

**CHAPTER 3**  
**PRETRIAL MOTIONS**

### Chapter 3 - Pretrial Motions

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## PRETRIAL MOTIONS

- KEY POINTS

### Rule 3.190(a) : Motions

- Every motion/pleading must be in writing and signed
- Each motion shall state grounds, be served on adverse party and contain a certificate of service
- Judge may waive these requirements for **good cause**; the rule contemplates that *ore tenus* pretrial motions should be rare
- Discovery depositions in misdemeanor cases may be granted only upon good cause shown. Judges should not implement a blanket policy of either granting or denying depositions or other motions

### Motion To Dismiss

- Grounds may relate to matters of form or substance; former acquittal; former jeopardy; or to any other defense available to a defendant by plea other than not guilty
- Time for motions shall be before or upon arraignment, or at any other time within discretion of the judge
- Judge may at any time entertain a motion to dismiss on the following grounds:
  - The defendant is charged with an offense for which the defendant has been pardoned
  - The defendant is charged with an offense for which the defendant has previously been placed in jeopardy
  - The defendant is charged with an offense for which the defendant has previously been granted immunity
  - There are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant
- Motion to dismiss alleging factual matters under subdivision (c)(4) may be traversed/demurred to by the State. Facts alleged in motion are admitted unless specifically denied by State in the traverse
- Evidence may be received on the motion at the judge's discretion
- A motion to dismiss under subdivision (c)(4) shall be denied if the State files a traverse that with specificity denies under oath the material facts alleged in the

motion to dismiss

- If motion is granted, defendant may be held in custody for a reasonable time pending the filing of a new information

### **Motion To Suppress Physical Evidence**

- Unlawful search must be based on one of the following grounds: no warrant, insufficient warrant, wrong property seized, lack of probable cause to issue warrant, or warrant illegally executed
- Contents of motion must state evidence sought to be suppressed, and reason(s) for suppression, and a general statement of facts on which motion is based
- If motion is legally sufficient, defendant presents evidence which may be rebutted by the State
- Motion to suppress should be filed prior to trial, unless no opportunity or defendant was not aware of grounds

### **Motion To Suppress Confession or Admission**

- Grounds can be raised by defendant, or on court's own motion, to suppress illegally obtained confession or statement
- Prior to trial, unless no opportunity or defendant was not aware of grounds, but can be at any time within judge's discretion
- Court shall receive evidence on any issue of fact necessary to be decided

### **Motion to Take Deposition to Perpetuate Testimony**

- Can be filed by either party after information filed
- Must be accompanied by credible affidavits stating grounds that the prospective witness resides beyond territorial jurisdiction of the court, or may be unable to attend, or be prevented from attending a trial or hearing
- Witness' testimony must be material and deposition necessary to prevent failure of justice
- Judge shall order a commission to be issued to take the deposition and may order tangible objects or documents not privileged be produced at same time and place

- Adequate notice must be given and defendant must have opportunity to be present, but presence can be waived after notice and failure to appear
- State shall pay the defendant's attorney and a defendant not in custody the expenses for travel and subsistence for attendance
- State must provide defendant any statement of witnesses to be deposed
- Upon motion by the State, judge may expedite if case involving a child under age 16 or an elderly or disabled person
- No deposition shall be used or read into evidence at trial when the attendance of the witness can be procured
- Application to perpetuate testimony may be denied if made within 10 days before trial

### **Speedy Trial**

- Misdemeanants must be tried within ninety (90) days without demand, commencing when defendant is taken into custody, which is defined as when the defendant is arrested or served with a notice to appear in lieu of physical arrest
- Upon demand, the trial must be commenced within sixty (60) days. This occurs if the State is served with a pleading entitled "Demand for Speedy Trial"
  - Calendar call must be held within five (5) days of demand
  - Trial set at a date no less than five (5) days and no more than forty-five (45) from calendar call
- Defendant may file and serve at any time on or after the expiration of the speedy trial period a notice of expiration of speedy trial
  - No later than five (5) days after the notice of expiration is filed, the judge shall hold hearing and set a trial within ten (10) days
- A notice of expiration of speedy trial time filed before expiration of the period of time for trial is invalid and shall be stricken on motion of the State
- The calculating of time deadlines does not include the date the notice or demand was filed

- The failure to hold the 5-day calendar call does not require dismissal, provided trial is commenced within overall 15- day period
- A defendant not brought to trial within the 15-day time period, from the filing of the notice, through no delay caused by the defendant, shall be discharged forever
- Defendant is bound: Demand for speedy trial must be based on a bona fide desire for trial, and indicates that accused is available for trial and has diligently investigated the case and will be prepared for trial within 5 days
- Demand may be stricken as invalid on the State's motion; the court cannot *sua sponte* strike a demand for speedy trial or notice of expiration, even if improperly filed.
- Demand may not be withdrawn by the defendant except on order of the judge, with consent of the State, or on good cause shown
- A defendant who has demanded a speedy trial and then is not prepared for trial is not entitled to a continuance
- Trial commences when jury panel is sworn for voir dire examination or when trial proceeds before the judge
- If trial does not commence within the times established, discharge shall be granted unless time extension has been ordered, or failure to hold trial is attributable to defendant/co-defendant/counsel, or accused is unavailable or demand is invalid
- Unavailability occurs when defendant/counsel fails to attend a proceeding where attendance is required, or defendant/counsel is not ready for trial on the date trial is scheduled
- A defendant who is in federal custody or incarcerated outside of the State's jurisdiction is not entitled to a speedy trial until that person returns and notice is filed with the court
- Time may be extended: upon stipulation; or by written or recorded court order in **exceptional circumstances**; or by written or recorded court order with good cause shown; or by written or recorded court order for a reasonable and necessary reason for delay of the proceeding. Such reasons for delay include: mental competency/physical ability of defendant to stand trial, hearings on pretrial motions, appeals by the State, trial of other pending criminal charges against the defendant
- Exceptional circumstances include, but are not limited to: unexpected

illness/incapacity; complexity of the case; specific evidence not available but will become available; accommodation of a co-defendant; accused has caused delay/disruption

- If there has been a mistrial, defendant is entitled to a new trial within ninety (90) days

### **Incompetency**

- There shall be no proceedings against a defendant while incompetent
- Attorney for State, defense or judge, upon reasonable grounds, can raise issue of competency, requiring an immediate examination of defendant's mental condition
- Hearing within twenty (20) days, based upon an examination of no fewer than two (2) or more than three (3) experts
- See rules 3.211-3.213 for scope of examination and factors to be considered
- All information contained in motion, report, or information elicited at hearing are privileged, and shall be used only in determining mental competency
- If a defendant, charged with a misdemeanor, is incompetent to stand trial or proceed with a probation violation hearing for one (1) year, there is no substantial probability that the defendant will become mentally competent in the foreseeable future, and defendant does not meet criteria for commitment, charges shall be dismissed without prejudice to refile if competency returns
- Sentencing shall be postponed until competency is declared
- Use of psychotropic medication does not automatically deem a defendant incompetent, but if such medication is used, the jury shall be given explanatory instructions regarding such medication

### **3.02 AUTHORITIES**

Florida Rules of Criminal Procedure:

Rules 3.210 - 3.215 - Competency

Rule 3.190 - Pretrial Motions and Defenses

Rule 3.191 - Florida Rules of Criminal Procedure: Speedy Trial

### **3.03 TIPS/NOTES**

### **3.04 CHECKLISTS/FORMS**

## Chapter 3 – Pretrial Motions

### Motion to Dismiss

Under rule 3.190(c)(4), a defendant can move for dismissal if there are no material disputed facts and the undisputed facts do not establish a prima facie case. The defendant's burden is to specifically allege and swear to undisputed facts in the motion and to demonstrate that no prima facie case exists upon the facts set forth in detail in the motion. The procedure is similar to summary judgment proceedings in civil cases.

