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Abstract

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KEYWORDS: criminal, supreme, swing

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By Bruce A. Zimet*

Introduction

In 1985, the Florida Supreme Court addressed numerous important issues relating to criminal procedure. This article will review and analyze significant 1985 Florida Supreme Court decisions. The purpose of this review and analysis is not to merely catalogue cases, but to explore the rationale and direction of the supreme court.

A cursory review of the Florida Supreme Court in 1985 reveals a significant number of criminal procedure opinions relating to cases in which the death penalty was imposed. This phenomenon is no doubt attributed to the supreme court's constitutionally mandated jurisdictional boundaries which limit direct appeal to the supreme court to final judgments of trial courts imposing the death penalty.[1] While the Florida Constitution does not prohibit the Florida Supreme Court from considering non-death penalty criminal procedure cases, as a practical matter jurisdiction limitations restrict the volume of non-death penalty cases.[2] The dominance of death penalty cases before the supreme court

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1. FLA. CONST. art. V, § 3(b)(1) provides that the Supreme Court: "Shall hear appeals from judgments of trial courts imposing the death penalty . . . ."

2. The Florida Constitution does not impose any other mandatory jurisdiction upon the supreme court for matters relating to criminal procedure other than direct appeals from trial courts imposing the death penalty and decisions of the district courts of appeal declaring invalid a state statute or a provision of the state constitution. FLA.

has created certain interesting characteristics. Obviously nearly all of the death penalty cases devote analysis to issues which arise during the "sentencing" phase of trial. These issues are generally limited in scope and application to the unique circumstances of the "mini-trial" of the death penalty sentencing.[3] Additionally, the death penalty cases have confronted the supreme court with a significant number of claims concerning the effective assistance of counsel as well as allegations of prosecutorial misconduct. Conversely, the jurisdictional boundaries of the Florida Supreme Court, with the resultant overflow of death penalty cases and unique issues, has limited the quantity of supreme court decisions relating to certain traditional areas of criminal procedure such as search and seizure, wiretaps, grand jury or fifth amendment issues.

Right to Jury Trial

While the right to a jury trial is a fundamental component of Florida criminal procedure,[4] the precise scope of that right has remained uncertain. In 1985, the Florida Supreme Court sought to provide more accurate definition of the right to a jury trial. The vehicle for review was the supreme court's review in *Reed v. State*.[5]

In *Reed*, the supreme court considered the question of whether an accused in a criminal mischief prosecution maintains a right to a jury trial under the Florida and United States Constitutions.[6] Reed was

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CONST. art. V, § 3(b)(1).

All other basis for jurisdiction of the Florida Supreme Court for matters relating to criminal procedure are discretionary. *See*, FLA. CONST. art. V § 3(b)(1). The practical result of the jurisdictional limitations on the supreme court has been to make decisions of the intermediate courts of appeal (the district courts of appeal in felony criminal cases) final decisions. *See*, *Florida Courts of Appeal: Intermediate Courts Become Final*, 13 STETSON L.REV. 479 (1984).

3. The sentencing hearing is authorized by Rule 3.780 Fla.R.Cr.P.. This article will not seek to specifically address opinions which discuss issues raised in the sentencing phase of trial. Such a review and analysis is best suited for individual and specified analysis.

4. The right to a jury trial is contained in Article III, Section 2 and the sixth amendment to the United States Constitution. Additionally, the right to a jury trial is contained in Article I, Sections 16 and 22 of the Florida Constitution.

5. 448 So. 2d 1102 (Fla. 5th Dist. Ct. App. 1984).

6. *Reed* had come before the court as a certified question of great public importance from the Fifth District Court of Appeal. Reed had been denied a jury trial in county court. The circuit court, acting in its appellate capacity, determined that Reed

charged with violation of Section 806.12(2)(a) Florida Statute (1981), which carried a maximum punishment of a term of incarceration of sixty days and/or a fine of up to $500. The *Reed* court considered the United States Supreme Court's decision in *Baldwin v. New York*,[7] in which that Court concluded that an offense carrying a maximum penalty in excess of six months was a "serious crime" which mandated a jury trial. *Reed*, however, did not construe *Baldwin* as requiring that an offense of less than six months as necessarily constituting a petty offense which by definition did not require a jury trial. Instead, *Reed*, relying upon *District of Columbia v. Colts*,[8] provided that the classification of a crime as a serious crime (requiring a jury trial) or a petty offense (triable summarily without a jury) depended primarily upon the nature of the offense. The Florida Supreme Court in *Reed* further relied upon its previous holding in *Whirley v. State*,[9] in which four classes of serious crimes (requiring jury trials) were enumerated. Those classes included crimes indictable at common law; crimes involving moral turpitude; crimes that are *malum in se*; and crimes carrying a penalty in excess of six months incarceration. Utilizing that analysis, the Florida Supreme Court in *Reed* found malicious mischief to be rooted in the common law as well as have been *malum in se* and requiring a jury trial under both the United States and Florida Constitutions.

