not a matter of right but judicial discretion.

The same problem[22] certified as one of great public interest reached the Supreme Court of Florida.[23] The Court rejected the view that the arraignment is a critical stage,[24] rejected the view that it is merely a formal preliminary step,[25] and accepted the view that deprivation of due process may result from special circumstances—such as a plea of guilty without benefit of counsel. The court stated "unless the right to counsel is intelligently waived at the arraignment *or by subsequent action of the accused,* a conviction grounded on a guilty plea without the aid of counsel would be constitutionally defective."[26]

The application of the above principle to the facts is worthy of note. The Court had reasoned that since counsel at the trial did not move to change the plea, tender any defense, or make any effort to proceed to a trial on the merits, that the prisoner had reaffirmed his plea of guilty, with the aid of counsel, and thereby had waived any objection he might have had to "the lack of counsel at his arraignment."[27] The Court answered the prisoner's argument, that a motion to withdraw a plea of guilty is subject to judicial discretion, by suggesting that unless the prisoner had waived counsel the plea should be granted "as a matter of law."

The trial itself,[28] direct appeal[29] therefrom, and sentencing have been held to be critical stages. Controversy in these three stages has been minimal. *Gideon* has been held to be retroactive.[30] Trial judges have been faithfully appointing counsel for indigent appellants on direct appeal.[31] Where the prisoners were represented at trials, but not at sentencing, the cases have been remanded for the single purpose of proper sentencing.[32]

21. Smith v. State, 168 So.2d 585 (Fla. 3d Dist. 1964).
22. Sardinia v. State, 162 So.2d 328 (Fla. 3d Dist. 1964).
23. Sardinia v. State, 168 So.2d 674 (Fla. 1964).
24. Hamilton v. Alabama, 368 U.S. 52 (1961).
25. *Ex parte* Jeffcoat, 109 Fla. 207, 146 So. 827 (1933).
26. Sardinia v. State, 168 So.2d 674, 677 (Fla. 1964). (Emphasis added.)
27. A retroactive waiver.
28. Gideon v. Wainwright, 372 U.S. 335 (1963).
29. Douglas v. California, 372 U.S. 353 (1963).
30. Geather v. State, 165 So.2d 229, 230 (Fla. 2d Dist. 1964), citing United States v. LaVallee, 330 F.2d 303 (2d Cir. 1964) and United States v. Myers, 329 F.2d 856 (3d Cir. 1964).
31. Donald v. State, 154 So.2d 357 (Fla. 2d Dist. 1963).
32. Evans v. State, 163 So.2d 520 (Fla. 2d Dist. 1964), citing Powell v. Alabama, 287 U.S. 45 (1932). Reader v. State, 168 So.2d 557 (Fla. 2d Dist. 1964); Phillips v. State, 165 So.2d

Parole and probation hearings have not been considered critical.[33]

Rule No. 1 hearings, and appeals therefrom, have been held to be non-criminal in nature and therefore not a critical stage. The development of this view has been particularly interesting. Rule No. 1 specifically provides that the hearing may be conducted without the prisoner. The production of the prisoner and/or assisting counsel is a matter of judicial discretion. The federal authority on this point indicates that the prisoner should be present if facts within his personal knowledge are in issue.[34] If any testimony is given and the prisoner is not represented by counsel, he should be present so that he may confront the witnesses, question his own witnesses and cross-examine the state's witnesses.[35] The appellate courts have followed these federal policies and in addition frequently have indicated or ordered that the prisoner should be present *and* represented by counsel.[36] In a few instances appellate courts have indicated considerable dissatisfaction where the trial courts had not afforded a bona fide hearing to the prisoner. In one case where neither the prisoner nor a defense attorney were present at the hearing, the court stated:

> We are gravely concerned by the circumstances disclosed by the record-on-appeal in this case. The record shows that the court below began dictating its order of denial before it had heard any of the testimony—a procedure which is unknown in our jurisprudence and improper to say the least. It is the solemn duty of every person exercising the judicial powers of the State of Florida to restrain his personal feelings . . . and to interpret and apply the law in a fair and impartial manner. By its adoption of Criminal Procedure No. 1 our Supreme Court in effect issued a directive which we must and shall enforce. . . . It must always be borne in mind that Rule No. 1 procedure must be adequate and effective, for, if it is not, the remedy of habeas corpus may be employed; and it is the duty of the court to make the remedy adequate and effective . . . evidence should not have been heard without the presence of the prisoner. The record-on-appeal discloses a hearing in form but not in fact—which is no hearing at all.[37]

The right of a prisoner to the aid of counsel on appeal from adverse orders from a Rule No. 1 hearing was raised in *Weeks v. State*.[38] The

246 (Fla. 2d Dist. 1964); Williams v. State, 165 So.2d 197 (Fla. 2d Dist. 1964); Perkins v. State, 165 So.2d 248 (Fla. 2d Dist. 1964); Abbott v. State, 164 So.2d 243 (Fla. 2d Dist. 1964).

33. Phillips v. State, 165 So.2d 246 (Fla. 2d Dist. 1964); Thomas v. State, 163 So.2d 328 (Fla. 3d Dist. 1964).

34. United States v. Nickerson, 211 F.2d 909 (7th Cir. 1954).

35. United States v. Hayman, 342 U.S. 205 (1950).

36. Turner v. State, 161 So.2d 11 (Fla. 2d Dist. 1964); Hall v. State, 160 So.2d 527 (Fla. 2d Dist. 1964); Keur v. State, 160 So.2d 546 (Fla. 2d Dist. 1964); Caminita v. State, 159 So.2d 921 (Fla. 2d Dist. 1964); Mullens v. State, 157 So.2d 701 (Fla. 1st Dist. 1963).

37. Dickens v. State, 165 So.2d 811, 814 (Fla. 2d Dist. 1964).

38. 156 So.2d 36 (Fla. 3d Dist. 1963).

court felt that since a defendant was entitled to assistance of counsel on direct review[39] he was entitled to counsel on collateral proceedings attacking his conviction on constitutional grounds. On certiorari the Supreme Court of Florida[40] noted that all three of the Florida district courts had held that an indigent is entitled, as a matter of right, to the assistance of counsel on appeal from an adverse order at a Rule No. 1 hearing.[41] The court observed that federal decisions have held that such proceedings under section 2255 are not criminal proceedings[42] and thus are not under the sixth amendment.[43] The Supreme Court of Florida concluded that proceedings under Rule No. 1 are civil in nature, analogous to post-conviction habeas corpus, and therefore the applicable constitutional requirements are the civil due process provisions under section 12, Declaration of Rights of the Florida Constitution and the fourteenth amendment of the United States Constitution, rather than the criminal provisions of section 11 of the Florida Declaration of Rights and the sixth amendment right to counsel provisions, as incorporated by the due process clause of the fourteenth amendment of the United States Constitution.

If the claims of the prisoner are determined to be without substance, or if the record conclusively shows no grounds for relief, the motion may be denied without hearing. Otherwise a hearing should be conducted and the prisoner produced at the discretion of the trial judge. There is no absolute organic right to counsel at a Rule No. 1 hearing or appeal therefrom. Each case should be decided in light of the fifth amendment due process requirements—whether counsel is essential to accomplish a fair and thorough presentation of the prisoner's claims. The court then issued a "Clarification of Opinion" which stated that since motions under Rule No. 1 are

> . . . cognizable by criminal courts of record as well as circuit courts, we should point out that such motions are actually hybrid in character. . . . However it does not constitute a step in a criminal prosecution. Therefore, such a motion is not a component of the prosecution process subject to the guarantees of Section 11, Florida Declaration of Rights, F.S.A., or the Sixth Amendment of the Constitution of the United States.[44]

The court seemed anxious to have its attitude directly expressed for the record. Justice Thornal found occasion to add:

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39. See note 29 *supra*.

40. State v. Weeks, 166 So.2d 892 (Fla. 1964).

41. Keur v. State, 160 So.2d 546 (Fla. 2d Dist. 1964); Mullins v. State, 157 So.2d 701 (Fla. 1st Dist. 1963); King v. State, 157 So.2d 440 (Fla. 2d Dist. 1963); Dias v. State, 155 So.2d 662 (Fla. 2d Dist. 1963).

42. State v. Weeks, 166 So.2d 892, 895 (Fla. 1964).

43. Townsend v. Sain, 372 U.S. 293 (1963); Heflin v. United States, 358 U.S. 415 (1959); United States v. Williamson, 255 F.2d 512 (5th Cir. 1958); Davis v. United States, 214 F.2d 594 (7th Cir. 1954); United States v. Caufield, 207 F.2d 278 (7th Cir. 1953).