For the state to defeat a motion to dismiss, the state must file a traverse denying specific facts in the motion or alleging specific additional facts just as a non-movant would have to do in a counter-affidavit to defeat a motion for summary judgment. The state need not disclose all facts upon which it intends to rely to support its theory of the case. The state need only allege additional material facts that meet the minimal requirement of a prima facie case. In meeting its burden of a prima facie case, the state can use circumstantial evidence and all inferences are resolved in its favor.

**•S. v. Kalogeropolous, 758 So. 2d 110 (Fla. 2000), 25 F.L.W. S360 (5/11/2000)**

Failure to swear to a c(4) motion requires that the motion be denied.

**Styron v. S., 662 So. 2d 965 (1st DCA 1995), 20 F.L.W. D2198 (9/22/95)**

Court errs in dismissing charges where no motion was filed and the court required the state to go to a hearing on a motion to suppress as soon as it was filed. The court's attempt to remove a weak case from its docket usurps the state's authority.

**S. v. Lamb, 638 So. 2d 1060 (1st DCA 1994), 19 F.L.W. D1463 (7/5/94)**

In reviewing a c(4) motion, the court may not try to determine factual issues or consider the weight of conflicting evidence or the credibility of witnesses. Even if the court doubts the state's evidence, it cannot grant a motion to dismiss simply because the court believes the case will not survive a motion for JOA.

**S. v. Dickerson, 811 So. 2d 744 (2d DCA 2002), 27 F.L.W. D480 (2/27/2002)**

If a police officer's actions amount to a denial of due process rights, dismissal of the charges may be warranted. Due process rights are violated when the government's conduct so offends decency or a sense of justice that the judicial power may not be exercised to obtain a conviction.

(See this case for citations to due process cases.)

**S. v. Taylor, 784 So. 2d 1164 (2d DCA 2001), 26 F.L.W. D803 (3/23/2001)**

When the defense files a c(4) motion and the state does not traverse, the facts alleged in the motion are deemed admitted. The court then must determine whether the admitted facts establish a prima facie case of guilt. Failure to file a traverse does not require that the motion be granted.

In considering the motion, all questions and inferences from the evidence must be resolved in favor of the state. Even if the court doubts the sufficiency of the evidence, it cannot grant a motion to dismiss simply because the judge believes the case will not survive a motion for JOA.

In a possession case, knowledge is a question of fact that is not a proper basis for a motion to dismiss.

**S. v. Paleveda, 745 So. 2d 1026 (2d DCA 1999), 24 F.L.W. D2414 (10/20/99)**

The court cannot grant a c(4) based on a disagreement whether the case should be prosecuted. The court is without the authority to decide which cases should be prosecuted if the state can present a prima facie case.

**S. v. Moore, 742 So. 2d 834 (2d DCA 1999), 24 F.L.W. D2088 (9/10/99)**

A motion attacking the sufficiency of an information is properly raised pretrial in a motion under rule 3.190(b), and failure to raise the issue pretrial waives the argument. Where the defendant styles a motion to dismiss as a motion for judgment of acquittal after the state's case, the court errs in dismissing the case.

**S. v. Strickler, 712 So. 2d 1218 (2d DCA 1998), 23 F.L.W. D1563 (6/24/98)**

A traverse that states, "the state specifically denies that the material facts as presented in the defendant's sworn motion to dismiss are the only facts upon which the state would rely during the state's case in chief," and nothing more, is legally sufficient to require the court to deny a c(4) motion.

**Branciforte v. S., 678 So. 2d 426 (2d DCA 1996), 21 F.L.W. D1752 (7/31/96)**

Court errs in sua sponte dismissing the case when a state witness fails to appear for a deposition and then fails to appear pursuant to a rule to show cause. Dismissal is proper only when no other sanction will suffice.

**S. v. L.E., 754 So. 2d 60 (3d DCA 2000), 25 F.L.W. D517 (3/1/2000)**

An unsworn traverse is not sufficient under rule 3.190(c)(4) to obtain an automatic denial of a motion to dismiss. The facts alleged in the traverse must be specific and under oath before the state is entitled to a denial of the motion.

When the facts alleged in defendant's motion do not present undisputed facts, the motion should be denied despite an insufficient traverse. Where a state witness make inconsistent statements regarding defendant's guilt, the evidence is not undisputed and the motion should be denied.

**S. v. Gutierrez, 649 So. 2d 926 (3d DCA 1995), 20 F.L.W. D349 (2/8/95)**

The court lacks authority to dismiss a case when it finds no probable cause at a rule 3.133 adversary preliminary hearing. The court's only authority is to release defendant.

**S. v. Conley, 799 So. 2d 400 (4th DCA 2001), 26 F.L.W. D2684 (11/14/2001)**

The court should dismiss an information due to police misconduct when the misconduct is so egregious as to violate due process rights. To determine whether the conduct violates due process, the court must weigh the opposing policy considerations which recognize the defendant's right to be protected from egregious governmental misconduct and the government's need to combat crime.

LEOs executed a search warrant at defendant's home and found drugs. They arrested him, and then set up a reverse sting operation in the home to arrest people who came to the house to buy drugs. Held: While the government's conduct is improper, the conduct is not so outrageous that it prejudiced defendant's right to a fair trial or violated judicial notions of justice and fairness (but see dissent).

**McDonald v. S., 742 So. 2d 830 (4th DCA 1999), 24 F.L.W. D2070 (9/8/99)**

A rule 3.190(c)(4) motion to dismiss is akin to a civil motion for summary judgment. The motion is decided only on the undisputed facts. In considering the evidence, the court must draw all inferences in favor of the state and against the defendant. The trial court may neither weigh conflicting evidence nor pass on the credibility of witnesses nor determine disputed issues of fact. Motive and intent are states of mind usually inferred from the conduct of the parties and the surrounding circumstances; they are questions for the trier of fact that are generally not appropriate for a motion to dismiss (cases cited).

Court errs in dismissing hate crime enhancement where, in the light most favorable to the state, but for racial prejudice the crime would not have occurred.

**S. v. Hart, 677 So. 2d 385 (4th DCA 1996), 21 F.L.W. D1638 (7/17/96)**

When the defense files a c(4) motion, the burden is on the defense to allege that the material facts of the case were undisputed, describe what the material facts were,

and demonstrate that the undisputed facts either (1) failed to establish a prima facie case or (2) established a valid defense.

In a constructive possession case, where the state's traverse alleged that the defendant was standing in the open front doorway of her house and immediately shut the door when LEOs arrived to serve a search warrant, and when she was next seen she was standing alone in the doorway of a bathroom where drug were found in the toilet bowl, the facts are sufficient to establish constructive possession.

Joint occupancy with or without ownership of the premises, where contraband is found in plain view in the presence of the owner or occupant is sufficient to support a conviction for constructive possession.

**S. v. Reese, 774 So. 2d 948 (5th DCA 2001), 26 F.L.W. D203 (1/12/2001)**

The issue whether defendant had knowledge of the presence of marijuana, in a constructive possession case, is for the jury to decide, and the court errs in granting a c(4) on that issue.

**S. v. Heffner, 727 So. 2d 977 (5th DCA 1999), 24 F.L.W. D217 (1/15/99)**

When the state does not file a traverse, the facts alleged in defendant's motion are deemed admitted.

The court at a c(4) motion hearing can take live testimony, and if the testimony indicates a factual dispute or any evidence that would support the charge, the motion should be denied.

