Criminal Procedure

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Abstract

The Florida Legislature addressed the right to trial by jury during the 1986 Legislative Session, passing legislation which applied the right to all cases in which imprisonment is a potential penalty, however short the imprisonment.

KEYWORDS: trial, jury, death
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I. Right to Trial by Jury: New Legislation Mandates Trial by Jury in All Cases Involving Potential Imprisonment

The Florida Legislature addressed the right to trial by jury during the 1986 Legislative Session, passing legislation which applied the right to all cases in which imprisonment is a potential penalty, however short the imprisonment. Although the Legislature apparently intended to eliminate the right in cases not involving loss of liberty, constitutional precedent requires its retention in many cases in which the punishment is limited to a monetary fine.

A. The Right to Trial by Jury in Felony Cases


2. See infra text accompanying notes 57 to 66.

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has had the right to trial by jury. In more recent decisions, the Florida courts have reflected the decisions of the United States Supreme Court, which had apparently settled the question of application of the right to felony prosecutions in the cases of Duncan v. Louisiana and Baldwin v. New York. Duncan first determined that the constitutional right was applicable to the states in cases which, if tried in the federal system, would be tried by jury; it then established the extant federal dichotomy between "serious" and "petty" offenses as the line which determined the availability of trial by jury. In the federal system, if a case was "serious," the defendant had the right to trial by jury; if the case was "petty," the defendant had no right to trial by jury. Although Duncan did not establish a "bright line" test for determining whether a given charge was serious or petty, the subsequent Baldwin holding—that "no case can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized"—appear to have established the dividing line at an authorized imprisonment of more than six months or a potential fine of more than $500.00. After the Duncan and Baldwin decisions, the Florida Supreme Court ratified the "serious/petty" dichotomy as the test in Florida, although not without some dissent. The right to trial by jury therefore clearly applies to all felonies, since a felony is defined as an offense which carries a potential imprisonment of more than one year and is, therefore, a "serious" offense.
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The Florida Legislature addressed the right to trial by jury during the 1986 Legislative Session, passing legislation which applied the right to all cases in which imprisonment is a potential penalty, however short the imprisonment.1 Although the Legislature apparently intended to eliminate the right in cases not involving loss of liberty, constitutional precedent requires its retention in many cases in which the punishment is limited to a monetary fine.2

A. The Right to Trial by Jury in Felony Cases

Insofar as the right to jury trial applies in felony cases, the law has always apparently been clear. In any felony prosecution, the accused has had the right to trial by jury.3 In more recent decisions, the Florida courts have reflected the decisions of the United States Supreme Court, which had apparently settled the question of application of the right to felony prosecutions in the cases of Duncan v. Louisiana4 and Baldwin v. New York.5 Duncan first determined that the constitutional right was applicable to the states in cases which, if tried in the federal system, would be tried by jury; it then established the extent federal dichotomy between “serious” and “petty” offenses as the line which determined the availability of trial by jury.6 In the federal system, if a case was “serious,” the defendant had the right to trial by jury; if the case was “petty,” the defendant had no right to trial by jury. Although Duncan did not establish a “bright line” test for determining whether a given charge was serious or petty, the subsequent Baldwin holding—that “no case can be deemed ‘petty’ for purposes of the right to trial by jury where imprisonment for more than six months is authorized”—apparently established the dividing line at an authorized imprisonment of more than six months or a potential fine of more than $500.00.7 After the Duncan and Baldwin decisions, the Florida Supreme Court ratified the “serious/petty” dichotomy as the test in Florida, although not without some dissent.8 The right to trial by jury therefore clearly applies to all felonies, since a felony is defined as an offense which carries a potential imprisonment of more than one year and is, therefore, a “serious” offense.9

2. See infra text accompanying notes 57 to 66.
3. The review of Florida case law history has turned up no significant challenges to the right of trial by jury, and no indications that the denial of the right was challenged on appeal of conviction for felonies. Indeed, it is probable that, throughout the early history of the State, the right was accorded to all “criminal offenses” whether felony or misdemeanor. See discussion on the applicability of the right in misdemeanor cases infra text accompanying notes 11 to 25.
8. See Reed v. State, 470 So. 2d 1382 (Fla. 1985); Whirley v. State, 450 So. 2d 836 (Fla. 1984); State v. Webb, 335 So. 2d 826 (Fla. 1976); Aaron v. State, 284 So. 2d 673 (Fla. 1973). For the dissenting views, see the opinions of Justices Shaw and Boyd in Reed and Whirley.
9. Fla. STAT. § 775.08(1) (1985) defines felony as an offense punishable by death or imprisonment in the state penitentiary. It then specifies that offenses punishable by imprisonment in the state penitentiary are those which exceed one year.
B. The Right to Trial by Jury for Misdemeanors

The right to trial by jury in prosecutions for offenses less than felonies has had a long, varied and confusing history in the State of Florida. The confusion stems from the fact that there are a multiplicity of offenses less than felonies to which the right might apply, and that the various denominated offenses are sometimes treated alike, sometimes differently. Early Florida cases did not explicitly refer to a right to trial by jury for misdemeanors, although they addressed the right to trial by jury in cases involving violations of municipal and county ordinances. The cases dealing with ordinance violations, however, clearly imply that, in early state jurisprudence, the Florida Constitution was interpreted as providing a right to trial by jury for felonies and misdemeanors alike. In the case of Hunt v. Jacksonville, for example, the defendant was charged with having "disturbed the public peace" by "committing an assault and battery" and was fined the sum of $500.00. The defendant pleaded to the jurisdiction of the court, claiming that the ordinance violation was, in reality, a violation of the misdemeanor of assault and battery, for which the defendant was entitled to a trial by jury, and that the City of Jacksonville, being unable to conduct a jury trial, lacked jurisdiction to try the defendant. Hunt claimed the right to trial by jury under section three, declaration of rights of the Constitution of the State of Florida, the equivalent of the current article one, section twenty-two. Although the Hunt case turned on other grounds, it is inconceivable that the defendant would have premised the defense on the availability of trial by jury for a misdemeanor in state courts had not the right been so available.

9. At present, there exist "misdemeanors," "municipal ordinance violations," "county ordinance violations," "infractions," etc., all of which may be treated differently for different purposes. See, for example, Webb, 335 So. 2d at 827, for the treatment of an "infraction."
10. Hunt v. Jacksonville, 34 Fla. 504, 16 So. 398 (Fla. 1894); Theisen v. McDavid, 34 Fla. 440, 16 So. 321 (Fla. 1894).
11. 34 Fla. at 504, 16 So. at 398.
12. The provisions of general law empowering municipalities to punish ordinance violations provided that the maximum sentence imposed could not exceed a fine of $500 or imprisonment for 60 days. §§ 673, Rev. Stats. (1877).
13. Hunt, 34 Fla. at 504, 16 So. at 398.
14. Fla. Const. art. I, § 22 reads in pertinent part: "The right of trial by jury shall secure to all and remain inviolate." Art. I, § 16 reads in pertinent part: "It is the duty of juries in criminal prosecutions to try the accused when they are charged with offenses of crimes or offenses punishable by imprisonment of more than one year or by fine of more than $1000 or both, and in all other cases to try them by the court where the crime was committed."

A similar argument is implicit in the case of Theisen v. McDavid. Theisen was charged with selling goods on Sunday, in violation of a municipal ordinance. Both the municipal ordinance and a state statute prohibited such sales, the state statute providing for a fine of not less than twenty or more than fifty dollars, but not authorizing imprisonment. In Theisen, as in Hunt, the defendant objected to the denial of trial by jury, since the case was being tried in municipal court. The defendant's actions clearly imply the existence of the right to trial by jury for a similar offense in a state court. Although the court did not explicitly address the issue, summarily denying the defendant's claims on other grounds, the case implies that the right to jury trial did exist for trial of misdemeanors. The issue would not otherwise have been relevant.

Regardless of earlier interpretations, however, once Duncan and Baldwin had been decided the courts in Florida applied the criteria set forth in those cases to misdemeanor offenses, holding that those misdemeanors which were considered "petty" did not require trial by jury. In the initial case of State v. Webb, although the decision turned on other grounds, the court mentioned the Duncan/Baldwin test with apparent approval, noting that the punishment imposed for a municipal ordinance violation would not have been forbidden by the United States Constitution because the violation was "petty." The ruling subsequently was made more explicit by the Second District Court of Appeal in the cases of State v. Lavalley and City of Tampa v. Popolito. In 1984, with the case of Whirley v. State, acceptance of the Duncan/Baldwin test was complete. The supreme court accepted the test as binding on the states, holding that it established not only the...
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9. At present, there exist “misdemeanors,” “municipal ordinance violations,” “county ordinance violations,” “infractions,” etc., all of which may be treated differently for different purposes. See, for example, Webb, 335 So. 2d at 827, for the treatment of an “infraction.”
10. Hunt v. Jacksonville, 34 Fla. 504, 16 So. 398 (Fla. 1914); Theisen v. McCrady, 24 Fla. 440, 16 So. 321 (Fla. 1892).
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13. Hunt, 34 Fla. at 504, 16 So. at 398.
14. Fla. Const. art. I, § 22 reads in pertinent part: “The right of trial by jury shall be the same in all cases and shall be enjoyed in all criminal prosecutions.” Art. I, § 16 reads in pertinent part: “It shall be the duty of the courts of the county where the crime was committed.”

A similar argument is implicit in the case of Thenisen v. McDavid. Thenisen was charged with selling goods on Sunday, in violation of a municipal ordinance. Both the municipal ordinance and a state statute prohibited such sales, the state statute providing for a fine of not less than twenty or more than fifty dollars, but not authorizing imprisonment. In Thenisen, as in Hunt, the defendant objected to the denial of trial by jury, since the case was being tried in municipal court. The defendant's actions clearly imply the existence of the right to trial by jury for a similar offense in a state court. Although the court did not explicitly address the issue, summarily denying the defendant's claims on other grounds, the case implies that the right to jury trial did exist for trial of misdemeanors. The issue would not otherwise have been relevant.

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maximum extent of the right (jury trial in "serious" cases) but also established the minimum (no jury trial in "petty" cases). Although exceptions to the test were recognized, the test was clearly applied to misdemeanor offenses in Florida. In 1985, in Reed v. State, the supreme court discussed the substance of the test in some detail, but emphasized that the test was to be accepted in Florida as setting the minimum standard for providing trial by jury. By 1985, with some exceptions, trial by jury was to be provided only for those misdemeanors the potential punishment of which exceeded imprisonment for more than six months or fine of more than $500.00.

C. The Right to Trial by Jury for Ordinance Violations

The various constitutions of the State of Florida have all contained two separate and distinct expressions of the right to trial by jury. The dual reference remains in the present Florida Constitution. Article one, section sixty, provides that, "In all criminal prosecutions the accused has a right to trial by jury." Article one, section twenty-two provides that "[t]he right of trial by jury shall be to all and remain inviolate . . ." The early cases in Florida which dealt with questions of the applicability of the right to trial by jury raised an issue not under the equivalent of section twenty-six, by its language applicable or obviously to criminal cases, but under the then extant equivalent of the current section twenty-two. This choice has apparently caused some confusion in later appellate decisions. Additional factors examining the confusion in Florida's appellate decisions were the labeling of certain actions as other than "criminal" and the concept, in earlier state jurisprudence, that the "municipal corporation" was an artificial entity established by inhabitants of a given area, having a mixture of governmental and proprietary purpose, but not sharing in the sovereignty of the state. The issue of the applicability of the right to trial by jury to prosecutions for ordinance violations was first raised in the case of Hunt v. City of Jacksonville, a case which established the proposition that trial for violation of a city ordinance need not be trial by jury. Hunt, charged with violation of a municipal ordinance, claimed the right to trial by jury under section three, declaration of rights of the Constitution of the State of Florida, the equivalents of the current article one, section twenty-two. Reliance on that provision was based on the concept that enforcement of a municipal ordinance did not involve the exercise of state criminal sovereignty; it was a civil matter, the state being a municipal corporation and the action one between the municipal corporation (not the state) and the citizen. The matter was considered to be other than "criminal," and therefore governed not by the constitutional guarantee of the right to trial by jury in criminal cases, but by the constitutional provision referring to the preservation of the right of trial by jury in other than criminal cases. Reasoning that the

23. See infra text accompanying notes 37 to 56 regarding exceptions to the "serious/petty" denouement.
24. Justice Boyd, in dissent, refused to accept the Dusenbery/Balduz test, reading the state constitution as providing a jury trial in all criminal cases. Whimper, 450 So. 2d at 840. (Boyd, J. dissenting).
25. 470 So. 2d at 1382.
26. See Reed, 470 So. 2d at 1386 (Shaw, J., concurring).
27. Fla. Const. art. I § 16.
28. Id. art. I § 22.
29. Hunt, 34 Fla. at 504, 56 So. at 398; Thiessen, 34 Fla. at 440, 16 So. at 321.
30. Reed, 470 So. 2d at 1382.

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maximum extent of the right (jury trial in “serious” cases) but also established the minimum (no jury trial in “petty” cases). Although exceptions to the test were recognized,23 and in spite of some dissent,24 the test was clearly applied to misdemeanor offenses in Florida. In 1985, in Reed v. State,25 the supreme court discussed the substance of the test in some detail, but emphasized that the test was to be accepted in Florida as setting the minimum standard for providing trial by jury. By 1985, with some exceptions, trial by jury was to be provided only for those misdemeanors the potential punishment of which exceeded imprisonment for more than six months or fine of more than $500.00.

