

Basics in Criminal Pleadings

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Basics in Criminal Pleadings

I. PREPARING YOUR PLEADINGS

- A. **The Golden Rule:** The judge is your audience, so you should strive to prepare your motions, briefs, and other court filings in a manner that will convey to the judge your understanding of the issues and the strength in your argument.
- B. **Matters of Form:** You should prepare your pleadings in accordance with Florida Rules of Appellate Procedure unless a local court rule provides differently.
- C. **Formatting:** All pleadings should be formatted as outlined below. The purpose of the formatting requirements is to make it easier for the judge to read your document. Additionally, it also allows the judiciary to equalize the length of pleadings submitted by each party.
1. **Page Lay Out:** See Fla. R. App. P. 9.210(a)
 - a) Margins: 1” on all sides.
 - b) Spacing: Single-space all headers, headings, footers, footnotes and extended quotation. Double-space the body of the pleading.
 - c) Font: Use either 14-point times new roman or Courier New 12-point fonts. However, for redundant or generalized pleadings it is acceptable to use 12-point times new roman.
 - d) Typeface: All material should be presented in ordinary type. Exceptions are italics or underlining for citations. Bold typeface is for you to decide, however it distracts the reader from your pleading.
 - e) Justification: The body of your pleading can be set to left justification or full justification. I suggest full justification.

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D. **Citation:** All citations should conform to Florida Rule of Appellate Procedure 9.800. Otherwise you may refer to the Bluebook or the ALWD Citation Manual. However, most law reviews, educational institutions and state court systems have adopted the Association of Legal Writing Directors (ALWD) Citation Manual and I suggest you use it.

1. **Purpose:** A citation refers the reader to a specific legal authority or source. It also informs the reader that there is support for your argument.

a) **Abbreviations:** “Except for citations to case reporters, all citation forms should be spelled out in full if used as an integral part of a sentence either in the text or in footnotes.” Fla. R. App. P. 9.800. Otherwise, abbreviations should only be used in citations.

E. **Writing Style and Usage:** The purpose of a pleading is to advocate your position as convincingly as possible while using the least amount of words.

1. **Fundamental Principles:** A pleading should strive to be (1) brief, (2) clear, (3) structured, (4) organized, and (5) easy to read.

2. **Word Choice:** You should not force words into a sentence. Your motion should sound as if you are speaking to the reader and avoid “legal words.”

3. **Reference Books:** Every lawyer should have two books in their law library; (1) *The Elements of Style* by William Strunk, Jr., and E.B. White; and (2) *The Elements of Legal Style* by Bryan A. Garner.

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II. MATTERS OF PROCEDURE

A. **Types of Pleadings:** Not every document you file is a motion, it is important you know what you have written and it's legal affect when filed.

1. **Motion:** A motion is a written or oral request for the court to take some action.
2. **Notice:** A notice puts the parties and the court on notice concerning a certain issue. Usually, a notice triggers obligations of the court or another party.
3. **Briefs:** An argument of law concerning a legal issue in which you have previously filed a motion about.

B. **Certificate of Service:** All pleadings must have a certificate of service that conforms to Florida Rule of Criminal Procedure 3.030(e).

1. **Purpose:** A certificate of service is prima facie proof that your pleading was timely filed and served upon all interested parties. This is important when the State Attorney attempts to say that they have not received a pleading from you. Because the Certificate of Service is prima facie proof that the pleading was timely filed, the burden then shifts to the State to explain why they are unprepared.

2. **Certificate:**

“I certify that a copy hereof has been furnished to(insert names or names)..... by.....(method of delivery)..... on(date).....

Attorney for (name of party)
Address and Phone Number
Fla. Bar No.

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C. **Filing Procedures:** The original copy of all pleadings must be filed with the court prior to being set for a hearing; a copy must also be served upon opposing counsel and any interpleaded third parties (Sheriff's office).

1. **Courtesy Copies:** As a courtesy, counsel should provide the judge a copy of any special pleadings well in advance of the hearing date. The purpose of this is to allow the judge to be familiar with your argument or issue before the hearing begins.

D. **Hearings:** What do you do after you file a pleading. Contrary to popular belief filing a pleading does very little. If you wish the court to take action on your pleading, and the court is not otherwise required to do so, you must do three things.