**S. v. Davis, 652 So. 2d 942 (5th DCA 1995), 20 F.L.W. D799 (3/31/95)**

### **Motion to Suppress physical evidence**

An order granting a motion to suppress is a non-final order because judicial labor is still required to effectuate a termination of the case.

When the court suppresses evidence during trial resulting in a dismissal or acquittal, a retrial would constitute double jeopardy.

Under rule 3.190(h)(4), the court has the authority to hear and rule on a motion to suppress during trial.

If the court decides to hear a motion to suppress during trial after jeopardy has attached, the court should use the following procedure. The court should exercise its discretion to withhold ruling on the motion and allow the case to be submitted to the jury. If the defendant is acquitted, the motion is moot. However, if the defendant is convicted, the court should then consider the motion to suppress post-trial in conjunction with a renewed motion for JOA or a motion for new trial. If the court grants the motion to suppress, the court should then grant a JOA and the state can appeal under rule 9.140(c)(1)(C) or (E). Such a procedure will allow

the court to consider a belated motion to suppress without violating double jeopardy or eliminating the state's right to appeal an adverse ruling.

**•S. v. Gaines, 770 So. 2d 1221 (Fla. 2000), 25 F.L.W. S987 (11/2/2000)**

In reviewing a ruling on a motion to suppress, the reviewing court is bound by the trial court's findings of fact unless the findings are clearly erroneous. So long as competent and substantial evidence supports the findings, and the court correctly applies the law to the facts, the ruling will be upheld.

**M.J. v. S., 776 So. 2d 341 (1st DCA 2001), 26 F.L.W. D325 (1/22/2001)**

At a motion to suppress, in the absence of a warrant, once the defendant establishes standing it is the state's burden to show that the evidence was lawfully obtained. When a warrant is issued, it is the defendant's burden to show grounds for suppression.

The reviewing court is bound by the findings of fact made by the trial court unless they are clearly erroneous. The reviewing court should apply the law de novo, however, and is not bound by the court's application.

(See this case for extensive citations to cases describing the burden of proof and procedures to be used in suppression hearings).

**S. v. Setzler, 667 So. 2d 343 (1st DCA 1995), 20 F.L.W. D2418 (10/24/95)**

In reviewing motion to suppress, court should not view evidence in the light most favorable to the state, but should act as a neutral and detached magistrate to determine whether the state has met its burden of showing an exception to the warrant requirement.

**Edwards v. S., 532 So. 2d 1311 (1st DCA 1988)**

When the defense alleges a warrantless search, the burden shifts to the state to prove by clear and convincing evidence that the search was lawful. The state cannot stipulate to the facts as alleged in defendant's motion. Such an offer to stipulate will not meet the state's burden of proof in a suppression hearing.

**Palmer v. S., 753 So. 2d 679 (2d DCA 2000), 25 F.L.W. D672 (3/15/2000)**

The judge in a suppression hearing has the obligation to judge the credibility of conflicting testimony and resolve the conflicts. The mere fact that an LEO presents testimony as to the elements of a crime does not obligate the court to believe the testimony and deny a motion to suppress.

**S. v. Oakley, 751 So. 2d 172 (2d DCA 2000), 25 F.L.W. D357 (2/9/2000)**

The trial court has the obligation of determining whether a ruling on a motion to suppress is dispositive. Failure to state on the record that the ruling is dispositive will result in dismissal of the appeal.

**Rust v. S., 742 So. 2d 471 (2d DCA 1999), 24 F.L.W. D2234 (9/22/99)**

A motion to suppress is an issue of law for the judge alone to decide. The jury has no role in determining the legality of a search.

In a motion to suppress, there is no evidentiary presumption favoring the state, and the court errs in viewing the evidence “in the light most favorable to the state.”

**Moore v. S., 647 So. 2d 326 (2d DCA 1994), 20 F.L.W. D41 (12/21/94)**

(See **S. v. McCray, 626 So. 2d 1017 (2d DCA 1993)** (Parker, J., concurring), for discussion of the legal sufficiency under rule 3.190 of a motion to suppress, and the judge’s obligations under the rule).

Trial court has the authority to reconsider a ruling on a motion to suppress while the court has jurisdiction of the case.

**Obregon v. S., 601 So. 2d 616 (3d DCA 1992)**

A trial court’s ruling on a motion to suppress is presumed correct, but the appellate court must decide for itself whether the facts relied upon by the trial court support its legal conclusions.

**S. v. Wikso, 738 So. 2d 390 (4th DCA 1999), 24 F.L.W. D1464 (6/23/99)**

Court does not err by hearing a motion to suppress during trial. Rule 3.190(h)(4) does not require that the hearing be held before trial.

**Gerlitz v. S., 725 So. 2d 393 (4th DCA 1998), 24 F.L.W. D25 (12/23/98)**

So long as the court retains jurisdiction of a case, it has the authority to reconsider its ruling on a motion to suppress upon an appropriate motion or objection.

A judge’s ruling granting a motion to suppress cannot be based on the judge’s finding that in another case the officer was untruthful. The prejudgment of the officer’s credibility by the court is clear error.

**S. v. Graham, 721 So. 2d 361 (4th DCA 1998), 23 F.L.W. D2415 (10/28/98)**

Court errs in refusing to conduct an evidentiary hearing on a legally sufficient motion to suppress when defendant requests a hearing. See rule 3.190(h).

**Gasdon v. S., 600 So. 2d 1287 (4th DCA 1992)**

Where defendant files a motion to suppress and a demand for speedy trial, the court is obligated to hear the motion to suppress, and cannot refuse to consider it because of the demand. Court can extend speedy trial time to hear the motion.

**Williams v. S., 548 So. 2d 898 (4th DCA 1989)**

A motion to suppress, to shift the burden to the state to prove the legality of a search or seizure, must allege and the defendant must prove that a search had taken place. In filing a motion to suppress the defendant undertakes the burden of making an initial showing that the evidence at issue was obtained by the government as the result of a search or seizure. Bare allegations in a motion, unsupported by proof, are not sufficient to sustain that burden.

(See this case for discussion of the legal sufficiency of a motion to suppress.)

**S. v. Gay, 823 So. 2d 153 (5th DCA 2002), 27 F.L.W. D1390  
(6/14/2002)**

When the court's order directs that suppression motions are to be heard not less than 7 days before pretrial, and defense filed suppression motions after the pretrial, the court does not err in summarily denying the motions without a hearing.

**Powell v. S., 717 So. 2d 1050 (5th DCA 1998), 23 F.L.W. D1857  
(8/7/98)**

### **Motion to Suppress Confession**

Defendant was stopped by DUI and arrested. He was not Mirandized when he was taken to booking area. During booking, he was asked standard questions about his age, height, weight, etc., and then was asked if he knew the date of his sixth birthday, which he did not. He then was videotaped doing field sobriety tests, and made several incriminating statements during the tests. Held: Slurring of speech during the answering of booking questions was non-testimonial and are beyond fifth amendment right. Defendant's answer to the sixth birthday question was testimonial because it showed the cognitive functioning of his mind, and should be suppressed as a Miranda violation. The incriminating inference of his failure to answer the question stemmed from the testimonial nature of the response.

Statements made during the sobriety tests were not made in response to interrogation, and thus are admissible.

(See this case for discussion of the "booking question" exception to Miranda requirements).

**•Pennsylvania v. Muniz, 110 L.Ed. 2d 528 (1990)**

Defendant was arrested on a murder warrant and requested an attorney during interrogation. He was allowed to speak with a lawyer several times, then LEOs approached again and demanded that he speak with them, and he confessed. Held: Miranda requirement that interrogation cease when an attorney is requested means that interrogation cannot be restarted after defendant speaks with an attorney.

