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Criminal Procedure Survey - 1988

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Abstract

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KEYWORDS: racial, discriminatory, challenges

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I. *Bernie v. State*: Florida's Constitutional "Forced Linkage" Revisited but not Resolved

In *Bernie v. State*,[1] a sharply divided Florida Supreme Court addressed questions raised by the 1982 amendment to article I, section 12, of the Florida Constitution.[2] These questions centered on the issues of whether the Florida courts were required to follow prospective decisions of the United States Supreme Court and whether evidence seized pursuant to a search which is defective under the applicable Florida statute, yet constitutionally valid under decisions of the United States

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1. 524 So. 2d 988 (Fla. 1988).
2. Prior to 1982, FLA. CONST., art. I, § 12 read as follows:

> *Section 12. Search and Seizures.* — The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of the evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.

In 1982, the constitutional provision was amended to provide that decisions of the United States Supreme Court would be controlling interpretations of the provision. The amended provision, with the additional language emphasized, reads:

> *Section 12. Search and Seizures.* — The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of the evidence to be obtained. *This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.* Articles or information obtained in violation of this right shall not be admissible in evidence *if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.*

Supreme Court, must be suppressed.

In *Bernie*, a package had been shipped to the defendants via air express. The package broke open during transit, revealing its contents — cocaine. Notified by the shipper, the police arranged to have the package re-sealed and a controlled delivery of the package made to the addressees, the defendants, on the following day. The officers then obtained a search warrant permitting them to search the defendants' home immediately following the delivery. Shortly after the controlled delivery was made, the officers searched the premises pursuant to the warrant, seized the contraband, and charged defendants with possession of cocaine.

The defendants moved to suppress the evidence, alleging that the search warrant was improperly issued and that the evidence seized pursuant to that warrant was therefore the product of an unreasonable search and seizure. Specifically, they claimed that, at the time of the issuance of the warrant, the law relating to narcotics was not being violated in the premises to be searched, a requirement of the statute.[3]

The trial judge, basing his decision on the language of the statute and its case interpretation, held that the statute required the violation of the narcotics law in the subject premises to be contemporaneous with the request for the warrant and granted the defendants' motion to suppress the evidence.[4] The judge concluded that, since the package had not been delivered at the time the police requested the warrant, the law

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3. FLA. STAT. § 933.18 (1987) delineates the requirements for issuance of a warrant permitting the search of a private home. The statute reads, in pertinent part:

> When warrant may be issued for search of private dwelling. — No search warrant shall issue under this chapter or under any other law of this state to search any private dwelling occupied as such unless:
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> * * *
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> (5) The law relating to narcotics or drug abuse is being violated therein;
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> * * *
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> No warrant shall be issued for the search of any private dwelling under any of the conditions hereinabove mentioned except on sworn proof by affidavit of some creditable witness that he has reason to believe that one of said conditions exists, which affidavit shall set forth the facts on which such reason for belief is based.

4. The Fourth District Court of Appeal, in the 1975 case of Gerardi v. State, 307 So. 2d 853 (Fla. 4th Dist. Ct. App. 1975), had interpreted the statute, holding that a warrant may not issue "*unless such law is currently being violated therein.*" Indeed, the decision had gone farther, stating that not only was issuance of the warrant unauthorized, it was "*expressly [prohibited].*" *Id.* at 855 (emphasis added).

was not yet being violated at the Bernie residence. The case was appealed to the Second District Court of Appeal.

The Second District Court of Appeal concurred with the trial judge and found that the warrant was invalid because the statutory requirements for insurance of a search warrant had not been met. Therefore, under the law established by Florida courts interpreting the statute, the improper issuance of the warrant required suppression of the evidence. The lower court decision was reversed, however, on the basis that, under the United States Supreme Court cases made applicable by the 1982 amendment to article I, section 12, the evidence was admissible regardless of the statutory infirmity inherent in the issuance of the warrant.[5]

The Florida Supreme Court first addressed the threshold issue of the prospective applicability of the 1982 amendment. The argument had been raised that the passage of the amendment required Florida courts to follow any cases of the United States Supreme Court then existing, but did not require the same adherence to decisions which might be rendered after the adoption of the amendment.[6] Basing its decision on the clear language of the amendment, the court met this argument, holding that the language of article I, section 12, clearly indicates "an intention to apply to all United States Supreme Court decisions regardless of when they are rendered."[7]

Having decided that post-amendment decisions of the United States Supreme Court were to be applied in interpreting Florida's search and seizure law, the court addressed the issue of the constitutional validity and statutory validity of the search warrant. The court first addressed the issue of the constitutional validity of the warrant. Examining controlling federal cases, the court explained that the kind

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5. The court relied on the U.S. Supreme Court cases of United States v. Leon, 468 U.S. 897 (1984) and Massachusetts v. Sheppard, 468 U.S. 981 (1984).

6. The amendment attempted to bring Florida's search and seizure law in conformity with the federal law outlined by the 4th amendment to the U.S. Constitution as interpreted by the U.S. Supreme Court. The argument has been advanced that Florida courts should not be bound by decisions made by the U.S. Supreme Court that followed the adoption of the amendment on November 2, 1982. The argument suggests that voters would not have ratified the amendment if they had known they would be subject to unknown decisions concerning search and seizure law. For a more detailed discussion of this argument see Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 U. FLA. L. REV. 653, 722-32 (1987).

7. Bernie, 524 So. 2d 988, 991 (Fla. 1988).

of search undertaken in *Bernie* had precedent as an "anticipatory search."[8] After examining the precedent, the court concluded that the anticipatory search is "[w]ithout question . . . constitutionally permissible *with* a warrant."[9] The decision went even further, however, finding that the type of search undertaken in *Bernie* would have been proper even without a warrant. Relying on *Illinois v. Andreas*,[10] the court found that the case was factually similar to *Bernie* and that the United States Supreme Court had approved the container search in *Andreas*.[11] The court then concluded that "neither the Florida Constitution nor the United States Constitution requires issuance of a warrant for this type of search."[12]

The decision then addressed the first of the issues that had been considered the primary determinants by both the trial court and the intermediate appellate court: the statutory validity of the warrant. Both the trial judge and the appellate court had found the issuance of the search warrant to have been statutorily defective, in that there was no concurrent violation of law in the private dwelling to be searched.[13] The Florida Supreme Court held this finding to be erroneous. In concluding that the search was statutorily valid, the court first determined that the package was in the constructive possession of law enforcement officers, and that the defendants therefore had "no expectation of privacy in the contraband package."[14] The difficulties with the reasoning are significant. First, the court ignores the fact that the warrant issues, under the statute, for the search of a private dwelling, not merely for the seizure of a package of which the officers already had "constructive possession." Had the officers seized the package under circumstances other than the search of the dwelling, no issue would have arisen. Second, the court imputes a legislative intent to the drafters of the statute that this is "not the type of *in futuro* allegation for a warrant that the legislature intended to prohibit by this statute."[15] In other words, "anticipatory searches" are envisioned by the statute. Apparently, the court re-

8. An "anticipatory search" is "one based upon an affidavit showing probable cause that at some future time, but not presently, certain contraband will be at the location set forth in the warrant." *Id.*
9. *Id.* (emphasis added).
10. 463 U.S. 765 (1983).
11. *Bernie*, 524 So. 2d at 992.
12. *Id.*
13. *Id.* at 990.
14. *Id.* at 992.
15. *Id.*; *see also id.* at 990 (Kogan J., dissenting).

lied on the plain language of the statute to demonstrate this intent, something not readily apparent from the phrase "[t]he law relating to narcotics *is being violated* therein."[16] Having determined that the lower courts incorrectly decided that the warrant was statutorily invalid, the court was not required to reach the second issue — the application of the 1982 amendment and the federal cases to a statutory violation.

The issue will reach the Florida Supreme Court again in a case where the question was certified as one of great public importance by the Fourth District Court of Appeal: *Davis v. State*.[17] In *Davis*, although the police officer applying for a wiretap order was acting in good faith, the affidavit presented to the court had such omissions and misrepresentations that the issued wiretap order lacked probable cause. The lack of probable cause, coupled with "inadequate minimization and failure to utilize more extensive investigative techniques" compelled suppression of the evidence under the wiretap statute.[18] The trial judge, however, on authority of the "good faith exception" to the exclusionary rule set forth in *United States v. Leon*,[19] denied the motions to suppress, stating clearly that if *Leon* did not apply, the motions would have been granted. The district court of appeal, after reviewing federal cases applying the *Leon* holding to statutory violations, concluded that the "good faith" exception is a "judicially-created remedy to the judicially created exclusionary rule. . . ."[20] It then held that the exception did not apply to a statutorily created remedy for violations of the wiretape statute.

The issue is squarely presented: what is the relationship between the amended article I, section 12 and other provisions of the Florida constitution or statutory rights more restrictive than those delineated under decisions of the United States Supreme Court interpreting the Fourth Amendment to the United States Constitution? The initial po-

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16. FLA. STAT. § 933.18(5) (1987) (emphasis added). In eight of its nine sections, the statute is phrased entirely in the present tense. In the ninth section, dealing with violations of laws relating to cruelty to animals, the statute refers to laws which "have been or are being violated therein. . . ."

17. 529 So. 2d 732 (Fla. 4th Dist. Ct. App. 1988).

18. *Id.* at 733. FLA. STAT. § 934.09(9)(a) (1987) provides that the remedy for violation of the statute is suppression of the evidence obtained. The good faith exception to application of the exclusionary rule, as set forth in *U.S. v. Leon*, 468 U.S. 897 (1984), is not made a part of the statutory scheme.

19. 468 U.S. 897 (1984).

20. *Davis*, 529 So. 2d at 734.

tential conflict is between article I, section 12 and article I, section 23, the right of privacy. The United States Constitution contains no express right of privacy. In the event of conflict, precedence from other jurisdictions would indicate that the constitutional provision granting the greatest freedom to the citizen should control.[21] The issue presented in *Davis*, that of conflict between section 12 and a more restrictive statutory enactment should likewise result in precedence of a legislative enactment giving the greater right to the citizen. A number of Florida statutes are more restrictive than are their counterpart decisions by the United States Supreme Court.[22] To hold that the amendment prohibits the legislature from providing greater protection for citizens of the state than is granted by the federal constitution and statutes would denigrate the inherent power of the legislature. Nonetheless, the issue is before the court and should be resolved during this coming year.

II. New Florida Supreme Court Cases Limit Racially Discriminatory Peremptory Challenges

During the survey period, the Florida Supreme Court addressed the extent of a party's right, in a criminal case, to use race as a factor in exercising peremptory challenges during jury selection. In so doing, the court expanded on its landmark case of *State v. Neil*,[23] clarifying the procedure to be used when either party objects to its opponent's use of peremptory challenges and alleges, as grounds for the objection, that the peremptory challenges are unconstitutionally based on race.

A. *State v. Neil*: The Florida Supreme Court Prohibits Racially Discriminatory Peremptory Challenges

In 1984, the Florida Supreme Court, in the case of *State v. Neil*,[24] addressed the disquieting problem of judicial oversight of a prosecutor's racially motivated exercise of peremptory challenges. The issue is par-

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21. State v. Solis, 693 P.2d 518 (Mont. 1984); State v. Jones, 706 P.2d 317 (Alaska 1985). For a thorough discussion of this issue and this position, *see* Slobogin, *supra* note 6, at 709-20.

22. FLA. STAT. §§ 901.151(5) (1987) (stop and frisk); 934.03(2)(a)(2) (1987) (electronic surveillance); FLA. R. CRIM. P. 3.132(c)(1) (exclusionary rule specifically applied to pretrial detention hearing); *see* Slobogin, *supra* note 6, for a thorough discussion of this issue.

23. 457 So. 2d 481 (Fla. 1984).

24. *Id.*

ticularly vexing because a peremptory challenge, by its very definition, is one for which no reason need be given and which is not subject to the court's control.[25] In *Neil* the defendant, a black man, was charged with murder in the second degree and with unlawful possession of a firearm. The defendant was alleged to have shot and killed another black man. During the jury selection process, the prosecutor challenged three black jurors. After hearing argument as to whether the selection was discriminatory and therefore a violation of the defendant's sixth amendment right to trial by jury, the trial court ruled that the prosecution did not have to explain its peremptory challenges. The court gave both sides five additional peremptory challenges. Although the panel of prospective jurors contained one remaining black, the defense was unable to reach this individual, although all defense peremptory challenges were exhausted in the attempt.[26] The defendant was convicted on all counts.

In its opinion, the Florida Supreme Court first addressed the prior holding of the United States Supreme Court in *Swain v. Alabama*,[27] a holding expressly relied upon by the district court of appeal in affirming the conviction. The Florida court noted the holding of *Swain* that the burden is on the defendant to prove discriminatory use of peremptory challenges, that the prosecution is presumed to be using its challenges to obtain a fair and impartial jury, and that the prosecution cannot be called to explain its exercise of peremptory challenges.[28] Noting that the *Swain* test has "seldom, if ever, been met,"[29] the court

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25. In Swain v. Alabama, 380 U.S. 202 (1965), the United States Supreme Court described the nature of the peremptory challenge:

> The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. . . . [T]he peremptory permits rejection [of a juror] for a real or imagined partiality that is less easily designated or demonstrable. . . . It is often exercised upon "the sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another. . . ."

Id. at 220

26. *Neil*, 457 So. 2d 481 at 483.

27. 380 U.S. 202 (1965).

28. *Id.* at 222, *cited* in *Neil*, 457 So. 2d at 483.

29. *Neil*, 457 So. 2d at 483. The United States Supreme Court itself revisited the *Swain* issue shortly after the *Neil* opinion in Batson v. Kentucky, 476 U.S. 79 (1986) and relaxed the stringent rule originally set out in *Swain*. After holding that the "purposeful racial discrimination" in selection of the jury violates the defendant's equal protection rights, *id.* at 88, the Court held that a prosecutor is forbidden to exercise peremptory challenges solely on the basis of race. *Id.* at 93. The Court then went on to

reviewed a number of cases from other jurisdictions which had addressed the issue[30] and explicitly rejected the *Swain* approach.[31] The court first found out that, while the constitution guarantees the right to an impartial jury, peremptory challenges are not constitutionally mandated.[32] It then set out the procedure for Florida courts to use in determining whether peremptory challenges have been improperly exercised.[33] Since peremptory challenges are presumed to be properly

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hold that the burden is on the defendant to prove "purposeful discrimination," but that, once the defendant makes a prima facie case of such discrimination, the burden shifts to the prosecution to adequately explain the racial exclusion. *Id.* at 94. The Court established the steps to be followed: The defendant must first show that "he is a member of a cognizable racial group," that the prosecutor exercised challenges to remove members of that racial group from the jury panel and, finally, that "these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the jury panel on account of their race." *Id.* at 96.