Jury Selection

The Florida Supreme Court addressed several challenges to trial court rulings relating to the competency of potential jurors. In these cases the court was careful to follow its well-established precedent that the competency of a challenged juror was a discretionary decision of the trial court which would not be disturbed absent a showing of manifest error.[10] In *Ross v. State*,[11] the court rejected a claim of reversible error based upon the trial court's denial of a motion to strike a prospective juror for cause due to the prospective juror's belief that she had

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was entitled to a jury trial. The Fifth District granted a writ of certioari quashing the circuit court order and certifying the ultimate question.

7. 399 U.S. 66 (1970).

8. 282 U.S. 63 (1980).

9. 450 So. 2d 836, 838 (Fla. 1984).

10. *See* Christopher v. State, 407 So. 2d 198 (Fla. 1981), *cert. denied*, 456 U.S. 910 (1982); Singer v. State, 109 So. 2d 7 (Fla. 1959).

11. 474 So. 2d 1107 (Fla. 1985).

seen the prosecutor at a family reunion and the juror's uncertainty whether the prosecutor was a distant relative of the juror's. The Florida Supreme Court, in rejecting Ross' claim of error, reviewed Florida's statutory provisions relating to challenge for cause based upon blood relations between potential jurors and attorneys for parties. The court in *Ross* concluded that the "abstract statements" made by the prospective juror failed to satisfy the statutory requirements that jurors may be challenged for cause if the jurors are related within the third degree to the attorneys of either party.[12] Unfortunately, the opinion in *Ross* does not discuss whether the prosecutor in question responded to the statement of the prospective juror in order to provide the court with a complete and accurate factual basis to determine the defendant's motion to challenge for cause. Additionally, the *Ross* opinion does not discuss whether Ross' counsel sought to further inquire of the juror concerning her knowledge of the prosecutor.[13]

In *Mills v. State*,[14] the Florida Supreme Court affirmed the trial court's determination of juror competency and found no error in the trial court's denial of a motion to excuse a potential juror for cause. The questioned *Mills* juror is described in the court's opinion as having a "distant relationship"[15] with the murder victim's family and an "acquaintance with Mills and his family."[16] In applying the court for an order to excuse the juror for cause, Mills' trial counsel had represented to the court that he had "independent information" that the questioned juror had voiced an opinion that Mills was guilty during a conversation with Mills' brother-in-law. The questioned juror denied that he had expressed an opinion concerning Mills' guilt during a conversation with Mills' brother-in-law. The juror additionally stated that he could be fair and impartial. When the trial court provided Mills' counsel with an opportunity to provide the court with evidence of the alleged statement of the juror concerning Mills' guilt, the attorney merely "repeat[ed] his

12. FLA. STAT. § 913.03(9) (1983).

13. Since trial attorneys are themselves provided *voir dire* examination, Rule 3.300(b), Fla. R.Cr.P., it would seem dubious that Ross' counsel would not have sought to further explore the question.

Further, *Ross* should not be read as precluding trial courts from granting motions to exclude for cause in situations where the requirements of Sec. 913.03(9) are not satisfied.

14. 462 So. 2d 1075 (Fla. 1985).

15. *Id.* at 1079.

16. *Id.*

representations that the incident did occur."[17] The *Mills* court concluded that the trial court properly concluded that the absence of evidence to substantiate the claims of partiality did not negate the jurors' insistence of imparitality. In reaching their decisions, the trial court and supreme court implemented the criteria announced in *Lusk v. State*,[18] and determined that the challenged juror could "lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court."[19]

In *Stano v. State*,[20] the Florida Supreme Court considered the scope within which the ability of a juror to implement the *Lusk* test could be explored during *voir dire*. The issue in *Stano* was whether trial counsel could ask a potential juror "how"[21] they could "block . . . out"[22] pretrial publicity relating to the defendant's case and accordingly provide the defendant a verdict based solely on the evidence presented.[23] The trial court sustained an objection to the inquiry as to "how" the juror could block out the pretrial publicity in satisfying the *Lusk* test. In affirming the prohibition imposed by the trial court, the supreme court found no abuse of discretion. The court relied upon the decision in *Jones v. Stater*,[24] and stated that: "While 'counsel must have an opportunity to ascertain latent or concealed prejudgments by prospective jurors,' it is the trial court's responsibility to control unreasonably repetitious and argumentative *voir dire*."[25] Unfortunately, the *Stano* case reflects the difficulty experienced by trial counsel in at-

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17. *Id.*

18. 446 So. 2d 1038, 1041 (Fla.), *cert. denied*, 105 S. Ct. 229 (1984).

19. 462 So. 2d at 1081. The *Mills* decision does not describe any reason why the defendant's brother-in-law was not called by the defendant to testify as to the alleged opinion of guilt expressed by the potential juror. Further, the *Mills* opinion is silent as to any questions asked of the potential juror concerning his knowledge of any particular facts concerning Mills and/or his background. This area is particularly significant considering the fact that Mills had four prior burglary convictions.