44. State v. Weeks, 166 So.2d 892, 898 (Fla. 1964). The sixth amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

> Admittedly, there are those who seem to advocate a form of socialization of the legal profession that would provide government supplied legal services "from the cradle to the jail." Fortunately, up to this point, such a process of "judicare" has not attracted general judicial endorsement. Until mandated otherwise, we have no intention of relegating existing precedents to the limbo of a jurisprudential graveyard.[45]

b. Waiver

The right to counsel may be waived by direct expression or by implication. Rule No. 1 provides that unless the motion and the files and records conclusively show that a prisoner is not entitled to relief, a hearing should be conducted. The corollary, of course, is that no hearing is necessary if the motion is insufficient,[46] or if the files and records do not support the motion. The surveyed cases illustrate the rather uniform policy of the appellate courts to afford hearings wherever merited despite technical defects in the motion. Where the trial court denied the petition because the motion referred to the date of sentence rather than the date of trial, the appellate court remanded and suggested a "liberal interpretation and application" of Rule No. 1.[47] An appellate court held that a document labeled "Petition for Application for a Writ of Habeas Corpus" should have been treated as a motion under Rule No. 1.[48] Another appellate court held that a hearing should not be denied merely because the motion was unverified, and added that the motions filed by a prisoner pro se "should not be scrutinized for technical niceties."[49] Where the basis of the motion is denial of counsel, the essential allegations for a sufficient motion are that the prisoner (1) had no counsel, (2) was indigent and could not obtain counsel, and (3) did not waive counsel. Where one of these essential allegations has been merely implied rather than directly expressed, appellate courts have usually ordered hearings. For example, where the motion failed to allege no waiver, the court held that the prisoner's "mixed factual and conclusional allegations designed to refute the state's suggestion of waiver" were sufficient.[50] Where the motion did not contain a "concise" allegation of indigency, a statement that the prisoner could not afford an attorney was sufficient.[51] An insufficient motion may be denied without a hearing or without reference to the files and records. At times the trial courts have chosen to examine the files and records. In such cases some appellate courts conducted their own examination and on occasion reversed. In one instance the trial court could have denied the

45. *Id.* at 897.

46. Beeson v. State, 159 So.2d 669 (Fla. 1st Dist. 1964); Timble v. State, 159 So.2d 265 (Fla. 2d Dist. 1964); Savage v. State, 156 So.2d 566 (Fla. 1st Dist. 1963).

47. Pitts v. State, 158 So.2d 763 (Fla. 2d Dist. 1963), citing Sanders v. United States, 373 U.S. 1 (1963) and Webster v. State, 156 So.2d 890 (Fla. 1st Dist. 1963).

48. Andrews v. State, 160 So.2d 726 (Fla. 3d Dist. 1964).

49. Ashley v. State, 158 So.2d 530 (Fla. 2d Dist. 1963).

50. Sampson v. State, 158 So.2d 771 (Fla. 2d Dist. 1963).

51. Hall v. State, 160 So.2d 527 (Fla. 2d Dist. 1964).

motion without a hearing because the prisoner's motion had not denied waiver of counsel. However, the trial court examined the record and then denied the motion. The appellate court stated that the motion would have been sufficient had it alleged that the prisoner had not been advised of his rights to counsel and had not been offered counsel. The appellate court then examined the record, found it to be silent on these points and therefore reversed and remanded.[52]

Even though the motion is sufficient, a hearing may be denied if the files and records conclusively show that the allegations are not supported. The determination of this issue must be made by reference to the files and records; the state's unverified denial of the allegations has been held to be insufficient.[53] Where the record was insufficient to prove the truth or falsity of the allegations, hearings were ordered.[54] The trial court was reversed where either the evidence outside the files and records was used to deny a hearing, or where the evidence did not support the trial court's finding.[55] Assuming that the motion contains all three essential allegations, and that the record supports the first and second, but is not conclusive as to an express waiver, the question will turn upon whether or not the prisoner's conduct proves that he competently and intelligently waived counsel.[56] The policy concerning implied waiver was ably described in *King v. State*,[57] and has been followed in many cases.[58] If the record is silent or,

> shows that the court neither advised [the] defendant of his constitutional rights to counsel nor offered to appoint counsel,

52. Dixon v. State, 163 So.2d 771 (Fla. 2d Dist. 1964). To the same effect: Adkins v. State, 165 So.2d 231 (Fla. 2d Dist. 1964); Hicks v. State, 165 So.2d 204 (Fla. 2d Dist. 1964); Johnson v. State, 165 So.2d 187 (Fla. 2d Dist. 1964).

53. Kelley v. State, 175 So.2d 542 (Fla. 1st Dist. 1965); Richardson v. State, 168 So.2d 765 (Fla. 1st Dist. 1964).

54. Ratcliff v. State, 168 So.2d 181 (Fla. 2d Dist. 1964); Quillian v. State, 163 So.2d 1 (Fla. 3d Dist. 1964); Murray v. State, 162 So.2d 313 (Fla. 3d Dist. 1964); Ashley v. State, 158 So.2d 530 (Fla. 2d Dist. 1963).

55. Mills v. State, 162 So.2d 521 (Fla. 2d Dist. 1964), citing Caminita v. State, 159 So.2d 921 (Fla. 2d Dist. 1964), also Bennett v. State, 165 So.2d 219 (Fla. 2d Dist. 1964) and Keur v. State, 160 So.2d 546 (Fla. 1st Dist. 1963). In Horton v. State, 170 So.2d 470 (Fla. 1st Dist. 1964), the appellate court reversed the trial court's finding that the prisoner had been represented by counsel, and held the trial court's finding that the prisoner was not indigent to be unacceptable because evidence outside the record was used.

56. Waiver will not be presumed from a silent record. Carnley v. Cochran, 369 U.S. 506 (1962).

57. 157 So.2d 440 (Fla. 2d Dist. 1963).

58. Coleman v. State, 164 So.2d 860 (Fla. 1st Dist. 1964); Alford v. Wainwright, 156 So.2d 1 (Fla. 1963); Perez v. State, 167 So.2d 313 (Fla. 2d Dist. 1964); Murphy v. State, 166 So.2d 759 (Fla. 1st Dist. 1964); Holmes v. State, 165 So.2d 433 (Fla. 2d Dist. 1964); Dortch v. State, 165 So.2d 409 (Fla. 1st Dist. 1964); Wilson v. State, 164 So.2d 43 (Fla. 2d Dist. 1964); Martin v. State, 164 So.2d 33 (Fla. 2d Dist. 1964); Stewart v. State, 163 So.2d 527 (Fla. 2d Dist. 1964); Boone v. State, 163 So.2d 526 (Fla. 2d Dist. 1964); Tynes v. State, 163 So.2d 19 (Fla. 3d Dist. 1964); Sams v. State, 163 So.2d 10 (Fla. 2d Dist. 1964); Branch v. State, 162 So.2d 528 (Fla. 3d Dist. 1964); Furman v. State, 162 So.2d 308 (Fla. 3d Dist. 1964); Beadles v. State, 162 So.2d 4 (Fla. 2d Dist. 1964); Pitts v. State, 158 So.2d 763 (Fla. 2d Dist. 1963); Ashley v. State, 158 So.2d 530 (Fla. 2d Dist. 1963); Crosby v. State, 157 So.2d 867 (Fla. 1st Dist. 1963).

> and the return of the prosecuting attorney of the court makes no allegations of fact to the effect that the defendant was aware of his constitutional right to counsel and was offered counsel,[59] the prisoner's motion should be granted.

Under such circumstances a failure to request counsel does not constitute an intelligent waiver of a known right. However, if the record indicates that the trial court offered to appoint counsel, then the prisoner must present evidence tending to prove that he did not competently and intelligently waive. If the facts are in dispute a hearing should be conducted. In the *King* case,[60] the fact that the prisoner pleaded guilty after being informed of his right to trial, did not justify the denial of a hearing under Rule No. 1.

Several cases offered particularly interesting applications of the above policy. A minor prisoner accompanied by his mother pleaded guilty. The trial judge asked if counsel was desired and both answered in the negative. The prisoner in his motion alleged that the trial judge failed to advise that the prisoner was entitled to a court appointed counsel, and he had previously indicated that he did not want an attorney because he could not afford one. The trial court denied the motion stating that the presence of the prisoner was not warranted. The appellate court reversed and ordered a hearing including a full opportunity for the prisoner or a court appointed attorney to present evidence.[61] The courts have afforded minors excellent protection.[62]

Where the trial court asked the prisoner if he desired to consult an attorney before *pleading*, an appellate court held that a negative reply was not conclusive evidence of waiver.[63]

In another case, the prisoner asked for representation other than the Public Defender. The Public Defender told the court that he did not want to represent the prisoner and that the prisoner had sufficient reason to have him disqualified, and asked the court to appoint another attorney. The court refused and told the prisoner that if he did not accept the Public Defender he would be tried without counsel. The prisoner represented himself and was convicted. The appellate court held that the conduct of the prisoner did not constitute a waiver.[64]

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59. King v. State, 157 So.2d 440, 444 (Fla. 2d Dist. 1963).

60. See note 57 *supra*.

61. Mullens v. State, 157 So.2d 701 (Fla. 1st Dist. 1963).

62. See note 105 *infra*.

63. Flemming v. State, 165 So.2d 261 (Fla. 2d Dist. 1964).

64. Donald v. State, 166 So.2d 453 (Fla. 2d Dist. 1964). A case, interesting because of similar facts, involved the waiver of right to counsel at direct appeal, and was reviewed by direct appeal rather than under Rule No. 1. The court held that where the defendant rejected the services of the public defender and represented himself he waived the right to counsel on direct appeal even though he had requested appointment of counsel other than the public defender. Brooks v. State, 172 So.2d 876 (Fla. 2d Dist. 1965).

