OLD LAW

Any crime must be charged pursuant to law as it existed at the time the crime was committed. The crime of Capital Sexual Battery has changed significantly over the years. Most of these changes occurred prior to October 1, 1984. Cases filed prior to this date must be taken before the grand jury and the indictment must contain the language of the applicable statute. The following will be a history of the changes of the Capital Sexual Battery law and the effective date of each change.

Effective Date:	**Language of Statute**:
1947	794.01: ***Rape and forcible carnal knowledge***: Whoever ravishes and carnally knows a female of the age of ten years or more, by force and against her will, or unlawfully or carnally knows and abuses a female child under the age of ten years, shall be punished by death, unless a majority of the jury in their verdict recommend mercy, in which event punishment shall be by imprisonment in the state prison for life, or for any term of years within the discretion of the judge. It shall not be necessary to prove the actual emission of seed, but the crime shall be deemed complete upon proof of penetration only. **Note:** Absent the use of force, the age limit is less than 10, and penetration is required. Definitions are determined by case law.
1/1/72	794.01: ***Rape and forcible carnal knowledge***: Whoever ravishes and carnally knows a female of the age of ten years or more, by force and against her will, or unlawfully or carnally knows and abuses a female child under the age of ten years, shall be guilty of a capital felony, punishable as provided in 775.082. It shall not be necessary to prove the actual emission of seed, but the crime shall be deemed complete upon proof of penetration only. Note: This law requires the child to be under the age of ten. The crime requires penetration. It should also be noted that this statute does not list the death penalty as an option.
12/8/72	794.01: ***Rape and forcible carnal knowledge***: (1) Whoever of the age of

seventeen years or older unlawfully ravishes or carnally knows a child under the age of eleven is guilty of a capital felony, punishable as provided in 775.082.

(2) Whoever ravishes or carnally knows a person of the age of eleven years or more, by force and against his or her will, or unlawfully and carnally knows and abuses a child under the age of eleven years, shall be guilty of a life felony, punishable as provided in 775.082.

(3) It shall not be necessary to prove the actual emission of seed, but the crime shall be deemed complete upon proof of penetration only.

Note: This statute requires the child to be under the age of 11. Penetration is required. The Laws of Florida do not give an effective date, but say that it was approved by the governor on 12/8/72. This age specification only applies for one year.

10/1/74 794.011(2): ***Sexual Battery***: A person 18 years of age or older who commits sexual battery upon, or injures the sexual organs of, a person 11 years of age or younger in an attempt to commit sexual battery upon said person commits a capital felony punishable as provided in 775.082 and 921.141. If the offender is under the age of 18, that person shall be guilty of a life felony, punishable as provided in chapter 775.

10/1/84 794.011(2): ***Sexual Battery***: A person 18 years of age or older who commits sexual battery upon, or injures the sexual organs of, a person less than 12 years of age in an attempt to commit sexual battery upon such person commits a capital felony punishable as provided in 775.082 and 921.141. If the offender is under the age of 18, that person is guilty of a life felony, punishable as provided in 775.082, 775.083 or 775.084.

Note: This statute simply changes the wording "over the age of 11 years" to 12 years of age or older." They both mean the same thing, but the revision is intended to be a clearer expression of legislative intent.

Statute of Limitations:

Prior to July 1, 1975, the statute of limitations was contained in F.S. 932.465. Under that statute, "a prosecution for an offense punishable by death may be commenced at any time." All others had a two year statue of limitations. On July 1, 1975, the statute of limitations was reclassified as F.S. 775.15. Under this statute "A prosecution for a

capital felony may be commenced at any time." The current law states that a prosecution for a capital or life felony may be commenced at any time. The death penalty was eliminated as a possible penalty as a result of the case of Buford v. State, 403 So.2d 943 (Fla. 1981), cert. denied, 454 U.S. 1164 (1982). From July 24, 1972 until October 1, 1972, there was a two year statute of limitations. S*ee* Mercer v. State, 654 So.2d 1221 (Fla. 5th DCA 1995) in my *Issues of Time* chapter.