20. 473 So. 2d 1281 (Fla. 1985).

21. *Id.* at 1284.

22. *Id.* at 1285.

23. Unfortunately, the *Stano* opinion does not provide a specific description of the pretrial publicity except the following generalization "numerous numbers of the venire for the second trial had been exposed to publicity regarding *Stano*, the instant crime, and the first trial." 473 So. 2d at 1285.

24. 378 So. 2d 797 (Fla. 1st Dist. Ct. App. 1979), *cert. denied*, 388 So. 2d 1114 (Fla. 1980).

25. 473 So. 2d at 1285 (quoting Jones v. State, 378 So. 2d 797-98 (Fla. 1st Dist. Ct. App. 1979).

tempting to properly explore an area critical to his client's opportunity to receive a fair trial. While it is difficult to understand how a question such as "How can you block out pretrial publicity?" is "unreasonable repetitious and argumentative,"[26] it is obvious that the "how" question is rather ineffective in achieving the ultimate goal of uncovering latent or concealed prejudgments.

The question of whether the trial court erred in denying a motion to excuse for cause two prospective jurors who were employed as corrections officers in the state prison system was reviewed by the court in *State v. Williams*.[27] The *Williams* court concluded that no error had occurred despite the fact that Williams had been charged with battery of a corrections officer.[28] In reaching its decision, the supreme court quashed the decision of the First District Court of Appeal.[29] The district court had relied upon its previous ruling in *Irby v. State*.[30] In *Irby* the court found an "appearance and a substantial probability of inherent juror bias" when considering the ability of a corrections officer to sit as a juror in a case involving a battery of a corrections officer at the Union Correctional Institute. In *Irby*, as in *Williams*, the potential jurors claimed that they could be fair and impartial jurors despite their employment as a corrections officer. The *Williams* court concludes that the *Irby* court "ignored"[31] the juror's protestations of fairness in reaching its conclusion that the juror should be excused for cause. The court in *Williams* held that application of the *Lusk* test was appropriate in *Williams* and that the trial court was in the best position to determine the actual basis of a juror.[32]

> The person in the best position to determine this actual bias is the trial judge. The trial judge hears and sees the prospective juror and has the unique ability to make an assessment of the individual's candor and the probable certainty of his answers to critical ques-

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26. *Id.* at 1285.

27. 465 So. 2d 1229 (Fla. 1985).

28. The corrections officer who was the victim in *Williams* was employed at the Union Correctional Institute. The court's opinion is silent as to the location of employment of the two questioned jurors (corrections officers).

29. Williams v. State, 440 So. 2d 404 (Fla. 1st Dist. Ct. App. 1983).

30. 436 So. 2d 1047 (Fla. 1st Dist. Ct. App. 1983), *review denied*, 447 So. 2d 888 (Fla. 1984).

31. 465 So. 2d at 1230.

32. *Williams* chose to argue in the Supreme Court that the *Lusk* test announced by the Supreme Court was not applicable to the "unique" facts of *Williams*.

tions presented to him.[33]

The result in *Williams* reflects the supreme court's basic reluctance to disturb the findings of the trial court in deciding whether the trial court denied motions to excuse jurors for cause. Unfortunately, the court has implemented the *Lusk* test which essentially restricts the trial court from excusing a juror for cause unless the court finds that the juror lacked candor in expressing confidence in being able to implement the *Lusk* test. The *Lusk* test is particularly troublesome when the trial court considers the "candor" of law enforcement personnel who are under obvious pressure to announce themselves fair in answer to the question of whether they will sit as fair jurors in a trial. It seems unlikely that any law enforcement officer would admit to being prejudiced and even more unlikely that a trial judge will grant a motion to challenge for cause and thus (as required by *Lusk*) make a determination that the official lacked candor.[34]

Defendant's Presence at Trial

The Florida Supreme Court was challenged by two unique questions concerning a defendant's right to be present at his trial. In *Peede v. State*,[35] the court considered for the first time whether a defendant could knowingly and voluntarily waive his presence at a capital trial. The court considered the question from the perspective of the United States Supreme Court decisions of *Taylor v. United States*,[36] in which a defendant's voluntary absence in a non-capital case operated as a waiver of his right to be present during all phases of a trial,[37] as well as *Drope v. Missouri*,[38] in which the question of whether a defendant may waive his presence at a capital trial was specifically left open. The *Peede* Court concluded that no valid distinction exists between defendants in capital and non-capital offenses and therefore concluded that a

33. 465 So. 2d at 1231.

34. It seems clear that legislative limitations on the ability of law enforcement officials to sit on juries is the only visible remedy to the *Lusk* test.

35. 474 So. 2d 808 (Fla. 1985).

36. 414 U.S. 17 (1973).

37. The right of a defendant to be present at the stages of a trial where fundamental fairness might be thwarted by his absence derives from the confrontation clause of the sixth amendment and the Due Process Clause of the fourteenth amendment. *Illinois v. Allen*, 397 U.S. 337 (1972).