1. **Set It:** As soon as you file a motion that you wish the Court to make a ruling on, you should call the Judge's judicial assistant and request a hearing date. You should request a hearing date that gives you sufficient time to notify your clients, other parties, and your witnesses.
2. **Send Notice:** Immediately upon confirming the hearing date with the judicial assistant, you must send a notice to the parties to whom the motion is addressed. Remember, the State is not the only party that can be involved in a criminal case. If you are subpoenaing a hospital's records you must notice the hospital's attorneys, if you are trying to get the Sheriff's office to return property you must notice the Sheriff's office.
3. **Appear on the Date Scheduled:** There is nothing worse than someone who sets a hearing and does not show up, or does not show up on time, for the hearing. If you realize at the last minute your motion is inadequate, or if you find out you will be unable to make

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your hearing, you should call the court, cancel the hearing, and notify all parties of the cancellation. If it will be reset be sure to re-notice everyone involved.

E. Orders (Rulings on your Motion): An order is a mandate or decision of the Court. An unsigned order should NEVER be filed with the clerk of the court, as a matter of practice the clerk's office throws away unsigned orders.

1. **When Made:** Usually a hearing will be held on a motion and a judge may make a ruling immediately after the hearing.
2. **Contents:** The order will reflect the ruling of the court about the merits of the motion and any relief that will be given.
3. **Who Provides:** Generally the moving party is responsible for providing an order that conforms to his oral pronouncement. However, the judge may create and issue the order. If you provide the order, you should consult opposing counsel to insure that they have no objection to your interpretation of the judge's decision.
4. **Copies:** The party providing the order should prepare enough copies of the order so that each party involved is accounted for. This includes the Defendant, the State, the clerk of the court, and any affected third parties. As a rule of thumb you should make two more copies than you anticipate needing.
5. **Signed:** Once the order is prepared, the attorney should either have the judge sign one copy; and provide the signed copy and the unsigned copies to the judicial assistant. Otherwise the attorney should submit the order, and all copies, to the judicial assistant. The multiple copies should be stapled in the top-middle.

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- a) **Envelopes:** If copies of the order need to be mailed to third parties, the attorney providing the order should also provide pre-addressed envelopes to the judicial assistant.
6. **Conformed:** After you have written the order, had it signed and provided the appropriate number of copies to the judicial assistant; the JA will conform the order. This simply means that the JA sends out the appropriate number of signed orders to the interested parties, and files the order with the clerk.
- F. **Motions with Accompanying Orders:** Some judges will accept motions and make rulings on them without requiring a hearing. If this is the case you should file the motion with the clerk and all interested parties, but you will also need to send over a courtesy copy of the motion to the judge along with a proposed order and sufficient copies of the order so that the JA can send out the order once the judge makes a decision.

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III. PRETRIAL MOTIONS

There are three basic pretrial motions that a criminal attorney must be familiar with: (1) motion to continue, (2) motion to suppress, and (3) motion to dismiss.

A. Contents of any Motion: All motions should contain the following components to be legally sufficient.

1. **The Grounds:** What authority authorizes you to file the motion, i.e. statutory, constitutional, or procedural authority. Many times a simple citation to the authority will suffice.
2. **The Relief Sought:** What is it that you want the court to do?
3. **Supporting Facts:** What are the facts of the case the warrant relief?
 - a) **Types of Facts:** Be aware there are two types of facts. There are alleged facts and sworn facts. Alleged facts are nonbonding, sworn facts are binding on the person attesting to them.
4. **Argument and Law:** Why do you think you are entitled to relief and what authorizes the relief.

B. Motion to Continue: A motion to continue is a postponement of a cause for any period of time. *See generally* Fla. R. Crim. P. 3.190(g).

1. **Basis:** A motion should only be granted for good cause.
 - a) **Unavailable Witness:** “In order to obtain 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.” State. v. Cook, 796 So. 2d 1247 (Fla. 5th DCA 2001).

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b) **Additional Time needed to Prepare.** When alleging additional time needed to prepare, you should allege the following issues as prejudicing you: “(1) time actually available for preparation; (2) likelihood of prejudice from the denial; (3) defendant's role in shortening preparation time; (4) complexity of the case; (5) availability of discovery; (6) adequacy of counsel actually provided; and (7) skill and experience of chosen counsel and his pre-retention experience with the defendant or the alleged crime.” Trocola v. State, 867 So.2d 1229 (Fla. 5th DCA 2004).

2. **Good Faith:** The attorney is required to certify that the motion is made in good faith and nor for the purpose of unneeded delay.

C. **Motion to Suppress:** The motion to suppress is the defense attorney’s primary weapon. It allows the defendant to suppress evidence obtained by an *illegal* search and seizure. Florida Rule of Criminal Procedure 3.190(h)-(i) address the appropriate grounds for filing a motion to suppress.

1. General Guidelines:

a) **Contents of Motion:** “Every motion to suppress evidence shall clearly state the particular evidence sought to be suppressed, the reasons for suppression, and a general statement of the facts on which the motion is based.” Fla. R. Crim. P. 3.190(h)(2).

