Criminal Law

Mark R. Brown

Abstract

This article surveys the important decisions of the Florida Supreme Court handed down between December 1, 1985, and November 30, 1986, in the field of substantive criminal law.

KEYWORDS: robbery, firearms, manslaughter
I. INTRODUCTION

This article surveys the important decisions of the Florida Supreme Court handed down between December 1, 1985, and November 30, 1986, in the field of substantive criminal law. Of course, not all decisions of the Florida Supreme Court in this area are reported; however, those that are of either some importance, or of some interest, have been included. If the article at times reaches beyond what is traditionally recognized as "criminal law," it is because the field is ever-expanding, and at times reaches into other disciplines. Because the court has recently delved quite heavily into sentencing, a short discussion of recent results in that area is included. A conscious effort has been made, however, to avoid cases involving the death penalty. Execution is, of course, a sentence, and thus no logic dictates

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II. Criminal Offenses

Defining criminal offenses might be considered the bulk of substantive criminal law. Consequently, considering the definitions of various crimes logically might be thought to encompass a great portion of the Florida Supreme Court’s time relative to the field of criminal law. This, however, has not proven true. Very rarely did the court actually discuss the substance of any given crime. But when it did, it achieved intriguing, and controversial, results.

A. Attempted Manslaughter

In Murray v. State, the defendant (Murray) was charged with, among other things, attempted murder. The facts giving rise to this charge included the kidnapping and robbery of a woman, together with her subsequent shooting and sexual assault. In defending against the attempted murder charge, Murray argued that he did not intend to shoot the victim. Apparently giving some credence to this claim, the jury convicted Murray of attempted manslaughter, as opposed to attempted murder.

On appeal, the district court of appeal initially reversed this conviction, finding that because the jury was instructed that manslaughter could consist of culpable negligence as well as an act or procurement, Murray may have been convicted of a non-existent crime (i.e., attempted negligent homicide). On rehearing, however, the district court

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2. 491 So. 2d 1120 (Fla. 1986).
3. Murray was also charged with and found guilty of kidnapping, two counts of sexual battery and armed robbery. Id.
4. Murray, as noted, supra note 3, was convicted on all other charges.
5. 471 So. 2d 70 (Fla. 4th Dist. Ct. App. 1984), modified, 491 So. 2d 1120 (Fla. 1986).

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7. Murray, 471 So. 2d at 73. In so holding, the district court of appeal relied on Tillman v. State, 471 So. 2d 32 (Fla. 1985), where the court concluded that to preserve such an objection for review the defense must object to the instruction given the jury concerning the non-existent crime.
8. Murray, 491 So. 2d at 1123.
9. See Tillman, 471 So. 2d at 32; Taylor, 444 So. 2d at 931.
10. Murray, 491 So. 2d at 1122 (quoting Taylor, 444 So. 2d at 934).
11. Id. at 1123.
12. Id. at 1122.
13. See infra note 21 and accompanying text.
14. Murray, 471 So. 2d at 72.
15. 444 So. 2d at 931.
tended murder might be used to infer lack of intent. In any event, the court was unjustified in assuming that the jury found one and not the other, and a strong possibility remains that Murray was convicted of a non-existent crime. At best, the court substituted its judgment for that of the jury, something which is inconsistent with the right to a jury trial. 16

A second criticism of Murray rests in the court's alternative holding that the issue was not preserved for review. Granted, this conclusion was based on the prior holding of the court in Tilman. 17 That opinion, however, is inconsistent with Ach in v. Stare, 18 where the court implicitly held that there need be no contemporaneous objection where the challenge is based on a conviction for a non-existent crime. There, the defense counsel actually requested a jury instruction on the nonexistent crime. Despite this, the court concluded, albeit "reluctantly," that the conviction had to be reversed. 19 So, if reversal is required where the defense requests the instruction, it should be required where the defense merely fails to object. 20

16. The Supreme Court of the United States has recently struggled with and resolved whether in a case involving a violation of Sandstrom v. Montana, 442 U.S. 280 (1979), there might be a finding of harmless error. See Connecticut v. Johnson, 460 U.S. 53 (1983); Rose v. Clark, 106 S. Ct. 3100 (1986). In Johnson the court split evenly over the issue, rendering no majority opinion. In Rose, however, the court concluded that a harmless error analysis could be applied without violating a defendant's due process or right to a jury trial. Arguably, by analogy, the Murray court's approach could be justified as being simply a finding of harmless error beyond a reasonable doubt. The error, however, failed to utilize this theory, instead merely finding that the evidence supported a finding of intent. Moreover, in the case of an ultimate conclusion of guilt resting on either of two different findings (Murray), as opposed to finding (Sandstrom), the harmless error theory should be less persuasive. In the latter case, only one ultimate conclusion exists (defendant is guilty of an existing crime); the error rests in how that conclusion was reached. The former presents the problem of not knowing exactly what the jury's conclusion is; whether there has been a finding that the defendant committed a crime.
17. 471 So. 2d at 32.
18. 436 So. 2d 30 (Fla. 1982).
19. Id. at 31.
20. The argument exists, of course, that Ach in simply involved a non-existent crime, while Tilman and Murray involved both an existing and a non-existent crime. This should not prove to be a material distinction, however, because the possibility exists in the latter situation that the defendant was convicted of an existing crime, e.g., attempted involuntary manslaughter. The fact that the defendant may also have been convicted of an existing crime should not logically alter the decision regarding whether an objection must be made. As stated in Ach in, notwithstanding defense counsel's actual raising of the issue, "no one may be convicted of a non-existent crime," 426 So. 2d at 31. The same should be true where defense counsel does not affirmatively cause the error, yet only passively allows it to occur.
22. See id. § 782.04(1)(a) (1985) (murder in the first degree).
24. Florida also defines murder in relation to a death occurring during the commission of any of several enumerated offenses, as well as in relation to the distribution of certain narcotics. Id. § 782.04(1)(c).
26. This would be impossible under the Model Penal Code, for if one acts purposely killing, he necessarily acts recklessly with indifference to human life. Model Penal Code § 2.02(5) (1962).
27. Voluntary manslaughter has traditionally been viewed as a lesser degree of murder. The intent to kill exists, yet certain circumstances (e.g., heat of passion) justify a lesser penalty. See, e.g., Model Penal Code § 210.01(5) (1962). In a situation where this is true, there logically exists the crime of attempted manslaughter, since

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tempted murder might be used to infer lack of intent. In any case, the court was unjustified in assuming that the jury found one and not the other, and a strong possibility remains that Murray was convicted of a non-existent crime. At best, the court substituted its judgment for that of the jury, something which is inconsistent with the right to a jury trial.18

A second criticism of Murray rests in the court's alternative holding that the issue was not preserved for review. Granted, this conclusion was based on the prior holding of the court in Tillman.17 That opinion, however, is inconsistent with Achei v. State,18 where the court implicitly held that there need be no contemporaneous objection where the challenge is based on a conviction for a non-existent crime. There, the defense counsel actually requested a jury instruction on the nonexistent crime. Despite this, the court concluded, albeit 'reluctantly,' that the conviction had to be reversed.18 Surely, if reversal is required where the defense requests the instruction, it should be required where the defense merely fails to object.19

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22. See Id. § 782.04(1)(a) (1985) (murder in the first degree).
23. Id. § 782.04(2)(b) (1985) (murder in the second degree). Florida also defines murder in relation to a death occurring during the commission of any of several enumerated offenses, as well as in relation to the distribution of certain narcotics. Id. § 782.04(16)(a).
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25. Voluntary manslaughter has traditionally been viewed as simply mitigated murder. The intent to kill exists, yet certain circumstances (e.g., heat of passion) justify a lesser penalty. See, e.g., MODEL PENAL CODE § 210.3(1)(b) (1962). In a situation where this is true, there logically exists the crime of attempted manslaughter, since
B. Robbery