C. The Right to Trial by Jury for Ordinance Violations

The various constitutions of the State of Florida have all contained two separate and distinct expressions of the right to trial by jury.26 The dual reference remains in the present Florida Constitution. Article one, section sixteen, provides that, “In all criminal prosecutions the accused has a right to trial by jury.”27 Article one, section twenty-two provides that “[t]he right of trial by jury shall be secure to all, and remain inviolate . . .”28 The early cases in Florida which dealt with questions of the applicability of the right to trial by jury raised the issue, not under the equivalent of section sixteen, by its language applicable obviously to criminal cases, but under the then extant equivalent of the current section twenty-two.29 This choice has apparently caused some confusion in later appellate decisions.30 Additional factors examined in the confusion in Florida’s appellate decisions were the labeling of certain actions as other than “criminal” and the concept, in earlier state jurisprudence, that the “municipal corporation” was an artificial entity established by inhabitants of a given area, having a mixture of governmental and proprietary purpose, but not sharing in the sovereignty of the state.31 The issue of the application of the right to trial by jury to prosecutions for ordinance violations was first raised in the case of Hunt v. City of Jacksonville,32 a case which established the proposition that trial for violation of a city ordinance need not be trial by jury. Hunt, charged with violation of a municipal ordinance, claimed the right to trial by jury under section three, declaration of rights of the Constitution of the State of Florida, the equivalent of the current article one, section twenty-two.33 Reliance on that provision was based on the concept that enforcement of a municipal ordinance did not involve the exercise of state criminal sovereignty; it was a civil matter, the city being a municipal corporation and the action one between the municipal corporation (not the state) and the citizen. The matter was considered to be other than “criminal,” and therefore governed not by the constitutional guarantee of the right to trial by jury in criminal cases, but by the constitutional provision referring to the preservation of the right of trial by jury in other than criminal cases.34 Reasoning that the

23. See infra text accompanying notes 37 to 56 regarding exceptions to the “serious/petty” demarcation.
24. Justice Boyd, in dissent, refused to accept the Dismuke/Baldwin test, reading the state constitution as providing for jury trial in all criminal cases. Whirley, 455 So. 2d at 840 (Boyd, J. dissenting).
25. 470 So. 2d at 1382.
26. See Reed, 470 So. 2d at 136 (Shaw, J., concurring).
27. Fla. Const. art. I § 16.
29. Hunt, 34 Fla. at 504, 16 So. 121 (1892).
30. Reed, 470 So. 2d at 1382.
31. For example, in Thiesen v. McDaid, 34 Fla. 410, 16 So. 321 (1894), the court clearly established the independent existence of the municipal corporation as a separate “sovereign” for purposes of double jeopardy analysis. Within the contemplation of the constitutional inhibition against dual jeopardy for the same offense, our municipal governments are regarded as separate and distinct bodies politic from the government of the state. Consequently, if the offender has been once in the municipal courts, put in jeopardy for the offense involved in the infraction of the municipal law, he cannot again, by the municipal authorities, be put in jeopardy for the same, but such jeopardy will not shield him from trial and punishment by the state authorities for the distinct and independent offense, though involving the same act, that grows out of the transgression of the state law.
32. Id. at 322.
33. This doctrine of separate and distinct municipal sovereignty, insofar as it permitted separate prosecutions for the same offense, was later repudiated by the United States Supreme Court in United States v. Butler, 377 U.S. 350 (1964), the Court holding that states and other political subdivisions of states were "subordinate instrumentalities" of the state and not independent sovereigns.
34. 34 Fla. 504, 16 So. 398 (1894).
35. Fla. Const. art. I § 22 reads in pertinent part: "The right of trial by jury shall be secure to all and remain inviolate." Art. I § 16 reads in pertinent part: "In all criminal prosecutions the accused shall . . . have a speedy and public trial by impartial jury in the county where the crime was committed."
36. In analyzing the applicability of the two sections, the Supreme Court of Florida made the distinction clear in the case of Wright v. Worsh, 83 Fla. 204, 97 So. 87 (1922), when it pointed out that the language of the current section 16 would not have applicability to municipal cases. Since the section provided for prosecution by indictment, not available from a city prosecutor, for trial in the county where the offense was
noncriminal right to jury trial for violation of municipal ordinances did not exist at the time of the adoption of the Florida Constitution, the court declined to apply it to the Hunt situation. More recent decisions have indiscriminately applied the statement that the right to trial by jury did not apply to ordinance violations to violations of municipal ordinances and county ordinances alike, the courts no longer discriminating between the effect of prosecution by the sovereign and prosecution by a distinct corporation.

D. Inroads on the Duncan/Baldwin Limitation

Following the Duncan and Baldwin decision and general acceptance of the serious/petty dichotomy as determinative of whether the right to trial by jury exists, attacks began to be made on the doctrine from various quarters. In the federal courts arose the cases of Muniz v. Hoffman and United States v. Sanchez-Meza. Muniz involved a labor union charged with contempt proceedings for violating temporary injunctions. The Supreme Court held that, despite the apparent Baldwin conclusion that imprisonment of over six months or fine of over $500 was always "serious," the seriousness of the penalty to be imposed was actually relative. A potential fine of $10,000 was not considered serious when applied to this labor union defendant because of the size and economic resources of the union. While the test for application of the right to trial by jury was reiterated as the serious/petty dichotomy established in Duncan, Muniz clearly held that the six month imprisonment/$500 fine test of Baldwin does not apply in all situations. In the case of a fine, at least, the relative seriousness of the fine imposed is relative to the financial resources of the defendant. The case leads one to question whether a fine of less than $500 might be considered serious, given the economic condition of an indigent defendant.

A further inroad on the test itself was made in the case of United

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42. 547 F. 2d at 461.
43. Id. at 464.
44. Whitley, 450 So. 2d at 836.
45. Id. at 838 (citing Callan v. Wilson, 127 U.S. 540 (1888)).
46. Id. (citing Shick v. United States, 195 U.S. 65 (1904)).
47. Id. (citing District of Columbia v. Colts, 282 U.S. 63 (1930)).
50. Whitley, 450 So. 2d at 839.
51. See the concurring opinions of Justices Overton and Shaw in Whitley, 450 So. 2d at 839.
52. Whitley, 450 So. 2d at 840. (Boyd, J., dissenting).
53. 470 So. 2d at 1382.
noncriminal right to jury trial for violation of municipal ordinances did not exist at the time of the adoption of the Florida Constitution, the court declined to apply it to the Hunt situation. More recent decisions have indeterminately applied the statement that the right to trial by jury did not apply to ordinance violations to violations of municipal ordinances and county ordinances alike, the courts no longer discriminating between the effect of prosecution by the sovereign and prosecution by a distinct corporation.

D. Intrusion on the Duncan/Baldwin Limitation

Following the Duncan and Baldwin decision and general acceptance of the serious/petty dichotomy as determinative of whether the right to trial by jury exists, attacks began to be made on the doctrine from various quarters. In the federal courts arose the cases of Mistretta v. Hoffman and United States v. Sanchez-Meza. Mistretta involved a labor union charged with contempt proceedings for violating temporary injunctions. The Supreme Court held that, despite the apparent Baldwin conclusion that imprisonment of over six months or fine of over $500 was always "serious," the seriousness of the penalty to be imposed was actually relative. A potential fine of $10,000 was not considered serious when applied to this labor union defendant because of the size and economic resources of the union. While the test for application of the right to trial by jury was reiterated as the serious/petty dichotomy established in Duncan, Mistretta clearly held that the civil fines imposed/$50 fine test of Baldwin does not apply in all situations. In the case of a fine, at least, the relative seriousness of the fine imposed is relative to the financial resources of the defendant. The case lends itself to question whether a fine of less than $500 might be considered serious given the economic condition of an indigent defendant.

A further intrusion on the test itself was made in the case of United States v. Sanchez-Meza. The federal court of appeals there found that the Duncan/Baldwin test did not apply to those cases which had been indictable at common law, or morally offensive and "tarnished in se." In the federal courts, therefore, the Duncan/Baldwin test became less than an absolute "bright line" test for determining whether a trial by jury was required for a criminal offense.

The Florida Supreme Court followed the Sanchez-Meza precedent in Whitley v. State, enumerating four classes of "serious" offenses and establishing the principle that the severity of the potential punishment is not the sole criterion for determining whether an offense is "serious" or " petty." In addition to those offenses carrying a maximum penalty of more than six months imprisonment or fine of more than $500, the court found four additional classes of offenses that required trial by jury: "crimes that were indictable at common law," "crimes that involve moral turpitude," and "crimes that are malum in se or inherently evil at common law." The court then concluded that the offense of Driving Under the Influence, whether prosecuted as a violation of a state statute or a county ordinance violation, did not give rise to the right to trial by jury so long as the sentence to be imposed did not exceed the six month/$500 criteria.

Three opinions in that case, however, two concurring and one dissenting, suggested that the law should be changed. The concurring opinions held that the right to trial by jury was governed by the federal Constitution and the Duncan/Baldwin interpretations, but that the legislature should change the statutory law so as to provide for trial by jury. The dissenting opinion indicated that the state constitution should always be provided for a jury trial for all criminal prosecutions, and that the subject offense was such a criminal offense. One year later, in Reed v. State, the court recon
sidered the issue, addressing the applicability of the *Duncan/Baldwin* rationale. While the court reiterated the *Duncan/Baldwin* dichotomy, it held that cases which fall into the categories which the court established in *Whirley* are not subject to the *Duncan/Baldwin* analysis. The defendant was charged with criminal mischief for willfully and maliciously breaking a glass door panel in a St. Augustine bank, and demanded trial by jury. Analyzing the offense of "criminal mischief," the court determined that the elements of that offense were the same as that of the common law offense of "malicious mischief." The court held that the offense had been indictable at common law and the defendant was, therefore, entitled to trial by jury.

E. The 1986 Legislation and its Effects

The major change in 1986 did not occur through court decision, but rather through legislative enactment. While the legislation apparently creates another objective, "bright line" test, it does not solve the problems of the right to trial by jury, but merely shifts them to another level. The new statute reads:

> 918.0155. Right to trial by jury. — In all prosecutions for a violation of a state law or a municipal or county ordinance punishable by imprisonment, the defendant shall have, upon demand, the right to trial by an impartial jury in the county where the offense was committed, except as to all such prosecutions for violations punishable for a term of imprisonment of 6 months or less, if at the time the case is set for trial the court announces that in the event of conviction of the crime as charged or of any lesser included offense, a sentence of imprisonment will not be imposed, and the defendant will not be adjudicated guilty, unless a right to trial by jury for such offense is guaranteed under the state or federal constitution.

The intent of the Legislature is clear: to enact a right to trial by jury correlative to the right to counsel established by the United States Supreme Court, and codified in the Florida Rules of Criminal Procedure.

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54. Id. at 1384.
55. Id.
56. Id.
57. 1986 Fla. Laws 340 (to be codified at Fla. Stat. § 918.0155 (1987)).
58. The United States Supreme Court, in the cases of *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and *Scott v. Illinois*, 440 U.S. 367 (1979), had established an apparently clear line as to when a defendant was entitled to appointment of counsel if the defendant was indigent. The test, in its current stage of evolution, was announced in *Scott*: "We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." *Scott*, 440 U.S. at 373-74. The cases did not, therefore, state that a defendant had the right to counsel, only that the state could not imprison a defendant who was not afforded the to counsel right at the trial of the cause.
60. Fla. R. CRIM. P. 3.111(b)(1).
63. See supra text accompanying notes 3 to 6.
sidered the issue, addressing the applicability of the Duncan/Baldwin rationale. While the court reiterated the Duncan/Baldwin dichotomy, it held that cases which fall into the categories which the court established in Whirley are not subject to the Duncan/Baldwin analysis. The defendant was charged with criminal mischief for willfully and maliciously breaking a glass door panel in a St. Augustine bank, and demanded trial by jury. Analyzing the offense of "criminal mischief," the court determined that the elements of that offense were the same as that of the common law offense of "malicious mischief." The court held that the offense had been indictable at common law and the defendant was, therefore, entitled to trial by jury.46

E. The 1986 Legislation and its Effects

The major change in 1986 did not occur through court decision, but rather through legislative enactment. While the legislation apparently creates another objective, "bright line" test, it does not solve the problems of the right to trial by jury, but merely shifts them to another level. The new statute reads:

918.0155. Right to trial by jury. — In all prosecutions for a violation of a state law or a municipal or county ordinance punishable by imprisonment, the defendant shall have, upon demand, the right to trial by an impartial jury in the county where the offense was committed, except as to all such prosecutions for violations punishable for a term of imprisonment of 6 months or less, if at the time the case is set for trial the court announces that in the event of conviction of the crime as charged or of any lesser included offense, a sentence of imprisonment will not be imposed, and the defendant will not be adjudged guilty, unless a right to trial by jury for such offense is guaranteed under the state or federal constitution.47

The intent of the Legislature is clear: to enact a right to trial by jury correlative to the right to counsel established by the United States Supreme Court,48 and codified in the Florida Rules of Criminal Procedure.49 In shorthand form, the right to counsel as set forth in the Florida rules precludes imposition of a sentence of imprisonment unless the right to counsel was afforded that defendant at trial. It does not apply, however, if the judge announces, prior to trial, that a sentence of imprisonment will not be imposed if the defendant is convicted.50 Tracking the right to counsel, the Legislature obviously intended the right to trial by jury to apply to those defendants facing potential imprisonment of any length.