In still another case, the prisoner appeared for trial with an attorney, but due to a disagreement the attorney did not represent him. The trial judge offered to appoint an attorney if the prisoner would sign an affidavit of insolvency. He refused. The attorney left to confer with the prisoner's employer who was trying to obtain another attorney for him. The trial court felt the case should proceed and tried the prisoner without an attorney. The appellate court held that the prisoner had not waived his right to counsel.[65]

Where the prisoner was advised of right to counsel on the capital charge of murder in the first degree, and the State Attorney agreed that he be allowed to plead guilty to a charge of murder in the second degree, the appellate court held that he had not intelligently waived right to counsel where he had not been advised of his right to counsel on the second charge.[66]

With one exception,[67] the First District Court of Appeals has held that where a trial judge asked the prisoner if he desired counsel, the prisoner waived his right to counsel if he answered in the negative and pleaded guilty.[68] On the other hand, the Second and Third District Courts have held no waiver resulted unless, in addition, the trial judge had informed the prisoner of the availability of a state-supplied attorney if he were indigent.[69] This conflict[70] was brought to the Supreme Court of Florida, certified as a question of great public interest.[71] The court approved the latter view and held that the prisoner was entitled to an adversary hearing on the motion.

c. Incompetent Counsel

The right to counsel implies the right to adequate representation.[72] Occasionally, but rarely successfully, prisoners have alleged that they were deprived of adequate representation because their counsel was incompetent.[73] The lack of success is not surprising in light of the test that

65. Smith v. State, 167 So.2d 609 (Fla. 3d Dist. 1964).

66. Carver v. State, 171 So.2d 898 (Fla. 2d Dist. 1965).

67. See text accompanying note 49 *supra*.

68. Hale v. State, 162 So.2d 5 (Fla. 1st Dist. 1964); Dykes v. State, 162 So.2d 675 (Fla. 1st Dist. 1964); Mankus v. State, 161 So.2d 547 (Fla. 1st Dist. 1964); Spriggs v. State, 158 So.2d 786 (Fla. 1st Dist. 1963).

69. Simons v. State, 175 So.2d 215 (Fla. 3d Dist. 1965); Carver v. State, 171 So.2d 898 (Fla. 2d Dist. 1965); Holmes v. State, 165 So.2d 433 (Fla. 2d Dist. 1964); Phillips v. State, 164 So.2d 858 (Fla. 2d Dist. 1964); Stewart v. State, 163 So.2d 527 (Fla. 2d Dist. 1964); Sams v. State, 163 So.2d 10 (Fla. 2d Dist. 1964); Furman v. State, 162 So.2d 308 (Fla. 3d Dist. 1964); Beadles v. State, 162 So.2d 4 (Fla. 2d Dist. 1964); King v. State, 157 So.2d 440 (Fla. 2d Dist. 1963).

70. Mason v. State, 167 So.2d 618 (Fla. 1st Dist. 1964).

71. Mason v. State, 176 So.2d 76 (Fla. 1965).

72. However an indigent does not have the right to choose a particular attorney. Simpson v. State, 164 So.2d 224 (Fla. 3d Dist. 1964); Woll v. State, 156 So.2d 909 (Fla. 1st Dist. 1963); Wilder v. State, 156 So.2d 395 (Fla. 1st Dist. 1963).

73. If the defendant retained his own counsel he may not raise the issue of compe-

is usually employed: Collateral attack is possible only where the substandard level of the attorney's efforts reduced the trial to a mockery or a farce. Common mistakes of judgment, strategy, trial tactics or policy are not sufficient.[74] On the basis of this policy the following allegations have been held to be insufficient: that the attorney did not spend any time with the prisoner, misadvised the prisoner relative to a "deal" with the state, and made no attempt to obtain vital evidence;[75] that the attorney was not interested;[76] that the attorney advised the prisoner to plead guilty.[77] On the other hand, the following allegations were sufficient to warrant a hearing: that the attorney did not confer with the prisoner before trial, did not speak on the prisoner's behalf at the trial, did not produce two witnesses as promised, forced the prisoner to take the stand, knew nothing of the facts and admitted this to the judge;[78] that the prisoner's right to a new trial or appeal was prejudiced because the attorney refused to discuss the matter with him after the trial.[79]

d. Misdemeanors

The *Gideon* decision[80] did not specifically limit its application to felonies, nor did it specifically include misdemeanors or lesser offenses. Rather, the court specifically avoided the issue:

> The special circumstance rule has been formally abandoned in capital cases and the time has come when it should be similarly abandoned in noncapital cases, at least to offenses which, as the one involved here, carry the possibility of a substantial prison sentence. (Whether the rule should be extended to all criminal cases need not now be decided.)[81]

However, the language of the decision does include suggestive phrases such as ". . . *any* person haled into court, who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided for him."[82] "The right of one charged with *crime* to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."[83] The sixth amendment upon which the *Gideon* decision is based refers to "all criminal prosecutions . . . ."[84]

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tency, but the competency of a court appointed counsel may be raised under Rule No. 1. Sears v. United States, 265 F.2d 301 (5th Cir. 1959); Everett v. State, 161 So.2d 714 (Fla. 3d Dist. 1964).

74. Florida courts have employed tests for competency stated in federal cases. Frand v. United States, 301 F.2d 102 (10th Cir. 1962).

75. Simpson v. State, 164 So.2d 224 (Fla. 3d Dist. 1964).

76. Wilder v. State, 156 So.2d 395 (Fla. 1st Dist. 1963).

77. Carroll v. State, 172 So.2d 266 (Fla. 2d Dist. 1965); Thomas v. State, 172 So.2d 245 (Fla. 2d Dist. 1965).

78. Gillyard v. State, 175 So.2d 798 (Fla. 3d Dist. 1965).

79. Henderson v. State, 174 So.2d 73 (Fla. 3d Dist. 1965).

80. Gideon v. Wainwright, 372 U.S. 335 (1963).

81. *Id.* at 350.

82. *Id.* at 344.

83. *Id.* at 344. (Emphasis added.)

84. *Id.* at 348.

The Supreme Court of Florida held that the absolute right to counsel does not apply where the defendant was charged with a misdemeanor. The court argued as follows:

> Following the decision in the Gideon case this court initiated steps to facilitate the procedure by which convicted felons could obtain relief . . . by adopting Criminal Procedure Rule No. 1. Thereafter the Legislature of Florida enacted Public Defender Law, Ch. 63-409 Laws of 1963, creating the office of public defender . . . to represent indigent defendants who are charged with a *non-capital felony* . . . . These actions were taken by this court and the Legislature as the direct result of—it might be said, under the coercion of—the mandate of the United States Supreme Court in the Gideon case . . . . By limiting the scope of the Act to felonies, the Legislature has in effect declared the public policy of this state to be that persons accused of misdemeanors only do not necessarily require the appointment of counsel to assist in their defense.[85]

2. SENTENCE

The right of an indigent to counsel at the time of sentencing is not in serious contention.[86] The interesting problems in this area concern the limitations upon the prisoner's right to collaterally attack the sentence by Rule No. 1. The language of the Rule states that the prisoner must be in custody by virtue of the sentence under attack.[87] This principle has been applied in several cases.[88] In a case where the issue merited review, the court suggested means other than Rule No. 1. The prisoner had been sentenced to life imprisonment as a fourth offender. The court held that he could not use Rule No. 1 to collaterally attack the prior three convictions, even though they formed the basis of the life sentence, because he was not in custody under these sentences. The court suggested that the prisoner pursue his argument by means of coram nobis.[89]

The early cases applied this limitation to consecutive sentences. Thus, if the first of the consecutive sentences had not been completely served, the prisoner was precluded from attacking the second sentence, for he was not in custody under that sentence.[90] This principle was extended to consecutive sentences imposed in different counties.[91] The later

85. Fish v. State, 159 So.2d 866, 868 (Fla. 1964). (Emphasis of the court.)

86. See note 32 *supra*.

87. See note 5 *supra*.

88. Nabozny v. State, 163 So.2d 765 (Fla. 2d Dist. 1964); Frappied v. State, 163 So.2d 502 (Fla. 2d Dist. 1964); Bryant v. State, 174 So.2d 41 (Fla. 3d Dist. 1965) (sentence had been vacated).