Royal v. State\(^{28}\) involved the question of whether force utilized after a theft is sufficient to support a robbery charge. The defendants in Royal were engaged in the simple crime of shoplifting, placing clothes in a shopping bag and then attempting to exit the store. Upon their arrival at the exit, the defendants were confronted by the store detective, whom they "pushed ... aside" in order to allow escape.\(^{29}\) The detective and two store personnel pursued the defendants into the parking lot where a scuffle ensued. One employee was struck, and the defendants escaped only when one brandished a pistol and pointed it at an employee's head.\(^{30}\)

The district court of appeal held that the thieves could be convicted of robbery,\(^{31}\) theorizing that a "continuing" theft had occurred, and that force used in a situation where there exists "uninterrupted pretext or pursuit in an effort to thwart a taking" is sufficiently contemporaneous to support a charge of robbery.\(^{32}\) The supreme court disagreed. Writing for the majority, Justice Overton concluded that the theft occurred prior to any removal from the store's premises.\(^{33}\) Thus, no "continuing" theft occurred, as opined by the district court. Any force used to effectuate a robbery must "precede or be contemporaneous with the taking of the property."\(^{34}\) Consequently, any force used after the actual physical taking is insufficient to support a robbery charge.\(^{35}\) As an additional matter, the court pointed out that Florida's intent is a requirement of the completed act. Under this scheme, however, any other intentional homicide is murder. The problem in Florida lies in its defining murder in terms of intent and recklessness, while also defining voluntary manslaughter solely in terms of intent, without any reference to mitigating circumstances.

A distinction might be made that in Florida deprived heart murder involves any intentional killing that is not premeditated, for any intentional killing is at least a reckless act with extreme indifference to human life. If this is the case, then there exists no crime of voluntary manslaughter, and consequently no attempt.

1. Firearms

Section 790.23 of the Florida Statutes makes it a crime for a convicted felon to "have in his care, custody, possession, or control any firearm..." Even if the firearm was manufactured before 1918, it is still considered a convicted felon's firearm. The apparent intent and effect of these provisions, read together, makes it a crime for a convicted felon to possess any firearm, other than an antique or replica of an antique.

In Williams v. State\(^{36}\) the defendant was charged and convicted under section 790.23 of possessing a convicted felon's firearm. On appeal, the defendant argued, inter alia, that the firearm which he possessed was either an "antique or a replica thereof."\(^{37}\) As to whether the firearm was antique, the Florida Supreme Court found conflicting evidence, thus sustaining the finding below. In regard to the

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\(^{28}\) Royal v. State, 460 So. 2d 44 (Fla. 1984).

\(^{29}\) Id. at 45.


\(^{31}\) Royal, 490 So. 2d at 45. The district court relied on a previous district court opinion, Stufflebeam v. State, 436 So. 2d 244 (Fla. 3d Dist. Ct. App. 1983), which made use of this same theory.

\(^{32}\) Royal, 490 So. 2d at 46.

\(^{33}\) Id. (quoting Montezuma v. State, 84 Fla. 82, 93 So. 157, 159 (1922) (emphasis in original)).

\(^{34}\) The court concluded that FLSA § 812.13 was consistent with the criminal law in this regard. Royal, 490 So. 2d at 46.

\(^{35}\) FLSA § 812.13(3) (1985).

\(^{36}\) Royal, 490 So. 2d at 46. Justice Shaw concurred in the result only, id. at 47 (Shaw, J., concurring). Chief Justice Boyd dissented, agreeing with the district court that there was a "continuing" theft, and consequently the force used at the exit and in the parking lot was contemporaneous with the taking, id. at 47 (Boyd, J., dissenting).

\(^{37}\) See FLSA § 790.23 (1985).

\(^{38}\) Id. at 790.001(6) (1985).

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C. Possession Crimes

1. Firearms

Section 790.23 of the Florida Statutes makes it a crime for a convicted felon to "have in his care, custody, possession, or control any firearm. . . ."\(^{38}\) "Firearm," in turn, is defined as including any weapon capable of "expel[ling] a projectile by the action of an explosive. . . ."\(^{39}\) Excluded from this definition, however, is any "antique firearm."\(^{40}\) Defined as "any firearm manufactured in or before 1918 . . . or replica thereof, whether actually manufactured before or after the year 1918. . . ."\(^{41}\) The apparent intent and effect of these provisions, read together, makes it a crime for a convicted felon to possess any firearm, other than an antique or replica of an antique.

In Williams v. State,\(^{42}\) the defendant was charged and convicted under section 790.23 of being a convicted felon in possession of a firearm. On appeal, the defendant argued, inter alia, that the firearm which he possessed was either an "antique or a replica thereof."\(^{43}\) As to whether the firearm was antique, the Florida Supreme Court found conflicting evidence, thus sustaining the finding below. In regard to the law in this regard, Royal, 490 So. 2d at 46.

34. FLA. STAT. § 812.13 (1985).
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38. FLA. STAT. § 790.23 (1985).
40. Id.
41. FLA. STAT. § 790.001(1) (1985).
42. 493 So. 2d 1031 (Fla. 1986).
43. Id. at 1033.
argument that the firearm was a replica,** the court stated, after noting that the firearm was loaded:

We do not believe that the legislature, when enacting section 790.23, intended to convert a convicted felon's weapon into a replica of a weapon that is not a firearm. The judicial construction of the statute allows for the introduction of evidence to support the defendant's claim that he was not the shooter of the victim. The statute does not prohibit the introduction of evidence to support the defendant's claim that he was not the shooter of the victim. Hence, the character of possession turns on a condition, the nature of which is not exact. Distinguishing between a machine designed to produce only credit cards which are conserved to be by the issuer, and one designed to produce credit cards which are not, is difficult if not impossible. The wording, though present subject to interpretation, appears sufficiently confusing to justify a finding of vagueness. Moreover, that law enforcement would possess ample discretion in making a determination based on a finding of vagueness, the court stated that if it would be unreasonable to interfere with the rights of those who legitimately use embossing machines in an effort to prevent others from using these machines illegally. As an additional matter, the court noted

44. Apparently, the evidence made it clear that the firearm was at least a replica. If not actually a replica, the court stated, after noting that the firearm was loaded:

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argument that the firearm was a replica," the court stated, after noting that the firearm was loaded:

We do not believe that the legislature, when enacting section 790.23, intended that a convicted felon could be acquitted when possessing a concealed, loaded weapon by using the excuse that the weapon is an antique or a replica thereof. The literal requirement of the statute extends over substance to the detriment of public policy, and such a result is clearly absurd. It is a basic tenet of statutory construction that statutes will not be interpreted so as to yield an absurd result." The conviction was accordingly affirmed. The court obviously took liberty with its role as interpreter of vague and ambiguous statutes. Here, the statute is neither: it clearly provides that no crime exists when the firearm is an antique or a replica. Thought to be "absurd" by the court as written," the statute now apparently states that no crime is committed only when the court is satisfied that public policy is not otherwise offended by the accused's acts.

2. **Embossing Machines**

Section 817.63 of the Florida Statutes proscribes the possession of "machinery, plates or any other contrivances designed to reproduce instruments purporting to be the credit cards of an issuer who has not consented to the preparation of such credit cards. . . ." In State v. Saites," this provision was challenged as abridging the first amendment right to free speech and due process notions of notice and vagueness, as well as the due process requirement of rationality. Per Justice Barckett, the Florida Supreme Court in addressing these arguments rejected both the first amendment and vagueness challenges, though ultimately hold-

44. Apparently, the evidence made it clear that the firearm was at least a replica, if not actually antique. An expert on firearms testified that he was reasonably certain that the gun was antique, though it could possibly have been manufactured later than 1918. Id. In any case, the date stamped on the barrel of the gun was pre-1918, and although this was not necessarily the date of manufacture, it was assuredly the date of the patent. Id. Thus, that the gun was at least a replica of a gun manufactured before 1918 appears unchallenged, and perhaps explains why the court turned to public policy, as opposed to the sufficiency of the evidence, to affirm the conviction.

