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Criminal Law and Procedure

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Criminal Law and Procedure: 1993 Survey of Florida Law

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I. INTRODUCTION

Florida has remained in the forefront of developments in criminal law and procedure, and in many respects serves as an incubator for new approaches and ideas which facilitate the operation of our criminal justice system. With a Florida Constitution that provides protections in addition to those guarantees secured by the Bill of Rights, the Florida Supreme Court has not hesitated to utilize Florida law to promote individual freedoms. Under the leadership of Chief Justice Rosemary Barkett,[1] the Florida Supreme Court continues to follow a judicial philosophy of recognizing the rights of both victims and defendants, promoting fairness in the relationship

1. As the people of the State of Florida applaud the tremendous leadership of Chief Justice Rosemary Barkett, practitioners should note with both sadness and exhilaration that the Chief Justice will be leaving the Florida court system to become a Circuit Judge of the Eleventh Circuit Court of Appeals. She will, no doubt, carry her insight, concerns, and leadership to the federal bench.

between prosecution and defense, and looking beyond the technical requirements of the law to restore meaning to the justice system.

This article surveys Florida criminal law and procedural developments which occurred between September 1992 and September 1993. While the primary focus of this survey is an exploration of the pronouncements of the Florida Supreme Court, developments in the Florida Legislature and the district courts of appeal are analyzed as deemed necessary. The approach used throughout this article highlights important developments, analyzes legal precedent, and suggests future issues of concern for the criminal law practitioner. Although specialized issues which arise in capital and death penalty litigation are not included in this survey, the article is otherwise comprehensive.

During the past year, as Florida saw the continued growth of crime and the apparent lack of resources to control that escalation, the Florida Legislature made a serious effort to promote an effective and fiscally responsible criminal justice system. The result was the enactment of a comprehensive new criminal justice package known as the Safe Streets Initiative of 1994,[2] which revised the sentencing guidelines to emphasize incarceration in state prison for violent and repeat offenders, and to utilize alternatives to incarceration for nonviolent and first time defendants. The Legislature also overhauled the control release laws, authorized the development of circuit pretrial intervention programs, revised DUI laws by lowering the blood alcohol level necessary for a conviction, and even added a change of venue law known as the "Lozano venue bill" in response to the highly charged debate about relocating high profile trials.

Juvenile justice issues also received substantial attention from the courts and the legislature. Law enforcement received authorization to release the names of juvenile offenders adjudicated guilty of certain offenses. Using or carrying weapons at bus stops and on school buses was prohibited, perhaps a surprise to all those who thought this was already illegal. With an eye toward promoting meaningful rehabilitation, the juvenile justice bill mandated comprehensive, community-based juvenile programs and services, and authorized pretrial intervention for certain juvenile crimes.

No survey of Florida criminal law and procedural developments for the past year would be complete without recognizing that the Florida justice system has responded to a number of unexpected crises this year. Images of just another fall season, suitable for watching sports on television or getting the children ready for school, were blown away with the unwel-

2. Ch. 93-406, 1993 Fla. Laws 2911.

comed arrival of Hurricane Andrew on August 24, 1992. The first order of business for the Florida Supreme Court was to ensure the normal operation of the justice system in South Florida. On September 2, 1992, responding to a request by the Dade County State Attorney, the supreme court issued an order tolling "all time limits authorized by rule and statute affecting the speedy trial procedure in criminal and juvenile procedure" in Dade County for the two weeks after Hurricane Andrew.[3] The court also acknowledged that Hurricane Andrew's impact extended well beyond Dade County, and accordingly permitted a tolling of time limits in situations "where a party demonstrates that the lack of compliance with the requisite time periods was attributable to Hurricane Andrew."[4]

At the same time, the supreme court took action to protect the operation of our democratic form of government by approving a delay of the primary election in Dade County for one week because voters were still recovering from the damages caused by Hurricane Andrew.[5] Both of these unprecedented decisions demonstrate the willingness of the Florida Supreme Court to utilize its considerable power to protect the people of the State of Florida, a philosophy which is evident in many of the court's decisions.

II. SENTENCING

Because both the Florida Legislature and the courts expended considerable effort on sentencing law and corrections policy, we begin our examination of Florida law with that perspective.

A. *Legislative Enactments*

The 1993 legislative session was, in large measure, a response to the public outcry over an escalating crime rate. The legislative result was a unique balance of the expected "tough on crime" approach with the recognition that available resources must be used efficiently to address our most pressing needs. The final legislative solutions dealt harshly with violent crimes, enhanced existing offense classifications, mandated sentencing violent offenders to longer prison sentences, approved building more prison beds, and created new criminal offenses. The most anticipated

3. *In re* Emergency Petition to Extend Time Periods Under All Florida Rules of Procedure, 17 Fla. L. Weekly S578 (Fla. Sept. 2, 1992).

4. *Id.* at S579.

5. State v. Dade County, 17 Fla. L. Weekly S578 (Fla. Aug. 31, 1992).

change, however, was the wholesale revision of the sentencing guidelines and the elimination of many minimum mandatory sentences.

1. Sentencing Guidelines Revision

The Florida Legislature designated the 1994 revision of the sentencing guidelines as the "Safe Streets Initiative of 1994."[6] It is one of the most comprehensive and sweeping revisions of sentencing law and policy in recent memory. The new guidelines are designed to emphasize incarceration in the state prison system for violent offenders and nonviolent offenders who have repeatedly committed criminal offenses and who have demonstrated an inability to comply with the less restrictive penalties previously imposed. The new law pays close attention to prison population limitations and requires that any legislation which creates a felony, enhances a misdemeanor offense to a felony, moves a felony from a lesser offense severity level to a higher offense severity level, or reclassifies an existing felony offense to a greater felony classification, provide that such change results in a net zero sum impact in the overall prison population.[7] The zero impact may be avoided if the legislation contains a funding source sufficient to accommodate the change, or by the adoption of a statutory provision which specifically abrogates the application of this requirement.[8]

The revised guidelines, effective January 1, 1994, are no longer procedural rules, but are contained in the statutes.[9] They are intended to eliminate unwarranted disparity. They mandate the imposition of sentences within the guidelines, unless the court orders a departure within written guidelines. If a recommended sentence within the guidelines exceeds the maximum sentence otherwise authorized by law, the guidelines sentence *must* be imposed absent a departure.[10] The court can order a departure sentence above or below the guidelines when sufficient statutory factors are proved by a preponderance of the evidence.[11] The extent of a departure is not reviewable.[12]

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6. Ch. 93-406, 1993 Fla. Laws 2911.

7. *Id.* § 5, 1993 Fla. Laws at 2917 (amending FLA. STAT. § 921.001 (Supp. 1992)).

8. *Id.*

9. *Id.* § 5, 1993 Fla. Laws at 2920 (to be codified at FLA. STAT. § 921.001). The Sentencing Guidelines Commission is required to prepare, adopt, and submit to the Florida Supreme Court for approval, procedures for implementing the revised guidelines.

10. *Id.* § 5, 1993 Fla. Laws at 2920 (amending FLA. STAT. § 921.001(5) (Supp. 1992)).

11. Ch. 93-406, § 13, 1993 Fla. Laws at 2941 (to be codified at FLA. STAT. § 921.0016).

12. *Id.* § 5, 1993 Fla. Laws at 2920 (amending FLA. STAT. § 921.001(5) (Supp. 1992)).

The revised sentencing guidelines now group offenses into levels contained in an offense severity ranking chart.[13] This chart is used to compute a sentence score, as opposed to the nine separate offense categories utilized under the existing sentencing guidelines. The ranking has ten levels, with "ten" being the most severe.[14] Each crime is assigned a level based on offense severity.[15] This ranking system allows greater flexibility in revising the recommended sentence because it allows individual offenses to be moved to another level without changing the punishment for other offenses. Prior offenses are now weighed according to their assigned severity, and are no longer a function of the category of the primary offense.

A major provision of the Safe Streets Initiative is the repeal of numerous minimum mandatory sentences, including the three-year minimum mandatory for purchase and possession of a controlled substance with intent to purchase or sell within 1,000 feet of a school,[16] some of the minimum mandatories for drug trafficking,[17] the minimum mandatories for violent offenses against law enforcement officers and related personnel,[18] as well as the three-year minimum mandatory for an assault or battery on a person sixty-five years of age or older,[19] among others. Some minimum mandatory penalties have been retained, including the minimum mandatories for possession of firearms during the commission of certain felonies,[20] the three-year minimum mandatory for sale of drugs within 1,000 feet of a school,[21] and the fifteen and twenty-five year minimum mandatories for trafficking in controlled substances.[22]

Another substantial statutory change is the deletion of language which prohibited eligibility for parole or control release for certain drug offenses. Control release eligibility has been expanded, and with regard to drug defendants establishes an order of priority, beginning with minimum mandatory sentences, followed by habitualized offenders whose primary offense at conviction was not burglary, and then a consideration of habitual offenders whose primary offense was burglary. The Control Release

13. *Id.* § 10, 1993 Fla. Laws at 2925 (to be codified at FLA. STAT. § 921.0012).
14. *Id.*
15. *Id.*
16. Ch. 93-406, § 23, 1993 Fla. Laws 2911, 2949 (amending FLA. STAT. § 893.13 (1991)).
17. FLA. STAT. § 893.135 (1991).
18. *Id.* § 775.0823.
19. *Id.* § 784.08.
20. *Id.* § 775.087.
21. *Id.* § 893.13.
22. FLA. STAT. § 893.135 (1991).

Authority is mandated to maintain the state prison population at or below 97.5% to 99%, and establishes responsibilities for the Secretary of the Department of Corrections and the Chair of the Parole Commission when the state prison population exceeds 99.5% of lawful capacity.[23] Basic gain time is abolished for all offenses committed on or after January 1, 1994, while incentive gain time has been expanded.[24]

Another revision designed to reduce the prison population permits a sentencing court to place a defendant, whose presumptive guideline sentence is up to twenty-two months imprisonment, in a local jail as a condition of probation or community control for offense categories five through nine.[25] The Legislature also expanded the definition of criminal restitution, permitted restitution orders to bear interest at 12%, to become liens as on real estate and continue for twenty years if not paid, and exempted restitution orders from discharge in bankruptcy.[26]

2. Habitual Offenders

The operation of the habitual offender statute received legislative attention, due in part to increased concern that the statute was not being utilized against appropriate defendants and that the statute was being disproportionately applied against black offenders. The statute has been changed to prohibit habitual offender treatment if the felony for which the defendant is being sentenced, or one of the two prior felony convictions, is the purchase or possession of drugs.[27] Also, prosecuting attorneys are now required to adopt uniform criteria for seeking habitual offender sentencing, with a case file explanation required for all deviations.[28] Deviations from the criteria are not subject to appellate review.[29]

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23. Ch. 93-406, § 27, 1993 Fla. Laws 2911, 2960 (amending FLA. STAT. § 947.146 (Supp. 1992)).

24. *Id.* § 26, 1993 Fla. Laws at 2958 (amending FLA. STAT. § 944.275 (1991)).

25. *Id.* § 36, 1993 Fla. Laws at 2967 (to be codified at FLA. STAT. § 921.188).

26. Ch. 93-37, § 1, 1993 Fla. Laws 198 (amending FLA. STAT. § 775.089 (Supp. 1992)).

27. Ch. 93-406, § 2, 1993 Fla. Laws 2911, 2913 (amending FLA. STAT. § 775.084 (1991)).

28. *Id.* § 3, 1993 Fla. Laws at 2915 (to be codified at FLA. STAT. § 775.08401).

