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Criminal Law

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Criminal Law: 1991 Survey of Florida Law

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I. INTRODUCTION

This article is a survey of substantive criminal law cases decided between December 1, 1990, and December 1, 1991, excluding opinions relating to the death penalty. Although the survey focuses on the decisions of the Florida Supreme Court, selected cases from Florida's district courts of appeal have been included, as well.

A large percentage of the Florida Supreme Court's criminal law decisions continue to concern sentencing. Although Florida's sentencing guidelines have been employed since October 1, 1983, it is apparent that numerous sentencing issues remain unresolved. However, during the survey period, the Florida Supreme Court made substantial progress towards clarifying some of these issues. In other instances, though, the solutions offered by the Court only raise new questions.

II. SENTENCING

A. *Legislative Enactments*

Effective May 30, 1991, the Legislature adopted the revisions recommended by the Florida Supreme Court[1] in *Florida Rules of Criminal Procedure re: Sentencing Guidelines (Rules 3.701 and 3.988)*,[2] concerning the issues of legal status[3] and victim injury points.[4] Although the Florida Supreme Court determined that the revisions were substantive[5] in nature and required legislative approval, the supreme court

1. 1991 Fla. Sess. Law Serv. 270 (West), *amending* FLA. R. CRIM. P. 3.701(d)(6), 3.701(d)(7).
2. 576 So. 2d 1307 (Fla. 1991).
3. FLA. R. CRIM. P. 3.701(d)(6).
4. FLA. R. CRIM. P. 3.701(d)(7).
5. *Florida Rules*, 576 So. 2d at 1308-09 (quoting FLA. STAT. § 921.001(1)

characterized the changes as clarifications of original legislative intent.[6]

1. Legal Constraint

The use of a so-called "multiplier" for purposes of assessing legal status points frequently resulted in potentially draconian sanctions for persons accused of committing multiple offenses while subject to a legal constraint.[7] By amending Rule 3.701(d)(6), of the Florida Rules of Criminal Procedure, the legislature directed that "points are to be assessed only once whether there are one or more [primary or additional] offenses at conviction."[8]

The Florida Supreme Court followed its opinion in *Florida Rules* with its decision in *Flowers v. State*.[9] In *Flowers*, the supreme court was required to decide whether the legal constraint "multiplier" should be applied to offenses occurring before May 30, 1991, the effective date of the substantive amendments to Rule 3.701(d)(6). The supreme court first determined that "Florida Rules of Criminal Procedure 3.701(d)(6) and 3.988 do not address the use of a multiplier when calculating legal constraint points."[10] However, by applying the principle of lenity found in section 775.021(1) of the Florida Statutes,[11] the supreme court concluded that the use of a "multiplier" is inappropriate.

2. Victim Injury

The recent legislative amendments recommended by the supreme court in *Florida Rules* also clarified the assessment of victim injury points, pursuant to Rule 3.701(d)(7) of the Florida Rules of Criminal

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(1989)).

6. *Id.* at 1309.

7. *See* Scott v. State, 574 So. 2d 247 (Fla. 2d Dist. Ct. App. 1991) (rejecting the trial court's assessment of legal constraint points for each of 24 offenses committed while on probation, thereby resulting in a recommended sentence of life imprisonment).

8. FLA. R. CRIM. P. 3.701(d)(6), *as amended*, 1991 Fla. Sess. Law Serv. 270 (West), pursuant to Florida Rules of Criminal Procedure re: Sentencing Guidelines (Rules 3.701 and 3.988), 576 So. 2d 1307, 1309-10 (Fla. 1991).

9. 586 So. 2d 1058 (Fla. 1991).

10. *Id.* at 1059.

11. FLA. STAT. § 775.021(1) (Supp. 1988) provides: "The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." *See* Lambert v. State, 545 So. 2d 838 (Fla. 1989) (applying the principle of lenity found in Florida Statutes section 775.021(1) to the sentencing guidelines).

Procedure. That amendment provides that for offenses occurring after May 30, 1991, victim injury points are properly assessed not only for each victim physically injured during a criminal offense, but for each count resulting in injury, regardless of the number of counts or victims.[12]

Based upon the fact that the supreme court in *Flowers* concluded that the principle of lenity in section 775.021(1) applies to the sentencing guidelines, it seems appropriate that victim injury points should be scored differently depending upon whether an offense occurs before May 30, 1991, the effective date of Chapter 91-270.[13] On the other hand, this result is made less clear by the Florida Supreme Court's observation in *Florida Rules* that the Florida Sentencing Guidelines Commission "never intended"[14] for victim injury to be scored only once, in instances of multiple offenses against the same victim.[15]

B. *Scoresheet Errors*

In *Goene v. State*,[16] the Florida Supreme Court determined that principles of double jeopardy are not violated when a defendant is resentenced to an increased term where the defendant affirmatively misrepresented his identity during sentencing. The defendant in *Goene* received a guideline sentence of four and one-half years imprisonment for the offenses of armed robbery, false imprisonment, and carrying a con-

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12. FLA. R. CRIM. P. 3.701(d)(7), *as amended*, 1991 Fla. Sess. Law Serv. 270 (West) (amendment pursuant to Florida Rules of Criminal Procedure re: Sentencing Guidelines (Rules 3.701 & 3.988), 576 So. 2d 1307, 1310 (Fla. 1991) [hereinafter *Florida Rules*].

13. For offenses occurring prior to May 30, 1991, recent cases have consistently concluded that it is error to score victim injury twice for the same victim, regardless of the number of offenses committed against that victim. Weekly v. State, 553 So. 2d 239 (Fla. 3d Dist. Ct. App. 1989); Williams v. State, 565 So. 2d 838 (Fla. 1st Dist. Ct. App. 1990); Stermer v. State, 567 So. 2d 13 (Fla. 2d Dist. Ct. App. 1990); Gordon v. State, 575 So. 2d 736 (Fla. 4th Dist. Ct. App. 1991).

14. *Florida Rules*, 576 So. 2d at 1308.

15. In an asterisk near the conclusion of their opinion, the supreme court added:

> Of course, if the Legislature approves the amendments, they then must be accorded the same legal status as any other express clarification of original legislative intent. Our opinion today is not meant to deny that the proposals in Appendix B are in fact a clarification, only to say that they will become a clarification only if and when the Legislature approves them.

Id. at 1309.

16. 577 So. 2d 1306 (Fla. 1991).

cealed weapon. At his sentencing hearing, the defendant represented to the trial court that Edwin Goene was his real name.

After Goene had commenced the service of his sentence, the state received information that the defendant had an extensive criminal history under his true name, Russell Dean Gorham, and properly scored twelve to seventeen years imprisonment under the sentencing guidelines. Accordingly, the trial court resentenced the defendant to a term of seventeen years imprisonment.

The Florida Supreme Court rejected Goene's contention that his resentencing violated the prohibition against double jeopardy. Instead, the supreme court concluded that the defendant's affirmative misrepresentation of his identity constituted a fraud upon the trial court, and that "orders, judgments or decrees which are the product of fraud, deceit, or collusion 'may be vacated, modified, opened or otherwise acted upon *at any time*.' "[17]

In *Manuel v. State*,[18] the Second District Court of Appeal read the Florida Supreme Court's decision in *Goene* narrowly. The defendant in *Manuel* appeared before the trial court for a violation of community control. After the imposition of the defendant's original community control sentence, the state discovered several additional prior convictions obtained by the defendant under aliases. Utilizing a corrected scoresheet prepared by the state, the trial court sentenced the defendant to five years' incarceration for the community control violation.

On appeal, the court reversed the defendant's sentence, and remanded for resentencing in accordance with the defendant's original scoresheet. Citing the Florida Supreme Court's decision in *Goene*, the *Manuel* court concluded that the defendant was entitled to sentencing under the original, and incorrect, scoresheet, in the absence of evidence that the defendant "took any affirmative action to mislead the trial court as to his prior record."[19]

C. *Consolidated Sentencing Hearings*

Rule 3.701(d)(1), of Florida Rules of Criminal Procedure, requires that "[o]ne guideline scoresheet shall be utilized for each de-

17. *Id.* at 1309 (emphasis in original) (quoting State v. Burton, 314 So. 2d 136, 138 (Fla. 1975).

18. 582 So. 2d 823 (Fla. 2d Dist. Ct. App. 1991).

19. *Id.* at 824.

fendant covering all offenses pending before the court for sentencing."[20] No definition of the term "pending" is provided by the Rule 3.701. On the other hand, Rule 3.720 requires the court to order a sentencing hearing "[a]s soon as practicable after the determination of guilt and after the examination of any presentence reports."[21]

In *Clark v. State*,[22] the defendant was found guilty of sale and possession of cocaine on November 19, 1986, after a trial by jury. On November 21, 1986, the defendant was brought to trial in a separate case before a different judge in the same circuit. During the jury's deliberations in the second trial, the judge in the first case sentenced the defendant to a guideline sentence of four years' incarceration, without objection by the defendant.

After the jury in the defendant's second trial also returned verdicts of guilty, the defendant was again sentenced to four years' incarceration. However, the trial court directed that the defendant serve the second four-year sentence consecutively to the sentence imposed two days earlier. Again, the defendant failed to object.

