Florida Criminal Procedure - Eighteen Months of Appellate Decisions...Defining Directions for the Nineties

Bruce A. Zimet* Erica J. Massaro†
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Abstract

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KEYWORDS: discovery, seizure, search
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I. INTRODUCTION

National and international attention focused upon state criminal proceedings in Florida during the past eighteen months. The print and electronic media feasted upon the sexual assault trial of William Kennedy Smith, the indictment of the alleged University of Florida mass murderer and the sexual assault investigation of several New York Mets baseball players. While these cases dominated the marquee of public focus, Florida appellate courts produced an explosion of dramatic developments during the identical eighteen month period. The Florida appellate decisions will no doubt formulate the terrain of criminal advocacy for years to come and will likely produce consequences which survive long after the "marquee" cases become little more than the subjects of trivia questions.

This article will concentrate upon criminal procedure developments in Florida appellate courts during the past eighteen months. Rather than indulging in sophomoric esoteric exercises, the authors will seek to provide a realistic overview of significant decisions in an attempt to assist practitioners including prosecutors, defenders and judges. Thematically, this article will abstain from merely cataloguing and digesting decisions. Instead, an attempt will be made to provide context and perspective to appellate determinations, with particular attention energized toward unresolved and potentially novel issues which will form the foundation of future appellate review.

The scope of this article has been defined by the published opinions issued by the Florida Supreme Court and the five Florida intermediate appellate courts. While traditional issues such as discovery, search and seizure and speedy trial continue to attract appellate attention, the spectrum of judicial scrutiny has expanded issues involving the grand jury and judicial misconduct.

Presentation of topics in this article will attempt to correspond to significant areas of importance to the mainstream criminal practitioner. Certain specialized issues involving the death penalty and sentencing, merit individual separate attention and will be withheld from this article.

II. GRAND JURY

The Florida Rules of Criminal Procedure permit prosecutors to directly file non-capital criminal charges without the need of a grand jury indictment. The availability of direct filing of criminal charges by means of an information has traditionally limited the use of the grand jury to either capital cases or politically sensitive cases such as allegations involving law enforcement officers or public officials.

Recently, an additional component in the grand jury equation developed due to the matriculation of the Florida Statewide Prosecutors Office. The Florida appellate decisions discussed in this article were reported in the Southern Reporter. The Florida Supreme Court maintains mandatory jurisdiction of all final judgments of trial courts imposing the death penalty. Fla. Const. art. V, § 9(3). The Florida Supreme Court also maintains discretionary jurisdiction of all non-dead penalty criminal procedure cases. See id. The discretionary Supreme Court jurisdiction has led certain commentators to conclude that the five geographically located intermediate District Court of Appeals are the main sources of final decisions. See Florida Courts of Appeals Intermediate Courts Become Final, 13 STETSON L. REV. 479 (1984).

7. Since Florida State Attorneys are elected officials, Fla. Const. art. V, § 17, the decision to utilize the grand jury in non-capital cases becomes a political decision as opposed to a legal decision.

10. The Statewide Prosecutor is authorized by the Florida Constitution. Fla. Const.
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primary vehicle to initiate Statewide Prosecutors cases is by means of the Statewide Grand Jury. The Statewide Grand Jury is strictly structured by statute. The Statewide Grand Jury can only be seated following gubernatorial petition to the Florida Supreme Court. The jurisdiction of the Statewide Grand Jury is specifically defined and limited by statute. The primary jurisdictional limitation relates to the type of crimes which may be investigated by the Statewide Grand Jury. The specific types of crimes are particularly set forth within the authorizing statute. In 1992 the Florida legislature amended the jurisdictional limitation and dramatically expanded the potential scope of the Statewide Grand Jury. This significant change was achieved by merely replacing the offense of “criminal fraud” with “any crime involving, or resulting in, fraud or deceit upon any person,” in the list of offenses within the Statewide process.

While appearing insignificant on its face, the amendment could result in offenses which previously maintained no nexus in law or logic to the statewide process becoming the subject of charging documents. Good faith arguments that crimes such as “misleading advertising,” fraudulently changing marks on an animal, providing false police reports, as well as a score of relatively minor offenses are now ripe for statewide prosecutor consideration. The most obvious effect of the amendment should be an increase in cases presented by the Statewide Prosecutor. This increase could develop jurisdictional “turf wars” between the statewide prosecutors and local State Attorneys’ offices. While those battles are not relevant to this article, practitioners should be aware of a new fertile area of litigation which has previously been relatively unaddressed, that being the operation of the Statewide Prosecutor, as well as the Grand Jury itself.

Practitioners should take particular notice of the recent developments in the areas of jury selection and the use of peremptory challenges to define areas necessary for their attention. It should take little creativity to transform issues from those areas to viable grand jury applications.

A second dramatic grand jury development occurred during the 1992 legislative session. It was at that time that the statutory provision relating to the persons who may be present during grand jury sessions was amended. Specifically, grand jury witnesses are now permitted to be represented by legal counsel before the grand jury. The scope of representation is limited to advising and counselling a witness. The attorney may not raise objections, make arguments or address the grand jury. The amended statute further prohibits any conduct which “otherwise disrupt[s] proceedings before the grand jury.

It is unclear how this particularly ambiguous standard will be defined. The drafters of the amendment clearly designate that the ability of a grand jury to receive legal counsel and advise is “permissive” in nature and not the creation of a right to counsel. It would seem logical that indigent witnesses would therefore not be able to secure appointed counsel.

21. State Grand Jury abuses cannot be challenged on federal due process grounds. See Alexander v. Louisiana, 405 U.S. 625, 633 (1977), Hurdat v. California, 110 U.S. 538 (1884). In fact, there is a paucity of grand jury litigation within Florida appellate decisions. The absence of federal constitutional grounds, as well as a history of litigation, offer little justification to abstain from aggressive motion practice. One bright area for potential litigation arose with the Florida Supreme Court's application of the Florida Due Process Clause to the grand jury in the context of an Indictment allegedly based on false material evidence. Anderson v. State, 574 So. 2d 87 (Fla. 1991). For a more thorough discussion of Anderson, see infra notes 35–44 and accompanying text.

24. Id. § 90.17(2). Witnesses are only permitted to be represented by one attorney. Additionally, an attorney or law firm may only represent one person or entity in any particular investigation. Id.
25. Id.
26. Id.
27. Fla. STAT. § 90.17(2) (1992).
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11. The use of the grand jury as the primary source of prosecution has evolved by practice. Statewide prosecutors are permitted to sign informations and accordingly direct

file non capital offenses. FLA. STAT. § 16.56(3) (1992).

12. See id. §§ 905.31-40.
13. Id. § 905.33.
14. Id. § 905.34.
15. Id.
17. Id.
19. Id. § 817.26.
20. Id. § 817.49.
Additionally, unavailability of counsel for a particular grand jury session would not present viable grounds to adjourn a grand jury proceeding. The statute imposes no obligation for the State or the grand jury to advise the witness that they are permitted to bring an attorney into the grand jury.

Inexplicably the amendment permitting grand jury witnesses to receive the advice of counsel does not apply to the Statewide Grand Jury.  

The amended statute contains certain built in protections which provide contempt protection as well as the opportunity to exclude attorneys from the grand jury room for their noncompliance with the prescribed limitations of the statute.

The impact of the new grand jury legislation probably will not be measurable for several years. A strong argument can be made that prosecutors, who are naturally anxious to perpetuate the exclusion of attorneys from investigative forums, will attempt to avoid the use of regular grand jury sessions to question civilian witnesses who might utilize attorneys. Consequently, prosecutors might be more inclined to use the State Attorney Investigative process to provide civilian witnesses since that mechanism permits the exclusion of attorneys. Prosecutors might be expected to limit grand jury presentations to law enforcement non-criminal witnesses who will not bring lawyers with them. Law enforcement witnesses could testify concerning the results of investigative interviews with witnesses and thus avoid the witness and attorney appearing in the grand jury. It is also likely that prosecutors will be reluctant to expose the identity of grand jurors and the operational inner workings of the grand jury process to criminal lawyers for fear that investigations might be compromised. Should a grand jury forum be necessary to an investigation, prosecutors might be able to utilize the Statewide Grand Jury as a means to escape the provisions of the newly amended statute.