30. The court first reviewed the denial of certiorari in McCray v. New York, 461 U.S. 961 (1983), originally decided as McCray v. Abrams, 576 F. Supp. 1244 (E.D.N.Y. 1983). In *McCray*, the trial court had found on a petition for habeas corpus that the record established a prima facie case of discrimination and had ordered the defendant retried. The court mentioned the case as indicating that it was time to revisit *Swain*.

The court then looked to the California case of People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), in which the court held that once a prima facie case of racial discrimination had been made, the burden shifted to the party exercising the challenges to satisfy the court that the challenges were validly exercised. *Neil*, 457 So. 2d at 483-85.

Commonwealth v. Soares, 377 Mass. 461, 387 N.E. 2d 499, *cert. denied*, 444 U.S. 881 (1979), was then reviewed. The Court in *Soares* had held that the Massachusetts Constitution was violated when jurors were purposefully excluded because of race, and then established a procedure by which, after the defense had shown a pattern of conduct resulting in the exclusion of a discrete group and the likelihood that the jurors were excluded because of their group membership, the burden shifted to the challenging party to explain the challenges. *Id.* at 490, 387 N.E. 23d at 517, *cited* in *Neil*, 450 So. 2d at 485.

Finally, the Florida Supreme Court examined a case from New York, People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739 (1981). The New York procedure was found to be similar to that of *Wheeler* and *Soares*. The burden is on the defendant to show that the persons challenged were members of a "distinct racial group" and it is likely that they were challenged because of race in order to overcome an initial presumption of correctness in the exercise of peremptory challenges. If such a likelihood exists, then the court may require the prosecutor to explain the challenges. *Id.* at 108-09, 435 N.Y.S.2d at 754, *cited* in *Neil*, 457 So. 2d at 486.

31. *Neil*, 457 So. 2d at 486.

32. *Id.*

33. *Id.* at 486-87.

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exercised, the aggrieved party must object to a perceived misuse of peremptory challenges and "demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race."[34] If the court finds no such likelihood, the judge may not inquire of the challenging party; however, if such likelihood is found, then the burden shifts to the challenging party to demonstrate that the challenges were exercised on a basis unrelated to race. If the court finds that challenges were being exercised on the basis of race, then the court should dismiss that jury pool and begin anew with a new venire. The court then held that, on the basis of the facts in *Neil*, the defendant was entitled to a new trial with a new jury. One of the more interesting facets of the opinion, however, is that it created a two-edged sword. Neither the prosecution nor the defendant may use peremptory challenges solely on the basis of race. In theory, the dissent alleges, a black defendant could not exercise peremptory challenges in order to exclude whites from the jury or to increase the number of minority members.[35]

During the survey year, issues arising from the *Neil* decision were addressed in three companion cases, all handed down on the same day, *State v. Slappy*,[36] *Tillman v. State*,[37] and *Blackshear v. State*.[38] The primary opinion was rendered in *Slappy*. *Blackshear* and *Tillman* both referred to the procedure established in that opinion.

B. *State v. Slappy*: The *Neil* Procedure Is Clarified

The black defendant, Slappy, was charged and tried for carrying a concealed firearm.[39] During the jury selection process, the state exercised four of its six peremptory challenges against black veniremen. After the fourth juror was excused, the defense objected and the court questioned the prosecutor about the prosecution's reasons for excusing the jurors. The prosecutor offered facially neutral reasons for excluding all four jurors which the court felt constrained to accept.[40] On appeal,

34. *Id.* at 486.
35. *Id.* at 489 (Alderman, J., dissenting).
36. 522 So. 2d 18 (Fla. 1988).
37. 522 So. 2d 14 (Fla. 1988).
38. 521 So. 2d 1083 (Fla. 1988).
39. *Slappy*, 522 So. 2d at 19.
40. *Id.* at 20. When asked about the reasons for challenging the jurors, the prosecutor replied that one juror was "not secure" about sitting on a jury, another juror

the district court of appeal reversed the conviction and remanded for a new trial. The district court of appeal found that the record did not support the reasons for exercise of the peremptory challenges which had been given by the prosecutor, and concluded that the trial judge erred in believing that the court was bound by the facially neutral explanations offered.

On review, the Florida Supreme Court first reiterated its earlier position in *State v. Neil*.[41] The court then proceeded to specify the procedure to be followed by the trial court in ruling on an allegation of discriminatory use of peremptory challenges. To initiate the inquiry, the aggrieved party must demonstrate that the challenged juror is a member of a distinct minority and that the likelihood exists that the person was challenged because of the minority status.[42] Evaluating the "likelihood" of racially motivated action is difficult. The court first noted, almost in passing, that it is not the number of minority veniremen challenged that establishes such a "likelihood." If a single juror is challenged for a racially discriminatory reason, the challenge is improper.[43] Therefore, the aggrieved party need not wait until a number of members of a racial minority have been challenged before raising the objection. The complaining party's burden of showing the "likelihood" of racial discrimination is to be construed liberally in favor of the complaining party, in order to assure the absence of racially discriminatory jury selection procedures. If there is doubt as to whether the complaining party has met the initial burden, it is to be resolved in favor of that party. The standard to be used is, apparently, that the complaining party's motion be "proper and not frivolous."[44]

Once the complaining party has met its initial burden, the burden shifts to the challenging party to rebut the inference of impermissible discriminatory exercise of the challenges. The rebuttal must be a " 'clear and reasonably specific' racially neutral explanation of 'legitimate reasons' for the state's use of its peremptory challenges."[45] In

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thought she knew the defense attorney, and the two remaining jurors were both teachers and therefore more liberal than the prosecutor wanted on the jury. *Id.* at 19-20.

41. *Id.* at 21, *citing* State v. Neil, 457 So. 2d 481 (Fla. 1984).

42. *Slappy*, 522 So. 2d at 21.

43. *Id.* at 21.

44. "[W]e hold that any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor. . . . Once a trial judge is satisfied that the complaining party's objection was proper and not frivolous, the burden of proof shifts." *Id.* at 22.

45. *Id.* at 22, *citing* Batson v. Kentucky, 476 U.S. 79, 96-98 (1986).

evaluating the reasons offered in rebuttal, the judge may not take the explanation at face value, but must evaluate the "credibility of the person offering the explanation as well as the credibility of the asserted reasons."[46] The judge must make a finding both that the reasons are neutral and reasonable and that the reasons are not merely a pretext to cover a racially based challenge.[47]

The court then endorsed a list of five factors, accepted by the court of appeals, as tending to show an impermissible motive:

> 1) alleged group bias not shown to be shared by the juror in question,
> 2) failure to examine the juror or perfunctory examination, assuming neither the trial court or opposing counsel had questioned the juror,
> 3) singling the juror out for special questioning designed to evoke a certain response,
> 4) the prosecutor's reason is unrelated to the facts of the case,
> 5) a challenge based on reasons equally applicable to juror(s) who were not challenged.[48]

Finally, relying on *Batson v. Kentucky*, the court cautioned against conscious or unconscious racism on the part of both prosecutors and judges, stating that, in reality, on seat-of-the-pants instincts might really be a surrogate for racism.[49]

Evaluating the facts of *Slappy*, the supreme court examined the responses of that prosecutor to the trial judge's questions and concluded that, although the prosecutor had advanced facially neutral reasons for striking the minority jurors, the record did not support those reasons.[50] The court stated that the presence of one or more of the five factors would tend to show that the reasons given are not actually supported by the record or are an impermissible pretext.[51] If the challenging party, in this case the prosecution, systematically excludes minorities without discernible reason then, if challenged, it must support its actions with neutral reasons based on the record.

The companion cases to *Slappy*, handed down the same day, both

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46. *Slappy*, 522 So. 2d at 22.
47. *Id.*
48. *Id.*, *citing* the district court opinion, 503 So. 2d at 355.
49. *Slappy*, 522 So. 2d at 22-23, *citing Batson*, 476 U.S. at 106.
50. *Slappy*, 522 So. 2d at 23.
51. *Id.* at 22.

addressed the issue of the prosecution's use of peremptory challenges to exclude blacks from a jury, applying the rule announced in *Slappy* to the different fact situations.

C. *Blackshear v. State*: A *Neil* Hearing Must Be Held at Time of Jury Selection

The clearest violation of the *Neil* rule was seen in *Blackshear v. State*.[52] At the defendant's trial on a charge of sexual battery of a child, the prosecuting attorney exercised eight of ten challenges to exclude blacks from the jury. The defense then objected on the grounds that the prosecutor was intentionally striking jurors because of race and moved to strike the panel.[53] The judge did not conduct a hearing but accepted the prosecutor's assertion that the challenges were not racially motivated.[54] After the trial, the court did hold a hearing on the motion, at which time the prosecutor presented a number of reasons for the juror strikes.[55]

In *Blackshear*, the Florida Supreme Court held that the failure of the trial judge to hold a *Neil* hearing at the time the objection to the prosecutor's use of peremptory challenges was raised constituted error. The time for a *Neil* hearing is at the time a valid defense objection is raised, for the "requirements established by *Slappy* cannot possibly be met unless the hearing is conducted during the voir dire process."[56]

D. *Tillman v. State*: The Procedure Set Out in *Neil* and *Slappy* Is Emphasized

The last case of the trilogy, *Tillman v. State*,[57] reiterated and emphasized the procedures set out in *Neil*, *Slappy*, and *Blackshear*. The court addressed two issues in *Tillman*; however only the second issue bears directly on jury selection.[58] Tillman was charged with first degree

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52. 521 So. 2d 1083 (Fla. 1988).
53. *Id.* at 1083.
54. *Id.* at 1083-84. At this time, the prosecutor was unable to give any specific reasons for the challenges, but asserted generally that the challenges were not racially motivated.
55. *Id.* at 1084.
56. *Id.*
57. 522 So. 2d 14 (Fla. 1988).
58. The first issue addressed in *Tillman* dealt with breach of a plea bargaining agreement. The court stated that "[t]he mere breach of the agreement, regardless of

murder and entered a plea of guilty to the charge. After accepting the plea, the court empaneled a jury for the sentencing hearing.[59] During the course of the jury selection process, the prosecutor used peremptory challenges to strike two jurors who were black, as was the defendant. The defense did not object until a third black juror was excluded, when defense counsel asked that the record reflect that the state appeared to be systematically striking blacks. The judge did not hold a *Neil* hearing, nor inquire of the prosecutor why the black veniremen had been excused. When a fourth black juror was excluded, the defense again objected and sought to have the court inquire as to the prosecutor's reasons for excusing that juror. The prosecutor gave "facially valid reasons" for excusing that juror, however, no further action was taken with respect to the first three jurors excused.[60]

The court, in reversing the sentence, reiterated the procedure established by *Neil*, *Blackshear*, and *Slappy*, and stressed one point made in *Slappy*. When the challenging party submits the reasons for excusing minority members of the jury, the reasons "must not only be neutral and reasonable, but they must be supported by the record."[61] Since the reasons advanced by the prosecution in *Tillman* were not supported by the record, the conviction was reversed and remanded for a sentencing proceeding before a new judge and jury.[62]

E. A Summary of the *Neil* Procedure

Based on *Neil*, *Blackshear*, *Slappy*, and *Tillman*, the procedures to be followed by the Florida courts when the issue of impermissible racial discrimination in jury selection is raised has been established in some detail:

1. The aggrieved party, whether defense or prosecution, must initiate the process by objecting to the challenging party's use of peremptory challenges to strike prospective jurors on the basis of race.[63]

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the influence that breach would carry, or whether it was an intentional breach, was cause for remand." *Id.* at 15.

59. The procedure to be followed for sentencing in a capital case is set out in FLA. STAT. § 921.141 (1987).

60. *Tillman*, 522 So. 2d at 16.

61. *Id. See also* State v. Slappy, 522 So. 2d 18, 22 (Fla. 1988).

62. *Tillman*, 522 So. 2d at 16.

63. State v. Castillo, 486 So. 2d 565 (Fla. 1986). It is presumed that the challenges are being properly exercised. State v. Neil, 457 So. 2d 481, 486 (Fla. 1988). In *Neil*, the court also cited Castor v. State, 365 So. 2d 701, 703 (1978) for the principle

2. The aggrieved party must then establish a prima facie case by a two-fold showing:

a. That the person challenged by the opposing party is a member of a distinct racial group;

b. That there is a strong likelihood that the challenge was exercised because the prospective juror is a member of that group;[64] If the judge finds no likelihood of an improper challenge, then the trial judge may not require the challenging party to divulge the reasons for the challenge.[65]

3. The objection can be made to the challenge of a single minority juror — the objecting party need not wait to show a pattern of minority challenges in order to object.[66]

4. In evaluating the facial validity of the objection, any doubt should be resolved in favor of the objecting party; so long as the objection is "proper and not frivolous," the burden shifts to the party exercising the challenges to demonstrate their validity.[67]

5. Once the valid objection is made, it is incumbent upon the court to immediately hold a *Neil* hearing and to require the challenging party to submit appropriate "racially neutral and legitimate reasons" for the challenges.[68]

a. At the hearing, the judge is to evaluate the credibility of the attorney offering the reasons and the credibility of the reasons themselves.[69]

b. The reasons offered must be supported by the record.[70]

c. Five factors which should be investigated by the judge in determining the validity of the reasons offered are:

1) alleged group bias not shown to be shared by the juror in question,

2) failure to examine the juror or perfunctory examination, assuming neither the trial court or opposing counsel had questioned the juror,

3) singling the juror out for special questioning designed to evoke

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that "practical necessity and basic fairness" require contemporaneous objection to asserted impropriety.

64. *Neil*, 457 So. 2d at 486; *Slappy*, 522 So. 2d at 22.

65. *Neil*, 457 So. 2d at 486.

66. *Slappy*, 522 So. 2d at 21; *Tillman*, 522 So. 2d at 17.

67. *Slappy*, 522 So. 2d at 22; *Tillman*, 522 So. 2d at 16; Blackshear v. State, 521 So. 2d 1083, 1084 (Fla. 1988).

68. *Slappy*, 522 So. 2d at 22.