In *Clark*, the Florida Supreme Court concluded that unless a defendant can show that a postponement of sentencing would not result in "unreasonable delay,"[23] an offense should generally be considered pending for purposes of Rule 3.701(d)(1) only if "a verdict of guilt or plea of guilty or nolo contendere has been obtained."[24] The supreme court specifically placed the burden on the defendant to request a "consolidated sentencing"[25] hearing, and cautioned that the defendant's failure to raise a timely objection would constitute "a procedural bar for appellate review."[26]

As guidelines, the supreme court suggested that unreasonable delay would result in instances where sentencing "might be postponed for an extended period of time—for example, for many months,"[27] as juxtaposed by situations where a defendant's second case is "likely" to be pending for sentencing "within the same day or week."[28]

Applying this approach, the supreme court in *Clark* concluded

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20. FLA. R. CRIM. P. 3.701(d)(1).
21. FLA. R. CRIM. P. 3.720.
22. 572 So. 2d 1387 (Fla. 1991).
23. *Id.* at 1391.
24. *Id.* at 1390-91.
25. *Id.* at 1391.
26. *Id.*
27. *Clark*, 572 So. 2d at 1391.
28. *Id.*

that the defendant was entitled to a consolidated sentencing hearing. However, the supreme court determined that the defendant was procedurally barred from raising the issue on appeal.[29] Although the supreme court had little difficulty reaching this result, their opinion was less equivocal concerning other matters. For example, the supreme court failed to suggest what result is appropriate when a defendant's second case is not "likely" to be completed within "the same day or week," but "might" be concluded in less than "many months."[30]

D. *Departure Sentences*

During the survey period, the Florida Supreme Court issued several decisions concerning the propriety of various departure sentences. In a related issue, the supreme court modified its holding in *Ree v. State*,[31] by slightly relaxing the requirement that written reasons be filed contemporaneous with a guidelines departure sentence.[32]

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29. The supreme court stated:

> The burden falls on the defendant to assert a desire for simultaneous sentencing and to demonstrate to the sentencing court's satisfaction that such a sentencing will not result in an unreasonable delay. This, Clark failed to do. Accordingly, the issue now is procedurally barred.

Id.

30. Aside from the supreme court's unfortunate reliance on terms such as "likely" or "might," other problems are apparent, as well. For example, does a defendant's demand for speedy trial in a second prosecution constitute sufficient grounds to postpone sentencing in the defendant's first case. If so, are constitutional concerns adequately safeguarded by presenting a defendant with the "Hobson's choice" of either foregoing adequate discovery in a second prosecution, or waiving the right to a consolidated sentencing hearing, and concurrent sentences, in each of the defendant's "pending" cases. *See* State v. Frank, 573 So. 2d 1070 (Fla. 4th Dist. Ct. App. 1991) (a defendant cannot be forced to choose between the independently guaranteed right to discovery and the right to a speedy trial); Harris v. Moe, 538 So. 2d 145 (Fla. 4th Dist. Ct. App. 1989) (same); State *ex rel.* Wright v. Yawn, 320 So. 2d 880 (Fla. 1st Dist. Ct. App. 1975) (same).

On the other hand, what result is appropriate where an "unreasonable delay" in a defendant's second prosecution is attributable to supplemental discovery provided by the state, or by the filing of additional charges, or delay caused by the unavailability of a state witness, or defense witness?

31. 565 So. 2d 1329 (Fla. 1990).

32. *See* Pamela Cole Bell, *Substantive Criminal Law*, 15 NOVA L. REV. 1037, 1039 (1991).

1. Contemporaneous Writing Requirement

In *State v. Lyles*,[33] the supreme court determined that the contemporaneous writing requirement of *Ree* was satisfied where, at sentencing, the court made oral findings in support of its departure sentence, which were "reduced to writing without substantive change on the same date."[34] It cautioned, however, that even "a few days"[35] delay in entering written reasons would not be considered contemporaneous.[36]

2. Nonscoreable Juvenile Convictions

Juvenile convictions may be scored as prior record only if the disposition date of the juvenile offense occurred within three years from the date of a defendant's primary offense at conviction.[37] However, in instances where juvenile convictions are too remote in time to be included as prior record, they may be considered as a basis for departure from the sentencing guidelines.[38]

In *Puffinberger v. State*,[39] the Florida Supreme Court clarified when, and to what extent, a defendant's nonscoreable juvenile convictions may be used as a basis for departure from the sentencing guidelines. Initially, the supreme court in *Puffinberger* concluded that "minimal or insignificant juvenile dispositions"[40] are insufficient grounds to serve as a basis for departure from the guidelines. On the other hand, the *Puffinberger* court reasoned that a "significant"[41] juvenile record would support a departure sentence.

In determining what is "significant," the supreme court directed

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33. 576 So. 2d 706 (Fla. 1991).

34. *Id.* at 708.

35. *Id.* at 709.

36. The supreme court also concluded that the "ministerial act" of filing the written departure order with the clerk of the court on the first business day after the defendant's sentencing hearing resulted in no prejudice and complied with *Ree*. *Id.* The Fifth District Court of Appeal subsequently extended this aspect of the Florida Supreme Court's decision in *Lyles* to a case where the written reasons for departure were not filed with the clerk of the court until three business days after sentencing. Rodwell v. State, 588 So. 2d 19 (Fla. 5th Dist. Ct. App. 1991).

37. FLA. R. CRIM. P. 3.701(d)(5)(c).

38. *See* Weems v. State, 469 So. 2d 128 (Fla. 1985).

39. 581 So. 2d 897 (Fla. 1991).

40. *Id.* at 899; *see* Crocker v. State, 581 So. 2d 580 (Fla. 1991).

41. *Id.*

that not only the "number," but the "nature and seriousness"[42] of the juvenile offenses must be examined.[43] However, the *Puffinberger* court concluded that any departure is "per se invalid" to the extent that it exceeds the maximum sentence a defendant could have received had the juvenile dispositions been scored as prior record.[44]

3. Escalating Patterns of Criminal Activity

Shortly after the establishment of the sentencing guidelines, the Florida Supreme Court determined in *Keys v. State*[45] that an "escalation from crimes against property to violent crimes against persons" constitutes a sufficient basis for departure from the sentencing guidelines.[46] In *Williams v. State*,[47] the Florida Supreme Court determined

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42. *Id.*

43. The supreme court offered some guidance in defining the term "significant," stating: "[A]n unscored juvenile record is significant for departure purposes if the record is extensive or serious, or if the number and nature of the dispositions, when considered in combination, amount to a significant record under the circumstances." *Id.* at 899.

The supreme court also determined that Puffinberger's three nonscoreable burglary convictions were not "significant," and therefore, could not be used by the trial court as a basis for enhancing Puffinberger's presumptive guidelines sentence for the offense of aggravated child abuse.

In concluding that Puffinberger's juvenile record was not "significant," the supreme court examined seemingly every facet of Puffinberger's juvenile record, noting that Puffinberger: 1) burglarized his parents home on each occasion; 2) all three burglaries occurred within a ten-day period; 3) Puffinberger was again living at home when he plead guilty to each of the three burglaries; 4) the victim, Puffinberger's father, cosigned the defendant's plea forms; 5) Puffinberger was required to make restitution for unrecovered items as a condition of his sentence. *Id.* at 900.

44. *Id.* at 899. *But see* FLA. STAT. § 921.001(5) (Supp. 1990) which provides in pertinent part: "The extent of departure from a guideline sentence shall not be subject to appellate review."

45. 500 So. 2d 134 (Fla. 1986).

46. *Id.* at 136. The holding in *Keys* was codified by the legislature in FLA. STAT. § 921.001(8) (1987):

> A trial court may impose a sentence outside the guidelines when credible facts proven by a preponderance of the evidence demonstrate that the defendant's prior record, including offenses for which adjudication was withheld, and the current criminal offense for which the defendant is being sentenced indicate an escalating pattern of criminal conduct. The escalating pattern of criminal conduct may be evidenced by a progression from nonviolent crimes to violent crimes or a progression of increasingly violent crimes.

that a pattern of "increasingly serious" *nonviolent* criminal activity may also constitute a valid basis for departure from the sentencing guidelines.[48]

4. Continuing and Persistent Patterns of Criminal Conduct

The Florida Supreme Court has consistently concluded that the "timing"[49] or "temporal proximity"[50] of a defendant's prior offenses may, under certain circumstances, constitute a valid basis for departure from the sentencing guidelines, where the offenses demonstrate a "continuing and persistent pattern of criminal activity."[51] Unfortunately, the circumstances required to sustain such a departure have continued to avoid easy definition.

In the 1988 decision of *Jones v. State*,[52] the supreme court determined that before the temporal proximity of a defendant's offenses could serve as a valid basis for departure from the sentencing guidelines:

> it must be shown that the crimes committed demonstrate a defendant's involvement in a continuing and persistent pattern of criminal activity as evidenced by the timing of each offense in relation to prior offenses and the release from incarceration or other supervision.[53]

In reaching this conclusion, the supreme court referred to its earlier decision in *Williams v. State* (*Williams I*),[54] and emphasized that the

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47. 581 So. 2d 144 (Fla. 1991).

48. *Id.* at 146. In *Williams*, the defendant's prior record consisted of fifteen misdemeanor convictions, followed by a conviction for the offense of grand theft, a third degree felony. The defendant was then placed on probation by the trial court for the offense of possession of cocaine with intent to sell, a second degree felony.

When Williams violated his probationary sentence, the trial court departed from the sentencing guidelines, relying upon the defendant's escalating pattern of criminal conduct. *See infra* notes 68-85 and accompanying text. The Florida Supreme Court approved the trial court's departure sentence based upon Williams' pattern of increasingly serious nonviolent criminal activity. *Williams*, 581 So. 2d at 146.

49. State v. Simpson, 554 So. 2d 506, 510 (Fla. 1989).

50. State v. Jones, 530 So. 2d 53, 56 (Fla. 1988).

51. *Id.*

52. 530 So. 2d 53 (Fla. 1988).

53. *Id.* at 56.

54. 504 So. 2d 392 (Fla. 1987).

defendant's conduct must demonstrate a "definite pattern."[55] The supreme court's opinion failed, however, to suggest that any escalation in the severity of the defendant's offenses was necessary to support a departure sentence.