Prosecutors might also advise grand jurors to avoid questioning witnesses represented by counsel within the grand jury, and instead to discuss potential grand juror questions with the prosecutor outside the presence of the witness and attorney. Of course,

the other side of the anticipated chilling effect prosecutors probably anticipate from the newly amended statute is the likely defense attorney analysis that the amended statute will open up the grand jury process and insure that grand jury proceedings are more responsible and responsive to the rights and interest of persons being investigated.

It is difficult to contemplate that defense attorneys are going to easily conform their conduct to the limitations set forth in the amended statute and merely act as an advisor to the witness without any interaction with the grand jury. Defense attorneys representing witnesses should be expected to seek a de facto expansion of their role once they are inside of the grand jury room. These anticipated expansion sojourns will likely produce a flurry of litigation and ultimate appellate review.

Another interesting issue should be the available remedy, if any, for a prosecutor's non-compliance with the amended statute. In particular, the amended statute's labelling of the availability of counsel as being "permissive" as opposed to being a "right" brings into issue whether the noncompliance with the statute affords any viable remedy to a witness. Even more questionable is whether a defendant indicted by a grand jury would have any standing or recognizable claim to litigate the failure of the prosecutor to comply with the amended statute while questioning a witness. Defendants would appear to be limited to applying for a contempt order against the offending prosecutor as opposed to any remedy such as the exclusion of witnesses or the dismissal of an indictment.

The third significant grand jury development was set forth in the Florida Supreme Court's holding in Anderson v. State. In Anderson, the court concluded that the due process clause of the Florida Constitution is violated if a prosecutor permits a trial to proceed based upon an indictment which the prosecutor knows is based on perjured, material testimony without informing the court, opposing counsel and the grand jury. Although the false testimony in Anderson was not materially false and not violative of a due process right, the supreme court unequivocally

28. Id. § 905.17(5).
29. Id. § 905.17(4).
30. The authority for State Attorneys to summon witnesses for testimony as part of an investigation at the State Attorney's Office is found in FLA. STAT. § 27.04.
32. See id. § 905.17(1), (2).
33. The authors do not seek to encourage or advocate noncompliance. Obviously, any intentional noncompliance raises significant ethical questions.
34. See id. § 905.17(1), (2).
35. 574 So. 2d 87 (Fla. 1991).
36. The Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." FLA. CONST. art. I, § 9.
37. 574 So. 2d at 91-92.
38. Id. at 92.
Additionally, unavailability of counsel for a particular grand jury session would not present viable grounds to adjourn a grand jury proceeding. The statute imposes no obligation for the State or the grand jury to advise the witness that they are permitted to bring an attorney into the grand jury.

Inexplicably the amendment permitting grand jury witnesses to receive the advice of counsel does not apply to the Statewide Grand Jury.28 The amended statute contains regulations which provide contempt protection as well as the opportunity to exclude attorneys from the grand jury room for their noncompliance with the proscribed limitations of the statute.29

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Although the statute offers the availability of counsel as a "permissive" opportunity as opposed to being a right and although the Statewide Grand Jury is excluded, practitioners should attempt to seek relief from the court to permit counsel to attend the Statewide Grand Jury with a witness.

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concluded that a viable due process claim would result in the dismissal of an indictment.\textsuperscript{39}

The significance of \textit{Anderson} must be measured in terms of the supreme court's willingness to apply the Florida due process clause to grand jury proceedings. With the unavailability of federal due process claims\textsuperscript{40} to state grand juries, the \textit{Anderson} decision potentially molds an entire area of grand jury litigation based upon state due process violations.

The importance of \textit{Anderson} was accentuated following the recent holding of the United States Supreme Court in \textit{United States v. Williams}.\textsuperscript{41} In \textit{Williams}, the Supreme Court determined that a federal court had no power to enforce the prosecutor's obligation to protect the fundamental fairness of proceedings before the grand jury by offering known exculpatory evidence to the grand jury.\textsuperscript{42} In reaching its conclusion, the Supreme Court rejected the argument that the inherent supervisory power of the judiciary could be utilized to require the presentation of exculpatory evidence to the grand jury.\textsuperscript{43} In a particularly stinging dissent, Justice Stevens, joined by Justices Blackmun, O'Connor and Thomas, stated:

\textit{We do not protect the integrity and independence of the grand jury by closing our eyes to the countless forms of prosecutorial misconduct that may occur inside the secrecy of the grand jury room. After all, the grand jury is not merely an investigatory body; it also serves as a protector of citizens against arbitrary and oppressive governmental action.}\textsuperscript{44}

While the federal court's "supervisory powers" do not extend to state court proceedings, the reluctance to intercede in federal grand jury matters reflects a basic hesitancy to utilize any federal judicial power to correct any grand jury abuse. Thus, the Florida Supreme Court's willingness to utilize

\textit{the Florida State Constitution to remedy grand jury abuse should be viewed by practitioners as an attractive arena to litigate questionable grand jury practices.}

\section{III. DISCOVERY}

Florida trial and appellate courts are frequently called upon to resolve disputes relating to discovery.\textsuperscript{45} The attention addressed to these disputes provides an enormous unnecessary commitment of judicial energies. It would be impossible to calculate either the quantity or percentage of judicial resources utilized during the past eighteen months to resolve discovery problems. However, it is possible to identify the areas in which discovery issues resulted in significant appellate decisions.

Three basic issues dominate appellate decisions concerning discovery. Initially, courts have determined whether a party has in fact withheld information which they were required to disclose. A second line of cases concerns whether a trial court properly considered the alleged discovery violation. Generally, these cases concern whether the court conducted an appropriate \textit{Richardson} hearing.\textsuperscript{46} The final area of consideration involves whether the remedy employed by the court for the discovery violation was appropriate. During the past eighteen months, Florida appellate courts have addressed each of these three areas.

One area of viable litigation relates to the scope of a party's obligation within the discovery rules. In \textit{State v. Mashke},\textsuperscript{47} the Second District Court of Appeal reviewed the necessity of the State of Florida to reveal the identity of a confidential informant at an \textit{in camera} hearing. In \textit{Mashke}, the State refused to disclose the identity of the informant and the trial court dismissed the Information. The Second District reversed the dismissal order and determined that the State of Florida had no obligation to reveal the identity of an informant it did not intend to call as a witness at trial.\textsuperscript{48} Additionally, the burden rested with the defendant to establish with sworn testimony the particularized need of the defense to utilize the informant.

\textit{Id. at 91-92 (citing \textit{State v. Glossom}, 462 So. 2d 1082, 1085 (Fla. 1985)).}

\textit{See supra note 21.}

\textit{Id. at 1745-46.}

\textit{Id. at 1743-44.}

\textit{Id. at 1753 (citation omitted).}

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39. Id. The Anderson court specifically concluded that:

The state violates [the Florida Constitution's Due Process clause] when it requires a person to stand trial and defend himself or herself against charges that it knows are based upon perjured, material evidence. Governmental misconduct that violates a defendant's due process rights under the Florida Constitution require dismissal of criminal charges.

Id. at 91-92 (citing State v. Glossom, 462 So. 2d 1082, 1085 (Fla. 1985)).

40. See supra note 21.


42. Id. at 1745-46.

43. Id. at 1743-44.

44. Id. at 1753 (citation omitted).
Since the defendant in Mashke failed to satisfy that burden, disclosure was not mandated. 49

Balancing the Mashke decision is the Florida Supreme Court's ruling in State v. Tascarella. 50 In Tascarella, the court affirmed the lower court's exclusion of federal agents from testifying at trial when the agents refused to appear at pre-trial depositions. 51 The Supreme Court rejected the State of Florida's argument that the defendant was obligated to seek the approval of the United States Department of Justice to permit the two federal agents to testify. The court concluded that since Tascarella's case arose in State court, State procedural rules controlled the disposition of the case. 52 Accordingly, despite the existence of contrary federal regulations which restricted federal agents from appearing at the depositions, the Supreme Court determined that the State had violated its discovery obligations through the agents non-appearance. 53

Two significant cases during the past eighteen months concern the failure of the prosecution to provide the defendant, prior to the time of trial, with an accurate and complete description of oral statements made by the defendant. In White v. State, 54 the Fourth District Court of Appeal reversed a conviction when a witness at trial testified about an oral statement of the defendant which was radically dissimilar to the oral statement provided on discovery. In Rainey v. State, 55 a conviction was reversed due to the non-disclosure of a statement by a state's witness to the defense. The Second District Court of Appeal followed the Fourth District Court of Appeal 56 in determining that the failure of a defendant to depose a known witness does not mitigate the state's failure to disclose the existence of the statements to the defendant as part of discovery. 57