89. McCormick v. State, 164 So.2d 557 (Fla. 3d Dist. 1964).

90. White v. State, 165 So.2d 799 (Fla. 2d Dist. 1964).

91. Barnes v. State, 173 So.2d 515 (Fla. 1st Dist. 1965); Cummings v. State, 166 So.2d 775 (Fla. 2d Dist. 1964).

cases have reversed this position. The court in *Falagon v. State*[92] stated that the cases which precluded an attack upon the second consecutive sentence were based upon a series of federal cases which held that a prisoner could collaterally attack under section 2255 only if the relief sought would release the prisoner from custody. This law is not applicable in Florida because section 2255 operates as an attack upon an allegedly illegal judgment and Rule 35 of the Federal Rules of Criminal Procedure is used to attack the sentence. The Florida Rule No. 1 is not predicated on the proposition that relief would release the prisoner from custody. Rather, the Rule provides for discharge or re-sentence or correction of sentence or a new trial. In *Jones v. State*[93] the court approved this reasoning and presented supporting arguments. The court stated that a prisoner incarcerated under consecutive sentences could be considered to be in custody under both, and that the interests of all concerned would be served by determining the questions at the earliest possible time.[94]

The other problem of note concerns collateral attack of the sentence under Rule No. 1 on the basis of an alleged miscalculation of the term. Where a prisoner receives a new trial and is re-sentenced, the trial judge may impose a greater term than the first sentence. However, the total of the second sentence plus time served on the first sentence, including gain time awarded, must not exceed the statutory limit. In one case the prisoner argued that the judge did not give credit for the time served on the first sentence. The appellate court found that the combined sentences plus gain time did not exceed the statutory limit. However, the solution was not clear cut because the court implied that, in addition to the above criteria, the trial judge should give consideration to the original sentence, and it suggested that trial judges state that they have done so. The court stated that it assumed the trial judge gave such consideration, and remanded the prisoner to custody, but without prejudice to file a new motion under Rule No. 1 to determine in fact whether consideration was given.[95]

A prisoner was granted relief where the trial judge failed to credit time served under a prior void sentence.[96]

3. INSANITY

The trial court denied without a hearing the prisoner's motion which alleged a previous history of mental incompetency, and incompetency at

92. 167 So.2d 62 (Fla. 2d Dist. 1964).

93. 174 So.2d 452 (Fla. 2d Dist. 1965).

94. This principle has been approved in another case from the Second District, Jerry v. State, 174 So.2d 772 (Fla. 2d Dist. 1965). Since the *Bains* case from the First District was decided after the *Falagon* case from the Second District, the development of the law on this point should be interesting.

95. See also Little v. Wainwright, 161 So.2d 213 (Fla. 1964); Tilghman v. Culver, 99 So.2d 282 (Fla. 1957); Tilghman v. Mayo, 82 So.2d 136 (Fla. 1955); Davis v. State, 166 So.2d 189 (Fla. 1st Dist. 1964).

96. Lassiter v. State, 166 So.2d 159 (Fla. 1st Dist. 1964).

the time of conviction. The appellate court, apparently under the impression that the trial court had not considered the issue of incompetency, remanded the cause for this purpose.[97] Thereafter the trial court determined from the record that "such inquiry had been made regarding Knight's claim of insanity at time of trial, with negative result."[98] The trial court again denied the motion without a hearing and the appellate court affirmed.[99]

4. PERJURED EVIDENCE

Where the prisoner's allegations concerning the use of perjured evidence are sufficient, he is entitled to a hearing,[100] but the prisoner must have alleged not only that the state used perjured testimony, but also that the state *knew* the testimony was perjured.[101] Allegations that the police officer who testified knew of the perjury are not sufficient.[102]

5. WITNESS

The denial of the defendant's right to obtain witnesses and have process issued for witnesses in his behalf[103] has been held to be subject to review under Rule No. 1.[104]

6. NOTICE TO MINOR'S PARENTS OR GUARDIANS

In *Milligan v. State*,[105] even though the prisoner had been represented by counsel at all critical stages, the court held that, since no notice was given to the parent or guardian,[106] the order denying the motion under Rule No. 1 was reversed and remanded with instructions that the judgment and sentence be set aside and the prisoner discharged.

7. TRANSCRIPT OF TRIAL

The First District Court of Appeals has held in two cases that the prisoner was "entitled" to a transcript of the record of the trial, but only

97. Knight v. State, 164 So.2d 229 (Fla. 3d Dist. 1964). Rodriguez v. State, 176 So.2d 516 (Fla. 3d Dist. 1965) supports *Knight* in the view that the issue of insanity may be appropriately raised under Rule No. 1.

98. Knight v. State, 175 So.2d 98, 99 (Fla. 3d Dist. 1965).

99. Knight v. State, 175 So.2d 98 (Fla. 3d Dist. 1965).

100. Smith v. United States, 259 F.2d 125 (9th Cir. 1958); Brown v. State, 163 So.2d 335 (Fla. 3d Dist. 1964); Austin v. State, 160 So.2d 730 (Fla. 2d Dist. 1964).

101. Gillard v. State, 171 So.2d 902 (Fla. 2d Dist. 1965); Amard v. State, 171 So.2d 549 (Fla. 3d Dist. 1965). For a discussion of this extremely demanding criterion in a comparative context see Murray, *Convictions Obtained by Perjured Testimony*, 27 OHIO ST. L.J. 102, 1965; Note, 7 DUKE L.J. 150 (1958).

102. Gammage v. State, 162 So.2d 529 (Fla. 3d Dist. 1964) citing Sears v. United States, 265 F.2d 301 (5th Cir. 1959). See also Ingrim v. State, 166 So.2d 805 (Fla. 3d Dist. 1964).

103. FLA. STAT. § 932.37 (1966).

104. Stratos v. State, 167 So.2d 771 (Fla. 3d Dist. 1964); Byers v. State, 163 So.2d 57 (Fla. 3d Dist. 1964). The federal law seems to be that the right to witnesses is not absolute and thus appeal is based upon an abuse of discretion. United States v. Shields, 291 F.2d 798 (6th Cir. 1961); Reid v. Charney, 235 F.2d 47 (6th Cir. 1956).

105. 177 So.2d 75 (Fla. 2d Dist. 1965).

106. As required by FLA. STAT. § 932.38 (1965).

that part relating to his collateral attack.[107] The word "entitled" could be interpreted as implying that an indigent has a right to be furnished the transcript at the state's expense. *Dorsey v. United States*[108] held that a federal prisoner has no right to obtain a transcript of the testimony of his trial at government expense for the purpose of preparing a case under section 2255.

8. MATTERS WHICH COULD HAVE BEEN RAISED ON DIRECT APPEAL

Rule No. 1 was designed for collateral attack. Therefore, matters which could have been considered on direct appeal may not be reviewed under Rule No. 1. Although this policy has been applied extensively, a few exceptions have occurred where the alleged infringement could have resulted in a gross departure from due process and a fair trial, and where appeal was difficult. An illustration of the first instance occurred in *Burse v. State*.[109] The prisoner and a co-defendant had been convicted of murder. The co-defendant appealed and a new trial was ordered because the prosecution had commented on his failure to testify. The prisoner did not appeal and four years later filed a petition under Rule No. 1. The court held that the comment amounted to a denial of due process, that a hearing was not necessary because the record established the comment, and therefore ordered a new trial. In another case which involved comment by the prosecution, the prisoner alleged that he was indigent and that the Public Defender had refused his request to appeal. The court stated that such allegations negated a "waiver" of right to appeal and that "the trial court may again consider (as on a delayed motion for a new trial) the . . . merits of the . . . contentions. . . ."[110]

The importance of the "availability" of appeal is illustrated by a pair of cases in which the defense attorney was appointed just prior to trial and a continuance was denied. The petitions under Rule No. 1 alleged that the procedure was tantamount to a denial of the right to effective representation. In one case the petition was denied because the prisoner did not raise the issue of indigency until several days after the arraignment and the record showed no infringement upon his right to appeal.[111] In the other case the prisoner, acting in proper person, filed a motion for a new trial. After the motion was denied the prisoner informed the court that he wanted to appeal and requested counsel for that purpose. This request and his subsequent petition under Rule No. 1 was denied. The appellate court determined that he had been denied due process and reversed.[112]

107. Hall v. State, 165 So.2d 428 (Fla. 1st Dist. 1964); Harris v. State, 161 So.2d 885 (Fla. 1st Dist. 1964).

108. 333 F.2d 1015 (6th Cir. 1964).

109. 175 So.2d 586 (Fla. 3d Dist. 1965).

110. Jackson v. State, 166 So.2d 194, 196 (Fla. 3d Dist. 1964).

111. Lambert v. State, 169 So.2d 374 (Fla. 1st Dist. 1964).

112. French v. State, 161 So.2d 879 (Fla. 1st Dist. 1964).

B. *Petitions Not Properly under Rule No. 1*

During the period of survey, many problems other than the right to counsel were raised under Rule No. 1, and the courts were required to determine which were appropriate to the Rule. The policy of broadest application is that Rule No. 1 was designed for collateral attack and therefore issues which could have been raised on direct appeal may not be brought under Rule No. 1.[113] The courts have held that the following issues could not be raised by Rule No. 1: legality of arrest and admissibility of evidence,[114] sufficiency of evidence,[115] failure to supply prisoner with a copy of the charges,[116] refusal to supply court reporter at trial,[117] failure to grant continuance,[118] former jeopardy,[119] denial of speedy trial where prisoner failed to request trial,[120] alibi witness not available, and "confession" of another prisoner to the crime.[121] In two cases the prisoner argued that he plead guilty in order to get a light sentence but had received a long term. In one instance his motion was held inappropriate because he could have moved to withdraw his plea, and could have appealed if his motion was denied.[122] In the other, the promises were made to the prisoner by his privately employed counsel. The court held his petition was not properly brought under Rule No. 1 because the state was not responsible for such inducements.[123]

One case caused considerable controversy. The prisoner alleged that he was denied due process because Negroes were systematically excluded from the grand jury and petit jury. The court held that where the prisoner failed to raise timely objection in the trial court, he could not collaterally attack his conviction by Rule No. 1.[124] The prisoner cited federal authority to the effect that the issue could be raised collaterally,[125] but the

113. Austin v. State, 160 So.2d 730 (Fla. 2d Dist. 1964), citing Enzor v. United States, 379 U.S. 854 (1961). Williams v. United States, 307 F.2d 366 (9th Cir. 1962); Marti v. State, 163 So.2d 506 (Fla. 3d Dist. 1964).