(1) **Legal Sufficiency:** If a motion does not allege an illegal search or seizure it should be denied as legally insufficient. State v. Gay, 823 So.2d 153 (Fla. 5th DCA 2001).

b) **Time for Filing:** All motions to suppress should be made prior to pretrial, unless the grounds were not otherwise known. If you wait

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until trial to raise an issue, it does not have to be addressed by the court. See generally Rios v. State, 791 So.2d 1208 (Fla. 5th DCA 2001).

- c) **Standing:** Only a person who has been aggrieved by an illegal search or seizure has standing to raise the issue in a motion to suppress. Therefore, the Defense has the burden to prove standing when standing is at issue. However, the cases go on to state that the Defense only has the burden of proving standing where standing is really at issue. In a warrantless search and seizure of a person's body, vehicle, or home, the Defense need only make an initial showing of the absence of a search warrant, via Judicial Notice, as standing could not be truly at issue. State v. Setzler, 667 So.2d 343 (Fla. 1st DCA 1995); See also Green v. State, 824 So.2d 311 (Fla. 1st DCA 2002).

(1) If Defendant Testifies: The United States Supreme Court has held that “when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.” Simmons v. U.S., 390 U.S. 377 (US 1968). The reasoning behind this is that the Defendant should not have to choose between his Fifth Amendment right against self-incrimination and his Fourth Amendment right against unreasonable search and seizures.

- d) **Presence of Defendant:** The proceedings that a defendant must be present at are enumerated in Florida Rule of Criminal Procedure 3.180; See also Howard v. State, 484 So.2d 1319 (Fla. 3rd DCA

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1986). The current rules do not require the Defendant's presence at any pretrial motions.

(1) Can be modified by Court Order: A pretrial or case management order may be entered by the judge requiring the Defendant's presence, in which case his presence is required per Rule 3.180.

2. **Warrantless Search and Seizure:** The most common theme in a motion to suppress is that a person was unlawfully searched, without a warrant, and the search produced contraband.

a) **Burden of Proof:** Under Florida Rule of Criminal Procedure 3.190(h)(3) the burden is on the Defendant to present evidence that she was aggrieved by an unlawful search and seizure. However, a defendant may shift the burden of proving that the search was unlawful by showing that the search and seizure was done without a warrant. Woolley v. State, 459 So.2d 1101 (Fla. 2nd DCA 1984).

b) **Shifting the Burden:** Under Florida Rule of Criminal Procedure 3.190(h)(3), the Defendant is first required to submit a pleading sufficient to allege an unlawful search and seizure, and secondly make a Prima Facie showing of invalidity. State v. Lyons, 293 So.2d 391 (Fla. 2nd DCA 1974). A prima facie showing of invalidity is established by showing that there was no warrant, as a warrantless search is per se unreasonable. Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). Thus, the Defendant's sole burden is to show the absence of a search warrant. Irons v. State, 498 So.2d 958 (Fla. 2nd DCA 1986). The "burden can be initially met by a motion asserting the absence of the warrant and the court judicially noticing that its own file in the

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cause contains no warrant.” State v. Hinton, 305 So.2d 804 (Fla. 4th DCA 1975); See also Andress v. State, 351 So.2d 350 (Fla. 4th DCA 1977) (Note that both Hinton and Andress are controlling precedent in the Fifth). Once this initial burden is met, it then shifts to the State to sustain the validity of the search. Id.

(1) **Once Burden Has Shifted to the State:** The State then has the burden of showing a recognized exception to the search warrant requirement. Walker v. State, 433 So.2d 644 (Fla. 4th DCA 1983). Once the burden has been shifted from the Defendant by a showing the lack of a warrant “[t]he ultimate burden of proof as to the validity of a warrantless search is on the State.” Mann v. State, 292 So.2d 432 (Fla. 2nd DCA 1974). If the State does nothing, by refusing or being unable to proceed, the court is authorized to grant the Defendant’s motion. State v. Fortesa-Ruiz, 559 So.2d 1180 (Fla. 3rd DCA 1990); Andress v. State, 351 So.2d 350 (Fla. 4th DCA 1977); State v. Hinton.

D. Motion to Dismiss: A motion to dismiss allows the defendant to dispose of a case without the necessity of a trial. A defendant may raise any objections to his prosecution based on fundamental (constitutional) grounds, or any of the enumerated reasons listed in Florida Rule of Criminal Procedure 3.190(c).