The appropriate procedure for a court to follow once it is determined that a party has failed to comply with a required discovery obligation is to conduct a hearing pursuant to the Florida Supreme Court's holding in Richardson v. State. 58 This inquiry which is commonly known as a Richardson hearing, requires that:

At a minimum the scope of this inquiry should cover such questions as whether the state's violation was inadvertent or willful, whether the violation was trivial or substantial, and, most importantly, whether the violation affected the defendant's ability to prepare for trial. 59

In practical terms, a Richardson hearing is not complex nor time consuming. From the context of judicial economy, a trial judge is always more prudent in conducting a Richardson hearing as opposed to refusing to inquire and make findings. Incredibly, during the past eighteen months, trial judges in Florida have ignored the prudent approach and refused to conduct Richardson hearings. In many of those instances, the results resulted in reversals of convictions. For instance, in Livingston v. State, 60 a defendant's conviction was reversed due to the trial judge's refusal to conduct a Richardson hearing and the resultant exclusion of an essential defense witness. Defense counsel had only learned of the defense witness during voir dire examination and had offered to agree to a continuance in order to offset any prejudice. 61 The defense counsel also requested a Richardson hearing to demonstrate his lack of culpability in the late disclosure as well as to offer alternative remedies short of exclusion of the essential witness. 62 The action of the trial court in refusing a Richardson hearing request, as well as excluding the witness, illustrates the imprudence of a trial court refusing to take the short period of time to follow the law. Of course, for the criminal defendant who is convicted and incarcerated pending appeal, the refusal of the trial court to take only a few moments to conduct a Richardson hearing can have monstrous effects.

In McLymont v. State, 63 a manslaughter and attempted murder conviction were reversed due to the trial judge's refusal to conduct a Richardson hearing concerning a shotgun which the State utilized as part of a trial demonstration concerning the alleged offense. 64 The trial court incorrectly refused to conduct the Richardson hearing even though the demonstration gun had not been provided in discovery. 65 Similarly, the

\[\text{https://nsuworks.nova.edu/nlr/vol17/iss4/14}\]
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49. Id.
50. 580 So. 2d 154 (Fla. 1991).
51. Id. at 155.
52. Id. at 157.
53. Id.
57. Rainey, 596 So. 2d at 1296.
58. 246 So. 2d 771 (Fla. 1971).
59. State v. Hall, 509 So. 2d 1093, 1096 (Fla. 1987) (citing Richardson, 246 So. 2d at 775).
60. 575 So. 2d 1349 (Fla. 4th Dist. Ct. App. 1991).
61. Id.
62. Id. at 1349-50.
64. Id. at 710.
65. Id.
First, Fourth, and Fifth each reversed convictions due to the failure of the trial court to conduct an appropriate Richardson hearing.

Trial courts continue to experience difficulty in determining the appropriate sanction for discovery violations. In Griffin v. State, the First District Court of Appeal reversed a conviction based upon the trial court’s refusal to grant a continuance to a defendant based on the late disclosure of a new material witness the day before trial. Likewise, in State v. Theriault, the Fifth District Court of Appeal determined that disposal of an information was not an appropriate sanction where there was insufficient proof of prejudice to the defendant based upon the discovery violation as well as the failure of the trial court to evaluate alternative, less onerous sanctions short of dismissal. Similarly, the exclusion of two defense witnesses due to late disclosure was the basis of reversal of a conviction by the Third District Court of Appeal in McDugle v. State. The Third District concluded that the trial court had failed to consider the prejudice flowing from the late disclosure as well as the appropriateness of alternative sanctions.

IV. BRADY VIOLATIONS

One of the most basic components of the criminal justice system imposes upon the prosecution the duty to disclose favorable evidence to the accused which is both material and exculpatory. Failure of the prosecutor to satisfy this duty is commonly described as a Brady violation, based upon the legendary United States Supreme Court case. The evidence must be material to the guilt or punishment of the accused. Evidence is considered material only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." The Court has defined a "reasonable probability" as one which

70. 590 So. 2d 993 (Fla. 5th Dist. Ct. App. 1991).
72. Id. at 661.
74. Id.
75. Id. at 87.
77. Id.
79. Brady, 373 U.S. at 83.
81. 575 So. 2d 170 (Fla. 1991).
82. Id. at 171.
83. Id. at 172.
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The United States Supreme Court has held that the prosecution’s suppression of evidence favorable to the accused violates due process of law where the evidence is material to the defendant’s guilt or punishment.

To establish a *Brady* violation, a defendant must prove the following:
1. That the Government possessed evidence favorable to the defendant (including impeachment evidence);
2. That the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence;
3. That the prosecution suppressed the favorable evidence; and
4. That had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceeding would have been different.

The four-pronged *Brady* test leaves the Court with broad discretion in determining the existence of *Brady* violations. In the past eighteen months, the Supreme Court of Florida has addressed the issue of the existence of *Brady* violations in cases ranging from possible suppression by the prosecution to the possible effect upon the outcome of the case.

In *Hegwood v. State*, the Court reviewed the prosecution’s suppression of the initial telephone interview of a State witness where the witness could not identify the defendant. The witness made a positive identification during a later photo-lineup. The Court reasoned that the State is not responsible for actively assisting the defense in investigating its case, and that the prosecution had disclosed the existence of the witness and the witness’s positive identification in a timely manner. Under this rationale, the Court denied acknowledgement of a *Brady* violation and upheld conviction for first-degree murder. It should be obvious from the court’s holding in *Hegwood* that the right of a defendant to conduct depositions in...

70. 590 So. 2d 993 (Fla. 5th Dist. Ct. App. 1991).
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criminal cases requires that practitioners aggressively attempt to investigate all potential exculpatory evidence. Practitioners should also consider the availability of the Bill of Particulars to flush out beneficial evidence. 85

One of the traditional Brady issues involves the suppression of exculpatory evidence by the prosecution. The Florida Supreme Court has repeatedly observed that "[i]n the absence of actual suppression of evidence favorable to the accused . . . the state does not violate due process in denying discovery." 86 In Breedlove v. State, 99 the defendant claimed that the State had suppressed knowledge of the criminal activities of the detectives who testified on behalf of the State, and that information was necessary to impeach the credibility of the detectives. 99 The Florida Supreme Court acknowledged that "the state may not withhold favorable evidence in the hands of the police, who work closely with the prosecutor." 95 However, the Court reasoned that the prosecution did not have knowledge of the detective's criminal activities for which they were later indicted, and therefore, could not be held to have constructive notice of the information. 99 Thus, due to the absence of suppression by evidence by the prosecution, the Supreme Court of Florida did not acknowledge the existence of a Brady violation. 101

Similarly, in Steinhorst v. State, 94 the Florida Supreme Court refused to find a Brady violation where the defense claimed that certain summaries of various witness interviews taken by the Florida Department of Law Enforcement in the course of its investigation were necessary for impeachment purposes but were suppressed by the prosecution. 100 The Florida Supreme Court reviewed the alleged Brady material and concluded that a portion of the summaries were unnecessary for impeachment purposes and the remaining portion would probably not be admissible at trial anyway.