38. 420 U.S. 162 (1975).

defendant could voluntarily waive his right to be present at a capital trial just as a defendant could knowingly waive any other constitutional right.[39] The *Peede* court recognized that its opinion might be in conflict with the decision of *Proffitt v. Wainwright*,[40] in which the Eleventh Circuit found a defendant's presence at a capital trial to be non-waivable. In light of *Proffitt*, the ultimate viability of *Peede* would appear questionable.[41]

Despite its ruling in *Peede*, the court held in *Hooper v. State*,[42] that a trial court had not erred in refusing a request of a defendant to waive his presence during the jury selection phase of a trial. The *Hooper* holding, which ironically was announced on the same day as *Peede*, concluded that Hooper's reason for absenting himself (fear that his physical size might intimidate jurors in their *voir dire* responses) did not outweigh what the court called "the ultimate need to be present."[43] The Florida Supreme Court did not attempt to reconcile *Peede* and *Hooper*.

Competency

A. *Defendant's Competency*

The Florida Supreme Court reversed two death sentence convictions of first degree murder in 1985 due to a failure of a trial court to conduct an evidentiary hearing to determine the competency of a criminal defendant. In *Gibson v. State*,[44] the supreme court found a trial court's determination of competency merely based upon review of past medical reports and the trial court's personal observations to be insufficient. The *Gibson* court restated its holding in *Christopher v. State*,[45]

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39. 474 So. 2d at 814. The *Peede* court looked toward the 1975 Amendment to Rule 43, Federal Rule of Criminal Procedure which abandoned any distinction between capital and noncapital offenses relating to voluntary absence from criminal trials, as well as Florida Rule of Criminal Procedure 3.180(b) which similarly lacks a capital — noncapital distinction.

40. 685 F.2d 1227 (11th Cir. 1982), *cert. denied*, 104 U.S. 508 (1983).

41. *Peede* sought to distinguish *Proffitt* in two respects. Initially, *Peede* contended that the *Proffitt* court had not recognized the elimination of the distinction in Rule 43 between capital and non-capital cases. Secondly, *Peede* noted that *Proffitt* had alternatively concluded that no knowing or voluntary waiver had been satisfied.

42. 476 So. 2d 1253 (Fla. 1985).

43. *Id.* at 1256.

44. 474 So. 2d 1183 (Fla. 1985).

45. 416 So. 2d 450, 452 (Fla. 1982).

which states the responsibility of the trial court to conduct a competency hearing "whenever it reasonably appears necessary, whether requested or not." The facts determined to require a hearing in *Gibson* included an eight year history of court-ordered examination and periodic hospitalization, as well as a prior determination of incompetency.[46]

In *Hill v. State*,[47] the court reversed a first degree murder conviction in which the trial court refused to conduct an evidentiary hearing to determine competency in which a defendant had been previously diagnosed to suffer from grand malepileptic seizures and mental retardation. Further, during a special education program for mentally handicapped children, the defendant had been observed to often times be blamed for things he did not do, and when accused, often admitted guilt. Additionally, the defendant's I.Q. was subsequently measured to have been sixty-six which placed the defendant in the lowest one percent in the general population. The supreme court in *Hill* specifically rejected the procedure utilized by the trial court in which it determined that an evidentiary hearing was not necessary. The trial court only allowed the testimony of the defendant's attorney as well as an investigator for the defense. The trial court permitted submission of other testimony by deposition. However, the trial court stated that it was not going to review the depositions since the issue of competency was a judgment determination for the trial lawyer. The supreme court rejected this obvious misapplication of the law.

In *Trawick v. State*,[48] the Florida Supreme Court held that the trial court did not err in failing to conduct a competency hearing merely on the fact that the defendant appeared despondent and ambivalent about his guilty plea to first degree murder. *Trawick* recognized the obligation placed upon the trial court in *Drope v. Missouri*,[49] to conduct its own inquiry of a defendant's competency if irrational behavior or demeanor is displayed. However Trawick's contemplation of suicide and despondency when viewed in the light of the trial court's extensive colloquy prior to accepting Trawick's guilty plea were deemed not to require further hearing.

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46. *Gibson*, 474 So. 2d at 1183.
47. 473 So. 2d 1253 (Fla. 1985).
48. 473 So. 2d 1235 (Fla. 1985).
49. 420 U.S. 162 (1975).

B. *Physical Condition of Counsel*

While appellate courts generally do not disturb trial courts' discretionary determinations of motions for continuance, the Florida Supreme Court was confronted by a trial court's denial of a motion for continuance based upon the health of defense counsel which the supreme court found compelled reversal of a first degree murder conviction.

In *Jackson v. State*,[50] the supreme court evaluated the unrefuted record which included the defendant's attorney having suffered a head injury prior to trial and having received medication for that injury which resulted in episodes of dizziness and slurred speech. The court concluded that these circumstances mandated reversal due to the trial court's failure to grant the motion for continuance due to the inabililty of the trial counsel to effectively represent his client.