When a defendant pleads guilty or requests lessers at trial, he must personally, and not through his attorney show the court that he appreciates the nature of the right he is renouncing and is aware of the potential consequences of his decision. This decision must be knowingly, intelligently and voluntarily made. It must also be on the record. See Tucker v. State, 459 So. 2d 306 (Fla. 1984). The State should never ask for lessers at trial on one of these old cases. All lessers are barred by statute unless requested by defendant with appropriate colloquy.

Please see the chapter “Issues of Time” for more cases on this issue.

CASES:

Guzman v. State, 2016 WL 7403670 (Fla. Dist. Ct. App. Dec. 21, 2016)

This case provides a good discussion of the pitfalls inherent in re-filing cases after the expiration of the statute of limitations. The court used the term "amended information" as opposed to "re-file" even though new charges were added. Language from the opinion is inserted below to provide guidance on the issue:

> *A "subsequently filed information, which contains language indicating that it is a continuation of the same prosecution, timely commenced will not be considered an abandonment of the first information and therefore will not be barred by the statute of limitations." Rubin, 390 So.2d at 324. However, where the state has "brought a new charge, alleging a new and distinct crime with different elements, under a completely different statute," the statute of limitations requires dismissal of the new charge.*
>
> *It is true that the "state may amend the charging document to correct the error after the applicable statutory period has elapsed." M.F. v. State, 583 So.2d 1383, 1386 (Fla. 1991). However, such an amendment may not actually change the substantive charge and may not prejudice the rights of the defendant. Id. Where a more serious, amended charge alleges an act not originally charged, then the amended charge must independently satisfy the statute of limitations. Bongiorno v. State, 523 So.2d 644, 645 (Fla. 2d DCA 1988*
>
> *Had the crimes in the original and amended information been identical, there would have been a continuation of the charge, and no limitations bar. Rubin, 390 So.2d at 324. However, where there is "nothing in the last information to link it with the first," the state is deemed to have abandoned the original information, see Fridovich v. State, 562 So.2d 328, 330 (Fla. 1990), and the amended information will be subject to the statute of limitations bar. The initial information did not charge an offense in Count 1. The amended information Count 1 contains allegations different from the initial information Count 1, constituting a new charge. Rubin, 390 So.2d at 324. The new charge filed beyond the statute of limitations was barred.*

Smith v. State, 2016 WL 7403663 (Fla. Dist. Ct. App. Dec. 21, 2016)

Defendant could raise statute of limitations for the first time on direct appeal after he was convicted at trial for an offense barred by statute of limitations. *Certified to Florida Supreme Court*

A plea to a lesser offense which is barred by statute of limitations waives future objections.

Court cannot give a lesser included offense to the jury at trial which is barred by statute of limitations unless defendant affirmatively states on record that he understands the nature of the right he is waiving.

Discussion: This case provides a very thorough discussion of these statute of limitations issues.

Hearndon v. Graham, 767 So.2d 1179 (Fla. 2000):

Where plaintiff in tort action based on childhood sexual abuse alleges that she suffered from traumatic amnesia caused by the abuse, the delayed discovery doctrine postpones accrual of the cause of action.

Delayed discovery doctrine may only be applied to the accrual of a cause of action, and may not be applied to toll the running of statute of limitations.

Error to dismiss complaint alleging childhood sexual abuse on ground that action was barred by statute of limitations where alleged abuse occurred from 1968 to 1975, abuse was not recalled until approximately 1988, and complaint was filed in 1991, prior to 1992 enactment of statutory delayed discovery doctrine.

Discussion: This case does not apply to criminal prosecutions, but we occasionally get victim's who ask us if they can still pursue a case civilly. Although we cannot advise them on civil matters, we can suggest they discuss this case with a civil attorney.

Rains v. State, 671 So.2d 815 (Fla. 5th DCA 1996):

Conviction for capital sexual battery stemming from alleged rape occurring in 1971 must be reversed because state failed to adduce evidence as to lack of consent and use of force as those terms were legally defined in 1971.