69. *Id.*

70. *Tillman*, 522 So. 2d at 17.

a certain response,

4) the prosecutor's reason is unrelated to the facts of the case,

5) a challenge based on reasons equally applicable to juror(s) who were not challenged.[71]

III. Harmless Error: Two Cases Emphasize Prosecution's Burden and Appellate Court Responsibility

Prior to 1985, Florida decisions had consistently held prosecutorial comment on a defendant's failure to testify to be "per se" reversible error.[72] In 1985, however, the court reversed its position, holding that such error was not automatically reversible, but that the harmless error doctrine would apply.[73] The issue arose again, in 1986, in the case of *State v. DiGuilio*.[74] In *DiGuilio*, the court addressed the criteria to be used to determine whether a specific comment made by the prosecution was to be interpreted as comment on a defendant's silence. The court considered three potential tests and rejected the "necessary implication" test and the "manifest intention" test, adopting instead the less stringent "fairly susceptible" test — whether the language of the prosecutor is "fairly susceptible" to interpretation that it is a comment on the defendant's failure to testify.[75] The court held that the combination of the "fairly susceptible" test with harmless error doctrine gave the courts the necessary capacity to discriminate among the mass of prosecutorial comments potentially addressing the defendant's silence; it permitted the judge to determine the actual significance of the comment and the harm done by the comment to the defendant's case.[76] *DiGuilio* then addressed the issue of the harmless error test to be applied, once the court had decided that a prosecutorial comment was impermissible. Rejecting a "sufficiency-of-the-evidence" test, the court held that the test for harmless error is whether "there is no reasonable

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71. *Slappy*, 522 So. 2d at 22.

72. *See* Clark v. State, 443 So. 2d 973 (Fla. 1983); Bennett v. State, 316 So. 2d 41 (Fla. 1975); Shannon v. State, 335 So. 2d 5 (Fla. 1976); Donovan v. State, 417 So. 2d 674 (Fla. 1982); Bennett, *Criminal Procedure Survey*, 11 NOVA L. REV. 1245 (1987).

73. State v. Marshall, 476 So. 2d 150 (Fla. 1985).

74. 491 So. 2d 1129 (Fla. 1986).

75. *Id.* at 1135-36 (For a more detailed analysis of the holding, *see* Bennett, *supra* note 72.)

76. *Id.* at 1136.

possibility that the error contributed to the conviction."[77] The burden to show that the error is harmless is then placed on the state.[78] In applying the harmless error test, however, the court made a statement which was to require further interpretation:

> Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.[79]

A year later, deciding the case of *Holland v. State*,[80] the Florida Supreme Court again discussed the applicability of Florida's harmless error test, focusing on the duty of the appellate court when reviewing a harmless error assertion. *Holland* arose from the erroneous denial of a hearing on a motion filed under Florida Rule of Criminal Procedure 3.850. Holding that the harmless error doctrine did not apply to the denial of the rule's evidentiary hearing,[81] the court described the procedure to be used in application of a harmless error analysis in some detail. As part of that description, the court delineated the procedure to be used by the appellate court in analyzing the record of a case in which harmless error is proposed by the state:

> Lastly, we are once again compelled to caution appellate courts that the burden upon the state to prove harmless error whenever the doctrine is applicable is most severe. It is the duty of the panel of appellate judges to read the record in its entirety and review the issues with careful scrutiny in order to apply the test.[82]

The issues of harmless error and the responsibility of the trial court to review the record on an allegation of harmless error were revisited during the survey year in two cases from the Florida Supreme Court: *State v. Lee*[83] and *Ciccarelli v. State*.[84]

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77. *Id.* at 1135, *citing* Chapman v. California, 386 U.S. 18, 24 (1967).
78. *DiGuilio*, 491 So. 2d at 1135.
79. *Id.*
80. 503 So. 2d 1250 (Fla. 1987).
81. "[T]he impact of the error in precluding the presentation of evidence can never be harmless for the self-evident reason that a reviewing court does not know what that evidence would be." *Id.* at 1252.
82. *Id.* at 1253 (citation omitted) (emphasis in original).
83. 531 So. 2d 133 (Fla. 1988).

Lee arose on a question certified as one of great public importance. The certified issue called for reconsideration of the harmless error test from *DiGuilio*, which had emphasized the possibility that the improper comment might have been considered by the jury rather than the ultimate effect of that comment on the outcome of the case.[85] The question certified was:

> Does the erroneous admission of evidence of collateral crimes require reversal or appellant's comviction where the error has not resluted in a miscarriage of justice but the state has failed to demonstrate beyond a reasonable doubt the thereis no reasonable possibility that the error affected the jury VERDICT?[86]

The defendant in *Lee* had been charged with multiple charges arising from an incident occurring at 3:00 A.M. on December 13, 1983.[87] The evidence both of the substantive elements of the offenses and of the identification of the defendant as the perpetrator was overwhelming.[88] Over defense objection, however, the prosecution also had presented evidence of a bank robbery which had taken place at 2:00 P.M. the same day. Three bank tellers identified the defendant as the robber. The defendant was convicted of all charges. On appeal, the defendant contended that evidence of the bank robbery, a separate and distinct event from that for which the defendant was convicted, offended the similar fact evidence rule.[89] Analyzing the introduction of the similar fact evidence under Florida's precedent,[90] the court concluded that admission of testimony relating to the bank robbery was

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84. 531 So. 2d 129 (Fla. 1988).

85. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

86. *Lee*, 531 So. 2d at 134.

87. The defendant was charged with separate counts of armed kidnapping, armed sexual battery, armed robbery, possession of a firearm by a convicted felon, and possession of a firearm in the commission of a felony. *Id.*

88. Tests established that semen found on the victim was the defendant's blood type; latent fingerprints found on the car and a checkbook inside the car were identified as those of the defendant; the victim and two other individuals, one of whom had known the defendant before the incident, identified the defendant as the perpetrator. *Id.* at 135.

89. FLA. STAT. § 90.404(2)(a) (1987). *See also* Williams v. State, 110 So. 2d 654 (Fla. 1959), *cert. denied*, 361 U.S. 847 (1959).

90. *Williams*, 110 So. 2d 654; Heiney v. State, 447 So. 2d 210 (Fla. 1959), *cert. denied*, 469 U.S. 920 (1984); Smith v. State, 365 So. 2d 704 (Fla. 1978), *cert. denied*, 444 U.S. 885 (1979).

violative of the rule.[91]

In its opinion, the district court of appeal had concluded that the evidence against the defendant was "overwhelming, if not conclusive." The district court was confident that the defendant would be convicted again on retrial.[92] Nevertheless, the district court had stated that it was "unable to conclude that there is no reasonable possibility that the erroneous admission of the bank tellers' testimony did not . . . affect the verdict."[93] The prosecution, confronted with the difficulty of being required to prove a negative, admitted that it was "at a loss" to show that there was no "reasonable possibility" that the error affected the jury's verdict.[94] The prosecution argued that requiring them to prove a negative made the *DiGuilio* test unworkable; that the error ought to have been judged harmless because the evidence against the defendant was overwhelming.[95]

The Florida Supreme Court rejected the prosecution's contention that the test was unworkable and reaffirmed the *DiGuilio* test. The court reasoned that to adopt a test based on a sufficiency of the permissible evidence, or even a test which would hold error to be harmless if the permissible evidence were overwhelming, would result in the appellate court substituting its judgment on the facts for that of the jury.[96] The court agreed with former Chief Justice Traynor of the California Supreme Court in holding that the test must be one based on the potential effect of the erroneously admitted evidence on the jury.[97] The fact that other evidence is overwhelming does not lessen the possible impact of the erroneously admitted evidence on the jury's decision.[98] The court then concluded that the district court itself had shown that the test is workable by its conclusion that it could not say that the error

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91. The testimony relating to the bank robbery did not have a relevant or a material bearing on any essential aspect of the offenses being tried and did not tend to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident in regard to these charged offenses.

State v. Lee, 531 So. 2d 133, 135 (Fla. 1988).

92. *Id.* at 136.

93. *Id.*, *citing* Lee v. State, 508 So. 2d 1300, 1303 (Fla. 1st Dist. Ct. App. 1987).

94. *Lee*, 531 So. 2d 136.

95. *Id.*

96. State v. DiGuilio, 491 So. 2d 1124, 1136 (Fla. 1986).

97. *Lee*, 531 So. 2d at 137.

98. *Id.* (citing People v. Ross, 67 Cal. 2d 64, 85, 429 P.2d 606, 621 (Cal. 1967) (Traynor, C.J., dissenting), *rev'd*, 391 U.S. 470 (1968)).

had not affected the verdict.[99]

A week after its reaffirmation of the *DiGuilio* test in *Lee*, the court directed its attention to the duty of the appellate court on harmless error review in the case of *Ciccarelli v. State*.[100] The case arose on a question certified by the district court of appeal.[101] This time, the issue concerned the obligation of the judges on the reviewing panel to each independently review the entire record on appeal to determine whether the *DiGuilio* test was met. The district court suggested a procedure which it had used in which the judges had relied on a review of the evidence prepared by its legal staff and on the briefs of the parties, rather than requiring each appellate judge to read the entire trial record.[102] The supreme court set out a three-stage test for review of a harmless error allegation.[103] First, the defendant on appeal must demonstrate that there has been trial error. Once the defendant has shown the initial error, a significant burden falls on the state, the burden to "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict, or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction."[104] Unless the state makes a prima facie showing that the error did not contribute to the verdict, the court need not undertake further

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99. Another issue that may have persuaded both appellate courts of the potential effect of the erroneously admitted testimony on the jury was the emphasis given that testimony at trial. In both the opening statement and closing argument, the prosecutor dwelt at some length on the facts of the bank robbery, emphasizing the testimony of the bank tellers and the accuracy of their identification of the defendant as the one who had perpetrated that robbery. *Lee*, 537 So. 2d 133, 137 n.2.

100. 531 So. 2d 129 (Fla. 1989).

101. Ciccarelli v. State, 508 So. 2d 52 (Fla. 4th Dist. Ct. App. 1987). The question certified was: "was it necessary, in evaluating an assertion of harmless error in a criminal appeal, that each appellate judge independently read the complete trial record?" *Id.* at 53.

102.

> In determining that the error involved herein was harmless we have relied extensively upon the review of the evidence set out in the parties' briefs and our own internal review process by which the court's legal staff directly examines the trial court record to be certain that the court is presented with an accurate description of the evidence. Each judge on the panel has not independently read the record in its entirety.

Id. at 52.

103. The court, in the opinion, refers to a two-stage process of review of the harmless error allegation, assuming that the initial error has already been demonstrated by the defendant. *Ciccarelli*, 531 So. 2d at 132.

104. *Id.* (citing State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986)).

review. If the state meets its burden of establishing the prima facie case of harmless error, then the court must conduct an examination of the entire record. This examination, entailing an evaluation of the effect of the error on the jury, must, in all cases, be done by the appellate judge, not a clerk or by the lawyers involved.[105] The extent of the review, however, need not in all cases require the reading of the entire record. The supreme court decided that this matter is best "left to the conscience of each individual judge."[106]

IV. Lesser Included Offenses in Florida: Changing Again?

The most significant change generating confusion in the criminal procedure of the State of Florida during 1988 was effectuated, first by decisional law in both the supreme court and district courts of appeal and then by legislative enactment intended to modify the decisional law.[107] The legislation, defining legislative intent with respect to multiple punishments for lesser included offenses, has caused the zig-zag course of definition of that legal construct to change its tack again, with unpredictable consequences for future interpretation of double jeopardy issues and the determination of appropriate jury instructions on lesser included offenses.

A. The Federal Framework: Legislative Intent Governs

Under United States Supreme Court interpretations of the double jeopardy clause of the United States Constitution,[108] that clause protects against multiplicity of prosecution in three situations: 1) it forbids a second prosecution for the same offense following an acquittal; 2) it forbids a second prosecution for the same offense following a conviction; and 3) it forbids multiple punishments for the same offense.[109]

Initially, decisions of the United States Supreme Court apparently construed the amendment to preclude cumulative punishments for the same offense as well as successive prosecutions for a single offense. In

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105. *Id.* at 132.
106. *Id.*
107. FLA. STAT. § 775.021 (1987).
108. The fifth amendment to the United States Constitution provides that no person will "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.
109. North Carolina v. Pearce, 395 U.S. 711, 717 (1979).

both *North Carolina v. Pearce*[110] and *Brown v. Ohio*[111] the Court's language held, apparently, that the constitution permitted only a single punishment for a single offense. In *Pearce*, the defendant had been reprosecuted for a conviction which had been overturned on appeal, and was then, on resentencing, given a more severe sentence. In holding that failure to give credit for time served on the first sentence constituted a double jeopardy violation, the Court stated that "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense . . . the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it."[112]

In *Brown v. Ohio*, the defendant was arrested and initially charged with the offense of "joyriding."[113] The defendant entered a plea of guilty to the charge and received a sentence of thirty days in jail and a fine of $100. Upon completion of his sentence, the defendant returned to court to face the new offense of auto theft. Two issues faced the trial court: first, whether the two charges of joyriding and auto theft constituted the "same offense," and, if so, whether the constitution forbade the imposition of cumulative punishments for the separate facets of the offense. In order to resolve the first issue, the Court reiterated the "elements" test from *Blockburger v. United States*.[114] This test looks at the statutory elements of the two offenses and determines if "each provision requires proof of an additional fact which the other does not." If the greater offense requires proof of each of the elements required by the lesser offense, then they are to be considered as the same offense for double jeopardy purposes. Applying the test to the facts of *Brown*, the Court concluded that the lesser offense of joyriding, by definition, was always included in the greater offense of auto theft.[115] The Court further concluded that conviction of the greater offense precludes later

110. *Id.*

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

112. *Pearce*, 395 U.S. at 711 (citing Ex Parte Lange, 18 Wall. 163, 168 (1873)).

113. The defendant was charged with a violation of OHIO REV. CODE § 4549.04(D), which provided: "No person shall purposely take, operate, or keep any motor vehicle without the consent of the owner" and was punished as a misdemeanor. *Brown*, 432 U.S. at 161.

114. *Brown*, at 165 (citing Gore v. United States, 357 U.S. 386 (1958); Bell v. United States, 349 U.S. 81 (1955); Ex Parte Lange, 18 Wall. 163 (1874)).

115. *Id.* at 169.

prosecution for and conviction of the lesser; the converse is also true.[116] The case firmly established the *Blockburger* test as the operative criterion for determining whether one offense is a lesser included offense of another for federal double jeopardy purposes. It also held clearly that such offenses, if one was the lesser included offense of the other, could not be separately prosecuted and punished.

