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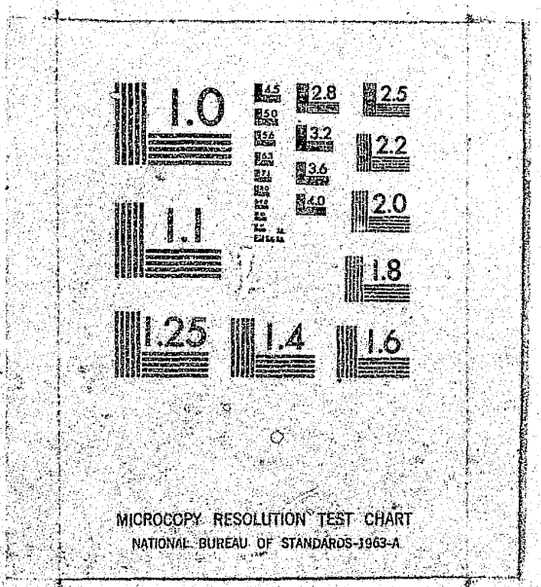

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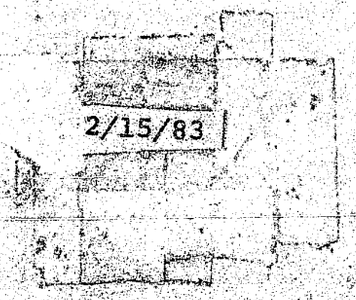

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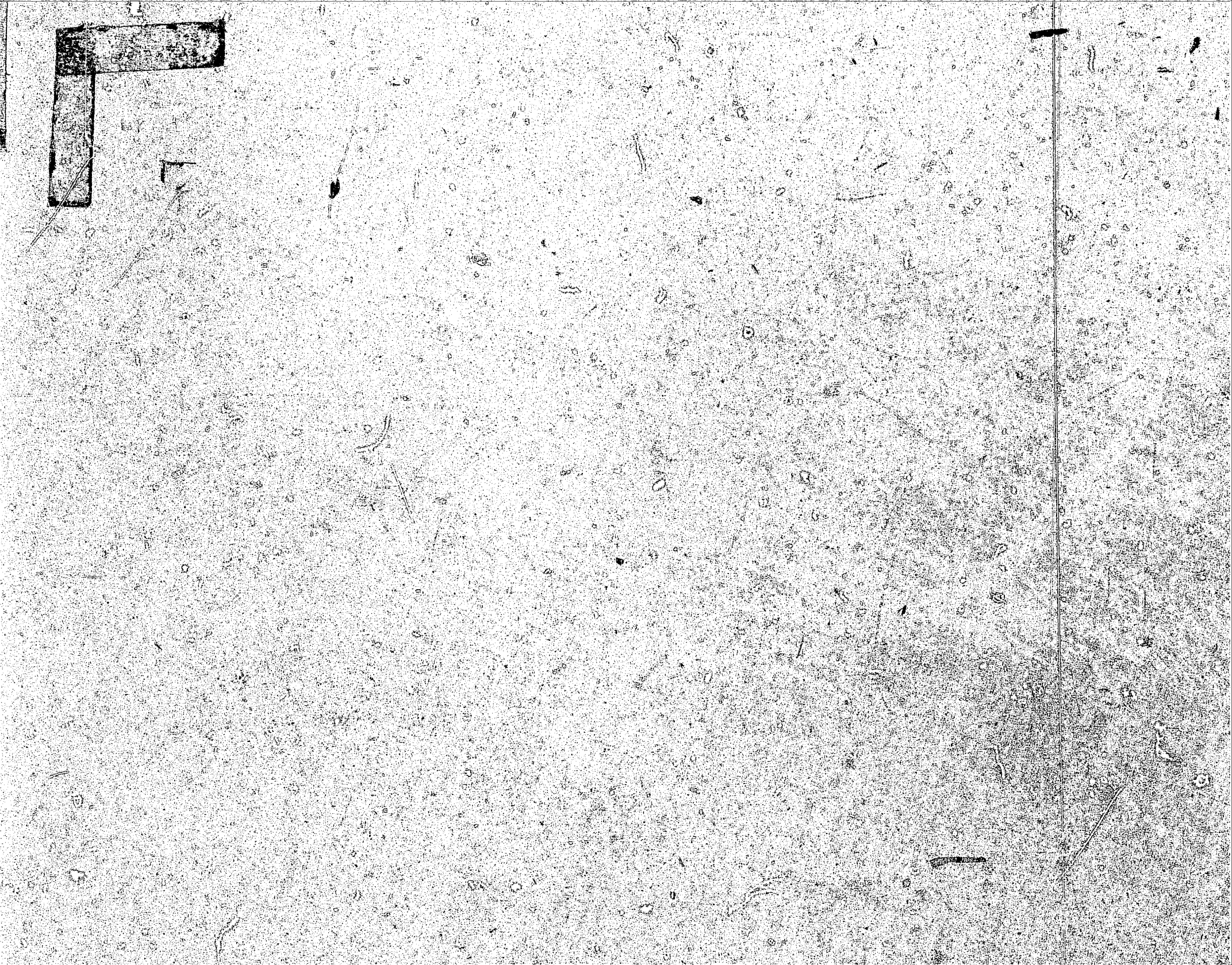

