County Court Bench Book
Criminal Edition

Produced by the Education Committee
of the
Florida Conference of County Court Judges

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Introduction

Education enhances the knowledge and skills of the judiciary and, therefore, contributes to the administration of justice. The Conference of County Court Judges of Florida is committed to the betterment of the judicial system of the state and the improvement of procedure and practice in the county courts. The Conference's Education Committee has developed this criminal bench book to aid the trial judge in basic procedures and techniques and to serve as a tool in the courtroom.

This bench book is divided into separate chapters - each with certain sections for ease of use. A Akey points" section sets forth the basic substantive and procedural law applicable to the chapter's topic. The Aauthorities" section lists all relevant criminal rules, Florida statutes and case law as of the date of the bench book's printing. The Atips/notes" section contains any helpful procedures and has a separate page and section for the judges to include any notations applicable to the chapter. The Achecklists/forms" section contains all checklists, forms and colloquies for the judge's ready use.

Former chairs of the Education Committee were instrumental in the design and creation of the Criminal Law Bench Book including, Judge Terry Lewis, Chair 1994-1998, Judge Sandra Edwards-Stephens, Chair 1998, Judge Jeffrey Colbath, Chair 1998-1999, and Judge Beth Bloom, Chair 1999-2000. The original contributors were Judge Mercedes Bach, Judge Beth Bloom, Judge Joel Lazarus, and Judge Lisa Kahn. The original editors were Judge Thomas H. Bateman, III, Judge Beth Bloom, John Hogenmuller, Esquire, Elena Marlow, Esquire, Judge Mark King Leban and Judge Sandra Edwards-Stephens.

In the July, 2003 edition pertinent case summaries have been added to each of the chapters. These case summaries have been excerpted from the *The Florida Criminal Cases Notebook* which is published by James Publishing, Inc., and authored by Kurt Erlenbach, Esquire. While the case summaries constitute copyrighted material, the publisher and the author have agreed to permit their inclusion in the Conference's bench book. Additional information about *The Florida Criminal Cases Notebook* and how to obtain a copy may be found in the advertisement included in this text.

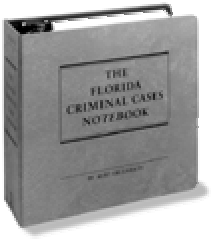
The July, 2003 edition is also the first to be available on compact disk and on the Conference web site. Judge Anne Kaylor is principally responsible for the electronic publication of the bench book in a manner that reduces publication costs and enhances the availability of the text.

The Education Committee views this bench book as a work in progress. It is our intention to update this book periodically. Our fellow judges, the users of this book, are welcome to contribute to that process through comments and suggestions. These can be sent directly to the Office of the State Courts Administrator, Legal Affairs and Education, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1900.

James Publishing, Inc.

The Florida Criminal Cases Notebook

by Kurt Erlenbach



Book Description

Author Kurt Erlenbach has boiled the key criminal cases of the last 12 years down to succinct summaries of their facts and holdings. One to three sentences cover most cases.

All case summaries are first organized by one of 150 topics, and then second by circuit. The most recent cases are positioned first. The end result is a quick-reading, easy-access summary of virtually the entire body of Florida criminal case law.

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CHAPTER 1
FIRST APPEARANCE AND BONDS

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FIRST APPEARANCE

1.01 KEY POINTS

- Held within 24 hours of arrest, in person, or by electronic audio visual device
- Defendant must be advised of:
    - Charge (and provide copy to defendant)
    - Right to remain silent
    - Right to counsel, private or appointed
    - Right to communicate with counsel, family, or friends
- Appoint counsel if appropriate:
    - Counsel may be appointed for limited purpose of representing defendant only at first appearance.
    - Defendant may waive counsel at first appearance; waiver shall be in writing, signed and dated by defendant (statement that waiver only for first appearance). Waiver shall contain statement explaining right to counsel.
- If private counsel, must give defendant reasonable opportunity to confer. Court may postpone first appearance if necessary.
- Determine probable cause (for defendant in custody)
    - Must be made within 48 hours.
    - If extraordinary circumstances exist, can be continued for up to two additional 24 hour periods to allow State to supplement probable cause affidavit.
    - If no probable cause established, defendant must be released on recognizance (ROR).
    - Information offered during pre-trial release proceedings need not strictly conform with the rules of evidence.
- Set bond and arraignment date
- A defendant is entitled to an independent bail determination, in front of the first appearance judge, after a consideration of all relevant factors.
- The case should be set for arraignment; however, the Court may accept pleas of guilty or no

contest to misdemeanor charges and resolve the cases at first appearance without the necessity of further formal charges being filed.

1.011 Pretrial Release

- Defendant entitled to pretrial release on reasonable conditions
    - Except capital or life felonies where proof of guilt is evident and presumption of guilt is great; or
    - Unless no conditions will reasonably protect the community from risk of physical harm, assure the presence of the accused at trial, or assure integrity of judicial process.
    - Presumption in favor of non-monetary conditions and least restrictive conditions which will serve purpose (assure presence, protect community and integrity of judicial process).
    - Non-monetary release presumption does not apply to violent offenses including domestic violence cases, however, court must set conditions of pretrial release in domestic violence cases, which may include monetary bond.
    - A defendant arrested on warrant or capias is entitled to independent review of bond and first appearance judge has discretion to modify conditions of pretrial release.
- Release conditions can include:
    - Personal recognizance
    - Unsecured appearance bond
    - Restrictions on travel, association, or residence
    - Placement in custody of person or organization agreeing to supervise the defendant
    - Cash or surety bond
    - Any other condition reasonably necessary to assure appearance including return to custody after specified hours.
- Factors to consider:
    - Nature and circumstances of the offense charged
    - Penalty
    - Weight of evidence against the defendant

- Family ties
- Length of residence in the community
- Employment history
- Financial resources
- Mental condition
- Defendant's criminal history (including escape charges and failures to appear)
- Nature and probability of danger to community posed by release
- Source of funds used to post bail
- Whether defendant has other pending criminal cases or is onprobation or parole
- Nature and probability of intimidation of, or danger to, the victim
- Value of drugs (if sale case)

- Mandatory release conditions include:
  - No criminal activity
  - No contact with victim except through discovery. This may be modified only upon a showing of good cause and after the victim has been given notice and an opportunity to be heard

Pretrial Detention

- State must show:
  - Defendant's previous violations and that no additional conditions will work
  - Defendant threatened, intimidated, or injured (or attempted or conspired to do so) a victim, witness, juror, or judicial officer, and no further conditions will prevent such conduct in the future
  - Defendant is charged with trafficking and there is a substantial probability defendant committed the offense, and no conditions will assure presence
  - Defendant poses threat of harm to community and is charged with a dangerous crime (listed in Section 907.041(4)(a), *Florida Statutes)*, and there is a substantial probability that the defendant committed the crime, circumstances indicate disregard

of community safety, and no conditions are reasonably sufficient to protect the community, and one of the following exists:

  - Defendant previously convicted of capital or life felony
  - Defendant convicted of dangerous crime within ten years of arrest
  - Defendant on probation, parole, or pretrial release for dangerous crime at time of arrest

- If the court finds probable cause exists that the defendant has committed another crime while already on pretrial release, the court may revoke pretrial release in the initial case and order pretrial detention in that case. Section 903.0471, *Florida Statutes*.

- Subsequent application for setting or modifying bail:
  - Only by chief judge, judge assigned to preside over criminal trial, judge that imposed the conditions, or first appearance judge
  - Must be heard *promptly*, but with at least three hours notice
  - Burden is heavier for state to modify than for the defendant, as state must show good cause

- Grounds for revocation include:
  - Failure to appear
  - Violation of release conditions
  - New information previously unavailable, which convinces the judge to increase security

- If bail revoked for failure to appear, no ROR. If FTA and defendant does not turn self in, bail must be the greater of $2,000 or twice the amount of original bond.

AUTHORITIES

Florida Rules of Criminal Procedure:
3.130 - First Appearance
3.131- Pretrial Release
3.133 - Pretrial Probable Cause Determination
3.132 - Pretrial Detention

Florida Statutes:
Section 907.041, 903.0471 - Pretrial Detention
Section 903.047 - Mandatory Conditions
Section 903.046(2) - Bail Determination

TIPS / NOTES

- Defendants can be advised as a group, either in person or by video, of the purpose of the hearing (to determine probable cause, to determine the conditions of release, and to appoint counsel if appropriate), of right to remain silent, and the right to communicate with family and friends.

- Most jurisdictions have a pretrial release office or other staff who can assist the judge by doing a pretrial interview, obtaining personal and employment information from the defendant, and running a criminal history check.

CHECKLISTS/FORMS

1.041 First Appearance Checklist

- Defendant should be advised of:

  _____Charge(s); copy of complaint available

  _____Right to remain silent and that anything said may be used against him/her

  _____Right to have counsel or to a continuance so that counsel can be consulted

  _____Right to an opportunity to communicate with family and friends

- Judge must:

  _____Appoint counsel if appropriate

  _____Obtain written waiver of counsel where appropriate

  _____Determine probable cause

  _____Determine, announce, and explain conditions of pretrial release

1.042 Sample Advisory for First Appearance

- Swear entire group of defendants at one time

- **Purpose of Hearing**

- You are here for a first appearance hearing. Each person who is arrested is entitled to see a judge within 24 hours. There are three (3) purposes for this hearing:

  Probable Cause:

  - First, it is for the purpose of determining whether there is probable cause for your arrest. That means whether there are reasonable grounds to believe that a crime may have been committed and that you are the person who committed that crime.

  - If I find there is no probable cause for your arrest, one of two (2) things may happen. I may give the state up to 24 hours to produce additional facts to show probable cause, or I may direct that you be released. If you are released for lack of probable cause that does not mean the case is over. It only means that you will be released from custody. If the State wants to proceed against you on these charges, it has the right to do so.

Public Defender

- The second purpose of this proceeding is to determine whether you should have a lawyer appointed to represent you. If you have your own attorney and you want him/her present, you should advise me, and I will direct the bailiff to attempt to reach him/her. If we cannot reach him/her, this proceeding will have to be delayed.

- If you want to have a lawyer appointed to represent you, i.e., a public defender, please advise me. I will appoint a public defender to represent you if you qualify for the services of the Public Defender. I will ask you some questions regarding your financial situation, and based upon your answers, and the financial affidavit that you have filed, I will determine if you meet the statutory criteria for having a public defender appointed to represent you.

- If you eventually enter a plea of guilty or no contest, or if you are eventually found guilty of the offense with which you are charged, then a judgment may be entered against you for the reasonable value of the public defender's services. The judgment will become a lien upon any property that you may now have or hereafter acquire.

Bond

- The third purpose of the first appearance proceeding is to determine whether your bond should be changed. In some cases, the bond that was set when you went through booking may be too high and in other cases it may be too low.

Fifth Amendment Rights

- Each of you has the right to remain silent under the Fifth Amendment to the United States Constitution. Anything you say can and will be used against you. So please do not say anything about the crime itself. I will be asking you questions that have nothing to do with the facts of the crime. The purpose of my questions is to determine whether a public defender should be appointed to represent you, and whether your bond should be changed. You may refuse to answer these questions.

- You have the right to communicate by telephone with your family and friends.

1.43 Questions - Determination of Bail and Eligibility for a Public Defender

- Do you have an attorney?
- If you do not have an attorney, do you wish to have the public defender represent you?
- How long have you lived in Florida?
- How long have you lived in _____County?
- What is your address?
- Do you have a job? Where do you work? How long have you had that job?
- How much salary do you bring home a week/month/year?
- Do you have family members in this county? If so, who?
- Are you married? Do you have any children?
- Are you on probation at the present time?
- Have you ever been arrested before?
- Have you ever been convicted of any prior crimes? If so, what?
- Have you ever failed to appear in court when directed to do so? If so, why?
- Do you own any property in this community? If so, describe the property?
- Do you own any real estate? If so, how much equity do you have in this property?
- Do you own a car, truck, a motorcycle, or a boat? If so, describe the property: year, make, model. When did you buy it? How much did you pay for it? Are there any outstanding liens on the property? What is the fair market value of the property?
- Do you own any stocks, bonds, money markets, savings accounts, certificates of deposit or any other negotiable instruments or investments?
- Do you own anything of value such as jewelry, television, etc?
- Is anyone holding any money for you?

Make a decision regarding bail and appointing the public defender.

Chapter 1 – First Appearance and Bonds

Denial of Bail and Pretrial Detention

When defendant violates bond conditions with a new offense, the court must follow the procedure and rules in § 907.041(b) before denying bond.
(See this case for extensive discussion of when the court can deny bond following a finding of violating the terms of release.)

•S. v. Paul, 783 So. 2d 1042 (Fla. 2001), 26 F.L.W. S185 (3/29/2001)

Court errs in holding defendant without bail as a result of appearing late for trial. Before the court can deny bail, the provisions of §907.041(c) must be complied with.

Roby v. S., 795 So. 2d 189 (3d DCA 2001), 26 F.L.W. D2355 (9/25/2001)

Court errs in refusing to set bond based on the court's finding that no condition of release would reasonably protect the public from the risk of harm, and where the state does not prove the pretrial detention criteria.

Surdovel v. Jenne, 706 So. 2d 115 (4th DCA 1998), 23 F.L.W. D630 (2/25/98)

To order pretrial detention under §907.041, the defendant must be charged with a "dangerous crime" as defined in §907.041(4)(a)16, and defendant must meet at least one of the criteria in §907.041(4)(b)4. Where none of the three criteria are met, pretrial detention is improper.
Prior juvenile adjudications do not qualify as "conviction for a dangerous crime" under the statute (but see dissent).

Moody v. Campbell, 713 So. 2d 1032 (1st DCA 1998), 23 F.L.W. D1423 (6/5/98)

Under the 2000 amendments to §903.046 and §907.041, a person who commits a new crime while on bond, or who violates a pretrial release condition, can have his bail revoked and be held without bail.
(See this case for extensive discussion of the 2000 amendments to the pretrial release and pretrial detention statutes.)

•Barns v. S., 768 So. 2d 529 (4th DCA 2000), 25 F.L.W. D2320 (9/27/2000)

Under section 903.0471 (2000), when there is probable cause to believe that defendant committed a new crime while on bail, the court can hold defendant without bail. The statute is constitutional and does not violate article I, section 14 of the constitution.
(See this case for extensive discussion of § 903.0471 and the law concerning revoking pretrial release upon committing a new crime.)

Parker v. S., 780 So. 2d 210 (4th DCA 2001), 26 F.L.W. D396 (2/7/2001)

At first appearance, the court found that the arrest affidavit did not provide probable cause for burglary with an assault, and reduced the charge to battery and set bail accordingly. The state then filed burglary with an assault, and the court revoked bail without taking further testimony. Held: Under rule 3.133(a)(1)(4), the information cannot provide probable cause, and that in the absence of probable cause supported by sworn testimony, there can be no restraint on liberty other than appearing for trial. The court errs in revoking bond.

Blount v. Spears, 758 So. 2d 1287 (3d DCA 2000), 25 F.L.W. D1421 (6/14/2000)

First Appearance Bond Review

Under rule 3.131(b)(2), the first appearance judge must be allowed to consider bail for a defendant arrested pursuant to a warrant. Thus, an administrative rule that prohibits the first appearance judge from modifying a bond amount set by the judge who issues the arrest warrant is invalid.

However, under rule 3.131(j), when a capias is issued following the issuance of an information or indictment, the issuing judge is required to set the amount of bail, and the discretion of the first appearance judge can be limited by the issuing judge.

S. v. Norris, 768 So. 2d 1070 (Fla. 2000), 25 F.L.W. S714 (9/28/2000)

Trial court may not refuse to consider pretrial release for VOPs as a matter of policy.

Chambers v. S., 491 So. 2d 309 (4th DCA 1986)

Any policy of denying bail to domestic violence simple battery arrestees is unconstitutional unless the state can show that pretrial detention under §907.041 is appropriate.

Swanson v. Allison, 617 So. 2d 1100 (5th DCA 1993), 18 F.L.W. D1120 (4/26/93)

Entitlement to Release

Defendant left in jail more than 40 days without an information being filed is not entitled to release when the state files an information immediately upon receipt of defendant's motion for release (pre-1991 amendments to rule 3.133(b)(6), now rule 3.134).

Bowens v. Tyson, 578 So. 2d 696 (Fla. 1991)

Under rule 3.134, when no information is filed for more than 40 days following arrest, a defendant is not automatically entitled to release. The court or defense must give notice to the state and the state must be given an opportunity to file before ROR is required.

Where the defense does not file a motion seeking ROR until day 49, and the state has filed by the time of the hearing, the defendant is not entitled to an ROR.

Ford v. Campbell, 697 So. 2d 1301 (1st DCA 1997), 22 F.L.W. D2004 (8/19/97)

Defendant was charged with sexual activity with a child, and moved to dismiss based on statute of limitation. The court granted the motion, and the state appealed. State sought to continue defendant on bond. Defendant sought release on recognizance. Held: Section 924.071(2), relating to state appeals, does not apply since the section only applies when the state appeals from pretrial orders suppressing evidence. Rule 9.140(e)(2) does not apply, as that rule only applies when defendant is charged with a bailable offense, and defendant was charged with no offense when the state appealed. Rule 3.190(e) applies, and since no new information was filed, defendant is entitled to ROR.

•Fontana v. Rice, 644 So. 2d 502 (Fla. 1994), 19 F.L.W. S544 (10/27/94)

Amount of Bail

Surety bond amount may not differ from cash bond amount. Where cash bond of $350 is called for under the bond schedule, the court cannot require a surety bond of $3503.

Harrell v. McMillan, 614 So. 2d 1185 (1st DCA 1993), 18 F.L.W. D576 (2/19/93)

Bail set at $200,000 for a first time offender with substantial local ties charged with fraud and theft crimes is excessive.

Winer v. Spears, 771 So. 2d 621 (3d DCA 2000), 25 F.L.W. D2825 (11/22/2000)

Setting bail at $50,000 for DUI and a failure to appear for a disabled man living on social security is excessive. Excessive bail is tantamount to no bail, and habeas is granted.

Quinn v. Crowder, 625 So. 2d 1247 (4th DCA 1993), 18 F.L.W. D1965 (9/7/93)

Setting bail at $65,000 for attorney charged with fraud and grand theft is not unreasonable where defendant has significant ties, but no permanent home and possibly has much money with which to make a getaway.

Nassetta v. Kaplan, 557 So. 2d 919 (4th DCA 1990)

Order setting bail at $1,000,000 for six counts of BUI resulting in 6 deaths is not reasonable where the court does not consider all of the circumstances in §903.046.

Cameron v. McCampbell, 704 So. 2d 721 (4th DCA 1998), 23 F.L.W. D220 (1/8/98)

Where defendant is charged with a crime punishable by life, but the state does not seek to show proof evident or presumption great, and defendant is indigent and has ties to the community, a $200,000 bond is tantamount to no bond and habeas is granted to obtain release.

Mesidor v. Neumann, 721 So. 2d 810 (4th DCA 1998), 24 F.L.W. D3 (12/16/98)

Where defendant is charged with non-capital crimes, has no criminal record, has strong ties to the community, and is no flight risk, the court errs in setting bond at $100,000 based solely on the nature of the crime and without considering the other factors under the statute.

Patterson v. Nueman, 707 So. 2d 946 (4th DCA 1998), 23 F.L.W. D802 (3/19/98)

Bail Criterion

Purposes of bail are to relieve defendant of incarceration, relieve state of burden of imprisoning defendant, and to place the accused as much under power of the court as if he were in custody of officers.

Bail bond is a three-party contract between the state, defendant, and surety, whereby surety guarantees appearance of defendant.

Pinellas Co. v. Robertson, 490 So. 2d 1041 (2d DCA 1986)

The purpose of bail is both to assure defendant's appearance and to protect the community from unreasonable danger. In fixing the amount of bail, the court should consider the financial resources of the defendant and the defendant's access to friends and family who are willing to be responsible for producing him.

Defendant's criminal record is an important consideration in setting bail amount.

(See this case for extensive discussion of the factors the court should consider in determining the amount of bail.)

Henley v. Jenne, 796 So. 2d 1273 (4th DCA 2001), 26 F.L.W. D2505 (10/17/2001)

A court's ruling on bail is entitled to a presumption of correctness. An appellate court will grant relief from an order setting bond when the petitioner demonstrates that the amount of bail is unreasonable under the circumstances.

Excessive bond depending on the petitioner's financial resources is tantamount to no bond at all. Defendant's financial resources, in addition to his record of appearing in court and ties to the community, must be considered in setting bail.

Martin v. Jenne, 745 So. 2d 412 (4th DCA 1999), 24 F.L.W. D2447 (10/27/99)

Conditions of Release

Court errs in increasing defendant's release requirements from pretrial services to electronic monitoring without any change in circumstances of additional evidence.

Burton v. Felton, 625 So. 2d 1334 (3d DCA 1993), 18 F.L.W. D2429 (11/10/93)

While amount of bail is a matter of discretion, the discretion is not unbridled. Appellate court will grant relief on a habeas corpus petition if the bail set is unreasonable.

Where bail was set at arraignment for defendant charged with purchase of marijuana, and the state does not show that the transaction resulted in defendant obtaining money that could be used for bail and the state does not show that he had made previous buys, the provisions of §903.046(2)(h) are not met and the court errs in raising defendant's bail.

Sikes v. McMillian, 564 So. 2d 1206 (1st DCA 1990)

Court errs in imposing as a condition of release in an extradition bail case that defendant turn himself in to official in the requesting state. The purpose of bail in an extradition case is to ensure that defendant turn himself in to Florida authorities upon receipt of the governor's warrant.

Burkhart v. Jenne, 814 So. 2d 1064 (4th DCA 2001), 26 F.L.W. D2369 (9/28/2001)

CHAPTER 2
ARRAIGNMENTS AND PLEAS

Chapter 2 - Arraignments and Pleas

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ARRAIGNMENTS

2.01 KEY POINTS

- Conducted in open court or by audiovisual device
- Judge or clerk or prosecuting attorney reads information or states substance of the charge(s)
- Defendant asked to plead
- Reading of charge may be waived by the defendant
- Counsel representing the defendant may waive arraignment if counsel files a written plea of not guilty at or before arraignment
- Unless there is an objection by the defendant, failure to arraign or irregularity in the arraignment does not affect the validity of any other proceeding if the defendant pleads to the indictment or information or proceeds to trial
- If a person who has been indicted or informed against for an offense has not been arraigned and desires to plead guilty, the court having jurisdiction of the offense may arraign the defendant and permit the person to plead guilty
- After a plea of not guilty, the defendant is entitled to a reasonable time to prepare for trial

2.011 Right To Counsel

- If the defendant is not represented by counsel, the judge shall advise the defendant of the right to counsel
- If the defendant cannot afford counsel, counsel will be appointed if the defendant is determined to be indigent
- Defendant shall execute a financial affidavit that he/she cannot afford counsel
- If counsel appointed, a reasonable time shall be given before the defendant is required to plead to charges or otherwise proceed
- If the judge determines that the defendant will not be sentenced to imprisonment if convicted, the judge shall issue an order of no imprisonment and the public defender shall not be appointed

2.012 *Faretta* Inquiry : Defendant Wishes To Proceed Pro Se

- Defendant has a constitutional right of self-representation
- Reversible error for the judge to grant or deny the defendant self-representation without making an inquiry to determine if the decision is knowingly, intelligently, and voluntarily made
- Defendant must be informed of the right to counsel and the dangers of self-representation
- Judge must inquire into the defendant's age, education, and prior exposure to and understanding of the legal system
- Appointing standby counsel is not sufficient. An inquiry must always be made. If the judge determines that the decision is knowingly, intelligently, and voluntarily made, it is reversible error not to permit the defendant to represent himself/herself
- If the judge permits self-representation, standby counsel can be appointed, even over the defendant's objection
- At each crucial stage of the proceedings, the defendant's waiver must be renewed
- If the defendant wishes to waive his/her right to counsel, it must be done in writing and filed in the case. Rule 3.160(e), Florida Rules of Criminal Procedure

2.013 Accepting Pleas

- Type of pleas:
  - Not guilty
  - Guilty
  - With the consent of the judge, nolo contendere
- Must be in open court
- If sworn complaint (probable cause affidavit) charges the commission of a misdemeanor, the defendant may plead guilty to the charge at first appearance under Rule 3.130. Formal charges need not be filed.
- If the defendant stands mute, or pleads evasively, a plea of not guilty shall be entered.

- Pleas of guilty or nolo contendere shall be in open court (unless good cause is shown), recorded stenographically or mechanically

- Defendant shall be under oath

- Plea must have a factual basis

- Judge must determine that plea is voluntary:

- Defendant has a full understanding of the charge

- Defendant understands the minimum and maximum penalty of the charge

- If defendant is not represented by an attorney that the defendant understands he/she has the right to be represented by an attorney

- That the defendant understands he/she has the right

    - to plead not guilty
    - to assistance of counsel at trial
    - to compel the attendance of witnesses on his/her behalf
    - to confront and cross examine witnesses
    - not to be compelled to incriminate himself/ herself
    - to a trial by jury

    - That the defendant understands that he/she is giving up the right to appeal all matters relating to the judgment, including the issue of guilt or innocence (unless the defendant expressly reserves that right). The defendant, however, is not giving up the right for review by appropriate collateral attack

    - That the defendant understands that the judge may ask the defendant questions about the offense, and that his/her answers may be used against him/her in a prosecution for perjury

    - That if the defendant is not a United States citizen, the plea may subject him/her to deportation pursuant to the laws and regulations governing the Immigration and Naturalization Service

- The judge must determine that the defendant understands the terms of the plea agreement and all obligations the defendant will incur as a result of the plea agreement.

- Prior to accepting a guilty or nolo contendere plea, the judge must determine that the defendant:

    - Acknowledges his/her guilt

    - Acknowledges that he/she feels the plea to be in his/her best interest, while maintaining his/her innocence

- No plea offer or negotiation is binding until it is formally accepted by the trial judge after making all the inquiries, advisements, and determinations required above. Until that time, it may be withdrawn by either party without any justification.

- If a plea is withdrawn, no statement made in connection with the plea is admissible in any civil or criminal proceeding against the person who made the plea or offer.

2.02 AUTHORITIES

Florida Rules of Criminal Procedure:
3.160 - Arraignment
3.170 - Pleas
3.172 - Acceptance of Guilty or Nolo Contendere Plea
3.111 - Providing Counsel to Indigents

Florida Statutes:
Section 27.512 - Order of No Imprisonment
Section 27.52 - Determination of Indigency
Section 27.56 - Lien for Payment of Attorney's Fees

Case Law:
Faretta v. California, 422 U.S. 806 (1975)
State v. Bowen, 698 So.2d 248 (Fla. 1997)

2.03 TIPS/NOTES

Every court event should be used by the trial judge to resolve the case. Criminal misdemeanor arraignments are a very important opportunity to resolve the matter by a plea of guilty or nolo contendere. An assistant state attorney should be present so that he/she can offer a plea to the defendant and inform the court of the defendant's prior criminal history. If the assistant state attorney does not come to arraignments with the criminal history of the defendant, the judge should consider working with pre-trial release or the sheriff's department so that the defendant's criminal history will be in the court file.

Prior to court, affidavits of indigency can be given to defendants; the court clerk can instruct them that they should fill out the affidavit if they want to have the public defender appointed to represent them.

Written rights waiver forms can be given to defendants by the court clerk to be read and signed before their names are called.

2.04 CHECKLISTS/FORMS

2.041 Arraignment Checklist

__ Advise defendant of

__ The charge(s)

__ The right to counsel; appoint a public defender if defendant's affidavit of indigency shows he/she is unable to afford counsel and Court is certifying jail.

Determine if the defendant is indigent. Ask defendant about:

__ Net income

__ Other income

__ Assets

__ Income of parents or guardian if defendant is a minor or defendant is an adult tax-dependent person who is substantially supported by a parent or guardian

__ Has defendant been released on bail-$5,000 or more

__ Equity in intangible or tangible personal property or real property or the expectancy of an interest in any such property

__ Advise defendant of lien for payment of attorney's fees or costs, and $40 application fee

__ Ask defendant how he/she pleads - guilty or nolo contendere or not guilty

With a plea of guilty or nolo contendere:

__ Must be in open court; on record

__ Place defendant under oath

__ Advise defendant of nature of charge

__ Minimum and maximum penalties

__ Right to counsel; right to have appointed counsel if defendant cannot afford counsel

__ Right to trial by jury

__ Right to assistance of counsel

__ Right to compel attendance of witnesses on his/her behalf

__ Right to confront and cross-examine witnesses

__ Right not to be compelled to incriminate himself/herself

__ No further trial of any kind

__ Waiver of right to appeal (unless defendant expressly reserves right)

__ Defendant may be asked questions about offense

__ Defendant's answers may be used against him/her in prosecution for perjury

__ If defendant is not a United States citizen, the plea may subject him/her to deportation pursuant to the laws and regulations governing the Immigration and Naturalization Service

__ State terms of plea agreement, including all obligations of defendant as a result of plea agreement

__ Court should determine that the plea was freely and voluntarily given

__ Defendant must either:

- __ acknowledge his/her guilt
- __ acknowledge that he/she feels it is in his best interest to plead nolo contendere while maintaining his/her innocence

2.042 Sample Arraignment Colloquy

GOOD MORNING. I'm Judge _____. This is an arraignment calendar of the criminal division of the COUNTY COURT. You are here because you have been accused of violating a law/or laws of the State of Florida.

PURPOSE OF THIS HEARING

You are here for an arraignment on the criminal charges filed by the State of Florida.

1. At this hearing you will be informed by the court of the following:

    - The criminal charges against you
    - Your constitutional rights in this matter
    - Your right to have an attorney represent you

2. You will have an opportunity to enter a plea today of:

    - Not Guilty
    - Guilty
    - No Contest

3. You will also be given your next court date, if you are to have one.

Do not leave the courtroom today without your paperwork since it will tell you what happened here today.

- **MAXIMUM PENALTIES**

These are misdemeanor offenses. They are separated into two categories:

1. Second degree misdemeanors: punishable by a fine not exceeding $500.00 or incarceration not exceeding 60 days in the county jail, or both fine and incarceration.

2. First degree misdemeanors: punishable by a fine not exceeding $1000.00 or incarceration not exceeding 1 year in the county jail, or both fine and incarceration.

- **PLEAS THAT CAN BE ENTERED**

As your name is called, please come forward to the podium, and I will

inform you of the charge(s) against you. You may enter one (1) of three (3) pleas:

1. You can plead guilty: This means that you admit the truth of each and every essential element of the crime with which you are charged.

2. You can plead no contest: By entering a no contest plea you are neither admitting nor denying the truth of the charge. You are saying to the court that you will not contest the matter. I will then treat your plea of no contest in exactly the same manner as if you entered a guilty plea.