Brown seemed to establish the proposition, as well, that if two charged were held to be the "same offense," cumulative punishments could not be imposed for that offense even if they were imposed in the same proceeding. In somewhat ambiguous language, the Court stated:

> The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial. . . . Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.[117]

The court then added a passage which seemed to solidify the holding that the constitution forbids cumulative punishments for the same offense, even at the same trial:

> If two offenses are the same under this test for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions. Where the judge is forbidden to impose cumulative punishment for two crimes at the end of a single proceeding, the prosecutor is forbidden to strive for the same result in successive proceedings. Unless "each statute requires proof of an additional fact which the other does not," the Double Jeopardy Clause prohibits successive prosecutions as well as cumulative punishment.[118]

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116. "Where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." *Id.* at 168 (citing Ex Parte Neilsen, 131 U.S. 176, 188 (1889)).

117. *Id.* at 165 (citing Gore v. United States, 357 U.S. 386 (1958); Bell v. United States, 349 U.S. 81 (1955); Ex Parte Lange, 18 Wall. 163 (1874)).

118. *Id.* (citations omitted).

After *Brown*, the Court addressed the issue of cumulative punishments which occurred in *Albernaz v. United States*.[119] *Albernaz* applied the *Blockburger* rationale to a case in which a single conspiracy violated two separate conspiracy statutes. The defendants argued that congressional intent to impose cumulative punishments was unclear and that the court should apply a rule of "lenity," prohibiting cumulative punishment in the absence of clear Congressional intent.[120] Applying the *Blockburger* test to determine legislative intent, the Court held the offenses to be sufficiently different as to permit multiple punishments.

The issue arose again in a 1983 case, *Missouri v. Hunter*.[121] The defendant was convicted, in a single proceeding, of first-degree robbery, armed criminal action, and assault with malice. The defendant had argued that, under the *Blockburger* test, the robbery conviction and the conviction for armed criminal action, by definition, comprised the "same offense." In a somewhat surprising opinion, the Court held that the *Blockburger* test may be ignored when legislative intent to the contrary is clear. The Court accepted the holding of the Missouri Supreme Court that the two statutes under which the defendant was convicted did, indeed, define the same crime.[122] The Court also found that the legislature intended that "punishment for violations of the statutes be cumulative."[123] Finding that the purpose of the double jeopardy clause is limited to "protecting the individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense,"[124] and that the *Blockburger* test is a test solely of statutory construction used to determine that legislative intent,[125] the Court held that, where legislative intent is clear, multiple punishments may be imposed provided they are imposed in the same proceeding:

> Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment

119. 450 U.S. 333 (1981).
120. *Id.* at 336.
121. 459 U.S. 359 (1983).
122. *Id.* at 368.
123. *Id.*
124. *Id.* at 365 (citing Burks v. United States, 437 U.S. 1, 11 (1978) (quoting Green v. United States, 355 U.S. 184, 187 (1957))).
125. *Id.* at 367 (citing *Albernaz*, 450 U.S. at 340).

under such statutes in a single trial.[126]

B. Florida Cases: A Patchwork of Lesser Included Offense Definitions

Over the years, Florida has developed a series of cases attempting to define what constitutes "the same offense" and "lesser included offenses" for purposes both of instructing the jury and determining issues of double jeopardy. The first of these cases, *Brown v. State*,[127] established the test for determining when a defendant was entitled to a jury instruction on a lesser included offense of the crime charged. The defendant had robbed a grocery store at gunpoint. At his trial on the charge of robbery, the defendant requested a jury instruction and "verdict form of larceny."[128] The trial judge denied the instruction, and the defendant was convicted of robbery. On appeal, the Florida Supreme Court first reviewed historical precedent as illustrative of the common law principle that a defendant could be convicted of a lesser included offense if the facts supported conviction of the lesser.[129] The court then set out to establish a procedure which could be used throughout the state to determine the propriety of a lesser included offense instruction in a given case.

The *Brown* court began by dividing related offenses into four categories. These were:

1) Crimes divisible into degrees.
2) Attempts to commit offenses.
3) Offenses necessarily included in the offense charged.
4) Offenses which may or may not be included in the offense charged, depending on the accusatory pleading and the evidence.[130]

The court then examined each of the established categories, analyzing each in the light of the governing statute, and setting out the conditions under which a defendant had the right to an instruction on a lesser

126. *Hunter*, 459 U.S. at 368-39.
127. 206 So. 2d 377 (Fla. 1968).
128. *Id.* at 379.
129. The earliest instances of a finding of guilt of a lesser included offense were seen in 2 BLACKSTONE'S COMMENTARIES 1587, where even in the "Gothic and Roman predecessors of the common law" there were degrees of guilt recognized for certain offenses. *Brown*, 206 So. 2d at 380.
130. *Id.* at 381.

offense or degree in each of the categories.[131] Although not explicitly stated, the opinion assumes that a conviction of a lesser included offense would be in lieu of conviction of the greater offense, not in addition to it. Absent such assumption, the defendant's attorney would have had no viable reason to have requested a jury instruction on an additional offense, and the prosecutor would have had no reason to oppose such instruction.[132]

In 1984, the Florida Supreme Court addressed the double jeopardy implications of the lesser included offense categories in *State v. Baker*.[133] Baker had been charged with first degree murder and with use of a firearm during the commission of a felony. The jury had convicted him of both charges. The defendant alleged a double jeopardy violation, basing his argument on the *Brown* categories, claiming that the use of a firearm charge was a category four lesser included offense of the murder charge and therefore a lesser included offense within the meaning of Florida Statutes, section 775.021(4). That statute prohibited conviction for both the charged offense and a lesser offense included in the charged offense.[134] Upholding the defendant's conviction

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131. Crimes divisible into degrees were governed by Florida Statutes, section 919.14, which required that, upon request, the trial judge must instruct on all lesser degrees of a charged offense. Attempts were governed by Florida Statutes, section 919.16, which provided that a jury could convict a defendant of an attempt to commit the crime charged if the attempt itself were an offense. Necessarily included offenses were controlled by Florida Statutes, section 919.16, which required instructions on all lesser offenses necessarily included in the greater, and the offenses which may be included were determined by extension of Florida Statutes, section 919.16, the court reasoning that if there were necessarily included offenses, there were also offenses which may or may not be included. Instructions on these would be mandated if supported by the allegations and the proof. *Brown*, 459 U.S. at 381.

132. *See also* State v. Baker, 456 So. 2d 419, 423 (Fla. 1984) (Overton, J., dissenting).

> However, if a defendant is not charged separately, then such a defendant would be entitled to a jury instruction on the permissive lesser included offense when the evidence justifies such a charge. In this latter situation, the defendant can be found guilty of only one offense, either the offense charged or the lesser included offense, and sentenced accordingly.

133. 456 So. 2d 419 (Fla. 1984).

134. FLA. STAT. § 775.021(4) (1981) read as follows:

> (4) Whoever, in the course of one criminal transaction or episode, commits an act or acts constituting a violation of two or more criminal statutes, upon conviction and adjudication of guilt shall be sentenced separately for each criminal offense, excluding lesser included offenses, com-

on both charges, the court determined that the statute precluded separate sentences only for those lesser included offenses that were "necessarily" lesser included offenses, or category one offenses under *Brown*.[135] Further, the *Blockburger* test, with its focus on the statutory elements of the offense, is to be used to decide whether a given offense was a "necessarily lesser included offense."[136] The court dismissed the categories established by *Brown*, stating that "*Brown* category four lesser included offenses have nothing to do with double jeopardy or with this case."[137] In attempting to sever the concepts of double jeopardy and the right to instructions on a lesser offense included within the greater, the court distinguished the two situations:

> "Lesser included offense" in regard to jury alternatives is different from what that term means in regard to double jeopardy. The former implements the nonconstitutional right of an accused to an instruction which gives the jury an opportunity to convict of an offense with less punishment than the crime charged. The latter, on the other hand, involves distinguishing offenses in order to protect against multiple prosecutions for the same crime.[138]

Following the *Baker* decision, the Florida Legislature amended Florida Statutes, section 775.021(4) to incorporate the *Blockburger* test for determining lesser included offenses.[139]

The cases trying to define lesser included offenses under *Brown*, *Baker*, and the newly amended statute resulted in confusion, a confusion culminating in *Barton v. State*.[140] In *Barton*, the Fifth District

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mitted during said criminal episode, and the sentencing judge may order the sentences to be served concurrently or consecutively.

135. *Baker*, 456 So. 2d at 422-23.

136. *Id.*

137. *Id.* at 422.

138. *Id.*

139. FLA. STAT. § 775.021(4) (9187) was amended to read:

(4) Whoever, in the course of one criminal transaction or episode, commits separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. *For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial* (emphasis added).

140. 507 So. 2d 638 (Fla. 5th Dist. Ct. App. 1987), *aff'd in part and quashed in part by*, 523 So. 2d 152 (Fla. 1988).

Court of Appeal noted that the supreme court in *Mills v. State*[141] did not follow its *Baker* reasoning; although the day before deciding *Mills*, the court had decided *State v. Snowden*,[142] noting the amendment to Florida Statutes, section 775.021 and its adoption of *Blockburger*. Although each of the two offenses contained an element that the other did not (allowing the two to be punished separately since they did not fall into one of the first three *Brown* categories), the *Mills* court did not allow separate punishments for the two offenses.[143] The court felt that the legislature did not intend dual convictions and punishments for the two offenses even though one was not a lesser included offense of the other.[144] The *Mills* court failed to follow the *Baker* test for legislative intent but seemed to develop an ad hoc test for determining whether the offenses were capable of being punished separately.[145] But on the previous day the court had issued its initial opinion in *State v. Boivin*,[146] applying a strict *Baker* test.[147] Then it changed its opinion in *Boivin* and applied the *Mills* analysis, deciding that the legislature did not intend to punish twice for the two offenses.[148] Next, in *State v. Rodriquez* the Supreme Court of Florida rejected the *Mills/Boivin* analysis and returned to the original *Boivin* analysis which used the strict *Baker* test.[149] Recognizing the confusion, the *Barton* court rendered its opinion on an entirely different rationale, that the two offenses of which the defendant was convicted not only were separate offenses, but were mutually exclusive.[150]

C. *Carawan v. State*: An Attempted Escape from the Definitional Morass

In *Carawan v. State*,[151] the Florida Supreme Court attempted to

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141. 476 So. 2d 172 (Fla. 1985).

142. 476 So. 2d 191 (Fla. 1985), *cited in* Barton v. State, 507 So. 2d 638, 639 (Fla. 5th Dist. Ct. App. 1987)).

143. *Mills*, 476 So. 2d at 172, *cited in* Barton v. State, 507 So. 2d 638, 639 (Fla. 5th Dist. Ct. App. 1987).

144. *Mills*, 476 So. 2d at 172.

145. *Id.* at 177.

146. 487 So. 2d 1037 (Fla. 1986).

147. *Barton*, 507 So. 2d at 639.

148. *Id.* at 639-40.

149. State v. Rodriquez, 500 So. 2d 120 (Fla. 1986).

150. The reasoning was then rejected by the Florida Supreme Court in State v. Barton, 523 So. 2d 152, 153 (Fla. 1988).

151. 515 So. 2d 161 (Fla. 1987).

resolve the confusion that existed following *Baker*. Carawan was charged and convicted of three offenses, attempted manslaughter, aggravated battery, and shooting into an occupied structure. All the offenses arose from a single incident in which four shotgun blasts were fired into a structure, at least one of which wounded the victim.[152] The defendant asserted that the victim was wounded by a single shotgun blast or, if more than one, that the two were fired in such rapid succession as to constitute a single criminal offense. Noting the confusion over Florida's double jeopardy law, the court accepted jurisdiction to give guidance to lower courts in interpreting the constitutional and statutory double jeopardy provisions.[153]

The court began by establishing three applicable rules of statutory construction. First, absent violations of a constitutional right, "specific, clear and precise statements of legislative intent control regarding intended penalties."[154] Although such statements are rare, they will control where they exist. Second, in the absence of such clear legislative intent, the *Blockburger* test is used to assist in determining the legislative intent.[155] If neither offense has an element that the other does not, the offenses are presumed to be the same and the courts must assume that the legislature does not intend to punish the same offense twice. Finally, any remaining doubts are to be resolved under the "rule of lenity," a principle of statutory construction resulting in strict construction of criminal statutes against the state.[156]

The decision emphasized that both the *Blockburger* analysis and the rule of lenity are mechanisms to determine legislative intent and that neither will operate in the face of a contrary but clear legislative intent.[157] In explaining the application of the rule of lenity, the court

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152. *Id.* at 163.

153. In an apt quotation, the district court of appeal noted that Florida's double jeopardy law had become "curiouser and curiouser." *Id.*

154. *Id.* at 165.

155. *Id.*

156. The rule of lenity had been explained in federal cases. "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." Albernaz v. United States, 450 U.S. 333 (1981) (citing Ladner v. United States, 358 U.S. 169, 178 (1958)). The Florida exposition of the rule was then cited from Palmer v. State, 438 So. 2d 1 (Fla. 1983) as "a fundamental rule of statutory construction, i.e., that criminal statutes shall be construed strictly in favor of the person against whom a penalty is to be imposed."

157. *Carawan*, 515 So. 2d at 167-68.

noted that it is appropriate to assume that the legislature would not act unreasonably, i.e. by passing two separate statutes to punish precisely the same evil when a single statute with an enhanced penalty would be sufficient to achieve the same result.[158] The court, applying its conclusion to the facts of the case, determined that the shots constituted a single underlying act for which the legislature did not intend multiple punishments.[159] The *Carawan* court also pointed out, almost in passing, that the process outlined above only applies to separate punishments arising from one criminal act, not a number of separate acts constituting one criminal transaction. It defined "act" as a discrete event arising from a single criminal intent, whereas a transaction was defined as a related series of acts.[160] Courts must first determine that the two charges are the product of one act before applying the rules of statutory construction laid out in *Carawan*. The single act analysis was used in a number of subsequent cases during the year following the *Carawan* decision.[161]

D. The Survey Year: The *Carawan* Test Becomes the Standard

During the 1988 survey year, courts began to follow and to apply the *Caravan* reasoning to a number of fact situations. The first major case was decided early in the year by the Florida Supreme Court, *Hall v. State*.[162] Hall was convicted of robbery and possession of a firearm, both convictions arising from the same criminal act. Affirming the dual convictions, the district court of appeal certified the lesser included offense question as one of great public importance.[163] The Supreme Court rephrased the certified question as one turning on legislative intent and held that the offenses of possession or display of a firearm were lesser included offenses of armed robbery.[164] The court, after re-

158. *Id.* at 168-69. As was seen by its subsequent amendment to Florida Statutes, section 775.021, the legislature demonstrated that the court's assumption was erroneous.

159. *Id.* at 170.