Broader discretion has been practiced by the Court when determining the materiality of evidence suppressed by the prosecution. As previously stated, in order to prevail on a Brady claim, one factor the defendant must establish is that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. 101 In Cruse v. State, 95 the defendant appealed a first-degree murder conviction claiming that the State's failure to disclose necessary psychiatric evidence violated the defendant's due process rights. At an in camera hearing prior to trial, the State disclosed the names of two mental health experts who had been consulted but would not be testifying at trial. 99 The trial judge determined that this information was not Brady evidence and would not have to be disclosed to the defense. 100 During review, the Supreme Court of Florida used its broad discretionary power to determine the importance of such testimony for the defense and concluded that it would have been "merely cumulative in light of the tremendous amount of expert testimony at trial . . . ." Therefore, the court affirmed the decision of the lower court. 95 Similarly, in Roudy v. State, 96 the Court found that documentary evidence suppressed by the prosecution relating to the immunity granted to a State witness was not Brady evidence in that it would have been cumulative impeachment evidence. After review of the record, the Court further concluded that there was no reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. 100

A further example of the Court's restrictive Brady analysis was set forth in Jennings v. State, 102 where the Florida Supreme Court affirmed the trial court's decision that a taped interview of a State witness which was suppressed by the State was not a Brady violation. The trial court stated that the evidence would not have aided the defense theory initially asserted by the defendant and that, in the court's opinion, better evidence was available to the defense regarding this theory. 102 The Supreme Court of Florida agreed with the trial court's analysis and further stated that there was not a reasonable probability that the tape would have caused a different outcome at the trial. 103 It is clearly evidenced by the cases discussed that the discretionary authority given to the Court has grown from simply

85. Bill of Particulars are provided in Fla. R. CRIM. P. 3.140.
86. Delap v. State, 505 So. 2d 1321, 1323 (Fla. 1987) (quoting James v. State, 453 So. 2d 786, 790 (Fla.), cert. denied, 469 U.S. 1098 (1984)).
87. 580 So. 2d 605 (Fla. 1991).
88. Id. at 606.
89. Id. at 606 (quoting Arango v. State, 467 So. 2d 692, 693 (Fla.), vacated on other grounds, 474 U.S. 806 (1985)).
90. Id. at 606-07.
91. Id. at 609.
92. 574 So. 2d 1075 (Fla. 1991).
93. Id. at 1076.
94. Hegwood, 575 So. 2d at 172.
95. 588 So. 2d 983 (Fla. 1991).
96. Id. at 987.
97. Id.
98. Id. at 988.
99. 590 So. 2d 397 (Fla. 1991).
100. Id. at 399.
101. 583 So. 2d 316 (Fla. 1991).
103. Id. at 319.

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While some practitioners might pessimistically claim that the appellate court’s focus upon the "effect" of the withheld evidence reduces the likelihood of relief for *Brady* violations by creating a "harmless" violation standard, practitioners should attempt to present trial and appellate courts with persuasive factual authority concerning the effect of the withheld information. For instance, it would be helpful for an advocate to present expert testimony from other attorneys concerning the effect upon trial strategy of a *Brady* violation, as well as the results of a "mock jury" reviewing a case with and without the withheld evidence.

V. SEARCH AND SEIZURE

A. Anonymous Tips

In *Illinois v. Gates*, the Supreme Court addressed the issue of anonymous tips in relation to probable cause. The Court abandoned the two-prong test previously used, and established the "totality of the circumstances" approach to determine whether an informant's tip is sufficient to establish probable cause. The factors considered when examining the totality of the circumstances include the informant's veracity, reliability and basis of knowledge. In *Gates* the Court examined the tip in light of the totality of the circumstances and additionally considered the officers personal observations and independent police work executed in the case.

The factors examined when applying the "totality of the circumstances" approach to establish probable cause are also used to meet the lesser standard of reasonable suspicion. In *Alabama v. White*, the Supreme Court determined that the anonymous telephone tip, as corroborated by independent police work, exhibited sufficient indicia of reliability to provide reasonable suspicion to permit the investigatory stop of the vehicle. The Court acknowledged that "reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered in the "totality of the circumstances" . . ." Probable cause may be established through information supplied by an anonymous tipper if that information appears sufficiently reliable because of the surrounding circumstances or the nature of the information given in the tip, and the information establishes reasonable suspicion that the defendant is committing, or has committed a crime. Since the Supreme Court’s application of the "totality of the circumstances" approach in *Gates* and its further application in *White*, Florida courts have considered the same factors to apply this approach in its most recent cases. Specifically, the First, Second, and Third District Courts of Appeal have employed these standards during the past eighteen months. These applications have resulted in extended opportunities for law enforcement intrusions and potential abuses.

B. Florida Stop and Frisk Law

Florida’s Stop and Frisk Law, authorizes the temporary detention of a person when an officer has reasonable suspicion to believe the person has committed, is committing or is about to commit a crime. The stop and frisk law also permits the officer to conduct a limited search of a person where there is reasonable suspicion that the detainee is armed with a dangerous weapon. However, seizure of the object is only permitted where the officer reasonably believes the object felt during the pat-down is a weapon.

A stop is unjustified when based solely upon an officer’s observation of a black person who leans into the window of a white man’s car stopped in a high crime area and then walks away when the officer approaches.

105. The "two-prong test" was established in *Aguilar v. Texas*, 378 U.S. 108, 113 (1964) and Spinelli v. United States, 393 U.S. 410, 413 (1969). *Gates* took the elements established in *Aguilar*, and broke them into factors. *Gates*, 462 U.S. at 214
106. Id. at 214.
108. Id.
110. Id. at 330.
111. Id.
112. Id.
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106. Id. at 214.
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117. Id.
Nor is a stop justified merely because the individual had engaged in such activity in the presence of known drug dealers or because such person had been present at other drug transactions.\(^\text{120}\) Similarly, an officer lacks founded suspicion to detain an individual who he merely observes riding a bicycle at 2 a.m. in the area of ongoing burglary.\(^\text{121}\) However, the officer may develop a founded suspicion to detain an individual based upon the officer's observation, training and experience.\(^\text{122}\) Accordingly, an officer is justified to detain an individual upon the observation of that individual leaning into a vehicle in a high crime area and exchanging money or drugs.\(^\text{123}\) Further, an officer is believed to have well founded suspicion of unlawful activity when the officer obtains knowledge that the registered owner of the vehicle does not possess a valid driver's license.\(^\text{124}\)

A limited search of the detainee is permissible when the officer has probable cause to believe the individual is armed with a dangerous weapon.\(^\text{125}\) "The Supreme Court has construed the term probable cause to mean reasonable belief in the context of the stop and frisk law."\(^\text{126}\) It is impermissible for an officer to stop and frisk an individual where the officer does not reasonably believe the individual is armed with a dangerous weapon but proceeds on the basis of routine.\(^\text{127}\) Nor may an officer search into the contents of a package carried by the detainee when based on a generalized view of the circumstances and therefore lacking any reasonable belief of a threat of safety.\(^\text{128}\) Thus, in the past eighteen months, courts have enforced the expressly limited scope permitted by Florida Statutes.

C. Search of Person

During the course of a legitimate frisk for weapons, an officer is only permitted to seize objects which the officer reasonably believes could be weapons, despite the officer's suspicion that the object may be evidence of a crime.\(^\text{129}\) However, the officer may lawfully seize contraband if the officer develops probable cause during the stop and frisk.\(^\text{130}\) To determine whether a police officer has sufficient probable cause to believe that a suspect is carrying illegal contraband, one must look to the totality of the circumstances existing at the time.\(^\text{131}\) When considering the totality of the circumstances, an officer's training and experience are relevant to provide specific facts from which the officer could reasonably conclude the existence of unlawful activity.\(^\text{132}\) In Doctor v. State,\(^\text{133}\) the Supreme Court of Florida reviewed the seizure of contraband during the course of a stop and frisk. The pat-down for a weapon was the result of an obvious bulge in the detainee's groin area.\(^\text{134}\) The Supreme Court found that, had the initial stop been valid, the search of the detainee's groin area and the seizure of the contraband would have been justified based upon the officer's specific significant experience with this particular aspect of drug trafficking.\(^\text{135}\)

However, in the case of a random and suspicionless stop in a public airport, voluntary consent to search one's person does not extend to a pat-down of the groin area.\(^\text{136}\) Once it is determined that the consent given was voluntary, the standard for measuring the scope of a detainee's consent is whether a reasonable person would have understood that the consent given encompassed a search as intrusive as the search of that person's groin area.\(^\text{137}\) Due to the expectation of privacy with respect to a person's groin area, an officer must obtain specific consent for such an intrusive search.\(^\text{138}\) Specific consent to search the groin area of a detainee is also required during a random search of persons on a public bus.\(^\text{139}\) However, a strip search of a detainee is permissible as long as the officer has reliable detailed information which under the totality of the circumstances was

122. State v. Warsah, 580 So. 2d 317 (Fla. 3rd Dist. Ct. App. 1991) (officer's observation, training and experience led him to have a founded suspicion that the defendant was inhaling cocaine).
123. Winters, 578 So. 2d at 5.
127. Id.
130. Id. at 728 n.1.
132. Id.
133. Id. at 444.
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123. Winers, 578 So. 2d at 5.
125. FLA. STAT. § 901.151 (1989).
127. Id.
130. Id. at 726 n.1.
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sufficient to establish probable cause for a formal arrest.140

D. Scope of Search

The scope of a suspect’s consent should be measured under a standard of objective reasonableness.141 The issue to be determined is what would have been understood by the typical reasonable person regarding the exchange between the officer and the suspect.142 This standard has been applied to determine the scope of a person’s consent to search their person and further extended to determine the scope of consent to search a vehicle.143

In Florida v. Jimeno,144 the Supreme Court addressed the issue of whether a person’s consent to search a vehicle may extend to closed containers found inside the vehicle. The Court reasoned that the scope of the search is generally defined by its expressed object and the person may delimit the scope of the search as he or she chooses.145 In this case, the officer expressly requested consent to search the vehicle because he had reason to believe there were narcotics in the car.146 The Court concluded that it was objectively reasonable for the officer to believe that the general consent to search the vehicle included a search of any container in the vehicle which could conceal narcotics.147 However, the Court expressly noted that it would be unreasonable for the consent to search to extend to a locked briefcase within the trunk.148

Yet, an officer is justified in extending the search if, while conducting the consent search, the officer develops probable cause to believe contraband may be present.149 Once an officer develops probable cause, a warrantless search may be conducted of every part of the vehicle and its contents.