3. You can plead not guilty: A plea of not guilty denies the truth of the charge against you. If you enter a not guilty plea, your case will be set down for a trial. Your trial will not be today and you will be notified of your trial date in the near future.

- **CONSTITUTIONAL RIGHTS WAIVED**

If you elect to enter a plea of guilty or a plea of no contest, then you will waive and give up each and every one of the following constitutional rights:

1. Your right to remain silent.
2. Your right not to be compelled to incriminate yourself.
3. Your right to confront your accusers and to question them.
4. Your right to compel witnesses to appear and testify on your behalf through court subpoenas.
5. The presumption of your innocence, and your right to require the state to prove you guilty beyond a reasonable doubt before the presumption of innocence is removed.
6. Your right to testify on your own behalf and to present any defenses which you might have.
7. Your right to a trial by jury when one is required.
8. Your right to appeal any action that the Court has taken in your case unless the Court has entered an illegal sentence or judgment.

- **PRE-TRIAL DIVERSION**

The state may offer some of you pre-trial diversion (PTD). This program consists of educational classes and/or community service hours. If you are eligible for PTD then the state will drop the charges against you once you complete PTD. If you do not complete the requirements of PTD, then the state can still pursue the charges against you. In order for the state to refer you to PTD, you must waive your right to a speedy trial.

I will ask those of you who are going to be referred to PTD if you waive your right to a speedy trial. If you do, then you will receive an enrollment form. If you fail to enroll for PTD, you will be required to return to Court to answer to the charge(s) against you.

- **PLEA BARGAINING**

There is an assistant state attorney present in the courtroom today. The state may be willing to enter into a plea bargain with you on your case. That is, the state may say that if you plead guilty or no contest today, it will offer you a particular resolution to your case. You can accept or reject the state's offer.

- **RIGHT TO HAVE AN ATTORNEY**

Before I ask you how you wish to plead to the charges, I will ask you:

- Whether you want a lawyer? That question may be answered by: AYes, I want a lawyer." or ANo, I do not want a lawyer."

- You do not have to have a lawyer if you don't want one. That decision is your decision. You may waive your right to a lawyer if you want to.

- If you intend to enter a plea of not guilty and go to trial, I strongly urge that you either hire your own lawyer or accept the services of a public defender (if you qualify).

- A criminal trial is a very complex proceeding that the average person is not usually competent to handle without the professional assistance of a lawyer.

- If you tell me you do not want a lawyer, I will then proceed to find out how you want to plead today.

- If you tell me you want an attorney, and you can afford your own attorney, I will enter a not guilty plea on your behalf and set the case for trial.

- If you tell me you want an attorney, but state that you cannot afford an attorney, I will place you under oath, and ask you certain questions regarding your financial circumstances. Based upon your answers, I will determine if you qualify for the services of the public defender's office.

- If you ask for a public defender, and you qualify financially for a public defender, I will appoint a public defender to represent you. If you eventually enter a plea of guilty or no contest, or if you are found guilty of the offense with which you are charged, then a judgment may be entered against you for the reasonable value of

the public defender's services. The judgment will become a lien upon any property that you may now have or hereafter acquire.

- In addition a fee of $40.00 must be deposited at the time the affidavit of indigency is filed with the Court or at the time of the final disposition.

- The assistant public defender in this courtroom is:_____

- You must contact the public defender. Do not wait until the public defender contacts you. The bailiff will hand you an information sheet listing the public defender's address and telephone number.

- It is essential that you get in touch with your public defender as soon as possible so that he/she can begin preparing your case as soon as possible.

- In any event you need to contact your public defender within three (3) days from today's date.

- If the state certifies that it will not be seeking jail and the Court determines that it will not impose jail at the time of sentencing, then you are not entitled to court appointed counsel. However, you are free to hire your own private counsel if you are able to do so.

- If you are going to hire your own attorney, you need to do so as soon as possible, so your attorney can prepare your case.

- **PROBATION**

  - If you are on probation, you need to let me know that, since your probation can be violated if you plead guilty or no contest.

  - If you plead guilty or no contest today, and I order you to be placed on probation, you must report to the probation office within 72 hours of today's date.

- **FINAL INSTRUCTIONS**

  It is my job to see to it that you are treated fairly, that you understand what is going on, that nobody is using any force or coercion or is twisting your arm to make you enter a plea that you otherwise do not want to, and that no one has promised you a light or suspended sentence in exchange for your plea.

  If you have any questions, I will do my best to answer them when your case is called.

- **CALL THE CASE**

  AS YOUR NAME IS CALLED, PLEASE STEP FORWARD TO THE PODIUM, AND I WILL INFORM YOU OF THE CHARGE OR CHARGES AGAINST YOU.

2.043 Criminal Traffic Arraignment Colloquy

- **INTRODUCTION**

  Ladies and Gentlemen, welcome to County Criminal Traffic Court. Please listen carefully as I will explain to you what we hope to accomplish today and how we go about it.

  Unless you are just visiting with us, you are here today because you have been charged with a violation of one or more of our county criminal laws. The purpose of you being here today is to formally answer the charge against you - what we call entering a plea to the charge. When you enter a plea to a charge you have three choices. You may plead not guilty, guilty, or no contest. Let me explain to you what each of these pleas mean and what will happen depending on which plea you choose to enter.

- **PLEA OF NOT GUILTY**

  If you plead not guilty, you are denying the charge, and you may take advantage of a number of valuable rights that are allowed to you under our law, including the following:

  1. In all criminal cases you are entitled to a trial. In the more serious cases, you are entitled to a trial by jury - the right to have six people chosen from the community to determine your guilt or innocence.

  2. At such trial, you will not have to prove your innocence. Under our law, you are presumed to be innocent unless and until the state can present sufficient evidence at trial to prove your guilt beyond a reasonable doubt.

  3. You do not have to testify at your trial. That is, you have the right to remain silent - and the fact that you remain silent cannot be used against you at your trial.

  4. If you wish, you can testify and have your testimony considered as any other witness.

5. You may bring witnesses to testify on your behalf and, if they will not come voluntarily, you may use the subpoena power of this court to force them to come and tell what they know.

6. At your trial, you will have the right to confront your accusers. That is, the right to see and hear and question or cross examine the state's witnesses against you.

7. You have the right at trial, and throughout the proceedings against you, including today, to have the assistance of legal counsel. You may consult or hire an attorney of your choice. If you wish to have an attorney assist you in this case but cannot afford to hire your own attorney, you may qualify to have the office of the public defender appointed to represent you.

8. You have the right to appeal your conviction if you are found guilty at your trial. On appeal, you may raise any issue that you raised at trial, including the question of your guilt or innocence. You are entitled to an attorney to assist with an appeal and if you cannot afford to hire your own, one may be appointed for you.

- **PUBLIC DEFENDER LIEN**

If you decide to request the services of the public defender, you need to know now that getting a court appointed attorney does not necessarily mean that you are getting a free attorney. If you are found not guilty, or if the state drops the charge against you, there will be no cost to you for the services of this attorney. If, however, you are found guilty, or enter a plea of guilty or no contest, you may owe the county some money for these legal services provided to you. If you are simply unable to pay for these services over a period of time, a lien may be placed on your personal or real property to insure payment, and the money collected from you when you do obtain the ability to pay.

- **APPEARANCE AT FUTURE COURT DATES**

If you decide to enter a plea of not guilty this morning, you will be given a written notice of your next court date by the clerk before you leave. I want to emphasize that it is very important that you make sure you get this notice, that you make a note of the date you are to appear, and that you make sure you show up then.

If you are not here on that date a capias or warrant may be issued for your arrest and you may be held in jail until your next court date. If the public

defender is appointed in your case, it will be your responsibility to keep in touch with your attorney and to follow his or her directions.

- **PLEA OF GUILTY OR NO CONTEST**

Some of you may decide to plead guilty or no contest today. A plea of guilty means that you are admitting the charge against you. A plea of no contest, or nolo contendere as it is sometimes called, means that you neither admit nor deny the charge against you. You simply do not wish to fight it or contest it. For purposes of this case and these proceedings today, however, there is no difference in terms of what may happen to you and what sentence may be imposed. If you enter either a plea of guilty or no contest, you give up or waive all of those rights which I have described above that are available when you enter a plea of not guilty. There will be no trial, the state will not have to prove you guilty. I will impose sentence today.

Also, you should understand that if you enter a plea of guilty or no contest today and you are adjudicated guilty, there will be a conviction of record in this case. If you are not a United States citizen, you may be deported. Also, as a result of such a conviction, you may be subject to greater penalties if you are ever convicted again in another case.

Even if you decide to enter a plea of guilty or no contest, you still have the right to consult with an attorney and have that attorney represent your interest and speak on your behalf. If you are not able to hire an attorney, one may be appointed for you. In light of the valuable rights that you waive and the adverse consequences that result when you enter a plea of guilty or no contest, you want to make sure that such a plea is in your best interest.

PLEA AGREEMENT

In most of your cases, the state has had an opportunity to review your file and your record, if any, and will be prepared today to suggest a sentence or disposition in your case which he or she feels is fair. If you agree with the assistant state attorney's offer, you may enter a plea today of guilty or no contest subject to my acceptance of this plea agreement. Although no judge is required to accept a plea agreement, most cases are, in fact, disposed of in this manner. If I am not willing to accept the plea agreement, you will be allowed to withdraw your plea of guilty or no contest, and plead not guilty.

MINIMUM/MAXIMUM PENALTY

Let me take a few minutes to talk about the possible range of sentences which might be imposed if you enter a plea of guilty or no contest today. If you

are charged with a first degree misdemeanor, the maximum sentence is one year in jail, or a $1,000 fine, plus court costs, or both. If you are charged with a second degree misdemeanor the maximum sentence is sixty days in jail, or a $500 fine, plus court costs, or both. The absolute minimum sentence for either a first degree or second degree misdemeanor if you enter a plea of guilty or no contest today, is a withholding of adjudication and the payment of court costs of $_____. A withholding of adjudication means that even though you enter a plea of guilty or no contest, you would not be adjudicated guilty by me and there would not be a conviction on your record for that charge.

For offenses other than DUI the absolute minimum sentence you will receive if you enter a plea of guilty or no contest would be a withholding of adjudication and court costs totaling $___. A withholding of adjudication means that even if you enter plea no contest or guilty, there would not be an adjudication of guilt, upon your record. You could truthfully say that you have not been convicted of the offense. A withholding of adjudication is usually reserved for a first time minor offense.

If you are charged with DUI and your blood alcohol level is below .20%, the absolute minimum sentence you will receive today if you plea guilty or no contest is as follows: Six months reporting probation, $250 fine, court costs and surcharges, 50 hours of community service, DUI school, driver's license revocation for six months. Your driving privileges will be revoked for six months and your vehicle will be impounded for 10 days. Also, on a DUI charge, you must be adjudicated guilty. That is, there will be a conviction on your record for that offense if you plea guilty or no contest today.

If you have any questions at all about any of the information that I have gone over here with you, or any questions at all concerning your case, please do not sign anything and do not leave the courtroom until you have had an opportunity to speak with me. If you wish to speak with an attorney before you decide how you wish to plea to the charge against you, I will postpone your arraignment and allow you an opportunity to do so. If you wish to have the public defender's office appointed to represent you, you will need to inform the clerk and obtain a financial affidavit to be completed so I can review it when I come into the courtroom.

One of the most important parts of my job is to make sure that whatever you decide to do, you do so voluntarily and knowingly. You will not be penalized, ridiculed, or in any way treated more harshly because you decide to ask me a question. So, I emphasize to you, that if you are unsure about anything at all, have any questions at all, do not leave the courtroom and do not sign anything, until you have had a chance to speak with me.

2.044 *Faretta* Inquiry - Plea Stage

RIGHT TO COUNSEL SECTION

1. Do you understand that you have the right to a lawyer?

-The State of Florida and the U.S. Constitution guarantee your right to a lawyer.

-If you can't afford to hire your own lawyer, and if you qualify for a court appointed lawyer, I will appoint a lawyer right now.

-The State of Florida will even pay for this lawyer to help you with the decision as to whether or not to enter a plea.

2. Shall I appoint a lawyer to represent you?

ADVANTAGES AND DISADVANTAGES SECTION

3. Let me tell you a few ways a lawyer might help you:

-a lawyer can tell you if this plea is in your best interest

-a lawyer may tell you that you have a good case and even not to accept conditions of this plea.

-a lawyer has the experience to help you work with the assistant state attorney and even bargain for different terms.

-a lawyer can tell you the advantages and disadvantages of what you might say to the Court.

4. As an alternative, if you like, I could ask the public defender to act as standby counsel if you have any questions in the course of these proceedings.

5. Do you understand how necessary a lawyer is and how he or she could help you?

CONSEQUENCES OF THE PLEA SECTION

6. If you decide to take this plea you will (terms of the plea go here).

-The maximum sentence that can be imposed against you is _____.

-You may be forced to report to a probation officer for (length of time).
-You may have a permanent criminal record.

7. Do you understand that if you do not fulfill the conditions of your plea the assistant state attorney can ask to revoke your probation and you could be arrested and brought back to court for a probation hearing, and sentenced to up to _____ in jail?

8. Do you understand the serious nature of the charges against you and the consequences of any violation of probation.

COMPETENCY SECTION

9. I need to ask you a few questions about your background:

-Can you read?

-Did you go to high school?

-Did you graduate from high school?

-Did you go to college?

-Are you under the influence of any drugs or alcohol?

-Have you ever been diagnosed with a mental illness?

10. Has anyone told you to hire a lawyer or ask for an appointed lawyer? Has anyone threatened you if you do so?

11. Do you understand that the lawyer will be appointed for free, but that a lien may be imposed for the services of the office of the public defender?

12. Do you have any questions about having a lawyer appointed to defend you?

13. Do you understand the advantages and disadvantages of representing yourself?

14. Are you sure you don't want me to appoint a lawyer to defend you?

[Renew at sentencing if sentence is to imposed at a subsequent hearing].

FINDINGS OF THE COURT

COURT PERMITS PRO SE REPRESENTATION

1. The Court finds that the Defendant is literate, competent, and understands the ramifications of the decision to represent himself/herself.

2. The Court further finds that the defendant has freely, voluntarily and intelligently exercised his/her judgment in deciding to represent himself/herself.

3. Do you request that there be a STANDBY COUNSEL to advise and assist you in representing yourself?

COURT DOES NOT PERMIT PRO SE REPRESENTATION

The Court does not find that the defendant is competent to freely and voluntarily waive his/her right to be represented by counsel in this matter.

2.043 <u>Accepting the Plea Colloquy</u>

1. Mr./Ms._____, you are charged with the crime of _____:

2. It is a _____degree misdemeanor. The maximum sentence imposed by the statute is _____

3. Do you understand that you have the right to have an attorney represent you? (see if no jail/no adjudication applies).

   a. Do you want an attorney to represent you? Are you waiving your right to have an attorney represent you?

   b. Can you afford an attorney (have defendant also fill out the indigency affidavit)?

Ask indigency questions:

- Net income
- Other income
- Assets: cash, savings accounts, bank accounts, stocks, bonds, certificate of deposits, equity in real estate, and equity in a boat or motor vehicle or in other tangible property
- Income of an accused minor or an accused adult tax-dependent person who is substantially supported by a parent or parents or by a guardian, who continues to be claimed as a dependent for tax purposes shall include the income of that dependent person's parent or parents or guardian, except a parent or guardian who has an adverse interest in the proceedings
- Release on bail in the amount of $5,000 or more.
- Defendant owns or has equity in any intangible or tangible personal property or

real property or the expectancy of an interest in such property.

4. How do you wish to plead?

Raise your right hand - administer oath to defendant

- State your full name.
- How do you wish to plead to the charge of _____?
    - Do you understand the mandatory minimum penalty (if any) and the maximum penalty provided by the statute in this matter?
    - Has anyone forced you or threatened you to enter this plea?
    - Has anyone promised you anything in order to get you to enter this plea?
    - Have you taken any pills, drugs, or alcoholic beverages in the past 24 hours?
    - Do you feel you are mentally alert and capable of exercising your best judgment at this time?
    - Do you understand that if you are not a United States citizen, the entry of your plea may subject you to deportation pursuant to the laws and regulations of the Immigration and Naturalization Service?
- Waiver of rights if represented by counsel:
    - Ms./Mr. _____has represented you in this matter.
    - Are you satisfied with his/her representation?
    - Have you had the opportunity to fully discuss this case with him/her?
- To both represented and unrepresented defendants:
    - Did you hear the constitutional rights I read at the beginning of these proceedings?
    - Do you understand those rights?
    - Do you understand that you are giving up those rights?
- If not represented by counsel:

- Do you understand that you are giving up your right to:
    - Remain silent
    - Not be compelled to incriminate yourself
    - Confront your accusers and to question them
    - Compel witnesses to appear and testify on your behalf through court subpoenas
    - A presumption of your innocence, and your right to require the state to prove you guilty beyond a reasonable doubt before the presumption of innocence is removed
    - Testify on your own behalf and to present any defenses which you might have
    - A trial by jury when one is required
    - Appeal any action that the court has taken in your case unless the court has entered an illegal sentence or judgment.
- Do you understand that I will be asking you questions about the offense and that your answers may be used against you in a prosecution for perjury?
- Do you understand the complete terms of the plea agreement and the obligations that you will incur as result of this plea?
- Do you understand that there will not be a trial of any kind if I accept this plea and you are giving up your right to a trial?

- Do you
    - Acknowledge your guilt?

      OR

    - Acknowledge that this plea is in your best interest even if you are maintaining your innocence?

The Court finds that the waiver of the defendant's rights were knowingly, voluntarily and intelligently made, that the defendant understands the nature of the charge(s) and the

consequences of his/her plea. The Court further finds that there is a factual basis for the plea as set forth in (charging document).

- ***I will accept your plea and I will sentence you as follows:***

  - Do you understand that you have the right to appeal an illegal judgment or sentence, and that you have 30 days to do so? If you intend to appeal, you need to file the notice of appeal with the clerk's office in thirty (30) days from today's date. If you cannot afford an attorney, one will be appointed to represent you.

Chapter 2 – Arraignments and Pleas

Right to Counsel

6th amendment right to counsel attaches at arraignment. 5th amendment right to counsel attaches during custodial interrogations.

Attempts by government to get information from defendant after arraignment occur during a "crucial stage" at which 6th amendment right applies.

•Michigan v. Jackson, 89 L.Ed. 2d 631 (1986)

Under art. I §16, a defendant in Florida state courts has the right to counsel at each crucial stage of a prosecution. A crucial stage is one that may significantly affect the outcome of the case.

The right to counsel attaches when a defendant is charged with a crime.

At the commencement of each crucial stage the defendant is entitled to decide if he desires counsel and know the consequences of his decision. A waiver must knowing and intelligent, and the court should indulge every reasonable presumption against waiver.

Once the right to counsel has attached, the state may not initiate any crucial confrontation with the defendant, including interrogation, without a valid waiver. A waiver applies only to the current crucial stage and must be renewed at each stage where the defendant is unrepresented.

Once the right to counsel has attached and a lawyer retained or requested, the state may not initiate a confrontation with the defendant without the lawyer present, but the defendant is free to initiate a confrontation without counsel at any time.

The right to counsel is charge-specific, and the invocation of rights in one case imposes no restrictions on the police in another.

Defendant is entitled to counsel at the earliest of the following points (1) when he is formally charged by the filing of an information, (2) as soon as feasible after custodial restraint, or at first appearance. Rule 3.111 procedures pertaining to appointment of counsel for indigents apply equally to non-indigent defendants.

(See this case for incorporation into Florida law under art. I §§16 and 2 the sixth amendment right to counsel and confession law of Faretta, Wade, Kirby, Brewer v. Williams, Jackson, and McNeil).

•Traylor v. S., 596 So. 2d 957 (Fla. 1992)

The right to counsel under the US constitution attaches at the earliest of the following points: formal charge, preliminary hearing, indictment, information, or arraignment. Under the Florida Constitution, the right attaches at the earliest of the following points: formal charge by information or indictment, as soon as feasible after custodial restraint, or first appearance.

Where an indictment is filed against defendant before his arrest, the right to counsel attaches before he is arrested.

The right to counsel must be invoked before it is effective. Thus, where defendant waives his right to talk to a lawyer after his arrest on the warrant, no violation of the right occurs. the mere appointment of counsel does not invoke the right.

Smith v. S., 699 So. 2d 629 (Fla. 1997), 22 F.L.W. S396 (7/3/97)

Defendant has right to attorney at VOP hearing unless he knowingly and voluntarily waives right.

S. v. Hicks, 478 So. 2d 22 (Fla. 1985)

While rule 3.160 allows for the filing of a written plea of not guilty, the court has discretion to require some defendants to appear in court for arraignment. While a blanket policy of requiring appearance would be improper, in specific cases it may be proper.

Tellis v. S, 779 So. 2d 352 (2d DCA 2000), 25 F.L.W. D734 (3/22/2000)

Court errs in refusing to consider defendant's request for a public defender where defendant was found not indigent at arraignment, but after his plea he lost his job and requested a public defender at sentencing.

Smith v. S., 590 So. 2d 1078 (2d DCA 1991)

Defendant has no 6th amendment right to an attorney when taking breathalyzer test. No formal charges have been instituted, so no right attaches.

Defendant has no 5th amendment right to attorney when taking breathalyzer test, since test is not testimonial.

Defendant has no 14th amendment due process right to attorney during breathalyzer test. Defendant has no right to refuse test, so he is giving up no right by taking test. Society's right to keep drunks off the road outweighs defendant's interest in keeping his license, and there is no abusive process used in administering test.

Section 901.24, F.S. does not require police to allow defendant to consult with attorney before taking breathalyzer test.

•S. v. Hoch, 500 So. 2d 597 (3d DCA 1986)

Court errs in requiring defendant to go to trial without an attorney over his objection when defendant had been through several private attorneys and public defenders, all of whom had withdrawn.

Stanojevich v. S., 567 So. 2d 37 (3d DCA 1990)

When the court in a DUI prosecution discharges the PD because the court will not impose a jail sentence, and defendant pleads guilty, upon a subsequent VOP the court may not impose a jail sentence.

Tur v. S., 797 So. 2d 4 (3d DCA 2001), 26 F.L.W. D195 (1/10/2001)

Forcing defendant to trial without an attorney is error where defendant at arraignment said he would hire an attorney, but showed up at trial without one claiming indigency and the court failed to make an adequate inquiry into his finances.

Landry v. S., 562 So. 2d 843 (4th DCA 1990)

Court errs in allowing defendant only a few minutes to confer with public defender before accepting defendant's no contest plea to violation of community control. Offer of counsel was not adequate.

J.G. v. S., 595 So. 2d 256 (4th DCA 1992)

Where defendant at arraignment indicates he wants to represent himself, the court errs in failing to renew the offer of counsel at all subsequent proceedings.

Norman v. S., 699 So. 2d 854 (4th DCA 1997), 22 F.L.W. D2296 (10/1/97)

Court errs in proceeding with restitution hearing without defendant's counsel present.

Hodas v. S., 603 So. 2d 21 (4th DCA 1992)

Court errs in failing to comply with rule 8.165 by not advising a child accused of a delinquent act of his right to counsel at each stage and failing to conduct a "thorough inquiry" that a waiver of his right to counsel is freely and intelligently made.

J.H. v. S., 679 So. 2d 67 (5th DCA 1996), 21 F.L.W. D2009 (9/6/96)

Faretta **Inquiry**

(**See •Faretta v. California. 45 L.Ed. 2d 562 (1975)** for requirements of hearing before allowing defendant to represent himself)

No Nelson inquiry is required when defendant does not allege that counsel's representation is incompetent. When defendant merely expresses dissatisfaction with his attorney, no inquiry is required.

Disagreement with trial strategy or lack of communication with defendant does not require the court to do a Nelson inquiry.

(See this case for extensive discussion of Nelson requirements.)

Morrison v. S., 818 So. 2d 432 (Fla. 2002), 27 F.L.W. S253 (3/21/2002)

Counsel is not required to blindly follow defendant's desire in conducting his defense. Counsel's refusal to follow defendant's instructions does not constitute good cause for discharging counsel such that new counsel must be appointed.

Gore v. S., 784 So. 2d 418 (Fla. 2001), 26 F.L.W. S257 (4/19/2001)

Where defendant's complaint about his attorneys concerns the failure to provide copies of paperwork and does not involve the lawyer's competence, the court need not do a Nelson inquiry.

Stephens v. S., 787 So. 2d 747 (Fla. 2001), 26 F.L.W. S161 (3/15/2001)

A court's inquiry into defendant's dissatisfaction with his counsel can be only as specific as the defendant's complaint. Thus, when defendant complains about counsel's trial strategy and he makes no formal allegations of incompetence, the court has no obligation to inquire further and no Nelson error occurs.

Sexton v. S., 775 So. 2d 923 (Fla. 2000), 25 F.L.W. S818 (10/12/2000)

A ruling on a request to permit self-representation is entitled to great weight and will be affirmed if supported by competent substantial evidence in the record.
(See this case for discussion of the right to self-representation and a discussion of the purpose of Faretta inquiry.)

Potts v. S., 718 So. 2d 757 (Fla. 1998), 23 F.L.W. S450 (9/10/98)

Where there is no unequivocal request for self-representation, the court does not err in not doing a Faretta inquiry.

Davis v. S., 703 So. 2d 1055 (Fla. 1997), 22 F.L.W. S701 (11/6/97)

Where defendant merely expresses dissatisfaction with the progress of his case, but does not claim incompetence by his counsel, the court does not err in not doing a Nelson inquiry.

Davis v. S., 703 So. 2d 1055 (Fla. 1997), 22 F.L.W. S701 (11/6/97)

While telling a defendant who wishes to represent himself of the disadvantages of self-representation is preferred, it is not required. Thus, where defendant had represented himself several times previously, and had been successful, and it is clear that he understood what he was doing, the court does not err in allowing self-representation.

Rogers v. Singletary, 698 So. 2d 1178 (Fla. 1997), 22 F.L.W. S561 (9/11/97)

Technical legal knowledge is not the criterion for assessing the knowing exercise of defendant's right to represent himself.

Bell v. S., 699 So. 2d 674 (Fla. 1997), 22 F.L.W. S485 (7/17/97)

When the court determines that defendant has knowingly and intelligently waived his right to counsel, the trial court may not deprive the defendant of his right to self-representation by ruling that he would not receive a fair trial if he proceeded without counsel.

Faretta only requires that the defendant waive his right to counsel with his eyes open. When the court determines that the defendant has knowingly and intelligently waived his right to counsel, it must allow him to represent himself irrespective of whether he will do a good job.

(See this case for extensive discussion of Faretta requirements).

S. v. Bowen, 698 So. 2d 248 (Fla. 1997), 22 F.L.W. S208 (4/24/97)

When defendant complains about his public defender, but the court in a Nelson hearing determines that the PD is rendering effective assistance, the court does not err if it fails to inform defendant of his right to self-representation so long as defendant makes no indication that he wants to represent himself.

S. v. Craft, 685 So. 2d 1292 (Fla. 1996), 22 F.L.W. S3 (12/26/96)

A Nelson inquiry is appropriate when an indigent defendant seeks to discharge court-appointed counsel and obtain new counsel before trial due to allegations of ineffectiveness. Nelson rules do not apply to privately-retained counsel.

Branch v. S., 685 So. 2d 1250 (Fla. 1996), 21 F.L.W. S497 (11/21/96)

Court errs in requiring defendant to represent himself even where defendant uses his right to counsel as a way to frustrate the administration of justice. Where defendant fired previously-appointed lawyer and refused to cooperate, a Faretta hearing must be held before requiring defendant to represent himself.

(See this case for extensive discussion of Faretta requirements in light of belligerent defendants who try to thwart the system).

•S. v. Young, 626 So. 2d 655 (Fla. 1993), 18 F.L.W. S556 (10/28/93)

Where the court does not inquire into defendant's age, ability to read, ability to write, education, drug or alcohol use, or mental status, the Faretta inquiry is insufficient and gets reversal.

Harmless error does not apply to Faretta errors.

Wilson v. S., 724 So. 2d 144 (1st DCA 1998), 23 F.L.W. D2673 (12/4/98)

When defendant wants to act as co-counsel, the court must conduct a Faretta hearing.

The court has no obligation to allow defendant to act a co-counsel with his attorney. If the court denies the request, no Faretta hearing is required. However, when the court

decides to allow hybrid representation, a Faretta hearing must be done (but see dissent).

Brooks v. S., 703 So. 2d 504 (1st DCA 1997), 23 F.L.W. D41 (12/23/97)

(See •**Eady v. S., 695 So. 2d 752 (1st DCA 1997), 22 F.L.W. D799 (3/25/97)** for extensive discussion of the proper method of handling an obstreperous defendant who refuses court-appointed counsel and insists on representing himself, and then behaves in a disruptive way during trial).

Failure to re-offer counsel at each stage of the proceedings gets conviction reversed, including in a situation where defendant rejects counsel following a full Faretta hearing, but no subsequent offer is made.

(See this case for discussion of the circumstance under which the failure to renew an offer of counsel is harmless error.)

Smith v. S., 787 So. 2d 902 (2d DCA 2001), 26 F.L.W. D1164 (5/4/2001)

While there is no constitutional requirement under State v. Hicks, 478 So. 2d 22, 23 (Fla. 1985), to appoint counsel in all VOPs, counsel must be provided unless there is an informed waiver of counsel.

Failure to do an adequate Faretta inquiry before accepting waiver of counsel at a VOP gets reversal.

Gibson v. S., 747 So. 2d 420 (2d DCA 1999), 24 F.L.W. D2740 (12/8/99)

Failure to do an adequate Faretta inquiry is reversible error and harmless error rules do not apply.

If the court does not have sufficient time to do a full hearing at the time the request is made, the court should reschedule the hearing rather than place the burden on defendant to renew his motion. Failure to renew the request after the court fails to do an adequate inquiry does not waive review on appeal.

Hutchens v. S., 730 So. 2d 825 (2d DCA 1999), 24 F.L.W. D918 (4/9/99)

While defendant has a right to counsel of his own choice, the court can properly refuse to allow defendant to be represented by a non-attorney.

(See this case for discussion of unlicensed practice of law and requirement that defendant be represented by a licensed attorney).

Bauer v. S., 610 So. 2d 1326 (2d DCA 1992)

When defendant seeks to discharge his lawyer and asks for a different one, the court is not required to inquire about self-representation and do a Faretta inquiry. If the defendant does not ask to represent himself, the court need not offer it.

Wilson v. S., 753 So. 2d 683 (3d DCA 2000), 25 F.L.W. D638 (3/15/2000)

When defendant represents at sentencing that he has hired a new attorney, the court should recess the hearing to verify the statement and, if true, should allow the new attorney to appear.