160. *Id.* at 170 n.8.

161. *See* discussion, *infra* note 162-86 and accompanying text.

162. 517 So. 2d 678 (Fla. 1988) (decided January 7, 1988).

163. The district court has certified the question in these words: "may an offense proscribed by Florida Statutes section 790.07(2) ever be considered a lesser included offense of the proscription of Florida Statutes section 812.13(1)(d)(2)." Hall v. State, 470 So. 2d 796 (Fla. 4th Dist. Ct. App. 1985).

164. The Florida Supreme Court recast the question as: "Did the legislature in-

viewing the historical background, revisited and reaffirmed *Carawan v. State*.[165] In its *Carawan* analysis, the court emphasized that the decision dealt with multiple punishments arising from a single act, not transaction, and held that where the two statutory offenses addressed the same evil inherent in the single act that was committed, it was unreasonable for the legislature to intend that both offenses be punished.[166] The court further pointed out the irrationality of enhancing punishment twice for precisely the same act: the offense of robbery becomes that of armed robbery (enhancement number one) because of the presence of the firearm; the offense then becomes possession of a firearm (enhancement number two) because of the presence of the firearm.[167] Where the legislature could have obtained the same result from a stronger penalty for either enhancement by itself, it is irrational to conclude that the legislature intended to reach the same enhanced penalty through two separate provisions.

More than fifty *Carawan*-issue cases decided by the district courts of appeal during the survey year fell into a number of broad categories: cases dealing with lesser offenses of possession of narcotics included in charges of trafficking, sale, or delivery of narcotics; cases dealing with a lesser offense of possession or display of a firearm included in charges of murder, robbery or similar offenses; cases in which the courts analyzed the facts of a given case to determine whether the facts resulted in a single act or a multiple-act transaction; and cases dealing with a number of other kinds of lesser included offense situations.

The primary case dealing with the narcotics issue was *Gordon v. State*,[168] in which the defendant was convicted of sale of cocaine and possession of that same cocaine with intent to sell. The defendant appealed on the grounds that the dual convictions violated his double jeopardy rights. The district court of appeal first analyzed the facts, finding a single act which gave rise to the two convictions, rather than

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tend that a defendant could be convicted of the offense of armed robbery under Florida Statutes section 812.13(1) and (2)(a) and the offense of displaying a firearm or carrying a concerned firearm, under Florida Statutes section 790.07(2) when the offenses resulted from a single act. *Hall*, 517 So. 2d at 678.

165. The court reviewed and discussed State v. Gibson, 452 So. 2d 553 (Fla. 1984), specifically overruling the case; Mills v. State, 476 So. 2d 172 (Fla. 1985); Houser v. State, 474 So. 2d 1193 (Fla. 1985); State v. Boivin,, 478 So. 2d 1037 (Fla. 1986); and State v. Rodriquez, 500 So. 2d 120 (Fla. 1986).

166. *Hall*, 517 So. 2d at 680.

167. *Id.*

168. 528 So. 2d 980 (Fla. 2d Dist. Ct. App. 1988).

a criminal "transaction" or "episode" comprised of multiple acts. Following the *Carawan* prescription, the court then analyzed the two statutes in light of the prohibition against double jeopardy. The court first looked for a clear statement of legislative intent specifying whether the two offenses in question were separate offenses, to be punished separately, or were to be considered a single offense. Finding no clear statement of intent, the court analyzed the charges under the *Blockburger* test. Since the *Blockburger* analysis of the statutory elements showed that the offenses were the same, the third step of the analysis, application of the rule of lenity, was unnecessary.[169] The *Gordon* formula has been followed by other district courts of appeal without exception.[170]

Another area where the *Carawan* analysis has been applied frequently is that of possession or use of a firearm in the commission of some other offenses. Issues of possession of a firearm arise either because the use of the firearm is an integral part of the primary offense or because its use as part of the primary offense enhances the punish-

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169. The court, after reviewing the statutory elements comprising the two crimes, concluded that the offense of possession with intent to sell contained no elements not also contained within the crime of sale. It went on to say that the crime of possession with intent to sell is a crime representing a frustrated or incomplete sale. A defendant could not be convicted of both offenses when they occurred in the same act. *Id.* at 913.

170. *See, e.g.*, Ramos v. State, 529 So. 2d 807 (Fla. 2d Dist. Ct. App. 1988) (dealing with possession and delivery of cocaine); Lee v. State, 526 So. 2d 777 (Fla. 2d Dist. Ct. App. 1988) (where convictions for trafficking in cocaine and possession of cocaine were reversed); Fleurit v. State, 528 So. 2d 1352 (Fla. 1st Dist. Ct. App. 1988) (involving convictions for trafficking in cocaine and possession of cocaine); Garrison v. State, 530 So. 2d 365 (Fla. 5th Dist. Ct. App. 1988) (involving simple possession of cocaine (FLA. STAT. § 893.13(1)(e)), and sale or possession of cocaine (FLA. STAT. § 893.13(1)(a)), both held lesser included offenses of trafficking in cocaine); Leeks v. State, 529 So. 2d 787 (Fla. 2d Dist. Ct. App. 1988) (involving possession and sale of cocaine); Oxilius v. State, 528 So. 2d 527 (Fla. 2d Dist. Ct. App. 1988) (involving trafficking in cocaine and sale of cocaine); Park v. State, 528 So. 2d 524 (Fla. 2d Dist. Ct. App. 1988) (involving trafficking in cocaine and possession of cocaine); Lipscomb v. State, 534 So. 2d 1202 (Fla. 2d Dist. Ct. App. 1988) (with the two offenses of trafficking and possession of cocaine with intent to sale); Fuentes v. State, 533 So. 2d 311 (Fla. 2d Dist. Ct. App. 1988) (trafficking and possession of cocaine with intent to sell); Hurtado v. State, 533 So. 2d 304 (Fla. 1st Dist. Ct. App. 1988) (trafficking and possession of cocaine); Taylor v. State, 531 So. 2d 1066 (Fla. 4th Dist. Ct. App. 1988) (possession of cocaine with intent to sell and sale of cocaine); Baker v. State, 530 So. 2d 402 (Fla. 1st Dist. Ct. App. 1988) (Sale and possession of cocaine. In this case the acts were held to be two separate acts, dealing with separate amounts of cocaine and so the cumulative punishments were proper).

ment for that offense. A separate conviction for an additional offense with respect to that firearm in either situation, e.g. possession of the firearm or display of the firearm, has been found improper under a *Carawan* rationale. This issue was addressed by the Florida Supreme Court in *Hall v. State*[171] and has been followed consistently by the district courts of appeal. The Third District Court of Appeal, for example, in *Henderson v. State*,[172] held that the defendant could not be convicted of both possession of a firearm in the commission of a felony and second degree murder by use of a firearm. The court based its decision on the fact that there was only one misuse of a firearm, a single act. Citing *Hall v. State*[173] and *Carawan*,[174] the court emphasized that the two offenses could not result from the single act. Once having determined that the two offenses resulted from a single act, the court did not go through the remaining *Carawan* analysis. In *Marion v. State*[175] the Second District Court of Appeal held that the defendant could not be convicted of both armed burglary and possession of a concealed firearm while committing the burglary. Basing its analysis on *Carawan*, the court first determined that the two offenses were predicated on a single underlying act. Analogizing the case to the *Carawan* facts, the court found that the legislature did not intend to punish both offenses. The court further pointed out that to hold otherwise would mean that every robbery in which a firearm was used would automatically be enhanced twice. "It is unreasonable to presume the legislature intended this result."[176] A series of other opinions from the district courts of appeal have reinforced the *Carawan/Hall* conclusion.[177]

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171. 517 So. 2d 678 (Fla. 1988).
172. 526 So. 2d 743 (Fla. 3d Dist. Ct. App. 1988).
173. 517 So. 2d 678.
174. 515 So. 2d 161 (Fla. 1988).
175. 526 So. 2d 1077 (Fla. 2d Dist. Ct. App. 1988).
176. *Id.* at 1078.
177. *See, e.g.*, Wilcher v. State, 524 So. 2d 1105 (Fla. 3d Dist. Ct. App. 1988) (citing *Carawan* for the proposition that discharging a firearm in public, a violation of FLA. STAT. § 790.15 (1987) is the same offense as shooting a deadly missile into an occupied vehicle in violation of FLA. STAT. § 790.19 (1987)); Wright v. State, 519 So. 2d 1157 (Fla. 5th Dist. Ct. App. 1988) (dealing with aggravated assault with a deadly weapon and possession of a firearm in commission of a felony); Neal v. State, 527 So. 2d 966 (Fla. 5th Dist. Ct. App. 1988) (involving convictions of armed robbery (FLA. STAT. § 812.13(2)(a) (1987)), possession of a weapon in the commission of a felony (FLA. STAT. § 790.07 (1987), and aggravated assault with a deadly weapon (FLA. STAT. § 784.021 (1987)). All but the armed robbery conviction were reversed on the basis of *Carawan*); Torres v. State, 527 So. 2d 272 (Fla. 3d Dist. Ct. App. 1988) (involving

A number of district court of appeal decisions turned on the issue of whether the multiple convictions and punishments had arisen from a single act or from multiple acts.[178] In *Ogletree v. State*,[179] the defendant had taken a single-shot shotgun and fired once through the window of a house at a table where nine persons were seated. The defendant then chased one of the persons through the house, striking her with the butt of the shotgun. The defendant, convicted of nine separate counts of attempted first degree murder, claimed that, since he had fired only a single shot, eight of the convictions were invalid under the "single act" criterion of *Carawan*. The court reasoned that, since the statute involved requires an intent to kill a specific person, the focus of the statute is on the victim, not the offender. Therefore the shot at the nine persons constituted nine separate acts and could validly support the nine convictions. A similar result was reached in *Watford v. State*,[180] where the defendant was charged with lewd and lascivious assault on a child, aggravated battery and false imprisonment. The defendant was convicted of two counts of simple battery, one as a lesser included offense of lewd and lascivious assault on a child, the other as a lesser included offense of the false imprisonment. Reasoning that the battery

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convictions for possession of a firearm while engaged in a criminal offense and for shooting into an occupied building); Cardwell v. State, 525 So. 2d 1025 (Fla. 5th Dist. Ct. App. 1988) (aggravated battery (784.045(1)(b)) and possession of a weapon (FLA. STAT. § 790.07(1) (1987))); Henderson v. State, 526 So. 2d 743 (Fla. 3d Dist. Ct. App. 1988) (possession of a firearm in the commission of a felony (790.07) and second degree murder by use of a firearm (FLA. STAT. §§ 782.04(2) and 775.087 (1987))); Perez v. State, 528 So. 2d 129 (Fla. 3d Dist. Ct. App. 1988) (attempted first degree murder with a firearm, armed robbery with a firearm and display of a firearm, where the display of a firearm charge was reversed); Evans v. State, 528 So. 2d 125 (Fla. 3d Dist. Ct. App. 1988) (attempted first degree murder with a firearm and possession of a firearm during the commission of a felony); Neal v. State, 531 So. 2d 410 (Fla. 1st Dist. Ct. App. 1988) (robbery, aggravated assault and use of a firearm during commission of a felony); Anderson v. State, 530 So. 2d 1104 (Fla. 3d Dist. Ct. App. 1988) (attempted first degree murder and armed robbery were held to be separate offenses while possession of a firearm in the commission of a felony was held to be improper in the light of the other convictions); Monsanto v. State, 530 So. 2d 952 (Fla. 3d Dist. Ct. App. 1988) (kidnapping and possession of a firearm during the commission of a felony); Rose v. State, 530 So. 2d 401 (Fla. 1st Dist. Ct. App. 1988) (possession of a firearm during commission of a felony and the primary felony); Payne v. State, 528 So. 2d 546 (Fla. 1st Dist. Ct. App. 1988) (reversing fourteen counts of use of a firearm in the commission of a felony).

178. *See Carawan* analysis, *supra* notes 151-61 and accompanying text.

179. 525 So. 2d 967 (Fla. 1st Dist. Ct. App. 1988).

180. 525 So. 2d 484, 486 (Fla. 1st Dist. Ct. App. 1988).

statute envisioned that each separate act of touching would be a separate offense, and that the convictions were each founded on a separate act of battery, the court concluded that the convictions were proper. The acts did not constitute a "single act" under *Carawan*.[181]

A number of other fact patterns resulted in similar analyses and similar results. In reviewing cases in which robbery was the primary charge and either grand larceny or petit larceny the lesser charge, the courts held the larceny to be a lesser included offense of the robbery.[182] In *Stancato v. State*,[183] the defendant was charged and convicted of manslaughter by operating a motor vehicle while intoxicated and vehicular homicide. Both charges arose out of a collision in which the driver of the other vehicle was killed. In a short opinion the court decided that the defendant could not be convicted of both crimes when there was only one homicide and one act. The court mentioned that vehicular homicide was a lesser offense of manslaughter by operating a motor vehicle while intoxicated but did not go through the *Carawan* analysis. Still another opinion dealt with the situation where a defendant was accused of aggravated battery and battery of a law enforcement officer. In the case of *Garza v. State*,[184] while a law enforcement officer was trying to break up a fight in which the defendant was a participant, the defendant stabbed the officer once in the back. Applying a *Carawan* analysis, the court held that the legislature did not intend the two statutes to separately punish the same evil and that the conviction for the lesser of the two offenses had to be reversed.

Finally, in one of the more inventive applications of the rule, the defendant in *Mapps v. State*[185] argued a "merger" rationale. The facts indicated that the victim, a child, had died from a fractured skull caused by the defendant's throwing, shaking, or striking the child. The defendant had been convicted, after a bench trial, of first-degree felony murder, the underlying felony being that of aggravated child abuse. The defendant argued that since the felony of aggravated child abuse was the very act that constituted the murder, the two offenses had "merged" with the result that the defendant could not be convicted of

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181. A similar analysis led to the same result in Reid v. State, 531 So. 2d 211 (Fla. 1st Dist. Ct. App. 1988).

182. Shupe v. State, 517 So. 2d 780 (Fla. 5th Dist. Ct. App. 1988) (holding that both a conviction for robbery and for grand theft could not stand); Cole v. State, 530 So. 2d 983 (Fla. 5th Dist. Ct. App. 1988) (involving robbery and petit theft).

183. 526 So. 2d 723 (Fla. 3d Dist. Ct. App. 1988).

184. 518 So. 2d 978, 979 (Fla. 2d Dist. Ct. App. 1988).