The 1986 legislation did not eliminate the problems of applicability of the right to trial by jury. It transferred them to a new level and raised additional difficulties. Effectively, the legislation extended the right to trial by jury to those offenses which had been crimes or ordinance violations carrying a potential penalty of less than six months imprisonment and which did not fall under any of the four categories established in Whirley.51 The legislation obviously did not, and could not, abrogate a right founded in the Constitutions of the United States or the State of Florida. Indeed, the legislation specifically exempts from its application all offenses for which the right to trial by jury is constitutionally guaranteed.52

In summary, there now exists a number of classes of offenses which may, under one rationale or another, be entitled to the right of trial by jury:

1. Offenses deemed serious under the Duncan/Baldwin test. These offenses are governed primarily by the six month/$500 test set out in the Duncan and Baldwin cases.

2. Cases which do not involve a potential imprisonment of more than six months, but in which the potential penalty is deemed "serious"

54. Id. at 1384.
55. Id.
56. Id.
57. 1986 Fla. Laws 340 (to be codified at Fla. STAT. § 918.0155 (1987)).
58. The United States Supreme Court, in the cases of Gideon v. Wainwright, 372 U.S. 335 (1963), Argersinger v. Hamlin, 407 U.S. 25 (1972), and Scott v. Illinois, 440 U.S. 367 (1979), had established an apparently clear line as to when a defendant was entitled to appointment of counsel if the defendant was indigent. The test, in its current stage of evolution, was announced in Scott: "We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." Scott, 440 U.S. at 373-74. The cases did not, therefore, state that a defendant had the right to counsel, only that the state could not imprison a defendant who was not afforded the to counsel right at the trial of the cause.
63. See supra text accompanying notes 3 to 6.
because of its application to a particular defendant. The existence of this kind of case is inferred from Muniz v. Hoffman, where the imposition of a fine on a labor union could not be considered “serious” because of the relative affluence of the union. In this situation, conviction of an offense involving only imposition of a fine could be considered “serious” in the case of an indigent, or a person in such a position that the very fact of conviction would affect the person’s future.

3. Offenses for which imprisonment of any length may be a penalty, in which the judge does not announce beforehand that the defendant will not be imprisoned. This, of course, is the class of cases to which the right was extended by the 1986 legislation.

4. Offenses which were deemed serious at common law. These are offenses which fit one of the three criteria established in Whirley: offenses which are malum in se or inherently evil, crimes which were indictable at common law, or crimes that involve moral turpitude.

II. Speedy Trial: The Second District Interprets the 1984 Speedy Trial Rules Amendment

In 1984, the Florida Supreme Court, upon the quadrennial submission of proposed rules amendments, adopted a major change to the sanctions provision of Florida Rule of Criminal Procedure 3.191, the Speedy Trial rule. The primary thrust of the change was to modify the overly harsh and arbitrary remedy of automatic discharge from the crime for a violation of the applicable speedy trial time periods. This past year, in the case of Apolonari v. Ulmer, the Second District Court of Appeal provided the first major judicial interpretation of the effect of the modification.

Prior to the 1984 revision, the Speedy Trial rule had established a maximum time period within which a defendant had to be tried. The period began with the date the defendant was taken into custody and ended on the day the defendant’s trial commenced. The rule further provided that, in the event the time periods established by the rule were exceeded, the defendant was to be “forever discharged” from the crime. The remedy applied automatically, and its effect was to insulate the defendant from any further prosecution for the offense. The effect of the discharge for a violation of speedy trial equates to that required for a violation of double jeopardy, collateral estoppel or immunity from prosecution.

Under the Speedy Trial rule, the time periods applicable to the particular charge begin to run from the time the defendant is taken into custody as defined by that rule. The rule, as it existed prior to 1984, did not require a defendant taken into custody to take any affirmative steps to effectuate the right to speedy trial. Once the applicable time period established by the rule had expired, the defendant became entitled to automatic discharge upon appropriate motion. At the hearing on the motion, the trial judge’s inquiry was limited to two questions: whether, taking into account any exclusions and extensions, the time period had been exceeded, and whether the defendant was “continuously available” for trial as that “availability” was defined by the rule. If the answer to both questions was affirmative, the defendant was “forever discharged from the crime.”

Two aspects of the rule led the committee to recommend amendments. First, the remedy, “discharge from the crime” was absolute.

72. Once the defendant was entitled to discharge, the trial court lost jurisdiction to try the case. Lowe v. Price, 437 So. 2d 142, 143 (Fla. 1983).
73. Sherrard v. Franza, 427 So. 2d 161, 163 (Fla. 1983).
74. Fla. R. Crim. P. 3.191(a)(4) defines “custody” as arrest or service with a notice to appear in lieu of physical arrest.
75. Fla. R. Crim. P. 3.191 (amended 1984). A motion filed before the expiration of the time period was considered not timely and would be appropriately denied. Lowe, 437 So. 2d at 142.
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76. FLA. R. CRIM. P. 3.191(c) (amended 1984).
The remedy equated to an acquittal. Absolute acquittal seemed overly harsh for a technical failure to meet an arbitrary time limit. Second, the remedy applied automatically and arbitrarily once the time periods established by the rule were exceeded. The state had no opportunity to remedy its failure to schedule and start the trial once the specified period has elapsed. The remedy was sufficiently harsh that the Florida Prosecuting Attorney’s Association had, by petition, sought to amend the rule to obtain an additional thirty day grace period prior to imposition of the sanction. The 1984 amendments to the rule attempted to cure these deficiencies. Discharge from the crime, while harsh, must be the ultimate remedy. However, the application of the remedy need not be automatic and absolute. The 1984 amendments therefore provided a fifteen day “window,” initiated by the defendant’s filing of a motion for discharge at the expiration of the speedy trial time period, during which the state might bring a defendant to trial after a motion for discharge had been filed. This fifteen day period was then bifurcated into two segments: a pre-hearing period of five days and a post-hearing period of ten days.

80. Apolinarv. 483 So. 2d at 77.
81. At the time the revision was drafted and submitted to the Florida Supreme Court by the Criminal Procedure Rules Committee, the author was a member of the Committee and Chairman of the Subcommittee which drafted the subject amendments.
82. In the landmark United States Supreme Court case on Speedy Trial, Barker v. Wingo, 407 U.S. 514 (1972), the Court spoke to the question of remedy, stating that the “amorphous quality of the right ... leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived.” Id. at 522. The court concluded that, despite the seriousness of the remedy, “it is the only possible remedy.” Id.
83. The amended Rule 3.191(a) reads, in relevant part, as follows:
   (3): In the case of a defendant charged with a felony, the defendant may, at any time after the expiration of the prescribed time period, file a motion for discharge.
   (4): No later than 5 days from the date of the filing of a motion for discharge, the court shall hold a hearing on the motion, and unless the court finds that one of the reasons set forth in section (d)(3) exists, shall order that the defendant be brought to trial within the 10 days. If the defendant is not brought to trial within the 10 day period through no fault of the defendant, the defendant shall be forever discharged from the crime.
84. The subcommittee established the bifurcation at the request of committee members for the benefit of the State. Prosecuting attorneys wished to establish a formal mechanism for scheduling of the trial so that their offices would receive adequate notification and be able to bring the matter before the trial judge.
85. In the language of the rule, “[n]o later than 5 days from the date of the filing of a motion for discharge, the court shall hold a hearing on the motion.” F1a. R. Crim. P. 3.191((4). The speedy trial time itself was shortened from a 180 day period to a 175 day period to accommodate this additional five day hearing provision.
87. Id.
88. Although the language of Rule 3.191((4) stated that “[i]f the defendant is not brought to trial within the 10 day period through no fault of the defendant, the defendant shall be forever discharged from the crime,” the preceding sentence mandated that the court “shall” hold a hearing “[n]o later than 5 days” from the date of the motion. Further, the Committee Note to the 1984 amendments stated that the intent of the amendment was to provide the state attorney with a total of 15 days in which to try the defendant, the 15 day period to commence with the filing of the motion for discharge. Fla. R. Crim. P. 3.191 Committee Note (1984).
89. Apolinarv, 483 So. 2d at 75.
90. Id.
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83. The amended Rule 3.191(i) reads, in relevant part, as follows:
(3): In the case of a defendant charged with a felony, the defendant may, at any time after the expiration of the prescribed time period, file a motion for discharge.
(4) No later than 5 days from the date of the filing of a motion for discharge, the court shall hold a hearing on the motion, and unless the court finds that one of the reasons set forth in section (d)(3) exists, shall order that the defendant be brought to trial within the 10 days. If the defendant is not brought to trial within the 10 day period through no fault of the defendant, the defendant shall be forever discharged from the crime.
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89. Apolinar, 483 So. 2d at 75.
tion was granted over defendant's objection. The state then obtained a second continuance because the co-defendants were unprepared for trial on November 18, again over defendant's objection, and the trial was set for a time beyond the time limits established by the Speedy Trial Rule.\textsuperscript{81} The defendant moved for discharge pursuant to the rule on December 19, 1985, triggering the five-day hearing provision. The requisite hearing on the motion for discharge was held on January 15, 1986, well outside the five day period. More than 190 days had elapsed from the date of custody, and more than fifteen days from the date of the defendant's motion for discharge.\textsuperscript{82}

On appeal, the state claimed that the defendant's failure to schedule a hearing on the motion constituted a waiver of speedy trial, and the appellate court addressed the issue so framed.\textsuperscript{83} The question became one of the burden of insuring that the motion, once filed, would be heard within the applicable five day period. Once the defendant has filed the requisite motion, is the responsibility for setting the motion for hearing and for conducting the trial within the specified ten day period that of the defendant or that of the system, be it the court or the prosecution? The Apolinar court held squarely that the obligation is not that of the defendant.\textsuperscript{84} "We are not persuaded that it is a defendant's burden both to move for discharge and to insure a timely hearing on the motion. . . . We believe this rule places a burden upon the state to honor the defendants' right to a speedy trial once those defendants have served notice that the 180 day deadline has expired."\textsuperscript{85} The court based its decision both on the language of the rule itself and the language of the 1984 Committee Note.\textsuperscript{86} Basing its reasoning on the language of

\textsuperscript{81} The time limit for felonies was 175 days. Fla. R. Crim. P. 3.191(a)(1).

\textsuperscript{82} The case indicates that the applicable time period is 180 days. Apolinar, 483 So. 2d at 77. However, the rule had been amended to shorten the applicable time period to 175 days. Fla. R. Crim. P. 3.191(a)(1).

\textsuperscript{83} Apolinar, 483 So. 2d at 76, 77.

\textsuperscript{84} Id.

\textsuperscript{85} Id.

\textsuperscript{86} Fla. R. Crim. P. 3.191 Committee Note (1984). The note is clear in stating that the purpose of the rule is to provide the state attorney with a fifteen day period from the date of the filing of the motion for discharge in which to bring the defendant to trial. The time begins with the filing of the motion and continues regardless of whether the judge hears the motion.

At the time of the adoption of the rule by the supreme court's Criminal Procedure Rules Committee and subsequent adoption by the supreme court, the author was chairman of the subcommittee of the Rules Committee which drafted and presented the subject amendments. Subsequent to the adoption of the amendments by the supreme court, and prior to the Apolinar case, the issue of the accuracy of the footnote in question was raised before the Criminal Procedure Rules Committee. At a meeting subsequent to the adoption of the rule by the court, members of the committee had objected to the Committee Note, stating that it did not accurately reflect the intent of the Rules Committee and that the rule should not envision a total fifteen day period, but should require that the defendant be responsible for the setting of the hearing on the motion. It was, at that time, the recollection of the author and of Professor John Yetter, the Committee Chairman at the time the rules change was adopted, that the Committee Note accurately reflected the intent of the proposed amendment. A review of the issue by the committee resulted in the defeat of a motion that a new committee note be submitted establishing the committee intent that the time be solely a ten day period from the time the order was entered. The motion was defeated by a vote of 4-13. In short, upon a reconsideration of the issue, the Criminal Procedure Rules Committee voted to leave the Committee Note unchanged. See Minutes of Meeting of Criminal Procedure Rules Committee (March 14, 1986) (filed with the Clerk of the Florida Supreme Court).

\textsuperscript{87} Apolinar, 483 So. 2d at 76, 77.

\textsuperscript{88} Fla. R. Crim. P. 3.191 Committee Note (1984). Committee notes are specifically not adopted by the Court. Florida Bar Amendment to Rules-Criminal Procedure, 462 So. 2d 386 (Fla. 1984). The Apolinar court pointed out, however, that such notes are "a valuable aid in application of the rules" and that they may even be considered persuasive. Apolinar, 483 So. 2d at 77 n.1 (citing State ex rel. Evans v. Chappell, 308 So. 2d 1 (Fla. 1975), and Duggar v. State, 446 So. 2d 222 (Fla. 1st Dist. Ct. App. 1984)).

tion was granted over defendant’s objection. The state then obtained a second continuance because the co-defendants were unprepared for trial on November 18, again over defendant’s objection, and the trial was set for a time beyond the time limits established by the Speedy Trial Rule. 98 The defendant moved for discharge pursuant to the rule on December 19, 1985, triggering the five-day hearing provision. The requisite hearing on the motion for discharge was held on January 15, 1986, well outside the five day period. More than 190 days had elapsed from the date of custody, and more than fifteen days from the date of the defendant’s motion for discharge. 99

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In short, once the defendant has filed the motion for discharge, the defendant no longer has an automatic, absolute discharge from the crime. Rather, the filing of the motion initiates the running of the grace period for the state, a fifteen day period in which the state may bring the defendant to trial. While the court is required to hold a hearing within five days, the hearing is primarily for the benefit of the system, not the defendant, and failure to hold the hearing has no effect on the running of the fifteen day grace period. The rule, in the language of the Committee Note, “gives the system a chance to remedy a mistake; it does not permit the system to forget about the time constraints.” 99 The burden clearly falls on the state or the court, not the defendant, to see court, and prior to the Apolinaris case, the issue of the accuracy of the footnote in question was raised before the Criminal Procedure Rules Committee. At a meeting subsequent to the adoption of the rule by the court, members of the committee had served notice that the 180 day deadline has expired. 99 The court based its decision both on the language of the rule itself and the language of the 1984 Committee Note. 99 Basing its reasoning on the language of the rule itself, the court noted that the language of the rule that “the court shall hold a hearing” places the burden on the court, especially when read in the light of the Committee Note. 99 That Note recited the purpose for the adoption of the amendment, that the relaxation of the automatic imposition of absolute discharge “gives the system a chance to remedy a mistake” and provides a “safety valve” to enable the state to remedy a technical error. 99

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III. "Death Qualification" of Juries Does Not Result in a Biased Panel

One of the major issues apparently resolved during 1986 was the issue of whether a "death-qualified" jury is inherently biased in favor of conviction. The issue was raised frequently during the year, and addressed both by the state and federal level. Although the issue appears now to have been resolved by the United States Supreme Court, as with so many issues the resolution leaves some question, questions primarily concerned with the legal principles involved but with the quantum of proof required for defendants to demonstrate grounds for relief.