Ventura v. S., 741 So. 2d 1187 (3d DCA 1999), 24 F.L.W. D2190 (9/22/99)

Pursuant to the sixth amendment, a defendant has the right to present a closing argument, regardless of the length of the proceedings of the apparent simplicity of the issues. A pro se defendant his the right to give a closing argument in a non-jury trial, and conviction is reversed when the right is violated.

Rodriguez v. S., 770 So. 2d 740 (4th DCA 2000), 25 F.L.W. D2630 (11/8/2000)

Where private counsel appears for defendant the day after jury selection and defendant indicates that he wants private counsel to substitute in for the PD, and indicates that he wants a delay, the court properly finds that the substitution of counsel was made in bad faith for the purpose of delay.

Hurtado v. S., 760 So. 2d 279 (4th DCA 2000), 25 F.L.W. D1383 (6/7/2000)

A defendant has no sixth amendment right both to represent himself and have appointed counsel. Thus, pleadings filed by a represented defendant are a nullity. The exception to that rule is when defendant seeks to discharge appointed counsel. When defendant files a motion to discharge his lawyer, the court reversibly errs when it strikes the motion and refuses to consider it.

Lewis v. S., 766 So. 2d 288 (4th DCA 2000), 25 F.L.W. D423 (2/16/2000)

Defendant has the right to self-representation so long as the right to assistance of counsel is knowingly and intelligently waived. While a thorough inquiry in a Faretta inquiry is the best way to determine competency to waive counsel, a judge's familiarity with the defendant may prompt the judge to conclude that defendant is not competent to waive the right. However, the record still must reflect that court's findings on the Faretta factors.

Beaton v. S., 709 So. 2d 172 (4th DCA 1998), 23 F.L.W. D866 (4/1/98)

Under Nelson, a defendant always has the right to discharge his court-appointed counsel. The purpose of Nelson is to determine whether the defendant will be entitled to other court-appointed counsel following discharge of his present counsel. If

counsel is rendering effective assistance, then defendant has the right to accept his lawyer or represent himself.

When defendant seeks to discharge court-appointed counsel and hire his own lawyer, Nelson is not implicated.

Where on the day of trial defendant appears with a private attorney, and the court refuses to permit the substitution, but allows the court appointed counsel a continuance, the court errs in refusing to allow the new attorney in. Since the substitution would not have delayed the proceedings, defendant's right to the counsel of his choice is violated.

Refusal to allow the defendant the right to the counsel of his choice is reversible per se.

Foster v. S., 704 So. 2d 169 (4th DCA 1997), 23 F.L.W. D14 (12/17/97)

Where defendant at arraignment indicates he wants to represent himself, the court errs in failing to renew the offer of counsel at all subsequent proceedings.

Norman v. S., 699 So. 2d 854 (4th DCA 1997), 22 F.L.W. D2296 (10/1/97)

The right to counsel prevails over the right to self-representation. The right to counsel attaches automatically while the right to self-representation must be affirmatively invoked.

To invoke the right, defendant must affirmatively state his desire to proceed pro se. The request must be manifested in a written or oral request in order to trigger a Faretta inquiry.

Where defendant expressed dissatisfaction with his public defender, and wanted a different court-appointed lawyer, and upon being told no he expressed disappointment by saying, "I'd appreciate you getting him off my case, or go to trial by myself," the statement is not a request for self-representation and court does not err in not doing a Faretta inquiry.

(See this case for extensive discussion of when defendant's statements rise to the level required to do a Faretta inquiry.

•Gibbs v. S., 623 So. 2d 551 (4th DCA 1993), 18 F.L.W. D1769 (8/11/93)

When the PD withdraws due to a conflict, and defendant's conflict attorney seeks to withdraw due to the fact that defendant filed a Bar grievance, but defendant states he does not want to represent himself, the court errs in requiring defendant to represent himself without a proper Faretta inquiry.

Clary v. S., 818 So. 2d 686 (5th DCA 2002), 27 F.L.W. D1387 (6/14/2002)

Merely signing a waiver of counsel form, without the court inquiring the waiver, does not constitute a proper waiver, and guilty plea should be withdrawn.

Failure to move to withdraw a plea results in a failure to preserve error, but failure to comply with rule 8.165 is fundamental.

J.O. v. S., 717 So. 2d 185 (5th DCA 1998), 23 F.L.W. D2159 (9/18/98)

Where the court does not meet all of the Faretta requirements each time defendant comes before him, but meets all requirements at least once and most several times, the inquiry is sufficient to allow defendant to represent himself.

There is no "fair trial" exception to Faretta. The fact that defendant may not get a fair trial if he represents himself does not permit the court to appoint counsel for defendant against his will.

(See this case for extensive discussion of Faretta requirements).

•Morris v. S., 667 So. 2d 982 (5th DCA 1995), 21 F.L.W. D33 (12/22/95)

Pleas

A voluntary and intelligent plea of guilty by a person who has been advised by competent counsel cannot be collaterally attacked.

Plea agreements (sentencing recommendation) are consistent with the requirements of voluntariness and intelligence. Because each side can obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained-for exchange.

Only when a defendant was not properly apprised of the consequences of his plea can defendant make a due process claim.

When prosecutor offers specific sentencing recommendation in exchange for plea, and defendant accepts the offer, and prosecutor rescinds offer before plea, and prosecutor makes another more stringent offer which is ultimately accepted by defendant, and court sentences defendant in accordance with prosecutor's recommendation, defendant has no constitutional right to specific performance of prosecutor's initial offer and sentence and plea is upheld.

•Mabry v. Johnson, 81 L.Ed. 2d 437 (1984)

Even though a plea has been accepted and the court has participated in the plea negotiations, and there is a firm agreement for a specific sentence, the judge is never bound to honor the agreement. However, when there is a firm agreement and the judge decides to impose a greater sentence, the defendant has the right to withdraw the plea.

If the agreement calls only for the state to recommend a particular sentence and it is clear that the trial judge may impose a greater sentence, the defendant cannot withdraw the plea if a greater sentence is imposed so long as the state carries out its promise.

When the judge cannot honor a plea bargain, the judge must affirmatively offer the defendant the right to withdraw the plea. A motion to withdraw the plea need not be made to preserve the issue for appeal.

•Goins v. S., 672 So. 2d 30 (Fla. 1996), 21 F.L.W. S158 (4/11/96)

Where defendant displays irrational behavior, abnormality of demeanor, or other strange behavior that causes court to call defendant's competency into question, court on its own motion should conduct inquiry into competency.

Defendant's despondency and suicidal thoughts did not as a matter of law constitute grounds to believe that defendant was incompetent to plead guilty.

Where record shows that defendant entered pleas intelligently and voluntarily and understood the consequences of pleading guilty, court did not err in accepting plea to first-degree murder despite despondency.

Trawick v. S., 473 So. 2d 1235 (Fla. 1985)

The court must inform defendant of the possible consequences when accepting a VOP plea.

Johnson v. S., 776 So. 2d 1024 (1st DCA 2001), 26 F.L.W. D323 (1/22/2001)

Prior to the court's acceptance of a plea, the defendant has an absolute right to withdraw the plea.

Herald v. S., 755 So. 2d 763 (2d DCA 2000), 25 F.L.W. D784 (3/31/2000)

Until the court affirmatively states that a plea is accepted, the defendant can withdraw the plea.

If a plea is not binding on the defendant, it is not binding on the state. If the state nol prosses counts based on a plea, and defendant withdraws from the plea, the state can withdraw the nol pros.

Mackey v. S., 743 So. 2d 1117 (2d DCA 1999), 24 F.L.W. D1929 (8/20/99)

Before accepting a guilty plea, the court must determine whether a factual basis exists for the plea. The purpose of the factual basis requirement is to make sure the defendant is pleading to the right charge. To withdraw a plea for lack of a factual basis, the defendant must show prejudice or manifest injustice.

A sufficient factual basis can be shown by the contents of the arrest affidavit.

Suarez v. S., 616 So. 2d 1067 (3d DCA 1993), 18 F.L.W. D896 (4/6/93)

When the court fails to ask all of the appropriate questions when accepting a plea, but the motion to withdraw the plea is not made until more than 30 days after sentencing, the court does not err in refusing to allow the lea to be withdrawn. In the absence

of a showing of manifest injustice, the court need not allow the plea to be withdrawn.

Barlow v. S., 784 So. 2d 482 (4th DCA 2001), 26 F.L.W. D766 (3/14/2001)

A plea can be withdrawn at any time before sentencing so long as the court has not accepted the plea. Thus, where defendant goes through a plea hearing involving substantial assistance, and part of the agreement is that he will not seek to withdraw the plea, but the court does not formally accept the plea, he must be allowed to withdraw it.

Miller v. S., 775 So. 2d 394 (4th DCA 2000), 26 F.L.W. D16 (12/20/2000)

Defendant announced an intent to plead, and the state then announced a nol pros. The court then proceeded to take the plea, ruling that defendant started to plead before the nol pros. Held: The state has the sole authority to determine whether to proceed with a case, and once a nol pros is announced, there is no case before the court for which a plea can be accepted.

S. v. R.J., 763 So. 2d 370 (4th DCA 1998), 23 F.L.W. D2686 (12/9/98)

No plea bargain is binding until the judge accepts it in open court. Until it is accepted, either party can withdraw from the agreement without any necessary justification. The court errs in accepting a plea bargain where the state indicates it was not agreeing to the plea.

S. v. Parisi, 660 So. 2d 372 (4th DCA 1995), 20 F.L.W. D2104 (9/13/95)

Court may not refuse categorically to accept negotiated sentence pleas, best interest pleas, or no contest pleas. The court has discretion to accept those pleas, and refusal to exercise discretion is subject to mandamus.

Boykin v. Garrison, 658 So. 2d 1090 (4th DCA 1995), 20 F.L.W. D1595 (7/12/95)

There is no federal constitutional right to have the court accept a best interest plea.

Under rule 3.172, once the court determines that a factual basis for the plea exists, and the court determines that the plea is made voluntarily and the state agrees with the plea, the defendant cannot be forced to go to trial anyway. The court cannot unilaterally refuse to accept best interest pleas when the defendant is willing to concede guilt. There is no residuum of discretion available to the judge once the defendant makes a public acknowledgement of actual guilt, and the plea must be accepted.

•Rigabar v. Broome, 658 So. 2d 1038 (4th DCA 1995), 20 F.L.W. D812 (4/5/95)

The judge has no authority to enter into a sentence bargain with the defendant without the consent of the state. While the court has the authority to accept or reject a plea under rule 3.172(g), the court cannot interfere with the state's function.

Agreeing to a downward departure without the agreement of the state and without hearing the state's evidence exceeds the judge's power, even where the reasons for the ultimate downward departure are valid.

(See this case for extensive discussions of the court's authority in plea bargaining.)

S. v. Gitto, 731 So. 2d 686 (5th DCA 1999), 24 F.L.W. D1105 (4/30/99)

CHAPTER 3
PRETRIAL MOTIONS

Chapter 3 - Pretrial Motions

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PRETRIAL MOTIONS

- **KEY POINTS**

  Rule 3.190(a) : Motions

  - Every motion/pleading must be in writing and signed
  - Each motion shall state grounds, be served on adverse party and contain a certificate of service
  - Judge may waive these requirements for **good cause**; the rule contemplates that *ore tenus* pretrial motions should be rare
  - Discovery depositions in misdemeanor cases may be granted only upon good cause shown. Judges should not implement a blanket policy of either granting or denying depositions or other motions

  Motion To Dismiss

  - Grounds may relate to matters of form or substance; former acquittal; former jeopardy; or to any other defense available to a defendant by plea other than not guilty
  - Time for motions shall be before or upon arraignment, or at any other time within discretion of the judge
  - Judge may at any time entertain a motion to dismiss on the following grounds:
    - The defendant is charged with an offense for which the defendant has been pardoned
    - The defendant is charged with an offense for which the defendant has previously been placed in jeopardy
    - The defendant is charged with an offense for which the defendant has previously been granted immunity
    - There are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant
  - Motion to dismiss alleging factual matters under subdivision (c)(4) may be traversed/demurred to by the State. Facts alleged in motion are admitted unless specifically denied by State in the traverse
  - Evidence may be received on the motion at the judge's discretion
  - A motion to dismiss under subdivision (c)(4) shall be denied if the State files a

traverse that with specificity denies under oath the material facts alleged in the motion to dismiss

- If motion is granted, defendant may be held in custody for a reasonable time pending the filing of a new information

Motion To Suppress Physical Evidence

- Unlawful search must be based on one of the following grounds: no warrant, insufficient warrant, wrong property seized, lack of probable cause to issue warrant, or warrant illegally executed

- Contents of motion must state evidence sought to be suppressed, and reason(s) for suppression, and a general statement of facts on which motion is based

- If motion is legally sufficient, defendant presents evidence which may be rebutted by the State

- Motion to suppress should be filed prior to trial, unless no opportunity or defendant was not aware of grounds

Motion To Suppress Confession or Admission

- Grounds can be raised by defendant, or on court's own motion, to suppress illegally obtained confession or statement

- Prior to trial, unless no opportunity or defendant was not aware of grounds, but can be at any time within judge's discretion

- Court shall receive evidence on any issue of fact necessary to be decided

Motion to Take Deposition to Perpetuate Testimony

- Can be filed by either party after information filed

- Must be accompanied by credible affidavits stating grounds that the prospective witness resides beyond territorial jurisdiction of the court, or may be unable to attend, or be prevented from attending a trial or hearing

- Witness' testimony must be material and deposition necessary to prevent failure of justice

- Judge shall order a commission to be issued to take the deposition and may order tangible objects or documents not privileged be produced at

same time and place

- Adequate notice must be given and defendant must have opportunity to be present, but presence can be waived after notice and failure to appear

- State shall pay the defendant's attorney and a defendant not in custody the expenses for travel and subsistence for attendance

- State must provide defendant any statement of witnesses to be deposed

- Upon motion by the State, judge may expedite if case involving a child under age 16 or an elderly or disabled person

- No deposition shall be used or read into evidence at trial when the attendance of the witness can be procured

- Application to perpetuate testimony may be denied if made within 10 days before trial

Speedy Trial

- Misdemeanants must be tried within ninety (90) days without demand, commencing when defendant is taken into custody, which is defined as when the defendant is arrested or served with a notice to appear in lieu of physical arrest

- Upon demand, the trial must be commenced within sixty (60) days. This occurs if the State is served with a pleading entitled "Demand for Speedy Trial"

    - Calendar call must be held within five (5) days of demand

    - Trial set at a date no less than five (5) days and no more than forty-five (45) from calendar call

- Defendant may file and serve at any time on or after the expiration of the speedy trial period a notice of expiration of speedy trial

    - No later than five (5) days after the notice of expiration is filed, the judge shall hold hearing and set a trial within ten (10) days

- A notice of expiration of speedy trial time filed before expiration of the period of time for trial is invalid and shall be stricken on motion of the State

- The calculating of time deadlines does not include the date the notice or demand was filed

- The failure to hold the 5-day calendar call does not require dismissal, provided trial is commenced within overall 15- day period

- A defendant not brought to trial within the 15-day time period, from the filing of the notice, through no delay caused by the defendant, shall be discharged forever

- Defendant is bound: Demand for speedy trial must be based on a bona fide desire for trial, and indicates that accused is available for trial and has diligently investigated the case and will be prepared for trial within 5 days

- Demand may be stricken as invalid on the State's motion; the court cannot *sua sponte* strike a demand for speedy trial or notice of expiration, even if improperly filed.

- Demand may not be withdrawn by the defendant except on order of the judge, with consent of the State, or on good cause shown

- A defendant who has demanded a speedy trial and then is not prepared for trial is not entitled to a continuance

- Trial commences when jury panel is sworn for voir dire examination or when trial proceeds before the judge

- If trial does not commence within the times established, discharge shall be granted unless time extension has been ordered, or failure to hold trial is attributable to defendant/co-defendant/counsel, or accused is unavailable or demand is invalid

- Unavailability occurs when defendant/counsel fails to attend a proceeding where attendance is required, or defendant/counsel is not ready for trial on the date trial is scheduled

- A defendant who is in federal custody or incarcerated outside of the State's jurisdiction is not entitled to a speedy trial until that person returns and notice is filed with the court

- Time may be extended: upon stipulation; or by written or recorded court order in **exceptional circumstances**; or by written or recorded court order with good cause shown; or by written or recorded court order for a reasonable and necessary reason for delay of the proceeding. Such reasons for delay include: mental competency/physical ability of defendant to stand trial, hearings on pretrial motions, appeals by the State, trial of other

pending criminal charges against the defendant

- Exceptional circumstances include, but are not limited to: unexpected illness/incapacity; complexity of the case; specific evidence not available but will become available; accommodation of a co-defendant; accused has caused delay/disruption

- If there has been a mistrial, defendant is entitled to a new trial within ninety (90) days

Incompetency

- There shall be no proceedings against a defendant while incompetent

- Attorney for State, defense or judge, upon reasonable grounds, can raise issue of competency, requiring an immediate examination of defendant's mental condition

- Hearing within twenty (20) days, based upon an examination of no fewer than two (2) or more than three (3) experts

- See rules 3.211-3.213 for scope of examination and factors to be considered

- All information contained in motion, report, or information elicited at hearing are privileged, and shall be used only in determining mental competency

- If a defendant, charged with a misdemeanor, is incompetent to stand trial or proceed with a probation violation hearing for one (1) year, there is no substantial probability that the defendant will become mentally competent in the foreseeable future, and defendant does not meet criteria for commitment, charges shall be dismissed without prejudice to refile if competency returns

- Sentencing shall be postponed until competency is declared

- Use of psychotropic medication does not automatically deem a defendant incompetent, but if such medication is used, the jury shall be given explanatory instructions regarding such medication

3.02 AUTHORITIES

Florida Rules of Criminal Procedure:
Rules 3.210 - 3.215 - Competency
Rule 3.190 - Pretrial Motions and Defenses
Rule 3.191 - Florida Rules of Criminal Procedure: Speedy Trial

3.03 TIPS/NOTES

3.04 CHECKLISTS/FORMS

Chapter 3 – Pretrial Motions

Motion to Dismiss

Under rule 3.190(c)(4), a defendant can move for dismissal if there are no material disputed facts and the undisputed facts do not establish a prima facie case. The defendant's burden is to specifically allege and swear to undisputed facts in the motion and to demonstrate that no prima facie case exists upon the facts set forth in detail in the motion. The procedure is similar to summary judgment proceedings in civil cases.

For the state to defeat a motion to dismiss, the state must file a traverse denying specific facts in the motion or alleging specific additional facts just as a non-movant would have to do in a counter-affidavit to defeat a motion for summary judgment.

The state need not disclose all facts upon which it intends to rely to support its theory of the case. The state need only allege additional material facts that meet the minimal requirement of a prima facie case. In meeting its burden of a prima facie case, the state can use circumstantial evidence and all inferences are resolved in its favor.

•S. v. Kalogeropolous, 758 So. 2d 110 (Fla. 2000), 25 F.L.W. S360 (5/11/2000)

Failure to swear to a c(4) motion requires that the motion be denied.

Styron v. S., 662 So. 2d 965 (1st DCA 1995), 20 F.L.W. D2198 (9/22/95)

Court errs in dismissing charges where no motion was filed and the court required the state to go to a hearing on a motion to suppress as soon as it was filed. The court's attempt to remove a weak case from its docket usurps the state's authority.

S. v. Lamb, 638 So. 2d 1060 (1st DCA 1994), 19 F.L.W. D1463 (7/5/94)

In reviewing a c(4) motion, the court may not try to determine factual issues or consider the weight of conflicting evidence or the credibility of witnesses. Even if the court doubts the state's evidence, it cannot grant a motion to dismiss simply because the court believes the case will not survive a motion for JOA.

S. v. Dickerson, 811 So. 2d 744 (2d DCA 2002), 27 F.L.W. D480 (2/27/2002)

If a police officer's actions amount to a denial of due process rights, dismissal of the charges may be warranted. Due process rights are violated when the government's

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conduct so offends decency or a sense of justice that the judicial power may not be exercised to obtain a conviction.

(See this case for citations to due process cases.)

S. v. Taylor, 784 So. 2d 1164 (2d DCA 2001), 26 F.L.W. D803 (3/23/2001)

When the defense files a c(4) motion and the state does not traverse, the facts alleged in the motion are deemed admitted. The court then must determine whether the admitted facts establish a prima facie case of guilt. Failure to file a traverse does not require that the motion be granted.

In considering the motion, all questions and inferences from the evidence must be resolved in favor of the state. Even if the court doubts the sufficiency of the evidence, it cannot grant a motion to dismiss simply because the judge believes the case will not survive a motion for JOA.

In a possession case, knowledge is a question of fact that is not a proper basis for a motion to dismiss.

S. v. Paleveda, 745 So. 2d 1026 (2d DCA 1999), 24 F.L.W. D2414 (10/20/99)

The court cannot grant a c(4) based on a disagreement whether the case should be prosecuted. The court is without the authority to decide which cases should be prosecuted if the state can present a prima facie case.

S. v. Moore, 742 So. 2d 834 (2d DCA 1999), 24 F.L.W. D2088 (9/10/99)

A motion attacking the sufficiency of an information is properly raised pretrial in a motion under rule 3.190(b), and failure to raise the issue pretrial waives the argument. Where the defendant styles a motion to dismiss as a motion for judgment of acquittal after the state's case, the court errs in dismissing the case.

S. v. Strickler, 712 So. 2d 1218 (2d DCA 1998), 23 F.L.W. D1563 (6/24/98)

A traverse that states, "the state specifically denies that the material facts as presented in the defendant's sworn motion to dismiss are the only facts upon which the state would rely during the state's case in chief," and nothing more, is legally sufficient to require the court to deny a c(4) motion.

Branciforte v. S., 678 So. 2d 426 (2d DCA 1996), 21 F.L.W. D1752 (7/31/96)

Court errs in sua sponte dismissing the case when a state witness fails to appear for a deposition and then fails to appear pursuant to a rule to show cause. Dismissal is proper only when no other sanction will suffice.

S. v. L.E., 754 So. 2d 60 (3d DCA 2000), 25 F.L.W. D517 (3/1/2000)

An unsworn traverse is not sufficient under rule 3.190(c)(4) to obtain an automatic denial of a motion to dismiss. The facts alleged in the traverse must be specific and under oath before the state is entitled to a denial of the motion.

When the facts alleged in defendant's motion do not present undisputed facts, the motion should be denied despite an insufficient traverse. Where a state witness make inconsistent statements regarding defendant's guilt, the evidence is not undisputed and the motion should be denied.

S. v. Gutierrez, 649 So. 2d 926 (3d DCA 1995), 20 F.L.W. D349 (2/8/95)

The court lacks authority to dismiss a case when it finds no probable cause at a rule 3.133 adversary preliminary hearing. The court's only authority is to release defendant.

S. v. Conley, 799 So. 2d 400 (4th DCA 2001), 26 F.L.W. D2684 (11/14/2001)

The court should dismiss an information due to police misconduct when the misconduct is so egregious as to violate due process rights. To determine whether the conduct violates due process, the court must weigh the opposing policy considerations which recognize the defendant's right to be protected from egregious governmental misconduct and the government's need to combat crime.

LEOs executed a search warrant at defendant's home and found drugs. They arrested him, and then set up a reverse sting operation in the home to arrest people who came to the house to buy drugs. Held: While the government's conduct is improper, the conduct is not so outrageous that it prejudiced defendant's right to a fair trial or violated judicial notions of justice and fairness (but see dissent).

McDonald v. S., 742 So. 2d 830 (4th DCA 1999), 24 F.L.W. D2070 (9/8/99)

A rule 3.190(c)(4) motion to dismiss is akin to a civil motion for summary judgment. The motion is decided only on the undisputed facts. In considering the evidence, the court must draw all inferences in favor of the state and against the defendant. The trial court may neither weigh conflicting evidence nor pass on the credibility of witnesses nor determine disputed issues of fact. Motive and intent are states of mind usually inferred from the conduct of the parties and the surrounding circumstances; they are questions for the trier of fact that are generally not appropriate for a motion to dismiss (cases cited).

Court errs in dismissing hate crime enhancement where, in the light most favorable to the state, but for racial prejudice the crime would not have occurred.

S. v. Hart, 677 So. 2d 385 (4th DCA 1996), 21 F.L.W. D1638 (7/17/96)

When the defense files a c(4) motion, the burden is on the defense to allege that the material facts of the case were undisputed, describe what the material facts were,

and demonstrate that the undisputed facts either (1) failed to establish a prima facie case or (2) established a valid defense.

In a constructive possession case, where the state's traverse alleged that the defendant was standing in the open front doorway of her house and immediately shut the door when LEOs arrived to serve a search warrant, and when she was next seen she was standing alone in the doorway of a bathroom where drug were found in the toilet bowl, the facts are sufficient to establish constructive possession.

Joint occupancy with or without ownership of the premises, where contraband is found in plain view in the presence of the owner or occupant is sufficient to support a conviction for constructive possession.

S. v. Reese, 774 So. 2d 948 (5th DCA 2001), 26 F.L.W. D203 (1/12/2001)

The issue whether defendant had knowledge of the presence of marijuana, in a constructive possession case, is for the jury to decide, and the court errs in granting a c(4) on that issue.

S. v. Heffner, 727 So. 2d 977 (5th DCA 1999), 24 F.L.W. D217 (1/15/99)

When the state does not file a traverse, the facts alleged in defendant's motion are deemed admitted.

The court at a c(4) motion hearing can take live testimony, and if the testimony indicates a factual dispute or any evidence that would support the charge, the motion should be denied.

S. v. Davis, 652 So. 2d 942 (5th DCA 1995), 20 F.L.W. D799 (3/31/95)

Motion to Suppress physical evidence

An order granting a motion to suppress is a non-final order because judicial labor is still required to effectuate a termination of the case.

When the court suppresses evidence during trial resulting in a dismissal or acquittal, a retrial would constitute double jeopardy.

Under rule 3.190(h)(4), the court has the authority to hear and rule on a motion to suppress during trial.

If the court decides to hear a motion to suppress during trial after jeopardy has attached, the court should use the following procedure. The court should exercise its discretion to withhold ruling on the motion and allow the case to be submitted to the jury. If the defendant is acquitted, the motion is moot. However, if the defendant is convicted, the court should then consider the motion to suppress post-trial in conjunction with a renewed motion for JOA or a motion for new trial. If the court grants the motion to suppress, the court should then grant a JOA and the state can appeal under rule 9.140(c)(1)(C) or (E). Such a procedure will allow

the court to consider a belated motion to suppress without violating double jeopardy or eliminating the state's right to appeal an adverse ruling.

•S. v. Gaines, 770 So. 2d 1221 (Fla. 2000), 25 F.L.W. S987 (11/2/2000)

In reviewing a ruling on a motion to suppress, the reviewing court is bound by the trial court's findings of fact unless the findings are clearly erroneous. So long as competent and substantial evidence supports the findings, and the court correctly applies the law to the facts, the ruling will be upheld.

M.J. v. S., 776 So. 2d 341 (1st DCA 2001), 26 F.L.W. D325 (1/22/2001)

At a motion to suppress, in the absence of a warrant, once the defendant establishes standing it is the state's burden to show that the evidence was lawfully obtained. When a warrant is issued, it is the defendant's burden to show grounds for suppression.

The reviewing court is bound by the findings of fact made by the trial court unless they are clearly erroneous. The reviewing court should apply the law de novo, however, and is not bound by the court's application.

(See this case for extensive citations to cases describing the burden of proof and procedures to be used in suppression hearings).

S. v. Setzler, 667 So. 2d 343 (1st DCA 1995), 20 F.L.W. D2418 (10/24/95)

In reviewing motion to suppress, court should not view evidence in the light most favorable to the state, but should act as a neutral and detached magistrate to determine whether the state has met its burden of showing an exception to the warrant requirement.

Edwards v. S., 532 So. 2d 1311 (1st DCA 1988)

When the defense alleges a warrantless search, the burden shifts to the state to prove by clear and convincing evidence that the search was lawful. The state cannot stipulate to the facts as alleged in defendant's motion. Such an offer to stipulate will not meet the state's burden of proof in a suppression hearing.

Palmer v. S., 753 So. 2d 679 (2d DCA 2000), 25 F.L.W. D672 (3/15/2000)

The judge in a suppression hearing has the obligation to judge the credibility of conflicting testimony and resolve the conflicts. The mere fact that an LEO presents testimony as to the elements of a crime does not obligate the court to believe the testimony and deny a motion to suppress.

S. v. Oakley, 751 So. 2d 172 (2d DCA 2000), 25 F.L.W. D357 (2/9/2000)

The trial court has the obligation of determining whether a ruling on a motion to suppress is dispositive. Failure to state on the record that the ruling is dispositive will result in dismissal of the appeal.

Rust v. S., 742 So. 2d 471 (2d DCA 1999), 24 F.L.W. D2234 (9/22/99)

A motion to suppress is an issue of law for the judge alone to decide. The jury has no role in determining the legality of a search.

In a motion to suppress, there is no evidentiary presumption favoring the state, and the court errs in viewing the evidence "in the light most favorable to the state."

Moore v. S., 647 So. 2d 326 (2d DCA 1994), 20 F.L.W. D41 (12/21/94)

(See **S. v. McCray, 626 So. 2d 1017 (2d DCA 1993)** (Parker, J., concurring), for discussion of the legal sufficiency under rule 3.190 of a motion to suppress, and the judge's obligations under the rule).

Trial court has the authority to reconsider a ruling on a motion to suppress while the court has jurisdiction of the case.

Obregon v. S., 601 So. 2d 616 (3d DCA 1992)

A trial court's ruling on a motion to suppress is presumed correct, but the appellate court must decide for itself whether the facts relied upon by the trial court support its legal conclusions.

S. v. Wikso, 738 So. 2d 390 (4th DCA 1999), 24 F.L.W. D1464 (6/23/99)

Court does not err by hearing a motion to suppress during trial. Rule 3.190(h)(4) does not require that the hearing be held before trial.

Gerlitz v. S., 725 So. 2d 393 (4th DCA 1998), 24 F.L.W. D25 (12/23/98)

So long as the court retains jurisdiction of a case, it has the authority to reconsider its ruling on a motion to suppress upon an appropriate motion or objection.

A judge's ruling granting a motion to suppress cannot be based on the judge's finding that in another case the officer was untruthful. The prejudgment of the officer's credibility by the court is clear error.

S. v. Graham, 721 So. 2d 361 (4th DCA 1998), 23 F.L.W. D2415 (10/28/98)

Court errs in refusing to conduct an evidentiary hearing on a legally sufficient motion to suppress when defendant requests a hearing. See rule 3.190(h).

Gasdon v. S., 600 So. 2d 1287 (4th DCA 1992)

Where defendant files a motion to suppress and a demand for speedy trial, the court is obligated to hear the motion to suppress, and cannot refuse to consider it because of the demand. Court can extend speedy trial time to hear the motion.