Search and Seizure

Relatively few significant search and seizure issues were considered by the Florida Supreme Court in 1985. In *Lara v. State*,[51] the court concluded that an exception to the warrant requirement would be rooted in exigent circumstances when law enforcement officers conduct an immediate search of an area to determine the number and condition of the victims or survivors, to see if the killer is still on the premises and to preserve the crime scene.[52] In *State v. Dilyerd*,[53] the supreme court implemented the holding of the United States Supreme Court in *Michigan v. Long*,[54] and found that reasonable suspicion that an unarrested person is dangerous supports a warrantless area search of the passenger compartment of an automobile. As in *Long*, the *Dilyerd* court reached its conclusion despite the fact that the unarrested individual had been removed from the automobile *prior* in time to the search.

Finally, in *Roche v. State*,[55] the court found the statutory basis supporting random searches of vehicles in furtherance of agricultural regulations to be constitutional. The *Roche* decision was in direct con-

50. 464 So. 2d 1181 (Fla. 1985).
51. 464 So. 2d 1173 (Fla. 1985).
52. *Id.* at 1175.
53. 462 So. 2d 301 (Fla. 1985).
54. 463 U.S. 1032 (1983).
55. 462 So. 2d 1096 (Fla. 1985).

trast to the holding in *Lake Butler Apparel Co. v. Department of Agriculture and Consumer Services.*[56] In *Lake Butler*, the court found the identical statute to be unconstitutional.

Statements

In *Haliburton v. State*,[57] the Florida Supreme Court considered the question of whether a defendant who has been advised of his *Miranda* rights and agrees to answer questions must be advised by his interrogators that an attorney retained on his behalf desires to speak to him. The supreme court answered that question in the affirmative, finding that a defendant must be advised that an attorney retained on his behalf is trying to advise him even if said notification is during the course of an interrogation. The court reiterated that the determination of the need for counsel is the defendant's prerogative, citing *State v. Craig*,[58] and that once informed of the opportunity for advice, the defendant may reject that opportunity. The court specifically rejected any requirement for law enforcement officials to obey a telephone order of an attorney to terminate questioning a defendant.[59] It would appear, however, that the *Haliburton* opinion has been directly contradicted by the subsequent United States Supreme Court decision in *Moran v. Burbine.*[60] In *Burbine*, the Supreme Court concluded that the failure to advise a defendant of the efforts of an attorney who had been retained by the defendant's sister without defendant's knowledge, to contact a defendant did not deprive the defendant of his right to counsel or defeat defendant's waiver of his *Miranda* rights.

In *State v. Inciarrano*,[61] the Florida Supreme Court confronted a rather novel factual scenario in which a victim of a homicide had tape recorded his own murder in his own office. The issue before the court related to the admissibility of the tape recording which contained the voice of Inciarrano conversing with the victim "the sound of a gun being cocked, five shots being fired by Inciarrano, several groans by the

56. 551 F. Supp. 901 (M.D. Fla. 1982).

57. 476 So. 2d 192 (Fla. 1985).

58. 237 So. 2d 737 (Fla. 1970).

59. The supreme court similarly found in Valle v. State, 474 So. 2d 796 (Fla. 1985) that an instruction by a public defender to police agents not to question a defendant which is agreed to by the police does not amount to invocation of defendant's right to counsel and does not compel suppression of a statement.

60. 106 S. Ct. 1135 (1986).

61. 473 So. 2d 1272 (Fla. 1985).

victim, the gushing of blood, and the victim falling from his chair to the floor."[62] The supreme court determined that the Florida Communications Statute which requires consent to the interception of wire or oral communications by all parties to the communications did not apply to the murder tape and therefore suppression of the tape was not mandated. While the result announced in *Inciarrano* is not particularly dramatic, the rationale implemented to reach that result is potentially quite significant. The court analyzed the Florida Communications Statute and determined that it applied only to communications in which an individual "Exhibit[ed] an expectation of privacy *under circumstances reasonably justifying such an expectation.*"[63]

In *Cave v. State*,[64] the Florida Supreme Court affirmed the denial of a motion to suppress a defendant's statements. In *Cave*, the court found that he had been fully advised of his *Miranda* rights and acknowledged his rights. The defendant proceeded to initially proclaim his innocence. At no time did he ask for counsel or exercise his right to remain silent. The court found that the defendant's eventual statement was proper since the law enforcement officials had no obligation to equate protestation of innocence with implementation of constitutional rights that require questioning to cease.