45. Id. at 1054.
46. Id.
48. 489 So. 2d 1125 (Fla. 1986).
49.Id. at 1129.
50. Id. at 1127. Conceivably, the first amendment might be "implicated" in a case of this nature, but because the proscription is content neutral, no real problem should exist. See generally United States v. O'Brien, 391 U.S. 367 (1968); Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482 (1976); G. Gunther, Constitutional Law 174-76 (1985).
51. Saites, 489 So. 2d at 1127.
53. Saites, 489 So. 2d at 1129.
54. Id. at 1127 (citing Fla. Const. art. I, § 9; U. S. Const. amend. XIV, § 2).
55. Id. at 1129. The court relied on several cases which express great difficulty with prohibitions that could conceivably be applied to "innocent" acts. Delmonico v. State, 155 So. 2d 368 (Fla. 1963) (possession of spear fishing equipment); Robinson v. State, 389 So. 2d 1076 (Fla. 1980) (wearing mask in public); State v. Walker, 444 So. 2d 1137 (Fla. 2d Dist. Ct. App.) aff'd, 461 So. 2d 108 (Fla. 1984) (possession of lawfully dispensed controlled substance in differing container). But it is the statute which defines the "innocence" of an act, and if the statute is not vague, and prohibits
that the statute was altered in 1985 to require "intent that such equipment be used in the production of counterfeit credit cards."

D. Indecent Exposure

Sunbathers will be distressed to learn of the court's decision in McGuire v. State, 59 upholding an administrative rule prohibiting "indecent exposure" on public beaches. 60 The defendant, a female, was apprehended jogging without a top, thus exposing her breasts, on Air Force Beach in John D. McArthur Beach State Recreation Area. At the time of the event in question, the state controlled the beach. Prior to the state's having control of this area, however, the northern portion of the beach had been considered "clothing optional."

Defendant challenged her conviction under the ban as violating both her first amendment right to free speech and her fourteenth amendment right to be placed on adequate notice that her conduct was criminal. 61 In regard to the first amendment challenge, the court held that the defendant was not engaged in any protected activity. 62 There exists no constitutional right as such to dress (or undress) as one pleases in public. 63 Any right to dress flows from the first amendment only when the dressing is either intended to convey a message, or is otherwise coupled with speech. 64 Here, defendant concededly was not engaged in any form of communication, and thus could herself claim no first amendment protection.

Defendant did, however, present a significant overbreadth argument.

certain conduct, that conduct cannot be labeled "indecent."

59. State, 449 So. 2d at 1129 n.3. Hence, the vagueness problem has been solved, and the court would apparently uphold the revised statute as against a substanti- ative due process attack because it now punishes only those who possess themselves with an evil intent -- narrowly to include only "non-innocent" acts.

60. McGuire, 449 So. 2d at 730. 61. Id.

62. This much of the court's opinion is necessarily correct under current United States Supreme Court precedent. The Court has yet to strike down indecent exposure 422 U.S. 205, 211 n.7 (1975) ("rudely [in motion] is distinguishable from the kind of nudity traditionally subject to indecent exposure laws").

63. McGuire, 449 So. 2d at 731.

64. Overbreadth analysis is generally limited to first amendment cases, representing the Court's unwillingness to allow challenges brought by parties actually engaged in protected speech where the prohibition at issue is so broad as to sweep both protected and unprotected activity within its ambit. Accordingly, "standing" require- ments are relaxed, and even those parties who otherwise could be punished might successfully challenge an overbroad law. See generally Guntern, supra note 70, at 1148.


66. The court specifically ruled that defendant lacked "standing" to advance the overbreadth challenge. Id. at 731. This choice of words is unfortunate, since the overbreadth doctrine is itself premised on a lack of standing. A better approach, and that which the court apparently applied in logic if not language, would have been to simply hold the statute's overbreadth insubstantial; thus recognizing but rejecting the challenge.

67. See Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) ("particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep"); cf. id. at 630 (Brennan, J., dissenting) ("We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single irrepressible application, and in that sense a requirement of substantial overbreadth is already implicit in the doctrine."))


69. McGuire, 449 So. 2d at 731 (citations omitted).
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Sunbathers will be distressed to learn of the court's decision in McGuire v. State,85 upholding an administrative rule prohibiting "indecent exposure" on public beaches.86 The defendant, a female, was apprehended jogging87 without a top, thus exposing her breasts, on Air Force Beach in John D. McArthur Beach State Recreation Area. At the time of the event in question, the state controlled the beach. Prior to the state's having control of this area, however, the northern portion of the beach had been considered "clothing optional."

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57. 489 So. 2d 729 (Fla. 1986).
59. Why a woman would jog without properly supporting her breasts is beyond
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65. McGuire, 489 So. 2d at 731 (citing Village of Hoffman Estates v. Flipside,
Hoffman Estates, Inc., 455 U.S. 489 (1982)).
66. The court specifically ruled that defendant lacked "standing" to advance the
overbreadth challenge. Id. at 731. This choice of words is unfortunate, since the over-
breadth doctrine is itself premised on a lack of standing. A better approach, and that
which the court apparently applied in logic if not language, would have been to simply
hold the statute's overbreadth insubstantial; thus recognizing but rejecting the
challenge.
67. See Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) ("particularly where
conduct and not merely speech is involved, we believe that the overbreadth of a statute
must not only be real, but substantial as well, judged in relation to the statute's plainly
legitimate sweep."); cf. id. at 630 (Brennan, J., dissenting) ("We have never held that a
statute should be held invalid on its face merely because it is possible to conceive of a
single impermissible application, and in that sense a requirement of substantial over-
breadth is already implicit in the doctrine").
69. McGuire, 489 So. 2d at 731 (citations omitted).
sentence being unduly vague in that the phrase “commonly accepted standards” was left undefined. The court found, however, that as applied to defendant the phrase was defined, simply because two weeks prior to defendant’s arrest she had “received an individual warning from the park manager against sunbathing topless at Air Force Beach.”

Though the court found the defendant’s vagueness argument “remarkable” in light of this prior warning, what is truly remarkable is the court’s misunderstanding of the “vagueness as applied” concept, as well as vagueness in general. The United States Supreme Court has indeed required that when challenging a criminal statute as unconstitutionally vague, the statute must be vague “as applied.” This, however, does not refer to the defendant’s knowledge of the statute’s existence, nor does it refer to the defendant’s personal understanding or interpretation of the law. Rather, the doctrine applies to the situation where a law is vague only in part, and the defendant’s conduct falls under that portion which is not vague. For example, the court stated: “It shall be unlawful to expose public habit, and any other offensive part of the body”—and the defendant was apprehended after exposing pubic hair, the “vagueness as applied” concept would be relevant. Even despite the possible vagueness of part of the statute, i.e., “any other offensive part of the body,” the statute would not be vague as applied because the activity involved, exposing pubic hair, is clearly prohibited by the statute.

Defendant’s challenge in McGuire, however, rested on the rule’s being “perfectly vague,” in that it failed to clearly define any prohibited conduct. For this reason, the court’s discussion of “vagueness as applied” is misplaced. Complicating the court’s analysis is its reliance on defendant’s apparent “actual notice” of the rule’s meaning via the park manager. Again, the court misconceives the nature of a vagueness

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challenge. The argument is not that the defendant was unaware of the rule’s existence; rather it is that the rule, even if known to defendant, is subject to varying interpretations. That a park manager believed the rule to proscribe topless jogging is irrelevant; in fact, that is exactly what the vagueness doctrine is designed to prevent—leaving interpretation of the law to executive authorities.