A. Witherspoon Excludables: The New "Catch-Phrase"

In Witherspoon v. Illinois, the United States Supreme Court held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." In so doing, "the State crossed the line of neutrality: . . . [and] produced a jury uncommonly willing to condemn a man to die." In footnote twenty-one of Witherspoon, however, the Court created a two-pronged standard by which a state could constitutionally exclude prospective jurors for their opposition to the death penalty in capital cases. The Court approved the exclusion of prospective jurors

100. Matthews v. State, 495 So. 2d 748 (Fla. 1986); Funchess v. Wainwright, 486 So. 2d 592 (Fla. 1986); Thomas v. Wainwright, 486 So. 2d 574 (Fla. 1986); State v. Wainwright, 486 So. 2d 1227 (Fla. 1986); Jones v. Wainwright, 486 So. 2d 1225 (Fla. 1986); Adams v. Wainwright, 484 So. 2d 1211 (Fla. 1986); Kennedy v. Wainwright, 483 So. 2d 424 (Fla. 1986); O'Connor v. State, 480 So. 2d 1254 (Fla. 1985); Reed v. State, 494 So. 2d 213 (Fla. 1st Dist. Ct. App. 1986).
103. Id. at 522.
104. Id. at 520-21.
105. Id. at 522-23.

106. Id. at 107.
108. Id. at 45.
110. Id. at 424.
111. Id.
112. Id. at 426.
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The Witherspoon decision has been affirmed several times. In Adams v. Texas, the Court asserted that “this line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”

In 1985, the Supreme Court in Wainwright v. Witt modified the two-pronged Witherspoon standard for the exclusion of prospective jurors for cause. The Court held that the standard for the exclusion of jurors for cause is “whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'” The Court noted that “in addition to dispensing with Witherspoon’s reference to ‘automatic decision-making’, the standard likewise does not require that a juror’s bias be proved with ‘unmistakable clarity.’”

In summary, the Court dispensed with the “extremely high burden of proof” required for excluding prospective jurors under Witherspoon. By eliminating the requirement that it be made “unmistakably clear” that the juror is biased or that he would “automatically” vote against the imposition of the death penalty, the Witt decision allows exclusion for cause based on the “definite impression that a prospective juror would be unable to faithfully and impartially apply the law.”

B. Grigsby v. Mahry: A “WE” Approach from a Different Angle

In 1985, the Eighth Circuit handed down the case of Grigsby v.
Mawbry, a case addressing the Witherspoon question on a somewhat different issue. The case was later decided by the United States Supreme Court under the name of Lockhart v. McCree. While it is beyond the purview of this article to discuss the opinions in Grigsby and Lockhart in detail (the issues raised in those cases merit at least a note), a brief synopsis is necessary to set the stage for the Florida decision. The issue in Grigsby was not one of whether the jury, after being culled of its WE's, was a “death prone” jury, but whether it was more “conviction prone,” i.e., whether such a jury would be more likely to convict the defendant during the guilt phase of the trial. The case had arrived at its current posture through a somewhat circuitous history, involving two decisions of the circuit court and a remand for a hearing specifically on the conviction prone jury issue. As a result of the hearing on remand, the district court had ordered the State of Arkansas to hold bifurcated jury trials, the first to determine guilt, the second to determine punishment. The circuit court affirmed, finding specifically that “a capital jury, with WE’s stricken for cause, is in fact conviction prone. . . .” The circuit court reviewed in some detail the scholarly studies presented to the district court, which had been “exhaustively analyzed” by that court in support of its decision, as well as the expert testimony on the issue. After its own full discussion of the issue, the circuit court found the evidence submitted to be “exhaustive” and that no contradictory evidence existed. The court also introduced, although somewhat tangentially, the concept of the “ADP,” the “Automatic Death Penalty” juror, the juror who would always vote to impose the death penalty in a capital case. Even though this group might be excluded for cause, as well, both the district court and

ablest, to refer to those jurors excluded from service for cause because they were found to meet the Witherspoon test.

114. 758 F. 2d 226 (8th Cir. 1985).
117. Id. at 228.
118. Id. at 229.
119. The evidence submitted included five “Attitudinal and Demographic Surveys,” five “conviction-proneness surveys,” three “other surveys” and the testimony of four expert witnesses. Id. at 232-35.
120. Id. at 238.
121. Id. at 235 n.14.

C. Lockhart v. McCree: The United States Supreme Court Addressed WE’s, ADP’s and Conviction Prone Juries

Grigsby was taken up on conflict certiorari to the United States Supreme Court under the name of Lockhart v. McCree, decided in 1986. Justice Rehnquist, writing for the majority in Lockhart, first reviewed the studies introduced at the district court’s hearing and then reviewed by the circuit court. The studies were abruptly dismissed:

McCree introduced into evidence some fifteen social science studies in support of his constitutional claims, but only six of the studies even purported to measure the potential effects on the guilt-innocence determination of the removal from the jury of ‘Witherspoon Excludables’. Eight other studies . . . were only marginally relevant to the constitutionality of McCree’s conviction. . . .

The court concluded as it did in Witherspoon that the social science evidence was too “tentative and fragmentary” to establish that conviction-prone juries were indeed the result of death qualification.

Finally, the Court noted that the Constitution does not require that “petit juries actually chosen must mirror the community and reflect the various distinct groups in the population.” Such a requirement would be a practical impossibility. The Court added, however, that even if a fair cross-section requirement were extended to petit juries, death qualification would not violate that requirement. The Court asserted “that the essence of a ‘fair cross-section’ claim is the systematic exclusion of a ‘distinctive’ group in the community. . . . In our view, groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors, such as the ‘Witherspoon - excludables’ at issue here, are not ‘distinctive groups’ for fair cross-section purposes.” The Court stated that racial groups and women constitute
Mowbray, 114 a case addressing the Witherspoon question on a somewhat different issue. The case was later decided by the United States Supreme Court under the name of Lockhart v. McCree. 118 While it is beyond the purview of this article to discuss the opinions in Grigby and Lockhart in detail (the issues raised in those cases merit at least a note), a brief synopsis is necessary to set the stage for the Florida decision. The issue in Grigby was not one of whether the jury, after being culled of its WE's, was a "death prone" jury, but whether it was more "conviction prone," i.e., whether such a jury would be more likely to convict the defendant during the guilt phase of the trial. The case had arrived at its current posture through a somewhat circuitous history, involving two decisions of the circuit court and a remand for a hearing specifically on the conviction prone jury issue. 119 As a result of the hearing on remand, the district court had ordered the State of Arkansas to hold bifurcated jury trials, the first to determine guilt, the second to determine punishment. 112 The circuit court affirmed, finding specifically that "a capital jury, with WE's stricken for cause, is in fact conviction prone." 113 The circuit court reviewed in some detail the scholarly studies presented to the district court, which had been "exhaustively analyzed" by that court in support of its decision, as well as the expert testimony on the issue. 110 After its own full discussion of the issue, the circuit court found the evidence submitted to be "exhaustive" and that no contradictory evidence existed. 119 The court also introduced, although somewhat tangentially, the concept of the "ADP," the "Automatic Death Penalty" juror, the juror who would always vote to impose the death penalty in a capital case. 116 Even though this group might be excluded for cause, as well, both the district court and the circuit court found the group to be "negligible." 112

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distinctive groups for fair cross-section purposes and then distinguished these groups from the Witherspoon-excludables.\textsuperscript{129}

D. Florida's Position on WE's and ADP's

Following the Grigsby decision, but before the Supreme Court had acted in Lockhart, the issue of conviction-prone juries was raised in a number of Florida cases, primarily by prisoners awaiting execution.\textsuperscript{130} While most cases did not receive in-depth analysis by the Florida Supreme Court, a review of the major cases and their holdings follows in chronological order.

1. O'Connell v. State

The issue in O'Connell v. State\textsuperscript{131} was not a true WE issue, but turned on an ancillary point. In O'Connell, prospective jurors, upon stating that they were opposed to the death penalty, were immediately excused. The defense attorney was given no chance to examine them with a possible view to rehabilitation. This arbitrary curtailment of voir dire was found to be an abuse of the court's discretion.\textsuperscript{132}

The court addressed, almost in passing, another issue mentioned in Grigsby: the challenge for cause of the "Automatic Death Penalty" (ADP) juror.\textsuperscript{133} Citing Thomas v. State,\textsuperscript{134} the court reiterated the principle that the defense lawyer is entitled to challenge for cause those jurors who would automatically recommend a sentence of death in a capital case.\textsuperscript{135} The bias on the part of such a juror is so fundamental that it amounts to a violation of the constitutional right to be tried by an impartial jury.\textsuperscript{136} The trial judge had refused to excuse three such potential jurors for cause. Although it is unclear whether either viola-

\begin{itemize}
  \item[129.] Id. at 1765-66.
  \item[130.] Middleton, 495 So. 2d at 748; Punchess, 486 So. 2d at 392; Harich, 484 So. 2d at 1237; Thomas, 486 So. 2d at 574; James, 484 So. 2d at 1235; Adams, 484 So. 2d at 1211; Kennedy, 483 So. 2d at 424; O'Connell, 480 So. 2d at 1294; Reed, 496 So. 2d at 214.
  \item[131.] 480 So. 2d at 1284.
  \item[132.] Id. at 1287.
  \item[133.] See discussion on "Automatic Death Penalty" jurors supra text accompanying notes 121 to 122.
  \item[134.] Id. at 1287.
  \item[135.] 403 So. 2d 371 (Fla. 1981).
  \item[136.] O'Connell, 480 So. 2d at 1287.
  \item[137.] Id.
  \item[138.] Id.
  \item[139.] 483 So. 2d at 424.
  \item[140.] Kennedy v. State, 455 So. 2d 351 (Fla. 1984). The United States Supreme Court had denied certiorari. 469 U.S. 1197 (1985).
  \item[141.] Kennedy, 483 So. 2d at 427.
  \item[142.] Id.
  \item[143.] Id.
  \item[144.] 484 So. 2d at 1211.
  \item[145.] Id. at 1212.
  \item[146.] Id. at 1213.
\end{itemize}

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\textbf{1987} \hspace{1cm} \textbf{Criminal Procedure} \hspace{1cm} 1267
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2. Kennedy v. Wainwright

In Kennedy v. Wainwright\textsuperscript{138} a prisoner under sentence of death, had petitioned for habeas corpus on a number of grounds, one of which related to the seating of a death-qualified jury. The issue was disposed of summarily, since it had been raised on an earlier appeal.\textsuperscript{139} It is noteworthy that the court referred to "various studies and scholarly articles" presented to the court in an effort to demonstrate that death qualified juries are not fair and impartial.\textsuperscript{140} The court declined to visit this contention on its merits, holding that the issue had been visited on the first appeal and that, even if it were shown to be true, it would not apply to the prisoner under the facts of this case.\textsuperscript{141} Only one prospective juror had been excused for cause under this rationale and the evidence of guilt was otherwise overwhelming.\textsuperscript{142}

3. Adams v. Wainwright

Adams v. Wainright\textsuperscript{144} involved a petition for habeas corpus brought by a prisoner under a death warrant. The prisoner argued that the seating of a death-qualified jury was unconstitutional in that the jury was biased, conviction-prone, and not representative of the community at large. The supreme court dismissed the issue as being improperly raised.\textsuperscript{143} At trial, no juror had been excluded for cause on the basis of opposition to the death penalty.\textsuperscript{144}

The petitioner, however, had extended the argument's rationale to include peremptory challenges. If death-qualified juries are biased, he argued, it makes no difference whether the bias results from the exer-

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The trial judge had refused to excuse three such potential jurors for cause. Although it is unclear whether either violation, in and of itself, would have been sufficient for reversal, the combination of the two errors “permeated the convictions themselves and therefore warrant a new trial.”138

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129. Id. at 1765-66.
130. Middleton, 405 So. 2d at 748; Finchess, 406 So. 2d at 592; Hack, 441 So. 2d at 1237; Thomas, 486 So. 2d at 576; James, 484 So. 2d at 1235; Adams, 484 So. 2d at 1211; Kennedy, 483 So. 2d at 424; O’Connell, 480 So. 2d at 1284; Root, 495 So. 2d at 214.
131. 480 So. 2d at 1284.
132. Id. at 1287.
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135. 403 So. 2d 271 (Fla. 1981).
136. O’Connell, 480 So. 2d at 1287.
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138. Id.
139. 483 So, 2d at 424.
141. Kennedy, 483 So. 2d at 427.
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143. Id.
144. 484 So. 2d at 1211.
145. Id. at 1212.
146. Id. at 1313.
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4. Funchess v. Wainwright

Arising on still another petition for habeas corpus and stay of execution, the petitioner in Funchess v. Wainwright again advanced the issue of the bias of the death-qualified jury. In this case, the court held the issue to be procedurally barred because the defendant had not objected to the death qualification at trial. Although the decision turned on the procedural grounds, the court went on to discuss the merits, referring to its earlier holdings and stating that the “statistical evidence” provided by petitioner was insufficient to persuade the court to overrule its prior holding. At this point, certiorari had been granted in Lockhart v. McCree, and the petitioner argued further that a stay should be granted until the United States Supreme Court had ruled in Lockhart. The court disagreed, holding that the argument regarding a future ruling of the United States Supreme Court was pure speculation; that the court had denied a stay for Daniel Thomas, even though the identical issue had been raised in that case; and, finally, that the issue before the United States Supreme Court was that of exclusion of WEs for cause; at least one juror in this case had been excused by the use of a peremptory challenge.