185. 520 So. 2d 92 (Fla. 4th Dist. Ct. App. 1988).

the murder. Using a *Carawan* analysis to determine legislative intent, the district court of appeal held that, when the legislature added aggravated child abuse as an underlying felony of felony murder, the legislature had not intended for the murder to merge into the lesser offense, but that a defendant be punished for both offenses.[186]

E. Legislative Amendment to Florida Statutes, Section 775.021: The Legislature Rejects *Carawan*, Single Acts and Lenity

In *Carawan*, the Florida Supreme Court had established a viable mechanism for determining multiple punishment double jeopardy claims raised by defendants, the viability demonstrated by its utility during the year following its rendition. In addition, the procedure had the virtue of instilling a modicum of reason in the process, while allowing courts some flexibility in determining what "makes sense." With the application of the process of analysis set out in the case, the state had already begun to formulate a significant body of law establishing a hierarchy of relationships between greater and lesser offenses in those areas most frequently litigated. The viability of the process was also demonstrated by the consistency with which the courts were able to apply the *Carawan* analysis.

During its 1988 session, however, the Florida Legislature again amended Florida Statutes, section 775.021(4), the amendments to take effect on July 1, 1988.[187] The intent of the amendment was to overrule legislatively the *Carawan* decision. Section 775.021(4), as amended, now reads:

> (4)(a) Whoever, in the course of one criminal transaction or episode, commits *an act or acts which constitute one or more* separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.
>
> *(b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set*

187. 1988 FLA. LAWS 88-131 § 7.

forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:

1. Offenses which require identical elements of proof.

2. Offenses which are degrees of the same offense as provided by statute.

3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.[188]

While the ultimate effects of the statutory amendment will await further appellate explication, a few predictions may be tentatively proffered.

It seems clear that the legislature wishes to reject the *Carawan* reasoning that the legislature does not normally intend to punish the same offense by more than one statute. By clearly stating that it is the legislative intent that anyone who commits a single act which constitutes multiple criminal offenses be punished separately for each of the offenses for which the defendant may be convicted, the legislature has clearly repudiated the rule of rationality applied through *Carawan's* "lenity." In those cases which found that the *Blockburger* test did apply, the finding that one offense is a lesser included of another should not be changed by the legislation. Therefore, those cases following the *Gordon* analysis of narcotics offenses should still be valid.[189] Those cases which have been based on the "single act" analysis and on the rule of lenity, however, are probably legislatively overruled.[190]

The pragmatic effects of the legislative amendment are both unknown and unpredictable. One effect of the statutory amendment may be the effect on prosecutorial discretion. If the intent of the legislature is to punish every potentially lesser included offense (former category two offenses), it may become the duty of the prosecuting attorney to seek out and to charge every sustainable lesser included offense to the major charge, regardless of how inappropriate such charge may be. If the prosecutor fails to do so, the prosecutor is apparently violating the expressed legislative intent. Moreover, adoption of such a mechanistic approach to convictions and sentences may well lead to inappropriately disparate sentences under the sentencing guidelines. Sentencing now depends on the guidelines "matrix," with departure sentences being

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188. FLA. STAT. 775.021(4) (Supp. 1988) (added language italicized).

189. *See* discussion of *Gordon* and subsequent cases, *supra* notes 168-70 and accompanying text.

190. *See* discussion on Hall v. State, *supra* notes 171-77 and accompanying text.

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carefully scrutinized.[191] The matrix, in turn, is heavily weighed toward "multiple offenders," basing significant increases in sentence on the number of prior convictions with no recognition that multiple convictions may have resulted from the same act.[192] It is unfortunate that the legislature has turned from a workable process based on reasonable assessment of the criminal act involved to a mechanistic formula the results of which are currently unpredictable. The state will have to wait and assess the results when the data becomes available.

F. The Jury Instruction Issue: The *Wimberly* Standard Is Modified by *Barritt*

While the double jeopardy aspects of lesser included offenses were making their tortuous way through the courts, the issue of lesser included offenses as they relate to jury instructions was not neglected. The issue is whether a court must instruct on a lesser included offense when the evidence unequivocally supports the greater.[193] Although the primary thrust of *Brown* was to establish its four categories of "lessers,"[194] the court had introduced the concept of "jury pardon" as the

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191. An electronic search of Florida cases for the year 1987 revealed that the issue of inappropriate guideline sentencing had been raised in over 370 cases. For an example of the effect that multiple sentences can have on a guidelines sentence, see Diaz v. State, 527 So. 2d 300 (Fla. 2d Dist. Ct. App. 1988).

Probably the record for single case reversals of multiple sentences was done in Payne v. State, 528 So. 2d 546 (Fla. 1st Dist. Ct. App. 1988). The defendant had been convicted in two separate cases of 28 charges, including fourteen counts of use of a firearm in the commission of a felony. The court reversed all fourteen convictions of possession of a firearm during the commission of a felony, since all related to felonies which required the possession of a firearm as an element or had been reclassified because of the defendant's use of the firearm.

192. FLA. R. CRIM. P. 3.988. For example, if a defendant were accused of robbery, the difference between a "nonstate prison sanction" and three years incarceration is thirteen "points." Thirteen points can be attained through two prior convictions for a third degree felony, or two misdemeanors and one third degree felony, or two prior misdemeanors plus one third degree felony lesser included offense of the offense charged.

193. The classic example of such a situation would be the request for an instruction on battery on a charge of murder when the evidence clearly shows that the victim died as a result of the battery, or an instruction on petit larceny when the evidence clearly shows that the amount taken was far in excess of the amount required for the offense of grand larceny.

194. The four categories were 1) Offenses divided into degrees, 2) Attempts to commit an offense, 3) Necessarily lesser included offenses and 4) Offenses which may

rationale for mandating instruction on certain lesser included offenses. Basing its holding on the then extant Florida Statutes, section 919.16, the court implied that the right to a jury instruction on lesser included offenses is part of "the basic rule that gives to the accused the right to have the jury consider the evidence and, if it desires, find him not guilty of any crime, even though the trial judge might be fully convinced that the evidence overwhelmingly establishes his guilt."[195] In *State v. Baker*, the rationale had been reiterated by the court referring to the "nonconstitutional right of an accused to an instruction which gives the jury an opportunity to convict of an offense with less severe punishment than the offense charged."[196] The primary case which had addressed this issue subsequent to the *Brown* decision was *State v. Wimberly*,[197] decided in 1986. Between the *Brown* and *Wimberly* decisions, the governing statute had been superseded by a rule of criminal procedure.[198] The rule modified the statute in that it required instructions on necessarily lesser included offenses and lesser included offenses which are "supported by the evidence" and prohibited instruction to the jury on "any lesser included offense as to which there is no evidence."[199]

The defendant in *Wimberly* was charged with a number of offenses, including battery of a law enforcement officer. Under the facts, it was obvious that the victim was a custodial officer, clearly a law enforcement officer under the statute.[200] At trial the defendant re-

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or may not be included in the greater offense, depending on the pleadings and the proof. *See* discussion of *Brown* categories, *supra*, notes 127-50 and accompanying text.

195. Brown v. State, 206 So. 2d 377, 382 (Fla. 1968).

196. 456 So. 2d 419, 422 (Fla. 1984).

197. 498 So. 2d 929 (Fla. 1986).

198. FLA. R. CRIM. P. 3.510. The rule reads:

> Upon an indictment or information upon which the defendant is to be tried for any offense the jury may convict the defendant of:
>
> (a) an attempt to commit such offense if such attempt is an offense and is supported by the evidence. The judge shall not instruct the jury if there is no evidence to support such attempt and the only evidence proves a completed offense.
>
> (b) any offense which as a matter of law is a necessarily included offense or a lesser included offense of the offense charged in the indictment or information and is supported by the evidence. The judge shall not instruct on any lesser included offense as to which there is no evidence.

199. FLA. R. CRIM. P. 3.510(b).

200. The person allegedly battered was a prison guard, clearly a law enforcement officer under the statutory definition. "As used in this section, the term 'law enforce-

quested a jury instruction of simple battery as a lesser included offense of battery of a law enforcement officer. The trial court refused the instruction and the defendant was convicted of battery of a law enforcement officer. The First District Court of Appeal reversed the conviction and certified the issue as one of great public importance.[201] The supreme court affirmed the district court of appeal. In its opinion, the court first reviewed the history of the rule requiring instructions on necessarily lesser included offenses, explaining the *Brown* decision and the subsequent modification of the rule of criminal procedure. The court held that instructions on necessarily lesser included offenses must be given in all cases, regardless of whether the offense is supported by the evidence. As the rationale for this holding, the court referred to its earlier *Baker* decision and the concept of jury pardon: "The requirement that a trial judge must give a requested instruction on a necessarily lesser included offense is bottomed upon a recognition of the jury's right to exercise its 'pardon power.' "[202]

During this past year, the court again addressed the issue, modifying its position in *Wimberly*. In *State v. Barritt*,[203] the defendant had been charged with vehicular homicide. At trial, the defendant contended that reckless driving was a lesser included offense of vehicular homicide and requested an instruction on reckless driving. The instruction was refused by the trial judge, and the defendant was convicted of vehicular homicice.[204] On appeal, the First District Court of Appeal found an apparent conflict with two prior supreme court cases and certified the question.[205] In a rather succinct opinion, the Florida Supreme

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ment officer' includes, but shall not be limited to, any sheriff; deputy sheriff; municipal police officer; . . . state, county, or municipal correctional officer; officer of the Parole and Probation Commission; . . ." FLA. STAT. § 784.07 (9187).

201. The question certified was:

> If the evidence at trial is sufficient to convict of a necessarily lesser included offense, and the same evidence also incontrovertibly shows that the necessarily lesser included offense could not have been committed without also committing the greater charged offense, does Rule 3.510(b), Florida Rules of Criminal Procedure, require the trial judge to instruct the jury to the necessarily lesser included offense?

Wimberly v. State, 476 So. 2d 272 (Fla. 1st Dist. Ct. App. 1985).

202. *Wimberly*, 498 So. 2d at 932.

203. 531 So. 2d 338 (Fla. 1988).

204. The defendant had also been charged with leaving the scene of an accident involving personal injury, and had been convicted and sentenced for that offense as well. No issue was raised with respect to that conviction. *Id.*

205. *Id.* at 338-39. In Chikitus v. Shands, 273 So. 2d 904 (Fla. 1979), the court

Court both reiterated the rule from *Wimberly* and established an exception. The court first established the *Wimberly* rule, although not in unequivocal language:

> *Technically*, reckless driving is a necessarily lesser included offense of vehicular homicide. *Normally*, a defendant is entitled to an instruction on all necessarily lesser included offenses. [*Wimberly*] Furthermore, a trial judge must give a requested instruction on a necessarily lesser included offense even when the evidence at trial, which is sufficient to convict of the lesser included offense, also incontrovertibly shows that the lesser included offense could not have been committed without also committing the greater charged offense.[206]

The difficulty with such an adverb-laden rule is that it becomes virtually no rule at all, but merely a general indication of the direction that the court might take at some future time under a different fact and charge pattern. And, in the case, the court did then take a different direction. The court held that where the element of "death" is not controverted, "no rational purpose would be served" by instructing on the lesser offense.[207] The difficulty with the reasoning is obvious. If a defendant is charged with battery of a law enforcement officer, and the employment of the victim as a law enforcement officer is unquestioned, there is no more rational purpose to be served in giving a lesser included offense of simple battery than there is in giving an instruction on reckless driving in a case where the reckless driving unquestionably has caused death. If the principle of jury pardon has validity, then it should apply to all cases, the more serious as well as the less serious. If it has no validity, then it should be abandoned.[208]

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had held that reckless driving was, for double jeopardy purposes, a lesser included offense of vehicular homicide. A conviction of reckless driving therefore precluded a later prosecution for the greater offense of vehicular homicide. In Martin v. State, 342 So. 2d 501 (Fla. 1977), the court had ruled that where a homicide had occurred, the jury instructions should be limited to the issue of whether or not the homicide was lawful.

206. *Barritt*, 531 So. 2d at 339 (emphasis added).

207. *Id.*

208. Justice Shaw has consistently argued that it has no validity other than that the jury is empowered to find a defendant not guilty of a charged crime in the face of clear evidence that the defendant did commit that crime. *See* Justice Shaw's dissent in *Wimberly*, 498 So. 2d 929, 932 (Fla. 1986) and special concurrence in *Barritt*, 531 So. 2d 338, 339 (Fla. 1988).

V. Exclusion as a Sanction for Non-Disclosure of Defense Witnesses

In 1967, Florida adopted a code of criminal procedure rules designed, in part, to facilitate discovery in criminal cases.[209] Five years later, the rules were substantially amended, the discovery section being expanded to give Florida one of the most progressive codes of criminal procedure in the nation.[210] These rules provide for prosecution disclosure of the names of witnesses and the statements of those witnesses.[211] One of the more innovative aspects of the newly adopted discovery process was its provision establishing reciprocal discovery, discovery in favor of the prosecution. Disclosure of information is mandated from the defense under two rules, the rule providing for notice of alibi[212] and the general discovery rule.[213] Carefully crafted to comply with the perceived dictates of *Williams v. Florida*,[214] the discovery rule requires that the defendant provide the prosecution with a list of all witnesses that the defense expects to call at trial.[215] The rule also provides for a

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209. In re Florida Rules of Criminal Procedure, 196 So. 2d 124 (Fla. 1967). A year later, in February of 1968, the rules were amended slightly in In re Florida Rules of Criminal Procedure, 207 So. 2d 430 (1968), but this amendment had no effect on discovery provisions of the rules. The court enacted a more significant amendment in June, 1968, affecting Rule 1.200, the notice of alibi rule, and Rule 1.220, the rule providing for discovery depositions. It removed the requirement that a written statement be requested of a witness before a deposition of that witness would be approved by the court. In re Florida Rules of Criminal Procedure, 211 So. 2d 203 (Fla. 1968).

210. In re Florida Rules of Criminal Procedure, 272 So. 2d 65 (Fla. 1972).

211. FLA. R. CRIM. P. 3.220(a)(1)(i) provided that the state, on demand, was to furnish the defendant with a list of all persons known "to have information relevant to the offense charged and to any defense with respect thereto." FLA. R. CRIM. P. 3.220(a)(1)(ii) then compels production of any statements made by persons whose names were disclosed. Although the provision appears to mandate disclosure of police reports containing statements of witnesses, the definition of "statement" has been somewhat restricted by subsequent decisional law. *See* Downing v. State, 536 So. 2d 189 (Fla. 1988). *See also* Latimore v. State, 284 So. 2d 423 (Fla. 3d Dist. Ct. App. 1973) and Miller v. State, 369 So. 2d 46 (Fla. 2d Dist. Ct. App. 1978). FLA. R. CRIM. P. 3.220(b)(3) mandates disclosure by the defense of those witnesses that the defendant expects to call at the trial of the case.