29. *Id.*

B. *Sentencing Guidelines*

1. Single Scoresheet

Florida Rule of Criminal Procedure 3.701(d)(1) requires that "[o]ne guideline scoresheet shall be utilized for each defendant covering all offenses pending before the court for sentencing."[30] The guidelines provide that a particular scoresheet must be used in the case of specific offenses, with category one used in all cases of murder or manslaughter except first degree murder and alcohol-related manslaughter charges,[31] while a category nine scoresheet is used for any felony not otherwise contained in any category.[32] The guidelines do not specify what scoresheet to use for the offense of solicitation of murder. The court addressed this issue in *Hayles v. State*.[33] The defendant in *Hayles* claimed that because inchoate offenses, e.g., conspiracy and solicitation, are included within the category of the offense attempted, solicited, or conspired to,[34] a category nine scoresheet should have been used for his sentencing, since category one does not apply to first degree murder.[35] The supreme court disagreed, finding that solicitation to commit first degree murder requires use of a category one scoresheet for sentencing guidelines purposes, since the "solicitation was intended to effectuate a murder here, and so [the defendant] falls under category one of the guidelines."[36]

2. Departure Sentences

During the survey period, the Florida Supreme Court announced several decisions which analyzed the propriety of departure sentences. The court adhered to prior decisions in holding that "advance planning and premeditation are permissible reasons for a departure in the context of sexual battery."[37] In evaluating this ground for departure, the court explained that because premeditation and advance planning are not inherent components of the sexual battery offense, these factors constitute departure grounds in a sexual battery case if they are of a "heightened variety," which "consists

30. FLA. R. CRIM. P. 3.701(d)(1).
31. FLA. R. CRIM. P. 3.701(c).
32. *Id.*
33. 608 So. 2d 13 (Fla. 1992).
34. FLA. R. CRIM. P. 3.701(c) (Comm. Note).
35. *Hayles*, 608 So. 2d at 14.
36. *Id.*
37. State v. Obojes, 604 So. 2d 474, 475 (Fla. 1992).

of a careful plan or prearranged design formulated with cold forethought."[38] The court carefully limited its holding to sexual offenses, and stressed "that heightened premeditation never can be a reason for departure in cases that inherently involve cold forethought, such as conspiracy or drug trafficking cases."[39]

The temporal proximity of a defendant's crimes does not, by itself, provide a valid reason for departure from the sentencing guidelines without a finding of a persistent pattern of criminal conduct.[40] A defendant's efforts to cover up a crime do not constitute proper grounds for a departure from the sentencing guidelines.[41]

C. *Habitual Offender Sentences*

The habitual offender law was designed "to allow enhanced penalties for those defendants who meet objective guidelines indicating recidivism."[42] In determining whether a defendant satisfies the criteria for habitual felony offender sentencing, the trial court must find by a preponderance of the evidence that the defendant qualifies as an habitual felony offender.[43] It is the defendant's burden to assert a pardon or to set aside a prior conviction as an affirmative defense.[44] When the state introduces copies of the defendant's prior convictions and the defendant concedes the validity of the convictions, the trial court's failure to make an express finding that the prior convictions were not pardoned or set aside constitutes harmless error.[45] The habitual offender classification is permitted where the predicate offense for which the defendant was convicted occurred after the commission of the offense for which the defendant is being sentenced.[46]

Although the state is required to provide notice of its intention to have the defendant sentenced as an habitual offender,[47] the purpose of the

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38. *Id.*
39. *Id.*
40. Cave v. State, 613 So. 2d 454, 455 (Fla. 1993).
41. State v. Varner, 616 So. 2d 988 (Fla. 1993); Smith v. State, 620 So. 2d 187 (Fla. 1993).
42. Eutsey v. State, 383 So. 2d 219, 223 (Fla. 1980).
43. *Id.* at 224.
44. *Id.* at 223.
45. State v. Rucker, 613 So. 2d 460, 462 (Fla. 1993); State v. Anderson, 613 So. 2d 465, 465 (Fla. 1993).
46. Perkowski v. State, 616 So. 2d 26 (Fla. 1993).
47. FLA. STAT. § 775.084(3)(b) (1991).

requirement of prior notice "is to advise of the state's intent and give the defendant and the defendant's attorney an opportunity to prepare for the hearing."[48] Where the state fails to provide advance notice, but the defendant and counsel had actual notice in time to prepare for the sentencing hearing, the failure of the state to provide notice is a mere technical violation which constitutes harmless error.[49] A mere technical violation does not rise to the level of actionable error.

A criminal defendant declared to be an *habitual violent felony offender* is subject to enhanced punishment pursuant to the habitual offender statute.[50] The statute defines an "habitual violent felony offender" as a person who has "previously been convicted of a felony or an attempt or conspiracy to commit a felony and one or more of such convictions was for" one of the enumerated violent felonies listed in the statute.[51] In *Tillman v. State*,[52] and *Reeves v. State*,[53] the supreme court upheld a defendant's sentence as an habitual violent felony offender even though the offense of conviction was a nonviolent felony. Since the defendant's prior conviction of a violent felony indicated the "incorrigible and dangerous character of the accused and establishe[s] the necessity for enhanced restraint,"[54] the supreme court determined that the enhanced penalties met the statutory objective of punishing recidivism.[55] The supreme court also held that the habitual violent felony offender provisions did not violate a defendant's constitutional rights concerning due process, double jeopardy, or ex post facto laws.[56]

In considering what sentence to give an habitual offender, the supreme court resolved a conflict within the districts by declaring that a defendant convicted of a life felony is not subject to enhanced punishment as an habitual offender.[57] Curiously, notwithstanding the legislative intent of

48. Massey v. State, 609 So. 2d 598, 600 (Fla. 1992).

49. *Id.*

50. FLA. STAT. § 775.084 (1991).

51. *Id.* § 775.084(1)(b).

52. 609 So. 2d 1295 (Fla. 1992).

53. 612 So. 2d 560 (Fla. 1992).

54. *Tillman*, 609 So. 2d at 1298.

55. This holding has been altered by Chapter 93-406 of the Laws of Florida, which prohibits habitual offender sentencing if the current offense or one of the prior felonies is the purchase or possession of drugs. Ch. 93-406, § 2, 1993 Fla. Laws 2911, 2913 (amending FLA. STAT. § 775.084 (1991)).

56. *Tillman*, 609 So. 2d at 1297-98; Merriweather v. State, 609 So. 2d 1299 (Fla. 1992).

57. Lamont v. State, 610 So. 2d 435, 438 (Fla. 1992).

severe punishment for habitual offenders, a trial judge has discretion to place an habitual felony offender on probation.[58]

D. *Youthful Offenders*

In *State v. Arnette*,[59] the supreme court explained that a defendant sentenced to prison and community control as a youthful offender maintains that youthful offender status even upon a subsequent violation of community control.[60] Under the youthful offender statute, the maximum term of imprisonment for a violation of community control is six years.[61]

E. *Probation*

A court is permitted to impose conditions of probation which are reasonably related to the defendant's rehabilitation.[62] When a defendant challenges the relevance of a special condition of probation, the condition is invalid if it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality."[63] Consequently, a condition of probation which prohibits the use or possession of alcoholic beverages is improper where the offense was not alcohol related and where the presentence investigation report contained no suggestion that the defendant had a negative propensity toward alcohol.[64]

An uncounseled guilty plea to an offense will not support a revocation of probation unless the defendant knowingly waived the right to counsel in the earlier case.[65] In order to shift the burden to the state to prove that the convictions were counseled or that counsel was knowingly waived, a defendant must do more than state under oath that no counsel was provided in the prior proceedings.[66] Utilizing the holding of *State v. Beach*,[67] the court held:

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58. McKnight v. State, 616 So. 2d 31 (Fla. 1993).
59. 604 So. 2d 482 (Fla. 1992).
60. *Id.* at 484.
61. FLA. STAT. § 958.14 (1991).
62. Biller v. State, 618 So. 2d 734 (Fla. 1993).
63. *Id.* at 734-35.
64. *Id.* at 735.
65. State v. Rock, 605 So. 2d 456, 458 (Fla. 1992).
66. *Id.*
67. 592 So. 2d 237 (Fla. 1992).

> The defendant must assert four facts under oath in order to shift the burden to the State: (1) that the offense involved was punishable by more than six months of imprisonment or that the defendant was actually subjected to a term of imprisonment; (2) that the defendant was indigent, and thus, entitled to court-appointed counsel; (3) that counsel was not appointed; and (4) that the right to counsel was not waived.[68]

An indigent defendant cannot be held to have violated probation due to an inability to pay court-ordered restitution.[69] If a probationer cannot pay restitution or the costs of supervision, a court is required to consider "alternative measures" of punishment other than imprisonment, such as community service or similar measures which do not amount to community control, probation, or imprisonment.[70] A court has no ability to extend probation upon a defendant's failure to pay, in the absence of finding that the defendant willfully violated the terms of probation.[71]

F. *Restitution*

When restitution is made an original condition of probation, a court is authorized to determine the amount of restitution at a later date, even beyond sixty days after sentencing.[72] Setting the amount of restitution already authorized does not constitute the addition of a new condition of probation.[73]

Concern with the rights of crime victims continues to be an important issue for the courts. In *Hodge v. State*,[74] the court held that restitution could be ordered for the reasonable value of the time necessarily spent and the costs incurred by a theft victim in determining and documenting the extent of loss as required by a fidelity bonding company.

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68. *Rock*, 605 So. 2d at 458.
69. Hewett v. State, 613 So. 2d 1305, 1306-07 (Fla. 1993).
70. FLA. STAT. § 948.06(4) (1991).
71. *Hewett*, 613 So. 2d at 1307.
72. Gladfelter v. State, 618 So. 2d 1364, 1365 (Fla. 1993).
73. *Id.*
74. 603 So. 2d 1329 (Fla. 4th Dist. Ct. App. 1992).

III. DISCOVERY

A. *Access To Information*

Defining the limits of reciprocal discovery has been a vexing problem for prosecutors and defense lawyers alike. In *Llanes v. State*,[75] the Third District held that a defendant does not elect to participate in discovery in a criminal case by engaging in discovery in a parallel administrative proceeding. The court noted that while Florida Rule of Criminal Procedure 3.220(a)[76] provides that "the defendant's taking of the deposition of any person . . . shall be an election to participate in discovery," the rule requires "that the defendant must participate in the discovery process in the pending criminal case in order to trigger the defendant's obligation to provide reciprocal discovery to the state . . . ."[77] The rule does not apply "to discovery taken by the defendant in parallel administrative or civil proceedings."[78]

A discovery deposition is not ordinarily admissible as substantive evidence. However, Florida Rule of Criminal Procedure 3.190(j)[79] governs the taking of depositions intended to perpetuate testimony. In *Rodriguez v. State*,[80] the supreme court held that, unless a party complies with the requirements of Rule 3.190(j), a traditional discovery deposition is not admissible as substantive evidence, even though all parties participated in the deposition and the witness is otherwise unavailable at the time of trial.[81] Without the safeguards found in Rule 3.190(j),[82] which are designed to ensure that both parties have an opportunity and motive to fully develop the deposition testimony, a discovery deposition does not qualify for admission as evidence.