114. Chayter v. State, 176 So.2d 382 (Fla. 3d Dist. 1965); Austin v. State, 160 So.2d 730 (Fla. 2d Dist. 1964).

115. Johnson v. State, 177 So.2d 23 (Fla. 3d Dist. 1965); Bell v. State, 168 So.2d 336 (Fla. 2d Dist. 1964); Sam v. State, 167 So.2d 258 (Fla. 2d Dist. 1964); Simpson v. State, 164 So.2d 224 (Fla. 3d Dist. 1964); Austin v. State, 160 So.2d 730 (Fla. 2d Dist. 1964).

116. Frisby v. State, 167 So.2d 335 (Fla. 3d Dist. 1964).

117. Lee v. State, 165 So.2d 443 (Fla. 2d Dist. 1964), citing Bowen v. United States, 260 F.2d 266 (5th Cir. 1958). Smith v. United States, 252 F.2d 369 (5th Cir. 1958); Harper v. State, 168 So.2d 325 (Fla. 1st Dist. 1964).

118. Lambert v. State, 169 So.2d 374 (Fla. 1st Dist. 1964). See notes 111, 112 *supra*.

119. Baker v. State, 175 So.2d 573 (Fla. 2d Dist. 1965).

120. Kemp v. State, 177 So.2d 58 (Fla. 3d Dist. 1965).

121. Grant v. State, 166 So.2d 503 (Fla. 2d Dist. 1964).

122. Conley v. State, 160 So.2d 752 (Fla. 1st Dist. 1964). Note: Although FLA. STAT. § 909.13 (1965) provides for change of plea before sentence, change of plea after sentence has been permitted. Banks v. State, 136 So.2d 25 (Fla. 1st Dist. 1962).

123. Manning v. State, 176 So.2d 380 (Fla. 3d Dist. 1965).

124. Lee v. State, 173 So.2d 520 (Fla. 1st Dist. 1965). Considerable federal authority supports this.

125. Avery v. Georgia, 345 U.S. 559 (1953); Norris v. Alabama, 294 U.S. 587 (1935); Bailey v. Henslee, 287 F.2d 936 (8th Cir. 1961).

court pointed out that, with one exception,[126] timely objection at the trial court had been made. The court distinguished the one exception, as follows:

> [N]o motion based upon the exclusion of Negroes from the grand jury or petit jury in Mobile, Alabama, had ever been made prior to the Seals trial, nor had the witnesses who testified ever known of a Negro serving on a Mobile jury in a capital case in which a Negro was a defendant. . . . An additional factor . . . was . . . that the evidence to support objections to the composition of the jury was entirely unknown to the defendant. . . . Furthermore, that evidence was not known to the attorney who defended Seals.[127]

C. *Successive Motions*

Rule No. 1 provides that the court is not required to entertain second or successive motions for similar relief. On this basis the court denied a second petition which was substantially the same.[128] In one instance, the prisoner requested permission to withdraw his petition. The court "upon consideration of the request" dismissed the motion. The prisoner's subsequent motion based upon the same allegations was denied.[129] The rule is not absolute. A prisoner filed a motion alleging a denial of right to counsel. This motion was denied without a hearing and the prisoner filed a second motion on the same grounds, but containing allegations which, if true, were sufficient to warrant relief. This, too, was denied, and the prisoner appealed. The appellate court cited the federal rule which applies to successive petitions under section 2255: [that the petition]

> should be denied on the ground of a prior denial only if (1) the same ground presented in the subsequent motion was determined adversely to the prisoner on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.[130]

The court held that since the files and records did not conclusively show that the prisoner was not entitled to relief, and since the prior denial was not on the merits, the order denying relief was reversed.[131]

D. *Miscellaneous*

1. BAIL

A prisoner is not necessarily entitled to bail pending an appeal of denial of motion under Rule No. 1.[132]

126. Seals v. Wiman, 304 F.2d 53 (5th Cir. 1962).
127. *Id.* at 68.
128. Manning v. State, 167 So.2d 616 (Fla. 1st Dist. 1964).
129. Rankin v. State, 168 So.2d 324 (Fla. 1st Dist. 1964).
130. Archer v. State, 166 So.2d 163, 164 (Fla. 2d Dist. 1964).
131. Archer v. State, 166 So.2d 163 (Fla. 2d Dist. 1964).
132. Simmons v. State, 163 So.2d 888 (Fla. 2d Dist. 1964), citing Gammage v. State, 154 So.2d 712 (Fla. 3d Dist. 1963).

2. NOTICE OF APPEAL

Since proceedings under Rule No. 1 have been considered non-criminal, but rather hybrid or civil in nature,[133] the time for filing motion for appeal from adverse decision under Rule No. 1 has been changed from 90[134] to 60 days.[135] *Carroll v. State*[136] held that separate notices of appeal are necessary to review separate judgments.

II. SENTENCE

The jurisdiction of trial judges to defer sentence was severely limited by changes made in the parole and probation statutes in 1957.[137] Jurisdiction is lost when the maximum time for which the sentence *could* have been imposed has passed.[138] However, the trial judge maintains jursdiction to sentence up until the date of maximum time, but he may not sentence the defendant to a period which would exceed that date.[139] In one instance where the sentence could have been life imprisonment, the trial judge sentenced the defendant to a term of five years, then suspended sentence and placed him on probation. Subsequently, the trial judge revoked probation and re-sentenced the defendant to a term of five years to run from that date. The appellate court affirmed,[140] even though the term of the second sentence would have exceeded the expiration date of the original sentence, because the term did not exceed the date of the maximum time possible—life.

An unusual application of the above principles occurred in *Yates v. Buchanan*.[141] The defendant was sentenced to a term but allowed to remain at liberty due to poor health. After four years the trial judge ordered that he serve the sentence. The appellate court held that the order was invalid because the maximum time for which the sentence could have been imposed had expired. Judge Barkdull, dissenting in part, distinguished the case on the basis that the actual sentencing had not been delayed. The delay had to do with the service of sentence and was occasioned by the defendant's own request. Judge Barkdull reasoned that even if the trial judge were in error as the majority argued, the error was induced by the defendant and he should not be allowed to take advantage of it. The writer considers the point well taken. From a practical point of view, the decision of the majority might cause trial judges to be reluctant to defer incarceration for reasons of health.

133. State v. Weeks, 166 So.2d 892 (Fla. 1964).
134. Roy v. Wainwright, 151 So.2d 825 (Fla. 1963).
135. Barton v. State, 176 So.2d 597 (Fla. 1st Dist. 1965).
136. 171 So.2d 196 (Fla. 2d Dist. 1964).
137. FLA. STAT. § 948.01-49.03 (1965).
138. State v. Bateh, 110 So.2d 7 (Fla. 1959); Helton v. State, 106 So.2d 79 (Fla. 1958); Bateh v. State, 101 So.2d 869 (Fla. 1958).
139. Rodriguez v. State, 119 So.2d 681 (Fla. 1960).
140. Drayton v. State, 177 So.2d 250 (Fla. 3d Dist. 1965).
141. 170 So.2d 72 (Fla. 3d Dist. 1964).

The principle that a defendant is entitled to credit for time served under a void sentence where he is re-tried and re-sentenced in the same case[142] was held not to apply where he was re-sentenced in a subsequent unrelated case.[143] Credit for time served out of prison, while on parole, was denied where the prisoner was re-incarcerated due to violation of parole.[144]

III. CONFESSIONS

Before the *Escobedo* case[145] the Florida law concerning the admissibility of confessions had been quite stable and simple. Voluntary confessions were admissible; involuntary confessions were not. An extra-judicial confession was not necessarily rendered involuntary by the fact that the defendant was not advised of his constitutional right to remain silent, or by the fact that he was not taken without delay to a committing magistrate. The federal rule which excludes confessions elicited during prolonged pre-commitment detention[146] has not been adopted in Florida.

The *Escobedo* case may have considerable influence on the law of Florida in two areas—the right to counsel[147] and admissibility of confessions. In all cases in which the court was asked to follow *Escobedo* the judges have managed to distinguish the facts. In *Crum v. State*[148] the court pointed out that the defendant had been advised of his constitutional rights, and reaffirmed the Florida view that the accused need not be taken before a committing magistrate before a statement can be taken from him. In *Montgomery v. State*[149] the court distinguished the case on the basis that the defendant made no request for counsel either before or at the time of confession nor was it claimed that he was unaware of his right to remain silent. The attitude of the court was indicated by its reference to the majority's holding in *Escobedo* as a "kind of judicial legerdemain."[150] However, some dissatisfaction with prior decisions has been expressed. For example, in one case, although the court held that the confession was admissible because there was no showing of prejudice by failing to take the defendant to a magistrate, the court stated:

> Were this the first time that the subject statute had been presented to an appellate court with these circumstances clearly delineated, we would be constrained to agree with appellant and hold that the failure of arresting officers to reasonably comply

142. Tilghman v. Culver, 99 So.2d 282 (Fla. 1957); Tilghman v. Mayo, 82 So.2d 136 (Fla. 1955).

143. Jackson v. State, 172 So.2d 7 (Fla. 1st Dist. 1965).

144. Richardson v. Wainwright, 171 So.2d 375 (Fla. 1965).

145. Escobedo v. Illinois, 378 U.S. 478 (1964).

146. Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943).