Discussion: When you try one of those ancient capital sexual battery cases, be very careful to establish the elements of the offense as they existed at the time. This opinion cites a few old cases which interpreted the law as it existed in 1971. For instance, the

case of *Huffman v. State*, 400 So.2d 133, 134 (Fla. 5th DCA 1971) was cited for the following language: "If the exhibited or threatened force was not sufficient to put the woman 'in fear of loss of life or other great danger,' evidence of resistance was required to demonstrate the act was by force and against her will." Please consider this case and the decisions cited therein when you make a decision to take one of these cases to the grand jury. The following segment of this case is helpful in assessing the level of force:

> "Section 794.01, Florida Statutes (1971), the applicable statute, required evidence of force and lack of consent as elements of the offense. See Paramore v. State, 238 So.2d 604 (Fla.1970) (victim's testimony should be rigidly scrutinized as to the nature and extent of force used). "[I]f the exhibited or threatened force was not sufficient to put the woman 'in fear of loss of life or other great danger,' evidence of resistance was required to demonstrate the act was by force and against her will." Hufham v. State, 400 So.2d 133, 134 (Fla. 5th DCA 1981). Under this standard, our courts reversed rape convictions for insufficient evidence on facts far more egregious than exist in the instant case. See Bailey v. State, 76 Fla. 213, 79 So. 730 (1918); see also Hollis v. State, 27 Fla. 387, 9 So. 67 (1891); O'Bryan v. State, 324 So.2d 713 (Fla. 1st DCA), cert. denied, 336 So.2d 1184 (Fla.1976); Johnson v. State, 118 So.2d 806 (Fla. 2d DCA 1960)."

Mercer v. State, 654 So.2d 1221 (Fla. 5th DCA 1995):

In prosecution for capital sexual battery based on acts alleged to have occurred during eight and a half month period during which two different limitations periods were applicable, conviction must be reversed because state failed to prove that offenses occurred during the period when the unlimited limitations period was in effect rather than when the two year period was in effect.

Discussion: The sexual battery on a child was alleged to have occurred between January 1972 and September 16, 1972. Two different limitations periods were applicable during that time frame. From January 1, 1972 to July 24, 1972, there was no time limitation for prosecuting the offense of forcible intercourse on a child less than ten as the crime was punishable by death. From July 24, 1972 to October 1, 1972, the two year statute of limitations provided in F.S. 932.465(2) controlled.

Washington v. State, 302 So.2d 401 (Fla. 1974):

This case interprets "carnal knowledge" under the law as it existed in 1973. It basically says that both the mouth and the anus will qualify for carnal knowledge. "Any forcible

penetration by a man's sexual organ into any bodily orifice of another against the latter's will constitutes forcible carnal knowledge of the victim."

Discussion: The court adopts the definition in Brinson. The Court notes "In our view, the body and mind of a victim of a forcible sexual assault is no less outraged because the penetration by the assailant occurred in the anal orifice--as in the instant case-- or in the oral orifice--as in the Parisi case--rather than in the vaginal orifice. In either case, it is a gross invasion of the privacy of one's body which cannot be tolerated by a civilized society.

Brinson v. State, 278 So.2d 1973 (Fla. 1st DCA 1973):

Any forcible penetration by a man's sexual organ into any bodily orifice of another against the latter's will constitutes forcible carnal knowledge of the victim.

Discussion: This very interesting case recognizes that "carnal knowledge statutes have generally been held to connote forcible penetration of the sexual organ of the victim," but notes that there is nothing in the language of the statute to require such a restricted interpretation. The court reasoned that the restricted interpretation was based upon the fact that there was a crime against nature statute which covered other such sexual acts. Once the crimes against nature statute was ruled unconstitutional, the court felt that acts such as sodomy and oral sex should be covered by carnal knowledge. Please note that this case was overruled in Brinson v. State, 288 So.2d 480 (Fla. 1974) on other grounds. In addition to modifying the interpretation of "carnal knowledge" the District Court also ruled that the statue would apply to male victims even though the statute specified it only applied to female victims. This was usurping a legislative function. The District Court's definition of "carnal knowledge" was specifically approved by the Florida Supreme Court in Washington v. State, 302 So.2d 401 (Fla. 1974).