The *Rodriguez* decision may not end the "deposition as evidence" discussion. The supreme court "requested that the Rules of Criminal Procedure Committee consider and make recommendations as to whether the Criminal Rules should be amended to provide for the use of discovery depositions as substantive evidence subject to certain safeguards which

75. 603 So. 2d 1294 (Fla. 3d Dist. Ct. App. 1992).
76. FLA. R. CRIM. P. 3.220(a).
77. *Llanes*, 603 So. 2d at 1297-98.
78. *Id.*
79. FLA. R. CRIM. P. 3.190(j).
80. Rodriguez v. State, 609 So. 2d 493 (Fla. 1992), *cert. denied*, __ U.S. __ (1993).
81. *Id.* at 498-99.
82. FLA. R. CRIM. P. 3.190(j).

would be provided in the rules."[83] To date, the Rules of Criminal Procedure Committee has not acted on the court's referral.

B. *Privacy Interests*

Another of the more celebrated cases to reach the Florida Supreme Court this year was *Post-Newsweek Stations v. Doe*,[84] which involved the Kathy Willets prostitution scandal. In July 1991, the Broward County Sheriff's Office obtained a search warrant for the home of Kathy Willets and her husband, Deputy Sheriff Jeffrey Willets, who were believed to be involved in a criminal prostitution scheme. The police seized various pieces of evidence, including a directory containing names and addresses, and other lists stating the names, amounts paid, and sexual preferences of Kathy's customers. When the state charged Kathy Willets with prostitution, and her husband with living off the proceeds of prostitution, the defense requested production of all materials seized during the search warrant, including Kathy's list. Nervously, numerous John Does filed motions in the trial court to deny public access to the pretrial discovery materials. Their concerns were that release of the information would invade their privacy and damage their personal and professional reputations. The trial court refused to withhold release of the discovery, stating that people named on a prostitute's client list have no reasonable expectation of privacy.[85]

The Florida Supreme Court began its analysis by noting that the John Does possessed standing to challenge the release of the discovery materials.[86] Florida Rule of Criminal Procedure 3.220(m) provides that "[u]pon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or any portion of such showing to be made in camera."[87] In addition, Florida Rule of Criminal Procedure 3.220(l)[88] allows the court to restrict disclosure of discovery to protect a witness from "harassment, unnecessary inconvenience or invasion of privacy."[89]

Having allowed the John Does to litigate the disclosure, the court began an analysis of criminal procedure rules, the public records law, and the constitutional right to privacy. The public does not have a universal right to all discovery materials, and courts may act to protect the privacy interests

83. *Rodriguez*, 609 So. 2d at 499 n.2.
84. 612 So. 2d 549 (Fla. 1992).
85. *Id.* at 550.
86. *Id.*
87. FLA. R. CRIM. P. 3.220(m).
88. FLA. R. CRIM. P. 3.220(l).
89. *Post-Newsweek*, 612 So. 2d at 550-51.

of litigants and third parties.[90] The party seeking to prevent disclosure bears the burden of proving that restricting access is necessary to prevent an imminent threat to privacy rights.[91] When balanced against the policy that public records are to be open for public inspection and that access to pretrial discovery information should be limited only when necessary to protect the constitutional rights to a fair trial and due process, the supreme court concluded that the John Does had no substantial privacy interest in their names and addresses sufficient to negate production of the discovery.[92] With the right of access to discovery materials now firmly entrenched in Florida jurisprudence, the moral of this case may well be that one must be careful lest one's immorality becomes a public spectacle.

C. *Discovery Violations*

Discovery violations do not automatically mandate the imposition of sanctions. In a criminal case, a trial court must consider all pertinent circumstances before imposing sanctions for a discovery violation. When sanctions are ordered, the court must impose the least severe sanction necessary to address the violation.[93] Excluding a witness as a sanction for the state's failure to provide an address for the witness was found to be erroneous because the trial court did not consider less severe sanctions, such as ordering a continuance or directing the state to comply with the discovery request.[94]

A defendant offering an alibi witness is required to furnish the prosecuting attorney with notice of an intent to call the witness, setting out the name and address of the witness, at least ten days before trial.[95] When a defendant fails to provide advance notice, the trial court is required to conduct a hearing to determine the circumstances of the defendant's failure

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90. *Id.* at 553.

91. Barron v. Florida Freedom Newspapers, Inc., 531 So. 2d 113, 118 (Fla. 1988).

92. *Post-Newsweek*, 612 So. 2d at 553.

93. Austin v. State, 461 So. 2d 1380, 1381 (Fla. 1st Dist. Ct. App. 1984).

94. State v. Schwartz, 605 So. 2d 1000, 1001 (Fla. 2d Dist. Ct. App. 1992). The court was mindful that the criminal process is intended to be a search for the truth:

> In a system in which the search for truth is the principal goal, the severe sanction of witness exclusion for failure to timely comply with the rules of procedure should be a last resort and reserved for extreme or aggravated circumstances, particularly when the excluded testimony relates to critical issues or facts and the testimony is not cumulative.

Id. (quoting *Austin*, 461 So. 2d at 1381).

95. FLA. R. CRIM. P. 3.200.

to provide notice before ordering sanctions.[96] As often as the courts have repeated this message, trial courts continue to impose sanctions without holding the required hearing,[97] even though the few minutes needed for a hearing is so much more efficient than a subsequent retrial of the entire case.

IV. JUVENILE PROCEDURE

The courts, perhaps like many parents, are experiencing problems controlling unruly juveniles. Therefore, the authorized procedure for punishing a juvenile for contempt of court was an important issue for the court in *A.A. v. Rolle*,[98] which involved a petition for writ of habeas corpus challenging the incarceration of six children in secure detention facilities for contempt of court. Chief Justice Barkett noted although juveniles can be found in contempt of court, "juveniles may not be incarcerated for contempt of court by being placed in secure detention facilities."[99] The majority opinion recognized that judges handling juvenile matters are often frustrated by the deficiencies of Florida's juvenile justice system, and noted the deficiencies were the result of a lack of adequate and meaningful funding.[100] The court noted the Legislature "has recognized the critical need to provide appropriate placements or services for such children, but these services have not been made available" to meet the needs of the children.[101] This is an area which is ripe for continued judicial attention, and how involved the courts will become in overseeing the operation of Florida's juvenile justice system is a serious question.

The Legislature also addressed some of the inadequacies of the juvenile justice system,[102] as it ordered the development of comprehensive, community-based juvenile programs and services.[103] The Legislature also

96. Small v. State, 608 So. 2d 829 (Fla. 3d Dist. Ct. App. 1992), *review granted*, 621 So. 2d 433 (Fla. 1993).

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

98. 604 So. 2d 813 (Fla. 1992).

99. *Id.* at 818-19.

100. *Id.* at 819.

101. *Id.*

102. *See* Ch. 93-200, § 1, 1993 Fla. Laws 1799, 1800 (amending FLA. STAT. § 20.19 (Supp. 1992), to be codified at FLA. STAT. § 20.19(4)); Ch. 93-230, § 23, 1993 Fla. Laws 2359, 2373 (amending FLA. STAT. § 39.045(9) (1991)); Ch. 93-408, 1993 Fla. Laws 2975.

103. Ch. 93-200, § 1, 1993 Fla. Laws 1799, 1800 (amending FLA. STAT. § 20.19 (Supp. 1992), to be codified at FLA. STAT. § 20.19(4)).

authorized the release of the names of juvenile offenders adjudicated guilty of capital, life, first, or second degree felonies involving a victim.[104]

V. CONSTITUTIONAL LAW

A. *Right to Counsel*

The right of the police to record or to intercept conversations between a defendant and a co-defendant is severely restricted once the defendant has been arrested and obtained counsel. In *Peoples v. State*,[105] a defendant obtained the services of defense counsel shortly after being arrested. After the defendant was released on bail, the co-defendant, who had begun to cooperate with the police, received permission from the police to record his telephone conversations with the defendant. The recordings of these conversations were admitted in evidence during the defendant's drug trafficking trial. The supreme court found that the recordings were obtained in violation of the defendant's right to counsel as guaranteed by the Florida Constitution.[106] That right to counsel attaches at the earliest of three points, as indicated in Rule 3.111(a):[107] "[w]hen [a defendant] is formally charged with a crime via the filing of an indictment or information, or as soon as feasible after custodial restraint, or at first appearance."[108] Plainly, the defendant's constitutional right to counsel had attached and had been invoked by the time the taped telephone conversations were made. In order to avoid future confusion, the supreme court announced a bright line rule for this situation: "[o]nce the section 16 right to trial counsel attaches and is invoked, the State is barred from obtaining incriminating statements on a charged offense by knowingly circumventing an accused's right to assistance of counsel during a crucial encounter with the State."[109] In this case, however, the introduction of the tape recordings at trial was deemed harmless error.

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104. Ch. 93-230, § 23, 1993 Fla. Laws 2359, 2373 (amending FLA. STAT. § 39.045(9) (1991)).

105. 612 So. 2d 555 (Fla. 1992).

106. *Id.* at 556-67; *see also* FLA. CONST. art. I, § 16.

107. FLA. R. CRIM. P. 3.111(a).

108. *Peoples*, 612 So. 2d at 556 (quoting Traylor v. State, 596 So. 2d 957, 970 (Fla. 1992) (footnotes omitted)); FLA. R. CRIM. P. 3.111(a).

109. *Peoples*, 612 So. 2d at 557; *see* Phillips v. State, 612 So. 2d 557 (Fla. 1992) (right to counsel under Florida and United States Constitutions attached upon appointment of counsel at defendant's first appearance prior to initiation of adversarial proceeding).

A trial court order prohibiting the defendant from speaking with counsel during a recess immediately following direct examination of the defendant, and prior to the defendant's cross-examination, implicates constitutional protections and constitutes clear error which requires reversal, unless there is no reasonable possibility the error affected the jury verdict.[110]

B. *Confessions and Admissions*

The decision in *State v. Guess*[111] is convincing proof that Florida courts are willing to utilize the Florida Constitution to guarantee rights which are not protected by the United States Constitution. In *Guess*, the supreme court held a trial court's refusal to receive the defendant's testimony on the voluntariness of a statement outside the presence of the jury was error that is not subject to the harmless error analysis.[112] In so holding, the Florida Supreme Court rejected the United States Supreme Court holding in *Arizona v. Fulminante*,[113] which employed the harmless error rule in situations involving the admission of an unconstitutionally obtained confession.[114]

The corpus delicti rule is a concept studied by every law student, but promptly forgotten upon passing the Bar. Yet the rule is alive and well in Florida, and is designed to limit the admission into evidence of a defendant's confession in the absence of independent, substantial evidence which proves the crime was committed.[115] The policy reason for the corpus delicti rule is simple to understand: "[t]he judicial quest for truth requires that no person be convicted out of derangement, mistake or official fabrication."[116] The rule is applicable to any statement by a defendant which tends to establish or disprove a material fact in the case, including both confessions and admissions against interest.[117] Circumstantial evidence remains sufficient as a foundation for proving corpus delicti.[118]

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110. Amos v. State, 618 So. 2d 157, 161 (Fla. 1993).
111. 613 So. 2d 406 (Fla. 1992).
112. *Id.*
113. 499 U.S. 279 (1991).
114. *Guess*, 613 So. 2d at 407.
115. *See* Burks v. State, 613 So. 2d 441, 443 n.2 (Fla. 1993).
116. State v. Allen, 335 So. 2d 823, 825 (Fla. 1976).
117. *See Burks*, 613 So. 2d at 444.
118. *Id.* at 443.