5. Middleton v. State

Between the time the petitioner in Middleton v. State filed his petition for writ of habeas corpus and the rendering of the decision on the petition, the United States Supreme Court had handed down its decision in Lockhart v. McCree. The Florida Supreme Court reviewed the petitioner’s claims in the light of Lockhart, pointing out that the support provided for the claim by Grigsby v. Mabry no longer existed, since the case had been reversed. The court discussed the studies presented by the petitioner, dismissing them as “purporting to report the results of ‘studies’” and because the petitioner “casually puts forth conclusions from these ‘studies’” as “established and universally accepted truth.” The court then concluded that the articles do not establish the bias of death qualified juries. The court engaged in no further analysis of the “studies,” nor did the court indicate what studies were, in fact, presented. One assumes that they were the same studies provided in the Grigsby and Lockhart cases. The court then concluded that the procedure in question has a “long history” in Florida courts, is “sanctioned by statutory law, procedural rule and judicial custom,” and “is known by Florida jurists and practitioners to produce fair and impartial juries.”

147. Id.
148. Id.
149. Id. “When you make up your mind to hang a man, you put yourself at a disadvantage with him.” G.B. Shaw, The Devil's Disciple, Act III.
150. 484 So. 2d at 1235.
151. 486 So. 2d at 574.
152. 484 So. 2d at 1237.
153. 486 So. 2d at 592.
154. Id. (The trial itself had occurred in 1975).
155. Id. at 593.
156. 106 S. Ct. 1758 (1986).
157. Funchess, 486 So. 2d at 592. See Thomas, 486 So. 2d at 574.
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158. Funchess, 486 So. 2d at 592.
159. 495 So. 2d at 748.
160. 106 S. Ct. at 1758.
161. Middleton, 495 So. 2d at 749. See discussion of Grigsby and Lockhart, supra text accompanying notes 113 to 129.
162. Middleton, 495 So. 2d at 749.
163. Id.
164. Id. The court summarily rejected the attempts that have been made, despite the restriction placed by the system itself on researchers’ contact with jurors, to scientifically determine the results of the death qualification process with qualitative and pejorative language (“purporting,” “casually,” etc.); it then accepted intuitive reasoning, unnamed historical precedent, statutes, case law, and even “custom” and social conjecture as having the probative value appropriate to overcome the data-based studies presented to the court. If the studies were indeed insufficient, one would have hoped to see a more thorough analysis of the deficiencies coupled with an invitation to social scientists to study the system more thoroughly to provide accurate data, rather than a
At this point, therefore, Lockhart apparently controls, at least in the absence of social science data demonstrating more definitively than that presented to date the bias that the defense claims is inherent in death-qualified juries. Because of the reluctance of the system to permit access to jurors to determine this issue, it is difficult to see how such additional evidence might be obtained.445

At the level of the district courts of appeal, the issue arose in one case, Reed v. State.446 Reed raises some interesting questions, especially in the light of prior Supreme Court holdings. In Reed, the defendant had been charged with first degree murder, in a situation in which the death penalty was inappropriate. The court pointed out that, before trial, the prosecutor could point to no facts which might justify the death penalty, although the prosecutor stated before trial that the case itself "might" bring out such facts.447 The court held that there was insufficient basis on which to death qualify the jury. The court, however, took a further step. The court declared that, in a case in which "the State could offer no basis for leaving in the death penalty... it was error to permit the jury to be death qualified."448 The court then stated that, because otherwise qualified jurors had been eliminated from participation, the error was not harmless.449 The court, in Reed,

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cavalier dismissal of the attempts of social scientists to study the phenomenon of the death qualified jury. "Few arguments are more dangerous than the one that 'let' right but can't be justified." S. Gould, THE MMESURM OF MAN 157.

165. The difficulty caused by the system's refusal to permit access to the jury was noted by the court in Grigsby, 758 F. 2d at 237.

166. 496 So. 2d at 214.

167. Reed, 496 So. 2d at 214.

168. Id. at 214.

169. Id. The court cited Butler v. State, 493 So. 2d 451 (Fla. 1986), for the proposition that the error was not harmless. Although Butler dealt with the concept of harmless error, it arose under a jury instruction rationale, not under death qualification of a jury. In Butler, the court held that the giving of a jury instruction, related to no evidence adduced at trial, constituted harmful error. "Hence, the challenged instruction improperly gave the state the benefit of a situation which was disavowed even by its own witnesses and was therefore never presented into evidence." Id. at 452. The court then pointed out that "[t]he extremely misleading and confusing jury instruction that did not pertain to any evidence presented at trial did not constitute harmless error because there exists a reasonable possibility that it contributed to the conviction." Id. at 453. Although the Reed opinion is not clear as to the precise grounds for the determination that the error was harmful, the court's reliance on Butler leads one to the conclusion that the jury confusion, resulting from infusion of an irrelevant issue, injected sufficient error into the proceedings. The alternative conclusion, of course, would be precisely that raised by the defendants in the other cases reported in this article—

hinted that the action of the state in continuing to prosecute the case as one calling for the death penalty, in the absence of grounds to consider it a death case, was done in bad faith, but the court did not reach that conclusion.\textsuperscript{170} The infusion of the death qualification into a trial not involving the death penalty, because of its emphasis on an issue not properly before the court, was sufficiently confusing to the jury as to constitute harmful error.\textsuperscript{171}

IV. Indirect Comment on Defendant's Failure to Testify: The "Fairly Susceptible Test" and "Harmless Error" Remain

One of the most prevalent problems arising from the defendant's privilege against self-incrimination is that of indirect violation of the defendant's right by impermissible prosecution comment on the defendant's silence. The problem has generated two separate but intertwined legal issues. The first issue is that of the standard by which a prosecutor's comment is to be judged — what comments are impermissible and what comments are proper in the trial setting?\textsuperscript{172} Second, once it has been determined that the prosecutor has commented impermissibly on the defendant's silence can such comment be considered harmless error, or is it ipse reversible?\textsuperscript{173} This past year, the Florida Supreme Court addressed both issues in the case of State v. DiGuilio.\textsuperscript{174} DiGuilio reaffirmed the Florida test for determining impermissibility of the comment,\textsuperscript{175} holding that the harmless error doctrine applied once prosecutorial comments were found to be improper,\textsuperscript{176} and explained both the history of the doctrine and the relationship between the two issues.\textsuperscript{177} In order to appreciate the DiGuilio holding, a brief review of both underlying doctrines is appropriate.

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that the resultant jury was unduly biased.

170. Id.

171. Id.

172. See infra text accompanying notes 178 to 209 and 243 to 253.

173. See infra accompanying notes 210 to 242.

174. 491 So. 2d 1129 (Fla. 1986).

175. Id. at 1135.

176. Id. at 1137.

177. Id. at 1131-36.
A. The "Fairly Susceptible" Test: Florida's Standard for Determining Impermissibility of Prosecutorial Comment on the Defendant's Silence

In 1964, the United States Supreme Court applied the fifth amendment to the states through the fourteenth amendment in Moyer v. Hogan. The following year, the question of impermissible comment on the defendant's silence was raised in the case of Griffin v. California, where the Court held that the prosecutor's comments on a defendant's failure to testify or jury instructions permitting inference of guilt to be drawn from such silence violated the self-incrimination clause of the fifth amendment. The prosecutor in Griffin commented extensively about the defendant's failure to testify about matters within his knowledge. The trial court instructed the jury on the defendant's constitutional right not to testify and that the jury could draw reasonable inferences of guilt from the defendant's failure to explain or deny facts within his knowledge.

Citing Wilson v. United States, the Supreme Court noted that, in the federal courts, a statute made such comments reversible error. The Court reasoned that the spirit of the fifth amendment and the statutory prohibition set forth in the Wilson decision were the same. Comments on a defendant's failure to testify were remnants of an inquisitorial criminal justice system prohibited by the fifth amendment. Allowing comments about or inferences to be drawn from a defendant's silence imposes a penalty for exercising a constitutional privilege, diluting the privilege by making its use costly.

In the wake of Griffin, direct prosecutorial comments on a defendant's failure to testify posed little problem for the courts, but subsequent cases presented the issue of indirect prosecutorial comment. The courts had to decide the test for determining when such comment was impermissible error under Griffin. The federal test was first enunciated in Samuels v. United States. In Samuels, the prosecutor commented during closing argument, that the defendant "does not want to talk about the facts." The court of appeals held the comment, taken in context, to be directed to the argument of defense counsel, not to the defendant's failure to testify. Such comment was impermissible if the prosecutor's manifest intention was to comment on the defendant's failure to testify or was of such character that the comment would naturally and necessarily be taken by a jury as a comment on the defendant's failure to testify. The Samuels test was recently reaffirmed in United States v. Fuentes-Cobas.

In 1979, the Florida Supreme Court addressed the issue of indirect prosecutorial comment in David v. State. In David, the court held that any comment " 'fairly susceptible' of being interpreted by the jury as referring to a criminal defendant's failure to testify" is impermissible. The prosecutor in David had stated during closing argument, "[if] he [referring to the defendant] had a business failure, why didn't he say anything about . . . ." The court found that the comment was fairly susceptible of interpretation as referring to the defendant's failure to testify. Actually, a less well-defined version of the "fairly susceptible" test had been in use in the state since 1959.

Following the lead of the federal courts, the First and Second District Courts of Appeal had adopted the federal test in Gains v. State and State v. Bolton. However, in 1985, the Florida Supreme Court disapproved of these cases in State v. Kinchen. In Kinchen, where the questionable comment was made by a co-defendant's counsel, the court reaffirmed and further defined the "fairly susceptible" test. Kinchen adopted a dictionary definition of "fairly": "[i]n a fair manner; equitably; justly; legitimately; without unfair advantages; . . . plainly; clearly; distinctly." The court specifically disapproved of the

180. Id. at 615.
181. Id. at 610, 611.
182. 149 U.S. 60 (1893).
183. Griffin, 380 U.S. at 612.
184. Id. at 614 (citing Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)).
185. Id.
186. 398 F.2d 964 (5th Cir. 1968), cert. denied, 393 U.S. 1021 (1969).
A. The “Fairly Susceptible” Test: Florida’s Standard for Determining Im perm issibility of Prosecutorial Comment on the Defendant’s Silence

In 1964, the United States Supreme Court applied the fifth amendment to the states through the fourteenth amendment in Malloy v. Hogan. 178 The following year, the question of impermissible comment on the defendant’s silence was raised in the case of Griffin v. California, 179 where the Court held that the prosecutor’s comments on a defendant’s failure to testify or jury instructions permitting inferences of guilt to be drawn from such silence violated the self-incrimination clause of the fifth amendment. 180 The prosecutor in Griffin commented extensively about the defendant’s failure to testify about matters within his knowledge. The trial court instructed the jury on the defendant’s constitutional right not to testify and that the jury could draw reasonable inferences of guilt from the defendant’s failure to explain or deny facts within his knowledge. 181

Citing Wilson v. United States, 182 the Supreme Court noted that in the federal courts, a federal statute made such comments reversible error. 183 The Court reasoned that the spirit of the fifth amendment and the statutory prohibition set forth in the Wilson decision were the same. Comments on a defendant’s failure to testify were remnants of an inquisitorial criminal justice system prohibited by the fifth amendment. 184 Allowing comments about or inferences to be drawn from a defendant’s silence imposes a penalty for exercising a constitutional privilege, diluting the privilege by making its use costly. 185

In the wake of Griffin, direct prosecutorial comments on a defendant’s failure to testify posed little problem for the courts, but subsequent cases presented the issue of indirect prosecutorial comment. The courts had to decide the test for determining when such comment was impermissible error under Griffin. The federal test was first enunciated in Samuels v. United States. 186 In Samuels, the prosecutor commented, during closing argument, that the defendant “does not want to talk about the facts.” 187 The court of appeals held the comment, taken in context, to be directed to the argument of defense counsel, not to the defendant’s failure to testify. 188 Such comment was impermissible if the prosecutor’s manifest intention was to comment on the defendant’s failure to testify or was of such character that the comment would naturally and necessarily be taken by a jury as a comment on the defendant’s failure to testify. 189 The Samuels test was recently reaffirmed in United States v. Fuentes-Coba. 190