147. See notes 12, 13, 14 *supra*.

148. 173 So.2d 24 (Fla. 3d Dist. 1965).

149. 176 So.2d 331 (Fla. 1965).

150. *Id.* at 335.

> with the provisions of the statute will render an admission or confession against interest during such period of incarceration inadmissible. We think this is the purpose the legislature had in mind in passing such a statute and that a flouting of same by law enforcement officers of this state should not be sanctioned any more than the violation of the criminal laws of this state by those charged with such offenses. However, in view of the decisions rendered by our Supreme Court in Leach v. State, 132 So.2d 329 (Fla. 1961), Dawson v. State, 139 So.2d 408 (Fla. 1962) and Milton v. Cochran, 147 So.2d 137 (Fla. 1962), we have no alternative but to hold that failure to comply with the terms of the subject statute will not, of itself, render an extra-judicial confession inadmissible.[151]

State v. Hodges[152] held that although the trial judge erred in allowing the state to introduce the defendant's extra-judicial confession before other evidence established prima facie proof of the corpus delicti, the error was cured by subsequent evidence sufficient to independently establish the corpus delicti. The Supreme Court of Florida,[153] on writ of certiorari, reversed because the evidence independent of the confession did not establish prima facie proof of the corpus delicti.

In *Lett v. State*[154] the court held that where the defendant made statements to an investigating officer and subsequently the defendant reduced the statements to writing on the officer's promise not to take out a warrant against him, the written statement was not voluntary because it was induced by promise of reward, but the officer's testimony concerning the original statements was admissible.

Although the influence of narcotics generally relates to credibility, a confession given under influence of demerol was held to be involuntary.[155]

IV. SEARCH AND SEIZURE

Contrary to the trend in some other areas and in other times, the courts, during the period surveyed, seemed to have given the police more leeway in matters of search and seizure. The policy in Florida has been that where the police arrest a person for vagrancy in order to obtain evidence of a second crime, the evidence so obtained would be admissible if the arrest for vagrancy were not merely a "ruse." Where the defendant was prosecuted and convicted of vagrancy the courts had no difficulty in holding that the arrest for vagrancy was not merely a ruse.[156] This policy

151. Gore v. State, 163 So.2d 37 (Fla. 1st Dist. 1964).
152. 169 So.2d 361 (Fla. 3d Dist. 1964).
153. Hodges v. State, 176 So.2d 91 (Fla. 1965).
154. 174 So.2d 568 (Fla. 2d Dist. 1965).
155. Reddish v. State, 167 So.2d 858 (Fla. 1964).
156. Blake v. State, 112 So.2d 391 (Fla. 2d Dist. 1959).

was extended in *Rinehart v. State*[157] so as to admit evidence of the second crime even though the defendant was acquitted of vagrancy. Recently the courts extended the policy even further. The defendants were arrested for vagrancy, searched and subsequently convicted of possession of burglary tools. The courts justified the admission of evidence on the basis of the *Rinehart* case even though the defendants were well dressed, drove a 1964 Pontiac, and "had more than adequate means." The opinion does not mention any prosecution for vagrancy.[158]

A search must be reasonably related to the offense for which the defendant was arrested. Where traffic violators are to be taken to the police station as fourth offenders, the police may "pat down" the persons in search of concealed weapons. Search beyond this point is open to question. In one case the defendant was ordered to empty his pockets. He did so and the contents were admissible in evidence in a lottery charge.[159] In another case the officers emptied the defendant's pockets, in spite of his protests, and the contents were admissible in a lottery prosecution.[160] A dissenting judge argued that where the defendant had been arrested for driving without a license the search was unreasonable because the defendant admitted that he had no license, and the "patting down" was sufficient protection. The writer agrees with the dissent.

Several cases turned on the right of a police officer to enter a dwelling by force.[161] Forcible entries were held to be unlawful where they were made prior to announcement of the officer's authority and purpose[162] and prior to affording the defendant reasonable opportunity to allow entry.[163] A peaceful entry made in the presence of others, without announcement of authority and purpose was lawful.[164]

Property rights were in question in several cases. Two cases[165] held that a still, not within the curtilage of the dwelling, was not under immunity from unreasonable search and seizure.[166] *Maclin v. State*[167] reaffirmed the view that the defendant operating an automobile in the presence of the owner may not contest the validity of the search of the vehicle. *Fletcher v. State*[168] held that an attack on the validity of the search of a dwelling was immaterial as related to jewelry that apparently

157. 114 So.2d 487 (Fla. 2d Dist. 1959).
158. Sutherland v. State, 167 So.2d 236 (Fla. 2d Dist. 1964).
159. Smith v. State, 155 So.2d 826 (Fla. 2d Dist. 1963).
160. Smith v. State, 167 So.2d 225 (Fla. 1964).
161. FLA. STAT. § 901.19 (1965).
162. Benefield v. State, 160 So.2d 706 (Fla. 1964).
163. McLendon v. State, 176 So.2d 568 (Fla. 3d Dist. 1965).
164. Koptyra v. State, 172 So.2d 628 (Fla. 2d Dist. 1965).
165. Phillips v. State, 177 So.2d 243 (Fla. 1st Dist. 1965) and Lane v. State, 177 So.2d 245 (Fla. 1st Dist. 1965).
166. The court distinguished the case from Houston v. State, 113 So.2d 582 (Fla. 1st Dist. 1959) where the still was within the curtilage.
167. 162 So.2d 547 (Fla. 3d Dist. 1964).
168. 168 So.2d 162 (Fla. 3d Dist. 1964).

had been thrown out of the window for the jewelry had not been taken by the officers from the dwelling.

V. CHARGE TO THE JURY

The law concerning an important instruction was changed during the period under survey. The Supreme Court of Florida reversed a conviction of murder in the first degree rendered without a recommendation of mercy where the trial judge had charged the jury that the defendant could be subject to parole if the verdict were guilty of murder in the first degree with a recommendation of mercy.[169] The court noted that matters of parole are beyond the jurisdiction of the jury and recommended that in capital cases the judge should instruct the jury that provision for probation should not influence their decision as to mercy. The court expressly overruled a previous contrary holding.[170] The court considered the matter important enough to the interests of justice to justify review even though the appellant had not objected at the trial.[171]

In addition to the above change, a conflict in an important area was resolved. The Supreme Court of Florida took jurisdiction on the basis of a conflict between prior decisions, and held that where the trial judge has instructed the jury as to manslaughter, he should not refuse to instruct them as to excusable and justifiable homicide as well since manslaughter is defended in terms of the latter homicides.[172]

According to a Florida statute[173] the court shall in all cases charge the jury as to the degrees of the offense. Section 918.10(a) of Florida Statutes, 1963, provides that no party shall assign as error, or grounds for appeal, the giving or failing to give an instruction unless he made appropriate objection. A series of cases[174] have held that a failure to instruct on a lesser included offense is not fundamental error where no evidence relative to the lesser offense was presented and where no request had been made by the defendant for such an instruction, and where the failure to so instruct was not set forth in the defendant's motion for a new trial. This view was followed where a conviction for robbery was affirmed where no charge on larceny was given,[175] and a conviction for grand larceny was affirmed where no instruction on petit larceny was given.[176] *Allison v.*

169. Burnette v. State, 157 So.2d 65 (Fla. 1963).

170. Phillips v. State, 92 So.2d 627 (Fla. 1957).

171. For discussion of the related problem of instructing the jury as to the penalty see Wills, *Criminal Law Survey*, 14 U. MIAMI L. REV. 529 (1960).

172. Hedges v. State, 172 So.2d 824 (Fla. 1965).

173. FLA. STAT. § 919.14 (1965).

174. Johnson v. State, 130 So.2d 599 (Fla. 1961); Jefferson v. State, 128 So.2d 132 (Fla. 1961); Brown v. State, 124 So.2d 481 (Fla. 1960); State v. Brown, 118 So.2d 574 (Fla. 2d Dist. 1960).

175. Johnson v. State, 173 So.2d 487 (Fla. 1st Dist. 1965).

176. Silver v. State, 174 So.2d 91 (Fla. 1st Dist. 1965).

State[177] followed the usual rule that if a defendant requested charges of lesser included offenses (assault and assault and battery) failure to so charge was reversible error even though the evidence was sufficient to support the conviction of assault with intent to commit rape.

VI. APPEAL

Previously courts have held that where a prisoner delivered notice of appeal to the prison authorities for transmission to the Clerk of the Circuit Court, but, due to delay caused by the prison authorities, it was not filed in time,[178] the notice was nonetheless timely made.[179] This view was reversed by *State v. Smith*[180] and *Burke v. State*[181] in which the courts held that timely notice is an essential jurisdictional requirement and that no appeal was possible. The courts stated that the decision was without prejudice to apply for relief by way of habeas corpus. In subsequent habeas corpus proceedings[182] the court discharged the prisoner from custody because the action of the state's "functionaries" which made appeal impossible had caused the petitioner to be denied due process and equal protection of the laws.