FLORIDA ARSON PROSECUTION

A Trial Manual For Florida Prosecutors

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FOREWORD

Among all other major crimes arson stands alone as the least often and least successfully prosecuted offense. Ineffective criminal statutes, inadequate investigation and inexperienced arson prosecutors have all contributed to the problem. For too long arson has been accorded a state of "benign neglect." Now there is a new awareness of the need to combat arson at all levels, and steps are being taken which offer hope of true success. The Florida Legislature has revised Florida's arson statute into what may be the toughest arson code in the country; major funding for investigative resources and personnel has been provided through both public and private support; and special programs of instruction and assistance to Florida's prosecutors are being made available, as evidenced by this project.

This manual doesn't pretend to offer the solution to the problem of successful arson prosecution. Hopefully, it will be a means to that end. It is intended to provide a source of specialized information on a crime most prosecutors never become familiar with. Some of the material will be well known to prosecutors from their experiences prosecuting other offenses; it is included here to show its application in an arson context. The balance of this manual will focus on material known to only the more experienced arson prosecutor. Developing skilled prosecutors with an awareness of the special needs of an arson prosecution is a major step forward in meeting the arson challenge. To that end this effort is directed.

FLORIDA ARSON PROSECUTION

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INTRODUCTION

Arson! Deadly, costly, and difficult to prove. It has become probably the nation's most expensive crime against property; direct property damages run into several billion dollars each year, and one estimate places annual indirect costs of arson at ten billion dollars as a result of property tax losses and higher insurance premiums. As a crime against people arson is to blame for as many as 1,000 deaths per year in this country alone. Occasionally, arson will destroy whole neighborhoods leaving thousands homeless or without jobs.

It has been recently estimated to be the cause of thirty percent of all fires in the United States and of as many as sixty percent of the fires in some metropolitan locations.

Arson is tremendously difficult to prove. Many judicial decisions and statutory arson laws have clung to common law concepts, with the all too often result that defendants who intentionally cause fires have been set free for inadequate proof of arson or have been charged with much lesser crimes. The lack of evidence to prove arson, the frustrating judicial application of outmoded common law concepts, and the reluctance of the legislature to provide laws adequate to curb arson have contributed to prosecuting attorneys' reluctance to file charges and try arson cases. As a result, only ten percent of all arsonists are actually charged with the crime, and a mere one percent are convicted.

In the 1979 Regular Session, The Florida Legislature responded to the need for increased arson control and passed what has been referred to as the nation's toughest arson law. By amending Chapter 806, Florida Statutes, the legislature substantially reduced proof requirements and eliminated several frustrating common law impediments. The new law should provide an incentive to prosecute arson cases which previously might have been discarded for lack of proper proof. This manual will explore the new arson law in conjunction with traditional problems associated with arson prosecution and will attempt to provide a guide for each step of a criminal prosecution of arson.

THE ARSON INVESTIGATION

The investigation of the fire scene is without a doubt the most critical period of time in the development of an arson prosecution. During this period the fire cause will be determined and physical evidence will be collected for later use at trial. Careful consideration must be given to the statutory authority and duty of officials to search the fire scene, the limitations on that authority and the prosecutor's role in the investigatory process.

The relationship between the investigator and prosecutor is particularly crucial in an arson case. It is imperative, at a minimum, for the prosecutor to thoroughly familiarize himself or herself with the results of the investigation and with the qualifications of the investigator involved. Because proof of an arson charge will often be based on circumstantial evidence, prosecutors who fail to acquaint themselves with essential facts well before trial will almost certainly face surprises and not guilty verdicts.

This portion of the manual is designed to briefly introduce the prosecutor to basic techniques used in arson investigation, including cause and origin determination and methods used to ascertain the use of accelerants. It will also present the statutory authority of the State Fire Marshal to investigate the scene of a fire and will explain the appicable case law relating to fourth amendment rights in such a situation. A fire investigator's checklist is included in the Appendix so that the prosecutor might cross reference the information received from the investigator to assure that all anticipated defense allegations will be fully answered. Finally, this section will detail the prosecutor's activity during the investigation, including his or her preparation of search warrants and supporting affidavits.