212. FLA. R. CRIM. P. 3.200.

213. FLA. R. CRIM. P. 3.220(b).

214. 399 U.S. 78 (1970). Although *Williams* arose under the notice of alibi rule, FLA. R. CRIM. P. 3.200, the issue of defense disclosure of anticipated witnesses to the state was central to the Court's decision.

215. In the *Williams* opinion, the Court concluded that the notice of witness requirement did not violate the fifth amendment prohibition against compulsory self-

duty of continuing discovery — both defense and prosecution have the duty to prompt disclosure of additional witnesses coming to their attention.[216]

Rule 3.220(j) establishes sanctions for failure to comply with discovery provisions of the rule. The multiple sanctions available include the court's issuing an order to comply, granting a continuance, granting of a mistrial, or "enter[ing] such other order as it [the court] deems just under the circumstances." The penultimate sanction is that of exclusion of any witness not disclosed.[217] Exclusion of a prosecution witness as sanction for a discovery violation by the prosecution in a criminal case offends no provision of either the state or federal constitution. Significant question has arisen, however, with respect to the exclusion of a non-disclosed defense witness in the light of both the state and federal constitutions.[218]

One Florida Supreme Court case decided during the survey year obliquely addressed the issue,[219] while two cases decided during the survey period by district courts of appeal dealt directly with areas relevant to exclusion of testimony of both prosecution and defense witnesses.[220] In addition, a long-awaited decision from the United States Supreme Court has clarified the restrictions on exclusion of witnesses imposed by the sixth amendment to the United States Constitution.[221] This decision may have significant impact on Florida precedent.

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incrimination because it did not require the defendant to reveal anything to the state. The Court held "the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information which the petitioner from the beginning had planned to divulge at trial." Since the defendant had planned to call the witnesses at trial, requiring disclosure of the witness's names before trial violated no privilege under the fifth amendment. *Id.* at 85-86.

216. FLA. R. CRIM. P. 3.220(f).

217. FLA. R. CRIM. P. 3.220(j)(1). In addition, the testimony of defense alibi witnesses or prosecution alibi rebuttal witnesses may be excluded for failure to disclose under Rule 3.200.

218. Exclusion of such a witness potentially violates the United States Constitutional sixth amendment rights to a fair trial and to compulsory process of witnesses. It potentially violates the equivalent Florida constitutional rights established by article I, section 16 of the Florida Constitution.

219. *See infra* notes 248-53 and accompanying text.

220. *See infra*, notes 254-65 and accompanying text.

221. *See infra*, notes 266-87 and accompanying text.

A. Florida Witness Exclusion Cases — Pre-1988

Almost with the initial passage of the first rules of criminal procedure in the state, the issue of exclusion as a sanction for a defense failure to disclose witnesses began to arise. The issue was first addressed by the Third District Court of Appeal in the case of *Wilson v. State*.[222] In a somewhat cursory opinion, the court apparently disallowed use of this sanction against the defendant in a criminal case. The court first stated categorically that "[A] defendant charged with a serious crime should be able to produce evidence material to his case,"[223] then concluded that the trial judge in this case had "abused the discretion afforded him under Rule 1.220(g) in not allowing the witness to testify."[224]

Two years later, the Florida Supreme Court rendered an opinion that has become controlling with respect to imposition of sanctions for failure to comply with discovery, *Richardson v. State*.[225] In *Richardson*, the prosecutor had failed to comply with the then extant Rule 1.220(e), which required the prosecutor, on demand, to furnish the defendant a list of potential witnesses. The failure, however, was found not to have resulted in prejudice to the defendant.[226] Addressing first the issue of prejudice, the court adopted the unanimous holding of the four then existing district courts of appeal, all agreeing that, absent "prejudice or harm" to a defendant, violation of a rule of procedure does not call for reversal.[227] The court then established what has come to be known as a "*Richardson* hearing." Citing the fourth district's opinion in *Ramirez v. State*, the court held that when a discovery violation has occurred, it is incumbent upon the trial judge to inquire into "all of the surrounding circumstances" in order to properly exercise judicial discretion in imposing sanctions for failure to comply with the rule.[228] The thrust of the inquiry was to determine whether the failure to comply resulted in prejudice to the defendant.[229] The court further

222. 220 So. 2d 426 (Fla. 3d Dist. Ct. App. 1969).
223. *Id.* at 427 (citing Fine v. State, 70 Fla. 412, 70 So. 379 (1915) and Norman v. State, 156 So. 2d 186 (Fla. 3d Dist. Ct. App. 1963)).
224. *Id.*
225. 246 So. 2d 771 (Fla. 1971).
226. *Id.* at 773.
227. *Id.* at 774.
228. *Id.* at 775 (citing Ramirez v. State, 241 So. 2d 774 (Fla. 4th Dist. Ct. App. 1970)).
229. *Id.* The court found, from a factual analysis, that failure to disclose had

held that once the proper inquiry had been made, the court had authority to "enter such order as it deems just," but that, if the defendant were found not to have been prejudiced, that fact must affirmatively appear in the record.[230] Since the opinion involved dereliction by the prosecution, and imposition of a penalty against the prosecution, the potential constitutional issues were not mentioned; the court did, however, clearly establish prejudice as the determinant of whether the sanction of exclusion of witnesses was appropriate.

After emphasizing the necessity of a broad "*Richardson* inquiry" in *Cumbie v. State*,[231] the Florida Supreme Court again addressed issues relating to *Richardson* eight years later, in a pair of cases which discussed the nature of the prejudice required in order to support the exclusion sanction. The first case, *Wilcox v. State*,[232] dealt again with the prosecutor's nondisclosure of a prosecution witness, but turned on the failure of the court to hold the prescribed "*Richardson* inquiry." It held that the inquiry was to focus on "procedural prejudice, whether the discovery violated prevented the defendant from properly preparing for trial."[233] Only if such a hearing had been held and was timely could the trial judge fashion a remedy appropriate to avert the prejudice.[234]

The second case, *Smith v. State*,[235] dealt with the failure of a defendant to comply with discovery, the primary issue concerning the acceptability of a post-trial "*Richardson* inquiry" to determine prejudice at the time of trial. In *Smith*, the defense attorney admitted that he inadvertently had omitted a witness's name from the witness list. The prosecutor objected to that witness's testimony, the court sustained the prosecutor's objection and excluded the witness. No hearing was held to determine the existence of prejudice to the prosecution for failure to list the potential witness. While the case was on appeal to the Second District Court of Appeal, the appellate court relinquished jurisdiction to the trial court to conduct the appropriate hearing. At the hearing, held more than one year after the trial itself, the trial court had found that exclusion of the witness was the only way to cure the prejudice to the state resulting from the defense failure to disclose the name of the

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prejudiced the defendant and reversed the conviction for that reason.

230. *Id.* at 775 (citing Ramirez v. State, 241 So. 2d 774 (Fla. 4th Dist. Ct. App. 1970)).

231. 345 So. 2d 1061, 1062 (Fla. 1977).

232. 367 So. 2d 1020 (Fla. 1979).

233. *Id.* at 1022.

234. *Id.* at 1023.

235. 372 So. 2d 86 (Fla. 1979).

witness.[236] The district court of appeal affirmed the conviction.

The supreme court, reiterating that the hearing is to determine procedural prejudice, held that such a post-trial hearing was inappropriate and that the "*Richardson* inquiry" must be held at time of trial.[237] In both of these cases, the court reiterated that the determinant criterion was that of prejudice — procedural prejudice — and that the prejudice must be addressed in a timely hearing in order to fashion the appropriate remedy. Although the sanction of exclusion as applied to a defense witness was the subject of *Smith*, the court did not mention the constitutional implications of exclusion of a defense witness, but concentrated solely on the timing of the "*Richardson* inquiry" and its effectiveness after the passage of one year from the date of trial.

At the district court of appeal level, the issue of exclusion of a defense witness has been addressed frequently, although the constitutional implications of the remedy have not been discussed. In *Dorry v. State*,[238] the trial court had excluded a defense witness on motion of the state without holding a *Richardson* hearing. The defendant's conviction was reversed and the case remanded for a new trial. The court emphasized that it was error to exclude the witness's testimony without a clear showing of prejudice to the state; only the showing of prejudice provided adequate basis for the exclusion sanction.[239] Defense witnesses were held properly excluded, however, in a case arising two years later, *Morgan v. State*.[240] In *Morgan*, the defense provided the state with a list of witnesses to be called to impeach the final prosecution witness. In a single paragraph addressing the issue, the court noted that the trial judge excluded the witnesses "after hearing argument from counsel. . . ."[241] The court also noted that the defense had made no proffer of the expected testimony of the witnesses. On that basis, the appellate court found "no reversible error."[242]

A different rationale was advanced in *State v. Bowers*,[243] the court holding that, even though a party is prejudiced by non-disclosure of a witness, the extreme remedy of exclusion of the witness should be used

236. *Id.* at 88.
237. *Id.*
238. 389 So. 2d 1184 (Fla. 4th Dist. Ct. App. 1980).
239. *Id.* at 1186.
240. 405 So. 2d 1005 (Fla. 2d Dist. Ct. App. 1981).
241. *Id.* at 1006.
242. *Id.* at 1007.
243. 422 So. 2d 9 (Fla. 2d Dist. Ct. App. 1982).

only where "no other remedy suffices."[244] Although *Bowers* dealt with prosecution failure to disclose, other district courts of appeal decisions have applied the same stringent standard where the defense counsel had failed to comply with discovery. In *O'Brien v. State*,[245] the appellate court reversed the defendant's conviction on the grounds that the trial judge had not held the appropriate *Richardson* hearing, but also stressed that "the most extreme sanction should never be imposed except in the most extreme cases, such as when purposeful, prejudicial and with intent to thwart justice."[246] The *O'Brien* rationale has been reiterated in most of the cases which have addressed the issue since the time of the *O'Brien* decision.[247]

As the survey year began, therefore, Florida's position with regard to exclusion of a defense witness as a sanction for failure of the defendant to comply with discovery may be summed up succinctly. If a party, defendant or prosecution, fails to disclose a witness as required by the appropriate rules of procedure and then offers that witness at trial, the trial judge is required to conduct a *Richardson* inquiry. The inquiry consists of the judge's scrutiny of all the facts and circumstances surrounding the failure to disclose in order to determine the prejudice caused the non-offending party. That prejudice is procedural prejudice, and is determined as of the time of trial; a post hoc inquiry into prejudice is not sufficient. If the judge should determine that the party has been prejudiced, the judge has discretion to fashion an appropriate remedy. The remedy of exclusion of the witness, however, should be a remedy of last resort, to be used only when no other remedy has proved adequate. Inexplicably, in none of the cases reviewed did any of the courts address the issue of possible constitutional prohibition of exclusion of a defense witness in light of the sixth amendment to the Constitution of the United States and article I, section 16 of the Constitution of the State of Florida.

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244. *Id.* at 11 (citing Cooper v. State, 336 So. 2d 1133 (Fla. 1976)).

245. 454 So. 2d 675 (Fla. 5th Dist. Ct. App. 1984).

246. *Id.* at 677 (citing Anderson v. State, 314 So. 2d 803 (Fla. 3d Dist. Ct. App. 1975), Williams v. State, 264 So. 2d 106 (Fla. 4th Dist. Ct. App. 1972), Kruglak v. State, 300 So. 2d 15 (Fla. 3d Dist. Ct. App. 1974), Patterson v. State, 419 So. 2d 1120 (Fla. 4th Dist. Ct. App. 1982)).

247. *See* Fedd v. State, 461 So. 2d 1384 (Fla. 5th Dist. Ct. App. 1984), Peterson v. State, 465 So. 2d 1349 (Fla. 5th Dist. Ct. App. 1985), Wilkerson v. State, 461 So. 2d 1 (Fla. 5th Dist. Ct. App. 1985), Floyd v. State, 514 So. 2d 413 (Fla. 1st Dist. Ct. App. 1987).

B. Florida Witness Exclusion Cases — 1988

During the survey year, the issue arose, at least tangentially, as part of the Florida Supreme Court's review of a case in which the death sentence was imposed: *Holsworth v. State*.[248] Holsworth had been convicted of attempted first degree murder, armed burglary, and first degree murder. The jury had recommended life in prison, but the recommendation was overridden by the trial judge and the death penalty imposed. One of the six allegations of error raised on appeal was that the trial judge had improperly excluded the testimony of an expert witness from the guilt phase of the trial.[249] The witness would have testified to a possible defense of voluntary intoxication. The court affirmed the conviction[250] and, addressing the exclusion in a three paragraph segment of the opinion, listed two reasons for upholding the exclusion of the defense witness. First, not only had the defense neglected to inform the state that they were going to present the defense of voluntary intoxication, but they had affirmatively misled the state into believing that they would not call the expert.[251] Second, the expert opinion was based on no more than the "defendant's hearsay statements" to the doctor with no corroborating evidence. Therefore, "[u]nder these circumstances, the trial court did not err in precluding Dr. Varsida's testimony."[252] The opinion did not address the issues relating to exclusion of the witness in any detail. The discovery violation on which the defense witness was excluded is unclear, and there is no reference whatsoever to a *Richardson* inquiry.[253]

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248. 522 So. 2d 348 (Fla. 1988).

249. *Id.* at 348. The other five errors alleged were (1) the trial judge had erred in denying a change of venue, (2) eyewitness identification had been tainted by unreliable out-of-court proceedings, (3) two statements made by the defendant to arresting authorities were improperly admitted, (4) collateral crime evidence was improperly admitted, and (5) the trial judge improperly responded to a question raised by the jury during its deliberations.

250. *Id.* at 355. The court reversed imposition of the sentence of death, however, concluding that the trial judge's override of the jury recommendation of life imprisonment was improper.

251. *Id.* at 352.

252. *Id.*

253. While FLA. R. CRIM. P. 3.216 requires the defendant to give pretrial notice of intent to rely on the affirmative defense of insanity, no similar provision exists with respect to the defense of voluntary intoxication. The sanction of exclusion would have been appropriate if defendant had demanded reports of the prosecution experts or names of witnesses, and had failed to provide reciprocal discovery. *See* FLA. R. CRIM. P.