Williams v. S., 548 So. 2d 898 (4th DCA 1989)

A motion to suppress, to shift the burden to the state to prove the legality of a search or seizure, must allege and the defendant must prove that a search had taken place. In filing a motion to suppress the defendant undertakes the burden of making an initial showing that the evidence at issue was obtained by the government as the result of a search or seizure. Bare allegations in a motion, unsupported by proof, are not sufficient to sustain that burden.

(See this case for discussion of the legal sufficiency of a motion to suppress.)

S. v. Gay, 823 So. 2d 153 (5th DCA 2002), 27 F.L.W. D1390 (6/14/2002)

When the court's order directs that suppression motions are to be heard not less than 7 days before pretrial, and defense filed suppression motions after the pretrial, the court does not err in summarily denying the motions without a hearing.

Powell v. S., 717 So. 2d 1050 (5th DCA 1998), 23 F.L.W. D1857 (8/7/98)

<u>Motion to Suppress Confession</u>

Defendant was stopped by DUI and arrested. He was not Mirandized when he was taken to booking area. During booking, he was asked standard questions about his age, height, weight, etc., and then was asked if he knew the date of his sixth birthday, which he did not. He then was videotaped doing field sobriety tests, and made several incriminating statements during the tests. Held: Slurring of speech during the answering of booking questions was non-testimonial and are beyond fifth amendment right. Defendant's answer to the sixth birthday question was testimonial because it showed the cognitive functioning of his mind, and should be suppressed as a Miranda violation. The incriminating inference of his failure to answer the question stemmed from the testimonial nature of the response.

Statements made during the sobriety tests were not made in response to interrogation, and thus are admissible.

(See this case for discussion of the "booking question" exception to Miranda requirements).

•Pennsylvania v. Muniz, 110 L.Ed. 2d 528 (1990)

Defendant was arrested on a murder warrant and requested an attorney during interrogation. He was allowed to speak with a lawyer several times, then LEOs approached again and demanded that he speak with them, and he confessed. Held: Miranda requirement that interrogation cease when an attorney is requested means that interrogation cannot be restarted after defendant speaks with an attorney.

Interrogation cannot be restarted unless the attorney is present or defendant validly waives the right to an attorney. Merely consulting with an attorney does not satisfy Miranda rights.

Edwards bright-line rule does not allow reinterrogation once an attorney is requested, and the exception sought by the state is inconsistent with Edwards.

•Minnick v. Mississippi, 112 L.Ed. 2d 489 (1990)

Edwards v. Arizona rule that states that when a suspect "has expressed his desire to deal with the police only through counsel [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police" is extended to cases where defendant refuses to speak without an attorney and then is questioned about an unrelated offense. Where defendant does not initiate further conversation, police may not question him about another, unrelated offense without providing counsel first.

Where defendant asks for counsel and questioning is stopped, it is inherently coercive to restart interrogation before counsel is provided, because it gives a suspect the impression that his earlier request for counsel was not proper and that he may have no choice but to answer.

It is irrelevant that the second interrogating officer did not know that the suspect had requested counsel from a different officer. The focus is on defendant's state of mind, not the officer's.

Arizona v. Roberson, 43 L.Ed. 2d 3085 (1988)

Defendant approached LEO and confessed to murder. LEO asked several questions and defendant appeared to understand questions and answers. Defendant then was arrested. He continued confession after arrest and Miranda. Defendant moved to suppress based on defendant's mental state, that defendant's statement was not voluntary because mental condition forced defendant to confess (he believed God was ordering him to confess). Held: Due process is violated only by acts of official coercion, and where police had no role in causing defendant's mental state, voluntariness for due process purposes is not implicated.

Voluntariness inquiry relates to due process concerns. But where there is no police overreaching, defendant's mental condition, confusion, apprehension, etc. does not implicate due process.

The most outrageous behavior by a private party seeking to secure evidence against defendant does not violate due process. Since purpose of exclusionary rule is to deter future constitutional violations, excluding evidence obtained through sources other than the police misconduct does not support exclusionary rule rationale.

State must show waiver of Miranda rights by a preponderance of evidence, not by any higher level of proof.

Requirement that waiver of Miranda rights be voluntary is governed by the same rules as voluntariness of confession due process rules. Voluntariness of waiver depends on police conduct and police overreaching, not on "free will" concepts.

Miranda protects defendants from government coercion leading them to surrender rights protected by the fifth amendment. Coercion from other sources not associated with the government does not have fifth amendment ramifications.

•Colorado v. Connelly, 40 L.Ed. 2d 3159 (1986)

Defendant was arrested for burglary, and evidence implicating him in murder was developed. Attorney for defendant on burglary called police, asked to be present if defendant was questioned, and was told that cops were through with him for the night and defendant would not be questioned. Defendant was questioned and confessed to murder. Held: Because defendant was properly Mirandized and voluntarily confessed, misleading attorney is not a violation of 5th, 6th, or due process rights.

Waiver of Miranda rights must be product of free will and deliberation, not intimidation, coercion, or deception. Only if totality of circumstances surrounding the interrogation show an uncoerced choice and the requisite level of comprehension may a court conclude that rights were waived.

Events occurring unknown to defendant cannot bear on defendant's capacity to understand and waive a constitutional right.

Once right to attorney attaches, police may not interfere with attorney's right to act as a medium between defendant and the police.

6th amendment right to counsel attaches only after initiation of formal charges. While defendant has the right to contact an attorney during custodial interrogation, 6th amendment right is not implicated until formal charges are made, and state can interfere with attorney's efforts to contact defendant during pre-arraignment custodial interrogation.

•Moran v. Burbine, 89 L.Ed. 2d 410 (1986)

"Interrogation" under Miranda refers not only to direct questioning but also to any words or actions by LEOs (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit incriminating responses from suspect.

"Incriminating response" is any response, inculpatory or exculpatory, that the state seeks to introduce against defendant.

LEOs arrest defendant for robbery with shotgun shortly after robbery. During trip to station, the converse in front of defendant about dangers to school children if a child found the gun. Defendant, who stated he wanted attorney when Mirandized, said he would show them where gun was. Held: Conversation was not interrogation. No indication that LEOs should have known that defendant was particularly susceptible to appeals to conscience, or that he was disoriented or upset.

•Rhode Island v. Innis, 64 L.Ed. 2d 297 (1980)

Defendant was illegally arrested without warrant or PC. He was taken to station, read Miranda, waived, and made incriminating statements. Held: For 5th amendment rights to be validly waived following a 4th amendment violation, there must be some break in the causal connection sufficient to eliminate the taint of the illegal arrest. Giving Miranda warnings and obtaining a waiver is an important factor, but is not determinative.

Other factors to consider are the length of time between arrest and confession, the presence of intervening factors, and particularly the purpose and flagrancy of the official misconduct.

•Brown v. Illinois, 45 L.Ed. 2d 416 (1975)

Statements by police regarding leniency of sentencing are objectionable only if they establish a quid pro quo for the confession. where defendant confesses expecting leniency, but there is no express offer, only his expectation, the confession is voluntary.

(See this case for discussion of a case where defendant was appointed a PD and he then, in the presence of his attorney confessed to murder that resulted in the death penalty.)

Philmore v. S., 820 So. 2d 919 (Fla. 2002), 27 F.L.W. S530 (5/30/2002)

Defendant was arrested an Mirandized. He agreed to talk, and after a few minutes he invoked his right to counsel. the discussion stopped, and the officers left the room. About three and a half hours later he knocked on the door, and the officer asked what he wanted. Defendant indicated he wanted to talk, and the officer said they could not talk because he had requested an attorney. Defendant said he changed his mind and no longer wanted an attorney, and he subsequently gave an incriminating statement. Held: The court proper denies suppression. Under Oregon v. Bradshaw, the defendant has the right to reinitiate conversation, and his waiver was proper.

Francis v. S., 808 So. 2d 110 (Fla. 2001), 27 F.L.W. S2 (12/20/2001)

A determination whether a suspect is "in custody" for Miranda purposes involves two discrete inquires; first, what were the circumstances surrounding the interrogation, and second, would a reasonable person have felt he was not at liberty to terminate the interrogation and leave. The first inquiry is factual and he second is a mixed question of law and fact.

Appellate courts should give a presumption of correctness to the trial court's rulings on motions to suppress with regard to the court's determination of historical facts. Appellate court must independently review mixed questions of law and fact that ultimately determine constitutional issues in fourth and fifth amendment contexts.

•Connor v. S., 803 So. 2d 598 (Fla. 2001), 26 F.L.W. S579 (9/6/2001)

A defendant may not invoke his fifth amendment right to counsel until a custodial interrogation has begun or is imminent. Where defendant signs an invocation of rights form from the public defender, that form will not serve to invoke his fifth amendment rights in a subsequent interview.

Hess v. S., 794 So. 2d 1249 (Fla. 2001), 26 F.L.W. S565 (5/17/2001)

Under Almeida, the police are required to be honest and fair in answering questions posed by a defendant about his rights. The officers are not required to act as legal advisors or personal counselors for suspects.

Following Miranda warnings, the defendant asked the officer if they thought he should have an attorney. The officers responded that it was not their decision to make, and that the decision was up to him. Defendant then confessed. Held: The answer provided by the officers was simple, reasonable, and true. The officers did not engage in gamesmanship or try to give an evasive answer or to skip over the question. The response thus was proper under Almeida.

•S. v. Glatzmayer, 789 So. 2d 297 (Fla. 2001), 26 F.L.W. S279 (5/3/2001)

When defendant is handcuffed for his own protection because he told LEO that he had tried to kill himself, and he said in his subsequent statement that he asked the LEO to restrain him, he is not in custody for Miranda purposes.

Voluntary statements by a person thought by LEO to be a witness rather than a suspect are not the result of interrogation for Miranda purposes.

For Miranda warnings to be required, the suspect must be both in custody and interrogated.

A determination of both voluntariness of a statement and knowing and intelligent waiver of Miranda requires an examination of the totality of the circumstances.

Once a suspect asks for a lawyer, no state agent can reinitiate interrogation on any offense through the time of custody unless a lawyer is present, although the suspect can volunteer a statement to the police on his own initiative. When defendant asks for a lawyer, and then on his own tells the police he wants to talk, the subsequent statement is admissible.

Repeated reading of Miranda rights, (here, four times) is an effort to provide procedural safeguards and not an attempt by officers to persuade him to talk.

Lukehart v. S., 762 So. 2d 482 (Fla. 2000), 25 F.L.W. S489 (6/22/2000)

In determining whether defendant was in custody for Miranda purposes, the court should consider: (1) the manner in which police summon the suspect for questioning; (2) the purpose, place, and manner of the interrogation; (3) the extent to which the

suspect is confronted with evidence of his or her guilt; (4) whether the suspect is informed that he or she is free to leave the place of questioning.

Where defendant is asked to go to the station by several officers, he is questioned at the station by two officers, he is not told he is free to leave, he is confronted with substantial evidence of his guilt, and it was clear he was the prime suspect, he is in custody for Miranda purposes and Miranda warnings are required.

The error in admitting a statement made in violation of Miranda is reviewed on a harmless error standard.

Mansfield v. S., 758 So. 2d 636 (Fla. 2000), 25 F.L.W. S245 (3/30/2000)

When defendant is Mirandized and and invokes his right to counsel, he cannot be interrogated further until counsel is provided or the suspect initiates further communication. If the suspect voluntarily initiates the contact and validly waives the right he had previously invoked, the interrogation can resume.

After invoking his right to silence and counsel, defendant reinitiated contact by asking to speak with the detective. He said during a statement made not in response to questioning that he wanted to talk to the detective, his mother, and his attorney. He subsequently confessed to the crime. Held: The statement about talking to his lawyer was not an unequivocal request for counsel.

Edwards is not violated when defendant repeatedly makes statement to a correctional officer that he wants to get the crime off his chest and wants to get right with God, and then confesses.

•Jones v. S., 748 So. 2d 1012 (Fla. 1999), 24 F.L.W. S535 (11/12/99)

Defendant may not invoke the fifth amendment right to counsel until custodial interrogation has begun or is imminent. Where defendant signs an "Edwards notice" following his arrest for fleeing, and then a week later is approached by the police an interrogated regarding a separate crime, defendant's Miranda waiver is proper.

Thomas v. S., 748 So. 2d 970 (Fla. 1999), 24 F.L.W. S461 (9/30/99)

During Miranda warnings, defendant asked LEO, "Well, what good is an attorney going to do?" The officer did not answer and continued trying to get defendant to talk. Held: Subsequent statement violates Miranda and should be suppressed.

Under Traylor v. State, 596 So. 2d 957 (Fla. 1992), when a suspect asks a clear question regarding his rights during Miranda warnings, the officer is required to give a simple, straightforward answer. Giving an evasive answer or attempting to evade the question violates Miranda and results in coercion. Any statement thus obtained violates the Florida Constitution and cannot be used by the state.

(See this case for extensive discussion of Florida's Miranda law as adopted by Traylor.)

•Almeida v. S., 737 So. 2d 520 (Fla. 1999), 24 F.L.W. S331 (7/8/99)

Custody for Miranda purposes encompasses not only a formal arrest, but any restraint on freedom of movement of the degree associated with formal arrest. If a reasonable person placed in the suspect's position would believe that his freedom of movement has been curtailed to the extent associated with a formal arrest, he is in custody for Miranda purposes.

Whether a person is in custody is a mixed question of law and fact. The following are factors the court should consider: (1) the manner in which police summon the suspect for questioning; (2) the purpose, place, and manner of the interrogation; (3) the extent to which the suspect is confronted with evidence of his or her guilt; (4) whether the suspect is informed that he or she is free to leave the place of questioning.

(See this case for extensive discussion of "custody" for Miranda purposes.)

After taking an unlawful unwarned statement, giving proper Miranda warnings can cure the error and allow a subsequent warned statement to be admitted if the warnings are careful and thorough. However, where the police give the warnings in a manner designed to minimize and downplay their importance, the subsequent, warned statement should be suppressed.

The manner in which Miranda warnings are given is a critical factor in determining whether a subsequent waiver of the rights is voluntary. Any evidence that the suspect was threatened, tricked, or cajoled into a waiver will render the waiver involuntary. The suspect's age and level of experience in the justice system affects the level of care needed in giving warnings.

Under §39.037(2) (now §985.207(2)), the police are obligated to attempt and continue to attempt to contact the child's parent upon his arrest. Under Allen v. State, 636 So. 2d 494 (Fla. 1994), the police may not continue to question a juvenile after the child's parent asks to talk with him. Where a child's parent is not given an opportunity to be present during interrogation despite the parent's request, the statement is involuntary.

In admitting a juvenile's confession, the state must demonstrate meaningful attempts to contact the child's parents

•Ramirez v. S., 739 So. 2d 568 (Fla. 1999), 24 F.L.W. S353 (7/8/99)

The failure to notify a juvenile's parents of the police intention to question a juvenile, or the failure to tell the child of his right to have his parent present does not result in the suppression of the statement, but is a factor the court can use to determine whether the statement is voluntary.

Where defendant's mother knew defendant was going to jail, he was 18 when interrogated but 17 at the time of the crime, he had a GED, and the interrogation was brief, the court properly finds the confession to be voluntary.

Under Colorado v. Connelly, 479 U.S. 157, 164 (1986), the most outrageous behavior by a private person seeking to secure evidence against an individual does not made the evidence inadmissible under the due process clause. Thus, where defendant's uncle recorded defendant's phone calls from jail and got him to confess by telling him that he needed the information to hire a private attorney, the confessions are admissible (but see Mirabal v. State, 698 So. 2d 360 (Fla. 4th DCA 1997), and see dissent.)

Snipes v. S., 733 So. 2d 1000 (Fla. 1999), 24 F.L.W. S191 (4/22/99)

Statements are not rendered involuntary because the officers do not inform defendant of the nature of the charges at the time of his arrest.

Telling defendant that he should confess and tell them where the body was because the victim's wife needed "closure" is not a Christian burial speech violation sufficient to render a confession involuntary.

Alston v. S., 723 So. 2d 148 (Fla. 1998), 23 F.L.W. S453 (9/10/98)

LEO Mirandized defendant and he gave a statement, then stated he wanted a lawyer. The officer offered defendant a phone book, and stopped questioning. The next day, defendant reinitiated contact and gave a full statement. Held: The adequacy of the LEO's response is irrelevant, because the officer stopped questioning. When defendant reinitiates contact and waives his rights, the statement is properly admitted.

(See this case for discussion of the proper procedure to follow when defendant reinitiates contact following an invocation of the right to counsel.)

•**Jennings v. S., 718 So. 2d 144 (Fla. 1998), 23 F.L.W. S459 (9/10/98)**

A confession made in the course of plea negotiating, which the state wanted as a condition of negotiating, is inadmissible if the plea eventually fall apart.

(See this case for extensive discussion of when a statement made during plea negotiations is admissible.)

•**Richardson v. S., 706 So. 2d 1349 (Fla. 1998), 23 F.L.W. S54 (1/29/98)**

A statement made in an effort to induce a plea bargain is not admissible against the defendant pursuant to rule 3.172(h) and section 90.410. However, once the plea bargain is made, statements made in fulfillment of the plea bargain are admissible if the deal falls through.

(See this case for extensive discussion of when statements are or are not admissible under those sections.)

•**Wainwright v. S., 704 So. 2d 511 (Fla. 1997), 22 F.L.W. S713 (11/13/97)**

A confession obtained by physical or psychological coercion or violation of a constitutional right is involuntary and inadmissible. For a confession to be admissible, the state must demonstrate by a preponderance that the confession was voluntary.

To determine if a Miranda waiver is voluntary, the court must determine first if the waiver was the product of free and deliberate choice rather than intimidation, coercion or deception. Second, the court must determine whether the waiver was executed with a full awareness of the nature of the rights being abandoned and the consequences of their abandonment. The court should use a totality of the circumstances analysis to determine whether a Miranda waiver is valid.

The fact that defendant did not sign a Miranda waiver does not mean the waiver is not voluntary if the defendant orally indicates that he understands his rights.

Where there is competent, substantial evidence to support the court's determination regarding the voluntariness of a waiver, a court on appeal will not disturb the ruling.

Sliney v. S., 699 So. 2d 662 (Fla. 1997), 22 F.L.W. S476 (7/17/97)

The right to counsel under the US constitution attaches at the earliest of the following points: formal charge, preliminary hearing, indictment, information, or arraignment. Under the Florida Constitution, the right attaches at the earliest of the following points: formal charge by information or indictment, as soon as feasible after custodial restraint, or first appearance.

Where an indictment is filed against defendant before his arrest, the right to counsel attaches before he is arrested.

The right to counsel must be invoked before it is effective. Thus, where defendant waives his right to talk to a lawyer after his arrest on the warrant, no violation of the right occurs. the mere appointment of counsel does not invoke the right.

Defendant's Miranda right to counsel is properly waived once he is properly warned and waives counsel.

Smith v. S., 699 So. 2d 629 (Fla. 1997), 22 F.L.W. S396 (7/3/97)

Statements taken in violation of Miranda are inadmissible, regardless of whether they are inculpatory or exculpatory.

Miranda warnings are needed when a suspect is interrogated and in custody. If one or the other requirement is not met, no warnings are needed.

Custody includes more than circumstances when a suspect is arrested. The fact that the police have a warrant for arrest does not mean that the suspect is in custody when interrogated. Custody requires restraint of movement to the degree associated with a formal arrest. The a proper inquiry is not the unarticulated plan of the LEO, but how a reasonable person in the suspect's position would have perceived the situation.

LEOs questioned defendant several times following the murder of his girlfriend's child. After obtaining a warrant for his arrest, they asked him to come to the station for another interview. He did, and denied the killing. He then was arrested. Held: Under those circumstances, the pre-arrest interview was not custodial, and no error occurs in admitting defendant's statements.

After his arrest, defendant invoked his right to counsel. An LEO approached him and told defendant that he was "disappointed" in him. Defendant then made inculpatory statements. Held: The LEO's approach to defendant was "initiation" of contact under Edwards, but the LEO's statement was not "interrogation" under Innes. The statement by the LEO was not intended to elicit incriminating information.

Upon defendant reinitiating contact, formal Miranda warnings are not needed unless he had never been Mirandized. Here, defendant had not received the full warnings, and the subsequent statement confessing to the crime should be suppressed.

When a voluntary statement in violation of Miranda is given and suppressed, a subsequent statement that is not in violation of Miranda should not be suppressed. Thus, where defendant's first statement is suppressed because full warnings are not given, a subsequent statement given after the warnings are provided is admissible.

Once full warnings are given, they need not be given again when defendant talks again so long as the second statement is voluntarily made. Thus, where defendant gives a statement following Miranda, and then a week later indicates he wants to talk again and only partial warnings are provided, the second statement is admissible.

•Davis v. S., 698 So. 2d 1182 (Fla. 1997), 22 F.L.W. S331 (6/5/97)

The rule of *Davis v. United States*, 514 U.S. 452 (1994), which holds that police need stop a custodial interrogation only if the suspect "clearly" invokes his right to silence or counsel, will be adopted as the law in Florida. Thus, when a suspect makes an equivocal invocation, the police no longer need to stop questioning to clarify the suspect's desires.

(See concurring opinion by Shaw, J., stating that the courts should use a "reasonable person" standard when determining whether a suspect has "clearly" invoked his right to cut off questioning. Thus, a suspect "clearly" invokes his right to stop questioning when a reasonable person would conclude that the suspect has evinced a desire to stop the interview in light of all of the circumstances surrounding the statement, including the suspect's schooling, command of English, and ethnic background.)

•S. v. Owen, 696 So. 2d 715 (Fla. 1997), 22 F.L.W. S246 (5/8/97)

A statements cannot be obtained through direct or implied promises. The totality of circumstances must indicate that the confession is the result of a free and rational choice.

The state must show by a preponderance of evidence that defendant's statement was voluntary.

The fact that the court fails to make an explicit finding that defendant's statement was voluntary will not result in reversal when it is clear that the issue of voluntariness is before the court and the record shows with unmistakable clarity that the court found by a preponderance of evidence that the statement was voluntary.

When defendant makes self-serving statements indicating that he was promised leniency in return for his statements, and the testimony of the LEOs involved is contrary, the court does not err in finding the statements voluntary.

Johnson v. S., 696 So. 2d 326 (Fla. 1997), 22 F.L.W. S253 (5/8/97)

A defendant cannot invoke his Miranda right to counsel by signing a form claiming his rights when interrogation has not begun or is imminent. Thus, when defendant signs an invocation of rights form provided by his PD and LEOs approach him on an unrelated crime and he validly waives his Miranda rights, the confession is properly admitted.

•Sapp v. S., 690 So. 2d 581 (Fla. 1997), 22 F.L.W. S115 (3/13/97)

A decision on the issue whether defendant was too intoxicated to waive his rights is reviewed in the light most favorable to the prevailing theory. If the ruling is supported by substantial competent evidence, it will not be reversed.

•Orme v. S., 677 So. 2d 258 (Fla. 1996), 21 F.L.W. S195 (5/2/96)

When the evidence regarding the voluntariness of defendant's confession is conflicting, the appellate court should review it in the light most favorable to the prevailing party. The fact that the evidence is conflicting does not mean that the state failed to meet its burden of showing voluntariness.

Telling defendant that he failed a polygraph does not render a subsequent confession involuntary so long as there is no showing of physical, psychological coercion, intentional deception, or violation of a constitutional right.

Absent egregious police misconduct, a confession may be admitted but defendant is entitled to argue voluntariness to the jury.

Police misconduct poses a question of law for the judge, but less serious matters that may reflect on the reliability or fairness of the confession are questions of fact.

Putting allegations of polygraph misconduct into issue necessarily opens the door to all matters associated with the polygraph, and the state cannot broach the matter unless the defense opens the door.

Police do not improperly prey on defendant's conscience by telling him he had a serious sexual disorder and needed help. Police may appeal to the conscience of individuals.

Violation of rule 3.111(d)(4) by failing to provide the signature of at least two attesting witnesses to defendant's waiver of right to counsel does not result in reversal unless it results in prejudice or harm. Where one witness attests to the waiver, the confession is upheld.

Johnson v. S., 660 So. 2d 637 (Fla. 1995), 20 F.L.W. S343 (7/13/95)

When defendant alleges in a motion to suppress that defendant was not read his Miranda rights and did not make the statement alleged by the police, subsequent claims that defendant did not understand his rights, he made the statement after invoking his right to remain silent, and his 6th amendment rights were violated are not preserved for appeal.

Pangburn v. S., 661 So. 2d 1182 (Fla. 1995), 20 F.L.W. S323 (7/6/95)

Motion to Take Deposition to Perpetuate Testimony

Where state moves to take deposition to perpetuate testimony under Rule 3.190(j), Fla.R.Crim.Pro and fails to give notice to defendant personally, defendant's right to confront witnesses is denied, error is fundamental, and conviction is reversed.

Brown v. S., 471 So. 2d 6 (Fla. 1985)

Failure of the state to procure a written commission to take deposition to perpetuate testimony does not result in suppression of deposition when defendant does not object and was not prejudiced.

Where defendant sat in the hall during deposition to perpetuate and could not hear well due to malfunctioning hearing aid, right of confrontation is not violated.

Court reporter who recorded videotaped deposition may authenticate the videotape.

S. v. Wells, 538 So. 2d 1292 (2d DCA 1989)

Where defendant is not given notice and opportunity to be present during deposition to perpetuate testimony, right to confront witnesses is violated and conviction is reversed.

Wilson v. S., 479 So. 2d 273 (2d DCA 1985)

While rule 3.190(j) requires a written motion, where the defense does not object to proceeding without a written motion no error is shown.

The state flew the victim in from Haiti, and defense asked to continue. The court agreed to continue on the condition that the defendant would agree to perpetuate the victim's testimony. The defense agreed. When the case came up for trial before a different judge, the judge noted the absence of a written motion and excluded the perpetuated testimony. Held: Court errs in excluding the deposition. The defense waived any procedural defects in taking the deposition.

S. v. Charles, 827 So. 2d 1107 (3d DCA 2002), 27 F.L.W. D2253 (10/16/2002)

Court errs in refusing to permit depositions to perpetuate testimony for out-of-country witnesses where the witnesses' testimony would have supported the defendant's defense.

Montoya-Navia v. S., 691 So. 2d 1144 (3d DCA 1997), 22 F.L.W. D943 (4/16/97)

Deposition to perpetuate testimony was taken of witness. On trial day, witness was available to testify but had organic brain syndrome and there was no guarantee that witness would be lucid for trial. Held: Rule 3.190(j)(6) prohibits use of deposition to perpetuate testimony when the attendance of the witness can be procured. Attendance of witness includes reasonable likelihood that witness is or soon will be able to give coherent testimony. Court did not err in admitting deposition.

DiBattisto v. S., 480 So. 2d 169 (3d DCA 1985)

Court errs in admitting deposition to perpetuate when the state does not have evidence at the time of trial showing that the victim was unable to travel to the trial.

McMillon v. S., 552 So. 2d 1183 (4th DCA 1989)

Deposition of absent witness is not admissible if not taken to perpetuate testimony.

Jackson v. S., 453 So. 2d 456 (4th DCA 1984)

Speedy Trial

Time while defendant is under no actual restraint on liberty is not calculated in any way in determining whether defendant's constitutional speedy trial rights were violated.

While indictment was dismissed and government was appealing, and defendant was free on recognizance, he was in the same posture as any other suspect in a criminal investigation, and no speedy trial rights are implicated.

During appeals by government when defendant was under indictment or restraint, 4-part test is used. Test balances length of delay, reason for delay, defendant's assertion of right, and prejudice to defendant.

U.S. v. Loud Hawk, 76 L.Ed. 2d 96 (1986)

State's convenience in trying conspiracy co-defendants together does not override defendant's right to speedy trial, and thus is not an exceptional circumstance to justify extending speedy trial time, overruling Garcia v. S., 474 So. 2d 1203 (5th DCA 1985).

Garcia v. S., 498 So. 2d 401 (Fla. 1986)

Seven year and seven month delay between crime and indictment, during which time substantial evidence pertaining to defendant's alibi is lost and other exculpatory

evidence is lost, results in a due process violation causing conviction and death sentence to be reversed.

Where due process violation caused by pre-indictment delay is alleged, defendant must show actual prejudice. Once actual prejudice is shown, the court must balance the government's need for the delay against the prejudice asserted by the defendant. Where prosecution's actions violate fundamental concepts of justice, reversal is required.

This issue is a fourteenth amendment due process issue, not a sixth amendment speedy trial issue.

•Scott v. S., 581 So. 2d 887 (Fla. 1991)

Defendant was charged with attempted murder, he filed a demand for speedy trial, and before the expiration of the demand period the state nol prossed. Two years later the state refiled. Held: State may not avoid the effect of a speedy trial demand by nol prossing, and he 15-day recapture window does not apply under the circumstances. Thus, defendant's trial is barred.

•S. v. Agee, 622 So. 2d 473 (Fla. 1993), 18 F.L.W. S391 (7/1/93)

Defendant was arrested in 1981 and charged with murder. The state nol prossed 9 days before speedy trial ran.He was re-indicted in 1990 and moved for discharge. Held: Under S. v. Agee, the speedy trial period continues to run after a state nol pros and the state may not refile based on the same charges after the period has expired.

Dorian v. S., 642 So. 2d 1359 (Fla. 1994), 19 F.L.W. S511 (10/6/94)

When the state ends a case by filing a notice of no information, and later decides to file the charges, the defendant has the right to move for dismissal under the speedy trial rule if the charges are filed more than 175 days after his arrest. The fact that a no information was filed does not toll the period.

•Genden v. Fuller, 648 So. 2d 1183 (Fla. 1994), 19 F.L.W. S559 (11/3/94)

Defendant committed several crimes and was arrested. He was charged with some of the crimes. The state nol prossed the charges before speedy trial ran, and the defense filed a motion to discharge after the time ran. State then refiled all charges and the court denied the motion to discharge. Held: Under Agee rule, the motion should have been granted (but see dissents).

When the state is not ready to charge a defendant who has been arrested, the state should file the charges and seek an extension rather than fail to file.

(See dissents, arguing that under this rule once a defendant is arrested and speedy trial runs on one charge, the suspect gains immunity from any other crime arising from the incident).

•Reed v. S., 649 So. 2d 227 (Fla. 1995), 20 F.L.W. S34 (1/19/95)

Court has no authority to "deny" a demand for speedy trial. The court can strike the demand as invalid upon a finding that defendant's desire for an early trial is not "bona fide" or a determination that counsel has not investigated the case. But refusing to set the trial within the time periods specified merely because counsel has not engaged in discovery thereby making the case "ripe" for an ineffective assistance claim is not proper. First degree murder conviction and death sentence is reversed and defendant discharged.

(See this case for extensive discussion of the procedures to follow when defendant demands s speedy trial).