Subsequent to *Jones*, the supreme court concluded in *State v. Simpson*[56] that the "timing"[57] of a defendant's offenses may serve as grounds for departure from the sentencing guidelines "if based on facts that demonstrate the type of escalating or persistent pattern described with approval in *Keys*, *Williams I*, *Rousseau* and *Jones*."[58]

During the survey period, the Florida Supreme Court again revisited this issue in *State v. Smith*,[59] and in their opinion, cited to their earlier decision in *State v. Simpson*, and quoted from *Jones v. State*. Discussing *Simpson*, the supreme court stated that "we suggested that the temporal proximity of crimes could, under some circumstances, be grounds for departure."[60] Without articulating precisely what "circumstances" are necessary to support such a departure sentence, the *Smith* court determined that the defendant's commission of the offenses of grand theft, petit theft, and resisting arrest without violence—only thirty days after release from incarceration—was not a sufficient basis to support a departure from the sentencing guidelines. The *Smith* court specifically noted that all of defendant's crimes were "nonviolent property crimes with no substantial escalation in severity."[61] Although their decision quoted the "temporal proximity" language of *Simpson* and *Jones*, the supreme court nevertheless concluded that "one successive criminal episode of no greater significance than the first, even though committed only thirty days after release from incarceration, is not a sufficient reason to depart from the guidelines."[62]

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55. *Jones*, 530 So. 2d at 56.

56. 554 So. 2d 506 (Fla. 1989).

57. *Id.* at 510.

58. *Id.* (citations omitted in original). The citations to *Jones*, *Williams I*, *Rousseau*, and *Keys* are as follows: State v. Jones, 530 So. 2d 53 (Fla. 1988); Williams v. State, 504 So. 2d 392 (Fla. 1987); State v. Rousseau, 509 So. 2d 281 (Fla. 1987); Keys v. State, 500 So. 134 (Fla. 1986).

It is unclear why the supreme court in *Simpson* mixed the terms "escalating" and "persistent." Each term had historically referred to a separate and distinct basis for departure.

59. 579 So. 2d 75 (Fla. 1991).

60. *Id.* at 76.

61. *Id.*

62. *Id.* at 77.

In the final analysis, then, it is unclear based upon the supreme court's decisions in *Jones*, *Simpson*, and now *Smith*, exactly what factors are necessary, and should be considered, when examining whether the timing of an individual's offenses support a departure sentence. The supreme court's decision in *Jones* suggests that where a definite pattern exists, a defendant's continuing and persistent criminal activity need not necessarily escalate in severity to give rise to a departure sentence. On the other hand, *Smith* suggests that an escalation in severity, combined with the temporal proximity of the defendant's offenses, may give rise to a departure, regardless of whether the defendant has exhibited a persistent pattern of criminal conduct.[63]

5. Professional Manner

In *Hernandez v. State*,[64] the Florida Supreme Court determined that a departure sentence may never be based upon the "professional" manner of a criminal act. The *Hernandez* court found the term "professionalism" incapable of easy definition, and simply "too vague" a basis upon which to substantiate a departure sentence.[65] Alternatively, the supreme court reasoned that to the extent "professionalism" relates to a defendant's background or experience, this factor is already weighed into the sentencing guidelines, based upon a defendant's prior record.[66]

6. Probation and Community Control Sentences

In recent years, the Florida Supreme Court has consistently con-

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63. *Simpson* appears to suggest that either possibility is correct. *See supra* notes 57-59 and accompanying text.

Because of the lack of clarity in the *Jones-Simpson-Smith* line of cases, the Florida Supreme Court's decision in *Smith* will undoubtedly cause confusion for the district courts of appeal. *See* Wilson v. State, 573 So. 2d 915 (Fla. 2d Dist. Ct. App. 1991) (concluding that a departure sentence may be based upon the temporal proximity of a defendant's offenses, without any showing of an escalation in the seriousness of the offenses, "notwithstanding language in *Smith* which might arguably be taken otherwise").

64. 575 So. 2d 640 (Fla. 1991).

65. *Id.* at 642.

66. *Id.* Citing its earlier decision in Hendrix v. State, 475 So. 2d 1218 (Fla. 1985), the supreme court concluded that "Florida law now is settled that a departure may not be based on any matter already factored into the guidelines' computations." *Id.* at 641.

cluded that it is improper to impose a departure sentence following a violation of probation.[67] However, in *Williams v. State*,[68] the supreme court concluded that a departure sentence may be imposed following a violation of probation if the legal basis for the departure existed at the time the offender was originally placed on probation.[69]

The supreme court reasoned that their earlier decisions in *Lambert v. State*,[70] and *Ree v. State*,[71] prohibited only those departure sentences which relied upon conduct occurring during the defendant's probationary sentence, as opposed to reasons for departure which existed at the time the defendant was originally sentenced.[72] As a matter of policy, the supreme court expressed concern that efforts to curtail the discretionary authority of the courts following a probation violation might discourage courts from imposing probationary sentences.[73]

Following the *Williams* opinion, the supreme court rejected a post-probation violation departure sentence in *State v. Johnson*.[74] The defendant in *Johnson* received a split sentence,[75] and subsequently violated the probationary portion of that sentence. Upon revoking the defendant's probation, the trial court imposed a departure sentence. As a basis for the departure, the trial court relied upon conduct which occurred during the defendant's probationary sentence—the same practice prohibited in *Williams*.

Without citing *Williams*, the supreme court instead discussed and rejected the theory that departure sentences could be based upon "non-

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67. Ree v. State, 565 So. 2d 1329 (Fla. 1990); Lambert v. State, 545 So. 2d 838 (Fla. 1989).

68. 581 So. 2d 144 (Fla. 1991); *see supra* notes 47-48 and accompanying text.

69. *Id.* at 146. Although the supreme court's decision failed to specifically address the issue, it logically follows that the holding in *Williams* pertains to offenders placed on community control.

70. 545 So. 2d 838 (Fla. 1989).

71. 565 So. 2d 1329 (Fla. 1990).

72. *Williams*, 581 So. 2d at 145-46.

73. *Id.* at 146. The supreme court found additional support for their holding in FLA. STAT. § 948.06(1) (1987) which provides in part:

> If probation or community control is revoked, the court shall adjudge the probationer or offender guilty of the offense charged and proven or admitted, unless he has previously been adjudged guilty, and impose any sentence which it might have originally imposed before placing the probationer on probation or the offender into community control.

74. 585 So. 2d 272 (Fla. 1991).

75. *See generally* Poore v. State, 531 So. 2d 161 (Fla. 1988) (describing the various types of split sentences recognized in Florida).

criminal" violations occurring during a defendant's probationary sentence.[76] It reasoned that "[t]his construction would require us to overrule both *Franklin* and *Poore*,"[77] and added that "[i]t would be incongruous to permit guideline departures for noncriminal probation violations but prohibit departures for new criminal conduct."[78]

Curiously, the supreme court's opinion in *Johnson* failed to make any reference whatsoever to its decision in *Williams*.[79] Equally odd was its failure in *Johnson* to cite *Ree v. State*,[80] the other cased relied upon in *Williams*.

One explanation is an implicit recognition by the supreme court in *Johnson* that the rationale in *Williams* is inapplicable to cases involving split sentences. *Williams* stands for the proposition that a departure sentence may be imposed following a violation of probation if the legal basis for the departure existed at the time the offender was originally placed on probation. *Johnson*, on the other hand, implies that a trial court may never depart from the sentencing guidelines when a defendant violates the probationary portion of a split sentence, regardless of whether valid reasons existed for a departure sentence at the time the offender was originally placed on probation.[81]

This reading of *Johnson* is directly supported by the supreme court's earlier decision in *Franklin v. State*,[82] which discussed sentencing options following violations of a true split sentence and a probationary split sentence. In both instances, the *Franklin* court concluded on the authority of *Lambert v. State*[83] and Rule 3.701(d)(14) of the Florida Rules of Criminal Procedure,[84] that departure sentence were

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76. *Johnson*, 585 So. 2d at 273.

77. *Id.* (citing Franklin v. State, 545 So. 2d 851 (Fla. 1989); Poore v. State, 531 So. 2d 161 (Fla. 1988)).

78. *Id.*

79. *Williams* was decided on May 30, 1991 and *Johnson* on August 22, 1991.

80. 565 So. 2d 1329 (Fla. 1990).

81. If this reading of *Johnson* is correct, split sentences remain a safe harbor for defendants seeking to avoid the types of post-probation violation departure sentences approved in *Williams*.

82. 545 So. 2d 851 (Fla. 1989).

83. *Id.* at 838.

84. FLA. R. CRIM. P. 3.701(d)(14) provides:

> Sentences imposed after revocation of probation or community control must be in accordance with the guidelines. The sentence imposed after revocation of probation or community control may be included within the original cell (guidelines range) or may be increased to the next higher cell (guidelines range) without requiring a reason for departure.

prohibited.[85]

E. *Modifications of Probation or Community Control*

In *Clark v. State*,[86] the Florida Supreme Court determined that before a probation or community control sentence may be enhanced, "either by extension of the period or by addition of terms,"[87] an offender must be 1) formally charged; 2) brought before the court; and 3) advised of the charge, in accordance with the procedures in section 948.06 of the Florida Statutes.[88] The supreme court concluded that "*[a]bsent proof of a violation*,"[89] a court may not enhance an offenders probationary or community control sentence, even where the defendant and the probation or community control officer agree to the modification in writing, and waive notice and hearing.[90]

But see Williams v. State, 581 So. 2d 144 (Fla. 1991).

85. Concerning true split sentences, the supreme court in *Franklin* stated:

> Upon the violation of probation after incarceration, the judge may resentence the defendant to any period of time not exceeding the remaining balance of the withheld or suspended portion of the original sentence, provided that the total period of incarceration, including time already served, may not exceed the one-cell upward increase permitted by Florida Rule of Criminal Procedure 3.701(d)(14). *Any further departure for violation of probation is not allowed. Lambert v. State.*

Franklin v. State, 545 So. 2d 851, 852-53 (Fla. 1989) (emphasis added) (citation omitted).