As additional support, the court turned to an “analogous” statute which had previously survived a vagueness attack. That statute proscribed action which corrupted “the public morals, or outrage[d] the sense of public decency...” In Moore v. State and State v. Magee this language was found to be clear because it was of “general understanding,” and anyone of “common intelligence” would be aware of its meaning. This reasoning, the court in McGuire concluded, applied equally to “commonly accepted standards,” and supported sustaining the statute.

Despite the court’s assertion to the contrary, the language under scrutiny in both Moore and Magee bears little, if any, resemblance to that in McGuire. Those cases, therefore, offer little guidance. In the absence of case law shedding light on the meaning of “commonly accepted standards,” it is the language is to be given any meaning at all, the first inquiry should be what vantage point the words should be viewed from. Conceivably, the words might describe either a state-wide or local approach to the matter. The court apparently viewed the words

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sentence being unduly vague in that the phrase "commonly accepted standards" was left undefined. The court found, however, that as applied to defendant the phrase was defined, simply because two weeks prior to defendant's arrest she had "received an individual warning from the park manager against sunbathing topless at Air Force Beach." 70

Though the court found the defendant's vagueness argument "remarkable" in light of this prior warning, what is truly remarkable is the court's misunderstanding of the "vagueness as applied" concept, as well as vagueness in general. The United States Supreme Court has indeed required that when challenging a criminal statute as unconstitutional vague, the statute must be vague "as applied." 71 This, however, does not mean that the defendant's knowledge of the statute's existence, nor does it refer to the defendant's personal understanding of interpretation of the law. Rather, the doctrine applies to the situation where a law is vague only in part, and the defendant's conduct falls under that portion which is not vague. 72 For example, had the law stated "it shall be unlawful to expose public hair, and any other offensive part of the body" — and the defendant was apprehended exposing public hair, the "vagueness as applied" concept would be relevant. Even though the possible vagueness of part of the statute, i.e., "any other offensive part of the body," the statute would not be vague as applied because the activity involved, exposing public hair, is clearly prohibited by the statute.

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As additional support, the court turned to an "analogous" statute which had previously survived a vagueness attack. 76 That statute proscribed action which corrupted "the public morals, or outrage[d] the sense of public decency..." In Moffet v. State 77 and State v. Magee 78 this language was found to be clear because it was of "general understanding," and anyone of "common intelligence" would be aware of its meaning. 79 This reasoning, the court in McGuire concluded, applied equally to "commonly accepted standards," and supported sustaining the statute. 80

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70. Id.
72. See L. Tribe, AMERICAN CONSTITUTIONAL LAW 720 (1978). Professor Tribe points two examples here. First, a "perfectly vague" statute, one which is vague in all respects, and second, a statute which although well-defined in relation to certain "core" The "vagueness as applied" doctrine applies only to the latter. McGuire involves the former.
73. See L. Tribe, supra note 72.
74. Moreover, that defendant's conduct was constitutionally unprotected should be irrelevant to a vagueness analysis.
76. To illustrate, suppose a law provides: "It shall be unlawful to gyrate. This act is perfectly vague; no one knows what it means. If a policeman sees a young boy break-dancing on the street, approaches and informs the boy that "gyrating" includes breakdancing, is that boy forever foreclosed from his dancing because one officer believes the definition is such? Hopefully not, simply because it is not left to the police to determine the law. They simply enforce it. See also McGuire, 489 So. 2d at 733 (Adkins, J., dissenting).
77. EXAM IN. § 877.03 (1985).
78. Id. § 877.03 (1985).
79. 340 So. 2d 115 (Fla. 1976).
80. 259 So. 2d 139 (Fla. 1972).
81. See McGuire, 489 So. 2d at 732.
82. Id. The court alluded to certain "posted notices" also, claiming these too would give "any person of common intelligence" notice that "an adult female is prohibited from jogging topless on Air Force Beach." Id. The posting of notices, however, does not help resolve the vagueness issue, but only begs the question.
83. See id. at 733-34 (Adkins, J., dissenting).
from a state-wide perspective, holding that the words mean the same everywhere, exactly what being left a little unclear. The words might be construed, however, to impose a local standard, much like that imposed in obscurity cases. If this was the case, then the commonly accepted standards of the locality would have to be explored. Prior to the state’s taking control of the beach it was “clothing optional.” This was obviously the accepted standard when the rule took effect. A good argument would therefore seem to exist that if “commonly accepted standards” is not a vague phrase, then it means the local standards prevailing at the beach — here, “clothing optional.”

The better approach would be to simply hold the rule unconstitutionally vague. As written, at best it allows for variable definitions across the state. Perhaps at some hypothetical beach the accepted standard is to wear sweat suits, and nothing less. A woman wearing a one-piece bathing suit might be charged with not conforming to “accepted” standards. Even a local approach thus does not seem to cure the vagueness. In any event, the court unfortunately went out of its way to sustain an admittedly poorly drafted law, one that should be rewritten.

E. Motor Vehicles

_Armenia v. State_ addressed once again the question whether it is “necessary to prove . . . a causal relationship between the manner of operation of defendant’s motor vehicle or his inability to avoid the accident because of his intoxication and the death of the victim to convict . . .” [DWI Manslaughter]. The court answered in the negative, reaffirming its 1979 decision in _Baker v. State_. Consequently, a person may be convicted of DWI Manslaughter whenever: 1) that person is legally intoxicated; 2) in control of a motor vehicle; 3) involved in an accident; and 4) a death ensues. Though there apparently must exist some causal connection between operation of the motor vehicle and the death, there need be no causal connection between the driver’s impaired state and the death. In essence, intoxication becomes a mere attendant circumstance to a virtual strict liability offense.

For the reasons pointed out in Justice Boyd’s dissent, the court should reevaluate its decision. Homicides have traditionally always required some level of culpability. By removing the causation requirement, the court allows for a homicide conviction where there exists no fault. This result should not attach unless made crystal clear by the legislature, something the legislature did not do in defining DWI Manslaughter.

III. Lesser Included Offenses

As in prior years, the Florida Supreme Court once again struggled with the nasty web of lesser included offenses. Following its 1985 decision in _State v. Emmund_, the court in at least three separate opinions reaffirmed its conclusion that the underlying felony supporting a felony murder conviction is not a lesser included offense, accordingly allowing conviction and sentence for both. Applying another 1985 decision, _Linehan v. State_, the court reaffirmed its position that sec-

91. _Id._ at 19.
92. _Id._ at 20 (Boyd, J., dissenting).
93. To date, there appears to exist no constitutional objection to imposing liability without fault. See United States v. Bailey, 258 U.S. 250 (1922) (rejecting due process challenge to strict liability offense); _see also_ United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Park, 421 U.S. 658 (1975).
94. At least one United States circuit court, however, has broken away from this authority. United States v. Wulf, 758 F.2d 1121 (6th Cir. 1985). In Wulf’s federal law imposed strict liability for selling parts or pieces of certain migratory birds, making the offense a felony. _Id._ at 1122. The court struck down the felony provision as abridging substantive due process, finding that as a constitutional matter, strict liability may be imposed only where the penalty is relatively small, and where the conviction does not gravely besmirch one’s character. _Id._ at 1125. _Contra_ United States v. Engler, 806 F.2d 425 (3d Cir. 1986) (expressly rejecting Wulf analysis in case involving same statute).
95. _See_ Morissette v. United States, 342 U.S. 246 (1952) (_malum in se_ crimes should be narrowly construed to require some level of culpability).
97. 476 So. 2d 165 (Fla. 1985).
98. State v. Furr, 493 So. 2d 432 (Fla. 1986); State v. Chapin, 486 So. 2d 566 (Fla. 1986); State v. W.S.L., 485 So. 2d 421 (Fla. 1986).
99. See id. at 18.
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E. Vehicle Deaths

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97. 476 So. 2d 165 (Fla. 1985).
98. State v. Parti, 493 So. 2d 433 (Fla. 1986); State v. Chapin, 486 So. 2d 266 (Fla. 1986); State v. W.S.L., 485 So. 2d 421 (Fla. 1986).
99. 476 So. 2d 1262 (Fla. 1985).
ond degree depraved mind murder is a lesser included offense of first degree felony murder, precluding conviction for both.⁹⁹