Interrogation cannot be restarted unless the attorney is present or defendant validly waives the right to an attorney. Merely consulting with an attorney does not satisfy Miranda rights.

Edwards bright-line rule does not allow reinterrogation once an attorney is requested, and the exception sought by the state is inconsistent with Edwards.

•**Minnick v. Mississippi, 112 L.Ed. 2d 489 (1990)**

Edwards v. Arizona rule that states that when a suspect “has expressed his desire to deal with the police only through counsel [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police” is extended to cases where defendant refuses to speak without an attorney and then is questioned about an unrelated offense. Where defendant does not initiate further conversation, police may not question him about another, unrelated offense without providing counsel first.

Where defendant asks for counsel and questioning is stopped, it is inherently coercive to restart interrogation before counsel is provided, because it gives a suspect the impression that his earlier request for counsel was not proper and that he may have no choice but to answer.

It is irrelevant that the second interrogating officer did not know that the suspect had requested counsel from a different officer. The focus is on defendant’s state of mind, not the officer’s.

**Arizona v. Roberson, 43 L.Ed. 2d 3085 (1988)**

Defendant approached LEO and confessed to murder. LEO asked several questions and defendant appeared to understand questions and answers. Defendant then was arrested. He continued confession after arrest and Miranda. Defendant moved to suppress based on defendant’s mental state, that defendant’s statement was not voluntary because mental condition forced defendant to confess (he believed God was ordering him to confess). Held: Due process is violated only by acts of official coercion, and where police had no role in causing defendant’s mental state, voluntariness for due process purposes is not implicated.

Voluntariness inquiry relates to due process concerns. But where there is no police overreaching, defendant’s mental condition, confusion, apprehension, etc. does not implicate due process.

The most outrageous behavior by a private party seeking to secure evidence against defendant does not violate due process. Since purpose of exclusionary rule is to deter future constitutional violations, excluding evidence obtained through sources other than the police misconduct does not support exclusionary rule rationale.

State must show waiver of Miranda rights by a preponderance of evidence, not by any higher level of proof.

Requirement that waiver of Miranda rights be voluntary is governed by the same rules as voluntariness of confession due process rules. Voluntariness of waiver depends on police conduct and police overreaching, not on “free will” concepts.

Miranda protects defendants from government coercion leading them to surrender rights protected by the fifth amendment. Coercion from other sources not associated with the government does not have fifth amendment ramifications.

**•Colorado v. Connelly, 40 L.Ed. 2d 3159 (1986)**

Defendant was arrested for burglary, and evidence implicating him in murder was developed. Attorney for defendant on burglary called police, asked to be present if defendant was questioned, and was told that cops were through with him for the night and defendant would not be questioned. Defendant was questioned and confessed to murder. Held: Because defendant was properly Mirandized and voluntarily confessed, misleading attorney is not a violation of 5th, 6th, or due process rights.

Waiver of Miranda rights must be product of free will and deliberation, not intimidation, coercion, or deception. Only if totality of circumstances surrounding the interrogation show an uncoerced choice and the requisite level of comprehension may a court conclude that rights were waived.

Events occurring unknown to defendant cannot bear on defendant’s capacity to understand and waive a constitutional right.

Once right to attorney attaches, police may not interfere with attorney’s right to act as a medium between defendant and the police.

6th amendment right to counsel attaches only after initiation of formal charges. While defendant has the right to contact an attorney during custodial interrogation, 6th amendment right is not implicated until formal charges are made, and state can interfere with attorney’s efforts to contact defendant during pre-arraignment custodial interrogation.

**•Moran v. Burbine, 89 L.Ed. 2d 410 (1986)**

“Interrogation” under Miranda refers not only to direct questioning but also to any words or actions by LEOs (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit incriminating responses from suspect.

“Incriminating response” is any response, inculpatory or exculpatory, that the state seeks to introduce against defendant.

LEOs arrest defendant for robbery with shotgun shortly after robbery. During trip to station, the converse in front of defendant about dangers to school children if a child found the gun. Defendant, who stated he wanted attorney when Mirandized, said he would show them where gun was. Held: Conversation was not interrogation. No indication that LEOs should have known that defendant was particularly susceptible to appeals to conscience, or that he was disoriented or upset.

**•Rhode Island v. Innis, 64 L.Ed. 2d 297 (1980)**

Defendant was illegally arrested without warrant or PC. He was taken to station, read Miranda, waived, and made incriminating statements. Held: For 5th amendment rights to be validly waived following a 4th amendment violation, there must be some break in the causal connection sufficient to eliminate the taint of the illegal arrest. Giving Miranda warnings and obtaining a waiver is an important factor, but is not determinative.

Other factors to consider are the length of time between arrest and confession, the presence of intervening factors, and particularly the purpose and flagrancy of the official misconduct.

**•Brown v. Illinois, 45 L.Ed. 2d 416 (1975)**

Statements by police regarding leniency of sentencing are objectionable only if they establish a quid pro quo for the confession. where defendant confesses expecting leniency, but there is no express offer, only his expectation, the confession is voluntary.

(See this case for discussion of a case where defendant was appointed a PD and he then, in the presence of his attorney confessed to murder that resulted in the death penalty.)

**Philmore v. S., 820 So. 2d 919 (Fla. 2002), 27 F.L.W. S530 (5/30/2002)**

Defendant was arrested and Mirandized. He agreed to talk, and after a few minutes he invoked his right to counsel. the discussion stopped, and the officers left the room. About three and a half hours later he knocked on the door, and the officer asked what he wanted. Defendant indicated he wanted to talk, and the officer said they could not talk because he had requested an attorney. Defendant said he changed his mind and no longer wanted an attorney, and he subsequently gave an incriminating statement. Held: The court proper denies suppression. Under Oregon v. Bradshaw, the defendant has the right to reinitiate conversation, and his waiver was proper.

**Francis v. S., 808 So. 2d 110 (Fla. 2001), 27 F.L.W. S2 (12/20/2001)**

A determination whether a suspect is “in custody” for Miranda purposes involves two discrete inquiries; first, what were the circumstances surrounding the interrogation, and second, would a reasonable person have felt he was not at liberty to terminate the interrogation and leave. The first inquiry is factual and the second is a mixed question of law and fact.

Appellate courts should give a presumption of correctness to the trial court’s rulings on motions to suppress with regard to the court’s determination of historical facts. Appellate court must independently review mixed questions of law and fact that ultimately determine constitutional issues in fourth and fifth amendment contexts.

**•Connor v. S., 803 So. 2d 598 (Fla. 2001), 26 F.L.W. S579  
(9/6/2001)**

A defendant may not invoke his fifth amendment right to counsel until a custodial interrogation has begun or is imminent. Where defendant signs an invocation of rights form from the public defender, that form will not serve to invoke his fifth amendment rights in a subsequent interview.

**Hess v. S., 794 So. 2d 1249 (Fla. 2001), 26 F.L.W. S565  
(5/17/2001)**

Under Almeida, the police are required to be honest and fair in answering questions posed by a defendant about his rights. The officers are not required to act as legal advisors or personal counselors for suspects.

Following Miranda warnings, the defendant asked the officer if they thought he should have an attorney. The officers responded that it was not their decision to make, and that the decision was up to him. Defendant then confessed. Held: The answer provided by the officers was simple, reasonable, and true. The officers did not engage in gamesmanship or try to give an evasive answer or to skip over the question. The response thus was proper under Almeida.

**•S. v. Glatzmayer, 789 So. 2d 297 (Fla. 2001), 26 F.L.W. S279  
(5/3/2001)**

When defendant is handcuffed for his own protection because he told LEO that he had tried to kill himself, and he said in his subsequent statement that he asked the LEO to restrain him, he is not in custody for Miranda purposes.