C. *Double Jeopardy*

Traditionally, under a federal constitutional analysis, a defendant cannot be subjected to multiple punishments and successive prosecutions for two or more offenses which contain the same elements.[119] This traditional test has been referred to as the "*Blockburger* test."[120] Recently, in *Grady v. Corbin*,[121] the Supreme Court added another element to the *Blockburger* test, holding that a subsequent prosecution must satisfy the "same conduct" test to avoid the double jeopardy bar.[122] The "same conduct" test provides that "if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted," a second prosecution may not be had.[123] Three years later, citing substantial dissatisfaction with the *Grady* analysis, the Supreme Court overruled the "same conduct" test and reestablished the preeminence of the *Blockburger* test.[124]

Another doctrine involving double jeopardy is that of "manifest necessity." A mistrial occasioned by "manifest necessity" enables a defendant to be retried without violating the prohibition against double jeopardy.[125] However, if a jury is discharged, before reaching a verdict, for legally insufficient reasons and without the defendant's consent, the discharge precludes a subsequent trial for the same offense.[126] In *Perkins v. Graziano*,[127] one juror was erroneously dismissed after the jury had been sworn, based on the juror's misunderstanding that the trial had been canceled. The court thereafter declared a mistrial and discharged the jury without exploring the alternatives of continuing the case while attempting to locate the sixth juror or determining the availability of an alternate.

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119. Brown v. Ohio, 432 U.S. 161, 166 (1977).

120. *Id.*

121. 495 U.S. 508 (1990).

122. *Id.* at 510.

123. *Id.*

124. United States v. Dixon, 113 S. Ct. 2849, 2864 (1993). The majority opinion, written by Justice Scalia, is a fascinating exercise in distinguishing precedent and parsing meaning from other authority. Additionally, Justice Scalia's pointed comments demonstrating the errors of Justice Souter's analysis in *Grady v. Corbin* deserve close reading. Portions of the discussion appear to suggest that Justice Souter actually miscited precedent. *See id.* at 2860-63.

125. United States v. Perez, 22 U.S. 579 (1824).

126. State *ex rel.* Williams v. Grayson, 90 So. 2d 710, 713 (Fla. 1956).

127. 608 So. 2d 532 (Fla. 5th Dist. Ct. App. 1992).

Because this situation did not constitute a "manifest necessity" for a mistrial, the subsequent trial was barred by the Double Jeopardy Clause.[128]

Application of the "manifest necessity" standard for determining whether a mistrial is appropriate requires a case-by-case analysis.[129] Courts have struggled with situations in which a trial participant or counsel becomes ill or is viewed as unable to continue with the trial.[130] In determining whether a particular trial event mandates the declaration of a mistrial, the "Florida Constitution requires a trial judge to consider and reject all possible alternatives before declaring a mistrial over the objection of the defendant . . . ."[131] So, when a trial judge, sua sponte and without considering and rejecting all possible alternatives, declared a mistrial based on the subjective impression that defense counsel was not competent to proceed with the trial because of illness, the defendant's double jeopardy protection precluded a retrial.[132]

D. *Search and Seizure*

In *Minnesota v. Dickerson*,[133] a case certain to spawn extensive litigation, the United States Supreme Court recognized the "plain feel" doctrine, which authorizes the seizure of contraband detected through the sense of touch during a patdown frisk. Using the analogy of the "plain view" doctrine, the Court explained that a police officer lawfully engaged in a patdown (where he or she can immediately identify an object as contraband) is entitled to seize that property without a warrant. The rationale is that there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons.[134] The approval of this doctrine did not, however, salvage the seizure in *Dickerson* because the police officer was unable to determine the incriminating character of the object upon an initial feel. Instead, the officer conducted a further exploratory search, which was not authorized by *Terry v.*

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128. *Id.* at 533.

129. Thomason v. State, 620 So. 2d 1234, 1237 (Fla. 1993).

130. *Perkins*, 608 So. 2d at 532; Cohens v. Elwell, 600 So. 2d 1224, 1225 (Fla. 1st Dist. Ct. App. 1992); Ostane v. Hickey, 385 So. 2d 110, 111 (Fla. 3d Dist. Ct. App. 1980).

131. *Thomason*, 620 So. 2d at 1239.

132. *Id.* at 1239-40. The defendant specifically advised the court he believed his counsel could proceed and he wanted to proceed with the trial. *Id.* at 1236.

133. 113 S. Ct. 2130, 2137 (1993).

134. *Id.*

Ohio.[135] Because the further search was constitutionally invalid, the seizure of the cocaine was unconstitutional.[136]

Identifying the circumstances which result in a voluntary abandonment of property which is retrieved by the police was the subject of *Hollinger v. State*.[137] Acknowledging the general rule that a seizure does not occur until a person is actually physically subdued by an officer or submits to an officer's show of authority,[138] the Florida Supreme Court held that where a reasonable person, when approached by police officers clad in masks and SWAT-team-type regalia, would not feel free to move, the subsequent dropping of cocaine is the fruit of the officers' illegal seizure. Consequently, contraband seized in such a case is properly suppressed.[139]

A similar situation resulted in a different conclusion in *Perez v. State*,[140] which involved a defendant who was chased by the police after failing to heed a call to halt. The firearm which the defendant dropped during the chase was declared by the court to have been abandoned, and the recovery of the firearm was not an illegal seizure because the defendant was not seized until he was actually caught by the police.[141] The rationale for the court's decision is simple: a defendant who flees from the police is not subject to constitutional protections until apprehended, while a defendant who remains pursuant to the police show of authority is entitled to the protections of the Fourth Amendment.[142]

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135. Ohio, 392 U.S. 1 (1968) (establishing a less intrusive "pat down" search as valid on less than probable cause).

136. *Dickerson*, 113 S. Ct. at 2138-39.

137. 620 So. 2d 1242 (Fla. 1993).

138. California v. Hodari D., 499 U.S. 621 (1991).

139. *Hollinger*, 620 So. 2d at 1243.

140. 620 So. 2d 1256, 1257 (Fla. 1993).

141. *Id.* at 1258.

142. *See id.* *Perez* contains an interesting philosophical discussion of precedent and the nature of stare decisis. *Perez* held that the Florida Supreme Court "is bound to follow the United States Supreme Court's interpretations of the Fourth Amendment and to provide no greater protection than those interpretations." *Id.* Chief Justice Barkett and Justices Shaw and Kogan dissented, concluding that the 1982 amendment to article I, section 12 of the Florida Constitution incorporated only the existing opinions of the United States Supreme Court and not future opinions. *Id.* at 1266, 1270. Justice Kogan declared that in view of the "precipitous retreat from its own precedent that characterizes the . . . [Supreme] Court today," no one envisioned that the Supreme Court would take away those rights which were recognized and approved by the precedent existing when the 1982 amendment was approved. *Perez*, 620 So. 2d at 1270. Curiously, Justice Overton, who first stated the view that the 1982 amendment applied only to existing Supreme Court precedent and not to future interpretations, *Bernie v. State*, 524 So. 2d 988, 994 (1988) (Overton, J., concurring in

When a motor vehicle is lawfully stopped by a law enforcement officer and the driver consents to a search of the vehicle, that consent extends to the search of a closed paper bag found within the vehicle.[143] Further, the United States Supreme Court held in *United States v. Padilla*[144] that the rule regarding standing to challenge the constitutionality of a search or seizure is not subject to a "co-conspirator exception." The Court rejected this exception, that "a co-conspirator obtains a legitimate expectation of privacy . . . if he has either a supervisory role in the conspiracy or joint control over the place or property involved in the search or seizure."[145]

VI. TRIAL ISSUES

A. *Evidence*

The psychotherapist-patient privilege is not applicable to situations involving child abuse or neglect, by action of the statutory requirement to report child abuse.[146] The statute essentially waives the psychotherapist privilege with regard to communications concerning child abuse.[147] Consequently, as part of the discovery process in a criminal case, a defendant is entitled to examine a psychotherapist or psychologist concerning communications he or she had with the victims of child abuse.[148]

The accident investigation privilege is designed to ensure that accident information may be compelled from individuals involved in traffic accidents without compromising constitutional protections.[149] But, the accident investigation privilege cannot be used to bar the introduction of a driver's statements regarding a traffic accident where the driver was never advised he was obligated to answer questions, and where the driver was given his

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judgment), nevertheless concluded that the doctrine of stare decisis mandated that the court follow the existing precedent in *Bernie*, and incorporate all of Supreme Court Fourth Amendment precedent. *Perez*, 620 So. 2d at 1259. Given the likelihood of future changes in the membership of the Florida Supreme Court, this issue may be revisited.

143. State v. Hester, 618 So. 2d 1365, 1366 (Fla. 1993).

144. 113 S. Ct. 1936, 1937 (1993).

145. *Id.*

146. FLA. STAT. § 415.512 (1991).

147. Jett v. State, 605 So. 2d 926, 927 (Fla. 5th Dist. Ct. App. 1992) (en banc), *review granted*, 620 So. 2d 762 (Fla. 1993).

148. *Id.* at 928.

149. *See* State v. Norstrom, 613 So. 2d 437, 440 (Fla. 1993); FLA. STAT. § 316.066(4) (1991).

Miranda rights.[150] The accident investigation privilege can be summarized as follows: the accident investigation privilege is applicable if no *Miranda* warnings are given; if a law enforcement officer gives any indication to a defendant that the defendant must respond to questions concerning the investigation, the officer must clearly state that "this is now a criminal investigation," and follow immediately with *Miranda* warnings before any statement by the defendant may be admitted against that defendant at trial.[151]

In prosecuting drug offenses, prosecutors often attempt to utilize expert testimony to explain the operation of drug organizations and the impact of certain conduct taken by the defendants. Prosecutors often seek to introduce this evidence in the form of expert opinion testimony. A limitation on the ability of the prosecution to introduce expert opinion testimony is the result of the decision in *Ruth v. State*.[152] In a prosecution for maintaining an aircraft used for keeping or selling drugs, concealing aircraft registration numbers, and aircraft registration fraud, the state introduced the expert opinion of a customs agent that the aircraft was used to smuggle narcotics. This opinion regarding the purported use of the aircraft addressed a necessary element of the charged crime. The appellate court, recognizing the considerable impact opinion testimony can have, held the evidence was inadmissible because it constituted an opinion on the ultimate issue involved in the trial.[153]

> A defendant may not be convicted solely upon the basis of an expert opinion as to the actual commission of the ultimate act which constitutes the commission of the crime charged. Such a situation clearly runs afoul of the ultimate issue rule. Without evidence of the actual presence of drugs in connection with the use of the plane, it was error to admit [the customs officer's] opinion testimony.[154]

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150. *Id.*; *see also* Miranda v. Arizona, 384 U.S. 436 (1966).

151. *Norstrom*, 613 So. 2d at 440-41. In State v. Riley, 617 So. 2d 340 (Fla. 1st Dist. Ct. App. 1993), the court certified the following question as one of great public importance:

> WHETHER STATEMENTS MADE IN THE COURSE OF A POST-ACCIDENT INVESTIGATION BY AN INDIVIDUAL NOT IN POLICE CUSTODY AND NOT GIVEN WARNINGS PURSUANT TO *MIRANDA V. ARIZONA* ARE PRIVILEGED UNDER SECTION 316.066, FLORIDA STATUTES (1991).

Id. at 341.

152. 610 So. 2d 9 (Fla. 2d Dist. Ct. App. 1992).

153. *Id.* at 11.