> The Court reached the same result regarding probationary split sentences:
> Upon a violation of probation during a probationary split sentence, a trial court may resentence the defendant to any term falling within the original guidelines range, including the one-cell upward increase. *However, no further increase or departure is permitted for any reason. Lambert.*

Id. at 853 (emphasis added) (citation omitted).

86. 579 So. 2d 109 (Fla. 1991).

87. *Id.* at 110.

88. *Id.* at 110-111.

89. *Id.* at 111 (emphasis added).

90. *Id.* In a footnote, the supreme court stated:

> We recognize that section 948.03(7), Florida Statutes (1987), permits the court to "rescind or modify at any time the terms and conditions theretofore imposed by it upon the probationer or offender in community control." However, that statute is not applicable here because the court did not modify a term or condition previously imposed. Rather, it added an entirely new condition to the order of community control.

Id. at 110 n.3.

> The court's reasoning seems less convincing when considered in conjunction with

F. *Youthful Offender Sentences*

In *Kepner v. State*,[91] the Florida Supreme Court examined the language and amendments to section 958.04(3) of the Florida Statutes, concerning the sentencing of youthful offenders.[92] The supreme court determined that section 958.04(3) allows for three possible results, depending upon an offender's guidelines scoresheet, and the sentence imposed by the court. While emphasizing in their opinion that the maximum youthful offender sentence is six years, the supreme court concluded in a multi-part holding:

> First, if the recommended guidelines sentence exceeds six years . . . and the court sentences the youthful offender to six years of sanctions, written reasons for a sentence less than the recommended guidelines sentence are not required. Second, if the recommended guidelines sentence is less than . . . six years, the court must sentence within the guidelines or give written reasons for the departure whether upward or downward. Third, if the recommended sentence is six years or greater and the court imposes a [sentence of] . . . less than six years, the court must provide written

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the first sentence of FLA. STAT. § 948.03(7) (1987). The language quoted by the supreme court comes exclusively from the second sentence of that section. Read together, the first two sentences of section 948.03(7) provide:

> The enumeration of specific kinds of terms and conditions *shall not prevent the court from adding* thereto such other or others as it considers proper. The court may rescind or modify at any time the terms and conditions theretofore imposed by it upon the probationer or offender in community control.

FLA. STAT. § 948.03(7) (1987) (emphasis added).

Other portions of this section have subsequently been amended and renumbered as FLA. STAT. § 948.03(8) (Supp. 1990).

91. 577 So. 2d 576 (Fla. 1991).

92. FLA. STAT. § 958.04(3) (1985) provided:

> The provisions of this section shall not be used to impose a greater sentence than the maximum recommended range as established by statewide sentencing guidelines pursuant to s. 921.001 unless clear and convincing reasons are explained in writing by the trial court judge. A sentence imposed outside of such guidelines shall be subject to appeal by the defendant pursuant to s. 924.06.

Portions of both sentences in this section were subsequently amended. The supreme court's decision in *Kepner* concerned the changes to the final sentence of FLA. STAT. § 958.04(3) (1987) which was amended to provide: "A sentence imposed outside of such guidelines shall be subject to appeal pursuant to s. 924.06 or s. 924.07."

reasons for departure.[93]

The supreme court in *Kepner* specifically recognized that a youthful offender sentence is an "alternative sentence."[94] However, the holding in *Kepner* makes the sentencing guidelines applicable to the extent provided above, with one caveat—unlike other sentencing schemes within the guidelines, the supreme court's rationale necessarily considers "sanctions" to include probation and community control. In all other instances under the sentencing guidelines, probation and community control cannot be used interchangeably, or in lieu of incarceration, insofar as each is a different type of "sanction" for purposes of the sentencing guidelines.

G. *Alternative Sentencing Provisions*

Several recent decisions of the district courts of appeal have addressed the conflict between the mandatory minimum sentencing provision contained in section 893.13(1)(e)(1), Florida Statutes,[95] relating to the manufacture, sale, or purchase of controlled substances within one thousand feet of a school, and section 397.12, Florida Statutes, which is an alternative sentencing provision for drug offenders.[96] Section 397.12

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93. 577 So. 2d at 578.

94. *Id.*; *see infra* notes 99-102 and accompanying text. *See generally* FLA. STAT. § 958.04 (Supp. 1990).

95. This section provides that individuals convicted of various offenses, including the manufacture, sale, or purchase of controlled substances such as cocaine within 1000 feet of a school are:

> guilty of a felony of the first degree . . . and shall be sentenced to a minimum term of imprisonment of 3 calendar years and shall not be eligible for parole or release under the Control Release Authority . . . or statutory gain-time . . . prior to serving such minimum sentence.

FLA. STAT. § 893.13(1)(e)(1) (Supp. 1990).

96. FLA. STAT. § 397.12 (1989) provides:

> When any person, including any juvenile, has been charged with or convicted of a violation of any provision of chapter 893 or of a violation of any law committed under the influence of a controlled substance, the court, Department of Health and Rehabilitative Services, Department of Corrections, or Parole Commission, whichever has jurisdiction over that person, may in its discretion require the person charged or convicted to participate in a drug treatment program licensed by the department under the provisions of this chapter. If referred by the court, the referral may be in lieu of or in addition to final adjudication, imposition of any penalty or sentence, or any other similar action. If the accused desires final adjudication, his

permits courts to require persons charged or convicted of a violation relating to controlled substances to participate in a licensed drug treatment program, "in lieu of or in addition to final adjudication, imposition of any penalty or sentence."[97]

With some reservations,[98] the Fourth District Court of Appeal has consistently held that the alternative sentencing scheme provided by section 397.12 may not be used to avoid the mandatory minimum sentencing language contained in section 893.13(1)(e)(1).[99] Several reasons were offered. First, section 397.12 provides an alternative sentencing option only for persons charged with the possession of controlled substances, as opposed to purchasing offenses.[100] Additionally, it is unlikely that the legislature intended that simple drug addiction should overcome the mandatory provisions of section 893.13(1)(e)(1).[101] Fi-

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constitutional right to trial shall not be denied. The court may consult with or seek the assistance of any agency, public or private, or any person concerning such a referral. Assignment to a drug program may be contingent upon budgetary considerations and availability of space.

97. *Id.*

98. State v. Liataud, 587 So. 2d 1155, 1156 (Fla. 4th Dist. Ct. App. 1991) (Anstead, J., specially concurring) ("[T]his is another case of the left hand of the legislature not knowing what the right hand is doing."); State v. Scates, 585 So. 2d 385 (Fla. 4th Dist. Ct. App. 1991) (question certified); State v. Jenkins, 16 Fla. L. Weekly D2628 (4th Dist. Ct. App. 1991) (same); State v. Vola, 16 Fla. L. Weekly D2246, 2249 (4th Dist. Ct. App. 1991) (Anstead, J., specially concurring) ("[T]he legislature's intent to see persons such as the appellee receive treatment is obviously being thwarted by our reversal of the trial judge's order.").

99. State v. Baxter, 581 So. 2d 937 (Fla. 4th Dist. Ct. App. 1991); State v. Lane, 582 So. 2d 77 (Fla. 4th Dist. Ct. App. 1991); State v. Baumgardner, 587 So. 2d 1147 (Fla. 4th Dist. Ct. App. 1991); State v. Liataud, 587 So. 2d 1155 (Fla. 4th Dist. Ct. App. 1991); State v. Jenkins, 16 Fla. L. Weekly D2038 (4th Dist. Ct. App. 1991); State v. Scates, 585 So. 2d 385 (Fla. 4th Dist. Ct. App. 1991); State v. Greisdorf, 587 So. 2d 1153 (Fla. 4th Dist. Ct. App. 1991); State v. Vola, 16 Fla. L. Weekly D2246 (4th Dist. Ct. App. 1991); State v. Kalogeras, 587 So. 2d 591 (Fla. 4th Dist. Ct. App. 1991); State v. Jenkins, 16 Fla. L. Weekly D2628 (4th Dist. Ct. App. 1991).

100. *Baxter*, 581 So. 2d at 938; *Lane*, 582 So. 2d at 78; *Vola*, 16 Fla. L. Weekly at D2247; *Jenkins*, 16 Fla. L. Weekly at D2628. This argument is derived from the language of FLA. STAT. § 397.011(2) (1989) which provides in pertinent part:

> For a violation of any provision of chapter 893 . . . relating to *possession* of any substance regulated thereby, the trial judge may, in his discretion, require the defendant to participate in a drug treatment program . . . pursuant to the provisions of this chapter.

Id. (emphasis added).

101. *Vola*, 16 Fla. L. Weekly at D2247. This line of analysis further reasons that the minimum mandatory sentencing provision in section 893.13(1)(e)(1) was promul-

nally, pursuant to Rule 3.701(d)(9), of the Florida Rules of Criminal Procedure, mandatory sentences take precedence over guideline sentences.[102]

H. *Habitual Offender Sentences*

During the survey period, two closely related issues concerning the habitual felony offender statute divided the district courts of appeal. Both issues concern the meaning of section 775.084(4)(a)(1), Florida Statutes, which provides: "The court . . . shall sentence the habitual felony offender as follows: 1. In the case of a felony of the first degree, for life."

On the one hand, the district courts of appeal have reached contrary conclusions concerning whether section 775.084(4)(a)(1) permits trial courts to impose habitual felony offender sanctions for individuals convicted of first degree felonies punishable by life. Some courts have determined such offenders are not subject to habitual felony offender sanctions. Other courts have reached a contrary result.[103]

On the other hand, the district courts of appeal have issued conflicting decisions concerning whether section 775.084(4)(a)(1) is mandatory or permissive in nature. Some courts have decided that section 775.084(4)(a)(1) permits the imposition of sentences of less than life in prison, as an habitual offender, where the offender is convicted of

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gated more recently, and therefore, evinces the intent of the legislature. *Id.*; *accord Lane*, 582 So. 2d at 78.