141. Jimeno, 111 S. Ct. at 1803-04.
142. Id.
145. Id. at 1804.
146. Id. at 1802.
147. Id. at 1804.
148. Id. (citing State v. Wells, 539 So. 2d 464 (Fla. 1989), aff’d on other grounds, 445 U.S. 1 (1991)).

including anywhere the object of the search may be concealed.150 In State v. Jones,151 after being given permission to search the vehicle, the officer inspected the exterior of the vehicle and observed a modified gas tank containing contraband. The court held that the officer developed probable cause during the consent search to extend the search beyond the interior of the vehicle.152 Further, in Minnis v. State,153 the warrantless search of the vehicle to disclose contraband was impermissible because probable cause was focused on the vehicle in general and not on a particular container.

E. Scope of Search of a Residence

A search warrant is valid when issued by a neutral magistrate on the basis of an affidavit which specifically sets forth facts establishing probable cause. The Fourth Amendment of the United States Constitution requires that a warrant "particularly describ[e] the place to be searched, and the ... things to be seized."154 Particular care must be taken when the warrant will be issued in order to search a private dwelling. A private dwelling is a place where people enjoy the highest reasonable expectation of privacy.155 When an affidavit lacks a factual basis to establish probable cause, it falls short of constitutional requirements.156 As such, the scope of the warrant does not extend beyond the specifications in the probable cause affidavit.157

Yet, [w]hen a person invites an undercover [police] officer into his or her home to conduct unlawful business, the person waives any right to privacy to the extent that the home is considered a commercial center where warrantless arrests upon probable cause are lawful.158 Once a police officer is invited into a home to participate in the commission of a felony, a search warrant is not required for back-up officers to enter the residence.

150. Ross, 456 U.S. at 822.
151. 592 So. 2d 363 (Fla. 5th Dist. Ct. App. 1992).
152. Id. at 365.
154. U.S. CONST. amend. IV.
157. Bergeron v. State, 583 So. 2d 790 (Fla. 2d Dist. Ct. App. 1991) (officer may not search a person on the curtilage when the search warrant authorizes search of a home and persons within the home).
sufficient to establish probable cause for a formal arrest.\footnote{140}

D. Scope of Search

The scope of a suspect’s consent should be measured under a standard of objective reasonableness.\footnote{141} The issue to be determined is what would have been understood by the typical reasonable person regarding the exchange between the officer and the suspect.\footnote{142} This standard has been applied to determine the scope of a person’s consent to search their person and further extended to determine the scope of consent to search a vehicle.\footnote{143}

In \textit{Florida v. Jimeno},\footnote{144} the Supreme Court addressed the issue of whether a person’s consent to search a vehicle may extend to closed containers found inside the vehicle. The Court reasoned that the scope of the search is generally defined by its expressed object and the person may delimit the scope of the search as he or she chooses.\footnote{145} In this case, the officer expressly requested consent to search the vehicle because he had reason to believe there were narcotics in the car.\footnote{146} The Court concluded that it was objectively reasonable for the officer to believe that the general consent to search the vehicle included a search of any container in the vehicle which could conceal narcotics.\footnote{147} However, the Court expressly noted that it would be unreasonable for the consent to search to extend to a locked briefcase within the trunk.\footnote{148}

Yet, an officer is justified in extending the search if, while conducting the consent search, the officer develops probable cause to believe contraband may be present.\footnote{149} Once an officer develops probable cause, a warrantless search may be conducted of every part of the vehicle and its contents, including anywhere the object of the search may be concealed.\footnote{150} In \textit{State v. Jones},\footnote{151} after being given permission to search the vehicle, the officer inspected the exterior of the vehicle and observed a modified gas tank containing contraband. The court held that the officer developed probable cause during the consent search to extend the search beyond the interior of the vehicle.\footnote{152} Further, in \textit{Minnis v. State},\footnote{153} the warrantless search of the vehicle to disclose contraband was impermissible because probable cause was focused on the vehicle in general and not on a particular container.

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141. Jimeno, 111 S. Ct. at 1803-04.
142. Id.
145. Id. at 1804.
146. Id. at 1802.
147. Id. at 1804.
148. Id. (citing State v. Wells, 539 So. 2d 464 (Fla. 1989), aff'd on other grounds, 495 U.S. 1 (1991)).
150. Ross, 456 U.S. at 822.
151. 592 So. 2d 363 (Fla. 5th Dist. Ct. App. 1992).
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and assist in the arrest.\footnote{159} Further, it has been established that an undercover officer who enters a residence to purchase illegal drugs and departs with the understanding he will return with the money, has implied consent to reenter the premises with back-up officers in order to assist in the arrest.\footnote{160} Yet, where the consensual entry of the undercover officer is limited to certain areas of the residence, the officer may not roam throughout the dwelling in order to observe the commission of a felony and effectuate an arrest without a warrant.\footnote{161}

However, a police officer may conduct a search of private property without a duly issued search warrant only under a few specifically established exceptions, such as consent to search the dwelling.\footnote{162} The State has the burden of establishing by clear and convincing evidence that the consent was given freely and voluntarily.\footnote{163} Consent which is simply an acquiescence to the authority displayed by the police officer's presence is not considered voluntary consent.\footnote{164} Therefore, where consent has been merely an acquiescence to authority, any subsequent consent obtained to conduct a complete search of the premises is considered invalid.\footnote{165}

F. Searches in Public Places

Recently, the United States Supreme Court addressed the issue of whether the Fourth Amendment permits police officers to approach individuals at random on buses to ask them questions and to request consent to search their luggage.\footnote{166} The Court stated that the crucial test is whether, taking into account all of the surrounding circumstances, a reasonable person would feel free to decline the officer's requests or terminate the encounter.\footnote{167} The Court reasoned that the seizure of an individual has occurred when the officer restrains the person by means of physical force or by a display of authority.\footnote{168} Accordingly, during a consensual encounter, the officer may ask the individual questions and request consent to search the person's luggage as long as they inform the individual that they have a right to refuse to consent.\footnote{169} Therefore, where the consent to search is free from any intimidation and a reasonable bus passenger would feel free to refuse continuing the encounter, the search and subsequent seizure does not violate the guarantees of the Fourth Amendment.\footnote{170}

This standard has been consistently applied to encounters occurring in public places such as airport terminals and train stations.\footnote{171} However, even when the initial encounter may be valid, there may be an unlawful seizure when the facts do not establish reasonable suspicion or probable cause.\footnote{172} Accordingly, the seizure of a passenger's luggage at an airport can only be justified on the basis of probable cause.\footnote{173} Similarly, under the totality of the circumstances, an investigatory detention of a person's luggage must be supported by factors which establish reasonable suspicion of criminal activity.\footnote{174}

G. Abandonment

Until the recent Florida Supreme Court decision in \textit{Anderson v. State},\footnote{175} the courts have been split on the issue of whether an abandonment made after an illegal stop was considered involuntary. Some courts found that evidence seized after improper police action is considered the fruit of an illegal detention; while other courts have held that an abandonment after an illegal stop is voluntary because the person has no expectation of privacy in the area where the object has been discarded.\footnote{176} However,
and assist in the arrest.\textsuperscript{159} Further, it has been established that an undercover officer who enters a residence to purchase illegal drugs and departs with the understanding he will return with the money, has implied consent to reenter the premises with back-up officers in order to assist in the arrest.\textsuperscript{160} Yet, where the consensual entry of the undercover officer is limited to certain areas of the residence, the officer may not roam throughout the dwelling in order to observe the commission of a felony and effectuate an arrest without a warrant.\textsuperscript{161}