Prosecutorial Misconduct

Episodes of prosecutorial misconduct were unfortunately not foreign to the cases considered by the 1985 Florida Supreme Court. The court was confronted with a veritable laundry list of improper conduct and tactics utilized in order to secure criminal convictions. These tactics included use of false testimony, refreshing recollection with inadmissible and factually inaccurate allegations of defendant's confessions, withholding of *Brady* material, attacks on defense counsel, and commenting on a defendant's right to remain silent. Although the 1985 supreme court cited impropriety with a high level of disdain, it nevertheless found that misconduct rarely creates grounds for reversal of criminal convictions. Instead, the supreme court, relying upon the harmless error rule, generally viewed disciplinary actions against particular attorneys as the most appropriate remedy for improper behavior.

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62. *Id.* at 1274.
63. *Id.* at 1275.
64. 476 So. 2d 180 (Fla. 1985).

Despite obvious awareness of the legendary "golden rule" parameters of closing arguments, prosecutors violated the prohibition against arguing to the jury that they may well be victims of the defendant's criminal behavior if they fail to convict him. In *State v. Wheeler*,[65] the Florida Supreme Court found the following argument to be violative of the golden rule which mandated reversal:

> Ladies and gentlemen, these officers were acting in nothing but good faith. They know there are drugs out there. It's all over the place. It's in the school yard, it's in the playground, it's in the home — it doesn't matter whether you are rich or poor, the drugs are out there. These officers know there is only one way to stop it and that is to go after the dealer. Ladies and gentlemen, Mr. Dale Wheeler is one of these people. He is one of these dealers. He is supplying the drugs that eventually get to the school yards and eventually get to the school grounds and eventually get into your own homes. He is one of the people who is supplying this. For him and people just like him — [at this point defense counsel objected, asked for a curative instruction, and moved for mistrial, all of which was denied by the judge].[66]

Section 924.33, Florida Statutes (1983), codified and adopted the "harmless error" rule for appeals of criminal convictions. In *State v. Murray*,[67] the supreme court applied the harmless error rule to prosecutorial misconduct in closing arguments. Consequently, the *Murray* court declined to apply its "supervisory power" unless the error was not harmless. Section 924.33, Florida Statutes (1983) provides that:

> No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

Despite the statute, Florida courts had traditionally concluded that prosecutors' comments on defendants' failure to testify created reversible error regardless of the harmless error statute. However, in *State v. Marshall*,[68] the court applied the harmless error rule to any comment

65. 468 So. 2d 978 (Fla. 1985).
66. *Id.* at 981.
67. 443 So. 2d 955 (Fla. 1984).
68. 476 So. 2d 150 (Fla. 1985).

which refers to any comment upon defendant's failure to testify.[69] In abandoning its *per se* reversal rule, the *Marshall* court referred to four factors. Initially, the supreme court looked to court decisions which have determined comments upon silence not to be fundamental error.[70] Secondly, the *Marshall* court looked to the United States Supreme Court decisions in *Chapman v. California*,[71] and *United States v. Hastings*,[72] which found the harmless error rule to be consistent with the federal constitution. Third, the harmless error rule was described as a preferred method of promoting the administration of justice. Finally, the *Marshall* court turned to the Florida legislative intent as encompassed within Section 924.33.

Consequently, as a result of *Marshall*, comments upon the failure of a defendant to testify must be evaluated according to the harmless error rule with the state having the burden of establishing the comment to have been harmless beyond a reasonable doubt.[73]

In *Bertolotti v. State*,[74] the Florida Supreme Court criticized a prosecutor's closing comments to a jury during a death sentence hearing. In that argument, the prosecutor proceeded to comment on the defendant's right to remain silent, violated the golden rule by inviting the jury to imagine the victim's pain, terror and defenselessness, and also asked them to send a message to the community at large. The *Bertolotti* court concluded that since the penalty phase of a murder trial only results in a nonbinding recommendation, misconduct must be "egregious" and so outrageous so as to taint the validity of the recommendation of the jury.[75] The court did, however, launch into a stern admonition of the prosecutor's conduct. The court restated its prescription to remedy similar misconduct by professional sanction of the individual attorney and not at the expense of the citizens by mistrial of

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69. *See* David v. State, 369 So. 2d 943 (Fla. 1979); Trafficante v. State, 92 So. 2d 811 (Fla. 1957); and Way v. State, 67 So. 2d 321 (Fla. 1953).

70. *See* Chapman v. California, 386 U.S. 18, 22 (1967); Clark v. State, 363 So. 2d 331 (Fla. 1978).

71. 386 U.S. 18 (1967).

72. 461 U.S. 499 (1983). In *Hastings* the Supreme Court set forth the issue to be decided by the reviewing court "absent the prosecutor's allusion to the failure of the defense to proffer evidence to rebut the testimony of the victim, it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty," 461 U.S. at 510-11.

73. 476 So. 2d at 153.

74. 476 So. 2d 130 (Fla. 1985).