154. *Id.*

The court also held that the opinion was "purely speculation" and was not based on facts or inferences supported by the evidence.[155] Without factual support for the opinion, the erroneous opinion evidence invaded the province of the jury. The defendant's conviction was, accordingly, reversed.[156]

Impeaching a witness through a prior felony conviction or a conviction for an offense involving moral turpitude should be a rather simple process. Yet, lawyers continue to attempt impeachment in a manner which informs the jury of the underlying crime, which is almost always error. An unsuccessful impeachment attempt occurred in *Tampling v. State*,[157] where the prosecutor cross-examined the defendant, asking whether the defendant had been convicted of jury tampering. As surprising as it might seem for a prosecutor to attempt that type of impeachment, it is inexplicable that the trial judge overruled defense counsel's objection.[158] As a result, the defendant's conviction was reversed, and the appellate court gave a lengthy explanation instructing the parties on the only permissible method for impeaching a witness by conviction of a prior crime:

> [T]he prosecutor is permitted to attack the defendant's credibility by asking whether the defendant has ever been convicted of a felony or a crime involving dishonesty or false statement, and how many times. If the defendant admits the number of prior convictions, the prosecutor is not permitted to ask further questions regarding prior convictions, nor question the defendant as to the nature of the crimes. If, however, the defendant denies a conviction, the prosecutor can impeach him by introducing a certified record of the conviction. The prosecutor is not permitted to ask the defendant questions about prior convictions unless the prosecutor has knowledge that the defendant has been convicted of a crime and has evidence necessary for impeachment if the defendant fails to admit the number of convictions for such crimes. The proper method to impeach the witness who answers the question regarding his prior convictions incorrectly, is to offer a certified record of the witness's prior convictions, which will necessarily reveal the nature of the crimes. It is improper for the prosecutor or questioning party to name the specific crimes or to state the nature of the crimes.[159]

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155. *Id.* at 12.

156. *Id.*

157. 610 So. 2d 100, 101 (Fla. 1st Dist. Ct. App. 1992).

158. *Id.*

159. *Id.* at 101-02; (quoting Gavins v. State, 587 So. 2d 487, 489-90 (Fla. 1st Dist. Ct. App. 1990)).

The supreme court had an opportunity to evaluate the admissibility of DNA test results in *Robinson v. State*.[160] While the court did not give a green light to the admission of DNA evidence in every case, the court nevertheless found the prosecution presented sufficient evidence demonstrating the reliability of the DNA testing method, while the defendant produced neither evidence nor authority that questioned the general scientific acceptance of the testing.[161] Consequently, the court held that the defendant had not demonstrated abuse of the trial court's discretion regarding the admissibility of DNA test results.[162]

Meanwhile, as the Florida Supreme Court was reiterating traditional reliance on the "general acceptance" test for the admission of scientific evidence, the United States Supreme Court held that the Federal Rules of Evidence superseded the "general acceptance" test for admissibility of scientific evidence first established in *Frye v. United States*.[163] In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[164] the Court noted that Rule 702 of the Federal Rules of Evidence did not incorporate a "general acceptance" standard as a prerequisite to admissibility.[165] In determining whether scientific evidence is admissible, the Supreme Court set out the following standard:

> Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test.[166]

160. 610 So. 2d 1288 (Fla. 1992).

161. *Id.* at 1291.

162. *Id.* DNA profile evidence introduced by the prosecution in a burglary and sexual battery offense obtained judicial approval in Toranzo v. State, 608 So. 2d 83 (Fla. 1st Dist. Ct. App. 1992), *review dismissed*, 613 So. 2d 9 (Fla. 1993).

163. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

164. 113 S. Ct. 2786 (1993).

165. *Id.* at 2794.

166. *Id.* at 2796 (footnotes omitted).

Among the factors considered important by the Court were whether the scientific methodology has been tested, whether the scientific theory has been subjected to peer review, the known or potential rate of error, and the level of support within the scientific community. The approach, the Court emphasized, is "a flexible one."[167]

Given the similarity between Rule 702[168] and the Florida analog,[169] the relevant question after *Daubert* was whether the Florida Supreme Court would abandon the "general acceptance" test and move toward the more flexible approach espoused by the Supreme Court. That did not happen when the court was asked to approve "sexual offender profile evidence" in *Flanagan v. State*.[170] There, the Florida Supreme Court reaffirmed the "general acceptance" test in concluding that "sexual offender profile evidence" is not generally accepted in the scientific community and therefore does not meet the test of admissibility for use in a sexual battery prosecution. The court acknowledged the decision in *Daubert*,[171] but stated firmly that "Florida continues to adhere to the *Frye* test for admissibility of scientific opinions."[172]

The admissibility of similar fact evidence in a sexual battery case led the supreme court to conduct a thorough analysis of the admissibility of other crimes evidence in *Williams v. State*.[173] There, the court acknowledged that evidence of other criminal activity may be prejudicial, but is subject to a "broad rule of admissibility based on relevancy . . . ."[174] Especially in a sexual battery case, other nonconsensual sexual encounters which are factually similar may well be probative of the defendant's common plan or scheme to seek out particular victims and to rebut a defense of consensual sex. When admitted, the court noted, the evidence should not be "made the focal point of [the] trial" and "proper cautionary instructions" should be given.[175]

167. *Id.* at 2797 (footnote omitted).
168. FED. R. EVID. 702.
169. FLA. STAT. § 90.702 (1991).
170. 18 Fla. L. Weekly S475 (Fla. Sept. 9, 1993).
171. 113 S. Ct. 2786 (1993).
172. *Flanagan*, 18 Fla. L. Weekly at S476 n.2.
173. 621 So. 2d 413 (Fla. 1993).
174. *Id.* at 414.
175. *Id.* at 417.

B. *Jury Selection*

In *State v. Aldret*,[176] the supreme court explained that "the state has standing to object to a defendant's discriminatory use of peremptory challenges under both the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and . . . the Florida Constitution."[177] In evaluating a claim of discriminatory peremptory challenges, a trial court has abundant discretion in fashioning the appropriate remedy in order to protect the constitutional rights of the parties.[178]

It is now well settled that neither the state nor the defense is permitted to exercise a peremptory challenge in a discriminatory or biased manner.[179] Appellate review of a trial court's ruling on peremptory challenges utilizes the abuse of discretion standard, so long as the lower tribunal's determination does not result from an incorrect application of the law.[180]

Trial counsel must properly preserve the issue of alleged racial bias in the exercise of peremptory challenges. In *Joiner v. State*,[181] the supreme court instructed lawyers that moving to strike the jury panel is not the only way to preserve a *Neil*[182] objection for review. A party sufficiently preserves the issue by renewing the objection or by accepting a jury subject to an earlier *Neil* objection.[183]

When a party raises an objection that a peremptory challenge is being utilized in a racially discriminatory manner, the trial court is required to conduct an inquiry during which the offending party must provide a racially neutral justification for exercising a peremptory strike.[184] "[T]he proper remedy in all cases where a trial court errs in failing to hold a *Neil* inquiry is to reverse and remand for a new trial."[185]

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176. 606 So. 2d 1156 (Fla. 1992).

177. *Id.* at 1458; *see also* FLA. CONST. art. I, § 16.

178. *Id.* at 1157; Jefferson v. State, 595 So. 2d 38, 41 (Fla. 1992).

179. State v. Slappy, 522 So. 2d 18, 22 (Fla.), *cert. denied*, 487 U.S. 1219 (1988). Black Americans are not the only protected ethnic group. The protection against discriminatory peremptory challenges was extended to hispanics as a cognizable ethnic group in *State v. Alen*, 616 So. 2d 452, 455 (Fla. 1993).

180. Files v. State, 613 So. 2d 1301, 1304 (Fla. 1992).

181. 618 So. 2d 174 (Fla. 1993).

182. State v. Neil, 457 So. 2d 481 (Fla. 1984) (holding that presumption of constitutional use of peremptory challenges may be rebutted by a timely objection followed by a showing that such challenge was based solely on race).

183. *See Joiner*, 618 So. 2d at 176.

184. State v. Johans, 613 So. 2d 1319, 1321-22 (Fla. 1993).

185. *Id.* at 1322; *see also* Valentine v. State, 616 So. 2d 971 (Fla. 1993). In *Valentine*, the supreme court noted that "reversal would have been unnecessary if the trial court had

C. *Speedy Trial*

The supreme court finally adopted a speedy trial rule for civil traffic infractions in an attempt to remedy "the effect on an individual of outstanding pending civil traffic infractions for an unreasonable time."[186] Rule 6.325[187] requires that "every defendant charged with a noncriminal traffic infraction shall be brought to trial within 180 days of the date the alleged infraction took place." If trial is not commenced within 180 days, the defendant is entitled to dismissal of the infraction charged.[188]

When a trial date is set beyond the speedy trial time, and defense counsel does not lodge an objection to the date, the defendant has not waived the right to speedy trial.[189] The defendant or counsel must make some affirmative statement in support of the trial date or request the particular setting in order to waive speedy trial rights.

While defense counsel's devotion to a client is absolutely essential to the proper operation of our criminal justice system, counsel must nevertheless play by the rules, even if fair play disadvantages the client. One such example of defense counsel's failure to stay within the limits of appropriate advocacy is found in *State v. Reaves*,[190] in which that court determined that defense counsel played fast and loose in attempting to obtain a speedy trial discharge. Counsel filed a demand for speedy trial in a pleading entitled "Demand Pursuant To Rule 3.191(a)(2)" without including in the caption the phrase "Demand for Speedy Trial." As anticipated by defense counsel, the clerk of court, whose duty it is to notify the court of a speedy trial demand and set a date for a calendar call, did not recognize the motion as a speedy trial demand. The appellate court did not appreciate counsel's calculating efforts. To prevent such miscarriages of justice in the future, the court declared that Rule 3.191 "mandates the use of the phrase 'Demand for Speedy Trial' in the captioning of that demand."[191] In reversing the trial

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simply followed *Slappy*'s clear directive and resolved all doubt in favor of the objector. Our holding in *Johans* will hopefully minimize such costly and frustrating errors—where a lengthy and expensive trial is foredoomed at its very beginning for lack of a five-minute inquiry." *Id.* at 975 (citations omitted).

186. *In re* Amendments to the Fla. Rules of Practice and Proc. for Traffic Courts, 608 So. 2d 451, 452 (Fla. 1992).

187. FLA. R. TRAFF. CT. 6.325.

188. *Id.*

189. Rivas v. Oppenborn, 605 So. 2d 516, 517 (Fla. 3d Dist. Ct. App. 1992).

190. 609 So. 2d 701 (Fla. 4th Dist. Ct. App. 1992), *review denied*, 623 So. 2d 494 (Fla. 1993).

191. *Id.* at 708.

court's speedy trial discharge, the appellate court chastised defense counsel for violating both the letter and the spirit of the oath of attorneys, finding counsel had acted in a manner which subverted the cause of justice.[192] The court did not consider it significant that defense counsel's actions initially led to the client's discharge.

D. *Venue*

Given the escalating number of high profile criminal cases in Florida, determining where a fair trial can be held requires considerable effort. Either the state or the defendant in a criminal case may move for a change of venue "on the ground that a fair and impartial trial cannot be had in the county where the case is pending for any reason other than the interest and prejudice of the trial judge."[193] As a consequence of the notoriety associated with moving a criminal trial to another county, the Florida Legislature recently amended the law relating to venue in criminal cases. The amendment requires a court, after ordering a change of venue, to give priority to any county which closely resembles the demographic composition of the original venue.[194]

The impetus for the change of venue legislation was the celebrated case of *Lozano v. State*,[195] involving a Miami police officer who was tried for and convicted of two counts of manslaughter in connection with a highly publicized shooting. The third district reversed the convictions and ordered a new trial, holding that the failure to grant Lozano's motion for a change of venue denied him the right to a fair trial.[196] On remand, the trial court granted a change of venue, ordering the case removed to Orlando. Then, sua sponte, the court reconsidered the venue change "in light of the widely publicized Los Angeles riots and the racial makeup of the Orlando area,"[197] and transferred the trial to Tallahassee.