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in *Anderson* the supreme court affirmatively answered the issue of whether abandonment of property after an illegal police stop, but not pursuant to a search, can be considered involuntary.\(^{177}\) The court, following the reasoning in *United States v. Beck,*\(^{178}\) stated that, "while it is true that a criminal defendant's voluntary abandonment of evidence can remove the taint of an illegal stop or arrest, it is equally true that for this to occur the abandonment must be truly voluntary and not merely the product of police misconduct."\(^{179}\) Therefore, the court found that, "[a]n abandonment which is the product of an illegal stop is involuntary, and the abandoned property must be suppressed."\(^{180}\)

The issue at hand in abandonment cases is whether the detention was lawful or unlawful resulting in suppression of the seized evidence. Under the totality of the circumstances the officer must have a founded suspicion of criminal activity in order to justify a detention. Under the totality of the circumstances, an officer lacks a reasonable suspicion of criminal activity simply because a person in a high crime area walks from the approaching officer.\(^{181}\) However, a brief detention is justified when a police officer observes a person in a high crime area engage in several hand transactions with others and then discard an object when the officer approaches.\(^{182}\)

In cases where the encounter is consensual, the abandonment of property is considered voluntary since the individual has no expectation of privacy in the area where the item has been discarded.\(^{183}\) When an individual consents to speak with a police officer and abandons a piece of property in the course of the conversation, the abandonment is considered voluntary.\(^{184}\) These actions constitute voluntary abandonment in that they are not responses to any police request or demand. Thus, property which is abandoned voluntarily or seized as a result of a lawful detention is admissible in a criminal proceeding.

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177. *Anderson*, 591 So. 2d at 613.
178. 602 F.2d 726 (5th Cir. 1979).
179. *Anderson*, 591 So. 2d at 613 (quoting *Beck*, 602 F.2d at 729-30 (citations omitted)).
180. *Id*.
182. See *Anderson*, 591 So. 2d at 611.
184. See *Hollinger*, 596 So. 2d at 521; *Wade*, 589 So. 2d at 322; *Starke*, 574 So. 2d at 1214.
186. *Id.* 3.152(b).
187. *Id*.
188. 596 So. 2d 447 (Fla. 1992).
189. *Id* at 449.
190. *Id* at 450.
191. *Id*.
192. *Id*.
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\(^{180}\) Id.
\(^{181}\) See Grant v. State, 596 So. 2d 98 (Fla. 2d Dist. Ct. App. 1992);
\(^{182}\) See Anderson, 591 So. 2d at 611.
\(^{184}\) See Hollinger, 596 So. 2d at 521; Wade, 589 So. 2d at 322; Starke, 574 So. 2d at 1214.

\(^{185}\) Fla. R. Crim. P. 3.152(a).
\(^{186}\) Id. 3.152(b).
\(^{187}\) Id.
\(^{188}\) 596 So. 2d 447 (Fla. 1992).
\(^{189}\) Id. at 449.
\(^{190}\) Id. at 450.
\(^{191}\) Id.
\(^{192}\) Id.

VI. SEVERANCE

The Florida Rules of Criminal Procedure provide two primary types of severance. Severance of offenses, as set forth in Rule 3.152(a), allows for severance of two or more offenses improperly charged in the same charging document or if two or more related offenses tried together would result in a fair determination of guilt or innocence.\(^{185}\) Severance of defendants as set forth in rule 3.152(b), permits for severance and separate trials of multiple defendants in order to protect a defendant's speedy trial right or to promote fair determinations of a defendant's guilt or innocence.\(^{186}\) Rule 3.152(b) additionally sanctions severance of defendants if a codefendant's statements make references to a defendant and are inadmissible against a defendant.\(^{187}\)

Surprisingly, given the volume of multiple offenses and/or multiple defendant cases, the past eighteen months reflected a relatively small number of severance decisions. Appellate attention focused primarily upon the issue of severance of offenses. In Crossley v. State,\(^{188}\) the Florida Supreme Court reversed a defendant's robbery convictions based upon a finding that the trial court had abused its discretion in refusing to sever allegations of the two robberies occurring within hours of one another and only a few miles apart. In reaching its conclusion, the Supreme Court carefully attempted to guide trial courts who would be required to determine severance of offense motions. The need for guidance and caution is reflected in the Supreme Court's concern that the evidence of one offense might have the effect of bolstering the proof of the other offense.\(^{189}\)

The Crossley Court required that a "meaningful relationship" between the two offenses exist before permitting a joint trial.\(^{190}\) The requirement of a meaningful relationship mandates that trial courts find more than a mere overlap of facts between the two offenses or as in Crossley, a proximity in time and location of the multiple offenses.\(^{191}\) Crossley also rejected the proposition that severance would not be mandated where a defendant possessed a vehicle stolen in an initial robbery at the time of the defendant's arrest for a second robbery.\(^{192}\) The supreme court reasoned that a joint
trial could not be sanctioned if the evidence failed to establish that the stolen vehicle from the first robbery was utilized in the second robbery.\textsuperscript{193}

While the \textit{Crossley} decision resolved an apparent conflict between the First District Court of Appeal and the Third District Court of Appeal, its precedential value might be limited to the unique facts of the case. More significant than its ultimate conclusion that the trial court abused its discretion is the supreme court's sensitivity and adherence to the protection of a defendant's right to a fair trial absent unfair bolstering. This sensitivity is particularly significant given the convenience and judicial economy afforded by a joint trial.

In \textit{May v. State},\textsuperscript{194} the Fifth District Court of Appeal applied the holding of \textit{Crossley} and reversed a conviction of multiple drug conspiracies where the two transactions were separated in time, geographic location and did not involve one continuous sequence of events. The \textit{May} court rejected the proposition that similar offenses committed by the same two persons justifies the joinder of the offenses for trial.\textsuperscript{195}

The holding in \textit{Crossley} should not be misinterpreted to conclude that appellate courts discount the significance of judicial economy in determining severance issues. Reflecting appellate concern for judicial economy was the holding in \textit{Velez v. State}.\textsuperscript{196} In \textit{Velez}, the Third District Court of Appeal endorsed the utilization of a dual jury system to diffuse the severance issue. According to \textit{Velez}, only two other Florida courts, the First and Second District Court of Appeals, had previously permitted two juries to jointly hear a case where one of the juries would be excused and therefore insulated from inadmissible evidence concerning the defendant that the second jury would be considering.\textsuperscript{197} The \textit{Velez} opinion strongly endorsed the dual jury system as an innovative exercise of judicial economy. The concept of dual trials should be cautiously approached, however, because it requires a delicate balancing of issues to insure the prevention of prejudice and error.\textsuperscript{198} The fact that the concept has been endorsed so vehemently by the Third District should alert practitioners of its potential. The implicit dangers of dual trials should afford fertile issues of future appellate review.

\textsuperscript{193} See \textit{Crossley}, 596 So. 2d at 450.
\textsuperscript{194} 600 So. 2d 1266 (Fla. 5th Dist. Ct. App. 1992).
\textsuperscript{195} Id.
\textsuperscript{196} 596 So. 2d 1197 (Fla. 3d Dist. Ct. App. 1992).
\textsuperscript{197} Id. at 1199-90.
\textsuperscript{198} See id.

\textbf{VII. PROSECUTORIAL MISCONDUCT}

No aspect of criminal procedure generates more prolific responses than the issue of prosecutorial misconduct. The past eighteen months of Florida appellate decisions have done nothing to tarnish the attention addressed to the actions of prosecutors. While it would be unfair to castigate all prosecutors for the actions of a relative few, certain actions described in recent Florida decisions reveal that the "win at all cost" mentality is not foreign to Florida prosecutions.