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178. Id. at 965.
179. Id. at 968.
180. Id. at 967.
182. 369 So. 2d 943 (Fla. 1979).
183. Id. at 944.
184. Id.
185. Id.
186. See Trafficante v. State, 92 So. 2d 81 (Fla. 1957).
188. 383 So. 2d 924 (Fla. 2d Dist. Ct. App. 1980).
189. 400 So. 2d 21, 22 (Fla. 1985).
190. Id. at 22.
federal test applied in Bolton and Gains, reasoning that the "fairly susceptible" test offered defendants more protection for such serious constitutional errors.\textsuperscript{200}

The supreme court further clarified those comments "fairly susceptible" of interpretation as referring to a defendant's failure to testify in State v. Shepard.\textsuperscript{202} In closing argument, the prosecutor commented that he had trouble deciding what the defense was because "I haven't heard any."\textsuperscript{203} The court agreed with the state that this comment was directed at the uncontradicted nature of the evidence and was not prejudicial error.\textsuperscript{204} The court specifically held that prosecution comments referring to the defense generally, not the defendant individually, "cannot be fairly susceptible" of interpretation by the jury as referring to the defendant's failure to testify.\textsuperscript{205}

Shortly after deciding Kinchen, the court applied the "fairly susceptible" test to a case involving jury instructions on the discussions between counsel and client, and the potential for such instructions to be interpreted as a comment on the defendant's failure to testify in State v. Grisimo.\textsuperscript{206} Although the case turned on the factual analysis of the statements made, the court emphasized that the "fairly susceptible" test is now firmly in place as the test for Griffin violations in Florida.\textsuperscript{207} The test has been applied to prosecutorial comments,\textsuperscript{208} testimony by police officers on a defendant's post-arrest silence,\textsuperscript{209} and written comments in the form of a clerk's notation on an indictment that the defendant stood mute at arraignment.\textsuperscript{210}

\begin{itemize}
\item 200. Id.
\item 201. 479 So. 2d 106 (Fla. 1985).
\item 202. Id.
\item 203. Id. at 107.
\item 204. Id.
\item 205. 492 So. 2d 1324 (Fla. 1986).
\item 206. Id. at 1325.
\item 207. Whitsfield v. State, 479 So. 2d 228 (Fla. 4th Dist. Ct. App. 1985); State v. Stoddard, 467 So. 2d 436 (Fla. 5th Dist. Ct. App. 1985).
\item 210. 386 U.S. 18 (1967).
\item 211. Id. at 94.
\item 212. Id. at 95.
\item 213. Id. at 97.
\item 214. Id. at 98.
\item 215. Id. at 99.
\item 216. Id. at 100.
\item 217. 461 U.S. 499 (1983).
\item 218. See Gordon v. State, 104 So. 2d 524 (Fla. 1958); Traficante v. State, 92 So. 2d 311 (Fla. 1958); Way v. State, 67 So. 2d 621 (Fla. 1954). Rev at state, 82 Fla. 17, 98 So. 613 (1924).
\item 219. See Bennett v. State, 316 So. 2d 41 (Fla. 1975); Shonman v. State, 335 So. 2d 505 (Fla. 1976); Bozeman v. State, 417 So. 2d 674 (Fla. 1983).
\item 220. 104 So. 2d 524 (1958). Traficante, 92 So. 2d at 811; Way, 67 So. 2d at 621; Rowe, 87 Fla. at 17, 98 So. 613 (1924).
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Shortly after deciding Kinchen, the court applied the "fairly susceptible" test to a case involving jury instructions on the discussions between counsel and client, and the potential for such instructions to be interpreted as a comment on the defendant's failure to testify in State v. Grissom. Although the case turned on the factual analysis of the statements made, the court emphasized that the "fairly susceptible" test is now firmly in place as the test for Griffin violations in Florida. The test has been applied to prosecutorial comments, testimony by police officers on a defendant's post-arrest silence, and written comments in the form of a clerk's notation on an indictment that the defendant stood mute at arraignment.

B. Florida Courts Now Apply the Harmless Error Doctrine to Prosecutorial Comments on Defendant's Failure to Testify

In Chapman v. California, the United States Supreme Court held that comment on a defendant's failure to testify is not per se reversible error and applied the harmless error doctrine. Chapman placed the burden on the state to prove beyond a reasonable doubt that the error did not contribute to the verdict. Per se reversible errors are those which are so basic to a fair trial they can never be harmless, such as right to counsel, right to an impartial judge and freedom from coerced confessions. Under the federal harmless error statute, errors which affect the substantial rights of a party are not considered harmless.

In Chapman, the prosecutor made repeated comments on the defendant's failure to testify and the inferences of guilt to be drawn therefrom. The trial court also instructed the jury that inferences of guilt could be drawn from the defendant's failure to testify. Despite strong circumstantial evidence of guilt, the Court held that these comments were not harmless beyond a reasonable doubt. Chapman was recently reaffirmed in United States v. Hastings.

Florida had long followed the per se rule requiring reversal for a prosecutor's comments on the defendant's failure to testify. Even after the Chapman decision, Florida continued to follow the per se reversal rule and extended it to comments on a defendant's post-arrest silence. In Gordon v. State and its predecessors, the Supreme Court of Florida had held that Florida's harmless error statute did not apply.

200. Id.
201. 479 So. 2d 106 (Fla. 1985).
202. Id.
203. Id. at 107.
204. Id.
205. 492 So. 2d 1324 (Fla. 1986).
206. Id. at 1325.
211. Id. at 24.
212. Id. at 23.
213. Id. .
214. Id. at 25.
215. Id.
216. Id. at 26.
218. See Gordon v. State, 104 So. 2d 524 (Fla. 1958); Trafficante v. State, 92 So. 2d 813 (Fla. 1957); Way v. State, 67 So. 2d 321 (Fl. 1953); Rowe v. State, 87 Fl. 17, 98 So. 613 (1924).
219. See Bennett v. State, 316 So. 2d 41 (Fla. 1975); Shannon v. State, 335 So. 2d 5 (Fla. 1976); Bonovan v. State, 417 So. 2d 674 (Fla. 1982).
220. 104 So. 2d at 524.
221. Trafficante, 92 So. 2d at 811; Way, 67 So. 2d at 321; Rowe, 87 Fla. at 17, 98 So. at 613.
apply to comments on a defendant's failure to testify. The court reasoned that once such remarks had been made, the resultant prejudice was so great that curative instructions or retraction of the comment could not remedy the error.

In 1975, in Bennett v. State, the Florida Supreme Court applied the per se reversal rule to comments on a defendant's post-arrest silence. In Bennett the defendant was convicted of third degree arson. At the trial the investigating fire marshall testified that the defendant refused to sign a waiver of his rights and make a statement. The Supreme Court reasoned that the comment amounted to a penalty for exercising a constitutional right and as such was a fundamental error requiring reversal. Although the error was inadvertent, the court held that it could not be remedied by curative instructions.

Three years later, in Clark v. State the court made a slight improvement on the Bennett decision by holding that, although the per se error rule still applies to such comments, contemporaneous objection must have been made [in error] for reversal to occur. In the light of the Bennett holding, that curative instructions could not remedy the error once it had occurred, it is difficult to see the value of the requirement of contemporaneous objection. Nonetheless, the rule persisted until 1985.

In 1985, in State v. Marshall the supreme court reversed its prior holding and specifically applied the harmless error rule to a prosecutor's comment on the defendant's failure to testify. During closing argument the prosecutor stated that "the only person you heard from in this courtroom was" the victim. The supreme court agreed with the district court that the comment was fairly susceptible to interpretation as referring to the defendant's failure to testify. However, it quashed the district court opinion requiring per se reversal and remanded the case for analysis under the harmless error rule.

The court agreed with the holding in Chapman and Hastings that such comments are not fundamental error and that the harmless error rule is constitutional. The harmless error rule promotes the administration of justice by avoiding an additional, unnecessary trial where it is less clear beyond a reasonable doubt the defendant would be reconvicted. Florida's harmless error statute was also cited as indicative of legislative intent on the matter. The state bears the burden of proving the comment was harmless beyond a reasonable doubt.

In a number of cases occurring during the 1986 term, Florida courts reiterated the applicability of the Marshall rule. Although the factual basis for the application of the rule is frequently stated only in conclusory language, some cases at least obliquely indicate the factual situations in which error might be considered harmful error. In Travieso v. State the Fourth District Court of Appeal held the error to be harmful when, after examining the record, the court found that it was impossible to determine the evidence against the defendant. The same court, in Danford v. State found reversible error in a situation where the jury had been permitted to view the clerk's stamped notation indicating that the defendant had stood mute at arraignment. Concluding, in view of the quality and weight of the evidence, that the state had failed to show that the error was harmless, the court reversed the conviction. Harmless error analysis has also been applied to testimony by police officers on a defendant's post-arrest silence, and comment by counsel for co-defendants.

222. Gordon, 104 So. 2d at 540.
223. Id. at 539.
224. Bennett, 316 So. 2d at 41.
225. Id. at 42.
226. Id. at 44.
227. 443 So. 2d 973 (Fla. 1984).
228. Id. at 976.
229. 476 So. 2d 150 (Fla. 1985).
230. Id. at 151.
231. Id. at 153.
232. Id.

233. Id.
237. 480 So. 2d 100 (Fla. 4th Dist. Ct. App. 1986).
238. Id. at 104.
239. 492 So. 2d 690 (Fla. 4th Dist. Ct. App. 1986).
241. Danford, 492 So. 2d at 692.
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C. DiGuilio v. State: The Supreme Court Firmly Establishes Both the "Fairly Susceptible" Standard and Applicability of the Harmless Error Doctrine

In DiGuilio v. State, the issue raised on certification of a question of great public importance was that of applicability of the harmless error doctrine to prosecutorial comment on a defendant's silence. The Florida Supreme Court used the case as a vehicle to restate the standard for determining impermissibility of such comments and to establish clearly the applicability of the harmless error doctrine. DiGuilio had been convicted, in a jury trial, of conspiracy to traffic in cocaine. At trial, during the prosecution's questioning of a police officer, the officer mentioned that the defendant had stated his wish to speak to an attorney and that there was no further questioning thereafter. On appeal of the conviction, the district court found the comment to be impermissible constitutional error, and further found it to constitute per se grounds for reversal.

The court began its opinion with an analysis of the "per se reversible" rule, noting that Florida had long followed that rule, and then explored the history of the rule. In its review of the history, the court pointed to the initial statutory underpinnings of the rule and reviewed the cases which had been decided under this statutory provision. Subsequent to these initial cases establishing the rule of per se reversibility, the Legislature enacted the "harmless error statute." Although the basis for the original holding was thereby changed, subsequent cases continued to perpetuate the per se reversibility doctrine down to the case of Clark v. State. In analyzing the issue, the court turned to the interface of the criterion for determining impermissibility and the standard for determining reversibility. The court pointed out that Florida has adopted a liberal rule for determining when a comment on the defendant's silence is impermissible, the "fairly susceptible" test. This test broadens the scope of those comments which might be determined to be inadmissible, no longer dealing with only "clear-cut" violations where the prosecutor makes a direct comment about the defendant's silence. The clear rationale of the court is that if the standard was stricter, referring only to clear-cut and obvious violations by the prosecutor, a per se rule of reversibility would be appropriate; since the rule is broader, a wide range of comments might be caught in the far flung net, the court must have a way of determining when those comments that might have negligible effect on the verdict have been included. The court concluded the analysis with a brief panegyric, extolling the virtues of the "happy union" of the two rules, and then proceeded to warn that prosecutorial comment on a defendant's silence always places a heavy burden on the prosecutor to prove that the error was harmless.

In sum, the issues of impermissibility and applicability of the harmless error doctrine appear to have been resolved, at least in the State of Florida. Comment is to be judged against the "fairly susceptible" standard, rather than the "manifest intention" of "necessary implication" test. If the comment is found to be an impermissible comment on the defendant's silence, the harmless error doctrine applies, and the state must show that the error was not harmful to preclude reversal on appeal.

V. A Plea Based on Misrepresentation of Counsel May Be Withdrawn

During December, 1985, the initial month of this survey year, the Second District Court of Appeal had occasion to revisit, and to further explain, circumstances under which a defendant may withdraw a plea of guilty because the defendant misled or misinformed the defendant about the consequences of the plea. The most recent of a series of cases dealing with this issue is R v. State, which is the latest in a series of cases dealing with this issue. It arose under the allegation of
that Florida has adopted a liberal rule for determining when a comment on the defendant's silence is impermissible, the "fairly susceptible" test. This test broadens the scope of those comments which might be determined to be inadmissible, no longer dealing with only "clear-cut" violations where the prosecutor makes a direct comment about the defendant's silence. The clear rationale of the court is that if the standard was stricter, referring only to clear-cut and obvious violations by the prosecutor, a per se rule of reversibility would be inappropriate; since the rule is broader, and a wide range of comments might be caught in the far flung net, the court must have a way of determining when those comments that might have negligible effect on the verdict have been included. The court concluded the analysis with a brief panegyric, extolling the virtues of the "happy union" of the two rules, and then proceeded to warn that prosecutorial comment on a defendant's silence always places a heavy burden on the prosecutor to prove that the error was harmless.

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ineffectiveness of counsel, and established the judgement/fact misrepresentation test for determining when such a plea should be invalidated.