This game of movable trials caused the chief judge of the Second Judicial Circuit to issue a sua sponte order removing and remanding the case back to Orlando. The Florida Supreme Court, concerned with the public's perception of the court system as a "ping-pong game" which undermined

192. *Id.* at 709.

193. FLA. R. CRIM. P. 3.240(a).

194. Ch. 93-225, § 1, 1993 Fla. Laws. 2336, 2337 (amending FLA. STAT. § 910.03 (1991), to be codified at FLA. STAT. 910.03(2)).

195. 584 So. 2d 19 (Fla. 3d Dist. Ct. App. 1991), *review denied*, 595 So. 2d 558 (Fla. 1992).

196. *Id.* at 23.

197. State v. Gary, 609 So. 2d 1291, 1292 (Fla. 1992).

confidence in the judicial function, declared that "absent extraordinary circumstances, a trial judge's order granting a change of venue may not be reviewed by a successor trial judge in the new venue. Once such an order has been issued, it must be honored in the new venue unless and until a proper appellate court rules otherwise."[198]

E. *Jury Instructions*

Under Florida law, a party is entitled to an instruction on a permissive lesser included offense when both the accusatory pleading and the evidence support the commission of that offense.[199] In *State v. Von Deck*,[200] the court answered the question of whether aggravated assault on a police officer is a lesser included offense of the attempted murder of a police officer. In that case, the defendant objected to the state's requested instruction on the permissive lesser included offense of aggravated assault, arguing that all the elements of this offense were not contained in the information. The defendant was found guilty of aggravated assault and appealed. The supreme court held that the prosecution is obligated to allege a "putting in fear" element whenever it seeks an instruction on the permissive lesser included offense of aggravated assault.[201] Because the attempted murder information did not allege that necessary element, the trial court should not have instructed the jury on aggravated assault as a lesser included offense.[202]

In *Taylor v. State*,[203] the supreme court explained the distinction between category-one "necessarily lesser included offenses" and category-two "permissive lesser included offenses."[204] When "the commission of one offense always results in the commission of another, the latter offense is a category-one necessarily lesser included offense."[205] If the lesser offense has at least one statutory element not contained in the greater, it cannot be a category-one necessarily lesser included offense, but may be a category-two permissive lesser included offense if all the required elements

198. *Id.* at 1294. The *Lozano* trial ultimately took place in Orlando, and resulted in an acquittal on all counts. The result caused no riots in any community.

199. Brown v. State, 206 So. 2d 377, 383 (Fla. 1968).

200. 607 So. 2d 1388 (Fla. 1992).

201. *Id.* at 1389.

202. *Id.*

203. 608 So. 2d 804 (Fla. 1992).

204. *Id.* at 805.

205. *Id.* (citing State v. Weller, 590 So. 2d 923 (Fla. 1991)).

are alleged in the accusatory pleadings and proven at trial.[206] In determining whether a defendant is entitled to a lesser included offense instruction, the trial court must analyze the charging document to see if the necessary elements of the lesser offense are included.

When a jury asks a question during deliberations, the trial judge must give counsel an opportunity to be heard before answering the jury's question.[207] The failure to observe this rule constitutes per se reversible error without regard to the harmless error rule.[208] Similarly, it is per se reversible error when a trial court, in responding to a jury's request for additional instructions, forwards the entire set of written instructions to the jury without providing prior notice to the parties.[209]

F. *Entrapment*

In *State v. Hunter*,[210] the supreme court held as violative of due process the practice in cases where the informant's contingent fee was conditioned on the giving of testimony. In those instances, the defense of objective entrapment was permitted.[211] The use of a paid confidential informant to solicit the defendant's participation in criminal activity does not violate due process, however, where payments to the informant were not conditioned on the giving of trial testimony or on the obtaining of an arrest.[212]

In *Munoz v. State*,[213] the supreme court ruled that the objective entrapment test has been abolished by the Legislature. The court analyzed the subjective entrapment test still in use, and validated the two part test: (1) whether the government agent induced the charged offense, and (2) whether the accused was predisposed to commit the offense. The court acknowledged that while entrapment is ordinarily a jury question, a trial judge has the authority to rule on entrapment as a matter of law where the facts are

206. *Id.*

207. Mills v. State, 620 So. 2d 1006 (Fla. 1993).

208. *Id.* at 1007 n.1 (citing Cherry v. State 572 So. 2d 521, 522 (Fla. 1st Dist. Ct. App. 1990)).

209. State v. Franklin, 618 So. 2d 171 (Fla. 1993).

210. 586 So. 2d 319 (Fla. 1991).

211. *Id.* at 321.

212. State v. Sargent, 617 So. 2d 1115 (Fla. 5th Dist. Ct. App. 1993); Taylor v. State, 612 So. 2d 626, 629 (Fla. 1st Dist. Ct. App.), *review granted*, __ So. 2d __ (Fla. 1993); State v. Ramos, 608 So. 2d 830 (Fla. 3d Dist. Ct. App. 1992), *review granted*, 617 So. 2d 321 (Fla. 1993).

213. 18 Fla. L. Weekly S537 (Fla. Oct. 14, 1993).

not in dispute and the state fails to muster sufficient evidence of predisposition.

In *Fruetel v. State*,[214] the appellate court held that the state's actions constituted entrapment as a matter of law when a defendant, with no prior criminal history, who was not the subject of an ongoing criminal investigation, was contacted by an informer whose sentence was subject to reduction if he provided evidence which would lead to a drug arrest.[215] The informant in that case furnished the defendant with the money needed to purchase drugs and even advised the defendant on how to proceed with the drug transaction. The record revealed that the informant "acted in the drug transaction without supervision and the record does not contain any evidence that would show the police 'utilized means reasonably tailored to apprehend only those already involved in ongoing criminal activity.'"[216] Under those circumstances, the Fourth District did not hesitate to reverse the defendant's drug convictions and order the defendant's discharge.[217] In light of the judicial concern with the possibility that informants might fabricate evidence in order to obtain a substantial personal benefit, law enforcement would be wise to develop criteria for strict control and supervision of a cooperating individual.

The illegal manufacture of crack cocaine by law enforcement officials for use in reverse-sting operations constitutes governmental misconduct which violates the due process clause of the Florida Constitution.[218] Therefore, a conviction for purchasing drugs manufactured by law enforcement officers is improper. In such a case, the supreme court has expressed its concern with law enforcement officers who choose to use methods which "cannot be countenanced with a sense of justice and fairness."[219]

VII. SUBSTANTIVE CRIMINAL OFFENSES

A. *Driving Offenses*

While driving a motor vehicle is generally regarded as a privilege and

214. 609 So. 2d 697 (Fla. 4th Dist. Ct. App. 1992).
215. *Id.* at 699.
216. *Id.* at 700.
217. *Id.*
218. State v. Williams, 623 So. 2d 462 (Fla. 1993).
219. *Id.* at 467.

not a right, most drivers consider driving to be a necessity. A suspension or revocation of driving privileges may have enormous practical consequences to a driver. The Department of Motor Vehicles has authority to seek review of an order reinstating the privilege to drive by petitioning for certiorari review from the order of the lower tribunal.[220] The standard of review remains a determination of whether the court departed from the essential requirements of the law.

Defendants routinely challenge the admissibility of blood alcohol test results based on the failure of the Department of Health and Rehabilitative Services ("HRS") to promulgate rules establishing standards for the use, maintenance, testing, and upkeep of testing equipment. In *Mehl v. State*,[221] the court found that HRS met the statutory requirement of providing an approved method of administration of the blood test. Nevertheless, in order to promote public knowledge of testing requirements, the supreme court declared that:

> beginning at 12:01 a.m. on January 1, 1994, the State shall not be allowed the benefit of the presumptions established in § 316.1934, Florida Statutes (1989), unless (a) the [S]tate has established reasonable definite rules specifying the precise methods of blood alcohol testing that are approved for use in this State, and (b) the State and its agencies substantially comply with these rules. Of course, even when the presumption is not available, the State should still have the benefit of the *Robertson* analysis, upon a proper request.[222]

Continued problems with blood alcohol testing may have led to the *Mehl* decision. For example, in *Robertson v. State*,[223] the question before the court was whether the prosecution should be permitted to introduce into evidence test results of blood samples taken at the request of a law enforcement officer if the statutory requirements were not satisfied.[224] The court held that even if the person conducting the blood test was not

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220. State Dept. of Highway Safety v. DeShong, 603 So. 2d 1349, 1351 (Fla. 2d Dist. Ct. App. 1992).

221. 18 Fla. L. Weekly S487 (Fla. Sept. 16, 1993).

222. *Id.* at S488.

223. 604 So. 2d 783 (Fla. 1992).

224. *Id.* at 787. The blood sample in *Robertson* was taken by a nurse at the direction of an investigating police officer, who was attempting to gather evidence for a drunk driving investigation. *Id.* at 786. The blood was analyzed by a licensed physician, who did not have a valid HRS permit for the purpose of performing a blood-alcohol test pursuant to section 316.1933(2), Florida Statutes (1987).

licensed by HRS, the test results are nevertheless admissible, provided that the blood was drawn by a person authorized to do so by the implied consent statute,[225] and the prosecution can establish that the test was reliable, was performed by a qualified operator with proper equipment, and an expert provides competent testimony concerning the meaning of the test.[226]

Drunk driving continues to have extraordinary consequences, beyond what many casual drinkers may believe. A trial court has the power to impose any valid condition of probation that serves a rehabilitative purpose. For example, a condition of probation requiring the defendant to place and pay for a newspaper ad consisting of the defendant's mug shot, name, and the caption "DUI-convicted" was an allowable sanction.[227]

Yet another example of the dangers of drugs and the serious consequences for those caught in possession of drugs is found in *Lite v. State*.[228] There, the supreme court upheld the constitutionality of section 322.055(1) of the Florida Statutes,[229] which requires the revocation of the driving license of those persons convicted of possession, sale, or trafficking of controlled substances. The law was declared to be constitutional against a claim that it violated substantive due process.[230]

B. *Burglary*

What constitutes possession of "burglary tools" was discussed by the court in *Green v. State*.[231] There, the court considered the following question: "[a]re items of personal apparel, such as common gloves, included under the terms 'tool, machine, or implement' as used in section 810.06, [of the] Florida Statutes?"[232] The court held that while "[c]ommon household objects, which . . . might have a useful and lawful purpose, may be classified as burglary tools if they are used with the intent to commit a burglary," gloves and other items of personal apparel "are not objects which

225. FLA. STAT. § 316.1933(2)(a) (1987), includes a list of qualified health care professionals. The Legislature amended the statute in 1991 to include other categories of healthcare professionals. Ch. 91-255, §§ 2-3, 1991 Fla. Laws 2442, 2448 (amending FLA. STAT. §§ 316.1932, 316.1933 (1989)).

226. *Robertson*, 604 So. 2d at 791.

227. Lindsay v. State, 606 So. 2d 652 (Fla. 4th Dist. Ct. App. 1992), *review denied*, 618 So. 2d 209 (Fla. 1993).

228. 617 So. 2d 1058 (Fla. 1993).

229. FLA. STAT. § 322.055(1) (Supp. 1990).

230. *Lite*, 617 So. 2d at 1059.

231. 604 So. 2d 471 (Fla. 1992).