A series of old cases had held that when the defendant failed to make timely motion for a new trial he could not contest the sufficiency of the evidence on appeal.[183] However, none of these cases indicated whether or not the defendant had moved for a directed verdict. A recent case[184] held that, in non-jury trial, if the defendant made a motion for directed verdict, the sufficiency of evidence may be considered on appeal even though no motion for a new trial was made.

VII. EVIDENCE

The trial court admitted into evidence a tape recording of a telephone conversation between the defendant and a person who had consented to the recording. The majority of the court affirmed the conviction on the basis that evidence obtained with the knowledge and consent of at least one conversant is admissible, even though the person adversely affected had no knowledge of the interception. A dissenting judge expressed the view that such a procedure constituted a violation of the defendant's right to avoid self-incrimination, his right to be secure in his home, and his

177. 162 So.2d 922 (Fla. 1st Dist. 1964).

178. FLA. R. APP. P. 6.2.

179. Henry v. State, 158 So.2d 807 (Fla. 1st Dist. 1963); Perez v. State, 143 So.2d 663 (Fla. 3d Dist. 1962).

180. 160 So.2d 518 (Fla. 1964).

181. 160 So.2d 523 (Fla. 1st Dist. 1964).

182. Hooper v. Wainwright, 168 So.2d 769 (Fla. 2d Dist. 1964).

183. Gilbert v. State, 148 Fla. 293, 4 So.2d 330 (1941); Thornton v. State, 143 Fla. 443, 196 So. 842 (1940).

184. Hogwood v. State, 175 So.2d 817 (Fla. 3d Dist. 1965).

right to be free from unreasonable search and seizure. The dissenting opinion commented,

> After a full analysis of the Federal decisions, I would be less than candid if I did not concede that the Federal courts have fluctuated in their decisions from day to day, from fact to fact, from constitutionality to unconstitutionality and from admissibility to inadmissibility.[185]

The defendant was arrested for unlawful possession of marijuana. Two officers and a private citizen were present but only one officer testified at non-jury trial. The defendant testified and denied the charge. He appealed the conviction and the district court of appeal reversed on the basis of insufficient evidence. The issue was certified as one of great public interest. The Supreme Court of Florida accepted jurisdiction and quashed the decision of the district court with directions that the decision of the criminal court of record be reinstated.[186] The court stated,

> We know of no statute or case law in this jurisdiction which requires more than one witness to a criminal case nor do we believe it proper for an appellate court to reverse a conviction of guilty upon the basis of insufficiency of the State's evidence merely because the State produced but one witness and his testimony was contradicted by the defendant.[187]

However the court indicated that the more desirable procedure would have been for both officers to have testified unless the evidence would have been merely cumulative. Justice Drew dissented. He considered that the failure of the other witnesses to corroborate could have created an inference that their testimony would have been adverse to the state. Such an inference might so weaken the testimony of the officer that the evidence would become insufficient. The point is well taken.[188]

In *Grant v. State*,[189] using established principles applicable to still pictures, the court decided for the first time in Florida that motion pictures are admissible in criminal trials. A dissenting judge thought that the particular pictures of the defendant re-enacting the event were prejudicial and perhaps an inaccurate portrayal. His dissent was not related to the principal of law, but to its application.

The conflict between the right of the defendant to confront his accusers, and the need of the state to hide the identity of its confidential

185. Barber v. State, 172 So.2d 857, 864 (Fla. 1st Dist. 1965) citing Griffith v. State, 111 So.2d 282 (Fla. 1st Dist. 1959).

186. State v. Sebastan, 171 So.2d 893 (Fla. 1965).

187. *Id.* at 895.

188. The judgment of the trial court was ultimately re-instated. Sebastin v. State, 172 So.2d 622 (Fla. 3d Dist. 1965).

189. 171 So.2d 361 (Fla. 1965).

informers, raises questions concerning the defendant's right to know the identity of the person who produced the evidence upon which a search warrant was based. A recent case[190] held that the state need not identify an informer who was not a participant, who would not testify and who informed an officer, where the officer rather than the informer made the affidavit.[191] The court further held that the state need not produce a lottery ticket purchased by the informer where neither the ticket, nor its purchase, were material and where the disclosure might identify the informer.

In *Capitoli v. State*[192] the court held that although the admission of evidence obtained by an allegedly unreasonable search and seizure was error, the decisions should not be reversed where the trial judge stated that he based his decision exclusively on other evidence.[193] The court cited only out-of-state cases.[194]

VIII. Fair Trial

Two issues related to the defendant's right to a fair trial were raised for the first time in Florida. In *Kaplow v. State*,[195] in spite of timely objection, the trial court permitted the state to call a co-defendant as a witness. The co-defendant refused to answer questions on grounds of self-incrimination. The appellate court held as a matter of law that where one of the co-defendants was required by the state to take the stand and was asked questions which the state knew the co-defendant would refuse to answer on the basis of self-incrimination, both defendants had "been prejudiced in the eyes of the jury to the extent that a fair trial is impossible."[196] Courts in some states consider this procedure to be a matter of judicial discretion.

In *Porter v. State*[197] the defendant claimed a denial of a fair trial because the trial judge's father was a member of the jury. The Supreme Court affirmed because the appropriate statute[198] did not prohibit this procedure and because the defendant failed to make timely objection at the trial.

Where the actual trial procedure afforded the defendant a fair trial, the court denied his petition for a writ of habeas corpus on the basis that

190. City of Miami v. Jones, 165 So.2d 775 (Fla. 3d Dist. 1964).

191. This confirms the trend in recent decisions. *E.g.*, Baker v. State, 150 So.2d 729 (Fla. 3d Dist. 1963); State v. Hardy, 114 So.2d 344 (Fla. 1st Dist. 1959).

192. 175 So.2d 210 (Fla. 2d Dist. 1965).

193. In the writer's opinion such practices could easily lead to abuse.

194. Butler v. United States, 138 F.2d 977 (7th Cir. 1943); State v. Davis, 120 Ala. 99, 23 So.2d 801 (1945); State v. Roach, 163 La. 329, 111 So. 775 (1927); State v. Lowery, 110 So. 721 (La. 926); Jones v. State, 52 Tex. Ct. App. R. 518, 107 S.W. 849 (1908).

195. 157 So.2d 862 (Fla. 2d Dist. 1963).

196. *Id.* at 864.

197. 160 So.2d 104 (Fla. 1963).

198. Fla. Stat. § 913.03 (1965).

he was brought into the court's jurisdiction by "forcible abduction" rather than proper extradition.[199]

IX. ENHANCED PUNISHMENT

Recent cases[200] indicate that an indictment or information may not allege that the defendant had been previously convicted of an unrelated crime in order to enhance the punishment under the general habitual offender statute.[201] However, where the statute defining the crime,[202] provides for enhanced punishment for repeated offenses, the information must allege prior offenses of that statute in order to enhance the punishment. This principle was followed in a recent prosecution of a narcotics case where the information alleged a prior violation of the statute.[203] The appellate court expressed some appreciation of the argument that where the state has a choice of means to enhance the punishment, the habitual offender statute should be used, but nevertheless ruled that the motion to quash should have been denied.[204]

X. HABEAS CORPUS

A collateral attack by habeas corpus upon criminal proceedings has been considered to be civil in nature. Therefore, courts have held that an indigent was not entitled as a matter of right to a state appointed counsel to assist him in an appeal from a final judgment denying his application for a writ of habeas corpus.[205] On the same basis, the appeal time has been held[206] to be the same as in civil cases.[207] The court noted that this ruling was a recession from previous holdings.[208]

The effect of Criminal Proceduce Rule No. 1 upon habeas corpus has been clarified. The Supreme Court of Florida has held in several cases that a writ of habeas corpus will not be considered if the same grounds for attack are available under Rule No. 1. Writs were denied when the petition failed to proceed under Rule No. 1 including appellate review.[209]

199. Jolly v. Wainwright, 175 So.2d 245 (Fla. 3d Dist. 1965), citing Frisbie v. Collins, 342 U.S. 519 (1952). Hobson v. Crouse, 332 F.2d 561 (10th Cir. 1946); Hunter v. State, 174 So.2d 415 (Fla. 3d Dist. 1965).

200. For example, Shargaa v. State, 102 So.2d 814 (Fla. 1958).

201. FLA. STAT. ch. 775 (1965).

202. Forgery, FLA. STAT. § 831.10 (1965); counterfeiting, FLA. STAT. § 831.17 (1965); beverage laws, FLA. STAT. § 562.45 (1965).

203. FLA. STAT. § 398.22 (1965).

204. State v. Curtis, 152 So.2d 754 (Fla. 2d Dist. 1963). For a rationale of the decision see Wills, *Criminal Law Survey*, 18 U. MIAMI L. REV. 395 (1963).