102. *Baxter*, 581 So. 2d at 938; *Jenkins*, 16 Fla. L. Weekly at D2628. FLA. R. CRIM P. 3.701(d)(9) provides:

> Mandatory sentences: For those offenses having a mandatory penalty, a scoresheet should be completed and the guideline sentence calculated. If the recommended sentence is less than the mandatory penalty, the mandatory sentence takes precedence. If the guideline sentence exceeds the mandatory sentence, the guideline sentence should be imposed.

103. *Compare* Gholston v. State, 589 So. 2d 307, 307 (Fla. 1st Dist. Ct. App. 1990) ("[s]ection 775.084, Florida Statutes, makes no provision for enhancing penalties for first-degree felonies punishable by life, life felonies, or capital felonies"); Johnson v. State, 568 So. 2d 519 (Fla. 1st Dist. Ct. App. 1990) (same) *and* Power v. State, 568 So. 2d 511 (Fla. 5th Dist. Ct. App. 1990) (same) *with* Paige v. State, 570 So. 2d 1108 (Fla. 5th Dist. Ct. App. 1990) (first degree felonies punishable by life are subject to enhancement under habitual felony offender statute); Swain v. State, 579 So. 2d 842 (Fla. 3d Dist. Ct. App. 1991) (same); Westbrook v. State, 574 So. 2d 1187 (Fla. 3d Dist. Ct. App. 1991) (same); Burdick v. State, 584 So. 2d 1035 (Fla. 1st Dist. Ct. App. 1991) (question certified) *and* Ford v. State, 586 So. 2d 511 (Fla. 1st Dist. Ct. App. 1991) (question certified).

a first degree felony. These courts reason that the language contained in section 775.084(4)(a)(1) is permissive, rather than mandatory. Other courts have disagreed, finding the statute's language mandatory.[104]

I. *Restitution*

In *State v. Hawthorne*,[105] the Florida Supreme Court refined the analysis for determining the value of property in restitution hearings.[106] In those instances when "the value of property is an essential element of a crime,"[107] value is determined as the market value of the property on the date of the offense.[108] In this regard, fair market value of an item should be derived from "direct testimony or through evidence of the four factors announced by the supreme court in *Negron*."[109]

In other instances, though, the standard method of determining value is inadequate. In these situations, "a court is not tied to fair market value as the sole standard for determining restitution amounts, but rather may exercise such discretion as required to further the purposes of restitution."[110] Examples might include the theft of a family heirloom, new automobiles—which immediately depreciate in value after purchase—or property which has undergone restoration, and thus, has

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104. *Compare* State v. Fannin, 578 So. 2d 471, 471 (Fla. 1st Dist. Ct. App. 1991) ("section 775.084(4)(a) mandates a life sentence in the case of felonies of the first degree," but question certified); Burdick v. State, 584 So. 2d 1035 (Fla. 1st Dist. Ct. App. 1991) (same) *and* Walsingham v. State, 576 So. 2d 365 (Fla. 2d Dist. Ct. App. 1991) (same) (question certified) *with* Henry v. State, 581 So. 2d 928, 929 (Fla. 3d Dist. Ct. App. 1991) ("the 'shall sentence' provision of the habitual offender statute . . . is permissive, not mandatory"); Cotton v. State, 588 So. 2d 694 (Fla. 3d Dist. Ct. App. 1991) *and* Smith v. State, 16 Fla. L. Weekly D151 (3d Dist. Ct. App. 1991).

105. 573 So. 2d 330 (Fla. 1991).

106. *See generally* FLA. STAT. § 775.089 (1989).

107. *Hawthorne*, 573 So. 2d at 332 (citing *Negron*, 306 So. 2d at 108).

108. *Id.*

109. *Id.* at 333 (footnote omitted). The four factors used to determine the appropriate market value in Negron v. State, 306 So. 2d 104 (Fla. 1974), *receded from on other grounds*, Butterworth v. Fluellen, 389 So. 2d 968 (Fla. 1980), were summarized by the supreme court as follows: "(1) original market cost; (2) manner in which the item was used; (3) the general condition and quality of the item; and (4) the percentage of depreciation." *Hawthorne*, 573 So. 2d at 332.

110. *Id.* at 333. As authority for this proposition, the supreme court looked to FLA. STAT. § 775.089(6) (1987) which includes reference to the fact that the court "shall consider . . . such other factors which it deems appropriate." *Id.*

not depreciated in value since the time of purchase.[111]

III. DEFENSES

A. *Entrapment*

1. Entrapment as a Matter of Law

In *State v. Hunter*,[112] the Florida Supreme Court determined that the objective entrapment standard established in *Cruz v. State*[113] was not superseded by section 777.201.[114] The supreme court's conclusion was predicated upon an implicit recognition that constitutional considerations of due process cannot be superseded by statutory enactment,[115] combined with an explicit recognition that, "[b]y focusing on police conduct," the objective entrapment aspects of their decision in *Cruz* "includes due process considerations."[116]

The facts in *Hunter* were typical of many drug transactions. First,

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111. *Hawthorne*, 573 So. 2d at 333 nn.4-5. The facts in *Hawthorne* concerned the theft of an older car that had been repaired shortly before it was stolen, but was otherwise in good working condition. As a result of the theft, the car was destroyed. Although the vehicle had been purchased by the victim for $1,530 14 months prior to the theft, the supreme court, cognizant of the repairs made to the vehicle and the fact that the car was in good working condition, approved the trial court's award of $1,500 restitution.

112. 586 So. 2d 319 (Fla. 1991).

113. 465 So. 2d 516 (Fla.), *cert. denied*, 473 U.S. 905 (1985).

114. Following the Florida Supreme Court's decision in *Cruz*, the legislature enacted FLA. STAT. § 777.201 (1987) which states in pertinent part:

> (1) A law enforcement officer, a person engaged in cooperation with a law enforcement officer, or a person acting as an agent of a law enforcement officer perpetrates an entrapment if, for the purpose of obtaining evidence of the commission of a crime, he induces or encourages and, as a direct result, causes another person to engage in conduct constituting such crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it.
>
> (2) A person prosecuted for a crime shall be acquitted if he proves by a preponderance of the evidence that his criminal conduct occurred as a result of an entrapment. *The issue of entrapment shall be tried by the trier of fact.*

115. *See* Strickland v. State, 588 So. 2d 269 (Fla. 4th Dist. Ct. App. 1991) (concluding in light of the Florida Supreme Court's decision in *Hunter* that "*Cruz* is still alive and well").

116. *Hunter*, 586 So. 2d at 322.

an individual named Ron Diamond agreed to perform substantial assistance[117] for the police in exchange for a reduction of sentence in his drug trafficking conviction. Diamond approached Kelly Conklin, who was not involved in any ongoing criminal activity, seeking to purchase drugs. Conklin, after much persistence from Diamond, turned to the defendant, David Hunter for assistance. Through a friend, Hunter was able to produce drugs to sell to Diamond. On the day of the sale, both Conklin and Hunter were arrested. Because Conklin had not been engaged any specific, ongoing criminal activity, the Court concluded that he had been entrapped by the State's agent, Diamond, as a matter of law.[118]

The supreme court, however, affirmed Hunter's conviction:

> Although Diamond's acts amounted to entrapment of Conklin, the middleman, he had minimal telephone contacts with Hunter. When a middleman, not a state agent, induces another person to engage in a crime, entrapment is not an available defense.[119]

2. Entitlement to Jury Instruction

In a separate case, *Wilson v. State*,[120] the supreme court held that where evidence exists to support a defendant's claim of entrapment, a request for a jury instruction on the defense of entrapment "should be refused only if the defendant has denied under oath the acts constituting the crime that is charged."[121] In *Wilson*, the defendant was charged with sale of cocaine and possession of cocaine with intent to sell, after allegedly selling a twenty dollar piece of crack cocaine to an undercover police officer. Wilson testified under oath all of the factual allegations concerning his arrest were untrue, and that another man was actually responsible for the offenses. Under these circumstances, the supreme court determined that Wilson was not entitled to an in-

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117. *See generally* FLA. STAT. § 893.135(3) (1985).

118. *Hunter*, 586 So. 2d at 322.

119. *Id.* In dicta, the supreme court stated that defendants may not vicariously assert due process violations suffered by third persons. Therefore, to the extent that a third party is the victim of outrageous police conduct, rising to the level of a due process violation, others who are induced to commit crimes based upon the third party's actions have no standing to raise constitutional challenges. *See* State v. Glosson, 462 So. 2d 1082 (Fla. 1985).

120. 577 So. 2d 1300 (Fla. 1991).

121. *Id.* at 1302.

struction on the defense of entrapment. However, the supreme court recognized that "there are some circumstances under which a defendant who claims entrapment may deny commission of the crime without necessarily committing perjury."[122] In these instances, an entrapment instruction is appropriate.[123]

B. *Self-Defense*

Under section 776.041(1), Florida Statutes,[124] the defense of self-defense is not available to defendants charged with a "forcible felony," as enumerated in section 776.08, Florida Statutes. That section contains a laundry list of "forcible felony" offenses, along with the proviso that a "forcible felony" includes "any other felony which involves the use of threat or physical force or violence against any individual."[125]

In *Perkins v. State*,[126] the defendant, Marcus Perkins, was charged with attempted trafficking in cocaine, and first degree murder, for the death of Anthony Kimble. On the date of Kimble's death, Perkins arranged to purchase cocaine from Kimble in exchange for $11,000. At the transaction Kimble failed to bring any cocaine, and instead, demanded Perkins' money at gun-point. A struggle ensued, and Kimble shot Perkins. Although injured, Perkins somehow took the firearm from Kimble, and fatally wounded him.[127]

In pre-trial proceedings, the State agreed that Perkins acted in self-defense, but argued that Perkins was prohibited from raising self-defense as a defense, based upon the State's contention that trafficking in cocaine is a "forcible felony" for purposes of section 776.08.[128] The

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122. *Id.* at 1301.