Voluntary statements by a person thought by LEO to be a witness rather than a suspect are not the result of interrogation for Miranda purposes.

For Miranda warnings to be required, the suspect must be both in custody and interrogated.

A determination of both voluntariness of a statement and knowing and intelligent waiver of Miranda requires an examination of the totality of the circumstances.

Once a suspect asks for a lawyer, no state agent can reinstate interrogation on any offense through the time of custody unless a lawyer is present, although the suspect can volunteer a statement to the police on his own initiative. When defendant asks for a lawyer, and then on his own tells the police he wants to talk, the subsequent statement is admissible.

Repeated reading of Miranda rights, (here, four times) is an effort to provide procedural safeguards and not an attempt by officers to persuade him to talk.

**Lukehart v. S., 762 So. 2d 482 (Fla. 2000), 25 F.L.W. S489  
(6/22/2000)**

In determining whether defendant was in custody for Miranda purposes, the court should consider: (1) the manner in which police summon the suspect for questioning; (2) the purpose, place, and manner of the interrogation; (3) the extent to which the

suspect is confronted with evidence of his or her guilt; (4) whether the suspect is informed that he or she is free to leave the place of questioning.

Where defendant is asked to go to the station by several officers, he is questioned at the station by two officers, he is not told he is free to leave, he is confronted with substantial evidence of his guilt, and it was clear he was the prime suspect, he is in custody for Miranda purposes and Miranda warnings are required.

The error in admitting a statement made in violation of Miranda is reviewed on a harmless error standard.

**Mansfield v. S., 758 So. 2d 636 (Fla. 2000), 25 F.L.W. S245  
(3/30/2000)**

When defendant is Mirandized and invokes his right to counsel, he cannot be interrogated further until counsel is provided or the suspect initiates further communication. If the suspect voluntarily initiates the contact and validly waives the right he had previously invoked, the interrogation can resume.

After invoking his right to silence and counsel, defendant reinitiated contact by asking to speak with the detective. He said during a statement made not in response to questioning that he wanted to talk to the detective, his mother, and his attorney.

He subsequently confessed to the crime. Held: The statement about talking to his lawyer was not an unequivocal request for counsel.

Edwards is not violated when defendant repeatedly makes statement to a correctional officer that he wants to get the crime off his chest and wants to get right with God, and then confesses.

**•Jones v. S., 748 So. 2d 1012 (Fla. 1999), 24 F.L.W. S535  
(11/12/99)**

Defendant may not invoke the fifth amendment right to counsel until custodial interrogation has begun or is imminent. Where defendant signs an “Edwards notice” following his arrest for fleeing, and then a week later is approached by the police an interrogated regarding a separate crime, defendant’s Miranda waiver is proper.

**Thomas v. S., 748 So. 2d 970 (Fla. 1999), 24 F.L.W. S461  
(9/30/99)**

During Miranda warnings, defendant asked LEO, “Well, what good is an attorney going to do?” The officer did not answer and continued trying to get defendant to talk. Held: Subsequent statement violates Miranda and should be suppressed.

Under Traylor v. State, 596 So. 2d 957 (Fla. 1992), when a suspect asks a clear question regarding his rights during Miranda warnings, the officer is required to give a simple, straightforward answer. Giving an evasive answer or attempting to evade the question violates Miranda and results in coercion. Any statement thus obtained violates the Florida Constitution and cannot be used by the state.

(See this case for extensive discussion of Florida’s Miranda law as adopted by Traylor.)

**•Almeida v. S., 737 So. 2d 520 (Fla. 1999), 24 F.L.W. S331  
(7/8/99)**

Custody for Miranda purposes encompasses not only a formal arrest, but any restraint on freedom of movement of the degree associated with formal arrest. If a reasonable person placed in the suspect's position would believe that his freedom of movement has been curtailed to the extent associated with a formal arrest, he is in custody for Miranda purposes.

Whether a person is in custody is a mixed question of law and fact. The following are factors the court should consider: (1) the manner in which police summon the suspect for questioning; (2) the purpose, place, and manner of the interrogation; (3) the extent to which the suspect is confronted with evidence of his or her guilt; (4) whether the suspect is informed that he or she is free to leave the place of questioning.

(See this case for extensive discussion of "custody" for Miranda purposes.)

After taking an unlawful unwarned statement, giving proper Miranda warnings can cure the error and allow a subsequent warned statement to be admitted if the warnings are careful and thorough. However, where the police give the warnings in a manner designed to minimize and downplay their importance, the subsequent, warned statement should be suppressed.

The manner in which Miranda warnings are given is a critical factor in determining whether a subsequent waiver of the rights is voluntary. Any evidence that the suspect was threatened, tricked, or cajoled into a waiver will render the waiver involuntary. The suspect's age and level of experience in the justice system affects the level of care needed in giving warnings.

Under §39.037(2) (now §985.207(2)), the police are obligated to attempt and continue to attempt to contact the child's parent upon his arrest. Under *Allen v. State*, 636 So. 2d 494 (Fla. 1994), the police may not continue to question a juvenile after the child's parent asks to talk with him. Where a child's parent is not given an opportunity to be present during interrogation despite the parent's request, the statement is involuntary.

In admitting a juvenile's confession, the state must demonstrate meaningful attempts to contact the child's parents

**•Ramirez v. S., 739 So. 2d 568 (Fla. 1999), 24 F.L.W. S353  
(7/8/99)**

The failure to notify a juvenile's parents of the police intention to question a juvenile, or the failure to tell the child of his right to have his parent present does not result in the suppression of the statement, but is a factor the court can use to determine whether the statement is voluntary.

Where defendant's mother knew defendant was going to jail, he was 18 when interrogated but 17 at the time of the crime, he had a GED, and the interrogation was brief, the court properly finds the confession to be voluntary.

Under *Colorado v. Connelly*, 479 U.S. 157, 164 (1986), the most outrageous behavior by a private person seeking to secure evidence against an individual does not make the evidence inadmissible under the due process clause. Thus, where defendant's uncle recorded defendant's phone calls from jail and got him to confess by telling him that he needed the information to hire a private attorney, the confessions are admissible (but see *Mirabal v. State*, 698 So. 2d 360 (Fla. 4th DCA 1997), and see dissent.)

***Snipes v. S.*, 733 So. 2d 1000 (Fla. 1999), 24 F.L.W. S191  
(4/22/99)**

Statements are not rendered involuntary because the officers do not inform defendant of the nature of the charges at the time of his arrest.

Telling defendant that he should confess and tell them where the body was because the victim's wife needed "closure" is not a Christian burial speech violation sufficient to render a confession involuntary.

***Alston v. S.*, 723 So. 2d 148 (Fla. 1998), 23 F.L.W. S453  
(9/10/98)**

LEO Mirandized defendant and he gave a statement, then stated he wanted a lawyer. The officer offered defendant a phone book, and stopped questioning. The next day, defendant reinitiated contact and gave a full statement. Held: The adequacy of the LEO's response is irrelevant, because the officer stopped questioning. When defendant reinitiates contact and waives his rights, the statement is properly admitted.

(See this case for discussion of the proper procedure to follow when defendant reinitiates contact following an invocation of the right to counsel.)

**•*Jennings v. S.*, 718 So. 2d 144 (Fla. 1998), 23 F.L.W. S459  
(9/10/98)**

A confession made in the course of plea negotiating, which the state wanted as a condition of negotiating, is inadmissible if the plea eventually falls apart.

(See this case for extensive discussion of when a statement made during plea negotiations is admissible.)