232. *Id.* at 472.

actually facilitate the breaking and entering of a dwelling."[233] Consequently, the court gave a plain and ordinary meaning to the statute and declined to extend the definition of "tool, machine, or implement" to articles of clothing.[234]

C. *Kidnapping*

A kidnapping conviction requires proof of the forced movement or confinement of the victim during the commission of another felony.[235] In *Walker v. State*,[236] the supreme court revisited the question of what constitutes movement in a kidnapping context. The court reiterated the existing rule that

> for a kidnapping conviction to stand, the resulting movement or confinement (a) must not be slight, inconsequential, and merely incidental to the other offense; (b) must not be of the kind inherent in the nature of the other offense; and (c) must have some significance independent of the other offense in that it makes the other offense substantially easier to commit or substantially lessens the risk of detection.[237]

The particular circumstances in *Walker* did not meet that test, because the limited movement of the robbery victims was slight and inconsequential, and was merely incidental to the robbery.[238]

D. *Hate Crimes*

The continuing escalation of hate crimes throughout Florida and the country has led to the enactment of "hate crimes" statutes. The statutes are

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233. *Id.* at 473.

234. *Id.*

235. Faison v. State, 426 So. 2d 963 (Fla. 1983).

236. 604 So. 2d 475 (Fla. 1992).

237. *Id.* at 477.

238. *Id.* In *Walker*, the defendant entered a convenience store, took money from the cash register, and then ordered all occupants of the store to go to the back room and lie on the floor. Three victims moved a short distance away but did not lie down. The fourth victim moved a shorter distance after the defendant threatened to shoot. The defendant immediately left the store. The court noted that the victims were not bound, blindfolded, barricaded inside a room, or dragged from room to room. *Id.* at 476. *But see Faison*, 426 So. 2d at 965-66; Marsh v. State, 546 So. 2d 33 (Fla. 3d Dist. Ct. App. 1989); Johnson v. State, 509 So. 2d 1237 (Fla. 4th Dist. Ct. App. 1987).

designed to outlaw discrimination in the selection of a crime victim.[239] The Florida "hate crimes" law enhances the penalties for the commission of any felony or misdemeanor which is motivated by bigotry and prejudice.[240] In this term, the United States Supreme Court upheld the constitutionality of a Wisconsin statute.[241] The statute provided for enhancement of a criminal sentence whenever the defendant intentionally selects the victim based on the victim's race. The Court found that the statute did not violate free speech rights.[242]

Although the Florida Supreme Court has yet to rule on the constitutionality of the similarly drafted Florida hate crimes law,[243] the statute was ruled constitutional in *Dobbins v. State*.[244] "[I]t is the act of discrimination against people because of their race, color or religion by making them victims of crime that is prohibited and punished, not the specific opinion that leads to that discrimination."[245]

E. *Fraud*

The Florida statewide prosecutor is authorized by statute to prosecute certain crimes that occur within two or more judicial circuits.[246] The prior version of the statewide prosecutor statute provided jurisdiction for offenses which included "criminal fraud" as an actionable crime.[247] The court in *State v. Nuckolls*[248] gave an expansive definition of criminal fraud for purposes of statewide prosecutor jurisdiction. The court held that the

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239. *E.g.*, Federal Religion Vandalism Act, 18 U.S.C. § 247 (1989); Federal Hate Crimes Statistics Act, Pub. L. No. 101-275 (1990); FLA. STAT. § 775.085 (1991).

240. FLA. STAT. § 775.085 (1991).

241. Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993). The Supreme Court distinguished the Wisconsin statute from the hate crimes ordinance found unconstitutional in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992), because the ordinance in *R.A.V.* punished protected public expression. *Mitchell*, 113 S. Ct. at 2196.

242. *Mitchell*, 113 S. Ct. at 2196.

243. The Florida Supreme Court is considering the constitutionality of the Florida hate crimes law in *State v. Stalder*, 599 So. 2d 1280 (Fla. 1992). The parties presented oral argument on September 1, 1992.

244. 605 So. 2d 922 (Fla. 5th Dist. Ct. App.), *review granted*, 613 So. 2d 3 (Fla. 1992).

245. *Id.* at 925-26.

246. FLA. STAT. § 16.56(1)(a) (Supp. 1992).

247. *Id.* Effective April 8, 1992, section 16.56 (1)(a) of the Florida Statutes, was amended to delete the reference to "criminal fraud" and substitute "any crime involving, or resulting in, fraud or deceit upon any person." FLA. STAT. § 16.56(1)(a) (Supp. 1992); Ch. 92-108, § 2, 1992 Fla. Laws 906, 907 (amending FLA. STAT. § 16.56 (1991)).

248. 606 So. 2d 1205 (Fla. 5th Dist. Ct. App. 1992).

Legislature intended to incorporate a variety of violations which fell within the generic heading of criminal fraud, rather than limit the reach of the statute to a particular fraud crime.[249]

F. *Lewd and Lascivious Conduct*

Florida law authorizes the prosecution of any person who "[k]nowingly commits any lewd or lascivious act *in the presence of* any child under the age of 16 years without committing the crime of sexual battery . . . ."[250] The defendant in *State v. Werner*[251] was charged with a violation of the lewd and lascivious conduct statute as a result of his act of masturbating in the presence of his 13-month-old daughter. At trial, the defense moved for a judgment of acquittal based on the state's failure to prove that the child victim was actually aware of the lewd and lascivious act, as opposed to merely being present when the act occurred.[252]

The supreme court, in an exercise of statutory interpretation, determined that the meaning of "presence" as used in section 800.04(4), "encompasses sensory awareness as well as physical proximity."[253] The court was of the view that incorporating an awareness element was legally correct and made practical sense. The court held that

> [a]pplying the legal as well as the common-sense meaning of the word 'presence' to section 800.04(4), leads us to the conclusion that, while the child need not be able to articulate or even comprehend what the offender is doing, the child must see or sense that a lewd or lascivious act is taking place for a violation to occur.[254]

The child victim in this case was too young to be aware of the father's masturbation.

G. *Public Corruption*

In a potential benefit to prosecutors pursuing public corruption cases, the Fourth District Court of Appeal construed the "official misconduct"

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249. *Id.* at 1207.
250. FLA. STAT. § 800.04(4) (1992) (emphasis added).
251. 609 So. 2d 585 (Fla. 1992).
252. *Id.* at 586.
253. *Id.*
254. *Id.* at 587.

statute in *Bauer v. State*.[255] The statute defining "official misconduct"[256] contains a general intent element of knowing that the act was unlawful, and requires a specific intent only insofar as proving that the defendant intended to cause a benefit to himself or harm to another.[257] In this type of public corruption case, a prosecutor need only prove that the defendant acted with knowledge that the actions taken were wrongful and unlawful, and that the defendant intended to reap a benefit or harm another. This statutory analysis is likely to expand the possible uses of the statute to prosecute public corruption cases.

H. *Contempt*

A direct criminal contempt results when offending conduct is committed in the actual presence of a judge.[258] It may be punished summarily by the judge who saw or heard the conduct constituting the contempt. In contrast, indirect criminal contempt, defined by Rule 3.840,[259] concerns conduct that has occurred outside the presence of the judge.[260] The indirect criminal contempt procedure requires that all procedural aspects of the criminal justice process be accorded a defendant, including a charging document, an answer, the right to bail, an arraignment, and a hearing. A defendant is entitled to representation by counsel, may compel the attendance of witnesses, and may testify.[261] In *Gidden v. State*, the court

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255. 609 So. 2d 608 (Fla. 4th Dist. Ct. App. 1992), *review denied*, 613 So. 2d 1 (Fla. 1993).

256. Section 839.25 of the Florida Statutes provides:

> (1) "Official misconduct" means the commission of the following act by a public servant, with corrupt intent to obtain a benefit for himself or another or to cause unlawful harm to another:
>
> (a) Knowingly refraining, or causing another to refrain, from performing a duty imposed upon him by law; or
>
> (b) Knowingly falsifying, or causing another to falsify, any official record or official document.
>
> (2) "Corrupt" means done with knowledge that the act is wrongful and with improper motives.
>
> (3) Official misconduct under this section is a felony of the third degree
>
> . . . .

FLA. STAT. § 839.25 (1991). This statute was amended in 1991 by eliminating subsection (1)(a) as a form of official misconduct.

257. *Bauer*, 609 So. 2d at 610.

258. Gidden v. State, 613 So. 2d 457, 460 (Fla. 1993).

259. FLA. R. CRIM. P. 3.840.

260. *Gidden*, 613 So. 2d at 460.

261. *Id.*

held that the defendant may be charged with indirect criminal contempt for failing to appear as required by his conditions of bond.[262]

In finding the defendant guilty of indirect criminal contempt, a court is required to, at a minimum, announce oral findings on the record.[263] "[W]ritten findings are discretionary, not mandatory."[264] This is in contrast to the exacting requirements of direct criminal contempt, which mandate that the "judgment of guilt of contempt *shall* include a recital of those facts upon which the adjudication of guilt is based."[265]

I. *Concealed Weapons*

Whether a firearm is "readily accessible for immediate use" within the meaning of the concealed weapon statute[266] continues to be an elusive concept. In *Ridley v. State*,[267] the police located a gun under the driver's seat of a car, and found ammunition for the gun and a fully loaded clip under the passenger's seat. This location and accessibility of the firearm and ammunition made the firearm readily accessible for immediate use for purposes of securing a concealed weapon conviction.[268] This conclusion prompted a dissent from Justice Kogan, who analogized an empty gun to one which is carried in the vehicle while "securely encased."[269] The carrying of a "securely encased" weapon in a vehicle is not a crime.[270] Justice Kogan found the court's contrary conclusion to be inconsistent with the statutory rationale which favors the "lawful use, ownership, and possession of firearms and other weapons."[271]

J. *Loitering*

Although municipalities typically utilize loitering statutes for the purpose of policing areas of the community, such ordinances are of questionable constitutionality. Three such ordinances, which prohibited

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262. *Id.*

263. *Id.* at 459.

264. *Id.* (citing Gidden v. State, 593 So. 2d 294, 294-95 (Fla. 5th Dist. Ct. App. 1992)).

265. FLA. R. CRIM. P. 3.830 (emphasis added).

266. FLA. STAT. § 790.01(2) (1992).

267. 621 So. 2d 409 (Fla. 1993).

268. *Id. See* Ashley v. State, 619 So. 2d 294 (Fla. 1993) (an unloaded gun in a car with no ammunition anywhere in the car is not readily accessible for immediate use, but an unloaded gun underneath the seat with bullets lying in open view is readily accessible).

269. *Ridley*, 621 So. 2d at 410 (Kogan, J., dissenting).

270. *Id.*; *see also* FLA. STAT. § 790.25(5) (1991).

271. *Ridley*, 621 So. 2d at 410 (Kogan, J., dissenting).

loitering for the purposes of engaging in drug-related activity,[272] soliciting for prostitution,[273] and illegally using a controlled substance,[274] were declared unconstitutional on the basis of vagueness, overbreadth, and a violation of substantive due process. In light of the court's clear distaste for loitering ordinances, municipalities would do well to develop other methods of protecting the citizenry.