1. **Motion to Dismiss on Factual Grounds (C4 motion):** A C4 is nothing more than an offer to stipulate to specific undisputed facts under oath. The purpose of the C4 is to say: “Even if what you allege is true, there still is no crime that can be proven.”

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a) **Elements of the Motion:** A C4 motion must allege certain issues to be legally sufficient so that it can be ruled on by its merits. The facts in the motion must be sworn to be the Defendant, or a person with personal knowledge, and allege that “(1) the material facts of the case are undisputed, (2) a description of the material facts, (3) and it must demonstrate that the undisputed material facts do not establish a prima facie case of guilt against the Defendant for the offense charged.” State v. Torres, 375 So.2d 889 (Fla. 3d DCA 1979).

(1) **Personal Knowledge:** The Defendant does not need to have personal knowledge of the facts. Devine v. State, 504 So.2d 788 (Fla. 3rd DCA 1987); See also State v. Betancourt, 616 So.2d 82 (Fla. 3rd DCA 1993).

(2) **Can be Sworn to Instead of Notarized:** A motion to dismiss, or any other motion that requires the Defendant swear to the facts in it, need not be notarized. The motion only needs to be sworn to so that the affiant is subject to the penalties or perjury. This can be done using the jurat provided in Florida Statute 92.525 and has specifically been upheld by the Florida Supreme Court. See State v. Shearer, 628 So.2d 1102 (Fla. 1993).

(a) **Adoptive Admissions:** The danger of swearing to certain facts though is that they can be used against you at a subsequent trial as impeachment material if the affiant changes his position. State v. Palmore, 510 So.2d 1152 (Fla. 3d DCA 1987).

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- (3) **Acceptable Jurat:** “Under penalty of perjury, I declare that I have read the foregoing document and the facts stated in it are true.”
- b) **Motion to Reduce Charge:** A 3.190(c)(4) motion can be used to force the judge to reduce the charge to one which the evidence supports, if the undisputed evidence does not support the original charge, but does not warrant complete dismissal either. Simmons v. State, 551 So. 2d 607 (Fla. 5th DCA 1989); State v. Smulkowitz, 482 So. 2d 1388 (Fla. 3rd DCA 1986).
- c) **The State’s Response:** In response to a legally sufficient C4 motion the State must file either a Demurrer or a Traverse. Either will likely defeat the Defendant’s motion if properly filed by the State.
- (1) **Demur:** A demur does not deny the material facts in the Defendant’s motion, but instead argues that the undisputed material facts establish a prima facie case against the Defendant under current law.
- (2) **Traverse:** A traverse is a denial of a fact or facts as alleged by the Defendant and therefore says they are disputed.
- (a) **Must be Sworn To:** A traverse filed by the State must be sworn to. The reason for this is to insure that the traverse is filed in good faith, by subjecting the prosecutor to the penalties of perjury.
- (i) **Done in Good Faith:** “Any denial by the State must be in good faith, and not be based upon speculation, conjecture, presumption or assumption.” State v. Gutierrez, 649 So.2d 926 (Fla. 3d DCA 1995); Citing

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Ellis v. State, 346 So.2d 1044, 1046 (Fla. 1st DCA 1977).

(b) **Done with Specificity:** “While the rule does not require the State to allege any facts which negate the factual matters set forth in the motion to dismiss, the State must nevertheless, when it purports to deny material facts, deny those facts with specificity. Ellis v. State, 346 So.2d 1044, 1046 (Fla. 1st DCA 1977).

2. **Motion to Dismiss Based on the Statute of Limitations:** A motion to dismiss based upon the statute of limitations (SOL) allows you to move for dismissal when a specific period of time has elapsed between the commission of the alleged offense by the Defendant and the *commencement* of prosecution by the State.

a) **Procedural Elements:** In order to allege a time limitations violation the Defendant must allege four things: (1) the date of the alleged offense, (2) the applicable time limitation as codified in Section 775.15, Florida Statute, for the alleged offense, (3) the date the Information was filed, and (4) the date the *capias*, summons, or other process was served on the Defendant was not within the applicable time limitation period.

(1) **Date of the Alleged Offense:** For most crimes the date of the alleged offense is the date alleged in the Information. This is the triggering date and can be proven by asking the judge to take judicial notice of the date alleged in the Information.

(2) **Applicable Statute of Limitation:** Most, but not all, time limitations for criminal offenses can be found in Section 775.15, Florida Statutes. Importantly, the statute of limitations

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that is applied is the statute in effect at the time of the offense, not the statute that was in effect when the Information was filed or when the Defendant was arrested. See Carcaise v. Durden, 382 So.2d 1236 (Fla. 5th DCA 1980); State v. Picklesimer, 606 So.2d 473 (Fla. 4th DCA 1992).