**•*Richardson v. S.*, 706 So. 2d 1349 (Fla. 1998), 23 F.L.W. S54  
(1/29/98)**

A statement made in an effort to induce a plea bargain is not admissible against the defendant pursuant to rule 3.172(h) and section 90.410. However, once the plea bargain is made, statements made in fulfillment of the plea bargain are admissible if the deal falls through.

(See this case for extensive discussion of when statements are or are not admissible under those sections.)

**•*Wainwright v. S.*, 704 So. 2d 511 (Fla. 1997), 22 F.L.W. S713  
(11/13/97)**

A confession obtained by physical or psychological coercion or violation of a constitutional right is involuntary and inadmissible. For a confession to be admissible, the state must demonstrate by a preponderance that the confession was voluntary.

To determine if a Miranda waiver is voluntary, the court must determine first if the waiver was the product of free and deliberate choice rather than intimidation, coercion or deception. Second, the court must determine whether the waiver was executed with a full awareness of the nature of the rights being abandoned and the consequences of their abandonment. The court should use a totality of the circumstances analysis to determine whether a Miranda waiver is valid.

The fact that defendant did not sign a Miranda waiver does not mean the waiver is not voluntary if the defendant orally indicates that he understands his rights.

Where there is competent, substantial evidence to support the court's determination regarding the voluntariness of a waiver, a court on appeal will not disturb the ruling.

**Slincy v. S., 699 So. 2d 662 (Fla. 1997), 22 F.L.W. S476  
(7/17/97)**

The right to counsel under the US constitution attaches at the earliest of the following points: formal charge, preliminary hearing, indictment, information, or arraignment. Under the Florida Constitution, the right attaches at the earliest of the following points: formal charge by information or indictment, as soon as feasible after custodial restraint, or first appearance.

Where an indictment is filed against defendant before his arrest, the right to counsel attaches before he is arrested.

The right to counsel must be invoked before it is effective. Thus, where defendant waives his right to talk to a lawyer after his arrest on the warrant, no violation of the right occurs. the mere appointment of counsel does not invoke the right.

Defendant's Miranda right to counsel is properly waived once he is properly warned and waives counsel.

**Smith v. S., 699 So. 2d 629 (Fla. 1997), 22 F.L.W. S396 (7/3/97)**

Statements taken in violation of Miranda are inadmissible, regardless of whether they are inculpatory or exculpatory.

Miranda warnings are needed when a suspect is interrogated and in custody. If one or the other requirement is not met, no warnings are needed.

Custody includes more than circumstances when a suspect is arrested. The fact that the police have a warrant for arrest does not mean that the suspect is in custody when interrogated. Custody requires restraint of movement to the degree associated with a formal arrest. The a proper inquiry is not the unarticulated plan of the LEO, but how a reasonable person in the suspect's position would have perceived the situation.

LEOs questioned defendant several times following the murder of his girlfriend's child. After obtaining a warrant for his arrest, they asked him to come to the station for another interview. He did, and denied the killing. He then was arrested. Held: Under those circumstances, the pre-arrest interview was not custodial, and no error occurs in admitting defendant's statements.

After his arrest, defendant invoked his right to counsel. An LEO approached him and told defendant that he was "disappointed" in him. Defendant then made inculpatory statements. Held: The LEO's approach to defendant was "initiation" of contact under Edwards, but the LEO's statement was not "interrogation" under Innes. The statement by the LEO was not intended to elicit incriminating information.

Upon defendant reinitiating contact, formal Miranda warnings are not needed unless he had never been Mirandized. Here, defendant had not received the full warnings, and the subsequent statement confessing to the crime should be suppressed.

When a voluntary statement in violation of Miranda is given and suppressed, a subsequent statement that is not in violation of Miranda should not be suppressed. Thus, where defendant's first statement is suppressed because full warnings are not given, a subsequent statement given after the warnings are provided is admissible.

Once full warnings are given, they need not be given again when defendant talks again so long as the second statement is voluntarily made. Thus, where defendant gives a statement following Miranda, and then a week later indicates he wants to talk again and only partial warnings are provided, the second statement is admissible.

**•Davis v. S., 698 So. 2d 1182 (Fla. 1997), 22 F.L.W. S331 (6/5/97)**

The rule of *Davis v. United States*, 514 U.S. 452 (1994), which holds that police need stop a custodial interrogation only if the suspect "clearly" invokes his right to silence or counsel, will be adopted as the law in Florida. Thus, when a suspect makes an equivocal invocation, the police no longer need to stop questioning to clarify the suspect's desires.

(See concurring opinion by Shaw, J., stating that the courts should use a "reasonable person" standard when determining whether a suspect has "clearly" invoked his right to cut off questioning. Thus, a suspect "clearly" invokes his right to stop questioning when a reasonable person would conclude that the suspect has evinced a desire to stop the interview in light of all of the circumstances surrounding the statement, including the suspect's schooling, command of English, and ethnic background.)

**•S. v. Owen, 696 So. 2d 715 (Fla. 1997), 22 F.L.W. S246 (5/8/97)**

A statements cannot be obtained through direct or implied promises. The totality of circumstances must indicate that the confession is the result of a free and rational choice.

The state must show by a preponderance of evidence that defendant's statement was voluntary.

The fact that the court fails to make an explicit finding that defendant's statement was voluntary will not result in reversal when it is clear that the issue of voluntariness is before the court and the record shows with unmistakable clarity that the court found by a preponderance of evidence that the statement was voluntary.

When defendant makes self-serving statements indicating that he was promised leniency in return for his statements, and the testimony of the LEOs involved is contrary, the court does not err in finding the statements voluntary.

**Johnson v. S., 696 So. 2d 326 (Fla. 1997), 22 F.L.W. S253  
(5/8/97)**

A defendant cannot invoke his Miranda right to counsel by signing a form claiming his rights when interrogation has not begun or is imminent. Thus, when defendant signs an invocation of rights form provided by his PD and LEOs approach him on an unrelated crime and he validly waives his Miranda rights, the confession is properly admitted.

**•Sapp v. S., 690 So. 2d 581 (Fla. 1997), 22 F.L.W. S115  
(3/13/97)**

A decision on the issue whether defendant was too intoxicated to waive his rights is reviewed in the light most favorable to the prevailing theory. If the ruling is supported by substantial competent evidence, it will not be reversed.

**•Orme v. S., 677 So. 2d 258 (Fla. 1996), 21 F.L.W. S195 (5/2/96)**

When the evidence regarding the voluntariness of defendant's confession is conflicting, the appellate court should review it in the light most favorable to the prevailing party. The fact that the evidence is conflicting does not mean that the state failed to meet its burden of showing voluntariness.

Telling defendant that he failed a polygraph does not render a subsequent confession involuntary so long as there is no showing of physical, psychological coercion, intentional deception, or violation of a constitutional right.

Absent egregious police misconduct, a confession may be admitted but defendant is entitled to argue voluntariness to the jury.

Police misconduct poses a question of law for the judge, but less serious matters that may reflect on the reliability or fairness of the confession are questions of fact.

Putting allegations of polygraph misconduct into issue necessarily opens the door to all matters associated with the polygraph, and the state cannot broach the matter unless the defense opens the door.

Police do not improperly prey on defendant's conscience by telling him he had a serious sexual disorder and needed help. Police may appeal to the conscience of individuals.

Violation of rule 3.111(d)(4) by failing to provide the signature of at least two attesting witnesses to defendant's waiver of right to counsel does not result in reversal unless it results in prejudice or harm. Where one witness attests to the waiver, the confession is upheld.

**Johnson v. S., 660 So. 2d 637 (Fla. 1995), 20 F.L.W. S343  
(7/13/95)**

When defendant alleges in a motion to suppress that defendant was not read his Miranda rights and did not make the statement alleged by the police, subsequent claims that defendant did not understand his rights, he made the statement after invoking his right to remain silent, and his 6th amendment rights were violated are not preserved for appeal.