In the first of the earlier cases, Brown v. State, the Supreme Court of Florida had held that a defendant should be permitted to withdraw a guilty plea when the plea was based on a failure of communication or a misunderstanding of the facts. In Brown, the trial judge, at a pretrial conference, had indicated to the attorneys that, in cases involving possession of a "small amount" of marijuana intended for personal use, the usual sentence would not exceed probation and the withholding of judgment of guilt. Although the amount in question was not set forth in the case, the defendant's attorneys clearly interpreted the judge's statement as indicating that it fell within the judge's definition of a "small amount." They so informed the defendant, and advised the defendant to change his plea from not guilty to guilty, which he did. After receiving the presence investigation report, however, the judge learned that the amount of marijuana in question exceeded what the judge considered a "small amount" and further learned that the defendant had sold a marijuana cigarette at the party. The judge then sentenced the defendant to three years in prison. The defendant moved to withdraw the plea, based on the misrepresentation of counsel. In considering the case, the supreme court first noted that the trial judge was in no way bound by statements made before the acceptance of the plea and, indeed, that no commitment of any kind was made by the court either to the defendant or counsel. In considering the facts, the court found that there existed an "actual misunderstanding" and "mutual mistake" resulting from the statements made by the judge. The court held that, where a plea is based on a "failure of communication or misunderstanding of facts," the plea should be permitted to be withdrawn and the case proceed to trial.

The following year, the issue arose again in a case involving the imposition of the death penalty, Costello v. State. Based on the judge's prior expressions of opposition to capital punishment and the prosecutor's statement that the State would not recommend the death penalty, the defendant's court-appointed attorneys advised him that he would not receive the death penalty if he entered a guilty plea. The defendant relied on the advice, entering a plea of "guilty generally" to murder. The court adjudged the defendant guilty of first degree murder and sentenced him to death. On appeal, the Florida Supreme Court reversed. After noting that a plea based on an actual promise that the defendant will receive less than the defendant in fact receives should be voided, the court held that "the result should be [no] different when a defendant has a reasonable basis for relying upon his attorney's mistaken advice that the judge will be lenient." Under these facts, the court ruled that the defendant's guilty plea was not entered freely and voluntarily.

In two cases subsequent to Costello, district courts of appeal have somewhat limited the effect of the Costello decision. In Lepper v. State and Trenary v. State, the appellate courts have affirmed denials of motions for withdrawal of pleas where the defendants had not received the sentence expected pursuant to a plea negotiation, and where there was no assertion of sentencing intention by the trial court. In Lepper, the trial judge made no promise as to sentencing, but informed the defendant at the time the defendant entered the guilty plea that the court would order a presentence investigation. The judge specifically informed the defendant that the court would not be bound by the plea negotiations. The defendant, on appeal of the denial of his motion for postconviction relief, argued that, since the actual sentence exceeded that envisioned by the plea agreement, he should have been

256. 245 So. 2d 41 (Fla. 1971).
257. Id. at 44.
258. Id.
259. Id. at 43.
260. Id. at 44.
261. 260 So. 2d 198 (Fla. 1972).

262. Id. at 199-200.
263. Id. at 199. It should be noted that, before imposing the sentence, the judge engaged in an extensive colloquy with the defendant, in which the defendant indicated to the court that he had received no promises, no threats, pressure or intimidation "or any other kind of pressure to cause you to plead guilty." ld.
264. Id.
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266. Id. The court here relied on precedent established by Reddick v. State, 190 So. 2d 340 (Fla. 2d Dist. Ct. App. 1967), cert. denied, 199 So. 2d 99 (Fla. 1967).
267. Id. at 201. The fact that the attorney was court-appointed apparently had some effect on the weight given to the attorney's representation of the defendant.
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270. 451 So. 2d at 1020.
271. 473 So. 2d at 820.
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271. 473 So. 2d at 820.
272. Lepper, 451 So. 2d at 1021.
given the opportunity to withdraw the plea. The court disagreed, stating that the mere advice of counsel as to what sentence the defendant might expect was not a sufficient basis for withdrawal of a plea of guilty, when the trial court had not expressly any intention to impose a certain sentence prior to entry of the plea. 273

The defendant in Trenary was indicted for first degree murder, but entered a plea of nolo contendere to second degree murder pursuant to a negotiated plea agreement. 274 The defense had entered the plea on the advice of his attorney that he would be sentenced under mandatory provisions of the youthful offender statute although the negotiations with the State and the subsequent agreement had not included sentencing. Further, the court had conducted a lengthy colloquy to determine the defendant's understanding of the court's independence in imposing sentence. 275 On appeal, the defendant argued that the Youthful Offender statute was mandatory and, if not, he should be allowed to withdraw his plea. Relying primarily on the fact that there had been no agreement with respect to the sentence, and referring to the colloquy which, at least on the surface, indicated that the defendant recognized the absence of any sentencing limitation, the court found that the trial judge had not abused judicial discretion in sentencing the defendant to 137 years in prison. 276 On appeal, the State suggested a distinction between Brown and Costello and the instant case which might have assisted in determining those cases in which the defendant's purported misunderstanding would permit the defendant to withdraw the plea and those instances in which plea withdrawal would not be permitted. The State suggested that, if the misunderstanding was based on some representation or failure of communication on the part of the State or the court, plea withdrawal would be appropriate; otherwise, it would not be permitted. 277 Although the court set out the argument in summary, the opinion did not refer to the distinction, and it apparently was not a factor in this decision.

In 1986, the Second District Court of Appeal again visited the issue in Ray v. State, and, this time, proposed a test to determine those circumstances necessitating withdrawal of a plea based on a defendant's misunderstanding of the potential consequences of that plea. 278

The defendant, charged with armed robbery, had been offered a choice between two sentencing options: either he could opt to receive a three year mandatory minimum sentence, 280 or the State would not allege use of a firearm and the defendant would receive a sentence of four and one-half years. Ray's attorneys advised him to choose the former, since he would thereby be eligible for "incentive gain-time." 281 After choosing the option involving the mandatory minimum sentence, and being sentenced to that option, the defendant discovered that he was ineligible for gain time until the minimum mandatory sentence had been fully served. 282 The trial court summarily denied the defendant's motion to withdraw the plea, and the defendant appealed, claiming that, had his attorney correctly advised him of the consequences, he would have chosen the four and one-half year sentence, with the opportunity to earn gain-time. In deciding that the defendant was entitled to withdraw the plea, the court established a dichotomy between a misunderstanding resulting from a "judgment call" of the defendant's attorney involving the attorney's estimate of what a potential sentence will be, and a "clear misstatement of how the law affects a defendant's sentence." 283

The court reiterated the statement of Trenary that a defendant is entitled to "reasonable reliance on the representations of counsel." 284 The conclusion to be drawn from Ray is twofold. First, a defendant has the right to reasonable reliance on the advice of the defendant's attorney as to the law applicable to the case and to the sentence; erroneous advice as to the law, creating a misunderstanding as to the consequences of the plea, will mandate at least withdrawal of the plea. 285 However, reli-

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273. Id. In fact, the judge specifically indicated at time of sentencing that the judge would not be bound by the plea.

274. Trenary, 473 So. 2d at 820.

275. Id. at 820-21. As part of the colloquy, the court asked the defendant if he understood the maximum penalty which the court could impose. The defendant responded, "Life in prison." The court then ascertained that the defendant had discussed the matter with his attorney and understood all the possibilities. Id.

276. Id. at 822.

277. Id. at 821.

278. 480 So. 2d at 229.


280. 480 So. 2d at 229. Fina Stat. § 944.275(4)(b) (1983). Under this statute, a prisoner may acquire 50 days a month of "basic" gain-time; the department may award additional "incentive" gain-time for prisoners who "perform work service or otherwise distinguish themselves favorably," Ray, 480 So. 2d at 228 n.1.

281. Id. at 229. Fina Stat. § 775.087(2) and Fla. Admin. Code Ann. § 3-11.05(1)(c) specifically precluded eligibility for gain time until all mandatory minimum sentence had been served.

282. Ray, 480 So. 2d at 229.

283. Id.

284. In Ray, the remedy was twofold, either to permit withdrawal of the plea or to refine the second option originally offered to the defendant, to impose the four and
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ing that the mere advice of counsel as to what sentence the defendant might expect was not a sufficient basis for withdrawal of a plea of guilty, when the trial court had not expressed any intention to impose a certain sentence prior to entry of the plea.\textsuperscript{99}

The defendant in \textit{Trenty} was indicted for first degree murder, but entered a plea of nolo contendere to second degree murder pursuant to a negotiated plea agreement.\textsuperscript{100} The defendant had entered the plea on the advice of his attorney that he would be sentenced under mandatory provisions of the youthful offender statute although the negotiations with the State and the subsequent agreement had not inclusion sentencing. Further, the court had conducted a lengthy colloquy to determine the defendant’s understanding of the court’s independence in imposing sentence.\textsuperscript{101} On appeal, the defendant argued that the Youthful Offender statute was mandatory and, if not, he should be allowed to withdraw his plea. Relying primarily on the fact that there had been no agreement with respect to the sentence, and referring to the colloquy which, at least on the surface, indicated that the defendant recognized the absence of any sentencing limitation, the court found that the trial judge had not abused judicial discretion in sentencing the defendant to 37 years in prison.\textsuperscript{102} On appeal, the State suggested a distinction between \textit{Brown and Castello} and the instant case which might have assisted in determining those cases in which the defendant’s purported misunderstanding would permit the defendant to withdraw the plea and those instances in which plea withdrawal would not be permitted. The State suggested that, if the misunderstanding were based on some representation or failure of communication on the part of the State or the court, plea withdrawal would be appropriate; otherwise, it would not be permitted.\textsuperscript{103} Although the court set out the argument in summary, the opinion did not refer to the distinction, and it apparently was not a factor in this decision.

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The defendant, charged with armed robbery, had been offered a choice between two sentencing options: either he could opt to receive a three year mandatory minimum sentence,\textsuperscript{105} or the State would not allege use of a firearm and the defendant would receive a sentence of four and one-half years. Ray’s attorneys advised him to choose the former, since he would thereby be eligible for “incentive gain-time.”\textsuperscript{106} After choosing the option involving the mandatory minimum sentence, and being sentenced to that option, the defendant discovered that he was ineligible for gain time until the minimum mandatory sentence had been fully served.\textsuperscript{107} The trial court summarily denied the defendant’s motion to withdraw the plea, and the defendant appealed, claiming that, had his attorney correctly advised him of the consequences, he would have chosen the four and one-half year sentence, with the opportunity to earn gain-time. In deciding that the defendant was entitled to withdraw the plea, the court established a dichotomy between a misunderstanding resulting from a “judgment call” of the defendant’s attorney involving the attorney’s estimate of what a potential sentence will be, and a “clear misstatement of how the law affects a defendant’s sentence.”\textsuperscript{108} The court reiterated the statement of \textit{Trenty} that a defendant is entitled to “reasonable reliance on the representations of counsel.”\textsuperscript{109} The conclusion to be drawn from \textit{Ray} is twofold. First, a defendant has the right to reasonable reliance on the advice of the defendant’s attorney as to the law applicable to the case and to the sentence; erroneous advice as to the law, creating a misunderstanding as to the consequences of the plea, will mandate at least withdrawal of the plea.\textsuperscript{110} However, reli-

\textsuperscript{99} Id. In fact, the judge specifically indicated at time of sentencing that the judge would not be bound by the plea.

\textsuperscript{100} Trenty, 435 So. 2d at 820.

\textsuperscript{101} Id. at 820-21. As part of the colloquy, the court asked the defendant if he understood the maximum penalty which the court could impose. The defendant responded, “Life in prison.” The court then ascertained that the defendant had discussed the matter with his attorney and understood all the possibilities. Id.

\textsuperscript{102} Id. at 822.

\textsuperscript{103} Id. at 821.

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\textsuperscript{107} Id. at 229. F.L.A. STAT. § 775.087(2) and F.L.A. Annov. Com. Avn. § 33-11.065(1) specifically precluded eligibility for gain time until all mandatory minimum sentences had been served.

\textsuperscript{108} Ray, 480 So. 2d at 229.

\textsuperscript{109} Id.

\textsuperscript{110} In Ray, the remedy was twofold, either to permit withdrawal of the plea or to enforce the second option originally offered to the defendant, to impose the four and
ance on the prediction of counsel or the attorney's estimate of what the trial judge will do is not sufficient to cause a misrepresentation as to the facts applicable to the case. Second, the misrepresentation need not arise from the actions of either the court or the prosecutor. Even if it arises through no fault of theirs, the misrepresentation will be sufficient to require a remedy, generally the withdrawal of the plea.

VI. 1986 Cases on Search, Seizure, Roadblocks and Canines

A. Florida Approves Warrantless Stops at Roadblocks

In the case of State v. Jones, the Florida Supreme Court addressed the constitutionality of warrantless, temporary DUI roadblocks which randomly stop vehicles without any articulable suspicion of illegal activity. Relying heavily on precedent of the United States Supreme Court and decisions from other states, the court held that a balancing of the legitimate governmental interest involved against the degree of intrusion on the individual's Fourth Amendment rights determines the reasonableness of the stop and temporary detention. Four criteria, initially set out in the opinion of the district court of appeal, were significant in the court's analysis: (1) the amount of discretion in field officers operating the roadblock, (2) safety of motorists, (3) the degree of intrusion and length of detention of each motorist, and (4) effectiveness of the roadblock compared with less intrusive means. Because of the limitations placed on the discretion of the officers in Jones, the court found that the Jones facts fell on a continuum between permanent checkpoints approved by the United States Supreme Court in United States v. Martinez-Fuerte and roving patrol random stops rejected in Delaware v. Prouse.

In Martinez-Fuerte the United States Supreme Court held that permanent roadblocks at border checkpoints were not unreasonable under the fourth amendment. The Court noted that the checkpoint served the legitimate government interest in apprehending illegal aliens. Criteria addressed by the Court included the fact that every vehicle was stopped, the roadblock was permanent, there were lighted warning signs well in advance of the stop, the roadblock was operated by uniformed officers, and supervisory personnel decided to establish the roadblock. Because of warnings posted well in advance of the roadblock, the Court reasoned that motorists would be less frightened, thereby reducing the subjective intrusion upon their liberty rights.