•Landry v. S., 666 So. 2d 121 (Fla. 1995), 20 F.L.W. S486 (9/21/95)

LEO got a sex abuse report. they went to defendant's home and they asked defendant to accompany them to the station. He agreed, LEO read him his rights, and they went to the station. LEO placed defendant in a holding cell for two hours, and another LEO then interviewed him. Defendant consented to a body search, and hair and blood were taken. Defendant was allowed to walk around the station, and after a total of seven hours, he was released. Held: Defendant was not in custody for speedy trial purposes, and the speedy trial period did not start until he was formally arrested a year later.

Under rule 3.191, a defendant must be taken into custody to trigger the running of the speedy trial time. Custody does not require a formal arrest, but it does require more than an investigatory detention. Custody for fourth amendment purposes does not custody for speedy trial purposes.

•S. v. Lail, 687 So. 2d 873 (2d DCA 1997), 22 F.L.W. D277 (1/22/97)

The "exceptional circumstance" extension of speedy trial time allowed under rule 3.191(l) is applicable both before the 175 day period expires and during the 15-day recapture period. Thus, when the prosecutor becomes ill during the recapture period, an exceptional circumstance extension is properly granted.

(But see dissent, arguing that the prosecutor's illness does not qualify as an exceptional circumstance in the absence of a showing that her presence was "uniquely necessary for a full and adequate trial.")

•Brown v. S., 695 So. 2d 1275 (1st DCA 1997), 22 F.L.W. D1564 (6/23/97)

The provisions of rule 3.191(i) permitting the state to move for an extension of speedy trial for good cause apply to an extension sought during the recapture period as well as during the regular 175-day period.

Brown v. S., 715 So. 2d 241 (Fla. 1998), 23 F.L.W. S266 (5/14/98)

A violation of the five or ten-day periods in rule 3.191(p)(3) is harmless if the defendant is actually brought to trial within fifteen days of the notice of expiration.

S. v. Salzero, 714 So. 2d 445 (Fla. 1998), 23 F.L.W. S359 (6/18/98)

(See **Rivera v. S., 717 So. 2d 477 (Fla. 1998), 23 F.L.W. S343 (6/11/98**) for discussion of pre-indictment delay and the requirement of showing prejudice to establish a due process violation.)

The constitutional speedy trial right attaches upon arrest, filing an indictment or information, or other official accusation.

In determining whether a constitutional speedy trial violation occurred, the court should consider: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant has timely asserted his rights; and (4) the existence of actual prejudice as a result of the delay.

Where there was a 44 month delay between filing and arrest, the delay is presumptively prejudicial.

Where defendant was continuously available in the jurisdiction of the court, had electricity and phone in his name, and no effort was made to find him, the delay was attributable to the negligence of the state.

Where an important defense witness died during the delay period, defendant sufficiently shows prejudice to make out a constitutional speedy trial violation, and the court errs in denying a motion to dismiss.

Seymour v. S., 738 So. 2d 984 (2d DCA 1999), 24 F.L.W. D1620 (7/9/99)

State moved for a continuance due to missing witnesses, and the court granted the delay, noting that there would be no more continuances. Defendant filed a notice of expiration for speedy trial purposes, and at the next docket sounding, the state again stated that witnesses were missing. The court denied a continuance and dismissed. Held: Failure to consider the state's arguments, and dismissing the case solely due to the prior warning against another continuance, is an abuse of discretion.

To get a continuance due to the unavailability of a witness, the movant must show: (1) prior due diligence to obtain the witness's presence; (2) that substantially favorable testimony would have been forthcoming; (3) that the witness was available and willing to testify; and (4) that the denial of the continuance would cause material prejudice.

Where the court is limited by a speedy trial problem, and the state is unable to proceed due to missing witnesses, the court must at least listen to the state's argument for a continuance.

S. v. J.G., 740 So. 2d 84 (3d DCA 1999), 24 F.L.W. D1625 (7/14/99)

Court errs in sua sponte striking a demand for speedy trial without a motion from the prosecutor.

McNeal v. S., 750 So. 2d 731 (2d DCA 2000), 25 F.L.W. D290 (1/26/2000)

When an information is not filed until 207 days after an arrest, the prosecution is barred. The defense has no obligation to file a notice of expiration.

Williams v. S., 774 So. 2d 23 (2d DCA 2000), 25 F.L.W. D2147 (9/1/2000)

A defendant need not choose between the right to a speedy trial and the right to discovery within sufficient time to prepare for trial. Where discovery is not provided within sufficient time to allow defendant to make reasonable use of it, the court should continue the case beyond speedy trial time and charge the continuance to the state, thereby granting the speedy trial discharge.

Vega v. S., 778 So. 2d 505 (3d DCA 2001), 26 F.L.W. D587 (2/28/2001)

When the state fails to take any action in a case prior to the expiration of speedy trial time, upon a motion to dismiss the state is not entitled to the 15-day recapture period. The state cannot file charges after the speedy trial time has run.

S. v. Williams, 791 So. 2d 1088 (Fla. 2001), 26 F.L.W. S513 (7/13/2001)

A demand for speedy trial under rule 3.191(b) does not require that the defendant be taken into custody. Thus, when defendant has not been arrested, he can still file a demand under the rule.

Brown v. S., 798 So. 2d 773 (2d DCA 2001), 26 F.L.W. D2034 (8/22/2001)

(See **Evans v. S., 808 So. 2d 92 (Fla. 2001), 26 F.L.W. S823 (12/13/2001)** for discussion of when pre-indictment delay can result in dismissal of charges.)

Where the court inadvertently set a case for trial outside the speedy trial window, and then realizes the error and tries to move the case up but the trial cannot begin because defendant cannot be located, the court properly finds defendant not ready for trial and denies discharge.

Goodrich v. S., 834 So. 2d 893 (3d DCA 2002), 28 F.L.W. D6 (12/18/2002)

When the state requests an extension of speedy trial for the purpose of taking an interlocutory appeal of a trial court's ruing, the court must grant the extension for the length of time needed to complete the appeal unless the court rules that the appeal is frivolous.

S. v. Clarke, 834 So. 2d 398 (2d DCA 2003), 28 F.L.W. D235 (1/17/2003)

Incompetency

Where one expert opines that defendant is competent and two defense experts state he is not, and there is record evidence supporting the judge's determination that defendant was competent, the decision is not an abuse of discretion and will be affirmed on appeal.

Hertz v. S., 803 So. 2d 629 (Fla. 2001), 26 F.L.W. S725 (11/1/2001)

For a mental health expert's opinion to constitute evidence adequate to support a court's determination on competency, the report must discuss each of the specific factors set out in rule 3.211(a).

Evans v. S., 800 So. 2d 182 (Fla. 2001), 26 F.L.W. S675 (10/11/2001)

In determining whether a defendant is competent to stand trial, the court must decide whether the defendant has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him.

Bryant v. S., 785 So. 2d 422 (Fla. 2001), 26 F.L.W. S218 (4/5/2001)

When conflicting testimony is presented regarding competency, it is the court's responsibility to consider all of the evidence and resolve the factual dispute. The judge's decision will be upheld absent an abuse of discretion.

(See this case for extensive discussion of competency proceedings for a defendant charged with murder who attempted suicide resulting is extensive brain damage.)

•Hardy v. S., 716 So. 2d 347 (Fla. 1998), 23 F.L.W. S347 (6/11/98)

While a county judge can properly make competency determinations in misdemeanor cases, only a circuit judge is authorized by §916.106 and §916.13 to order a defendant to be committed to HRS for placement in a forensic facility.

A county judge cannot be appointed by administrative order to enter commitment orders under §916.13 in misdemeanor cases.

Onwu v. S., 692 So. 2d 881 (Fla. 1997), 22 F.L.W. S217 (4/24/97)

Defendant is competent to stand trial if he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational understanding of the proceedings against him.

Reports of psychological or psychiatric experts are merely advisory to the trial court, and the judge retains the responsibility to make the final determination himself. The court should review all evidence relating to competency and the court's decision will not be reversed without showing an abuse of discretion. Where there are conflicting opinions on competency, the court's determination that defendant is competent will not be reversed.

Court does not err in refusing to do a second competency hearing where the renewed motion presented nothing materially different than the first motion. Only if a bona fide doubt as to defendant's competency is raised is the court required to do another competency hearing.

•Hunter v. S., 660 So. 2d 244 (Fla. 1995), 20 F.L.W. S251 (6/1/95)

CHAPTER 4
CONDUCTING THE TRIAL

Chapter 4 - Conducting the Trial

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CONDUCTING THE TRIAL

4.01 KEY POINTS

- Article I, Section 16 of the Florida Constitution, and the Sixth Amendment of the U.S. Constitution, both give each defendant the right to a jury trial in all criminal prosecutions.

- Rule 3.251 tracks the language of Article I, Section 16 and provides that "[I]n all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury..."

- However, a defendant's right to a trial by jury has been judicially limited to only those crimes which are considered to be "serious" as opposed to crimes considered to be "petty." The Supreme Court in Whirley v. State, 450 So. 2d 836 (Fla. 1984) has enumerated four classes of serious crimes as to which a defendant is entitled to a jury trial:

    - crimes that were indictable at common law
    - crimes that involve moral turpitude
    - crimes that are malum in se or inherently evil; and
    - crimes that carry a maximum penalty of more than six months in prison.

- Section 918.0157, Florida Statutes states that a defendant has the right to a trial by jury unless:

    - Court announce that in the event of a conviction of the crime or any lesser included offense a sentence of imprisonment will not be imposed and the Defendant will not be adjudicated guilty; and,

    - The right to a trial by jury is not guaranteed under the State or Federal Constitution.

- Waiver of Jury Trial

    - Make sure defendant understands his/her right to have a jury trial.

    - Determine that the defendant understands the difference between a jury and non-jury trial.

    - Determine that decision is freely and voluntarily being made.

    - Court makes findings of fact regarding the voluntariness of defendant's decision.

    - Have defendant execute a waiver of jury trial affidavit and file in court file.

- State must join in waiver.

- <u>Steps in Jury Trial</u>

- Call Jury panel.
  - Explain importance of jury's role and function of all court personnel. Advise of court's schedule and when breaks will be given.

- Voir Dire
  - Question jurors -- Court may use standard questionnaire previously given to jurors.
  - State then ask questions
  - Defense then asks questions

- Jury selection.
  - Each side has unlimited challeges for cause and three peremptory challenges per defendant.
  - State challenges
  - Defense challenges
  - State tenders
  - Defense tenders

- Swear jury.
  - Swear alternate juror separately. Ask: any objection to jury panel? Has defendant attorney consulted with defendant re: jurors?
  - Have record reflect presence of defendant and his/her attorney

- Read preliminary instructions - 1.01

- Opening Statements
  - State opens to jury
  - Defense opens - defense may reserve opening until close of state's case

- Testimonial Phase
  - State calls witnesses - clerk swears in each witness
  - State rests
  - Defense motions (jury out)
  - Ensure that attorney does not argue the facts - only the law
  - Find out, outside jury's presence, if the defense will be putting on a case Defense's case
  - Defense calls witnesses - clear swears each witness
  - Defense rests
  - State presents any rebuttal evidence

- Charge conference - outside of jury's presence

- Closing argument

    - Defendant goes first and last if defendant presents no evidence, whether or not defendant testifies
    - State goes first and last if defendant presents any evidence

- Jury charge

    - Read information or charges verbatim
    - Definitions
    - Standard instructions
    - Special instructions
    - Read form of verdicts to jury
    - Ask if any objections to any charges or form verdicts

- Jury deliberations

- Verdict

    - Ask jurors if an agreement has been reached
    - Ask foreperson to hand verdict form to clerk and have clerk read
    - Poll jury if requested - Is this your verdict?

- Discharge jury

    - Read discharge instructions and hand out certificates
    - If not guilty verdict, "Mr./Ms. defendant, the jury having found you not guilty, I hereby adjudicate you not guilty and forever discharge you from this case."

- Sentencing

    - If guilty verdict, ask: "Is there any legal reason why sentence should not be imposed?" (attorney and defendant speak)
    - "Mr. or Ms.(defendant), the jury having found you guilty of _____, I hereby adjudicate you guilty or withhold adjudication and impose the following sentence:"

- Right to appeal
    - "You are now advised that it is your right to appeal from the judgment and sentence within 30 days."
    - If there is a jail sentence, set a supersedeas bond. Supersedeas bond cannot be

posted until a notice of appeal is filed

4.013 Peremptory Challenges

- Peremptory challenges may not be used to challenge potential jurors based on the juror's race, religion, ethnicity or sexual differences.

- At present the case law has established the following "cognizable groups":
  - African-American: (State v.Neil, 457 So.2d 481 (Fla. 1984).
  - Hispanics: State v. Alen, 616 So.2d 452 (Fla. 1993)
  - American Indians: Tennie v. State, 593 So.2d 1199 (Fla. 2d DCA 1992)
  - Jews: Joseph v. State, 636 So.2d 777 (Fla. 3d DCA 1994)

- White jurors: Rome v. State, 627 So.2d 45 (Fla. 1st DCA 1993);
  - McClain v. State, 596 So.2d 800 (Fla. 1st DCA 1992), requiring a heavier burden to establish invidious racial discrimination when dealing with the majority race

- Women: Abshire v. State, 642 So.2d 542 (Fla. 1994).
  - Men: Drawdy v. State, 644 So. 2d 593 (Fla. 2 DCA 1994).

- The party objecting to the use of a peremptory challenge on racial grounds must:
  - make a timely objection on that basis;
  - show the venire person is a member of a distinct racial group, and;
  - request that the court ask the striking party its reason for the strike. Melbourne v. State, 679 So.2d 759 (Fla. 1996).

- The Court's focus in determining whether a strike is facially race-neutral and not pretextual is not on the reasonableness of explanation but, rather, on its genuineness. Melbourne, supra.

- Procedure:

  - Party objects to the exercise of a peremptory challenge (applied to either party).
  - Party must specifically state each time:
    - I object to use of challenge against _____(juror 's name).
    - Juror is a (cognizable group).
    - Request court ask striking party its reason for strike.
  - Court must conduct a hearing.
  - Court asks party exercising challenge to give a race/ethnic/gender-neutral reason for striking juror (reason must be supported by the record).
  - Court determines if reason is valid in light of the case law and facts of the case. (Genuineness not reasonableness).
  - The court must determine if reason is genuine and not pretextual. If the Court concludes that the proffered reason is genuine, it should allow the peremptory challenge. If the Court finds that the proposed explanation is not genuine, it should disallow the peremptory challenge and require that the juror be seated.

AUTHORITIES

Sixth Amendment, United States Constitution
Article 1, Section 16, Florida Constitution

Florida Rules of Criminal Procedure:
3.250 - Accused as Witness
3.251 - Right to Trial by Jury
3.260 - Waiver of Jury Trial
3.270 - Number of Jurors
3.280 - Alternate Jurors
3.281 - List of Prospective Jurors
3.290 - Challenge to Panel
3.300 - Vior Dire Examination, Oath, and Excusing of Member
3.310 - Time for Challenge
3.315 - Exercise of Challenges
3.330 - Determination of Challenge for Cause
3.340 - Effect of Sustaining Challenge
3.350 - Peremptory Challenges
3.361 - Attendance of Witnesses
3.440 - Rendition of Verdict; Reception and Recording
3.450 - Polling the Jury
3.451 - Judicial Comment on Verdict

Florida Statutes:
Section 40.01 - Qualifications of Jurors
Section 40.013 - Persons Disqualified or Excused from Jury Service
Section 918.0157 - Right to Trial by Jury

Case Law:
State v. Thorp, 659 So.2d 116 (Fla 2 DCA 1995)(State must consent to waiver of jury trial)
Whirley v. State, 450 So. 2d 836 (Fla. 1984)

TIPS/NOTES

CHECKLISTS/FORMS

Faretta Inquiry - Trial Stage

- Right to Counsel Section

Do you understand that you have the right to a lawyer? If you can't afford to hire your own lawyer, and if you qualify for a court appointed lawyer, one can be appointed for you.

  - That State of Florida will pay for a lawyer to advise you in these Court proceedings.
  - Shall I appoint a lawyer to represent you in this case?

- Advantages Section

I would like to begin by explaining to you some of the ways that having a lawyer represent you can be to your advantage:

  - A lawyer has the experience and knowledge of the entire trial process.
  - The lawyer can call witnesses for you, question witnesses against you, and present evidence on your behalf.
  - The lawyer will question potential jurors. The lawyer also has the expierence to know which jurors will be in your best interest.
  - A lawyer can advise of the harm and consequences of what you say in court and what you have a right not to say.
  - Do you understand that a lawyer will object to those questions that are improper?
  - Do you understand that a lawyer has studied the rules of evidence and knows wat evidence can or can not come into your trial?
  - And finally, do you understand that a lawyer will argue for your side during the whole trial and present the best legal argument for your defense?

- Disadvantage Section

As it is almost always unwise to represent yourself in court, let me tell you a few of the disadvantages of representing yourself in court:

  - Do you understand that you will not get any special treatment from the Court because you are representing yourself?
  - You also must follow all the procedural and substantive rules of criminal law. The same laws which took lawyers years to learn and abide by.
  - (If defendant is in custody) You will be limited to the resources that are available to you while you are in custody. A lawyer has less restrictions in researching your defense.
  - Do you understand that your access to the assistant state attorney will be severely reduced as compared to a lawyer who could easily contact the assistant state attorney.
  - As well, the State will not go easier on you or give you any special treatment because you are representing yourself.
  - The State will present its case against you using an experienced lawyer.

- Do you understand that if you are disruptive in the courtroom that the Court can terminate your self-representation and remove you from the courtroom? In that situation the trial will continue without your presence.
- If a "stay away order" is in effect you will be prohibited from contacting the victim and any other witnesses who are part of the "stay away order". On the other hand, a lawyer is allowed to speak to these people and question them regarding their testimony.
- Finally, if you do get convicted, you can not claim your own incompetence as a basis for appeal.

- Charge and Consequences Section
  - Have you received and read a copy of the charges against you?
  - Do you understand all the charges against you?
  - Do you understand all the possible penalties if you are found guilty of all the charges?
  - If you are found guilty by the jury the maximum jail sentence is _____ and the minimum sentence is _____.
  - You may be forced to report to a probation officer for _____.
  - You may have a permanent criminal record.
  - Do you understand that if you are not a citizen of the United States, and if you are found guilty you could be deported from the country, excluded from entering this country, and denied the opportunity to become a naturalized citizen?

- Competency Section

I need to ask you a few questions about your background:
  - Can you read? Can you write? Do you have difficulty understanding English?
  - How many years of school have you completed?
  - Are you under the influence of drugs or alcohol?
  - Have you ever been diagnosed and treated for a mental illness?
  - Has anyone told you not to use a lawyer?
  - Has anyone threatened you if you use a lawyer?
  - Do you understand that a lawyer will represent you for free?
  - Have you ever represented yourself in a trial? What was the outcome of the case?
  - Do you have any questions about having a lawyer appointed to defend you?
  - Do you understand the dangers and disadvantages of representing yourself in court?
  - **Are you certain that you do not want me to appoint a lawyer to defend you?**
  - As an alternative to self-representation, if you would like, I could ask the public defender to act as standby counsel if you have any questions in the course of these proceedings. Would you like standby counsel?

- **Sample Colloquy - Waiver of Jury Trial**

- Mr./Ms. (Defendant), you have indicated that you wish to waive your right to a jury trial.

- Do you understand that you are being charged with _____?

- Mandatory minimum sentence is _____(if there is one) and the maximum sentence is_____.

- Do you understand that you have a right to have the case heard by a jury of six (6) people?

- Do you understand that you may give up that right, and instead, have the case heard by me without a jury, in which case only one person will decide the facts?

- Do you understand that while your attorney may advise you on these matters, the decision as to whether the case should be tried by a jury of six (6) people, or by a judge, has to be your own decision?

- Do you wish to give up the right to have the case heard by a jury, and instead, have the case heard by a judge? Has this been your decision?

- Has anybody forced you or threatened you in any way to enter into this decision?

- Are you making this decision freely and voluntarily and because you feel it is in your best interest?

- Do you understand that, if I accept this waiver from you and later on you change your mind and decide you would rather have the case heard by a jury, you will not have the opportunity to have a jury trial?

- Knowing all of this, do you still wish to go ahead and give up your right to a jury trial?

- <u>Court's Findings</u>

  - I am satisfied that the defendant is knowingly and intelligently and freely and voluntarily giving up his/her right to a jury. I will accept the waiver.

  - Mr./Ms. Defendant, please sign the written form to indicate that it is your wish to have the case heard by a judge without a jury.

ORDER WAIVING JURY TRIAL

IN THE COUNTY COURT, IN AND
FOR _____ COUNTY, FLORIDA
_____ JUDICIAL CIRCUIT

CASE NUMBER: _____

STATE OF FLORIDA

Plaintiff,

vs.

_____,
Defendant.

ORDER WAIVING JURY TRIAL

Upon stipulation of the Defendant and the State, the above-styled case will be tried by the Court. The Defendant hereby waives his/her right to a trial by jury, and the State agrees to such waiver.

_____ _____
Defendant State of Florida

Filed in Open Court
This _____ Day of _____, _____.

_____
Deputy Clerk

DONE AND ORDERED this _____day of _____, 20____,
at _____ County, Florida.

_____
County Court Judge

- **Sample Colloquy for Prospective Jurors**

    - Good morning. Welcome to the _____County Courthouse. I am Judge _____, County Judge of the _____ Judicial Circuit. The _____ Judicial Circuit includes _____ and _____ Counties. There are presently _____ county court judges and _____ circuit judges in the _____ Judicial Circuit.

    - Why are you here? I am sure that some of you asked yourself that very question when you received the jury summons in the mail. Why me?

    - I think it is important for the Court to answer that question for you. The entire concept of jury service should be put into proper perspective so that your efforts this week will be more meaningful to you. You are being asked to perform one of the highest duties that can be imposed on a citizen--that is to sit in judgment of civil disputes or determine the guilt or innocence of a person charged with a crime.

    - Our jury system is not perfect. It will never be perfect because it is run by humans and none of us are perfect, but it is the best system yet devised for the settlement of disputes between citizens or between a citizen and his/her government.

    - You as citizens of the United States enjoy the privileges of citizenship and the protection of your liberties and property by the government. Therefore, in return you have a duty as a citizen to participate in some very important aspects of your democracy.

    - Citizens serve their government in many ways such as serving in the armed forces, holding public office, voting and paying taxes. Of all of these, being a juror is the most direct participation in government. When a case is submitted to a jury and it retires to deliberate in order to render a verdict, that jury is the government. It happens in

    - Hundreds of cases in hundreds of courtrooms in every state in this country every day. It places an impartial group of citizens in charge of democracy and assures that the search for truth will not be tainted with governmental oppression. It is the most solemn duty and responsibility that a citizen has to his or her government.

    - While I realize that it is an inconvenience to almost all of you coming here, the system will not work without the participation of citizens from a cross section of the community with different experiences and different backgrounds. It means every person who comes into the courtroom has a right to be seated in this jury box; side by side with people who are formally educated and those educated by life and experiences, those of different religions, cultures, races, and gender.

- WHY ARE YOU HERE? In sum, you are not only here today to perform your civic duty to serve on a jury, but you are also ensuring the survival of our democracy.

- Now I am going to address some of the more common procedural questions about jury duty.

- LENGTH

  - Usually your jury service is for one day or two at the most. We usually don't have cases that should last several days or weeks. If there is a trial that will be lengthy in duration, you will be notified of this so that if you have any problems with the length you can notify the court.

  - Usually jurors work a normal business day--from 9 o'clock a.m. until 5 o'clock p.m. Occasionally cases require we go longer than that, and if that is the case we try to let you know in advance so that you can plan.

  - You need to understand that trial by jury cannot proceed in a mechanical fashion. This is a human system. Matters continually come up that need to be taken up outside the presence of the jury. Some of these matters will be of short duration, and other matters will be of much longer duration. We will try our best to make sure that as little of your time is consumed in waiting as possible. But as a practical word of caution, there will be periods of waiting. So I encourage you to bring reading material or letter writing materials or other activities which can be done during these periods of waiting. And people will be communicating with you on an intermittent basis to let you know what's happening.

- THE QUESTIONING OF JURORS

  - You will be required to take two oaths before you can serve as a juror. First, you will be sworn to answer truthfully all questions asked of you regarding your qualifications to serve. Then, when you are called to a panel for a particular case, the judge and the lawyers will ask additional questions of you regarding your background. The latter questioning is called “voir dire” examination.

  - During voir dire some of the questions may seem personal, but the questions are not intended to embarrass or reflect upon a juror in any way. Lawyers have a duty to ask questions to assist them in deciding which jurors to select.

  - A juror may be excused "for cause" when the judge is of the opinion that the juror cannot render a fair and impartial verdict. The attorneys can also exercise a limited number of "peremptory challenges," by which they may excuse a juror

without stating any reason. If a juror is challenged or excused, it is not a reflection on the juror in any way. That a juror is excused means simply that in the particular case it is proper and lawful to excuse him or her. Those jurors who are selected to try a particular case are then sworn.

- WHAT DOES A JURY DO?

    - It will be your duty to decide from the evidence what the facts are. You hear the evidence and then decide the facts. You and you alone are the judges of the facts. You will hear the evidence, decide what the facts are, and then apply those facts to the law which the Court will give to you.

    - In a criminal case you will decide whether or not the State has proved its case beyond a reasonable doubt against an accused. In a civil case you will decide if the plaintiff has proved his/her case by a preponderance of the evidence against the defendant.

- ANSWERS TO QUESTIONS COMMONLY ASKED

    - What is the difference between a criminal and civil case?

        - Cases which come before a petit jury are divided into general classes: **Civil** and **Criminal.** If it's a case where there is a possibility of the loss of liberty, then it is a **Criminal** case. In a Criminal trial, the persons bringing the action are the people of the State of Florida, represented by the "prosecutor." The "defendant" is a person or corporation accused of a violation of law.If it's a case in which people are trying to seek monetary results, then it is a **Civil** case. In a Civil trial, parties in dispute come into court to determine and settle their respective rights. The person who brings an action against another is the "plaintiff." The person against whom the action is brought is the "defendant."

    - If it is a criminal case, what is the difference between a felony and a misdemeanor?

        - In a **felony case** a person can go to the state prison for more than a year and one day. In a **misdemeanor case** a person can go to the county jail for up to one year. A person can only be sentenced to a year or less.

    - What is the difference between the circuit court and the county court?

        - CIRCUIT: Criminal-over one year incarceration.Civil - over $15,000
        - COUNTY: Criminal-one year or less incarceration.Civil - up to $15,000

- How many jurors serve on each case?

    - In all cases in Circuit and County court, in civil and criminal cases, there are 6 jurors that serve on the jury. There are two exceptions: 1) If the government is seeking the death penalty in a criminal; or 2) If the government is seeking to take your land in a civil case(eminent domain), then there are 12 jurors.

- QUALIFICATIONS OF THE JURORS

    - Now I will qualify you as jurors. Please stand and raise your right hand.

    - Do you solemnly swear or affirm that you will answer truthfully all questions asked of you as prospective jurors?

    - The questions I will now ask you are divided into those the usual answer to which is "Yes", and those usually answered "No." If your answer is different from the usual answer, please call yourself to my attention:

- QUALIFYING QUESTIONS FOR PROSPECTIVE JURORS

    - Are you at least 18 years of age? **Required, F.S. 40.01**

    - Are you a citizen of Florida? **Required, F.S. 40.01**

    - Are you a full time federal, state or local law enforcement officer? **Excuse if requested, F.S. 40.013(2)(b)**

    - Are any of you expectant mothers? **Excuse if requested, F.S. 40.013(4)**

    - Are any of you parents not employed full time who have custody of a child under the age of six? **Excuse if requested**, **F.S. 40.013(4)**

    - Are any of you practicing attorneys or physicians?

- **Judge's discretion, F.S. 40.013(5)**

    - Do any of you have a physical infirmity that would render you incapable of being a fair and impartial juror attentive to all the evidence and law? **Judge's discretion, F.S. 40.013(5)**

    - Are any of you over 70 years of age? **Excuse if requested, F.S. 40.013(8)**

- Are any of you responsible for the care of a person who because of mental illness, retardation, senility or other incapacity is not able to take care of himself? **Excuse if requested**, **F. S. 40.013(9)**

- (If any of you is required to give an affirmative answer to the next question, please come forward at the end of my questions to discuss this matter). Have any of you been convicted of bribery, forgery, perjury, larceny or any other felony and your civil rights have not been restored? **Required, F.S. 40.013(1)**

- Is anyone under prosecution at this time for any crime either in state or federal court? **Required, F.S. 40.013(1)**

- The court realizes that service on a jury panel is not always convenient. There may be instances where service would be much greater than a mere inconvenience and would constitute a great hardship to an individual or his/her family.

- Under these circumstances, the court may excuse a juror for good cause of postpone the time of service to a later date.

- If because of hardship, extreme inconvenience or public necessity you wish to be excused from jury service, please form a line in front of the bench and we'll address that. **F.S. 40.013(6).** (learn nature of problem. After hearing the problem, make ruling).

- FINAL REMARKS

  - Jury service never comes at a convenient time. And we who work daily in the court system realize that. It is our hope that this week we can take steps to minimize your inconvenience. The court personnel are here to assist you and make your week of service as pleasant as possible. It is our goal to allow you to go about your business unless you are actually needed. You should not read law books, visit the scene of any occurrence in a case, or perform any independent investigation. Everything that you will need to know about a case will be presented to you in the courtroom.

  - Thank you for your patience. I hope that at the end of this week you will find that this was a rewarding and interesting experience; or at least that you will feel that you have done your part to insure that our democratic system of justice continues.

- **Sample Colloquy for Note Taking - Permitted**

    - Notepads and pens have been provided to you so that you may take notes during the trial if you so desire.(or: There has been a request from one of the jurors to take notes.) The taking of notes by jurors is discretionary with the trial judge. I am going to exercise that discretion by allowing you to take notes during the trial and to carry those notes with you to the jury room during your deliberations.

    - However, there are some dangers associated with note taking by jurors about which I will caution you.

    - First, there is the possibility that a person may become so engrossed in taking notes that he or she may fail to see or hear other evidence, or he or she may fail to appreciate the demeanor of a witness.

    - Also, when a juror uses his or her notes during the jury's deliberations, there may be a tendency for other jurors to rely on those notes and to abandon their own recollection of the evidence.

    - If your recollection of the evidence differs from the notes taken, you should not abandon that recollection merely because of what is contained in the written notes. You should therefore not allow the opinion or position of a juror who is relying on written notes to be given greater weight solely because of his or her notes.

    - After you have completed your deliberations, your notes will be placed into an envelope which will be provided to you when you retire to consider your verdict. The notes will be delivered to me at the end of the trial and I will personally destroy them--unread.