In Higdon v. State¹⁰⁰ the court held the schedule of lesser included offenses promulgated in 1981¹⁰¹ to be in error in classifying vehicular homicide¹⁰² as a necessarily lesser included offense of DWI Manslaughter.¹⁰³ In so holding, the court reversed the decision of the district court of appeal below,¹⁰⁴ and adopted as its own the dissenting opinion of Judge Dauksch.¹⁰⁵ There, Judge Dauksch reasoned that because each offense has an element not included within the other, for purposes of Blockburger v. United States¹⁰⁶ the two are not included offenses.¹⁰⁷

Unfortunately, given the court’s present interpretation of the DWI Manslaughter statute,¹⁰⁸ Judge Dauksch’s conclusion is sound. DWI Manslaughter requires intoxication, but not recklessness.¹⁰⁹ Vehicular homicide requires recklessness, but not intoxication. Hence, the offenses are separate and distinct, and a properly charged jury could return convictions on both counts, consistent with Blockburger.¹¹⁰

99. Furt, 493 So. 2d at 432.
100. 490 So. 2d 1252 (Fla. 1986).
101. See In re Use by Trial Court of Standard Jury Instruction, 431 So. 2d 594 (Fla. 1981).
105. Id. at 1311 (Dauksch, J., dissenting).
106. 284 U.S. 299 (1932). The Blockburger rule provides that “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” Id. at 304; See also Fla. Stat. § 775.021(4) (1985) (adopting a similar standard).
108. See Armera v. State, 497 So. 2d 638 (Fla. 1986); see discussion at supra note 87 and accompanying text.
109. This conclusion flows from the court’s reading causation out of the DWI Manslaughter statute. See supra note 88 and accompanying text.
110. Although Blockburger might not be offended, the prohibition against double jeopardy might still preclude two convictions based on the same conduct. See Brown v. Ohio, 432 U.S. 161, 164 (1977) (“It has long been understood that separate statutory crimes need not be identical — either in consistent elements or in actual proof — in order to be the same within the meaning of the constitutional prohibition [against double jeopardy].”) (emphasis added). In Illinois v. Vitale, 447 U.S. 410, 419 (1980), the court suggested that where the same proof is used to convict for two separate offenses, double jeopardy might be offended, even though the two offenses are not “included” within the meaning of Blockburger. Consequently, if one, while drunk, recklessly takes the life of another in an automobile accident, Vitale might prohibit conviction under both the vehicular homicide statute and DWI Manslaughter statute. Cf. Morris v. Mathews, 106 S. Ct. 1032 (1986); but see Missouri v. Hunter, 459 U.S. 359 (1983) (multiple convictions and punishment simply a question of legislative intent).
111. 485 So. 2d 414 (Fla. 1986).
112. Id. at 843.01 (1985).
113. Id. § 784.07 (1985).
114. See State v. Carpenter, 417 So. 2d 986 (Fla. 1982).
115. Again, Vitale might be considered as posing a limit on multiple convictions. See discussion at supra note 110. The court in Henriquez, however, did not consider this possibility, which is understandable in light of the overall confusion in this area of the law. After Hunter, 459 U.S. at 359, it might appear that the prohibition against double jeopardy really offers no restraint where the defendant is charged with multiple violations and is convicted at one trial. As long as the legislative intent is to allow for multiple punishments, it would appear to be constitutional.
116. 487 So. 2d 1037 (Fla. 1986).
119. Id. § 790.07 (1985).
120. Boivin, 487 So. 2d at 1038.
121. See also Accosio v. State, 497 So. 2d 640 (Fla. 1986). Note that in Accosio, even though the court reiterated that aggravated battery is not a necessarily included offense of attempted first degree murder (and a fortiori neither is battery), once the instruction on aggravated battery is given in an attempted murder case, so must the instruction on battery be given when requested.
ond degree depraved mind murder is a lesser included offense of first degree felony murder, precluding conviction for both. In Higdon v. State the court held the schedule of lesser included offenses promulgated in 1981 to be in error in classifying vehicular homicide as a necessarily lesser included offense of DWI Manslaughter. In so holding, the court reversed the decision of the district court of appeal below and adopted as its own the dissenting opinion of Judge Dauksch. There, Judge Dauksch reasoned that because each offense has an element not included within the other, for purposes of Blockburger v. United States the two are not included offenses. Unfortunately, given the court's present interpretation of the DWI Manslaughter statute, Judge Dauksch's conclusion is sound. DWI Manslaughter requires intoxication, but not recklessness. Vehicular homicide requires recklessness, but not intoxication. Hence, the offenses are separate and distinct, and a properly charged jury could return convictions on both counts, consistent with Blockburger.

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100. 490 So. 2d 1252 (Fla. 1986).
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109. This conclusion flows from the court's reading of the absence of the DWI Manslaughter statute. See supra note 88 and accompanying text.
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The court in State v. Henriques concluded that the crime of resisting an officer with violence is not an offense included within the crime of battering a law enforcement officer. Instead, each has an element the other does not; resisting an officer requires resistance with only a threat of violence, while battery of a law enforcement officer requires more than a mere threat, at least a touching, but not necessarily resistance. Thus, Henriques’s convictions under both statutes were sustained.

Finally, in State v. Boivin, the court held that attempted first degree murder, aggravated battery, and possession of a firearm in the commission of a felony are not included offenses. Each requires proof of an element the others do not, thus satisfying Blockburger. Despite no constitutional restriction on multiple convictions, the court concluded that the legislative intent was to not allow multiple punishments for both aggravated battery and attempted first degree murder “where . . . no additional injury to another person or property” results. Thus, Boivin could properly be convicted of only possession of a firearm and either attempted murder or aggravated battery.
IV. Double Jeopardy

Some consideration has been given by the court to double jeopardy outside the included offense context. In State v. Johnson, the defendant (Johnson) was charged with aggravated battery, reckless operation of a vessel, operating a vessel under the influence of intoxicating liquor, and failure to render assistance following an accident. In a plea arrangement, accepted by the court, Johnson pleaded nolo contendere to culpable negligence with injury, and guilty to reckless operation of a vessel, and operating a vessel while under the influence of liquor. Following receipt of a pre-sentence report showing that Johnson had a previous conviction in Alabama and had received an “undesirable” discharge from the Air Force, the court vacated its judgment, tried Johnson, found him guilty under the original charge of aggravated battery, and sentenced him to thirteen years in prison. Despite not making any objection at trial, Johnson subsequently challenged the conviction collaterally under Florida Rule of Criminal Procedure 3.850. The challenge was rejected by the trial court. Before the supreme court the state argued, first, that Johnson had made certain misrepresentations to the trial judge when asked about his past, thus giving the judge cause to vacate the plea arrangement. Next, it was argued that Johnson waived any objection he possessed under double jeopardy by not raising the argument at trial.

The court dispensed quickly with the first assertion, finding that Johnson made no misrepresentation to the court. He was not asked to provide information, but was asked only generally if there were any thing he would like to tell the court prior to judgment. The state’s second argument proved more problematical, but was also rejected. The court found that the proscription against twice being placed in jeopardy is a “fundamental” right, with its primary purpose being to prevent a second trial from taking place, as opposed to governing the conduct of the second trial. Hence, the claim might be raised in a motion for post-conviction relief “even when that conviction is the result of a guilty plea.” In more general terms, the court stated that “the failure to timely raise a double jeopardy claim does not, in and of itself, serve as a waiver of the claim.” Explicit warning was given by the court, however, that “there may be limited instances in which a defendant may be found to have knowingly waived his double jeopardy rights.”