In \textit{Brown v. State},\textsuperscript{199} the Fifth District Court of Appeal reversed a defendant's second degree murder conviction following a prosecutor's improper use of a defendant's six prior felony convictions during closing argument. The six felony convictions to unspecified crimes which were utilized to impeach the defendant during cross-examination were argued to the jury in summation as evidence of propensity to commit violent crimes. The prosecutor somewhat subtly attempted to establish bad character and propensity when he stated that a person with six felony convictions was "prone to be a little hotheaded, maybe a little irrational, maybe go over the handle a little bit."\textsuperscript{200}

In \textit{Killings v. State},\textsuperscript{201} the First District Court of Appeal strongly condemned a prosecutor's comments in which he was "essentially waging war against the Colombian drug lords through . . . prosecution of the defendant."\textsuperscript{202} The guilt by association trial tactics were not sufficient to mandate reversal since inexplicably no objection or motion for mistrial were made.\textsuperscript{203} The First District even went as far as to warn that attorney discipline proceedings might be inappropriate in response to "intemperate and inflammatory statements."\textsuperscript{204}

In a concurring opinion in \textit{Killings}, the Court warned that the "prosecutorial excess" displayed could eventually result in a per se rule of reversible error. As the Court quite bluntly stated:

\begin{quote}
I trust and fully expect that Florida's prosecutors are too intelligent and disciplined a lot to require a lick between their collective eyes by such a two by four to get their attention as did the proverbial mule of...
\end{quote}

\textsuperscript{199} 580 So. 2d 327 (Fla. 5th Dist. Ct. App. 1991).
\textsuperscript{200} Id.
\textsuperscript{201} 583 So. 2d 732 (Fla. 1st Dist. Ct. App. 1991).
\textsuperscript{202} Id. at 733.
\textsuperscript{203} Id.
\textsuperscript{204} Id.

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Perhaps the strongest example of judicial intervention to cure an instance of the "win at all cost" brand of prosecutorial misconduct was displayed by the Fourth District Court of Appeals in State v. Nessim. In Nessim, the Fourth District affirmed the trial court's order dismissing an indictment based upon the refusal of the State of Florida to impose "use" immunity upon a critical witness whose testimony was essential to the presentation of an individual's defense. The Nessim court adopted the rationale set forth in State v. Montgomery, that government misconduct resulting in a distortion of the fact-finding process was adequate grounds for the trial court to give the State of Florida an option to either impose statutory "use" immunity or suffer dismissal of criminal charges. In Nessim, the prosecutor had allegedly instructed the critical witness not to become involved as a witness in the case. The abhorrence and impropriety of the prosecutor withholding the opportunity of a critical witness to testify on behalf of a defendant is self-evident. However, the determination of both the trial court and the appellate court to remedy that impropriety should offer encouragement to advocates who can successfully present both the necessity of the requested testimony as well as the participation of the prosecution in the alleged misconduct.

Another component of the prosecutorial misconduct "win at all cost" arsenal is the production of testimony which is prejudicial and inflammatory. Illustrative of this methodology was a First District Court of Appeals case which involved the prosecutor's infatuation with racial "evidence" during prosecution of a black man accused of raping a white woman. Included in the prosecutor's racial prosecution game plan were questions of the rape victim concerning dating a "black boy or black man before," consorting with "black men or boys" or fighting with "a black man before." The prosecutor also asked witnesses whether the defendant had ever been known to date or have romantic relationships with a "white girl."

205. Id. at 733 (Miner, J., concurring).
207. Id. at 1346.
208. 467 So. 2d 387 (Fla. 3d Dist. Ct. App. 1985).
209. Nessim, 587 So. 2d at 1346.
210. Id.
212. Id. at 256 n.2.
213. Id. at 256 n.2.

In Gonzalez v. State, the Third District Court of Appeal reversed a conviction for sexual battery upon a child twelve years old or younger based in part upon the prosecutor's cross-examination of the defendant. In a truly amazing example of misconduct, which was labeled by the appellate court as "adjudging highly inflammatory and irrelevant evidence," the prosecutor sought to establish that the defendant desired to marry the sixteen year old sister of the victim and was, therefore, a sexual pervert.

One of the slickest means that prosecutors have attempted to improperly inflame jurors is by producing reputation testimony concerning "the area in which a crime allegedly took place." The thrust of the tactic is to have a law enforcement officer claim that the area in which the offense allegedly occurred had the reputation as a narcotic or high crime area. The testimony is not based upon any observation on the day of the alleged offense and has no nexus to the defendant. The jury is left to conclude that since the defendant was located in an area with a reputation of criminal activity, the defendant was involved in the alleged offense. Florida Appellate Courts have repudiated this tactic.

Traditional efforts by prosecutors to gain an unfair advantage surfaced in several prosecutions. Illustrating the "win at all cost" attitude was a prosecutor's attempt to introduce past contacts between a law enforcement officer and a defendant which were calculated to suggest the bad character of a defendant. The Third District Court of Appeals rejected the impropriety and reversed a resisting arrest without violence conviction. The same court reversed a conviction due to the prosecutors following question:

Q. Did Mr. Hicks make any statements to you after he was finally subdued or during the process of being induced.

A. No.

The testimony constituted an impermissible comment on the defenda-
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Q. Did Mr. Hicks make any statements to you after he was finally subdued or during the process of being induced.

A. No.221

The testimony constituted an impermissible comment on the defenda-
nt's post arrest silence. The fact that the silence was not induced by
Miranda warnings does not remove the prosecutors actions from the scope
of a state constitutional violation. 222

Prosecutorial misconduct most frequently occurs during closing argu-
ments. While traditional misconduct such as "Golden Rule" violations
were relatively rare, 223 prosecutors seemed intent upon becoming
advocates for the war on crime as opposed to mere advocates for the State
of Florida. The primary weapons in this war were attacks upon the defense and
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Each of the Florida appellate courts addressed improprieties in
prosecutor's closing arguments during the past eighteen months. Perhaps
the most flagrant example of prosecutorial misconduct was revealed in
Alvarez v. State, 224 in which fourteen specific examples of improper
closing argument comments are described. Included in the "top fourteen"
list of comments every prosecutor should never make were the following
classics. "Don't let them [the defense] confuse you, because all you will get
from the defense is tearing down. You will not get anything substantive
only inconsistencies . . ." 225 "They see a madman, a violent animal come
up to the window making demands." 226 "I went nuts every time the
defense asked . . ." 227 "So if you are nitpicking and trying to insult
somebody's intelligence, as the defense is really doing today . . ." 228 "I
would certainly be surprised if you don't believe . . ." 229 "What the
defense wants you to do is walk him, find him not guilty and turn him loose
again." 230 "He is a robber and a burglar, and don't go for anything less . . .
Can you live with the decision?" 231 "Don't let them confuse you or
insult your intelligence . . . Use your common sense. Do your part.
Excise this cancer from society." 232

While not approaching the recklessness described in Alvarez, the
Second District Court of Appeal revealed an analogous level of misconduct

222. Id. (citations omitted).
225. Id. at 1120.
226. Id.
227. Id.
228. Id.
229. Id.
230. Id.
231. Id.
232. Id. at 1120.
nt's post arrest silence. The fact that the silence was not induced by Miranda warnings does not remove the prosecutors actions from the scope of a state constitutional violation. 222

Prosecutorial misconduct most frequently occurs during closing arguments. While traditional misconduct such as "Golden Rule" violations were relatively rare, 223 prosecutors seemed intent upon becoming advocates for the war on crime as opposed to mere advocates for the State of Florida. The primary weapons in this war were attacks upon the defense and the insertion of prosecutor's personal opinions.

Each of the Florida appellate courts addressed improprieties in prosecutor's closing arguments during the past eighteen months. Perhaps the most flagrant example of prosecutorial misconduct was revealed in Alvarez v. State, 224 in which fourteen specific examples of improper closing argument comments are described. Included in the "top fourteen" list of comments every prosecutor should never make were the following classics. "Don't let them [the defense] confuse you, because all you will get from the defense is tearing down. You will not get anything substantive only inconsistencies ...." 225 "They see a madman, a violent animal come up to the window making demands." 226 "I went nuts every time the defense asked ...." 227 "So if you are nitpicking and trying to insult somebody's intelligence, as the defense is really doing today ...." 228 "I would certainly be surprised if you don't believe ...." 229 "What the defense wants you to do is walk him, find him not guilty and turn him loose again." 226 "He is a robber and a burglar, and don't go for anything less .... Can you live with the decision?" 230 "Don't let them confuse you or insult your intelligence .... Use your common sense. Do your part. Excise this cancer from society." 231