(a) Theft Offenses: It should be noted that the statute of limitation for almost any theft offense, or more specifically an offense charged under Sections 812.012 – 812.037, is five years under Section 812.035(10). This includes misdemeanors such as petit theft.

(3) Date Information Filed: “A charging document must show on its face that prosecution was commenced within the statute of limitations. If it does not, then the State must allege facts to show that the statute of limitations was tolled.” Gray v. State, 803 So.2d 755 (Fla. 2d DCA 2001); Citing Sturdivan v. State, 419 So.2d 300 (Fla.1982); State v. Robbins, 780 So.2d 89 (Fla. 2d DCA 2000). The State must file the Information within the statute of limitations period; otherwise the Defendant is entitled to automatic dismissal, unless the State alleges an exception to the late filing in the Information. Maguire v. State, 453 So.2d 438 (Fla. 2d DCA 1984). The date of filing can be proven by asking the Judge to take judicial notice of the clerk’s time stamp. However, there are two exceptions.

(a) Fraud or Breach of Fiduciary Duty: Section 775.15(3)(a), Florida Statutes, provides that even if the applicable statute of limitations has expired for an offense involving fraud or a breach of a fiduciary duty, the State may nevertheless extend

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the period in which they have to file an Information by up to three years if the fraud or breach was discovered after the expiration. Nevertheless, the burden is on the state to establish the date of the discovery of the offense by the aggrieved party. Finally, even assuming the offense is discovered by the aggrieved party within the three-year period, the State still only has one year from the date of discovery in which to file the Information. Gray v. State, 803 So.2d 755 (Fla. 2d DCA 2001).

(b) Defendant is Continually Absent: Under Section 775.15(6), Florida Statutes, the statute of limitations is also tolled during any time that the Defendant is continually absent from the State. King v. State, 687 So.2d 917 (Fla. 5th DCA 1997). Under this section, if the State files the Information outside of the otherwise applicable SOL, the State must alleged in the Information that the Defendant was outside of the State or that the Defendant had no ascertainable place of abode or work within the State. It should be noted that if the State files the Information within the applicable time period, the analysis then turns to whether the State served process on the Defendant without unreasonable delay.

(4) Service of Process: This is often the most litigated issue when a SOL defense is raised. Section 775.15(5)(b), Florida Statute, provides that when a person has not been previously arrested for the offenses, prosecution is commenced when the

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Information is filed, provided that the capias, summons, or other process is executed without unreasonable delay.

(a) Relation Back: Section 775.15(5)(b), Florida Statutes, allows the State to relate back the date of service [of the capias, summons, or other process] to the date the Information was filed. See King v. State, 687 So.2d 917 (Fla. 5th DCA 1997). Therefore, if the State filed the Information within the applicable SOL, they may nonetheless serve the Defendant outside of the applicable SOL, provided that they do so without unreasonable delay.

(i) Unreasonable Delay: It is the government's burden to come forward with positive proof to show that it has made a diligent and reasonable search to locate and serve process upon the accused, which would initiate and commence prosecution under the statute. The Fifth District Court of Appeal has held that a one-time attempt to "serve" the accused does not satisfy this burden. Bragenzer v. State, 582 So.2d 142 (Fla. 5th DCA 1991); Wells v. State, 571 So.2d 563 (Fla. 5th DCA 1990); Walker v. State, 543 So.2d 353 (Fla. 5th DCA 1989).

(b) Defendant Arrested Prior to Filing: In 1997 the legislature amended Section 775.15(5), Florida Statutes, to provide that prosecution for an offense on which the Defendant has previously been arrested is commenced by the subsequent filing of an Information within the applicable SOL. State v. Parks, 866 So.2d 172, 174 (Fla. 2d DCA 2004). Therefore,

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prosecution simply begins on the date the information is filed, as long as it is filed within the applicable SOL. This applies even if the Defendant was released from jail on a 33-day motion and the State filed the Information 9 months later. The reasoning is that the Defendant is on notice of the alleged offense (However, there would still be a speedy trial issue to raise).

- (i) **Pre-1997 Cases:** It should be noted that any offense that occurred prior to 1997 has a different standard. Even if the Defendant was arrested and subsequently released, unless the Defendant is notified of the charges by capias, summons, or other process (arraignment) within the applicable SOL, he can still move for dismissal. State v. Watkins, 685 So.2d 1322, (Fla. 2d DCA 1996); See also State v. Parks, 866 So.2d 172, 174 (Fla. 2d DCA 2004). Usually what would happen is someone would bond out and never show for arraignment.