    - You are instructed that although note pads have been furnished, you are not required to take notes.

- **Sample Colloquy for Note Taking - Not Permitted**

    - There has been a request by one of the jurors for permission to take notes during the trial. The taking of notes by jurors is discretionary with the trial judge. I am going to exercise that discretion by not allowing you to take notes during the trial.

    - There are dangers associated with note taking by jurors during the trial.

    - First, there is the possibility that a person may become so engrossed in taking notes that he or she may fail to see or hear other evidence, or he or she may fail to appreciate the demeanor of a witness.

    - Also, when a juror uses his or her notes during the jury's deliberations, there may be a tendency for other jurors to rely on those notes and to abandon their own recollection of the evidence. Further, the opinion or position of a juror who is relying on written notes may be given greater weight by the other jurors solely because of his or her notes.

    - For these reasons, I am not going to permit you to take notes during the trial. I am going to ask that you pay careful attention to the evidence presented at trial, and that you rely on the collected memories of all the jurors during the jury's deliberations.

Sample Colloquy for Voir Dire

Good morning ladies and gentlemen. My name is Judge_____. I will be the judge presiding over the jury selection as well as the trials in this courtroom. I would like to welcome you to the criminal division of the county court of _____ County. The crimes that are heard in the county court are misdemeanors. Misdemeanors are crimes punishable in the county jail.

So that you will know the persons with whom you will be working and their duties, I will introduce you at this time.

- **BAILIFFS:** They enforce the court's orders and have charge of the jury and are in charge of security in the courthouse.
    - If you have any questions about your personal welfare, apart from questions about the case being tried, you should direct those questions to the bailiffs.
- **COURT CLERKS:** They perform several functions for the court:
    - Swear the jury in.
    - Have custody of any physical exhibits that are introduced into evidence.
    - Swear in the witnesses.
    - Make sure that everything that is being said in the courtroom is being picked up on the tape and is electronically recorded.
- **COURT REPORTER** She/he transcribes everything that is being said in the courtroom.
    - In a few minutes the selection process will begin. centuries and had been adopted by the colonies.
    - There are two matters which are so fundamentally important for you to understand from the outset that I am going to address them.
    - First, is the presumption of innocence. Our system of justice is accusatorial in nature. That means the state has the power to bring charges against a defendant for conduct that violates the criminal laws. However, the state also has the responsibility to prove that charge against a defendant beyond and to the exclusion of every reasonable doubt. A defendant is presumed innocent until proven guilty beyond a reasonable doubt.
    - Secondly, the Fifth Amendment provides that a person accused of a crime has the absolute right to remain silent and to require the state to prove its case without any assistance from the accused. When a defendant invokes this right, a jury is not permitted to be influenced in any way by that decision.

- The (first) case that is set for trial this morning is the case of **State of Florida vs._____.**

- This first part of the trial is called *voir dire. Voir dire* is a French term and it means "to speak the truth." It is a question and answer session touching on your qualifications to serve as jurors in this particular case. I will ask you some questions and after I have finished, the attorneys will ask questions. These questions are not designed to pry into your personal affairs. *Voir dire* is for the purpose of determining if your decision in this case would in any way be influenced by opinions which you now hold or by some personal experience or special knowledge which you may have concerning the subject matter to be tried. The object is to obtain six (6) persons who will impartially try the issues of the case based upon the evidence presented in this courtroom, and without being influenced by any other factors. These questions are to assure each party a fair and impartial jury.

- OPTIONAL: If you are uncomfortable answering any question in front of the entire venire, please raise your hand and ask to approach the bench. I will allow you to answer the question at the bench in the presence of the attorneys, the court reporter and myself.

- I want to point out that there is never going to be enough time to ask you every question that would bring out something in your background that would prevent you from being fair and impartial to the state, the defendant or both.

- So I am asking you to volunteer any information that you feel might make you biased for or against either the state, the defendant or both parties.

- Each side has a certain number of "peremptory challenges", by which I mean each side can challenge you and ask that you be excused without giving a reason for the challenge. There are some legal limitations on "peremptory challenges." For example, factors such as gender or race are not legally permissible grounds to excuse a juror.

- In addition, each side has challenges "for cause", by which I mean that each side can ask that you be excused for a specific reason set out in the law or rules of court.

- If you are excused by either side, please do not feel offended or feel that your honesty or integrity is being questioned. It is not. If you are not selected on this jury, you may be selected for another one.

- As your name is called, please take a seat in the jury box as directed by the bailiff.

- QUESTIONS REGARDING THE INFORMATION

    - The defendant is charged with the offense of: _____.

    - I will now read you the pertinent portion of the information which sets forth the charges against the defendant. The information is not to be considered as evidence but is a mere formal charge against the defendant. You must not consider it as evidence of the defendant's guilt and you must not be influenced by the fact that this information has been filed against the defendant. Under the Constitution of the United States and the Constitution of the State of Florida, every person accused of a crime is entitled to know the exact nature of the charge. The filing of this document fulfills that constitutional requirement.

    - The information charges that the defendant (read pertinent portion of charging document)

    - You have heard the charge made in the information against the defendant.

    - Do any of you know anything about this case, either through your own personal knowledge, rumor, or by discussion with anyone else? (Have any of you read or heard about it in any of the news media?)

- IF A JUROR HAS KNOWLEDGE ABOUT THE CASE: The question is whether the juror has formed an opinion or has developed any bias or prejudice. If so, the test is whether the juror "can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given to him [or her] by the court."

- If there is a reasonable doubt, excuse the juror for cause. Turner v. State, 645 So.2d 444 (Fla. 1994).

- QUESTIONS ABOUT THE PARTICIPANTS IN THE TRIAL

    - The State is represented by Assistant State Attorney_____.

    - Would the Assistant State Attorney stand?

    - The defendant is _____

    - Would the defendant stand?

    - Representing the defendant is _____.

- Would the attorney representing the defendant stand?

- Do any of you know the **defendant** or the **attorneys** in this matter?

- Do any of you know any of the **courtroom personnel including me (the judge)?** If the answer is yes, please raise your hand.

- THE COURT SHOULD READ THE NAMES OF THE POTENTIAL **WITNESSES** (THIS PREVENTS THE DEFENSE FROM HAVING TO COMMIT IN FRONT OF THE JUROR ITS INTENTION TO PRESENT WITNESSES OR NOT WHEN THE STATE RESTS).

    - Do you know any of the witnesses that have been disclosed? If yes, ask:

    - In what capacity have you known _____?

    - Do you feel you have a state of mind with reference to your knowledge of _____in the event of his /her testifying in this case which would prevent you from acting with impartiality?

    - Would your relationship or knowledge of _____cause you to give greater or lesser weight to his/her testimony?

- COURT SCHEDULE FOR TRIAL

    - The court recognizes that service on a jury panel is not always convenient. Every effort will be made to see that your time is not wasted. The estimated length of this trial is _____days. The hours we generally work are from _____a.m. to _____p.m. with regular breaks and a break for lunch.

    - Does the schedule as I have explained it to you present a great hardship for any of you? If the answer is yes, please raise your hand.

- DISABILITIES OF JURORS

    - Do any of you have any medical or physical conditions such as hearing, sight, or otherwise which would require special accommodations or assistance or which would render you incapable of performing your duties as a juror in this case? If so, would you please raise your hand?

- FAIR AND IMPARTIAL JURY

    - Do you have any bias or prejudice either for or against the defendant or the state?

- If you are selected as a juror in this case will you render a fair and impartial verdict based upon the evidence presented in this courtroom and the law as it pertains to this particular case as instructed by the court, even if you disagree with the law and wish that it were different?

- Do you have any reason why you cannot give this case your undivided attention and render a fair and impartial verdict?

- Do each of you agree that trial by jury is the appropriate way to dispose of a criminal case?

- Do any of you have any conscientious beliefs that would preclude you from returning a guilty verdict in an appropriate case?

- On the other hand, do any of you have any conscientious beliefs that would preclude you from returning a not guilty verdict in an appropriate case?

- As jurors, you are the judges of the facts and the trial judge is the judge of the law. Do each of you agree and understand that proposition?

- Do you agree that if you are selected as a juror in this case you will put out of your mind any preconceived notion of what the law is or what you think the law ought to be and accept the law of this case as I instruct you?

- Do you agree that if you are selected as a juror in this case that the verdict you render will be based upon the testimony coming from the witness stand, exhibits introduced into evidence and the instructions on the law I give you---these things and these things only?

- In order to sustain a guilty verdict there must be proof presented by the state of the defendant's guilt beyond every reasonable doubt. I will explain to you later what the term **reasonable doubt** means. At this point then where there has been no proof presented, can the defendant be guilty of anything?

- Do you understand and agree with the principle of law that a person is presumed to be innocent until proven guilty beyond and to the exclusion of every reasonable doubt?

- Will you give the defendant in this case that presumption?

- Will you require the state to prove each and every element of the offense beyond a reasonable doubt?

- If the state proves the defendant's guilt beyond every reasonable doubt, will you render a verdict of guilty?

- If the state cannot prove the defendant's guilt beyond every reasonable doubt, will you render a verdict of not guilty?

- As a final question, if you were asked to go back into the jury room at this time and deliberate, what would be the only verdict that you could render?

- ALCOHOL

  - This case involves allegations of driving and the consumption of alcohol.
    - Does anyone on the juror panel not consume alcoholic beverages?
    - Why? Medical? Religious?

  - Have you or any of your friends or family members ever been involved in a traffic accident where it was alleged that someone had been drinking alcohol and driving?

  - If you do not drink alcoholic beverages, could you set aside your personal feelings about alcohol, and listen to the facts of this case impartially?

  - Are any of you members of Mothers Against Drunk Driving, Students Against Drunk Driving, or any other organization concerned with the formation or enforcement of laws related to drinking and driving?

- JUROR HISTORY RE: CONTACT WITH COURTS

  - Have you ever been a victim of a crime?

  - Have you ever been a plaintiff or defendant in any civil lawsuit?

  - Have you ever been a witness in a civil or criminal case?

  - Have you ever had any previous jury duty? If so: When? What kind of case was it (civil or criminal)? Did you reach a verdict? (Don't tell what your verdict was.)

  - Have you or members of your family ever been formally charged with committing a crime?

  - (Suggest to the jurors that if anyone wants to answer this at the judge's bench in the presence of only the judge, the attorneys, and the court reporter, this would be fine).

- Do you have any family or close friends who are in law enforcement such as:

    - police officers
    - highway patrol officers
    - probation officer
    - correctional officer
    - deputy sheriff?

- Will you believe the testimony of a witness who is in law
    - enforcement simply because he/she is in law enforcement or will you
    - weigh the credibility of that person's testimony as you would all
    - witnesses who testify?

- Do you have any family or close friends who are involved in the court system such as

    - judges
    - lawyers
    - probation officers
    - clerk of the courts
    - prosecutor's office
    - public defender's office?

- <u>PERSONAL HISTORY</u>

    - Ask each juror to introduce himself/herself and to state:

    - What he/she does for a living (if he/she works outside the). Any other employment he/she has had during adult life. What his/her spouse does for a living (if the spouse works outside the home). If he/she has adult children, what they do if they work outside the home.

    - The attorneys will now ask you questions. What they say now, or at any time other time during the trial, is not to be accepted by you as evidence or law. In fact, they are not allowed to tell you what the law is.

    - That is the job of the court. They will simply be asking you questions looking for answers from you that will aid all of us in selecting a fair and impartial jury.

- <u>AT CONCLUSION OF VOIR DIRE COURT SHOULD ASK</u>

    - After listening to the voir dire, do any of you have any feelings toward the defendant or the attorneys which might affect your ability to serve as a fair and impartial juror?

- From your answers, I understand that each of you, unless you have told me otherwise, can listen attentively to the evidence, apply the law to the facts which you find exist and fairly and impartially reach a verdict. Are there any of you who could not?

- Can you think of any other matter which you should call to the court's attention which may have some bearing on your qualifications as a juror or which may prevent your rendering a fair and impartial verdict based solely upon the evidence and the law?

- SWEAR JURY

Sample Colloquy for Exclusion of Witnesses

- Have all the witnesses brought into the courtroom. Instruct the witnesses as follows, in front of the jury, so that the jury has the benefit of knowing that the rule has been invoked.

- Each of you has been summoned as a witness in this case. The court has invoked a rule of procedure which requires your exclusion from the courtroom at all times except during the time when you testify in this case. You are directed to remain out of the courtroom except when you are called to testify. While you are waiting to testify, and after you have done so, you are not to discuss this case or your testimony among yourselves or with anyone else.

- You may, however, one witness at a time, discuss your testimony with counsel for either party in this case. Any violation of this direction may not only subject you to contempt of court, but may also disqualify you as witnesses in this case.

- You will now retire from the courtroom until you are called. Counsel for each of the parties is instructed to advise each of its respective witnesses that are not present at this time of the direction I have just given, and each of them shall be governed thereby.

Sample Colloquy - Discharge of Jury

- Court asks foreperson if verdict reached
- Verdict delivered to judge: examines verdict form, and corrects form with consent of all jurors
- Clerk reads verdict
- Jury may be polled upon request of State, defendant or on court's own motion; if there is dissent, the court sends jury back for continued deliberation, there cannot be polling of jurors once the verdict is recorded or the jurors are discharged
- Verdict is entered into the record
- Jurors discharged
- Court can thank jurors, but cannot praise or criticize verdict

Sample Thank You Letter to Jurors

(Juror's name)

(Juror's address)

Dear (name):

The right to a jury trial is basic to our American criminal justice system. That right would be meaningless without citizens like you who have demonstrated your willingness to serve as a trial juror.

I appreciate your service as a juror in my courtroom on (dates). I know that service involved personal sacrifices by you. You played the very important role of judge of the facts. I hop that was a rewarding experience.

Some jurors feel their contributions to our justice system go unnoticed. Please be assured that this is not true in this case. I personally am very grateful that you helped to make our system work; and on behalf of all the people personally involved, as well as the entire community, I thank you.

Sincerely,
County Court Judge

Chapter 4 -- Conducting the Trial

Waiver of jury trial

Under the US and Florida constitutions, the defendant can waive his right to a six-person jury and go with five when a juror become unavailable. No violation of the right to jury trial occurs when a six-person jury is waived.

The court is not required to explain to defendant his right to six jurors when defense counsel represents that he explained the right. Where defendant personally indicates his desire to proceeds, no error is shown in accepting the waiver.

(See this case for extensive discussion of the right to jury trial and the potential problems of proceeding with five jurors.)

•Blair v. S., 698 So. 2d 1210 (Fla. 1997), 22 F.L.W. S517 (8/28/97)

Counsel cannot waive defendant's right to a jury trial by signing a written waiver. The waiver must be done orally by the defendant after the court explains to him the right he is waiving, or by defendant signing a written waiver.

S. v. Upton, 658 So. 2d 86 (Fla. 1995), 20 F.L.W. S387 (7/20/95)

Defense counsel's agreement to waive a jury is not sufficient where the defendant himself does not consent orally or in writing and the court does not inquire into the voluntariness of the waiver.

Sansom v. S., 642 So. 2d 631 (1st DCA 1994), 19 F.L.W. D1973 (9/14/94)

Court errs in refusing to allow defendant to waive a jury where, after jury selection, the defendant files a written waiver and the state consents. The court cannot refuse the request under rule 3.260.

Warren v. S., 632 So. 2d 204 (1st DCA 1994), 19 F.L.W. D370 (2/16/94)

Where defense counsel waives a jury and he court does not question the defendant to determine if he understood the waiver, conviction is reversed.

Montero v. S., 780 So. 2d 917 (2d DCA 2000), 25 F.L.W. D290 (1/26/2000)

A jury may not be waived without the consent of the state, and article I, section 16(a) of the Florida Constitution does not give defendant a right to waive a jury without the state's consent.

S. v. Thorup, 659 So. 2d 1116 (2d DCA 1995), 20 F.L.W. D1683 (7/19/95)

Where the record on appeal does not contain a written or oral waiver of a jury, the conviction

will be reversed.

Scruggs v. S., 785 So. 2d 605 (4th DCA 2001), 26 F.L.W. D1112 (4/25/2001)

Right to a Jury Trial

Where defendant waives a jury trial on some charges, and the state adds charges, the court errs in proceeding without a jury on those counts in the absence of a properly-executed waiver.

Elmore v. S., 782 So. 2d 1016 (4th DCA 2001), 26 F.L.W. D1106 (4/25/2001)

The fact that the court certifies under §918.0157 that defendant will not be imprisoned or adjudicated guilty upon conviction does not serve to eliminate defendant's right to a jury trial for offenses that have a constitutionally-guaranteed right to jury trial.

Defendant has a constitutionally protected right to jury trial for offenses that were indictable at common law, crimes that involve moral turpitude, crimes that are malum in se, or crimes that carry punishment over 6 months.

Criminal mischief is indictable at common law and is malum in se, so defendant is entitled to a jury even where the court indicates defendant will not be adjudicated or imprisoned.

•Weber v. Ft. Lauderdale, 675 So. 2d 696 (4th DCA 1996), 21 F.L.W. D1486 (6/26/96)

Rule 3.251 stating that in all criminal prosecutions defendant shall have right to jury trial merely tracks the language of art. I §16 Fla. Const., and does not change or expand a defendant's right to jury trial.

Because criminal mischief is a codification of common law malicious mischief and is a malum in se offense indictable at common law, defendant has a right to jury trial.

Reed v. S., 470 So. 2d 1382 (Fla. 1985)

When the court certifies that defendant will not be incarcerated if convicted, and thereby tries the case non-jury, upon VOP defendant cannot be sentenced to jail.

Harris v. S., 773 So. 2d 627 (4th DCA 2000), 25 F.L.W. D2843 (12/13/2000)

Jury selection

A party objecting to the other side's use of a peremptory challenge on racial grounds must (a) make a timely objection on that basis, (b) show that the venireperson is a member of a distinct racial group, and (c) request that the court ask the striking party its reason for the strike. If these initial requirements are met (step 1), the court must ask the

proponent of the strike to explain the reason for the strike.

The burden of production then shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained (step 3). The court's focus in step 3 is not on the reasonableness of the explanation but rather its genuineness. Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination.

Failure to request that the prosecutor state the reasons for the strike will result in a ruling that the claimed error is not preserved.

Slappy is overruled to the extent that it requires a "reasonable" explanation rather than a "genuine" nonracial basis for the strike.

•Melbourne v. S., 679 So. 2d 759 (Fla. 1996), 21 F.L.W. S358 (9/5/96)

Court does not abuse its discretion in refusing to permit the defense to exercise a strike against a white juror because the defendant did not feel that the juror "would adequately represent a fair cross-section of the community." While the "fair cross-section" claim can encompass permissible bases, it also can be used for race-based claims.

Curtis v. S., 685 So. 2d 1234 (Fla. 1996), 21 F.L.W. S442 (10/10/96)

To get a Neil inquiry, the objecting party must (1) make a timely objection on that basis; (2) show that the venireperson is a member of a distinct class, and (3) request that the court ask the striking party for a reason. The party objecting to the strike need not place on the record facts that reasonably indicate that the challenge is being used impermissibly.

S. v. Holiday, 682 So. 2d 1092 (Fla. 1996), 21 F.L.W. S493 (11/14/96)

When reviewing the lawfulness of peremptories, the court should be mindful of two principles: (1) strikes are presumed to be exercised in a nondiscriminatory manner, and (2) the trial court's decision, which turns on an assessment of credibility, will be affirmed on appeal unless clearly erroneous.

Farina v. S., 801 So. 2d 44 (Fla. 2001), 26 F.L.W. S793 (11/29/2001)

When the defense does not challenge the reason given by the state for a strike and does not object to the jury panel as seated, any error in allowing a strike is not preserved.

Rimmer v. S., 825 So. 2d 304 (Fla. 2002), 27 F.L.W. S633 (7/3/2002)

Rule of Sequestration

The purpose of the rule of sequestration is to avoid a witness coloring his or her testimony by hearing the testimony of others, thereby discouraging fabrication, inaccuracy and

collusion.

Section 90.616(2)(c) allows an exception to the rule for a person who is shown by the party's attorney to be essential to the presentation of the party's case. The court has wide discretion in determining which witnesses are essential.

(See this case for discussion of circumstances where a fact witness, not an expert, can be allowed to remain in the courtroom.)

Knight v. S., 721 So. 2d 287 (Fla. 1998), 23 F.L.W. S587 (11/12/98)

The rule of sequestration is intended to prevent a witness' testimony from being influenced by the testimony of other witnesses in the case. Where evidence technicians were not told the rule had been invoked, and there was no danger that their conversation could have influenced them to change their testimony in any meaningful way, the court properly refuses to impose any sanction for violation of the rule.

Lott v. S., 695 So. 2d 1239 (Fla. 1997), 22 F.L.W. S289 (5/22/97)

The rule of sequestration of witnesses is not a strict rule of law. Before excluding a witness, the court must first determine whether the testimony of the witness would be substantially different after having heard the testimony of other witnesses in violation of the rule. The court must also determine whether the violation was intentional, and whether the witness or a party had acted in bad faith. Once the court has determined the circumstances, it can exercise its discretion in determining whether to exclude the witness.

Hines v. S., 719 So. 2d 358 (1st DCA 1998), 23 F.L.W. D2398 (10/21/98)

The purpose of the rule of sequestration is to avoid a witness coloring his testimony by hearing the testimony of another. Enforcement of the rule is within the court's discretion. Before a witness' testimony should be excluded on that ground, the court must determine whether the witness' testimony was affected by the other witness' testimony to the extent that it substantially differs from what it would have been had the witness not heard the testimony. (Concurring opinion.)

Duncan v. S., 727 So. 2d 413 (5th DCA 1999), 24 F.L.W. D743 (3/19/99)

CHAPTER 5
SENTENCING

Chapter 5 - Sentencing

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SENTENCING

5.01 KEY POINTS

- Must be pronounced in open court, entered into the record or docketed
- Must review any plea discussion or agreements
- Must impose Public Defender lien pursuant to Section 938.29, Florida Statutes
- Must occur upon conviction of DUI
- If after trial, must inform defendant of the finding of guilt and of the judgment
- Must inquire as to any legal grounds why sentence should not be imposed, including:
    - Insanity, or
    - Pardoned, or
    - The defendant is not the same person against whom the verdict or finding was rendered.
- Should consider all relevant submissions and evidence
    - **Maximum Penalties**
        - MISDEMEANOR - 1ST DEGREE
            - Incarceration 0 - 364 days
            - Fines: 0 - $1,000
            - Probation up to 1 year
            - Total probation plus incarceration may not exceed one (1) year
        - MISDEMEANOR - 2ND DEGREE
            - Incarceration 0 - 60 days
            - Fines: 0 - $500
            - Probation up to 6 months
            - Total probation plus incarceration may not exceed 6 months
            - May be enhanced to up to one year if alcohol is involved for certain offenses

5.012 Special Statutory Penalties

- Conviction(s) under Section 316.193, Florida Statutes are prior convictions for purpose of boating under the influence penalties (Section 327.35, Florida Statutes)

- If financial inability is determined, fine and court costs may be converted to community service at a rate not less than the federal minimum wage

- Must order restitution unless clear and compelling reason(s)

- Fleeing or attempting to elude a police officer: may suspend driver's license for up to one year

- Driving while license is suspended/revoked:

    - Second conviction is a first degree misdemeanor
    - Third degree felony, under Section 322.34(5), Florida Statutes if habitual traffic offender

- Possession or sale of controlled substances - license revoked by DHSMV for 2 years or until defendant completes a drug treatment program, upon receipt of conviction by clerk - Section 322.055, Florida Statutes

- Sentence of incarceration requires adjudication of guilt

- Misdemeanors involving death or injury to another - may impose additional fine up to $10,000

5.13 Mandatory Costs

MANDATORY COSTS IN ALL CASES

- Section 938.01(1), Florida Statutes

    - All courts shall, in addition to any fine or other penalty, assess $3 as a court cost against every person convicted for violation of state penal or criminal statute or convicted for violation of a municipal or county ordinance

    - Sections 938.03(1) and 938.04, Florida Statutes (Crimes Compensation Trust Fund)

        - $50.00, plus 5% of fine and penalty or forfeiture, if pleads, convicted of, or adjudicated delinquent for violation of a criminal law, municipal or

county ordinance which adopts by reference any misdemeanor, whether or not adjudication is withheld

- Considered assessed unless specifically waived by the court. If not ordered judge must state, on the record, detailed reasons

- Section 938.05(1), Florida Statutes (Local Government Criminal Justice Trust Fund)

  - If pleads to, or is found guilty...these costs Ashall be made a part of any plea agreement"

    - Felonies.....$ 200.00
    - Misdemeanors.....$ 50.00
    - Criminal Traffic Offenses. .....$ 50.00

MANDATORY COSTS IF AUTHORIZED BY LOCAL GOVERNMENT AUTHORITY

- Section 938.13, Florida Statutes (Substance Abuse Programs)

  - $15 if found guilty of any misdemeanor in which the unlawful use of drugs or alcohol is involved.

  - (Applies only in counties which have adopted an appropriate ordinance)

- Section 938.15, Florida Statutes (Criminal Justice Education)

  - $2.00 if pleads or found guilty in criminal case.

  - (Applies only in counties which have adopted an appropriate ordinance.)

- Section 938.17(2), Florida Statutes (County Delinquency Prevention)

  - $3.00 if counties adopt a mandatory cost, in addition to any other authorized cost or fine, on every person who pleads to or is convicted of a misdemeanor

  - (Applies only where sheriff is a partner in a juvenile justice assessment center or suspension program developed in conjunction with the school board, and the board of county commissioners has adopted an appropriate ordinance.)

- Section 938.19(1), Florida Statutes

    - Counties may adopt a mandatory cost of $3 to be assessed against every person who, in county or circuit court, pleads guilty or nolo contendere to, or is convicted of, regardless of adjudication, a violation of a state criminal statute or municipal ordinance or a county ordinance or who pays a fine or civil penalty for any violation of Chapter 316, Florida Statutes.

    - (Applies only where a teen court has been created and the board of county commissioners has adopted an appropriate ordinance.)

MANDATORY COSTS IN SPECIFIC CASES

- D.U.I.

    - Section 938.07, Florida Statutes: A court cost of $135 shall be added to any fine imposed under Section 316.193, Florida Statutes

- HANDICAPPED OR ELDERLY VICTIMS

    - Section 938.09, Florida Statutes

        - Upon a plea of guilty or nolo contendere to, or a conviction of, any felony or misdemeanor or any county or municipal ordinance in which any victim is handicapped or elderly, there shall be imposed an additional cost of $20.

        - Note: The costs imposed by this section apply only in counties containing housing projects as defined in Section 426.002(6), Florida Statutes.

- HANDICAPPED OR ELDERLY VICTIMS

    - Section 938.11, Florida Statutes

        - In addition to any fine for any criminal offense or any county or municipal ordinance, when any victim is handicapped or elderly, a 10-percent surcharge shall be imposed by all county and circuit courts.

        - Note: The costs imposed in this section apply only in counties containing housing projects as defined in Section 426.002(6), Florida Statutes.

5.014 <u>Discretionary Costs</u>

- CONTROLLED SUBSTANCES, D.U.I., DISORDERLY INTOXICATION, AOPEN HOUSE PARTIES," BEVERAGE LAW VIOLATIONS

    - Section 938.21, Florida Statutes

- Section 938.23, Florida Statutes

    - In addition to any fine imposed by law for any criminal offense under this chapter or for any criminal violation of Chapter 893 (controlled substances), Section 316.193 (DUI), Section 856.011 (disorderly intoxication), Section 856.015 (Aopen house parties"), or Chapter 562, 567, or 568 (beverage laws), the court may impose an additional assessment in an amount up to the amount of the fine authorized for the offense.

    - Note: The court may only order this cost if it finds that the defendant has the ability to pay the underlying fine (and this court cost) and Awill not be prevented thereby from being rehabilitated or from making restitution."

- SALE, MANUFACTURE, DELIVERY OR POSSESSION OF CONTROLLED SUBSTANCE

    - Section 938.25, Florida Statutes

        - The court may assess the amount of $100 against any defendant who pleads guilty or nolo contendere to, or is convicted of, a violation of Section 893.13, without regard to whether adjudication was withheld, in addition to any fine or other penalty.