75. 476 So. 2d at 133.

reversal and remand.[76]

Nondisclosure of Information

On several occasions in 1985, the Florida Supreme Court considered cases in which prosecutors failed to provide required information to the defense. In *Arrango v. State*,[77] the supreme court reversed a first degree murder conviction due to the state's failure to disclose the existence of evidence which had been requested by the defense pursuant to *Brady v. Maryland*.[78] The *Arrango* court concluded that the evidence in question had been (1) requested by the defense and suppressed by the prosecution (2) favorable in character for the defendant and (3) material to the outcome of the trial.[79]

In *Brown v. State*,[80] the supreme court reviewed the trial court's exclusion of certain evidence which the state had inadvertently not disclosed to the defense in discovery. The supreme court found that the trial court properly conducted a *Richardson* hearing (as provided in *Richardson v. State*[81]), and remedied the substantial discovery violation in a manner consistent with the seriousness of the breach.

Finally, in *Francis v. Stater*,[82] the supreme court refused to grant a new trial despite the fact that the prosecutor had failed to provide the exact details of the reward to be provided a state witness for her testimony. The court found the relevant facts of the witness' "deal" with the state had been made known to the jury and thus the nondisclosed facts did not deprive Francis of due process of law or a fair trial.

Jury Instructions

Parties and courts in Florida criminal cases are guided by standard jury instructions. While the Florida Supreme Court has approved these standard jury instructions, the supreme court also requires the trial court to individualize each case with appropriate instructions.[83]

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76. State v. Murray, 443 So. 2d 955, 956 (Fla. 1984).
77. 467 So. 2d 692 (Fla. 1985).
78. 373 U.S. 83 (1963).
79. 467 So. 2d at 694.
80. 473 So. 2d 1260 (Fla. 1985).
81. 246 So. 2d 771 (Fla. 1985).
82. 473 So. 2d 672 (Fla. 1985).
83. *In re* Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So. 2d 594, 598, *modified* 431 So. 2d 599 (Fla. 1981).

Consequently, in *Yohn v. State*,[84] the instruction relating to insanity was deemed to be insufficient by the supreme court and thus requiring reversal of a manslaughter conviction.

In *Rotenberry v. State*,[85] the supreme court closely scrutinized the standard entrapment instruction before deeming it sufficient.

Entrapment

In 1985, the Florida Supreme Court considered several cases relating to the issue of "entrapment." Specifically, in *State v. Wheeler*,[86] the supreme court defined the burden of proof to be carried by the prosecution and defense in entrapment cases. *Wheeler* defines the initial burden of adducing any evidence of entrapment as being the defendant's. The trial court is then responsible to determine the sufficiency of the evidence of entrapment. If a sufficient level of evidence relating to entrapment has been established, the prosecution then bears the burden of disproving entrapment beyond a reasonable doubt. The issue of whether the prosecution has disproved entrapment beyond a reasonable doubt is a jury question which must be preceeded by a proper jury instruction. That jury instruction may not, however, include any element describing the defendant's burden to adduce evidence.[87] *Wheeler* describes the level of evidence required to be adduced by the defendant as "[E]vidence which suggests the possibility of entrapment. . . ."[88]

The usual method the state uses to disprove entrapment is to prove the predisposition of the defendant beyond a reasonable doubt. Proving predisposition may be accomplished in a variety of ways. The state may show that the defendant had prior convictions or a reputation for engaging in prior similar illicit acts or by showing the defendant's "ready acquiescence" to commit the crime.[89]

In *Cruz v. State*,[90] the supreme court considerd whether a "subjective" and "objective" entrapment doctrine could co-exist. The subjective entrapment doctrine focuses upon the predisposition of the defendant.[91] The determination of predisposition is normally a question for

84. 476 So. 2d 123 (Fla. 1985).
85. 468 So. 2d 971 (Fla. 1985).
86. 468 So. 2d 978 (Fla. 1985).
87. *Id.*
88. *Id.*
89. *Id.*
90. 465 So. 2d 516 (Fla. 1985).
91. *Id.*

the jury to determine.[92] However, in *Cruz*, the supreme court was concerned that certain police conduct inducing crime was so egregious that the predisposition of a defendant to commit a crime became irrelevant. *Cruz* adopts an objective doctrine of entrapment to address such a circumstance.[93] The determination of whether "objective entrapment" has occurred is one to be decided by the court. In providing guidance to courts, the *Cruz* court sets forth a threshhold test of an entrapment defense. The court is required to first decide whether the questioned police activity is directed at a specific ongoing criminal activity or is in reality manufacturing crime. The second element of the test is directed to determining whether law enforcement officers utilized means reasonably tailored to apprehend those involved in the ongoing criminal activity.[94] *Cruz* described the first prong of its test in terms of a "but for" analysis. The court must determine "but for" the police activity would there have been a crime. The second prong of *Cruz* which evaluates techniques utilized to induce an individual to participate in the criminal activity. *Cruz* directs courts to two particular situations in which law enforcement officers make knowing false representations designed to induce the belief that the illegal conduct is not prohibited or by employing methods of persuasion or inducement which creates the substantial risk that the offense will be committed by persons other than those ready to commit said offense.[95]

In *State v. Glosson*,[96] the supreme court held that the due process clause of the Florida Constitution (Article I, Section 9) requires dismissal of criminal charges where constitutional due process rights of a defendant are violated by governmental misconduct regardless of the defendant's predisposition. In *Glosson*, the supreme court found a contingent fee agreement with an informant violated the Florida due process clause when the agreement was conditional on cooperation and testimony which was critical to a successful prosecution.