205. Coffee v. Wainwright, 172 So.2d 851 (Fla. 1st Dist. 1965).

206. Crownover v. Shannon, 170 So.2d 299 (Fla. 1964).

207. FLA. STAT. § 59.01(3,4) (1965).

208. Snell v. Mayo, 80 So.2d 330 (Fla. 1955); Sweat v. Hixom, 45 So.2d 190 (Fla. 1950).

209. Gentry v. State, 172 So.2d 435 (Fla. 1965); Brown v. Wainwright, 158 So.2d 527 (Fla. 1963); Gafford v. Wainwright, 157 So.2d 138 (Fla. 1963); Mitchell v. Wainwright, 155 So.2d 868 (Fla. 1963); Evans v. State, 175 So.2d 226 (Fla. 1st Dist. 1965).

XI. Recommendation of Mercy

After accepting a plea of guilty to murder in the first degree, the trial court empanelled a jury to consider the question of mercy. The jury did not recommend mercy and the judge sentenced the defendants to death. The appellate court held that although this procedure was not authorized, it did not constitute reversible error because "the judge decided independently, though his conclusion may have been strengthened . . ." by the decision of the jury.[210] The court suggested that if the judge had wanted a jury to consider mercy he could have rejected the guilty plea and have caused a plea of not guilty to be entered.

XII. Directed Verdict

State v. Shiver[211] raised a point of first impression in Florida. The defendant moved for a directed verdict. The court reserved ruling on the motion and submitted the case to the jury. The jury returned a verdict of guilty and was discharged. The defendant renewed his motion for a directed verdict. After several weeks the court granted the defendant's motion and set aside the verdict of the jury. On appeal the state argued that the court could not direct a verdict of not guilty after the jury had been discharged. The appellate court affirmed and noted that in absence of legislative prohibition, "the court possessed inherent power to direct a verdict of not guilty pursuant to the reservation of its ruling where it deemed the same essential for the proper administration of justice . . . ."[212] Federal,[213] but no Florida, authority was cited.

XIII. Metro Courts

The Florida Supreme Court in *County of Dade v. Saffan*,[214] held that section 932.52(2) of the Florida Statutes, which prescribes a 30 day period within which an appeal may be taken from a municipal court, does not apply to appeals from Dade Metropolitan Courts. The court reasoned that metropolitan courts could not be considered to be municipal courts and hence that the Home Rule Charter provision providing a 20 day period had to control.

XIV. Constitutional Law

In accordance with the general trend toward increased protection of the constitutional rights of individuals, section 43-10.5[215] of the City Code

210. Lee v. State, 166 So.2d 131, 133 (Fla. 1964).
211. 174 So.2d 778 (Fla. 2d Dist. 1965).
212. *Id.* at 779.
213. *Ex parte* United States, 101 F.2d 870 (7th Cir. 1939).
214. 173 So.2d 138 (Fla. 1965).
215. Any person in the City shall be disorderly who is found standing, loitering, or strolling about in any place in the City and not being able to give a satisfactory account of himself, or who is without any lawful means of support.

of the City of Miami relating to vagrancy, was held invalid because the language was too vague,[216] and the Supreme Court of Florida[217] under order of the Supreme Court of the United States[218] receded from its former view and held Florida Statute, section 798.05, providing for higher penalties for the cohabitation of white and colored persons, than provided for persons of the same race, to be unconstitutional.

XV. LOTTERY

The usual requirements to establish a lottery are a prize, an award of the prize by chance, and a consideration. A rather important case[219] raised the meaning of the term "consideration." The defendant, the manager of a grocery store, conducted a "Good Will Cash Night" wherein participants were required to register, obtain a card, have the card punched weekly, but were not required to pay or buy merchandise. The court held that a pecuniary consideration was not required. This view was supported by two civil cases.[220] A dissenting judge considered that gambling implies a tangible risk which in turn requires a pecuniary consideration.

XVI. MATERIAL WITNESS

The defendant, who had turned state witness, alleged that he was entitled to discharge pursuant to Florida Statute, section 902.17(4).[221] The court[222] held that the defendant was not entitled to the benefit of the statute because his incarceration was not the result of the independent action of the state, but rather was the result of his own action in making an agreement to ally with the state, and because the statute applies only to witnesses held under order of a magistrate. The court then justified the incarceration, where the defendant could not make bond, on the basis that the circuit court has the inherent power to hold material witnesses in the interest of justice.

XVII. FORMER JEOPARDY

Where the jury was discharged, over the defendant's objection, because the trial was running past midnight into the ensuing time of court, and the case was re-scheduled for trial, the defendant's motion to quash based upon former jeopardy was sustained.[223] The court stated that the

216. Headley v. Selkowitz, 171 So.2d 368 (Fla. 1965).
217. McLaughlin v. State, 172 So.2d 460 (Fla. 1965).
218. McLaughlin v. Florida, 379 U.S. 184 (1964).
219. Blackburn v. Ippolito, 156 So.2d 550 (Fla. 2d Dist. 1963).
220. Little River Theatre Corp. v. State, 135 Fla. 854, 185 So. 885 (1939) (involving a nuisance); Dorman v. Publix-Saenger-Sparks Theatres, 135 Fla. 284, 180 So. 886 (1938).
221. Provides procedure for release of material witness unable to give security.
222. State v. Buchanan, 175 So.2d 803 (Fla. 3d Dist. 1965).
223. State v. Cooper, 157 So.2d 875 (Fla. 2d Dist. 1963).

jury should be discharged only in cases of necessity and that the expiration of the term of court creates no such necessity in Florida.

XVIII. Worthless Check

The meaning of the term "thing of value" within the context of the worthless check statute is a question which has been in contention for quite some time.[224] The defendant issued a check which was dishonored because the account had been closed. He then issued a second worthless check drawn on a different bank in exchange for the dishonored check. He was charged under Florida Statute, section 832.05(3) for issuing the second worthless check for a "thing of value." He argued that the dishonored check was worthless and thus not a "thing of value." The court held that the first check was evidence of a debt and therefore was a "thing of value" within the meaning of Florida Statute, section 832.05(3).[225]

XIX. Breaking and Entering

The Florida courts have decided that within the meaning of Florida Statute, section 810.05, a telephone booth located inside a building is not a building,[226] but an outside telephone booth is a building.[227]

XX. Legislation

Important changes in criminal law and procedure made during the 1965 session of the Florida Legislature were few. Perhaps one of the most significant additions is provision for privileged communication between patient and psychiatrist.[228] The privilege is limited. It does not apply when the patient, having been informed that the communication will not be privileged, has made disclosures in the course of a psychiatric examination ordered by the court; any such communication would be admissible, however, only on issues involving the patient's mental condition. Further, the privilege does not apply in civil or criminal proceedings where the patient introduces his mental condition as an element in his claim or defense. However, the privilege does cover the area where it is needed most—private therapy. This law defines a psychiatrist as a person licensed to practice medicine who devotes a substantial part of his time to the practice of psychiatry.[229]

224. For discussion of previous cases see Wills, *Criminal Law Survey*, 16 U. Miami L. Rev. 234 (1961) and Wills, *Criminal Law Survey*, 18 U. Miami L. Rev. 395 (1963).

225. McCormick v. State, 161 So.2d 696 (Fla. 2d Dist. 1964).

226. Dewalt v. State, 156 So.2d 769 (Fla. 3d Dist. 1963).

227. Perry v. State, 174 So.2d 55 (Fla. 1st Dist. 1965), citing Sanchez v. People, 142 Colo. 58, 349 P.2d 561 (1960); People v. Miller, 95 Cal. App. 2d 696, 213 P.2d 534 (4th Dist. 1950) and People v. Clemison, 105 Cal. App. 2d 679, 233 P.2d 924 (2d Dist. 1951).

228. Fla. Laws 1965, ch. 65-404, creating Fla. Stat. § 90.242 (1965).

229. In the writer's opinion, the exclusion of communications between patients and other recognized and licensed psychotherapists is unnecessary and unfortunate.

Provision was made for the formation of a committee to study juvenile delinquency and submit a report to the governor.[230] The committee will be composed of three members of the Florida Senate appointed by the President of the Senate and three members of the Florida House of Representatives appointed by the Speaker. Another enactment concerning juveniles provided for amendment of Florida Statute, section 856.04, so as to provide penalty for a man who deserts or willfully withholds support from his wife or children. The provision will apply even though the child is illegitimate, providing that the fact of fatherhood had been adjudicated by a court in any state.[231]

A few new laws relating to special instances of general criminal conduct were enacted. Counterfeiting drivers licenses or possession of instruments and materials with intent to counterfeit drivers licenses is now a felony.[232] Flight or wilful refusal to stop by a motor vehicle operator with knowledge that he has been directed to stop by a police officer is now a misdemeanor.[233] Breaking or inserting an instrument into a coin operated machine (vending machine, parking meter, etc.) is now a misdemeanor.[234]

230. Fla. Laws 1965, ch. 65-558.
231. Fla. Laws 1965, ch. 65-210, amends FLA. STAT. § 856.04 (1963).
232. Fla. Laws 1965, ch. 65-278, creating FLA. STAT. § 831.29 (1965).
233. Fla. Laws 1965, ch. 65-388, creating FLA. STAT. § 317.0109 (1965).
234. Fla. Laws 1965, ch. 165.