However, in Delaware v. Prouse the United States Supreme Court rejected roving patrols and random stops conducted solely at the discretion of police officers in the field. The officer in Prouse observed no suspicious activity or traffic violations before stopping the defendant's vehicle solely for a driver's license and registration check. These "roving patrols" were held to be unreasonable seizures in violation of the fourth amendment. In dicta the Court limited its holding, indicating that spot checks involving less intrusion or unconstrained discretion by police officers were not precluded, and stopping all traffic at roadblocks was approved. Justice Blackmun, concurring, concluded that the Court's language did not preclude "other not purely random stops (such as every tenth car to pass a given point) that equate with, but are less intrusive than, a 100% roadblock stop."

In State v. Jones, the Tampa police established a DUI roadblock on a major highway at 2:30 a.m.. The police funneled traffic flow into one lane passing an officer who had instructions to stop every fifth car during heavy traffic and every third car during light traffic. Stopped cars were directed into a parking lot where five officers were stationed to determine if drivers were intoxicated. The defendant was stopped at the roadblock and appeared to the officers to be intoxicated. He failed
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one-half year sentence. Id.
285. Id.
286. Id.
287. 483 So. 2d 433 (Fla. 1986).
288. Id. at 435.
289. Id. at 437 (citing Jones v. State, 459 So. 2d 1068, 1079 Fla. 2d Dist. Ct. 1984, answer to certified questions approved, State v. Jones, 483 So. 2d 433 (Fla. 1986)).
290. Id. at 436. The officers had orders to stop every fifth car during heavy traffic and every third car during light traffic. United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

In Martinez-Fuerte the United States Supreme Court held that permanent roadblocks at border checkpoints were not unreasonable under the fourth amendment. The Court noted that the checkpoint served the legitimate government interest in apprehending illegal aliens. Criteria addressed by the Court included the fact that every vehicle was stopped, the roadblock was permanent, there were lighted warning signs well in advance of the stop, the roadblock was operated by uniformed officers, and supervisory personnel decided to establish the roadblock. Because of warnings posted well in advance of the roadblock, the Court reasoned that motorists would be less frightened, thereby reducing the subjective intrusion upon their liberty rights.

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several field sobriety tests and was arrested.\textsuperscript{304}

The \textit{Jones} court accepted the doctrine of \textit{Prouse} and \textit{Martinez-Fuerte} that a roadblock is a seizure for fourth amendment purposes.\textsuperscript{302} As a warrantless seizure, reasonableness for fourth amendment purposes is determined by balancing legitimate government interest against the degree of intrusion on an individual's fourth amendment rights. Noting the lack of a United States Supreme Court opinion on point, the court determined that the facts of \textit{Jones} fell between those of \textit{Prouse} and \textit{Martinez-Fuerte}.\textsuperscript{304} The court included a lengthy survey of opinions from other states that have addressed the constitutionality of DUI roadblocks.\textsuperscript{304} It then indicated its approval of criteria set forth by the Second District Court of Appeal to determine the reasonableness of the seizure.\textsuperscript{305}

The court emphasized the four criteria it considered the most important. First, since DUI roadblocks are seizures without any articulable suspicion of illegal activity, unbridled discretion of police officers in this area invites abuse which necessitates written, detailed guidelines for field officers to follow at such roadblocks.\textsuperscript{306} Procedures regarding selection of vehicles, detention techniques, duty assignments, and disposition of vehicles should be reasonably specific. Second, the procedures should assure safety of motorists by providing proper lighting and warning in advance of the stop to avoid startling drivers and increasing the threat of traffic accidents.\textsuperscript{307} Police officers should be easily identifiable by uniforms or the display of other indicia of authority to all motorists fears of pulling off the road late at night by order of strangers. Third, the degree of intrusion and length of detention of each driver should be kept at a minimum by using the written guidelines to streamline the procedure.\textsuperscript{308} Fourth, the roadblock should prove to be significantly more effective at combating drunk drivers than other available less intrusive means.\textsuperscript{308} The court specifically rejected the requirement of advance public notice required by the district court and \textit{Deskins}.\textsuperscript{309} Where signs and lights give drivers notice of the roadblocks purpose pursuant to a written plan.\textsuperscript{310} In addition, the court held that roadblocks do not have to stop every car to comply with \textit{Prouse}.\textsuperscript{311} Citing Justice Blackmun's concurring opinion in \textit{Prouse}, the court reasoned that stops which are not purely random (such as stopping every third or fifth car) are far from the selective stop rejected in \textit{Prouse}.\textsuperscript{312} The remainder of factors used in \textit{Deskins} and by the district court may be used cumulatively and in addition to the four principal criteria discussed.\textsuperscript{313}

Based on the particular facts of the case, the court ruled that the State failed to prove that the roadblock met the balancing test and would therefore have been proper under the fourth amendment prohibition against unreasonable seizures.\textsuperscript{314} The court therefore answered the question certified by the district court in the affirmative — roadblocks can, if the criteria are met, be valid — but affirmed the holding that the roadblock in question did not meet constitutional requirements.\textsuperscript{315}

In \textit{State v. Abelson},\textsuperscript{316} a Fourth District Court of Appeal opinion, the \textit{Jones} criteria were applied to uphold a DUI roadblock. Supervisory personnel planned the roadblock with specific guidelines to field officers. All vehicles were stopped, and uniformed officers identified themselves and explained the purpose of the roadblock. Traffic controls and warnings were set up, marked police units with their overhead lights on were present, and motorists were detained only a minute and a half to two minutes. Out of one hundred thirty-four cars stopped, four arrests were made.\textsuperscript{317}

\begin{footnotesize}
\begin{itemize}
\item 301. \textit{Id.} at 434-35.
\item 302. \textit{Id.} at 435.
\item 303. \textit{Id.} at 436
\item 304. \textit{Id.} at 437
\item 305. See supra text accompanying note 289. The criteria had originated in a Kansas case, \textit{State v. Deskins}, 234 Kan. 529, 673 P.2d 1174, 1185 (1983). The criteria included: (1) degree of discretion left to the officer in the field; (2) location, time, and duration of the roadblock; (3) standards set by superior officers; (4) advance notice to the public; (5) warning to approaching motorists; (6) degree of fear or anxiety caused; (7) length of detention of each motorist; (8) safety conditions; (9) physical factors of method of operation; (10) availability of less intrusive methods to combat the problem; (11) effectiveness of the procedure; (12) any other relevant circumstances.
\item 306. \textit{Jones}, 483 So. 2d at 438.
\item 307. \textit{Id.} at 439.
\item 308. \textit{Id.}
\item 309. \textit{Id.}
\item 309.1. 234 Kan. at 529, 673 P.2d at 1174.
\item 310. \textit{Id.}
\item 311. \textit{Id.} at 438.
\item 312. \textit{Id.} at 438-39.
\item 313. \textit{Id.} at 439.
\item 314. \textit{Id.}
\item 315. \textit{Id.}
\item 316. 485 So. 2d 861 (Fla. 4th Dist. Ct. App. 1986).
\item 317. \textit{Id.} at 862.
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\footnote{301} Id. at 434-35. 
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\footnote{303} Id. at 436. 
\footnote{304} Id. at 436-40. 
\footnote{305} See supra text accompanying note 289. The criteria had originated in (1) degree of discretion left to the officer in the field; (2) location, time, and duration of the roadblock; (3) standards set by superior officers; (4) advance notice to the public; (5) length of time that motorists are stopped; (6) degree of fear or anxiety created; (7) method of operation; (10) availability of less intrusive methods to combat the problem; (11) effectiveness of the procedure; (12) any other relevant circumstances.

\footnote{306} Jones, 483 So. 2d at 436.
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B. Florida Decisions Approve the Use of "Sniff Dogs" and "Scent-Discrimination" Lineups

In Cardwell v. State, the First District Court of Appeal approved warrantless roadblocks where vehicles are stopped without articulable suspicion of illegal activity for the purpose of permitting dogs trained in narcotics detection to sniff the vehicle to detect the odor of controlled substances. Cardwell was set up by the Florida Department of Law Enforcement and the Florida Highway Patrol pursuant to a plan to stop the transportation of illegal drugs on Florida highways. Every car was stopped and each driver was asked to produce a driver's license and registration. At the same time a "sniff dog" was walked around the vehicle. If the dog alerted officers to the presence of drugs, the vehicle was directed to the side of the road; otherwise the vehicle was allowed to proceed. Two dogs alerted to Cardwell's vehicle and, upon a search of the vehicle, four bales of marijuana were discovered in the trunk.

Applying the fourth amendment balancing test, the court held that the state interest in stopping transportation of illegal drugs outweighed the minor intrusion on motorists' privacy. Although Cardwell was decided prior to the Jones decision, the facts seem to fall within the Jones criteria for a proper roadblock. After finding that the roadblock was reasonable under the fourth amendment, the court addressed the use of the sniff dog. Citing United States v. Place, the court held that the use of the sniff dog was not a search prohibited by the fourth amendment and that the dog's alert was sufficient probable cause for a search. Under United States v. Ross the warrantless search of the vehicle was proper, once probable cause was obtained.

In another situation involving the use of "sniff dogs," the Florida Supreme Court in Ramos v. State discussed the criteria for the admissibility of evidence of identification through scent-discrimination lineups. Before such evidence may be admitted, there must be a showing that "(1) this type of lineup evidence is reliable, (2) the specific lineup was conducted in a fair, objective manner, and (3) the dog has been properly trained and found by experience to be reliable in this type of identification."

Two scent-discrimination lineups ("sniff-ups") were reviewed in Ramos. The first consisted of five shirts, one belonging to the female murder victim and the other four belonging to another, uninvolved male individual. The purpose of the lineup was to have the dog sniff an object which had been handled by the defendant, then permit the dog to sniff each of the shirts in the "lineup." If the dog alerted at the shirt worn by the murder victim, that would permit the inference that the defendant had handled that shirt. The second line-up consisted of five knives and was conducted for the same purpose.

The court ruled the sniff-lineup evidence inadmissible because the lineup did not meet the established criteria. First, the predicate as to the reliability of the dog was not sufficiently established. Further, the lineup was not conducted in a fair manner, since the test items did not have sufficient similarity to the suspect item. The only items to have had blood on them were the suspect knife and the suspect shirt, and the only shirt worn by a female was the suspect shirt. The court emphasized that it did not intend to rule out the possibility of admitting evidence obtained from a dog-snip lineup, but stressed that the lineup in question had not met the predicate requirements for admissibility.

Finally, the Third District Court of Appeal considered what could have been an impermissibly suggestive "sniff-up" in Zukor v. State. Zukor was sitting in the Amtrak station in Miami when he was...
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318. 482 So. 2d 512 (Fla. 1st Dist. Ct. App. 1986).
319. Id. at 513.
320. Id.
321. Id. at 514.
322. Id. at 514-15.
323. See supra text accompanying notes 306 to 313. The roadblock was planned by the supervisory personnel of the Florida Department of Law Enforcement, Florida Highway Patrol, the legal staff of both agencies, the State Attorney, and the Department of Transportation and local law enforcement officials. The road block was well marked with traffic cones, flashing lights, and uniformed officers. Vehicles were stopped long enough to check drivers' licenses, registrations, and to walk the dogs around the vehicles. Every vehicle was stopped until a large backlog occurred, and then all vehicles were permitted to pass until the backing had cleared. Id. at 513.
325. Cardwell, 482 So. 2d at 515.
327. Cardwell, 482 So. 2d at 515.
328. 496 So. 2d 121 (Fla. 1986).
329. Id. at 122.
330. Id. at 122.
331. Id. at 123.
332. Id.
333. Id.
334. Id.
335. 488 So. 2d 601 (Fla. 3d Dist. Ct. App. 1986).
proached by narcotics investigators, alerted by a number of factors. After questioning Zukor for several minutes, the investigators identified themselves and had a trained dog sniff the defendant's suitcase. The dog did not alert on the suitcase. The suspicion of the investigators was not allayed, however, because they believed that the dog "was not in the mood to work." The investigators continued their investigation, which reinforced their belief that the defendant was carrying illicit drugs. They therefore conducted a luggage lineup. The defendant's luggage (which had already been sniffed by the dog) was placed with ten other bags for the dog to re-sniff. This time, the dog alerted on the defendant's bag. The luggage was searched, revealing cocaine and marijuana. The defendant moved to suppress the seized contraband, but the motion was denied by the trial judge. On appeal, the denial was affirmed. The court reasoned that the first encounter with the defendant was not a fourth amendment violation, because a reasonable person would have believed that there was no compulsion to remain. Removing Zukor from the boarding line was a Terry-type stop supported by that time by a reasonable suspicion of illegal activity. The court did not consider the possibility that the later alert of the dog might have been occasioned by the earlier one-on-one "sniff" of the suitcase, an obviously impermissible "sniff-up," but assumed that the dog had alerted because of the presence of drugs.

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336. Id. at 602. The officers saw the defendant arrive with one small suitcase and attempt to board the train forty to fifty minutes prior to its scheduled departure. Unable to board, the defendant sat in the station, during which time he appeared increasingly nervous.

337. Id.

338. Id. The defendant said he was a salesman from Boston, but had no identification. The ticket was issued in the name of "Leech," which the defendant misspelled. A check of the hotel where the defendant had claimed to have stayed showed no record of any guests by the name of Leech during the preceding week.

339. Id.

340. Id.

341. Id. at 603.

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