While not approaching the recklessness described in Alvarez, the Second District Court of Appeal revealed an analogous level of misconduct in Brown v. State. 232 In Brown, the prosecutor's closing argument began with a claim that "it seemed to him that there was something wrong with the criminal justice system when a victim of a crime has to be victimized again by having to testify concerning the events of a crime and have his character impugned." 233 The prosecutor later stated that when the case was over, he "wanted to be able to call the victim and say that the jury had the courage to see the truth and that he was not victimized a second time." 234 The prosecutor's trifection of impropriety concluded with the comment that the jurors were the "only ones that could give the victim back his dignity." 235

Similarly, in State v. Ramos, 235 the Fourth District Court of Appeal reversed a conviction based upon a prosecutor's closing argument in which the defendant was described as "the very type of person he was looking for" as targets of ongoing narcotics investigations. 236 The prosecutor continued that "[s]ociety's best interest is served by convicting the kingpin over the supplier in this case ...." 237 Finally, the prosecutor stated, "[a]nd Susan testified, I believe she testified totally truthfully to you." 238

The most disturbing aspect of the reversed cases is that a trial court deemed it appropriate to deny the requested relief of a mistrial and thus sanctioned the cited misconduct. It would appear that practitioners should aggressively litigate the propriety of prosecutors' comments during the State's closing arguments. Apparently, many prosecutors have not gotten the message that the "win at all cost" war on crime mentality will not be tolerated by Florida Appellate Courts. Perhaps the implementation of Florida Bar disciplinary actions will assist in communicating the need for reform. It would also be appropriate for State Attorney's Offices to require attorneys who are accused of improper argument to personally brief that issue and appear before the Appellate Court to argue the propriety of their comments. Then prosecutors, knowing that they will be held personally accountable and must personally justify their comments, might adjust their "win at all cost" short-term thinking.

222. Id. (citations omitted).
225. Id. at 1120.
226. Id.
227. Id.
228. Id.
229. Alvarez, 574 So. 2d at 1120.
230. Id.
231. Id.
232. Id. at 1121.

234. Id. at 1211.
235. Id.
236. Id.
238. Id. at 362.
239. Id.
240. Id.
VIII. ABUSE OF JUDICIAL DISCRETION

While Florida courts recognize the tremendous adversity confronting trial judges in the administration of justice, appellate courts have not ignored the unsuitability of abuses in the discretion exercised by the trial courts. During the past eighteen months, numerous actions of trial judges were found to be abusive and requiring relief. Although difficult to categorize, these abuses of discretion merit individual discussion.

In Love v. State, 241 the Third District Court of Appeal reversed a conviction based upon a trial court's instruction to the jury panel during jury selection that "the defendant does not have to testify, will probably not testify, you will not hear both sides of the story." 242 The Love court concluded that the trial court's comment constituted an impermissible comment on the defendant's right not to testify. 243

The Fourth District Court of Appeal concluded in Lamar v. State, 244 that the trial court abused its discretion by limiting closing argument to fifteen minutes. Lamar relied upon the analysis of the Third District Court of Appeal 245 that under ordinary circumstances closing arguments limited to thirty minutes or less were suspect merit judicial scrutiny.

Abuses of discretion were also defined in terms of adverse rulings to the State of Florida. In State v. Macon, 246 the trial court's dismissal of an Information was deemed to be an abuse of discretion mandating reversal of a conviction. In Macon, the trial court refused to accept a defendant's guilty plea and consequently inquired whether the State was prepared for trial. The prosecution answered in the negative and prior to an opportunity to apply for a continuance, the trial judge dismissed the Information. 247

The Macon decision must be viewed within the context of the Fourth District Court of Appeal decision in State v. McCarthy, 248 in which the court affirmed the trial court's denial of the State of Florida's application for a continuance of a suppression hearing when subpoenaed State witnesses failed to appear. The failure of the witnesses to appear and testify resulted in suppression of evidence. 249

242. Id. at 371 (emphasis added).
243. Id.
244. 583 So. 2d 771 (Fla. 4th Dist. Ct. App. 1991).
247. Id. at 219.
248. Id. at 1167.
249. Id. at 1167.
250. Id. at 1166.
252. Id.
253. Id. at 1169.
255. Id. at 1167.
257. Id. at 1167.
258. Id. at 651.
259. Id. at 653.
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an errand.\footnote{Id. at 651.} In \textit{Porr v. State},\footnote{Id. at 944-45 (Fla. 2d Dist. Ct. App. 1991).} the Second District Court of Appeal found that the trial judge committed reversible error when the trial judge, in violation of rule 3.410 of the Florida Rules of Criminal Procedure, provided a written answer to a jury question without ever notifying counsel for the State or the Defense.\footnote{Id. at 83.}

Additionally, in \textit{McKinney v. State},\footnote{Id. at 379.} the Supreme Court of Florida found harmless error where the bailiff had ex parte communication with the jury regarding the law.\footnote{Id. 88 So. 2d 371 (Fla. 1st Dist. Ct. App. 1992).} In \textit{McKinney}, the jury summoned the bailiff to ask a question regarding the use of separate verdict forms for premadicated and felony first-degree murder.\footnote{Id. 88 So. 2d 371 (Fla. 1st Dist. Ct. App. 1992).} Instead of directing the question to the court, the bailiff instructed the jury, ":[premeditated murder] was part of the instructions. They were not to rule on premadicated murder." The Supreme Court of Florida found harmless error due to the immediate corrective instruction given by the trial judge and the nonprejudical nature of the bailiff’s comments.\footnote{Id. 88 So. 2d 371 (Fla. 1st Dist. Ct. App. 1992).}

Florida appellate courts have continued to illustrate that trial judges have the uncanny ability to commit error during jury selection for criminal cases. Perhaps the most flagrant example of this error occurs when the trial judge refuses to excuse a perspective juror for cause where a reasonable doubt exists as to whether the juror possesses the state of mind necessary to render an impartial recommendation. Illustrating the fetish for error were decisions from the First and Fourth District Court of Appeals. In \textit{Nee v. State},\footnote{Id. at 379.} a defendant’s first degree murder conviction was reversed due to the trial court’s refusal to strike for cause two jurors who expressed particular problems with the insanity defense.\footnote{Id. at 83.} In \textit{Chapman v. State},\footnote{Id. at 379.} the Fourth District Court of Appeal reversed a defendant’s armed kidnapping conviction in which the trial judge had refused to excuse for cause a juror who during \textit{voir dire} admitted that she would have a difficult time being impartial given the fact that her mother had been murdered in a convenience

store holdup when the juror was eight years old.\footnote{Id. at 605-06.}

Judicial abuses resulting in reversals of criminal dispositions place a heavy burden upon the criminal justice system. While the variety of abuses appear to coincide with the frailties of human nature, practitioners must be alert to protect the interests of their clients and preserve instances of abuse for appellate review. Appellate courts will likely seek to remedy individuals whose rights have been tarnished by judicial conduct.

\section*{IX. SPEEDY TRIAL}

No area of criminal practice has been as dramatically altered as litigation concerning the State Speedy Trial Act (Act).\footnote{P.A. R. CRIM. P. 3.191.} Unlike most areas of litigation, speedy trial matters have been dramatically reduced in recent years. The primary causation of this change has been the 1984 abolition of the automatic discharge provision of the Speedy Trial Rule. Instead of automatic discharge, the State of Florida is provided with what amounts to a ten day grace period to commence trial of a defendant after the speedy trial period has expired.\footnote{Id. at 3.191(p)(3).}

The amended Act has prevented defendants from sitting back and attempting to have their cases "slip through the cracks" of an overburdened court system. Instead of waiting until the speedy trial time has expired and then moving for discharge of their case, the defendant can only seek judicial intervention and the imposition of the ten day grace period in which the defendant must then be tried.

Relatively few appellate decisions were generated during the past eighteen months concerning the Act.\footnote{Id. at 3.191(p)(3).} Those cases presented relatively

\begin{itemize}
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259. *Id.* at 651.
261. *Id.* at 944-45.
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263. *Id.* at 83.
264. *Id.*
265. *Id.*
266. *Id.*
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unique factual scenarios which probably forebear an even smaller volume of litigation. While not the high profile topic of litigation of past years, "speedy trial" must still be considered and evaluated by all practitioners.

XIV. CONCLUSION

The past eighteen months of Florida criminal appellate procedure has seen a constant adherence to basic principles of individual rights. While the direction of federal appellate decisions might be travelling on a clearer restrictive path, the Florida courts appear dedicated to utilizing their independent judgment and tools, including the Florida Constitution, to promote justice. Practitioners must realize that Florida appellate courts will provide significant safeguards to protect the rights and interests of criminal defendants.