123. *Id.* The supreme court cited several cases as examples of instances where a defendant could properly claim entrapment and at the same time still deny the commission of any criminal act, without committing perjury. Mathews v. United States, 485 U.S. 58 (1988); United States v. Henry, 749 F.2d 203 (5th Cir. 1984); Stripling v. State, 349 So. 2d 187 (Fla. 3d Dist. Ct. App. 1977), *cert denied*, 359 So. 2d 1220 (Fla. 1978).

124. FLA. STAT. § 776.041(1) (1989) provides, in part, that the defense of self defense is not available to a person who: "(1) Is attempting to commit, committing, or escaping after the commission of a *forcible felony* . . . ." *Id.* (emphasis added).

125. FLA. STAT. § 776.04(1) (1987).

126. 576 So. 2d 1310 (Fla. 1991).

127. *Id.* at 1311.

128. *Id.* FLA. STAT. § 776.08 (1987) provides:

"Forcible felony" means treason; murder; manslaughter; sexual battery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated bat-

Florida Supreme Court disagreed based upon their conclusion that "a 'forcible felony' under the final clause of section 776.08 is a felony whose statutory elements include the use or threat of physical force or violence against any individual." Drug trafficking fails to meet this definition.[129]

C. *Double Jeopardy*

In *Grady v. Corbin*,[130] the United States Supreme Court clarified the coverage provided by the double jeopardy clause of the United States Constitution[131] by holding that double jeopardy prohibits a second prosecution if, "to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[132] The United States Supreme Court indicated that double jeopardy clause analysis necessitates a two-part test. First, the trial court must apply the analysis articulated in *Blockburger v. United States*.[133] This stage is commonly referred to as the "traditional *Blockburger* test."[134]

> If application of that test reveals that the offenses have identical statutory elements or that one is a lesser included offense of the

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tery; aircraft piracy; unlawful throwing, placing or discharging of a destructive device or bomb; any other felony which involves the use or threat of physical force or violence against any individual.

129. *Perkins*, 576 So. 2d at 1313. The supreme court conceded that neither treason or burglary meet this definition either, although each is designated as a "forcible felony" in section 776.08. Nevertheless, it reiterated that due process concerns require "that penal statutes must be strictly construed according to their letter." *Id.* (citing State v. Jackson, 526 So. 2d 58 (Fla. 1988); State *ex rel.* Cherry v. Davidson, 139 So. 177 (1931); *Ex parte* Bailey, 23 So. 552 (1897)). The Court concluded that the offense of drug trafficking does not inherently "involve" the use or threat of physical force or violence on every occasion, as required by section 776.08, although, obviously, drug trafficking offenses are sometimes violent. *Id.* at 1313.

130. 110 S. Ct. 2084 (1990).

131. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V; *see also* FLA. CONST. art. I, § 9. The Double Jeopardy Clause is enforceable against the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784 (1969).

132. *Grady*, 110 S. Ct. at 2087.

133. 284 U.S. 299, 304 (1932).

134. *Grady*, 110 S. Ct. at 2090.

other, then the inquiry must cease, and the subsequent prosecution is barred.[135]

However, the Court indicated, "a subsequent prosecution must do more than merely survive the *Blockburger* test."[136]

> [T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. This is not an "actual evidence" or "same evidence" test. The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct.[137]

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135. *Id.* (citation omitted).

136. *Id.* at 2093.

137. *Id.* The Court indicated that this secondary inquiry had its genesis in the Court's opinion in Illinois v. Vitale, 447 U.S. 410 (1980).

Factually, *Grady v. Corbin* concerned a traffic fatality. The State of New York first successfully prosecuted the defendant, Thomas Corbin, for various traffic offenses. In separate a prosecution, the defendant was subsequently charged with a more serious manslaughter offense, stemming from the same conduct.

In its Double Jeopardy Clause analysis, the United States Supreme Court relied heavily upon a bill of particulars filed by the State of New York prior to Corbin's trial on the charge of reckless manslaughter. The bill of particulars revealed that the same traffic violations for which the defendant had already plead guilty would again be relied upon by the State as predicate offenses for proving the defendant's recklessness in the manslaughter charge.

Although the elements of the offenses survived the traditional *Blockburger* analysis, the Court concluded that the same conduct was being relied upon by the prosecution in the defendant's subsequent case, thereby violating the second prong of the Double Jeopardy Clause. Relying on the bill of particulars filed by the State of New York, the Court concluded:

> By its own pleadings, the State has admitted that it will prove the entirety of the conduct for which Corbin was convicted—driving while intoxicated and failing to keep right of the median—to establish essential elements of the homicide and assault charges. Therefore, the Double Jeopardy Clause bars this successive prosecution.

Grady, 110 S. Ct. at 2094.

The Court was aware of the additional burdens their holding would place on prosecuting agencies. The Court noted that "[p]rosecutors' offices are often overworked and may not always have the time to monitor seemingly minor cases as they wind through the judicial system." *Id.* at 2095. However, the Court concluded that "these facts cannot excuse the need for scrupulous adherence to our constitutional principles." *Id.* (citing Santobello v. New York, 404 U.S. 257 (1971)).

The United States Supreme Court's opinion in *Grady v. Corbin* has had an immediate impact on Florida Courts. Most importantly, in *Scalf v. State*,[138] the First District Court of Appeal properly recognized that *Grady* may be at variance with section 775.021(4)(b), Florida Statutes,[139] as well as the Florida Supreme Court's decision in *State v. Smith*.[140] Relying upon *Grady v. Corbin*, several district courts of appeal decisions have barred subsequent prosecutions on double jeopardy clause grounds.[141] However, at least one district court opinion successfully distinguished *Grady v. Corbin*, and sustained a second prosecution for an offense arising from previously prosecuted conduct.[142]

IV. SUBSTANTIVE CRIMINAL OFFENSES

A. *Aggravated Battery*

In *Lareau v. State*,[143] the Florida Supreme Court concluded that the offense of aggravated battery, resulting in great bodily harm, permanent disability, or permanent disfigurement, contrary to section 784.045(1)(a) of the Florida Statutes,[144] when committed with a

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138. 573 So. 2d 202 (Fla. 1st Dist. Ct. App. 1991).

139. The appeals court in *Scalf* stated:

> In reaching our conclusion we acknowledge that our disposition of this case may be at variance with certain language set forth in Section 775.021(4)(b), Florida Statutes (Supp. 1988), as approved in State v. Smith, 547 So. 2d 613 (Fla. 1989), in that the statute provides that it is the legislature's intent to "*convict* and sentence for each criminal offense." If the legislature intended to permit a successive prosecution based on conduct that constituted an offense for which the defendant had previously been prosecuted, any such intent would no doubt be forced to give way to the interpretation placed on the Double Jeopardy clause by the United States Supreme Court.

Scalf, 573 So. 2d at 204 n.5 (emphasis in original).

140. 547 So. 2d 613 (Fla. 1989).

141. Scalf v. State, 573 So. 2d 202 (Fla. 1st Dist. Ct. App. 1991); Dixon v. State, 584 So. 2d 195 (Fla. 5th Dist. Ct. App. 1991); Anderson v. State, 570 So. 2d 1101 (Fla. 1st Dist. Ct. App. 1990).

142. *Walls v. State*, 580 So. 2d 131 (Fla. 1st Dist. Ct. App. 1991). In *Walls*, the court factually distinguished the holding in *Grady v. Corbin*, and approved a second prosecution for possession of a firearm by a convicted felon, even though the defendant had previously been convicted of grand theft of the same firearm and armed burglary.

143. 573 So. 2d 813 (Fla. 1991).

144. FLA. STAT. § 784.045 (1989) provides:

> (1) A person commits aggravated battery who, in committing battery:

weapon or firearm, may properly be reclassified as a felony of the first degree, pursuant to the enhancement provision contained in section 775.087(1)(b) of the Florida Statutes.[145] The supreme court found this result gives full effect to both section 784.045(1)(a) and the enhancement provision of 775.087(1)(b), and additionally, conforms with the legislative intent of providing increased punishments for violent criminal acts perpetrated with a firearm, or other weapon.[146]

In an unrelated case, *State v. Nelson*,[147] the Fourth District Court of Appeal affirmed the dismissal of an information charging the offense of aggravated battery upon a person 65 years of age or older, on the grounds that the information failed to allege that the offense was carried out "knowingly."[148] The *Nelson* court concluded that the language of section 784.08(2), Florida Statutes,[149] requires that the state prove the defendant *knew* the victim was at least 65 years of age.[150]

(a) Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or

(b) Uses a deadly weapon.

(2) Whoever commits aggravated battery shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

145. FLA. STAT. § 775.087 (1985) provides in pertinent part:

(1) Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows: . . .

(b) In the case of a felony of the second degree, to a felony of the first degree.

146. *Lareau*, 573 So. 2d at 815.

147. 577 So. 2d 971 (Fla. 4th Dist. Ct. App. 1991).

148. *Id.* at 972.

149. FLA. STAT. § 784.08 (1989) provides in part:

(2) Whenever a person is charged with knowingly committing an assault or aggravated assault or a battery or aggravated battery upon a person 65 years of age or older, the offense for which the person is charged shall be reclassified as follows:

(a) In the case of aggravated battery, from a felony of the second degree to a felony of the first degree.

150. *Nelson*, 577 So. 2d at 972.