5.015 <u>Probation</u>

- Special conditions must be pronounced in open court. See Section 948.03, Florida Statutes

    - Special conditions not pronounced at sentencing are unenforceable

    - Defendant must have opportunity to object to special conditions. <u>Mark v. State</u>, 646 So.2d 762 (Fla. 2d DCA 1994)

    - Defendant is on constructive notice of statutorily-authorized conditions. <u>Hayes v. State</u>, 665 So.2d 339 (Fla. 4th DCA 1995)

    - Failure to timely object to expressed conditions constitutes a waiver

    - Probation cannot be rejected in favor of electing jail by defendant

        - Compare <u>Morganti v. State</u>, 557 So.2d 593 (Fla. 4th DCA 1990) with
        - <u>Bentley v. State</u>, 411 So.2d 1361 (Fla. 5th DCA 1982)

- Can place defendant on probation with or without adjudication, regardless of the imposition of jail as a condition of probation
- Probation can be imposed after trial or plea (Section 948.01, Florida Statutes)
- Probation not discretionary in DUI (Section 316.193(5), Florida Statutes)
- Probation is not applicable for civil infractions
- Cannot impose community control for a misdemeanor
- The probation must be supervised.
- If there is more than one offense, separate orders for each offense must be entered
- Term of probation cannot exceed the statutory maximum sentence. Conrey v. State, 624 So.2d 793 (Fla. 5th DCA 1993).
- Misdemeanant's supervision shall be for six (6) months unless authorized by the court
- If alcohol is involved, may be up to one (1) year
- Consecutive probations and jail sentences can be imposed. Armstrong v. State, 656 So.2d 455 (Fla. 1995)
- Term of probation cannot be indefinite
- Probation begins when imposed

5.016 Conditions of Probation

- Valid conditions must be imposed pursuant to Sections 948.03 and 948.031, Florida Statutes
    - Must be reasonably related to the offense and rehabilitation or to prevent future criminal activity or protect the public
    - Conditions are invalid which are:
        - Not reasonably related to the offense and rehabilitation. Brock v. State, 688 So.2d 1368 (Fla. 1996), or

- Related to conduct which is not in itself criminal. Brock v. State, 688 So.2d 1368 (Fla. 1996), or
- Not related to prevention of future criminal activity, or
- Constitutionally vague. Morris v. State, 383 So.2d 1116 (Fla. 4th DCA 1980), or
- Overbroad and can be violated unintentionally. Morris v. State, 383 So.2d 1116 (Fla. 4th DCA 1980), or
- Unnecessarily burdensome or oppressive. Nichols v. State, 528 So.2d 1282 (Fla. 1st DCA), or
- Impossible to perform. Peters v. State, 555 So.2d 450, (Fla. 4th DCA 1990)
- No authority for court to delegate to probation officer the imposing of special conditions. Barber v. State, 344 So.2d 913 (Fla. 3d DCA 1977) and Kiess v. State, 642 So.2d 1141 (Fla. 4th DCA 1994)

5.017 Restitution

- Restitution must be imposed in all applicable cases. Sections 775.089 and 948.032, Florida Statutes
  - Defendant must be ordered to pay for damage or loss caused directly or indirectly by the offense or defendant's criminal episode
  - Restitution may be monetary or non-monetary
  - Restitution shall be a condition of probation
  - Failure to order restitution, in full or in part, must be on the record
  - Negotiated plea(s) can include restitution for offenses for which defendant does not enter a plea
- Restitution is proper unless contested by the defendant
  - A plea agreement estops the defendant from denying the legality of restitution. Ronan v. State, 666 So.2d 205 (Fla. 2nd DCA 1995)
  - Can be for uncharged or unproven crimes and other counts if agreed to. Crowder v. State, 334 So.2d 819 (Fla. 4th DCA 1976)

- Investigative costs by police are not recoverable as restitution, although can be ordered as a condition of probation if appropriate. Standt v. State, 616 So.2d 600 (Fla. 4th DCA 1993)

- Defendant's ability to pay

  - Burden on defendant to prove by clear and convincing evidence of present inability to pay, along with an absence of future financial ability

  - Court must consider resources of defendant and his/her dependents

  - Must be determined before entering an order of restitution

  - Reasonable amount of restitution shall be ordered within defendant's ability

  - As long as restitution is ordered within sixty (60) days, amount may be set at a later time. Evans v. State, 678 So.2d 863 (Fla. 2d DCA 1996)

  - While defendant may not be able to contest imposition of restitution, he/she can contest dollar amount at any time. Nettles v. State, 611 So.2d 103 (Fla. 5th DCA 1992)

  - Defendant waives the right to have a determination of ability to pay if he/she accepts negotiated plea. Ronan v. State, 666 So.2d 205 (Fla. 2d DCA 1995)

5.018 Modification of Probation Terms

- Enhancements or extensions after initial sentencing violate the double jeopardy clause of the U.S. Constitution if:

  - Additional hardships are added; and/or

  - Conditions are more restrictive on defendant. See, Lippman v. State, 633 So.2d 1061 (Fla. 1994)

- Orders of probation cannot be changed in the absence of proof of a violation. Clark v. State, 579 So.2d 109 (Fla. 1991)

- Defendant cannot waive his/her right to notice and a hearing. Clark v. State, 579 So.2d 109 (Fla. 1991)

- Upon a violation, defendant can be reinstated or placed on a new period of probation with different terms and/or conditions

5.019 Violations of Probation

- Court's jurisdiction
  - Affidavit must be filed with the clerk, not merely signed by the court
  - Must be filed prior to probation expiring. Tyson v. State, 655 So.2d 214 (Fla. 1st DCA 1995)
  - Amended affidavits must be timely filed before expiration. Jett v. State, 722 So.2d 211 (Fla. 1st DCA 1998)
- Court does not retain jurisdiction to revoke probation unless arrest warrant is delivered for execution before probationary period expires. Paulk v. State, 733 So. 2d 1096 (Fla 3rd DCA 1999)
  - Probationer cannot be violated for behavior occurring after expiration of probation. Kimble v. State, 396 So.2d 815 (Fla. 4th DCA 1981)
  - Probation is not tolled in the absence of probationer absconding. Hughes v. State, 667 So.2d 916 (Fla. 4th DCA 1996)
- Hearing
  - Bail may not be automatically denied on a probation violation. Glossom v. Solomon, 490 So.2d 94 (Fla. 3rd DCA 1986)
  - Affidavit must state:
    - Facts concerning the violation. Kune v. State, 397 So.2d 1169 (Fla. 3rd DCA 1981)
    - Nature, time, place of occurrence. Kune v. State, 397 So.2d 1169 (Fla. 3rd DCA 1981)
  - Due process considerations
    - Defendant's presence required. Summvall v. State, 588 So.2d 31 (Fla. 3rd DCA 1991)

- Defendant has right to notice and confrontation of witnesses. Hall v. State, 512 So.2d 303 (Fla. 1st DCA 1987)

- Defendant has right to written findings. King v. Florida Parole and Probation Commission, 306 So.2d 506 (Fla. 1978)

- Rules of discovery apply. Cuciak v. State, 410 So.2d 916 (Fla. 1982)

- Defendant has qualified 4th and 5th Amendment rights. Grubbs v. State, 373 So.2d 905 (Fla. 1979)

    - Self-incrimination applies to criminal conduct which would expose probationer to prosecution for a crime different from that for which he/she was already convicted. Dearing v. State, 388 So.2d 296 (Fla. 3rd DCA 1980)

    - Self-incrimination does not apply to technical violations

- Right to counsel

    - While right to counsel attaches to hearings, can be waived

    - Court needs to conduct *Faretta* hearing for a waiver

- Evidentiary issues

    - State must establish defendant as probationer

    - Standard of proof: preponderance of the evidence, greater weight of the evidence, or satisfies the conscience of the court

        - In violations for failure to pay restitution, burden on State to prove defendant's ability to pay. Edwards v. State, 439 So.2d 1028 (Fla. 3rd DCA 1983)

        - In violation for failure to pay costs, only need to establish failure by probationer to pay. McQuitter v. State, 622 So.2d 590 (Fla. 1st DCA 1993)

        - Burden on defendant to establish lack of ability to pay. Section 948.06 (5), Florida Statutes

        - Hearsay is admissible, but cannot be the **sole basis** for revocation

        - Lab reports, properly admitted as a business record exception under Section 90.803(6), Florida Statutes can be sole basis for violation. Walker v. State, 426 So.2d 1180 (Fla. 5th DCA 1983)

    - Probation can be revoked only for non-compliance with expressed conditions imposed by the court. Thomas v. State, 635 So.2d 1009 (Fla. 1st DCA 1994)

    - Defendant's probation cannot be violated unless actions are willful and substantial. Salzano v. State, 664 So.2d 23 (Fla. 2d DCA 1995)

- Ability to pay

    - Before incarceration for failure to pay, state must establish the defendant:

        - Has/has had ability to pay

        - Failure to pay is/was willful

- Allegations of new criminal activity

    - Arrests alone do not give grounds for revocation. Hines v. State, 358 So.2d 183 (Fla. 1978)

    - Probation cannot be revoked based on a dismissed charge. Pendergrass v. State, 601 So.2d 1250 (Fla. 2d DCA 1992)

    - Probation can be revoked based upon a plea of guilty or no contest or confession to other criminal activity: Plea: Thomas v. State, 350 So.2d 568 (Fla. 3rd DCA 1977); Maselli v. State, 446 So.2d 1079 (Fla. 1984); Confession - Waring v. State, 504 So.2d 786 (Fla. 2d DCA 1987)

    - Probation can be based upon certified copy of conviction for other offense. Stevens v. State, 409 So.2d 1051 (Fla. 1982)

5.0191 Sentencing After Probation Violation

- Must be written and conform to oral pronouncement. Amador v. State, 713 So.2d 1121 (Fla. 3rd DCA 1998)
  - For each offense there must be a separate sentence
    - General sentence not permitted
    - Basis for revocation must be stated. Thames v. State, 709 So.2d 650 (Fla. 2d DCA 1998)
- Options
  - Incarceration
    - Revoke and impose any legal sentence which could have been imposed upon initial sentencing
    - Jail and probation combined cannot exceed the statutory maximum
    - Separate misdemeanor offenses can be sentenced consecutively
    - Modify or extend probation
      - Requires notice and hearing
      - Cannot extend probation when the probationary period has already expired
    - Reinstate probation and reimpose old or add new conditions

5.02 AUTHORITIES

5.03 TIPS/NOTES

5.04 CHECKLIST/FORMS

Chapter 5 -- Sentencing

Sentencing

Once a person has been declared a habitual traffic offender and his license revoked, upon his first DWLSR charge following the designation, he must be charged with a misdemeanor under §322.34(2)(a), rather than a felony under §322.34(1), even though he may have had numerous prior DWLSR charges. Under the plain meaning of §322.34, a habitual traffic offender is treated differently than a non-habitual offender, and may be entitled to a lighter, rather than heavier, sentence.

S. v. Harvey, 693 So. 2d 1009 (4th DCA 1997), 22 F.L.W. D902 (4/9/97)

Defendant convicted of multiple misdemeanors who receives consecutive sentences may be incarcerated in a county jail for a total of more than one year.

Armstrong v. S., 656 So. 2d 455 (Fla. 1995), 20 F.L.W. S235 (5/18/95)

In the absence of specific direction that sentences are to be served consecutively, sentence resulting from crimes charged in the same information shall be served concurrently.

When felony and misdemeanor sentences for crimes in the same information are sentenced to concurrent time, defendant must get credit for time served on all counts.

Gulley v. S., 706 So. 2d 110 (2d DCA 1998), 23 F.L.W. D527 (2/20/98)

Defendant sentenced on two misdemeanors can get two years (one year on each consecutive) in the county jail. Exceeding one year in county jail on misdemeanors is permitted, not on felonies.

Armstrong v. S., 640 So. 2d 1250 (5th DCA 1994), 19 F.L.W. D1725 (8/12/94)

County court properly sentences defendant, convicted of fifteen misdemeanor traffic offenses and several contempt of court charges (apparently FTAs) to consecutive county jail sentences totaling 12 years. Defendant is properly ordered to serve that length of time in the county jail.

Gwynn v. Orange County, 527 So. 2d 866 (5th DCA 1988)

Defendant pled to a second degree misdemeanor and was placed on one year of probation. After more than six moths passed, a VOP warrant was issued. Held: Despite defendant's agreement to the plea and sentence, sentence was illegal and defendant may not be violated.

Purvis v. Lindsey, 587 So. 2d 638 (4th DCA 1991)

Defendant was charged with leaving the scene and driving with a suspended license. At restitution hearing, the court found that damages from the accident could not be imposed based on the leaving, but could under the DWLSR. Held: Since the court had sentenced defendant to time served on the misdemeanor, it could not later at a restitution hearing require restitution, as there was no probation to which it could attach.

Uribe v. S., 596 So. 2d 768 (5th DCA 1992)

Costs

An acquitted non-indigent defendant is entitled to reimbursement under §939.06 only for witness fees, sheriff's expenses, and clerk's fees. Expert witness fees, video deposition costs, deposition transcripts, fees paid to private process servers, and copy expenses are not taxable to the county.

Wolf v. Volusia County, 703 So. 2d 1033 (Fla. 1997), 22 F.L.W. S192 (4/7/97)

Imposing PD fees without prior notice does not constitute fundamental error, and the failure to object or move to set aside the fees waive review on appeal.

•Locke v. S., 719 So. 2d 1249 (1st DCA 1998), 23 F.L.W. D2399 (10/21/98)

Court errs in imposing prosecution costs based solely on the prosecutor's statement of costs. Under §938.27, the state must prove the amount of costs imposed.

Tucker v. S., 832 So. 2d 840 (2d DCA 2002), 27 F.L.W. D2483 (11/15/2002)

At a hearing contesting the fees imposed for a public defender, the defendant is entitled to be represented but is not entitled to appointed counsel.

Hill v. S., 734 So. 2d 443 (2d DCA 1999), 24 F.L.W. D1128 (5/5/99)

Probation

Before defendant's probation conditions can be modified, he must be found in violation of his probation. Modifying his probation to add a condition without finding a violation of probation is a double jeopardy violation, in that it provides multiple punishments for the same offense.

A double jeopardy violation is not procedurally barred from being raised in a 3.850 where the issue was not raised on direct appeal. The prohibition is fundamental, and where defendant did not knowingly waive his right the issue can be raised in a 3.850.

Lippman v. S., 633 So. 2d 1061 (Fla. 1994), 19 F.L.W. S129 (3/17/94)

Before defendant's probation conditions can be modified, he must be found in violation of his probation. Modifying his probation to add a condition without finding a violation of probation is a double jeopardy violation, in that it provides multiple punishments for the same offense.

Lippman v. S., 633 So. 2d 1061 (Fla. 1994), 19 F.L.W. S129 (3/17/94)

DUI probation does not differ from probation for felony, misdemeanor, or criminal traffic, and court may impose any lawful conditions under §948.03(4).

Goldschmitt v. S., 490 So. 2d 123 (2d DCA 1986)

Court may not add conditions of probation when probation is modified, it may only modify the conditions previously imposed. See §948.03(7).

Bernatelli v. S., 555 So. 2d 1315 (5th DCA 1990)

CHAPTER 6
POST TRIAL MOTION

Chapter 6 - Post Trial Motions

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POST TRIAL MOTIONS

6.01 KEY POINTS

6.011 Time Periods

- The day of the event is excluded from computation. Rule 3.040
- Last day is computed, unless Saturday, Sunday or legal holiday, and then utilize next working day
- If period of time is less than seven (7) days, intermediate Saturdays, Sundays or holidays are excluded, except for the periods of the time of less than 7 days contained in Rules 3.130, 3.132(a) and 3.133(a)
- For good cause shown, enlargement of time may be given if application is made before expiration of the period. Rule 3.050
- Upon motion and with notice, enlargement may be approved if the failure to comply was the result of excusable neglect, if application is made after expiration of the period
- Exceptions to the enlargement shall not be applicable to motions for a new trial, taking an appeal, or judgment of acquittal

6.012 Motion For New Trial or Arrest of Judgment

- Motion by either defendant or court, and may be for new trial or arrest of judgment
- Can be argued immediately after return of verdict and the judge may rule immediately, or within ten (10) days of verdict, or otherwise with leave of court
- May be made orally if dictated onto the record with a court reporter present, or
- Written with grounds stated

6.013 Grounds for New Trial

- If shown that the jurors decided verdict by lot, or
- Verdict is contrary to law or the weight of the evidence, or

- New and material evidence has been discovered, and, if introduced
- Would probably have changed the verdict, and
- Which the defendant could not with reasonable diligence have discovered and produced at the trial.

- If prejudice of defendant's substantial rights is established, and
  - Defendant not present where required by the rules, or
  - Jury received any evidence out of court, other than authorized view of premises, or
  - Jurors separated after retiring to deliberate without leave of court, or
  - Juror guilty of misconduct, or
  - Prosecutors guilty of misconduct, or
  - Court erred in decision of any matter of law during trial, or
  - Court erred in its instructions, either giving erroneous instruction or failing to give a proper instruction, or
  - For any other reason not the defendant's fault, the defendant did not receive a fair trial

6.014 <u>Grounds for Arrest of Judgment</u>

- Indictment or information was so defective it could not support a judgment of conviction, or
- Court is without jurisdiction, or
- Verdict uncertain, appearing that jurors did not intend to convict, or
- Defendant convicted of an offense for which defendant could not be convicted under indictment or information under which defendant was tried

6.015 <u>Rule 3.691 : Post Trial Release</u>

- If adjudicated for other than capital offense, release is discretionary with trial court, except

- No bail unless defendant establishes that appeal is taken in good faith, and on grounds fairly debatable, and not frivolous

- No bail if defendant previously convicted of a felony, or if other felony charges are pending (See Younghans v. State, 90 So.2d 308 (Fla. 1956))

- Denial of post trial release must be in writing

6.016 Rule 3.800: Correction, Reduction and Modification of Sentence

- Illegal sentences may be corrected at any time

- Reduction or modification of sentence must be within sixty (60) days of imposition, receipt of mandate, or dismissal of appeal

6.017 Rule 3.850: Vacate, Set Aside or Correct Sentence by Defendant

- Grounds may be based upon:

  - Violation of Constitution or laws of United States and/or Florida, or

  - Court without jurisdiction, or

  - Sentence exceeded maximum allowable by law, or

  - Plea was involuntary, or

  - Judgment or sentence is otherwise subject to collateral attack

- Time limitations

  - At any time for sentence exceeding maximum allowable by law

  - All other grounds must be filed within two (2) years after judgment and sentence becomes final in noncapital cases (1 year in capital cases), except if based upon:

    - Facts or claim unknown to movant or attorney, and facts could not have been ascertained by the exercise of due diligence, or

    - Fundamental constitutional right asserted was not established within the period provided for herein, and has been held to apply retroactively.

- Contents must be under oath, including
    - Judgment or sentence under attack and the name of the court; and
    - Whether or not there was an appeal; and
    - Number of postconviction motions previously filed, if any, and
    - If there were other 3.850 motions filed, and the reason(s), or claim(s) was/were not raised previously
- Defendant's presence not required
- Successive motions may be dismissed if duplicative

6.02 AUTHORITIES

Florida Rules of Criminal Procedure:
Rule 3.040 - Computation of Time
Rule 3.050 - Enlargement of Time
Rules 3.580, 3.590, 3.600 - Motion for New Trial
Rule 3.610 - Motion for Arrest of Judgment
Rule 3.640 - Effect of Granting New Trial
Rule 3.691 - Post-Trial Release
Rule 3.800 - Correction, Reduction and Modification of Sentence
Rule 3.850 - Motion to Vacate, Set Aside or Correct Sentence; Hearing, Appeal

6.03 TIPS/NOTES

6.04 CHECKLISTS/FORMS

Chapter 6 -- Post-trial motions

Motion for New Trial

(See **Robinson v. S., 770 So. 2d 1167 (Fla. 2000), 25 F.L.W. S742 (10/5/2000)** for extensive discussion of when newly discovered impeachment evidence is sufficient to obtain a new trial.)

Juror interviews are not permitted unless the moving party makes sworn allegations under oath that, if true, would require the court to order a new trial because the error was so fundamental and prejudicial as to vitiate the entire proceeding.
Kearse v. S., 770 So. 2d 1119 (Fla. 2000), 25 F.L.W. S507 (6/29/2000)

The court properly denies a motion seeking a new trial based on newly discovered evidence when the evidence is related in affidavits that constitute hearsay. The evidence must be admissible at trial before it can be considered sufficient to obtain a new trial.
Sims v. S., 754 So. 2d 657 (Fla. 2000), 25 F.L.W. S128 (2/16/2000)

When a motion for new trial based on newly discovered evidence is made, and the evidence consists of person who testified that another person had admitted to them that he, not defendant, had committed the murder, the court properly denies the motion upon ruling that the witnesses were not credible.
Melendez v. S., 718 So. 2d 746 (Fla. 1998), 23 F.L.W. S350 (6/11/98)

Recanted evidence is not likely to cause an acquittal upon retrial when defendant confessed to two other people in addition to the recanting witness.
Stano v. S., 708 So. 2d 271 (Fla. 1998), 23 F.L.W. S177 (3/20/98)

Recantation of a witness called by the state does not entitle defendant to a new trial. Recanted testimony is exceedingly unreliable, and the court must carefully examine all the facts of a case before granting a new trial on that basis.

Court does not err in admitting the testimony of experts relating to hypnosis when the state's key witness had been hypnotized and later recanted. The context of the hypnotized statements is critical to a decision regarding their credibility.

A motion for a new trial is addressed to the sound judicial discretion of the trial court, and the presumption is that it exercised that discretion properly. And the general rule is that unless it clearly appears that the trial court abused its discretion, the action of the trial court will not be disturbed by the appellate court.

•S. v. Spaziano, 692 So. 2d 174 (Fla. 1997), 22 F.L.W. S193 (4/17/97)

(See **Swafford v. S., 679 So. 2d 736 (Fla. 1996), 21 F.L.W. S304 (7/11/96)** for discussion of what constitutes newly discovered evidence for new trial purposes).

The court errs in entering sua sponte an order adjudging defendant to be not guilty, following a jury verdict of guilty, based on the court's determination that it should not have allowed the testimony of a child sex abuse victim. Where the evidence was not objected to by the defense, the order adjudging defendant not guilty is procedurally improper.

S. v. Brockman, 827 So. 2d 299 (1st DCA 2002), 27 F.L.W. D2000 (9/3/2002)

To get a new trial based on a juror's failure to disclose material, the defendant must show (1) the information the juror withheld is relevant and material to jury selection; (2) the juror concealed such information; and (3) the failure to disclose the information was not attributable to the movant's lack of diligence.

Defendant's allegation that a juror was aware of the defendant and had attended a neighborhood meeting concerning burglaries committed by the defendant is sufficient to require an evidentiary hearing on the matter.

Forbes v. S., 753 So. 2d 709 (1st DCA 2000), 25 F.L.W. D689 (3/17/2000)

In a motion filed under rule 3.600(b) on the ground that the verdict is contrary to the weight of the evidence, the trial court acts as a "safety valve" by granting a new trial when the evidence is technically legally sufficient but the weight of the evidence does not appear to support the verdict. In such a motion, the judge is asked to act as a "seventh juror" in reweighing the evidence.

(See this case for discussion of the distinction between a 3.600(b) motion for new trial and a civil motion for judgment notwithstanding the verdict.)

Geibel v. S., 817 So. 2d 1042 (2d DCA 2002), 27 F.L.W. D1327 (6/5/2002)

A motion for new trial delivered to the judge on day 10 but not filed with the clerk until later is not timely where the judge does not accept the motion for filing.

Porter v. S., 749 So. 2d 514 (2d DCA 1999), 24 F.L.W. D2100 (9/10/99)

Motion for arrest of judgment

Defendant was charged with introducing contraband into a detention facility and possession of cannabis for the same incident. He was convicted of count I, but acquitted of the possession charge. Held: Because section 951.22 prohibits both introduction and possession of contraband into a jail, and defendant here was charged with introduction in count I, the verdicts are factually inconsistent but not truly inconsistent. Florida law allows factually inconsistent verdicts, and the trial court errs in arresting judgment on the introduction charge.

(See this case for extensive discussion of inconsistent jury verdicts.)

•S. v. Connelly, 748 So. 2d 248 (Fla. 1999), 24 F.L.W. S387 (8/19/99)

A motion for arrest of judgment under rule 3.590(a) must be filed within 10 days of the verdict or ruling by the court.

S. v. Johnson, 651 So. 2d 145 (2d DCA 1995), 20 F.L.W. D449 (2/15/95)

Motions for arrest of judgment and for a new trial are not available to defendant who pled no contest. No contest plea is functionally the same as a guilty plea, and defendant waives the right to make those motions by entering a plea.

Brady v. S., 518 So. 2d 1305 (3d DCA 1988)

CHAPTER 7
CONTEMPT AND SANCTIONS

Chapter 7 - Contempt and Sanctions

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Case Notes – Chapter 7

Contempt 7.7

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CONTEMPT AND SANCTIONS

7.01 KEY POINTS

- Defined as an offense against the lawful authority of the court
    - May be criminal, civil, direct or indirect
    - Cause in which contempt arises is not determinative of type or class of contempt
    - Must inform contemnor of the accusations
    - Judgment must be in writing, signed by the judge and include a recital of the facts on which the adjudication of contempt is based
    - Sentence may be imprisonment or fine, or both
        - Fine for civil contempt must bear reasonable relationship to damage suffered by party in whose favor contempt order was entered
    - No right to jury trial if confinement is for term of less than six (6) months

7.011 Definitions

- Criminal contempt is any contempt proceeding having as its purpose punishment for offensive conduct against the court, its judgments, orders or processes. This type of contempt is punitive rather than coercive in nature
- Civil contempt is any contempt which is coercive and imposed to compel obedience to court orders or to preserve or enforce the legal rights of parties. This type of contempt is coercive in its purpose rather than punitive
- Direct contempt is any contemptuous act committed in the presence of the court. The behavior must have occurred within the hearing, smelling or sight of the judge
- Indirect contempt is any contemptuous act not committed in the presence of the court or so close as to be detected by the use of the judge's senses

7.012 Direct Criminal Contempt - Procedure

- Contemnor may be punished summarily if the judge sees, hears or smells the contemptuous behavior

- Judge must inform the defendant of the accusations
- Judge must inquire whether the defendant can show cause why the defendant should not be adjudged guilty of contempt
- Judge must give defendant opportunity to present evidence of excuse or mitigation
- Judgment must recite the facts on which adjudication of guilt is based

- Judgment must be signed by judge and entered into the record
- Sentence must be pronounced in open court
- Court must follow procedure set out in Rule 3.830, Fla. R. Crim. P. to insure due process to the accused. Failure to follow any step in the procedure will result in reversal

7.013 Indirect Criminal Contempt - Procedure

- Judge on own motion or upon affidavit by person having personal knowledge of the facts may sign and issue order to show cause to institute proceeding against contemnor
  - Order to show cause must state the essential facts constituting the criminal contempt charged and requiring the contemnor to appear to show cause why he/she should not be held in contempt
  - Order to show cause must be personally served on the defendant
  - Order to show cause must specify the time and place of the hearing and allow a reasonable time for the defendant to prepare after service of the order
  - Defendant or counsel may file a motion to dismiss, a motion for a statement of particulars or an answer which must be in writing. Failure to file a motion or answer is not to be deemed an admission of guilt.
  - Judge may issue order of arrest if judge has reason to believe the defendant may not appear in response to the order to show cause
  - If arrested, the defendant must be permitted bail pursuant to prevailing law
  - Defendant may be arraigned prior to hearing or at the time of hearing and any hearing shall follow the entry of a not guilty plea
- Judge may conduct a hearing without assistance of counsel or may be assisted by the state attorney or an appointed attorney

- Defendant or counsel is entitled to compulsory process to have witnesses attend and may testify in his or her own defense

- Judge determines all issues of fact and law

- If contemptuous behavior involves disrespect to or criticism of the judge the judge must disqualify him or herself from presiding over the contempt proceeding and another judge must be designated

- When the hearing is concluded, judge must sign and enter judgment of guilty or not guilty. A judgment of guilty must contain a recitation of facts constituting contempt

- Guilty defendant shall be permitted to advise whether there is reason not to pronounce sentence and, if none given, the defendant shall be afforded the opportunity to present evidence of mitigating circumstances

- Sentence shall be pronounced in open court in the defendant's presence

- Judgment must be in writing, reciting facts on which it is based, and signed by the judge

7.02 AUTHORITIES

Florida Statutes:
Section 38.22 - Gives courts the power to punish contempt
Section 900.03 - vests the county and circuit courts with criminal jurisdiction

Florida Rules of Criminal Procedure:
Rule 3.830 - Direct Criminal Contempt
Rule 3.840 - Indirect Criminal Contempt

7.03 TIPS/NOTES

7.04 CHECK LISTS/FORMS

CHECKLIST-DIRECT CONTEMPT

[Acts or behavior which occurs within the Apresence" of the judge]

CRIMINAL: Apunish" for offensive conduct against the court, its judgments, or orders, or process. Rule 3.830, F.R.Crim.P.	**CIVIL: Acompel" or Acoerce" obedience to orders entered for benefit of or to pre-serve or enforce the rights of parties.**
1. Initiated by court order which is based on personal knowledge or on motion directed to the court; may be invoked forthwith upon occurrence or contemptuous conduct 2. Summary procedure may be used and writ- 3. Inform defendant of accusations 4. Ask if defendant can show cause why he or she should not be adjudged guilty of con-tempt and sentenced for the conduct 5. Judgment **must**: 6. Sentencing: Y may be confinement, fine or both Y **<6 months confinement** if found guilty following a **non-jury** verdict Y **>6 months - <1 year** after **jury** verdict Y jail sentence **must** be for fixed period Y may not sentence to hard labor Y maximum fine is $500 (' 775.02, F.S)	1. Initiated by court or motion of a party or person with standing; may be invoked 2. Summary procedure may be used 3. Inform respondent of accusations 4. Ask if respondent can show cause why he or she should not be adjudged guilty of contempt and sentenced for the conduct 5. Judgment **must**: Y be signed by the judge Y recite facts on which findings are based Y make specific findings of respondent's ability to comply with the court's order and that the respondent failed to comply 6. Sentencing: Y may be confinement, fine or both Y **<6 months confinement** if found guilty following a **non-jury** verdict Y **>6 months - <1 year** after **jury** verdict Y confinement to county jail exclusively Y jail sentence **must** be for a fixed period Y may not sentence to hard labor Y jail sentence **must** contain a meaningful purge provision

CHECKLIST-INDIRECT CONTEMPT

[Acts or behavior which occurs outside the "presence" of the judge]

CRIMINAL: "punish" for offensive conduct against the court, its judgments, or orders, or process. Rule 3.830, F.R.Crim.P.	**CIVIL: "compel" or "coerce" obedience to orders entered for benefit of or to preserve or enforce the rights of parties.**
1. Initiated by court order which is based on affidavit of person with knowledge of facts 2. Court may sign and issue order to show cause which **shall** ✓ allege essential facts constituting the contemptuous conduct ✓ direct defendant to appear and show cause why he/she should not be held in contempt of court ✓ specify time and place of hearing allow-reasonable time to prepare for defense 3. Defendant may file answer, one of following defensive motions, or do nothing: ✓ motion to dismiss order to show cause ✓ motion for statement of particulars ✓ answer by denial, explanation or defense ✓ do nothing; failure to plead cannot be considered an admission of guilt 4. Court may order arrest of defendant to ensure 5. Arraignment may be held at time of hearing 6. Hearing on merits: ✓ judge determines issues of fact and law ✓ judge may conduct hearing or with assistance of prosecutor ✓ defendant's due process rights must be honored, including, right to counsel, right to compulsory process, right to testify or not to testify on own behalf	1. Initiated by motion of party or person who has 2. Service of motion and notice of hearing **must** ✓ be made on the respondent or his or her counsel of record ✓ state with specificity in the motion the acts alleged to be contemptuous ✓ state with specificity in the notice of hearing the time and place for hearing 3. Hearing on the merits ✓ inform respondent of accusations ✓ moving party has initial burden of proof ✓ burden shifts to respondent to show excuse or inability to perform once non-compliance is admitted or established 4. Judgment **must**: ✓ be in writing ✓ be signed by the judge ✓ recite facts on which findings are based ✓ if respondent is found guilty, must make specific findings of respondent's ability to comply with the order and failure do so 5. Sentencing ✓ may be confinement, fine or both ✓ <6 months confinement if found guilty following a non-jury ✓ >6 months - <1 year after jury verdict ✓ confinement to county jail exclusively ✓ jail sentence must be for fixed period ✓ may not be sentenced to hard labor ✓ jail sentence must contain a meaningful purge provision

CHECKLIST-INDIRECT CONTEMPT

PROCEDURE
[Acts or behavior which occurs outside the Apresence" of the judge]

CRIMINAL: Apunish" for offensive conduct against the court, its judgments, or orders, or process. Rule 3.830, F.R.Crim.P.	**CIVIL: Acompel" or Acoerce" obedience to orders entered for benefit of or to preserve or enforce the rights of parties.**
7. Judgment **must**: ✓ be in writing ✓ be signed by the judge ✓ recite facts on which findings are based; failure to do so may invalidate 8. Inform defendant of charge and judgment ✓ inquire whether cause can be shown why sentence ought not be imposed ✓ allow defendant to present evidence or mitigating circumstances 9. Sentencing: ✓ must be pronounced in open court w/ D present ✓ may be confinement, fine or both ✓ <6 months confinement on non-jury verdict ✓ >6 months - <1 year after jury verdict ✓ confinement to county jail exclusively ✓ may not sentence to hard labor	

Chapter 7 -- Contempt

Contempt Procedure

Contempt is an extremely important power that should never be abused. It is extremely important that due process rights be observed, and it is critical in the exercise of contempt power that it never be used by a judge in a fit of anger, in an arbitrary way, or for the judge's own sense of justice.