Effective Assistance of Counsel

The significant quantity of death penalty cases submitted to the Florida Supreme Court has predictably led to numerous issues relating

92. *Id.*
93. *Id.*
94. 465 So. 2d at 522.
95. *Id.*
96. 462 So. 2d 1082 (Fla. 1985).

to the effectiveness of trial and appellate counsel.

In *Sireci v. State*,[97] the supreme court reiterated its reliance upon the United States Supreme Court's two pronged test to determine a post conviction challenge to effective assistance of counsel. That test as set forth in *Strickland v. Washington*:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose results is reliable.[98]

In *Sireci*, the claimed error involved defense counsel's failure to cross-examine a state witness. The Florida Supreme Court accepted the testimony of Sireci's trial counsel that the failure to cross-examine was intended to properly preserve a state discovery violation. *Sireci* found the defense counsel's strategy to be reasonable within prevailing professional norms.

Numerous 1985 Florida Supreme Court cases discussed the issue of effective assistance of appellate counsel. The right to effective assistance of appellate counsel was restated in *Wilson v. Wainwright*.[99] In *Wilson* and in *Dardin v. State*,[100] the criteria required to establish ineffective assistance of appellate counsel were stated:

> Petitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.[101]

Utilizing this test, the supreme court concluded that appellate counsel was not ineffective in by failing to read appellate briefs of all potentially relevant cases pending before the supreme court prior to prepara-

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97. 469 So. 2d 119 (Fla. 1985).
98. 104 S. Ct. 2052, 2064 (1984).
99. 474 So. 2d 1162 (Fla. 1985).
100. 475 So. 2d 214, 215 (Fla. 1985).
101. 474 So. 2d at 1166 (quoting Johnson v. Wainwright, 463 So. 2d 207 (Fla. 1985)).

tion of his brief;[102] failing to file as supplementary authority supreme court authority coming after defendant's oral argument;[103] failing to raise nonfundamental issues relating to jury instructions in penalty phase which had not been objected to in the trial court;[104] and failing to argue certain prosecutorial comments.[105] In *Jones v. Wainwright*,[106] the supreme court found appellate counsel not to have been ineffective for not arguing alleged improper prosecutorial argument which trial counsel had not objected to. The *Jones* court concluded that "[C]ounsel was not ineffective for not raising an issue which had no chance of success on appeal."[107]

While challenges relating to effectiveness of counsel were generally unsuccessful, the supreme court in *Wilson v. Wainwright*,[108] found appellate counsel to be ineffective. The elements of ineffectiveness cited in *Wilson* included failure to brief issues relating to sufficiency of evidence and propriety of death penalty, lack of preparation and zeal during oral argument. Illustrative of appellate counsel's failure is the following excerpt:

> THE COURT: . . . You don't consider [the legality of the sentence] with any materiality or relevance in a case where . . . the death penalty has been imposed, sir?
> CONNER: Uh, those particular points about the aggravating and mitigating circumstance, uh, I felt the prior decision of this court were clear that with the aggravating circumstances as found by the court, that and with no mitigating circumstances that it was, uh, in an area where the court had already decided, unless something has changed in the interim.
> . . . .
> THE COURT: Well, let me ask a question. Do you feel that death is the appropriate punishment if he is guilty.
> CONNER: It's, it's quite possible, yes sir. Uh, there was sufficient evidence in this case for the jury to find premeditation and they did find premeditation.
> Later in the argument, the discussion continued:
> THE COURT: Would you agree that the evidence concerning the

102. 475 So. 2d at 214.
103. *Id.*
104. *Id.*
105. 476 So. 2d 685 (Fla. 1985).
106. 473 So. 2d 1244 (Fla. 1985).
107. *Id.* at 1245.
108. 474 So. 2d 1162 (Fla. 1985).

> fact of his committing first degree murder in this instance was pretty overwhelming?
> CONNER: I would say that it was overwhelming.
> . . . .
> THE COURT: May I ask you this please sir. Now, on the one hand, if I'm reading it correctly, you're saying that there is no question about the guilt and then your statement of the guilt there that the death penalty is appropriate. Am I misunderstanding you?
> CONNER: No, I don't — I don't think I meant to say that if that's the way it came out.[109]

Conclusion

The 1985 session of the Florida Supreme Court provided several opportunities for the court to address significant issues in the subject of criminal procedure. The focus of the court was persuaded by the nature of the cases which it was required to review. Nevertheless, the Florida Supreme Court criminal procedure decisions illustrate the difficult responsibility which the court has assumed to balance the needs of society with the rights of individuals.

109. *Id.* at 1164.