**Pangburn v. S., 661 So. 2d 1182 (Fla. 1995), 20 F.L.W. S323  
(7/6/95)**

**Motion to Take Deposition to Perpetuate Testimony**

Where state moves to take deposition to perpetuate testimony under Rule 3.190(j), Fla.R.Crim.Pro and fails to give notice to defendant personally, defendant's right to confront witnesses is denied, error is fundamental, and conviction is reversed.

**Brown v. S., 471 So. 2d 6 (Fla. 1985)**

Failure of the state to procure a written commission to take deposition to perpetuate testimony does not result in suppression of deposition when defendant does not object and was not prejudiced.

Where defendant sat in the hall during deposition to perpetuate and could not hear well due to malfunctioning hearing aid, right of confrontation is not violated.

Court reporter who recorded videotaped deposition may authenticate the videotape.

**S. v. Wells, 538 So. 2d 1292 (2d DCA 1989)**

Where defendant is not given notice and opportunity to be present during deposition to perpetuate testimony, right to confront witnesses is violated and conviction is reversed.

**Wilson v. S., 479 So. 2d 273 (2d DCA 1985)**

While rule 3.190(j) requires a written motion, where the defense does not object to proceeding without a written motion no error is shown.

The state flew the victim in from Haiti, and defense asked to continue. The court agreed to continue on the condition that the defendant would agree to perpetuate the victim's testimony. The defense agreed. When the case came up for trial before a different judge, the judge noted the absence of a written motion and excluded the perpetuated testimony. Held: Court errs in excluding the deposition. The defense waived any procedural defects in taking the deposition.

**S. v. Charles, 827 So. 2d 1107 (3d DCA 2002), 27 F.L.W. D2253  
(10/16/2002)**

Court errs in refusing to permit depositions to perpetuate testimony for out-of-country witnesses where the witnesses' testimony would have supported the defendant's defense.

**Montoya-Navia v. S., 691 So. 2d 1144 (3d DCA 1997), 22 F.L.W. D943 (4/16/97)**

Deposition to perpetuate testimony was taken of witness. On trial day, witness was available to testify but had organic brain syndrome and there was no guarantee that witness would be lucid for trial. Held: Rule 3.190(j)(6) prohibits use of deposition to perpetuate testimony when the attendance of the witness can be procured. Attendance of witness includes reasonable likelihood that witness is or soon will be able to give coherent testimony. Court did not err in admitting deposition.

**DiBattisto v. S., 480 So. 2d 169 (3d DCA 1985)**

Court errs in admitting deposition to perpetuate when the state does not have evidence at the time of trial showing that the victim was unable to travel to the trial.

**McMillon v. S., 552 So. 2d 1183 (4th DCA 1989)**

Deposition of absent witness is not admissible if not taken to perpetuate testimony.

**Jackson v. S., 453 So. 2d 456 (4th DCA 1984)**

### **Speedy Trial**

Time while defendant is under no actual restraint on liberty is not calculated in any way in determining whether defendant's constitutional speedy trial rights were violated.

While indictment was dismissed and government was appealing, and defendant was free on recognizance, he was in the same posture as any other suspect in a criminal investigation, and no speedy trial rights are implicated.

During appeals by government when defendant was under indictment or restraint, 4-part test is used. Test balances length of delay, reason for delay, defendant's assertion of right, and prejudice to defendant.

**U.S. v. Loud Hawk, 76 L.Ed. 2d 96 (1986)**

State's convenience in trying conspiracy co-defendants together does not override defendant's right to speedy trial, and thus is not an exceptional circumstance to justify extending speedy trial time, overruling *Garcia v. S.*, 474 So. 2d 1203 (5th DCA 1985).

**Garcia v. S., 498 So. 2d 401 (Fla. 1986)**

Seven year and seven month delay between crime and indictment, during which time substantial evidence pertaining to defendant's alibi is lost and other exculpatory

evidence is lost, results in a due process violation causing conviction and death sentence to be reversed.

Where due process violation caused by pre-indictment delay is alleged, defendant must show actual prejudice. Once actual prejudice is shown, the court must balance the government's need for the delay against the prejudice asserted by the defendant. Where prosecution's actions violate fundamental concepts of justice, reversal is required.

This issue is a fourteenth amendment due process issue, not a sixth amendment speedy trial issue.

**•Scott v. S., 581 So. 2d 887 (Fla. 1991)**

Defendant was charged with attempted murder, he filed a demand for speedy trial, and before the expiration of the demand period the state nol prossed. Two years later the state refiled. Held: State may not avoid the effect of a speedy trial demand by nol prossing, and the 15-day recapture window does not apply under the circumstances. Thus, defendant's trial is barred.

**•S. v. Agee, 622 So. 2d 473 (Fla. 1993), 18 F.L.W. S391 (7/1/93)**

Defendant was arrested in 1981 and charged with murder. The state nol prossed 9 days before speedy trial ran. He was re-indicted in 1990 and moved for discharge. Held: Under S. v. Agee, the speedy trial period continues to run after a state nol pros and the state may not refile based on the same charges after the period has expired.

**Dorian v. S., 642 So. 2d 1359 (Fla. 1994), 19 F.L.W. S511 (10/6/94)**

When the state ends a case by filing a notice of no information, and later decides to file the charges, the defendant has the right to move for dismissal under the speedy trial rule if the charges are filed more than 175 days after his arrest. The fact that a no information was filed does not toll the period.

**•Genden v. Fuller, 648 So. 2d 1183 (Fla. 1994), 19 F.L.W. S559 (11/3/94)**

Defendant committed several crimes and was arrested. He was charged with some of the crimes. The state nol prossed the charges before speedy trial ran, and the defense filed a motion to discharge after the time ran. State then refiled all charges and the court denied the motion to discharge. Held: Under Agee rule, the motion should have been granted (but see dissents).

When the state is not ready to charge a defendant who has been arrested, the state should file the charges and seek an extension rather than fail to file.

(See dissents, arguing that under this rule once a defendant is arrested and speedy trial runs on one charge, the suspect gains immunity from any other crime arising from the incident).

**•Reed v. S., 649 So. 2d 227 (Fla. 1995), 20 F.L.W. S34 (1/19/95)**

Court has no authority to “deny” a demand for speedy trial. The court can strike the demand as invalid upon a finding that defendant’s desire for an early trial is not “bona fide” or a determination that counsel has not investigated the case. But refusing to set the trial within the time periods specified merely because counsel has not engaged in discovery thereby making the case “ripe” for an ineffective assistance claim is not proper. First degree murder conviction and death sentence is reversed and defendant discharged.

(See this case for extensive discussion of the procedures to follow when defendant demands s speedy trial).

**•Landry v. S., 666 So. 2d 121 (Fla. 1995), 20 F.L.W. S486 (9/21/95)**

LEO got a sex abuse report. they went to defendant’s home and they asked defendant to accompany them to the station. He agreed, LEO read him his rights, and they went to the station. LEO placed defendant in a holding cell for two hours, and another LEO then interviewed him. Defendant consented to a body search, and hair and blood were taken. Defendant was allowed to walk around the station, and after a total of seven hours, he was released. Held: Defendant was not in custody for speedy trial purposes, and the speedy trial period did not start until he was formally arrested a year later.

Under rule 3.191, a defendant must be taken into custody to trigger the running of the speedy trial time. Custody does not require a formal arrest, but it does require more than an investigatory detention. Custody for fourth amendment purposes does not custody for speedy trial purposes.