Inquiry Concerning a Judge re: Daniel Perry, 641 So. 2d 366 (Fla. 1994), 19 F.L.W. S426 (6/16/94)

Contempt is a common law crime in Florida, and section 38.22 allows the court to punish for contempt but contains no penalty provision. Under §775.02, the maximum fine for a crime that does not contain a sentence provision is $500, and the maximum imprisonment is 12 months.

(See this case for discussion of the distinctions between civil and criminal contempt.)

Kramer v. S., 800 So. 2d 319 (2d DCA 2001), 26 F.L.W. D2661 (11/9/2001)

A proceeding seeking to hold defendant in criminal contempt must be recorded at public expense under rule 2.070(b). A proceeding in which a defendant is sentenced for criminal contempt must be on the record under rule 3.721. Due process right require that criminal contempt proceedings be recorded.

Criminal contempt proceeding are proper in failure to pay child support cases only when the defaulting party has continually and willfully failed to pay or has acted affirmatively to divest himself of assets or property.

When waiving counsel in a criminal contempt proceeding, the court must follow the requirements of rule 3.111(d).

A person found guilty of indirect criminal contempt can get no more than 6 months in jail without the benefit of a jury to hear the case. With a jury, or if the defendant waives a jury, the maximum sentence is one year.

A waiver of counsel for contempt must be in court and on the record or must be in writing before two attesting witnesses. Before accepting a waiver, the court must make a thorough inquiry to determine if the waiver is voluntary and intelligent, and the defendant must be informed of the dangers of self-representation.

Written findings of fact are required in a judgment unless sufficient oral findings are made on the record.

Indirect criminal contempt proceedings must be initiated by service of an order to show cause that meets the requirements of rule 3.840(a).

Blalock v. Rice, 707 So. 2d 738 (2d DCA 1997), 22 F.L.W. D2169 (9/10/97)

Court errs in finding entire state attorney's office in contempt for repeatedly announcing that cases were ready for trial when in fact they were not. Contempt may be proper as to the individual attorneys involved, but not the entire SAO.

(See this case for extensive discussion of indirect vs. direct contempt procedure).

In re Contempt Adjudication of the Broward County State Attorney's Office, 577 So. 2d 967 (4th DCA 1991)

In finding defendant guilty of indirect contempt, oral findings read into the record are sufficient to support the judgment.

(See this case for discussion of the differing requirements between the findings needed to support direct and indirect criminal contempt).

Gidden v. S., 613 So. 2d 457 (Fla. 1993), 18 F.L.W. S95 (2/4/93)

Due process requires that before a person may be convicted and sentenced to jail, she must be afforded reasonable notice of the charges against her and an opportunity to be heard, which includes at a bare minimum the right to examine the witnesses against her, the right to offer testimony, and the right to counsel.

There is an exception to this rule for charges of misconduct that occurs in open court in the presence of the judge that disturbs court business, where all of the essential elements of the misconduct occur before the judge. In such a case, immediate punishment is essential to prevent the demoralization of the court's authority before the public.\

The failure of a witness to appear for trial is not direct criminal contempt.

(See this case for extensive discussion of the distinctions between civil, indirect criminal, and direct criminal contempt, and the procedural requirements of each.)

•Kelly v. Rice, 800 So. 2d 247 (2d DCA 2001), 26 F.L.W. D2392 (10/5/2001)

<u>Indirect Contempt</u>

Court properly find an ASA in contempt for getting into a fight with defense counsel in the elevator after court under circumstances where a juror saw the fight.

Milian v. S., 764 So. 2d 860 (4th DCA 2000), 25 F.L.W. D1868 (8/9/2000)

Attorney's act of using profane language toward another attorney in the hallway following a hearing does not constitute indirect contempt. However, when counsel includes a threat or intimidation against the other lawyer in the course of representing her client, the contempt adjudication is proper.

Hoeffer v.S., 696 So. 2d 1265 (4th DCA 1997), 22 F.L.W. D1745 (7/2/97)

A defendant who is merely negligent in getting to court late cannot be found in indirect criminal contempt.
Werner v. S., 740 So. 2d 591 (5th DCA 1999), 24 F.L.W. D1940 (8/20/99)

(See **Flanagan v. S., 840 So. 2d 379 (1st DCA 2003), 28 F.L.W. D767 (3/18/2003)** for discussion of the sufficiency of an order to show cause in a case in which a witness was found in indirect criminal contempt for acts occurring during trial.)

Direct Contempt

Court errs in adjudicating defendant guilty of criminal contempt without asking defendant to show cause why he should not be found guilty and in failing to give him a chance to present mitigating evidence.
Marshall v. S., 764 So. 2d 908 (1st DCA 2000), 25 F.L.W. D1944 (8/14/2000)

Counsel cannot be found in contempt for violating guidelines or directions by the court concerning trial conduct. Before an order of contempt can be issued, the attorney must be found to have violated some direction or admonition beyond merely providing a written list of prohibited acts.
(See this case for extensive discussion of criminal contempt in the context of an attorneys closing argument.)
Thomas v. S., 752 So. 2d 679 (1st DCA 2000), 25 F.L.W. D393 (2/9/2000)

Under rule 3.830 governing direct contempt, a defendant need not be appointed counsel, nor does it require that a formal hearing be held on the charges. However, the judgment of contempt must include a recitation of the factual basis of the adjudication, and failure to include it is reversible error.
Williams v. S., 698 So. 2d 1350 (1st DCA 1997), 22 F.L.W. D2223 (9/16/97)

Two instances of profanity direct at the court, separated only by the finding of guilt on the first instance, constitutes one contempt, not two.
Williams v. S., 599 So. 2d 255 (1st DCA 1992)

For a witness to be held in direct criminal contempt based on purported perjurious testimony, it must be shown that (1) the alleged perjury had an obstructive effect, (2) there was judicial knowledge of the falsity, and (3) the testimony was pertinent to the issue at hand. A very strict standard is required to prove judicial knowledge of the falsity of the testimony. That standard is met only when the witness admits testifying falsely or other circumstances demonstrate beyond question that the testimony was false.
A routine credibility determination will not support a judicial determination of false testimony.

Before finding a witness in direct criminal contempt, the provisions of rule 3.830 must be scrupulously followed.

•Rhoads v. S., 817 So. 2d 1089 (2d DCA 2002), 27 F.L.W. D1385 (6/12/2002)

Court properly finds defense counsel in contempt when he directly refuses to approach the bench despite being ordered several times to approach. The fact that the court's ruling on evidentiary issues may have been incorrect is not a proper basis to ignore the rulings.

Soven v. S., 622 So. 2d 1123 (3d DCA 1993), 18 F.L.W. D1749 (8/10/93)

When a witness subpoenaed to testify before the state attorney refuses to answer and takes the fifth, the court properly holds her in contempt and orders her incarcerated until she agrees to answer. The subpoena confers use and derivative use immunity under §914.04, and refusal to testified after being granted immunity is contempt.

When testimony is compelled under a grant of immunity, other jurisdictions that may be able to prosecute the defendant must respect the grant. The witness cannot refuse to testify after receiving immunity based on a claim that other jurisdictions may not respect the grant and might use the compelled testimony against her.

•Costello v. Fennelly, 681 So. 2d 926 (4th DCA 1996), 21 F.L.W. D2335 (10/30/96)

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CHAPTER 8
DISQUALIFICATION AND RECUSAL

Chapter 8 - Disqualification

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DISQUALIFICATION AND RECUSAL

8.01 KEY POINTS

Motions for disqualification of a judge may be made by a party or done sua sponte by the judge. The legal grounds for disqualification are set forth in Rules of Judicial Administration, Rule 2.160. Ethical grounds for disqualification are set forth in Canons 3E and F of the Code of Judicial Conduct.

8.011 Voluntary Recusals

- Canon 3E of the Code of Judicial Conduct provides that a judge should recuse himself/herself in a proceeding in which his/her impartiality might reasonably be questioned. The Code specifies four areas of concern:
    - personal bias or prejudice or knowledge of disputed evidentiary facts; and,
    - service as the lawyer or lower court judge concerning the matter in controversy;
    - interest (financial or otherwise) in the outcome of the case; and,
    - relationships with parties or attorneys.
- A judge should refrain from proceeding when his/her impartiality may be seriously questioned.
    - A judge's personal friendship, with an attorney or party to a cause, absent special circumstances, is generally insufficient grounds for recusal. See, In Re Estate of Carlton, 378 So.2d 1219 (Fla. 1979) (However, disclosure may be appropriate).
- Disclosure
    - If a judge is aware of circumstances that could cause his/her impartiality to be questioned, the judge should disclose them for the record. In some instances, the parties may waive their right to have the judge recuse himself/herself by making a written agreement, outside the judge's presence, to proceed. Florida Code Judicial Conduct, Canon 3F; Section 38.03, Florida Statutes.
    - If a judge offers to recuse himself/herself, he/she must follow through, even if the offer is not accepted promptly. Failure to grant a motion for recusal following the judge's offer to recuse is reversible error. Funt v. Nadler, 530 So.2d 1107 (Fla. 3rd DCA 1988); Pistorino v. Ferguson, 386 So.2d 65 (Fla. 3rd DCA 1980).
    - The judge should monitor his/her personal and fiduciary financial interests and those of his/her spouse and minor children living with him/her. Florida Code Judicial Conduct, Canon 3E (2). The judge's ignorance of a conflict of interest

will not save the judge from a potentially embarrassing reversal. See Liljeberg v. Health Services Acquisition Corp. U.S., 108 S. Ct. 2194 (1988).

8.013 Motions for Disqualification of Judge - Fla. R. Jud. Admin. 2.160, Sections 38.02 & 38.10 Florida Statutes (1999)

- Grounds:
    - Fear that the party will not receive a fair trial because of specifically described prejudice or bias of the judge
    - Defendant or his/her attorney or another party or someone who has an interest in the outcome, including attorneys, is related to the judge by consanguinity or affinity within the third degree
    - Judge is a material witness for or against one of the parties
- Written motion required
    - Written motion must be filed alleging the facts and reasons for the disqualification
    - It must be sworn to by the party signing the motion or by separate affidavit. A certificate of good faith by counsel must accompany the motion
    - Time for motions
    - No more than 10 days after discovery of the facts constituting the grounds for the motion
- It must be promptly presented to the court for an immediate ruling
    - Must be filed before decisions are rendered unless there is excusable delay. Lawson v. Longo, 547 So.2d 1279 (Fla. 3rd DCA 1989).
    - If the motion is made during the trial it must be based on facts discovered during the trial and may be stated on the record and shall also be filed in writing in accord with the rule. Such motions shall be ruled on immediately
- May be waived by agreeing to presiding judge after being advised of problem. Lawson v. Longo, 547 So.2d 1279 (Fla. 3rd DCA 1989); Walker v. State, 552 So.2d 333 (Fla. 4th DCA 1989).
- If judge raises matter and the party then requests disqualification based upon what the judge has revealed, the judge is duty bound to recuse herself/himself. Pool Water Products, Inc. v. Pools by L.S. Rule, 612 So.2d 705 (Fla. 4th DCA 1993).

- If Prejudice is Claimed

    - DO NOT HOLD A HEARING. Ruling on a motion for disqualification "does not require a hearing, oral argument, the presentation of evidence, or a review of prior court proceedings. The legal sufficiency of the motion and affidavits is purely a question of law." Larimer v. State, 16 F.L.W. C147 (Fla. 5th Cir. Ct. 1991)

    - CAVEAT: If you do hold a hearing, you must assume the facts alleged are true and limit the argument SOLELY to the issue of the legal sufficiency of the motion.

    - Examine the submissions. If motion is legally sufficient the judge shall disqualify himself or herself without considering the truth of the allegations. Brown v. St. George Island, LTD, 561 So.2d 253 (Fla. 1990)

    - If there has been a disqualification under '38.02, the second judge is to be treated as if he or she were the first judge for purposes of a disqualification on a claim of prejudice. Brown v. St. George Island, LTD, 561 So.2d 253 (Fla. 1990)

    - Consideration of sufficiency of claim of prejudice

    - The motion is to be viewed from the perspective of the defendant, not the judge. Suarez v. Dugger, 527 So.2d 190 (Fla. 1988)

    - In examining the sufficiency of the motion, the judge must determine both its technical sufficiency and whether the facts alleged (which must be taken as true) would prompt Aa reasonably prudent person to fear that he would not get a fair and impartial trial". Thunderbird, LTD v. Great American Insurance Company, 566 So.2d 1296, 1304 (Fla. 1st DCA 1990)

    - Facts must be alleged showing a judge's undue bias, prejudice or sympathy. Dragovich v. State, 492 So.2d 350 (Fla. 1986)

    - Not sufficient if it only alleges subjective fears of bias without any allegation of objective facts. Kowalski v. Boyles, 557 So.2d 885 (Fla. 5th DCA 1990)

    - Adverse judicial rulings are not grounds for disqualification. Nassetta v. Kaplan, 557 So.2d 919 (Fla. 4th DCA 1990) Jernigan v. State, 608 So.2d 569 (Fla. 1st DCA 1992) [refusal to accept a plea]

- Statements by judge during or prior to hearings

    - Statements announcing an adverse judicial ruling or reflecting mental impressions and opinions formed during the course of the pretrial proceedings are not sufficient for disqualification.

- Statements indicating that the judge feels a party has lied and implying that he will not believe the party's testimony in the future generally reflect a bias against that party requiring removal.

- The aforementioned principle does not apply merely because the trial judge makes a pretrial ruling which has the effect of rejecting the testimony of the moving party. Brown v. St. George Island, LTD, 561 So.2d 253 (Fla. 1990)

- Comment by judge off the record when denying a bond reduction that he did not care whether the defendant got out of jail or not was not legally sufficient to show that he was prejudiced against the defendant or for the state. If the bond had been excessive the result might have been different. Nassetta v. Kaplan, 557 So.2d 919 (Fla. 4th DCA 1990)

- The motion for disqualification was legally sufficient where it alleged that the judge had predetermined a contempt matter against a defendant as evidenced by his refusal to allow him to present evidence and as evidenced by disparaging and insulting comments at the hearing. Sperber v. Sperber, 608 So.2d 145 (Fla. 4th DCA 1992).

- Claim that judge has formed a fixed opinion of the defendant's guilt is not sufficient even if the judge discusses it with others. Dragovich v. State, 492 So.2d 350 (Fla. 1986).

- Claim of bias against the type of crime, but not the person is not sufficient. Keenan v. Watson, 525 So.2d 476 (Fla. 5th DCA 1988); Jernigan v. State, 608 So.2d 569 (Fla. 1st DCA 1992) [a prejudice against people judge regarded as child abusers]

- Campaign involvement:

  - A trial judge was required to disqualify herself on motion where the attorneys for one of the parties were members of the judge's "contemporaneously active campaign committee in a contested election." The question was certified to the Supreme Court. This decision is questionable in light of recent supreme court decisions. Barber v. MacKenzie, 562 So.2d 755 (Fla. 3rd DCA 1990)

  - It is not legally sufficient for disqualification that the lawyer for one of the litigants made a legal campaign contribution to the trial judge or his spouse. MacKenzie v. Super Kids Bargain Store, Inc., 565 So.2d 1332 (Fla. 1990)

- Claim of bias because the judge was continuously having ex parte contact with the receiver in a mortgage foreclose was insufficient. Thunderbird, LTD v. Great American Insurance Company, 566 So.2d 1296 (Fla. 1st DCA 1990)

- Erroneous entry of a prior ex parte order was insufficient for disqualification. Harris v. P.S. Mortgage and Investment Corporation, 558 So.2d 430 (Fla. 3rd DCA 1990)

- Bias against the attorney - A motion for disqualification was sufficient where it alleged that the judge was biased against the attorney for the movant because he had represented an individual who had sued the judge while the judge was in private practice. James v. Theobald, 557 So.2d 591 (Fla. 3rd DCA 1990)

- The fact that there has been a great deal of pretrial publicity, none of which is attributable to the judge, is not grounds for disqualification. Provenzano v. State, 616 So.2d 428 (Fla. 1993)

- Motion Claiming Prejudice Against Subsequent Judge

    - If this is the party's second motion for disqualification due to alleged judicial prejudice, and if the predecessor judge granted the party's first motion, a successor judge "shall not be disqualified...unless the successor judge rules that he or she is in fact not fair or impartial in the case. Such a successor judge may pass on the truth of the facts alleged in support of the motion." Rule 2.160(g), Fla. R. Jud. Admin.; See also, Section 38.10, Florida Statutes (1999); Brown v. St. George Island, Ltd., 562 So.2d 684 (Fla. 1990)

- Where trial judge comments on truth of the allegations, the judge exceeds the proper scope of his/her inquiry and on that basis alone has established grounds for disqualification by creating an intolerable adversary atmosphere between himself/herself and [defendant]. Haggerty v. State, 531 So.2d 364 (Fl 1st DCA 1988); See also, Taylor v. State, 557 So.2d 138 (Fla. 1st DCA 1990); Townsend v. State, 564 So.2d 594 (Fla. 2d DCA 1990); Gulfstream Park Racing Association v. Gale, 540 So.2d 196 (Fla. 3rd DCA 1989); Hill v. Speiser, 536 So.2d 1190 (Fla. 4th DCA 1989)

- Statements by the judge expressing his recollection as to what he had done at the prior hearing were not an attempt to refute the charges of partiality, but rather they were merely a statement of the record. Kowalski v. Boyles, 557 So.2d 885 (Fla. 5th DCA 1990)

- If Appealed, Do Not File a Response

    - "Although we do not hold that any response filed by a judge in a prohibition-disqualification proceeding is per se disqualifying, it is decidedly dangerous for the judge to do so. The judge should remain silent and let the adversarial party supply the response." Fabber v. Wessel, 604 So.2d 533, 534 (Fla. 4th DCA 1992).

8.02 AUTHORITIES

8.03 TIPS/NOTES

8.04 CHECKLISTS/FORMS

8.041 Disqualification Checklist

____STOP, say nothing, take recess and take motion to chambers.

- Motion must be:

____1. in writing

____2. by a party

____3. allege specific facts and reason

____4. sworn to by party

____5. accompanied by attorney's certificate of good faith

____6. timely.

- When in doubt, GET OUT.

- DO NOT send case to another judge or reassign or transfer case. Administrative judge and/or clerk will handle it.

8.42 Recusal Form

THIS CAUSE came to be heard on the motion to recuse the undersigned Judge filed by the _____ and upon consideration it is:

ORDERED AND ADJUDGED that the motion is hereby:

G Granted - Request is hereby made to the Administrative Judge to reassign said cause to another division of this Court in accordance with established procedure.

G Denied

ORDERED in _____ County, Florida, this _____ day of _____, 200____.

_____
JUDGE

Chapter 8 -- Recusal and Disqualification

Criterion for Recusal

Article I, section 16 of the Florida Constitution guarantee the right to a jury trial. That right includes an entitlement to an impartial jury and it provide the accused with a safeguard against a compliant, biased, or eccentric judge.

Dougherty v. S., 813 So. 2d 217 (2d DCA 2002), 27 F.L.W. D756 (4/3/2002)

The standard for determining whether to grant a motion to disqualify is whether the fact alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial. whether motion is legally sufficient is a question of law, and the denial of that motion is reviewed de novo.

When the technical requirements of a motion to disqualify are not met, the court does not err in denying the motion even if the allegations are otherwise legally sufficient.

Barnhill v. S., 834 So. 2d 836 (Fla. 2002), 27 F.L.W. S850 (10/10/2002)

Under rule 2.160(g) and section 38.10, a successor judge cannot be recused unless the judge acknowledges that he in fact cannot be impartial. Where the court considered the motion and rules that his is impartial, and there is no abuse of discretion, the ruling is affirmed.

Quince v. S., 732 So. 2d 1059 (Fla. 1999), 24 F.L.W. S173 (4/8/99)

Judicial Conduct

Where the judge participates in ex parte contacts with the prosecutor during the pendency of defendant's 3.850 motion regarding preparing and changing orders, the judge's impartiality is properly questioned and the judge should be recused.

Smith v. S., 708 So. 2d 253 (Fla. 1998), 23 F.L.W. S49 (1/22/98)

When a judge has contact with jurors during lunch, the judge should not refuse to answer questions but should respond with minimal, courteous answers.

Mendoza v. S., 700 So. 2d 670 (Fla. 1997), 22 F.L.W. S655 (10/16/97)

A judge should not conduct an independent investigation into matters pertaining to the victim of a homicide and other matters pertaining to defendant's sentencing. Such behavior does not promote public confidence in the integrity and impartiality of the judiciary.

Vining v. S., 827 So. 2d 201 (Fla. 2002), 27 F.L.W. S654 (7/3/2002)

Defendant was charged with violating probation by having contact with children under 18. At the hearing the state presented evidence going to that point, and also heard evidence

that defendant was at work at another location at the charged time. The court sua sponte continued the hearing to allow the defense to get authenticated evidence of his time card. At the next hearing, the court told the state that it wanted to hear from the children themselves, and at a third hearing the court found defendant guilty. Held: The court did not depart from its position as a neutral magistrate. The court did not know what the evidence it sought was going to show, and gave the defense every opportunity to help discover the truth.

Kirkpatrick v. S., 769 So. 2d 515 (1st DCA 2000), 25 F.L.W. D2531 (10/23/2000)

(See **Grant v. S., 764 So. 2d 804 (2d DCA 2000), 25 F.L.W. D1782 (7/26/2000)** for criticism of the trial judge for interrupting cross and questioning witnesses himself.)

While a VOP hearing can be conducted informally and the judge may question witnesses, the judge may not take the role of the prosecutor. Where the judge departs from his role as a neutral magistrate, defendant's VOP conviction is reversed.

Cagle v. S., 821 So. 2d 443 (2d DCA 2002), 27 F.L.W. D1631 (7/19/2002)

Where the judge assumes the role of the prosecutor in a VOP hearing by doing all of the questioning of the witnesses, the judge departs from his role as an impartial magistrate and probation revocation is reversed.

Edwards v. S., 807 So. 2d 762 (2d DCA 2002), 27 F.L.W. D417 (2/15/2002)

The fact that a judge has ruled against a party is not a basis to recuse, nor does the judge's questioning a party about his position on an issue raise a doubt regarding the judge's impartiality.

Thompson v. S., 759 So. 2d 650 (Fla. 2000), 25 F.L.W. S346 (4/13/2000)

When the judge determines that defense counsel engaged in conduct that required that it be reported to the Bar, the judge's act of making that report does not require that the judge subsequently recuse himself from acting further in the case.

Birotte v. S., 795 So. 2d 112 (4th DCA 2001), 26 F.L.W. D1881 (8/1/2001)

The judge errs in interrupting cross to clarify the witness' testimony. Where the judge believed the witness was confused and that the jury was given the wrong impression, the judge should wait until the end of the witness' testimony to intervene. The court should

weigh the danger of creating the wrong impression with the jury regarding his impartiality with the danger of the witness' lack of clarity.

Hyland v. S., 826 So. 2d 1037 (3d DCA 2002), 27 F.L.W. D1840 (8/14/2002)

A judge should be recused when he assumes an adversarial position when ruling on a motion to disqualify. Any comment regarding the merit of the allegations will result in disqualification, regardless of whether the motion is legally sufficient.

SanMartin v. S., 820 So. 2d 403 (3d DCA 2002), 27 F.L.W. D1374 (6/12/2002)

The court's actions during trial of repeatedly interrupting defense counsel, without objection from the state, and commenting that defense counsel's actions were improper, is error. However, the failure of defense counsel to object to the interruptions and comments results in a failure to preserve the errors, and conviction is affirmed.

(See this case for discussion of when the judge's improper comments before the jury constitute fundamental error.)

•Mathew v. S., 837 So. 2d 1167 (4th DCA 2003), 28 F.L.W. D559 (2/26/2003)

Where the court on its own initiative suggests to the prosecutor that he inquire into the defendant's immigration status, the judge departs from his role as impartial magistrate, and the error is reversible.

Evans v. S., 831 So. 2d 808 (4th DCA 2002), 27 F.L.W. D2625 (12/11/2002)

The judge's stated policy that he will impose probation following a prison sentence is sufficient to get the judge disqualified as showing a refusal to consider sentences individually.

(See this case for extensive discussion of cases regarding disqualification when the judge has an expressed "policy" regarding sentencing in specific categories of cases.)

Martin v. S., 804 So. 2d 360 (4th DCA 2001), 26 F.L.W. D2218 (9/12/2001)

The judge's act of leaving the courtroom while testimony is being read back to the jury is fundamental error. While defendant can waive the judge's presence, when no valid waiver is made, the error gets reversal.

•Bryant v.S., 656 So. 2d 426 (Fla. 1995), 20 F.L.W. S164 (4/13/95)

<u>Judicial Comment</u>

It is error for the judge to comment on the evidence before the jury in such a way that indicates his opinion of the weight, character, or credibility of the evidence. Where the court overrules an objection to the prosecutor's closing in such a way that it indicates the judge believed the argument, a new trial is required.

Simmons v. S., 803 So. 2d 787 (1st DCA 2001), 26 F.L.W. D2838 (11/30/2001)

Denying a 3.850 motion by finding that the claim is nothing more than "abject whining" does not result in recusal, but the court is cautioned to refrain from comments that might cause a litigant to fear that the judge's neutrality has been compromised.

Ragsdale v. S., 720 So. 2d 203 (Fla. 1998), 23 F.L.W. S544 (10/15/98)

Judge's sua sponte comment that an LEO qualified as an expert witness constitutes an improper comment on the credibility of a witness.

Whitaker v. S., 742 So. 2d 530 (1st DCA 1999), 24 F.L.W. D2405 (10/20/99)

A judge's extra-record attempts to defend against allegations in a motion to recuse will result in recusal just as though the judge on the record had defended himself.

(See this case for discussion of the difficulties arising from the rule that prohibits a judge from seeking to rebut allegations in a motion to recuse.)

Brinson v. S., 789 So. 2d 1125 (2d DCA 2001), 26 F.L.W. D1589 (6/27/2001)

(See **Cornelius v. S., 760 So. 2d 292 (2d DCA 2000), 25 F.L.W. D1452 (6/14/2000),** Blue, J., concurring, for admonition to the court that the judge must refrain from facial expressions or body language that indicates that the court prefers one side to another.)

The judge's statement denying that he had prejudged the matter followed by his denial of a motion to recuse does not violate the rule against refuting the charges in a motion to disqualify.

Niebla v. S., 832 So. 2d 887 (3d DCA 2002), 28 F.L.W. D7 (2/18/2002)

<u>Disqualification Motion and Hearing</u>

When grounds for judicial bias are known but are not raised at the time, the grounds are waived and cannot be raised in a post-conviction relief motion.

Schwab v. S., 814 So. 2d 402 (Fla. 2002), 27 F.L.W. S275 (3/28/2002)

A motion for disqualification must be made within 10 days after the grounds for disqualification are discovered. Where the judge presided over defendant's first trial, which was reversed, and the same judge reappointed for the second trial and defendant did not seek to have the judge removed until after more than ten days after the appointment had passed, the motion is not timely.

Willacy v. S., 696 So. 2d 693 (Fla. 1997), 22 F.L.W. S219 (4/24/97)

Where court holds a hearing on motion to disqualify, and allows witnesses to be called, it is clear that the court is passing on the merits of the motion instead of determining solely whether the motion is legally sufficient as required under rule 2.160(d), and death sentence is reversed.

•Cave v. S., 660 So. 2d 705 (Fla. 1995), 20 F.L.W. S484 (9/21/95)

When a judge voluntarily removes himself form a case, he "recuses" himself. When a party seeks the judge's removal, he seek the judge's disqualification, not recusal.

An order denying a motion to disqualify is reviewable on a de novo standard.

Where an attorney who has a personal conflict with a judge takes a case after the case has been assigned to that judge, the judge is not required to recuse himself and is not subject to disqualification.

Sume v. S., 773 So. 2d 600 (1st DCA 2000), 25 F.L.W. D2802 (12/6/2000)

(See **Cascone v. Foster, 774 So. 2d 773 (1st DCA 2000), 25 F.L.W. D2803 (12/6/2000)** for discussion of an attorney's right to obtain a blanket order disqualifying a judge from hearing his cases.)

Under rule 2.160, when the judge is presented with a motion to disqualify, the judge is limited to assessing the motion's procedural and legal sufficiency and is not to pass on the truth or falsity of the allegations.

Legal sufficiency requires a factual foundation for the litigant's fear, and the facts must be sufficient to cause a reasonably prudent person to fear not receiving a fair trial.

A threat to humiliate defense counsel in front of the jury coming in a sidebar conference where the judge's voice was loud enough to be heard in the back of the courtroom, is legally sufficient to require disqualification.

Gates v. S., 784 So. 2d 1235 (2d DCA 2001), 26 F.L.W. D1098 (4/27/2001)

Denial of a continuance to allow time to prepare a written motion to recuse is an abuse of discretion. An oral motion is insufficient.

Tyler v. S., 816 So. 2d 755 (4th DCA 2002), 27 F.L.W. D1091 (5/8/2002)

When a judge enters an order recusing himself, any further orders entered by the judge in the case are void.

Meaweather v. S., 732 So. 2d 499 (1st DCA 1999), 24 F.L.W. D1261 (5/27/99)

(See **Franco v. S., 777 So. 2d 1138 (4th DCA 2001), 26 F.L.W. D343 (1/31/2001)** for discussion of the sufficiency of a motion to disqualify filed after trial and before sentencing based on the judge's dislike for defense attorney expressed during trial.)

Successor Judge

A successor judge can rule on a motion for rehearing when the original judge is unable to act due to death, disability, or other event.

A successor judge is without authority to reverse the original judge on a legal ruling made by the original judge. When the motion for rehearing is based on a reargument of points or facts originally made, the successor judge cannot reverse.

Haliburton v. Singletary, 691 So. 2d 466 (Fla. 1997), 22 F.L.W. S36 (1/9/97)

When a sentence is reversed and remanded for resentencing, a successor judge under rule 3.700(c) must become acquainted with what transpired at trial and other facts related to the case. Merely reviewing the prior sentencing order is not sufficient.

Watson v. S., 820 So. 2d 1057 (4th DCA 2002), 27 F.L.W. D1592 (7/10/2002)