Hansen v. State, 421 So.2d 504 (Fla. 1982):

Sexual battery statute governing offenses committed against persons "11 years of age or younger" was not ambiguous and was applicable to victim who was 11 years and 3 months of age.

Askew v. State, 118 So.2d 219 (Fla. 1960):

Court defines ravishment and carnal knowledge of a female of age of 10 years or more by force and against her will by enumerating three elements: 1) penetration of female private parts by private male organ; and 2) force of such a nature as to put victim in such fear that she is thereby compelled to submit to the act.

Perez v. State, 545 So.2d 1357 (Fla. 1989):

> Limitations period in effect at time of incident giving rise to criminal charges controls time within which prosecution must begin; therefore, defendant's prosecution for sexual battery was not time barred inasmuch as, at time of alleged offenses, death was possible penalty and no limitations period was applicable. A very good case for general knowledge in this area.

Sellers v. State, 212 So.2d 659 (Fla. 3d DCA 1968):

> Testimony of victim of rape that defendant placed his penis against her vaginal opening and testimony by expert witness that seminal fluid was found at least three and one half inches within the vagina was sufficient to establish penetration.

McGahee v. State, 561 So.2d 333 (Fla. 1st DCA 1990):

> Defendant was improperly convicted of rape for forcing child to commit oral sodomy upon him; rape statute in effect at the time of offense (1/1/71 to 10/1/72) was not interpreted to prohibit unlawful sexual acts other than penetration of female victim's sex organ by male's sex organ and , thus, trial court's definition of rape in its jury instruction, which included act perpetrated by defendant, violated ex post facto clause. This is an excellent case to follow the history of the sex laws.
>
> Discussion: This case points out a very subtle distinction in this legal area. Prior to December 17, 1971, sexual acts which did not involve the penis penetrating the vagina were punishable as crimes against nature, F.S. 800.01. When that statute was ruled unconstitutional on December 17, 1971, the only viable charge for such crimes as forcible sodomy and oral sex was a second degree misdemeanor under F.S. 800.02. The Brinson court expressed outrage at the pending status of the law and decided that they would redefine the term “carnal knowledge” to include those acts previously covered by the unconstitutional statute. The McGahee decision points out that the courts new definition only applies to offenses which occurred after the May 17, 1973 release date of the Brinson decision. Consequently, oral and anal sex only apply to the carnal knowledge statute for seventeen months. This covers the time period between the Brinson decision and the October 1, 1974 Sexual Battery statute.

Johnson v. State, 118 So.2d 806 (Fla. 2d DCA 1960)

> Where sole witness is the prosecutrix, her testimony is required to be rigidly scrutinized in order to avoid an unmerited conviction for rape.

Evidence was insufficient to sustain jury finding that prosecutrix was forced against her will to have intercourse with defendant or that the fear on part of prosecutrix was sufficient for jury to find that defendant was guilty of rape through fear.

Conduct of prosecutrix toward accused after alleged assault may be considered as bearing on question of consent.

Discussion: This case has a lengthy discussion of the amount of force that was required under the statute and the level of resistance required by the victim. The court ruled that the following facts did not establish the requisite level of fear/resistance:

> "They proceeded on toward home but then the defendant turned off the main highway down a county road adjoining a lake. The prosecutrix stated that she tried to jump out of the car but that defendant held her hand with his right hand thus preventing her from jumping. The defendant denied this in his testimony. They arrived at the lake at a spot where there was an overhanging tree, whereupon the defendant stopped the car and said, 'If you had let me kiss you, all of this would not have happened.' The defendant testified that he told her to 'put out or walk home,' which would have been a distance of approximately one mile. The prosecutrix stated that the defendant then slid over her and got out of the right side of the car; that he then made her lie down ('He took his hand, threatened me back with his hand'); that he stood by the car and dropped his trousers and shorts to his ankles; that all the while he was holding her legs; that he then got on top of her; that he held her hand with one of his hands while lifting her dress and removing her panties with his other hand; that she tried to get up, causing a small tear in her skirt; that she screamed once; that intercourse then took place, lasting for about 15 to 20 minutes; and that she 'shoved his shoulders' but did not cross her legs or resist in other ways."