B. *Aggravated Child Abuse*

In *State v. Gethers*,[151] the Fourth District Court of Appeal rejected the contention that the use of cocaine during pregnancy may constitute aggravated child abuse, contrary to section 827.04(1), Florida Statutes.[152] On the other hand, persons who ingest cocaine during pregnancy might violate other statutory provisions.[153]

C. *Controlled Substances*

In *Campbell v. State*,[154] the defendant was convicted of the offense of trafficking in cocaine. The Florida Supreme Court reversed the defendant's conviction after concluding that the defendant was entitled to a special jury instruction concerning the issue of dominion or control, based upon language in *Graces v. State*.[155]

The defendant in *Campbell* was arrested in a reverse-sting operation after negotiating the purchase of four kilos of cocaine from an undercover police officer. Just prior to the completion of the transaction, the defendant was permitted to inspect one of the four kilos of cocaine while seated in the back seat of a car. The defendant placed the kilo on his lap and examined its contents. After expressing satisfaction with the cocaine, the defendant placed the kilo on the rear seat, exited the vehicle, and was arrested.[156]

Based upon this factual scenario, the supreme court concluded that the defendant was entitled to a special jury instruction on the issue of dominion or control:

> *Temporary control of the contraband in the presence of its actual owner, for the purpose of verifying that it is what it purports to be*

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151. 585 So. 2d 1140 (Fla. 4th Dist. Ct. App. 1991).

152. FLA. STAT. § 827.04(1) (1987) provides:

> Whoever, willfully, or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment, or who, knowingly or by culpable negligence, permits physical or mental injury to the child, and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to such child, shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

153. *See infra* notes 166-69 and accompanying text.

154. 577 So. 2d 932 (Fla. 1991).

155. 485 So. 2d 847, 848 (Fla. 3d Dist. Ct. App. 1986).

156. *Campbell*, 577 So. 2d at 932-33.

> *or to conduct a sensory test for quality, prior to the consummation of the contemplated transaction, without more, does not constitute legal possession.*[157]

The supreme court also reiterated that "a judgment of acquittal is proper where there is no evidence from which dominion or control can be inferred."[158]

In an unrelated matter, the definition of a "school," for purposes of section 893.13(1)(e) of the Florida Statutes,[159] relating to narcotics offenses at or near schools, was decided in *State v. Roland*.[160] In that case, the Fourth District Court of Appeal held that offenses occurring near "kindergartens and preschools"[161] are not subject to the enhancement penalties provided in section 893.13(1)(e)(1) of the Florida Statutes.[162] The court determined that an elementary school, for purposes of the statute, means the "first through sixth grades."[163] However, grade level is determined by performance level, not chronological age.[164]

Finally, in *Johnson v. State*,[165] the Fifth District Court of Appeal

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157. *Id.* at 934 (emphasis in original) (quoting *Garces v. State*, 485 So. 2d 847, 848 (Fla. 3d Dist. Ct. App. 1986)).

158. *Id.* at 935.

159. FLA. STAT. § 893.13(1)(e) (Supp. 1990) provides in part:

> Except as authorized by this chapter, it is unlawful for any person to sell, manufacture, or deliver, or to possess with intent to sell, purchase, manufacture, or deliver, a controlled substance in, on, or within 1,000 feet of the real property comprising a public or private elementary, middle, or secondary school.

160. 577 So. 2d 680 (Fla. 4th Dist. Ct. App. 1991).

161. *Id.* at 681.

162. FLA. STAT. § 893.13(1)(e)(1) (Supp. 1990) provides, in part, that persons convicted of offenses occurring within 1000 feet of a school:

> [S]hall be sentenced to a minimum term of imprisonment of 3 calendar years and shall not be eligible for parole or release under the Control Release Authority . . . or statutory gain-time . . . prior to serving such minimum sentence.

163. *Roland*, 577 So. 2d at 681.

164. *Compare* State v. Edwards, 581 So. 2d 232 (Fla. 4th Dist. Ct. App. 1991) (definition of school satisfied where one child was performing at the first grade level) *with* State v. Lee, 583 So. 2d 1055, 1055 (Fla. 4th Dist. Ct. App. 1991) (school for severely mentally handicapped and retarded persons, ages five to twenty-two years old, not a school for purposes of enhancement statute where "the students have a minimal I.Q. and function below the level of a two year old").

165. 578 So. 2d 419 (Fla. 5th Dist. Ct. App. 1991).

determined that a pregnant person who ingests cocaine may violate section 893.13(1)(c) of the Florida Statutes,[166] concerning the delivery of controlled substances to minors. Under the theory advanced in *Johnson*, the criminal act occurs at the moment of birth:

> Appellant voluntarily took cocaine into her body, knowing it would pass to her fetus and knowing (or should have known) that birth was imminent. She is deemed to know that an infant at birth is a person, and a minor, and that delivery of cocaine to the infant is illegal. We can reach no other conclusion logically.[167]

The court concluded that it was "singularly unimpressed" with "what pregnant mothers might resort to if they know they may be charged with this crime."[168]

D. *Driving Under the Influence*

Section 316.193(1)(2)(b), Florida Statutes, provides that any person convicted of a fourth or subsequent offense of driving under the influence is guilty of a third degree felony.[169] In *State v. Rodriguez*,[170] the Florida Supreme Court determined that in order to invoke the jurisdiction of the circuit court, an information alleging the offense of felony driving under the influence must "unambiguously" charge a felony.[171] The supreme court concluded that reference in the information to section 316.193(1)(2)(b) was sufficient for this purpose.[172]

However, to comply with due process requirements, the supreme court held that the charging document must specifically allege each predicate DUI offense.[173] Therefore, to the extent that a jury is provided with a copy of the information during its deliberations, any refer-

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166. FLA. STAT. § 893.13(1)(c) (1987) provides in part: "Except as authorized by this chapter, it is unlawful for any person 18 years of age or older to deliver any controlled substance to a person under the age of 18 years."

167. *Johnson*, 578 So. 2d at 420.

168. *Id.*

169. FLA. STAT. § 316.193(1)(2)(b) (Supp. 1988) provides: "Any person who is convicted of a fourth or subsequent violation of subsection (1) is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084."

170. 575 So. 2d 1262 (Fla. 1991).

171. *Id.* at 1264.

172. *Id.*

173. *Id.* at 1266.

ence to the predicate offenses must be redacted.[174]

Additionally, in the event that a verdict of guilty is obtained, the supreme court's decision in *Rodriguez* directs that the trial court, sitting as fact-finder, "shall" conduct a separate evidentiary hearing to determine whether the defendant has, in fact, been previously convicted of DUI on three or more occasions. The State bears the burden of proving the existence of the predicate offenses beyond a reasonable doubt.[175]

In a related issue, the supreme court held in *Hlad v. State*,[176] that an uncounseled DUI conviction may serve as a predicate offense in a prosecution for felony driving under the influence, but only if the maximum penalty for the prior offense was no greater than six months incarceration, and the defendant was not actually incarcerated as a result of the conviction.[177] This bright-line test expressly approves the analysis urged by United States Supreme Court Justice Harry Blackmun in *Baldasar v. Illinois*.[178]

Finally, in *State v. Reisner*,[179] the Fifth District Court of Appeal found Rules 10D-42.023[180] and 10D-42.024[181] of the Florida Administrative Code, relating to chemical breath testing, unconstitutionally void for vagueness. Section 316.1932(1)(f)(1) of the Florida Statutes requires the Department of Health and Rehabilitative Services to implement rules governing the administration of all chemical breath testing in the State of Florida.[182] The results of a chemical breath test are

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174. *Id.*

175. *Rodriguez*, 575 So. 2d at 1266.

176. 16 Fla. L. Weekly S586 (Fla. 1991).

177. *Id.* at S586.

178. 446 U.S. 222 (1980) (Blackmun, J. concurring).

179. 584 So. 2d 141 (Fla. 5th Dist. Ct. App. 1991).

180. FLA. ADMIN. CODE ANN. r.10D-42.023 (1990) governing the *registration* and *yearly testing* of chemical breath test instruments provides in part: "All such chemical tests, instruments or devices registered hereunder shall be checked at least once each calendar year (January 1 through December 31) for *accuracy* and *reproducibility*." (emphasis added).

181. FLA. ADMIN. CODE ANN. r. 10D-42.024(1)(c) (1990), governing the *monthly maintenance* of chemical breath test instruments, provides:

> Chemical tests, instruments and devices used in the breath test method shall be inspected at least once each calendar month by a technician to ensure *general cleanliness*, *appearance*, and *accuracy*.

Id. (emphasis added).

182. FLA. STAT. § 316.1932(1)(f)1 (Supp. 1988) provides in part: "The tests determining the weight of alcohol in the defendant's blood shall be administered at the

inadmissible in a criminal proceeding[183] if the testing procedures fail to substantially comply with section 316.1932,[184] and the applicable administrative rules.[185] Pursuant to section 316.1932((1)(f)(1):

> Such rules and regulations shall be adopted after public hearing, shall specify precisely the test or tests which are approved by the Department of Health and Rehabilitative Services for reliability of result and facility of administration which shall be followed in all such tests given under this section.[186]

In *Reisner*, the court determined that the rules and incorporated forms promulgated to maintain the "accuracy" and "reproducibility" of chemical breath test machines failed to define those terms adequately, and were unconstitutionally void for vagueness.[187] Therefore, the court excluded the results of the defendant's chemical breath test.

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request of a law enforcement officer substantially in accordance with rules and regulations which *shall* have been adopted by the Department of Health and Rehabilitative Services." (emphasis added).

183. FLA. STAT. § 316.1932(1)(f)(l) (Supp. 1988) provides in part: "The tests determining the weight of alcohol in the defendant's blood shall be administered at the request of a law enforcement officer substantially in accordance with rules and regulations which *shall* have been adopted by the Department of Health and Rehabilitative Services." (emphasis added). *But see* State v. Bender, 382 So. 2d 697, 700 (Fla. 1980) ("[T]he results of blood alcohol tests are admissible into evidence without compliance with the administrative rules if the traditional predicate is laid which establishes the reliability of the test, the qualifications of the operator, and the meaning of the test results by expert testimony.").