State v. Mars presented the court with, hopefully, an uncommon scenario. Mars was indicted for first degree murder, allegedly occurring on or about January 30, 1983. The bill of particulars, however, contained a typographical error, limiting the death to a time between 5 p.m. on January 29 and 12:59 a.m. on January 30. At trial, evidence tended to prove Mars committed the murder, but after 12:59 a.m. on January 30. The jury took note of this discrepancy, and was informed by the court that the state was held to its burden of proof as alleged within the bill of particulars. Following a motion to amend, to which defense counsel objected, the court again informed the jury that it was confined to the bill of particulars. The jury accordingly returned a verdict of not guilty.

Not to be bested by a simple acquittal, the state re-indicted Mars for second degree murder; however, this time the bill of particulars specified the crime occurred between 1 a.m. on January 30 and 1 a.m. on January 31. Of course, a motion to dismiss on grounds of former jeopardy was made, and not surprisingly granted by the trial court.

112. 483 So. 2d 420 (Fla. 1986).
113. The government agreed to not pros the charge of failure to render assistance. Id. at 421.
114. Id. at 422.
115. Id.
116. Specifically, the trial judge stated: “Mr. Johnson, at this time, judgments are entered against you. Is there anything you care to tell this court or any legal cause to show why judgment should not be entered?” Id.
117. Id. (citing Benton v. Maryland, 395 U.S. 784 (1969)).
118. 483 So. 2d at 422 (quoting Robinson v. Neil, 409 U.S. 505 (1973)).
119. Id. (citing Hudson v. Louisiana, 450 U.S. 40 (1981)).
120. Id. at 423 (citing People v. Michael, 48 N.Y.2d 1, 394 N.E.2d 1134, 420 N.Y.S.2d 371 (1979)).
121. Id. at 423 (citing United States v. Pratt, 657 F.2d 218 (8th Cir. 1981); United States v. Herzog, 644 F.2d 713 (8th Cir.), cert. denied, 451 U.S. 1018 (1981)).
122. Pratt was a double jeopardy challenge to multiple punishments for the same offense, as opposed to multiple trials. The court there found a waiver because the defendant pleaded guilty to a charge of distributing phencyclidine with knowledge that he might receive consecutive sentences. The court viewed this as an “assumed risk” in the plea agreement. Herzog involved another plea arrangement, where one year after entering his plea the defendant sought to challenge the indictment as multiplicitous. The court found this argument barred by Fred. R. Cirm. P. 12(b)(2), because it was not raised prior to trial. In a “true” double jeopardy situation where a second trial is held, hopefully these precedents will not be followed.
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The court dispensed quickly with the first assertion, finding that Johnson made no misrepresentation to the court. He was not asked to provide information, but was asked only generally if there were anything he would like to tell the court prior to judgment. 132 The state's second argument proved more problematical, but was also rejected. The court found that the proscription against twice being placed in jeopardy is a "fundamental" right, 133 with its primary purpose being to prevent a second trial from taking place, as opposed to opposing the conduct of the second trial. 134 Hence, the claim might be raised in a motion for post-conviction relief "even when that conviction is the result of a guilty plea." 135 In more general terms, the court stated that "the failure to timely raise a double jeopardy claim does not, in and of itself, serve as a waiver of the claim." 136 Explicit warning was given by the court, however, that "there may be limited instances in which a defendant may be found to have knowingly waived his double jeopardy rights." 137

State v. Mars 138 presented the court with, hopefully, an uncommon scenario. Mars was indicted for first degree murder, allegedly occurring on or about January 30, 1983. The bill of particulars, however, contained a typographical error, limiting the death to a time between 5 p.m. on January 29 and 12:59 a.m. on January 30. At trial, evidence tended to prove Mars committed the murder, but after 12:59 a.m. on January 30. The jury took note of this discrepancy, and was informed by the court that the state was held to its burden of proof as alleged within the bill of particulars. Following a motion to amend, to which defense counsel objected, the court again informed the jury that it was confirmed to the bill of particulars. The jury accordingly returned a verdict of not guilty. 139

Not to be bested by a simple acquittal, the state re-indicted Mars for second degree murder; however, this time the bill of particulars specified the crime occurred between 1 a.m. on January 30 and 1 a.m. on January 31. Of course, a motion to dismiss on grounds of former jeopardy was made, and not surprisingly granted by the trial court.

128. 483 So. 2d at 422 (quoting Robinson v. Neil, 409 U.S. 505 (1973)).
129. Id. (citing Hudson v. Louisiana, 450 U.S. 40 (1981)).
130. Id. at 423 (citing People v. Michael, 48 N.Y.2d 1, 394 N.E.2d 1134, 42 N.Y.S.2d 721 (1971)).
131. Id. at 423 (citing United States v. Pratt, 657 F.2d 218 (8th Cir. 1981);
Proof was a double jeopardy challenge to multiple punishments for the same offense, as opposed to multiple trials. The court there found a waiver because the defendant pleaded guilty to a charge of distributing phenylcyclidine with knowledge that he might receive consecutive sentences. The court viewed this as an "assumed risk" in the plea agreement. Herzog involved another plea arrangement, where one year after entering his plea the defendant sought to challenge the indictment as multiplicitous. The court found this argument barred by Frye v. U.S., 120 (D.C. 2), because it was not raised prior to trial. In a "true" double jeopardy situation where a second trial is held, hopefully these procedures will not be followed.
132. 498 So. 2d 402 (Fla. 1986).
133. Id. at 403.
Following the state's appeal, the district court affirmed after noting that Mars had not requested any instruction limiting the jury to the bill of particulars.\textsuperscript{124} The supreme court, in an opinion astonishing in simplicity if not logic, reversed, finding that Mars could in fact be prosecuted again for the same murder.\textsuperscript{126} Quoting from a 1981 decision, \textit{State v. Katz},\textsuperscript{128} with roots dating back to 1918,\textsuperscript{127} the court stated: "If the facts alleged in the second information, taken as true, would have supported a conviction of the offense charged in the prior information, the offenses are the same and the second prosecution is barred."\textsuperscript{130} Presuming the converse to be true, where the facts alleged in the second charging instrument would not support a conviction under the prior charging document, the court found a second prosecution not to be barred.\textsuperscript{132} The court reasoned that here the second indictment alleged the crime occurred after 1 a.m. on January 30, while the first alleged it occurred before that time. The facts alleged in the second indictment therefore would not support a conviction under the first, and a second prosecution of Mars was thus permissible.\textsuperscript{134} Justices Overton and Boyd submitted strong dissents to the majority's opinion.\textsuperscript{136} Justice Boyd's argument was two-fold: first, the \textit{Katz} decision was premised on the defendant's seeking an acquittal based on a material variance between the pleading and the proof. Where this is true, the court is justified in estopping the defendant from later arguing that the variance was not truly material, and consequently invoking double jeopardy by further arguing that the second prosecution is in essence the same as the first.\textsuperscript{138} Here, Mars made no such motion:

\begin{quote}
but merely objected to amendment of the pleading. Second, re
prosecution, as previously argued by Justice Boyd in his dissenting
opinion in \textit{Katz},\textsuperscript{134} violates double jeopardy. Justice Overton expressed
similar concerns, asserting that the decision regarding double jeopardy
in \textit{Brown v. Ohio}\textsuperscript{142} was controlling.
\end{quote}