The exclusion issue was addressed more directly in two district court of appeal cases. In *Baker v. State*, the First District Court of Appeal held that exclusion should not be allowed where it may have "created reasonable doubt in . . . [jurors'] minds."[254] In *Baker* the defendant and victim were involved in a fight in which the victim received two gunshot wounds in the face. Baker was charged "with attempted first-degree murder, possession of a firearm during the commission of a felony, and aggravated battery." At trial, after the state had presented several witnesses, the defendant "informed the court that he intended to call three witnesses and the defendant." The prosecution objected to one witness, whose name had not been included in the defense witness list. The defense replied that the omission had been an error and the prosecution had been told, prior to trial, of the defense's intention to call the witness. The state interviewed the witness during a recess but stated to the court it "was insufficient to eliminate prejudice to the State" and that time was needed to investigate the credibility of the witness.[255] The prosecutor then told the court that the testimony was not "so damaging to the State that it must be kept from the fact finder" but restated the objection to the inclusion of the testimony.[256] As a result, the trial court excluded the testimony.

On appeal the court held that, while broad discretion is to be given to the trial judge, exclusion of the testimony under these circumstances was error. The appellate court first reiterated the importance of the *Richardson* inquiry, noting that the court had inquired "into the circumstances surrounding the failure to disclose the name of a witness . . . to determine whether the discovery violation was willful or inadvertent, trivial or substantial, and whether or to what extent it affected the ability of the aggrieved party to prepare for trial."[257] However, the sole reason for the state's objection to the testimony, a lack of time to investigate the witness, was insufficient basis for exclusion. The court reasoned that this argument could be made for every undisclosed witness, and if it were sufficient for exclusion, no undisclosed witness could

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3.220(b).

254. 522 So. 2d 491, 493 (Fla. 1st Dist. Ct. App. 1988).

255. *Id.* at 492.

256. *Id.* On proffer it was revealed that the witness's testimony was that the victim had visited Baker's apartment twice on the day of the fight. This contradicted the victim's testimony that he had only gone to the apartment once and supported the defendant's claim that the victim was in fact the aggressor.

257. *Id.* (citing Richardson v. State, 246 So. 2d 771 (Fla. 1971)).

be allowed to testify.[258] In addition, the district court noted that the state was aware the defendant planned to attack the victim's credibility and claim self-defense and stressed the importance of the witness's testimony to the defense.[259] As a result of the possibility that the evidence could raise a reasonable doubt in the jurors' minds the court reversed and remanded for a new trial.[260]

In *Baker*, since the defense had proffered the testimony of the witness subject to exclusion, the appellate court was able to evaluate both the testimony and its potential impact on the jury. In *Brazell v. State*,[261] the defendant did not make such a proffer. In a two sentence opinion, the Fourth District Court of Appeal rejected "appellant's claim of error in the trial court's exclusion of a witness called by the appellant whose name had not been furnished by discovery. . ." and certified as a question of great public importance the question of whether a defendant must proffer the testimony of the excluded witness in order to assert such exclusion as an issue on appeal. The question had been certified before, in the 1984 case of *Nava v. State*.[262] In *Nava*, the trial court had excluded the testimony of a defense witness whose name had not been disclosed during discovery. The court did not hold the requisite *Richardson* hearing, nor did the defendant proffer the testimony of the witness. On appeal, the defense raised, as error, the failure of the trial court to hold the *Richardson* hearing prior to sanctioning the defense by excluding the testimony of the non-disclosed witness. The appellate court reasoned that, because of the failure of the defendant to proffer the testimony, the court could not assess the substantive prejudice to the defendant's case from the inability to present that witness. The court could not assess the prejudicial impact of the exclusion sanction against the defense in order to weigh it against the

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258. *Id. See* Wilkerson v. State, 461 So. 2d 1376 (Fla. 1st Dist. Ct. App. 1985) (holding exclusion should not be granted "unless no other remedy suffices" and the impeachment evidence is always unavailable when a witness is allowed to testify who is not included on the witness list).

259. *Baker*, 522 So. 2d at 493.

260. *Id.* The court, in what is apparently gratuitous dictum, seemed to base its reversal in part on a harmless error test based on reasonable doubt. "The exclusion of the evidence cannot be considered harmless since it may have created a reasonable doubt in the minds of the jurors. Accordingly, we must reverse and remand for a new trial."

261. 522 So. 2d 60 (Fla. 4th Dist. Ct. App. 1988).

262. 450 So. 2d 606 (Fla. 4th Dist. Ct. App. 1984).

procedural prejudice suffered by the prosecution.[263] The court therefore affirmed the defendant's conviction, but certified, as a question of great public importance, the issue of whether the defense should be required to proffer the excluded testimony before asserting the failure to conduct a *Richardson* hearing as error.[264] The question was not addressed by the Florida Supreme Court, however, as the appeal was later dismissed.[265] As in prior state cases, the constitutional issues were never addressed.

C. The Federal Position: *Taylor v. Illinois*

The constitutional issues relating to exclusion of a potential defense witness as a sanction for a discovery violation are not unrecognized in federal decisions, although they had not been resolved by the United States Supreme Court until this survey year. The issue first arose in the seminal case of *Williams v. Florida*,[266] the case that first established the validity of requiring the defendant, at least in a situation where an affirmative defense is raised, to disclose proposed defense trial witnesses to the prosecution. The case arose under Florida's notice of alibi rule.[267] The sanction provided by the rule for non-disclosure of alibi witnesses is exclusion of those witnesses, although the remedy may be waived "for good cause shown."[268] While the case turned on issues other than the potential sanction for the discovery violation, the Court, in a footnote to the opinion, emphasized that the decision did not validate that sanction, recognizing that exclusion of witnesses raised "Sixth Amendment issues which we have no occasion to explore."[269] The issue

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263. *Id.* at 609.
264. *Id.* at 609. The question certified was:
> Is a defendant required to make a proffer of the testimony of a witness whose testimony is excluded by the trial court by reason of the defendant's failure to disclose the existence of the witness pursuant to the reciprocal rules of discovery prior to trial, before such exclusion may be asserted as reversible error on appeal?

265. Nava v. State, 508 So. 2d 14 (Fla. 1987).
266. *See* Williams v. Florida, 399 U.S. 78 (1970).
267. Then FLA. R. CRIM. P. 1.200, *cited* in *Williams*, 399 U.S. at 79.
268. FLA. R. CRIM. P. 1.200.
269. *Williams*, 399 U.S. at 83 n.14 reads:
> We emphasize that this case does not involve the question of the validity of the threatened sanction, had petitioner chosen not to comply with the notice-of-alibi rule. Whether and to what extent a State can enforce discovery rules against a defendant who fails to comply, by excluding rele-

was presented once again in *Wardius v. Oregon*,[270] a case in which the trial judge actually excluded the testimony, not only of the defense witnesses, but of the defendant himself. The case was resolved on other grounds, however, and the validity of exclusion of witnesses as a sanction was never reached.[271]

This year, the United States Supreme Court decided a case directly on point, a case which may have significant impact on Florida's discovery sanctions, *Taylor v. Illinois*.[272] In *Taylor* the defendant was tried on a charge of attempted murder arising from a street fight. In response to the prosecution's motion for discovery of defense witnesses, the defense initially provided the names of four individuals.[273] The defense was allowed to amend their discovery response the first day of trial by adding two names, and on the second day of trial, moved to add still two more witnesses to their discovery response. The court ordered defense counsel to produce the witnesses the following day when it would be decided if they would be allowed to testify.[274]

One of the witnesses, Wormley, appeared in court the next day, and the defense made an offer of proof. After hearing the offer of proof, the trial court found that the defense counsel had committed " 'a blatant violation of the discovery rules, [a] willful violation.' "[275] In addition the court questioned the truthfulness of the testimony as to what the witness claimed to have observed. The trial court then excluded Wormley's testimony as a sanction for the discovery violation. This decision was affirmed by the Illinois appellate court which found "[t]he decision of the severity of the sanction to impose on a party who violates discovery rules rests within the sound discretion of the trial

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vant, probative evidence, is a question raising Sixth Amendment issues which we have no occasion to explore. *Cf.* Brief for Amicus Curiae 17-26. It is enough that no such penalty was exacted here.

270. 412 U.S. 470 (1973).

271. *Id.* The Oregon scheme provided that the defendant disclose defense alibi witnesses to the prosecution. There was, however, no reciprocal duty on the part of the prosecutor to disclose rebuttal witnesses to the defense. The Oregon rule was held unconstitutional because of the lack of reciprocity and the case reversed on that ground, never reaching the sanctions issue.

272. 108 S. Ct. 646 (1988).

273. *Id.* at 649. Two of the witnesses testified at trial, while the other two were not called.

274. *Id.* at 650. The court was also "concerned about the possibility that witnesses are being found that really weren't there."

275. *Id.* In addition the court noted that defense attorneys in several other trials had committed discovery violations.

court."[276]

On certiorari the United States Supreme Court rejected absolutist positions asserted by both the prosecution and the defense, adopting a middle ground in favor of balancing the needs of the system against the right of a defendant to present witnesses in the defendant's behalf. Rejecting the prosecution's position that the confrontation clause of the United States Constitution grants no more than the right to have a subpoena issued and does not encompass the right to have the witness heard at trial, the Court noted that a defendant's right to present witnesses for the defense is fundamental.[277] The Court based its reasoning on the need to preserve the integrity of the adversary process and held that the sixth amendment must include the right to offer testimony as well as compel the attendance of the witness. Therefore, the sixth amendment right may be offended by the imposition of the sanction of exclusion of witnesses.[278] The Court rejected the defense contention that the right to present witnesses, as guaranteed by the sixth amendment, is absolute and, as such, is always abridged by the sanction of witness exclusion.[279] "The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."[280] The right to compulsory process differs from other sixth amendment rights in that it does not arise automatically, but requires affirmative action by the defendant. Therefore, its use must "be preceded by deliberate planning and affirmative conduct" to protect the state from "an eleventh hour defense" and prevent "a judgment predicated on incomplete, misleading, or even deliberately fabricated testimony."[281]

The Court then set out the criteria for balancing the competing interests:

> It is elementary, of course, that a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor. But the mere invocation of that right cannot automatically and invariably outweigh countervailing public interests. The integrity of the adversarial process, which depends both on the presentation of reliable evidence and the rejec-

276. Taylor v. Illinois, 141 Ill. App. 3d 839, 491 N.E.2d 3 (Ill. App. Ct. 1986).
277. *Taylor*, 108 S. Ct. at 652.
278. *Id.* at 652-53.
279. *Id.* at 653.
280. *Id.*
281. *Id.* at 653-54.

tion of unreliable evidence; the interest in the fair and potential prejudice to the truth-determining function of the trial process must also weigh in the balance."[282]

After holding that exclusion of a defense witness may be a constitutionally valid sanction, the court gave little further guidance as to the test to be used to determine the validity of the sanction in a given case. In response to the defendant's argument that the prosecution was adequately protected from prejudice by the availability of other sanctions, the Court pointed out that the test is not one of prejudice but one of integrity to the judicial process: "More is at stake than possible prejudice to the prosecution. We are also concerned with the impact of this kind of conduct on the integrity of the judicial process itself."[283] The Court continued its opinion by pointing out that the conduct of the attorney was "willful and blatant," that the "inference that he was deliberately seeking a tactical advantage is inescapable."[284] In short, it appears clear that prejudice to the prosecution is not required where the conduct of the defense attorney is designed to obtain unfair advantage under the rules. Further, the Court emphasized that the testimony to be offered was probably perjurious, and the trial judge has an interest in preventing that kind of testimony in order to preserve the integrity of the process from the "pollution of perjured testimony."[285]

The potential effect of the *Taylor* decision on Florida's sanctions procedure could be significant. To date, the thrust of the Florida cases has been to require the extensive *Richardson* hearing in order to ascertain procedural prejudice to the aggrieved party. Absent procedural prejudice, the sanction of exclusion is not appropriate. Under *Taylor*, however, prejudice is not the primary criterion. In the *Taylor* case itself, it was not relevant. Florida cases have not addressed other potential bases for imposition of the sanction, bases such as the maintaining the integrity of the process or the bad faith of the attorney in failing to disclose witnesses. The following issues, at least, need resolution:

1. Should the basis for imposition of the sanction of exclusion remain procedural prejudice to the non-offending party, or can the trial judge look to effect on the process independent of procedural prejudice? Under *Taylor*, one would assume that Florida could validly

282. *Id.* at 655.
283. *Id.* at 656.
284. *Id.*
285. *Id.* at 656-57.

Dedication

Craig Stewart Barnard, 39 years of age, died in West Palm Beach, Florida, on Monday, February 27, 1989. Craig was the son of Ronald and Trudy Barnard, the brother of Ron, and the beloved friend and companion of countless members of the Florida Bar and the legal profession.

Craig Barnard was a criminal lawyers' criminal lawyer. He graduated with the Class of 1975 from the University of Florida College of Law and went immediately into work as an Assistant Public Defender for the Fifteenth Judicial Circuit (Palm Beach County), State of Florida. He grew rapidly into positions of responsibility and authority, becoming the Chief Assistant Public Defender of that Circuit in 1978, which position he held until his untimely death. Throughout his legal career, Craig was characterized by and revered for his unflagging accessibility to lawyers and others seeking legal consultation and support. Because of his extraordinary grasp of criminal and constitutional law, and his keen insight into the evolution of legal principles, public defenders throughout the State of Florida knew him as the one to call for assistance or reflection on their cases.

Craig Barnard was a man of great proportion — in his principles, his commitments, his passions, and his concerns. For fifteen years, he devoted himself to the representation of persons sentenced to death in the State of Florida. Because of the expertise with which he represented his own clients, other lawyers throughout this country representing clients on death row came to know Craig as the one to call for consultation, analysis, and support. Craig never failed in his response, dedicating nights, weekends, holidays, and vacations to the task of meeting these needs. He analyzed every case, wrote manuals and law review articles, edited and critiqued briefs, and encouraged all. Throughout it all, he was a friend. Craig did much more than help us make our work right; he let us know we were alright. Without Craig's extraordinary assistance and encouragement, the *pro bono* efforts of countless attorneys would have been inadequate or impossible.

Craig Barnard was a modest man. He spoke little in public, wanted nothing for himself, and rested comfortably in the background of monumental efforts and events. In times of rejoicing and triumph, he claimed no credit. In times of failure, he assumed blame and suffered remorse greatly disproportionate to his role. Efforts to nominate him

for *pro bono* recognition, for which he was preeminently qualified, always met with his disapproval, and in respect of his feelings, such efforts were always dropped. Were he to know of our remarks here, he would be abashed.

We honor Craig Barnard because he honored us with his presence in our lives, his contributions to our profession, and his inspiration of our work. May he rest in peace, and may his memory sustain us in our days to come.

-Friends of Craig Barnard—