VIII. FORFEITURE

In a case having substantial consequences for the government in forfeiture cases, the supreme court precluded the RICO forfeiture of homestead property, finding that the constitutional provision exempting homesteads from forced sale was intended to guarantee that homestead property be preserved against any involuntary divestiture by the courts.[275] This decision may make forfeiture much more difficult in Florida, especially in view of the generous definition given to homestead property in the Florida Constitution.[276]

Because forfeiture of property is a harsh sanction, the Florida Supreme Court has strictly construed the forfeiture statute.[277] A person challenging a forfeiture must be in a position to demonstrate a recorded title or compliance with the requirements for receiving title.[278] For example, in *Byrom v. Gallagher*, there was an attempted forfeiture of an airplane. Byrom asserted an interest in the airplane based on his prior purchase of the plane. Unfortunately for the claimant, the registration of Byrom's ownership by the Federal Aviation Administration had not taken place as of the time the airplane was seized. Consequently, the circuit court found that Byrom lacked standing to contest the forfeiture. The district court affirmed, finding that because Byrom did not have title to the airplane, he did not have standing to contest the forfeiture.[279]

The supreme court reversed, concluding that where seized property is subject to title laws, the claimant must hold title or show compliance with

272. E.L. v. State, 619 So. 2d 252 (Fla. 1993).
273. Wyche v. State, 619 So. 2d 231 (Fla. 1993).
274. Holliday v. City of Tampa, 619 So. 2d 244 (Fla. 1993).
275. Butterworth v. Caggiano, 605 So. 2d 56 (Fla. 1992).
276. FLA. CONST. art. X, § 4.
277. Department of Law Enforcement v. Real Property, 588 So. 2d 957, 961 (Fla. 1991).
278. Byrom v. Gallagher, 609 So. 2d 24, 26 (Fla. 1992).
279. *Id.* at 26.

title requirements in order to show ownership.[280] A court should not defeat an owner's claim for technical reasons. Instead, the supreme court cautioned judges to conduct a searching inquiry in identifying individuals who have standing to contest a forfeiture:

> Consequently, in determining whether a person has standing the trial judge should consider: (1) whether that person holds legal title at the time of the forfeiture hearing or has complied with the requirements for receiving title; *and* (2) whether that person is in fact a bona fide purchaser. The trial judge should consider the facts surrounding the sale to determine whether the transfer is in fact a bona fide purchase. The relationship of the parties, the date the instruments were executed, the value of the property, the sale price, and canceled checks or bank deposits to show actual payment and receipt of money are all factors which the trial court should consider in determining whether the transfer is a bona fide purchase.[281]

In an effort to promote uniformity in the case style of forfeiture actions, the Fourth District ruled in *Fink v. Holt*,[282] that the case caption in a forfeiture case must

> identify the party seeking the forfeiture and the parties claiming an interest in [the seized property], if known. A description of the property to be forfeited should be used in the caption only where the owner or some lienor is unknown. Similarly, when there is an appeal from the forfeiture proceeding, the applicable rule of appellate procedure requires that the caption contain the name and designation of at least one party on each side.[283]

Thus, forfeiture proceedings should be brought in the name of the seizing person or authority, and against the person claiming the property.

An owner or bona fide lienholder having an interest in property subject to forfeiture may defeat a forfeiture action by establishing, by a preponderance of the evidence, a lack of knowledge the property was being used in criminal activity.[284] A certificate of title to a motor vehicle establishes

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280. *Id.*

281. *Id.* (emphasis added).

282. 609 So. 2d 1333 (Fla. 4th Dist. Ct. App. 1992).

283. *Id.* at 1335.

284. *In re* Forfeiture of 1989 Isuzu Pickup Truck, 612 So. 2d 695 (Fla. 1st Dist. Ct. App. 1993). The Supreme Court recently came to the same conclusion in a federal forfeiture case. United States v. 92 Buena Vista Ave., 113 S. Ct. 1126 (1993).

presumptive ownership of the vehicle. The presumption can be overcome only by clear and convincing evidence.[285]

IX. POST CONVICTION AND APPEAL

For those lawyers handling criminal appeals, knowing when a brief is due is a critical component of the practice of law, especially to keep malpractice rates low. In *Kuznik v. State*,[286] the circuit court, acting in its appellate capacity, dismissed an appeal due to the untimely filing of the record and initial brief, notwithstanding that a motion for extension of time was pending before the court. On certiorari review of the dismissal order, the Second District reinstated the appeal, holding that the "motion for extension tolled the time to file his brief."[287] The court previously cautioned, however, that a frivolous motion for extension will not toll the filing time.[288]

Post-conviction proceedings and collateral attacks on criminal convictions continue to demand the attention of Florida courts, particularly the Florida Supreme Court in death penalty matters. What qualifies for post-conviction relief remains a source of uncertainty. Claims of ineffective assistance of counsel, both at the trial and appellate stages, are by far the most frequently litigated issue in post-conviction and habeas corpus proceedings, but meeting the standard is difficult.

> In order to prevail on a claim of ineffective assistance of appellate counsel, the petitioner must show that counsel's performance fell below an objective standard of reasonableness and, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different.[289]

Ordinarily, a claim that defense counsel was ineffective is tested in a post-conviction proceeding in state or federal court. An unusual twist led the Florida Supreme Court to impose discipline in the form of a sixty day suspension for an attorney who failed to properly prepare a first degree

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285. *In re Forfeiture of 1989 Isuzu Pickup Truck*, 612 So. 2d at 697.

286. 604 So. 2d 37 (Fla. 2d Dist. Ct. App. 1992).

287. *Id.* at 37.

288. *E.g.*, Blanton v. State, 561 So. 2d 587 (Fla. 2d Dist. Ct. App. 1989).

289. Scott v. Dugger, 604 So. 2d 465, 469 (Fla. 1992) (citing Strickland v. Washington 466 U.S. 688 (1984); Johnson v. Dugger, 523 So. 2d 161 (Fla. 1988)).

murder case. In *The Florida Bar v. Sandstrom*,[290] a defendant convicted of the first degree murder of his wife succeeded in obtaining a vacation of the conviction based upon allegations of ineffective assistance of counsel because defense counsel failed to properly investigate and present evidence that would have established the wife's death was attributable to medical malpractice. The Florida Bar charged the attorney with inadequate preparation and neglecting a legal matter, and sought disciplinary sanctions.[291]

The referee agreed the defense counsel provided deficient representation, and that those deficiencies rose to the level of an unethical violation for inadequate preparation and neglect of a legal matter.[292] The referee recommended a one year suspension. The supreme court concluded the defense counsel was guilty of violating the disciplinary rules, but found only a sixty day suspension was warranted. The court recognized that disciplinary action for ineffective representation is unusual, but that it was justified in this case:

> We note that most cases of ineffective assistance of counsel do not rise to the level of a disciplinary violation. However, the circumstances of this case involved such a flagrant lack of preparation and such deficient performance by counsel as to warrant the finding that Sandstrom violated the disciplinary rules.[293]

Counsel would be well advised to heed this warning when preparing cases.

Additionally, a conviction or a sentence may be set aside or vacated as a result of "newly discovered evidence." In an effort to define the circumstances in which a claim may be made, the Florida Supreme Court recently reiterated the basic standard of proof.[294] To prevail on a claim of newly discovered evidence, a defendant must satisfy two requirements. First, the asserted facts "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence."[295] Second,

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290. 609 So. 2d 583 (Fla. 1992).

291. *Id.*

292. *Id.* at 584.

293. *Id.* at 584 n.1.

294. *See Scott*, 604 So. 2d at 465; Jones v. State, 591 So. 2d 911 (Fla. 1991).

295. *Scott*, 604 So. 2d at 468 (quoting Hallman v. State, 371 So. 2d 482, 485 (Fla. 1979). The *Scott* case involved a newly discovered evidence claim in a death penalty case. *Id.* at 468. A co-defendant's life sentence, imposed after appellate affirmance of the defendant's death sentence, constitutes newly discovered evidence for which post-conviction

"the newly discovered evidence must be of such nature that it would *probably* produce an acquittal on retrial."[296]

Post-conviction relief may also be granted when a defendant pleads guilty or no contest to criminal charges, relying on the incorrect advice and counsel of a defense lawyer. Defense counsel's inaccurate non-record assurances to the defendant regarding sentencing consequences may undermine the voluntariness of the defendant's plea, provided defense counsel "knew or should have known" the representations were inaccurate.[297] It is for this reason trial courts should conduct a thorough and exacting inquiry when accepting a plea to ensure the defendant has no other understanding regarding the consequences of a plea.

The defense counsel must make every effort to correctly communicate the facts and merits of a plea bargain offered by the state to the client. The failure to do so may result in the granting of post-conviction relief, provided the defendant is in a position to prove (1) that the defense counsel failed to communicate a plea offer or misinformed the defendant concerning the penalty, (2) that had the defendant been correctly advised, the defendant would have accepted the plea offer, and (3) that the defendant's acceptance of the plea offer would have resulted in a lesser sentence.[298]

Uniformity of judicial decisions extends to treating co-defendants similarly for appellate purposes. A defendant is entitled to post-conviction relief in a situation in which the defendant raised errors which were not found to be reversible in his original appeal, although the very same errors were found reversible in the co-defendant's later appeal by a different appellate panel of the same court.[299] Post-conviction relief is necessary in order to avoid "diametrically opposite results [which] are 'manifestly unjust, unfair and confound our search for uniformity.'"[300]

Coram nobis, as an extraordinary writ, is rarely utilized. Its use is limited to cases in which a defendant is no longer in custody on the sentence which is collaterally attacked.[301] The procedure for obtaining the writ is somewhat non-traditional. A petition for writ of error coram nobis

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relief is authorized, where both defendants were equally culpable and the evidence would enable the defendants to be treated similarly. *Id.* at 468-69.

296. *Jones*, 591 So. 2d at 915 (emphasis added).

297. Young v. State, 604 So. 2d 925, 926 (Fla. 2d Dist. Ct. App. 1992).

298. Young v. State, 608 So. 2d 111-13 (Fla. 5th Dist. Ct. App. 1992).

299. Wright v. State, 604 So. 2d 1248 (Fla. 4th Dist. Ct. App. 1992).

300. *Id.* at 1249 (citing Bourgault v. State, 515 So. 2d 1287 (Fla. 4th Dist. Ct. App. 1987)); Joseph v. State, 447 So. 2d 243 (Fla. 3d Dist. Ct. App. 1983), *review denied*, 447 So. 2d 888 (Fla. 1984).

301. Richardson v. State, 546 So. 2d 1037, 1039 (Fla. 1989).

must be filed in the original trial court if no appeal has been taken from the judgment and sentence sought to be vacated; otherwise, the petition must be filed with the appellate court which affirmed the conviction.[302] The purpose of the writ of error coram nobis "is to correct fundamental errors of fact," as opposed to errors of law.[303] Because the coram nobis remedy is designed to correct a miscarriage of justice, no express time limitation exists to bar the filing of the petition.[304] The passage of time between the conviction and the filing of a petition for writ of error coram nobis, standing alone, does not constitute the prejudice necessary to support a finding of laches as a reason for denying consideration of the writ.[305] In the appropriate case, the writ of error coram nobis can be a useful and extremely potent tool for obtaining relief.

X. CONCLUSION

The Florida courts continue to chart out new territory in deciding criminal cases. This year, in a special effort to bring solutions to the ever growing crime problem, the Florida Legislature made the criminal justice system the focus of its attention. Rather than press a meaningless "tough on crime" approach, the Legislature addressed the principal cause of problems in the criminal justice system—a lack of funding—and prioritized the use of resources. The result is one of the most comprehensive and sweeping revisions of sentencing law and corrections policy. The courts and lawyers will be busy applying the new laws and resolving new problems.

The courts have not and cannot solve all the persistent issues which plague the system, but the Florida Supreme Court has used this past year as an opportunity to provide leadership and guidance to the courts and to litigants. The Florida courts continue on the path of using common sense and reason to safeguard individual rights and promote fairness to every participant in the criminal justice system. Litigants should recognize that fine line when attempting to apply legal precedent and when charting new waters.

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302. State v. Woods, 400 So. 2d 456, 457 (Fla. 1981).
303. Malcolm v. State, 605 So. 2d 945, 947 (Fla. 3d Dist. Ct. App. 1992).
304. *Id.* at 949.
305. *Id.*