**•S. v. Lail, 687 So. 2d 873 (2d DCA 1997), 22 F.L.W. D277 (1/22/97)**

The “exceptional circumstance” extension of speedy trial time allowed under rule 3.191(l) is applicable both before the 175 day period expires and during the 15-day recapture period. Thus, when the prosecutor becomes ill during the recapture period, an exceptional circumstance extension is properly granted.

(But see dissent, arguing that the prosecutor’s illness does not qualify as an exceptional circumstance in the absence of a showing that her presence was “uniquely necessary for a full and adequate trial.”)

**•Brown v. S., 695 So. 2d 1275 (1st DCA 1997), 22 F.L.W. D1564 (6/23/97)**

The provisions of rule 3.191(i) permitting the state to move for an extension of speedy trial for good cause apply to an extension sought during the recapture period as well as during the regular 175-day period.

**Brown v. S., 715 So. 2d 241 (Fla. 1998), 23 F.L.W. S266 (5/14/98)**

A violation of the five or ten-day periods in rule 3.191(p)(3) is harmless if the defendant is actually brought to trial within fifteen days of the notice of expiration.

**S. v. Salzero, 714 So. 2d 445 (Fla. 1998), 23 F.L.W. S359 (6/18/98)**

(See **Rivera v. S., 717 So. 2d 477 (Fla. 1998), 23 F.L.W. S343 (6/11/98)** for discussion of pre-indictment delay and the requirement of showing prejudice to establish a due process violation.)

The constitutional speedy trial right attaches upon arrest, filing an indictment or information, or other official accusation.

In determining whether a constitutional speedy trial violation occurred, the court should consider: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant has timely asserted his rights; and (4) the existence of actual prejudice as a result of the delay.

Where there was a 44 month delay between filing and arrest, the delay is presumptively prejudicial.

Where defendant was continuously available in the jurisdiction of the court, had electricity and phone in his name, and no effort was made to find him, the delay was attributable to the negligence of the state.

Where an important defense witness died during the delay period, defendant sufficiently shows prejudice to make out a constitutional speedy trial violation, and the court errs in denying a motion to dismiss.

**Seymour v. S., 738 So. 2d 984 (2d DCA 1999), 24 F.L.W. D1620 (7/9/99)**

State moved for a continuance due to missing witnesses, and the court granted the delay, noting that there would be no more continuances. Defendant filed a notice of expiration for speedy trial purposes, and at the next docket sounding, the state again stated that witnesses were missing. The court denied a continuance and dismissed. Held: Failure to consider the state's arguments, and dismissing the case solely due to the prior warning against another continuance, is an abuse of discretion.

To get a continuance due to the unavailability of a witness, the movant must show: (1) prior due diligence to obtain the witness's presence; (2) that substantially favorable testimony would have been forthcoming; (3) that the witness was available and willing to testify; and (4) that the denial of the continuance would cause material prejudice.

Where the court is limited by a speedy trial problem, and the state is unable to proceed due to missing witnesses, the court must at least listen to the state's argument for a continuance.

**S. v. J.G., 740 So. 2d 84 (3d DCA 1999), 24 F.L.W. D1625 (7/14/99)**

Court errs in sua sponte striking a demand for speedy trial without a motion from the prosecutor.

**McNeal v. S., 750 So. 2d 731 (2d DCA 2000), 25 F.L.W. D290 (1/26/2000)**

When an information is not filed until 207 days after an arrest, the prosecution is barred. The defense has no obligation to file a notice of expiration.

**Williams v. S., 774 So. 2d 23 (2d DCA 2000), 25 F.L.W. D2147 (9/1/2000)**

A defendant need not choose between the right to a speedy trial and the right to discovery within sufficient time to prepare for trial. Where discovery is not provided within sufficient time to allow defendant to make reasonable use of it, the court should continue the case beyond speedy trial time and charge the continuance to the state, thereby granting the speedy trial discharge.

**Vega v. S., 778 So. 2d 505 (3d DCA 2001), 26 F.L.W. D587 (2/28/2001)**

When the state fails to take any action in a case prior to the expiration of speedy trial time, upon a motion to dismiss the state is not entitled to the 15-day recapture period. The state cannot file charges after the speedy trial time has run.

**S. v. Williams, 791 So. 2d 1088 (Fla. 2001), 26 F.L.W. S513 (7/13/2001)**

A demand for speedy trial under rule 3.191(b) does not require that the defendant be taken into custody. Thus, when defendant has not been arrested, he can still file a demand under the rule.

**Brown v. S., 798 So. 2d 773 (2d DCA 2001), 26 F.L.W. D2034 (8/22/2001)**

(See **Evans v. S., 808 So. 2d 92 (Fla. 2001), 26 F.L.W. S823 (12/13/2001)** for discussion of when pre-indictment delay can result in dismissal of charges.)

Where the court inadvertently set a case for trial outside the speedy trial window, and then realizes the error and tries to move the case up but the trial cannot begin because defendant cannot be located, the court properly finds defendant not ready for trial and denies discharge.

**Goodrich v. S., 834 So. 2d 893 (3d DCA 2002), 28 F.L.W. D6 (12/18/2002)**

When the state requests an extension of speedy trial for the purpose of taking an interlocutory appeal of a trial court's ruling, the court must grant the extension for the length of time needed to complete the appeal unless the court rules that the appeal is frivolous.

**S. v. Clarke, 834 So. 2d 398 (2d DCA 2003), 28 F.L.W. D235  
(1/17/2003)**

**Incompetency**

Where one expert opines that defendant is competent and two defense experts state he is not, and there is record evidence supporting the judge's determination that defendant was competent, the decision is not an abuse of discretion and will be affirmed on appeal.

**Hertz v. S., 803 So. 2d 629 (Fla. 2001), 26 F.L.W. S725  
(11/1/2001)**

For a mental health expert's opinion to constitute evidence adequate to support a court's determination on competency, the report must discuss each of the specific factors set out in rule 3.211(a).

**Evans v. S., 800 So. 2d 182 (Fla. 2001), 26 F.L.W. S675  
(10/11/2001)**

In determining whether a defendant is competent to stand trial, the court must decide whether the defendant has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him.

**Bryant v. S., 785 So. 2d 422 (Fla. 2001), 26 F.L.W. S218  
(4/5/2001)**

When conflicting testimony is presented regarding competency, it is the court's responsibility to consider all of the evidence and resolve the factual dispute. The judge's decision will be upheld absent an abuse of discretion.

(See this case for extensive discussion of competency proceedings for a defendant charged with murder who attempted suicide resulting in extensive brain damage.)

**•Hardy v. S., 716 So. 2d 347 (Fla. 1998), 23 F.L.W. S347  
(6/11/98)**

While a county judge can properly make competency determinations in misdemeanor cases, only a circuit judge is authorized by §916.106 and §916.13 to order a defendant to be committed to HRS for placement in a forensic facility.

A county judge cannot be appointed by administrative order to enter commitment orders under §916.13 in misdemeanor cases.

**Onwu v. S., 692 So. 2d 881 (Fla. 1997), 22 F.L.W. S217  
(4/24/97)**

Defendant is competent to stand trial if he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational understanding of the proceedings against him.

Reports of psychological or psychiatric experts are merely advisory to the trial court, and the judge retains the responsibility to make the final determination himself. The court should review all evidence relating to competency and the court's decision will not be reversed without showing an abuse of discretion. Where there are conflicting opinions on competency, the court's determination that defendant is competent will not be reversed.

Court does not err in refusing to do a second competency hearing where the renewed motion presented nothing materially different than the first motion. Only if a bona fide doubt as to defendant's competency is raised is the court required to do another competency hearing.

• **Hunter v. S., 660 So. 2d 244 (Fla. 1995), 20 F.L.W. S251 (6/1/95)**