184. FLA. STAT. § 316.1932(1)(b) (Supp. 1988) provides:

> An analysis of a person's breath, in order to be considered valid under this section, must have been performed *substantially* according to methods approved by the Department of Health and Rehabilitative Services. For this purpose, the department is authorized to approve satisfactory techniques or methods. Any insubstantial differences between approved techniques and actual testing procedures in any individual case shall not render the test or test results invalid.

(emphasis added). FLA. STAT. § 316.1932(1)(f)(1) (Supp. 1988) provides in part: "The tests determining the weight of alcohol in the defendant's blood shall be administered at the request of a law enforcement officer *substantially in accordance* with rules and regulations which shall have been adopted by the Department of Health and Rehabilitative Services." (emphasis added).

185. *See supra* notes 180-81.

186. FLA. STAT. § 316.1932((1)(f)(1) (Supp. 1988).

187. State v. Reisner, 584 So. 2d 141, 144 (Fla. 5th Dist. Ct. App. 1991) (citing State v. Cumming, 365 So. 2d 153 (Fla. 1978)).

E. *Grand Theft*

In *State v. G.C.*,[188] the Florida Supreme Court held that "mere presence as an after-acquired passenger in a vehicle, with knowledge that it has been stolen,"[189] was insufficient to sustain a conviction for the offense of grand theft.[190] The facts revealed that G.C., a fourteen-year-old juvenile, accepted a ride in a stolen vehicle. The defendant admitted that he suspected the car was stolen due to the fact that the vehicle's steering column was broken.[191]

However, unlike the driver of a stolen car, the supreme court determined that the defendant's mere presence as a passenger was insufficient evidence to prove "possession, dominion, or control" over the vehicle.[192] The supreme court distinguished the defendant's "use" from the specific intent to either temporarily or permanently "deprive" or "appropriate" the property of another.[193] To prove the "taking," the *G.C.*

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188. 572 So. 2d 1380 (Fla. 1991).

189. *Id.* at 1382.

190. FLA. STAT. § 812.014 (1987) provides in part:

> (1) A person is guilty of theft if he knowingly obtains or uses, or endeavors to obtain or use, the property of another with intent to, either temporarily or permanently:
>
> (a) Deprive the other person of a right to the property or a benefit therefrom.
>
> (b) Appropriate the property to his own use or to the use of any person not entitled thereto.

FLA. STAT. § 812.012 (1987) provides in part:

> (2) "Obtains or uses" means any manner of:
>
> (a) Taking or exercising control over property.
>
> (b) Making any unauthorized use, disposition, or transfer of property.
>
> (c) Obtaining property by fraud, willful misrepresentation of a future act, or false promise.
>
> (d)1. Conduct previously known as stealing; larceny; purloining; abstracting; embezzlement; misapplication; misappropriation; conversion; or obtaining money or property by false pretenses, fraud, or deception; or
>
> 2. Other conduct similar in nature.

191. *G.C.*, 572 So. 2d at 1380-81.

192. *Id.* at 1382.

193. *Id.* at 1381. The supreme court concluded, however, that the defendant's unauthorized entry into the stolen motor vehicle constituted the offense of trespass to a conveyance, contrary to FLA. STAT. § 810.08(1) (1987) which provides:

> Whoever, without being authorized, licensed, or invited, willfully enters or remains in any structure or conveyance, or, having been authorized, licensed, or invited, is warned by the owner or lessee of the premises, or by a person authorized by the owner or lessee, to depart and refuses to do so,

court concluded that proof of a specific intent to commit the offense of theft is necessary. This, the supreme court suggested, requires "some active step" on the part of the defendant beyond merely riding in the vehicle as a passenger.[194]

F. *Keeping a House of Ill Fame*

In *Warren v. State*,[195] the Florida Supreme Court examined the constitutionality of section 796.01, Florida Statutes.[196] Finding the term "ill fame" unconstitutionality vague, the court declared the statute unconstitutional. Although the supreme court concluded that the term "ill fame" may have provided sufficient notice of prohibited conduct in the past, it was nevertheless persuaded that in today's society, the term fails to provide sufficient notice between permitted and prohibited conduct.[197]

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commits the offense of trespass in a structure or conveyance.

194. *G.C.*, 572 So. 2d at 1381-82; *see* State v. Allen, 362 So. 2d 10, 12 (Fla. 1978).

195. 572 So. 2d 1376 (Fla. 1991).

196. FLA. STAT. § 796.01 (1987) provides: "Whoever keeps a house of ill fame, resorted to for the purpose of prostitution or lewdness, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084." On the other hand, FLA. STAT. § 796.07 (1987) provides in part:

> (2) It is unlawful in the state:
> (a) To keep, set up, maintain, or operate any place, structure, building, or conveyance for the purpose of lewdness, assignation, or prostitution.
> (5) Any person who violates any provision of this section is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

According to the *Warren* court, " '[i]ll fame' is the element that distinguishes the felony prohibited by § 796.01, Fla. Stat. (1987), from the misdemeanor prohibited by § 796.07(2)(a), Fla. Stat. (1987)." *Warren*, 572 So. 2d at 1377 n.3.

197. *Warren*, 572 So. 2d at 1377. The supreme court in *Warren* conceded that "[w]hile the general population might have understood the meaning of 'ill fame' a century ago, the lack of definition in the statutes, jury instructions, and cases is fatal to its continued validity." *Id.*

The term "Ill fame" is defined by one source as follows: "Evil repute; notorious bad character. Houses of prostitution, gaming houses, and other such disorderly places are called 'houses of ill fame,' and a person who frequents them a person of ill fame." BLACK'S LAW DICTIONARY 673 (5th ed. 1979).

The *Warren* court made special reference to the frustrations of one prosecutor, who, referring to the term "ill fame," unabashedly stated: " 'How are we going to prove that element, what witnesses are we going to use?" *Warren*, 572 So. 2d at 1377 (citing to State v. Warren, 558 So. 2d 55, 58 n.4 (Fla. 2d Dist. Ct. App. 1990) (quot-

G. *Robbery*

Section 812.13, of the Florida Statutes, defines the offense of robbery.[198] The element of "taking," for purposes of section 812.13, is defined in the Florida Standard Jury Instructions as one of the four elements necessary to prove the offense of robbery. This element requires proof that:

> The taking was with the intent to permanently [deprive (*victim*) of his right to the property or any benefit from it.] [appropriate the property of (*victim*) to his own use or to the use of any person not entitled to it.][199]

In *Daniels v. State*,[200] the Florida Supreme Court held that "the specific intent to commit robbery is the intent to steal, i.e., to deprive an owner of property either permanently or *temporarily*."[201] By holding that the specific intent to commit robbery is either the permanent or *temporary* deprivation of the property of another, the supreme court's opinion in *Daniels* expands the definition of "taking,"[202] and necessa-

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ing an unpublished portion of the trial court record in State v. Palmieri, 558 So. 2d 53 (Fla. 2d Dist. Ct. App. 1990), *rev'd*, Palmieri v. State, 572 So. 2d 1378 (Fla. 1991)).

198. FLA. STAT. § 812.13 (1989) provides in part: "(1) 'Robbery' means the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear."

199. FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 155 (The Florida Bar 1989).

200. 587 So. 2d 460 (Fla. 1991).

201. *Id.* at 462.

202. The supreme court's determination in *Daniels* that the "taking" may be temporary or permanent was based on a 1977 legislative amendment to chapter 812. *Id.*; *see* Chapter 77-342, Laws of Florida, codified at FLA. STAT. § 812.014 (concerning the offense of theft). That revision changed the language of the theft statute, in part, by adding the words "temporarily or permanently" to subsection 812.014(1).

In State v. Denumann, 427 So. 2d 166 (Fla. 1983), the Florida Supreme Court suggested in dicta that the 1977 legislative amendment had no impact on section 812.13, relating to the offense of robbery. *Id.* at 169. *Daniels* specifically recedes from that portion of *Denumann*. *Daniels*, 587 So. 2d at 462.

Additionally, in State v. Bell, 394 So. 2d 979 (Fla. 1991), the following question was certified: "Whether specific intent (i.e., the intent to *permanently* deprive the owner of property) is still a requisite element of the crime of robbery as now defined by Section 812.13, Florida Statutes (1975)." *Id.* at 979 (emphasis added). The supreme court answered the question in the affirmative, stating: "We hold that specific intent is still a requisite element of the crime of robbery." *Id.* at 980.

rily amends the appropriate jury instruction when the offense of robbery is alleged.

V. CONCLUSION

The Florida Supreme Court's numerous decisions in the area of sentencing, and the guidelines, continues to provide much needed refinement. Most, but not all, of the supreme court's sentencing decisions conceived reasonably appropriate solutions to difficult problems. In other instances, however, the supreme court's efforts failed to provide adequate guidance

In particular, the supreme court has again failed to clearly define what constitutes a continuing and persistent patterns of criminal conduct. Similarly, the test announced by the supreme court in *Clark v. State*,[203] concerning consolidated sentencing hearings, seems certain to foster numerous appeals.

Other important sentencing issues appear on the horizon, as well. One area which seems especially ripe for review concerns matters relating to the sentencing of habitual felony offenders. In the final analysis, then, it appears that as long as the sentencing guidelines remain in existence, there will be a fresh supply of criminal law cases to decipher and digest, and most importantly, to survey.

Based upon the manner in which the certified question in *Bell* was phrased, the supreme court's answer to the certified question reasonably suggested that the specific intent necessary to commit the offense of robbery included "permanent" deprivation. To this extent, the supreme court's decision in *Daniels* recedes from the language contained within the parenthetical portion of the certified question in *Bell*. *Daniels*, 587 So. 2d at 462.

203. *See supra* notes 23-30 and accompanying text.