The dissents' criticisms are well placed. Even if the \textit{Katz} opinion can be squared with basic double jeopardy principles, Mars did not involve a motion for acquittal. As a more fundamental concern, the Mars majority totally disregarded proper double jeopardy analysis. The
majority interpreted double jeopardy as only requiring a \textit{Block
burger}\textsuperscript{144} analysis; if this were satisfied the majority presumed no jeopardy problem existed. \textit{Blockburger} and its progeny,\textsuperscript{146} however, are concerned more with multiple convictions in a single trial than with multiple proceedings. Where the test is satisfied, the state may in a single proceeding convict and punish for violation of more than one statute. Double jeopardy concerns do not, however, end there; as pointed out by Justice Boyd in \textit{Katz},\textsuperscript{137} there exists an additional concern with trying the accused more than once for the same offense. This concern has generated its own United States Supreme Court precedent,\textsuperscript{148} quite distinct from the \textit{Blockburger} line. Most illustrative is \textit{Ash v. Swensson},\textsuperscript{150} where the Court found double jeopardy to include notions of collateral estoppel, thus precluding a second prosecution for robbery where a prior prosecution for robbery, involving the same incident but a different victim, resulted in acquittal. Though the second charge in \textit{Ash} involved a different victim, double jeopardy was found to prohibit reproduction because the victims were robbed together, and the prior acquittal necessarily established that the defendant was not one of the perpetrators. Note that had the Court applied only a \textit{Katz} - Mars analysis, a second prosecution would have been permissible.\textsuperscript{152}
Following the state's appeal, the district court affirmed after noting that Mars had not requested any instruction limiting the jury to the bill of particulars.134 The supreme court, in an opinion astonishing in simplicity if not logic, reversed, finding that Mars could in fact be prosecuted again for the same murder.135 Quoting from a 1981 decision, State v. Katz,136 with roots dating back to 1918,137 the court stated: "If the facts alleged in the second information, taken as true, would have supported a conviction of the offense charged in the prior information, the offenses are the same and the second prosecution is barred."138 Presuming the converse to be true, where the facts alleged in the second charging instrument would not support a conviction under the prior charging document, the court found a second prosecution not to be barred.139 The court reasoned that here the second indictment alleged the crime occurred after 1 a.m. on January 30, while the first alleged it occurred before that time. The facts alleged in the second indictment therefore would not support a conviction under the first, and a second prosecution of Mars was thus permissible.140

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134. Id.
135. Id. at 405.
137. See Sanford v. State, 75 Fla. 393, 396, 78 So. 340, 341 (1918) ("If the first indictment . . . were such that the accused might have been convicted under it on proof of the facts by which the second is sought to be sustained, then the jeopardy which attached on the first must constitute a protection against a trial on the second."). Id at 396, 78 So. at 341.
138. Mars, 498 So. 2d at 404.
139. Id.
140. Id.
141. Id. at 405 (Boyd, J., dissenting); Id. at 406 (Overton, J., dissenting).
142. Id. at 405. Though this author is not overly impressed with this "reverse estoppel" argument, it does bear a resemblance to the principle advanced by the United States Supreme Court that a defendant who seeks and obtains a mistrial might be re-prosecuted consistent with the double jeopardy clause. See United States v. Diaz, 425 U.S. 516 (1976).
143. 402 So. 2d at 1188 (Boyd, J., dissenting).
145. 284 U.S. 299 (1932); see supra note 106.
146. See supra note 109.
147. 402 So. 2d at 1188 (Boyd, J., dissenting).
148. See infra note 151 and accompanying text.
150. Because the second charge involved a different victim, the facts, taken as true, could not have supported a conviction under the prior charge. See Katz, 402 So. 2d at 1186. Mars, 498 So. 2d at 404. Consequently, under Katz and Mars, a second prosecution would be allowed.

Moreover, a long line of cases has addressed the problem, distinct from Blockburger, involving re-prosecution following either a mistrial or acquittal. Generally speaking, where a mistrial is granted on defendant’s motion, double jeopardy does not prejudice a second prosecution. Otherwise, following a mistrial a second prosecution is barred unless "manifest necessity" required the mistrial. An acquittal, on the other hand, generally bars a second prosecution regardless of how the acquittal comes about. In other words, if a final judgment of acquittal is returned by either a judge or jury as a determination of guilt or innocence, notwithstanding that the defendant "caused" the acquittal through motion or otherwise, re-prosecution is barred.

Although the foregoing approach might be criticized as one of form over substance, it is the law. Literal application of this law to Mars requires an affirmance of the trial court’s dismissal of the second indictment. Mars was acquitted of the murder by a jury of his peers. The second indictment was not for a new murder, but was a simple alteration of the time of the first murder. The possibilities of prosecutorial abuse in this situation are astounding; but conjecture aside, the Mars court’s logic and reasoning is simply inconsistent with current double jeopardy analysis. Though appealing in its simplicity, it runs afoul of Ashe v. Swenson and other Supreme Court precedent, and is a prime candidate for reexamination.

151. Illinois v. Somerville, 410 U.S. 458 (1973) (mistrial); Arizona v. Washington, 434 U.S. 497 (1978) (mistrial); United States v. Donitz, 424 U.S. 600 (1976) (mistrial); Oregon v. Kennedy, 456 U.S. 667 (1982) (mistrial); Lee v. United States, 432 U.S. 23 (1977) (court order equivalent to mistrial); United States v. Scott, 437 U.S. 82 (1978) (acquittal); Sanabria v. United States, 437 U.S. 54 (1978) (acquittal); United States v. Martin Linen Supply, 430 U.S. 564 (1977) (acquittal). 152. United States v. Donitz, 424 U.S. 600 (1976). 153. Illinois v. Somerville, 410 U.S. 458 (1973); see also Arizona v. Washington, 434 U.S. 497 (1978). 154. United States v. Scott, 437 U.S. 82 (1978); see also Sanabria v. United States, 437 U.S. 54 (1978). In Sanabria the defendant’s motion to suppress certain evidence was granted during trial. The court thereafter granted a judgment of acquittal because of insufficient evidence. The Supreme Court found that even though the suppression was erroneous, re-prosecution was barred. 154. 397 U.S. at 436. 155. Note that the problem might have been avoided if the trial court had granted the motion to amend, or simply ordered a mistrial. Because the grand jury indictment requirement of the fifth amendment is not binding on the states, no federal constitutional problem would have been raised by amending the indictment to conform to the evidence. Perhaps under Florida law, a problem would have arisen, but it would be much wiser for Florida courts to alter state law involving variance than to unnecessarily encounter federal constitutional difficulty. 156. 487 So. 2d 8 (Fla. 1986). 157. Though the court was correct in its conclusion, its reasoning again reflects the disregard of a fundamental concern of double jeopardy analysis, namely, avoiding multiple prosecutions. The court stated, consistent with its approach in Mars, that "[p]enal prosecutions are permissible for crimes which are not the "same offense" under the rule of Blockburger, . . . ." Id. at 10 (citation omitted). This approach, however, is not consistent with current double jeopardy analysis. See supra notes 136-55 and accompanying text. 158. 493 So. 2d 451 (Fla. 1986). 159. Id. at 452. 160. Id. at 453. The court further found this error not to be harmless, because of a "reasonable possibility that it contributed to the conviction." Id. 161. 480 So. 2d 94 (Fla. 1985).

V. Defenses

Defenses to crimes were considered by the court in only a few contexts. Butler v. State involved an awkward jury instruction on "justifiable use of force in one's own home" when the defendant was in fact in someone else's home and was claiming self-defense. The defendant (Butler) was charged with assaulting Jones in the latter's home. Butler claimed he was acting in self-defense in shooting at Jones because Jones had a gun. Not only did the trial court instruct the jury on self-defense, but it also instructed the jury on whether Jones, not a party to the action, was justified in using force. The court found this to be reversible error, reasoning that "[t]he instruction improperly shifted the focus of the case from the applicability of the defense of self-defense to the right of the victim to fight force with force." In a case with broader implications, State v. Holley, the court held that a person being charged with resisting arrest may defend under the theory that his resistance was in response to the use of excessive force. The court stated that "while a defendant cannot use force to resist an arrest, he may resist the use of excessive force in making

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One other case addressed by the court involving double jeopardy deserves mention. In Amazon v. State, the defendant was charged by information with burglary and sexual battery, and on the same day was indicted on two counts of first-degree murder. Defendant pleaded guilty before trial to burglary and sexual battery, and then moved to dismiss the indictment on double jeopardy grounds. The court correctly rejected the challenge, affirming the guilty verdict below.

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VI. Sentencing

Much of the court’s time this past year has been spent clarifying the use of its Sentencing Guidelines. Accordingly, at least some mention of the major developments in this area is justified. The Sentencing Guidelines were promulgated in an effort to achieve some level of uniformity in sentencing throughout the state. Under the Guidelines, points are awarded to each defendant following conviction based on the nature of the crime, and certain additional factors, such as prior rec

162. Id. at 96. Interestingly, the court reversed only the conviction for resisting arrest, and not the conviction for assaulting the officers. For this reason, Justices Boyd and Shaw dissented in part, arguing that because both convictions were a part of the same occurrence they should both have been reversed. Id. (Boyd and Shaw, JJ, dissenting).

163. 480 So. 2d 91 (Fla. 1985).

164. Id. at 92.

165. Id. at 93.

166. Id. In Lavado v. State, 492 So. 2d 1322 (Fla. 1986), the court found that the trial judge improperly limited questioning of the venire regarding his acceptance of the premise behind the defense of voluntary intoxication. This, the court concluded, denied defendant the right to trial by a fair and impartial jury. Id. at 1323.

167. 476 So. 2d 123 (Fla. 1985).


174. 488 So. 2d 523 (Fla. 1986); see also Reese v. State, 493 So. 2d 454 (Fla. 1986).

175. 429 So. 2d 797, 800 (Fla. 4th Dist. Ct. App. 1983).

176. Mitchler, 488 So. 2d at 525.

177. Id.


179. Id.

180. Id. at 28.

181. Id. at 28-29.
arrest."

In the case of *Gardner v. State*, the court reversed the trial judge's refusal to give a jury instruction on voluntary intoxication, stating: "Voluntary intoxication is a defense to certain limited crimes of first-degree murder and robbery." The instruction need not be given, however, when there is no evidence of the amount of alcohol consumed during the hours preceding the crime and no evidence that the defendant was intoxicated. In *Gardner*, the court found sufficient evidence to warrant the instruction, noting that the defendant's accomplice testified that the defendant drank three and one-half cans of beer and smoked marijuana prior to committing the crimes.

Finally, consistent with its 1985 decision in *Yohn v. State*, the court issued a standard jury instruction concerning the insanity defense: "All persons are presumed to be sane. However, if the evidence causes you to have a reasonable doubt concerning the defendant's sanity, then the presumption of sanity vanishes and the state must prove beyond a reasonable doubt that the defendant was sane."

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In Hankey v. State\textsuperscript{182}, the court held that although the economic hardship suffered by the victim of a burglary could not be used to denote from the Guidelines, emotional hardship could. In addition, "break of trust" could support departure in a burglary setting, where the victim had hired the defendant to clean the building and had entrusted the defendant with a key.\textsuperscript{188}

Where the charge is attempted murder or some other crime against the person, the status of the victim might support a departure from the Guidelines. In State v. Baker\textsuperscript{185}, the court held that departure is appropriate where the charge is attempted first-degree murder and the victim is a police officer. The supreme court agreed with the district court that "[t]here is a special interest in affording protection to police servants who regularly must risk their lives in order to guard the safety of other persons and property."\textsuperscript{189}

In other developments the court, relying on its 1985 decision in Albritton v. State,\textsuperscript{188} held that where both valid and invalid departure reasons are given by the trial judge, unless the state is able to show harmless error beyond a reasonable doubt reversal of the sentence is required.\textsuperscript{189} Also, as a procedural matter, the court made it clear that written reasons for departure must be given,\textsuperscript{190} and that mere inclusion of the trial transcript of the reasons is insufficient. Finally, when the court makes a computational error in calculating points under the guidelines, it may correct its error at any time without the need of objection.\textsuperscript{190}

\textsuperscript{182} 483 So. 2d 827 (Fla. 1986).
\textsuperscript{183} Id. at 828. Compare the case of Williams v. State, 492 So. 2d 1308 (Fla. 1986), where the court held that the "vulnerability" of the victim of a stabbing was not a valid reason for departure.
\textsuperscript{184} 483 So. 2d 423 (Fla. 1986).
\textsuperscript{185} Id. at 424. See Baker v. State, 466 So. 2d 1144, 1146 (Fla. 3d Dist. O. Apr. 1985) (quoting Roberts v. Louisiana, 428 U.S. 520, 526 (1976)).
\textsuperscript{186} 476 So. 2d 158 (Fla. 1985).
\textsuperscript{187} See Sloan v. State, 491 So. 2d 276, 278 (Fla. 1986); Wade v. State, 482 So. 2d 346 (Fla. 1986); Adams v. State, 479 So. 2d 739 (Fla. 1985).
\textsuperscript{188} State v. Conz, 487 So. 2d 1039 (Fla. 1986).
\textsuperscript{189} Berke v. State, 483 So. 2d 404 (Fla. 1985). Note that where the court fails to make written finding when departing from the guidelines, its sentence is illegal and may be set aside on appeal even without any contemporaneous objection. State v. Whitefield, 487 So. 2d 1045 (Fla. 1986).
\textsuperscript{190} State v. Chaplin, 490 So. 2d 52 (Fla. 1986). On appeal, however, the constitutional error must appear in the record, or the court cannot alter the sentence. Delvy v. State, 488 So. 2d 532 (Fla. 1986).

\textsuperscript{191} 498 So. 2d 863 (Fla. 1986).
\textsuperscript{192} FLA. STAT. § 775.084 (1985).
\textsuperscript{193} Whitehead, 498 So. 2d at 867.
\textsuperscript{194} A word of thanks to Paul Terlizzi, my research assistant, for his help in bringing this project to fruition.
In *Hankey v. State*, the court held that although the economic hardship suffered by the victim of a burglary could not be used to deviate from the Guidelines, emotional hardship could. In addition, "break of trust" could support departure in a burglary setting, where the victim had hired the defendant to clean the building and had entrusted the defendant with a key. Where the charge is attempted murder or some other crime against the person, the status of the victim might support a departure from the Guidelines. In *State v. Baker*, the court held that departure is appropriate where the charge is attempted first-degree murder and the victim is a police officer. The supreme court agreed with the district court that "[t]here is a special interest in affording protection to ... public servants who regularly must risk their lives in order to guard the safety of other persons and property." In other developments the court, relying on its 1985 decision in *Albritton v. State*, held that where both valid and invalid departure reasons are given by the trial judge, unless the state is able to show harmless error beyond a reasonable doubt of reversal of the sentence is required. Also, as a procedural matter, the court made it clear that written reasons for departure must be given, and that mere dictation into the trial transcript of the reasons is insufficient. Finally, where the court makes a computational error in calculating points under the guidelines, it may correct its error at any time without the need of objection.

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191. 498 So. 2d 863 (Fla. 1986).
193. Whitehead, 498 So. 2d at 867.
194. A word of thanks to Paul Tertlezzees, my research assistant, for his help in finishing this project.

**VII. Conclusion**

The Florida Supreme Court spent much of its time in 1986 clarifying the state's Sentencing Guidelines. Specifically, a good deal of energy was expended in the determination of what factors validly constitute "clear and convincing" reasons which would enable judges to deviate from the prescribed standards. While these reasons are still not completely defined, the decisions of this past year should at least provide a somewhat more workable standard.

The court was not quite as clear in its reasoning or logic in the handling of cases presenting vagueness challenges. The court, perhaps unwisely, chose to act as interpreter in *Williams* when the wording of the statute in question was a model of clarity. Whereas, in the McGuire decision, the court concluded that an apparently vague rule was not one tending to lead to inconsistent interpretation or application. The court's application of the vagueness doctrine appears to be an area which warrants a thorough reevaluation in times to come.

Likewise, the court struggled in its analysis of the proscription against double jeopardy. Granted, the contours of double jeopardy are irregular and often difficult to negotiate; notwithstanding, the court must reevaluate its position regarding multiple proceedings.