STATE FIRE MARSHAL'S AUTHORITY

The investigatory authority of the State Fire Marshal in Florida is derived from Chapter 633, Florida Statutes. Applicable sections include:

633.01 Which provides that the Fire Marshal shall enforce all laws relating to suppression of arson and investigation of all fires;

633.02 Which dictates that the State Fire Marshal "Shall appoint such agents as may be necessary to carry out his designated duties";

633.03 Which is the basic authority and duty for the State Fire Marshal to "investigate the cause, origin, and circumstances of every fire . . . wherein property has been damaged or destroyed where there is probable cause to believe that the fire was the result of carelessness or design." The section also provides for the Fire Marshal to make reports of all such investigations;

633.101 Which provides broad authority for the Fire Marshal to take sworn testimony of all persons believed to have knowledge of facts of matters under investigation; to cause the arrest of any person against whom, in his opinion, sufficient evidence exists to charge an offense; to compel testimony in relation to a matter under investigation; to require production of books and papers; and to seize furniture and other personal property;

633.111 Which details the Fire Marshal's duties to keep records of all fires investigated. All of the records kept by the Fire Marshal shall be deemed confidential and not subject to subpoena unless the Fire Marshal consents to or a court requires disclosure. (Note, however, that in a criminal prosecution the rules of discovery still apply);

633.13 Which gives the authority possessed by the State Fire Marshal to designated agents;

633.14 Which gives the State Fire Marshal and his agents "Authority to serve summonses, make arrests, carry firearms and make searches and seizures" similar to the authority of the sheriff of the respective counties;

633.175 Which gives the State Fire Marshal and his agents designated pursuant to 633.02 authority to request information from insurance companies investigating a fire loss and provides that the companies shall release such information without being subject to civil liability or criminal prosecution for such release.

THE PROSECUTOR AT THE FIRE SCENE

The prosecutor's involvement in an arson case should not begin in the courtroom, it should begin at the fire scene. Becoming involved at the inception of the case is your best insurance of a proper investigation and your best opportunity to fully understand the case you will ultimately be prosecuting.

Your function at the scene is, first, that of a coordinator between the several agencies of law enforcement and fire service involved. Hopefully you will have already planned out a course of action for each agency. The task force concept is designed for this approach, but if you have not organized a task force in your circuit at least meet with the heads of the various agencies to outline responsibilities at a fire scene. Then at the fire scene you can coordinate their respective efforts under the pre-designated guidelines.

Of course, the primary objective at the fire scene is bringing the fire under control. Only then can the investigative process begin in earnest. But even in the process of controlling the fire, evidence may be uncovered which will be of great importance to your case. That evidence may be destroyed or rendered incapable of analysis during the fire-fighting process. Your presence can help ensure that no problem arises in that area. Again, advance planning is the best insurance.

Once the fire is under control, the full-scale investigation can begin. The scene must, of course, be secured from the public. It must also be secured from the interference of the building's owners or occupants. You can fill a special role by your presence. You will be available to calm the distraught tenant and explain why he can't go in his building while the investigation is ongoing; the fire and police personnel are going to be busy doing the actual investigation. If his presence would disrupt the investigation, you will be able to tell the insistent tenant why, and how, you are going to forcibly prevent him from entering.

Remember that your crime scene is the essence of your arson case — it will yield nearly all the evidence you are going to have. Your presence can ensure that all relevant evidence is seized; that it is lawfully seized; and that it is properly identified and preserved for analysis. Most fire personnel haven't received general training in seizure and preservation of evidence; most police personnel aren't

familiar with the particularities of fire behavior and arson. You will know best what items have evidentiary value, and how they may be seized. A fire marshal or arson investigator, if available at the scene, can be of great assistance in preserving evidence.

Recent Supreme Court decisions such as the Mincey and Tyler cases (treated in depth in a following section) have placed new burdens on the state's efforts at crime scene investigations. You, as the legal representative at the fire scene, must be prepared to address any such problems which arise. Your presence assures instant response to questions of warrant requirements and the ability to quickly secure a warrant if needed. If you are not there for legal guidance, don't complain when you find a motion to suppress in your case file.

Finally, a very important reason for your presence at the fire scene is the perspective it gives you on the case. Your ability to understand the crime scene and to relate it effectively to the jury is immeasureably enhanced by your presence. To the extent you can re-create the scene at trial for the jury, you will improve your chances of conviction. Your extra effort in attending the fire scene will be rewarded amply by the satisfaction of a successful prosecution.

As a practical matter, you won't be available to participate in every fire investigation. But you should make it known that you are available and willing to be called out to selected fires. Fires at hospitals, jails or schools, and fires where arson is suspected should be on your call-out schedule. Hopefully, you can develop a notification system suited to your circuit's needs as well as your individual needs and abilities.

CAUSE AND ORIGIN DETERMINATION

The most critical instruction which can be given to fire department personnel is to preserve the scene during the fire, immediately after the fire, and until examination is complete. Only by examining a secure scene can the investigator be sure that evidence of the fire's cause and origin is exactly as it was during the fire.[1]

Ascertaining cause and origin in a partial destruction fire first requires an examination of the outside of the structure. Notice above windows and doors to determine the areas of most intense burning. This could indicate a point of origin or the wind direction. If an overhead view is possible, it will give the investigator

an additional perspective from which he or she can spot exterior damage — especially to the roof — which cannot be seen from ground level. Hot areas of the fire may be indicated by melting of the roofing material or by a complete burn-through of the roof. If a considerable portion of the roof is destroyed, the interior layout of the building can be seen from above, and major appliances, fixtures, and furniture can be located.

Trees, shrubs, and adjacent buildings should also be checked during the exterior examination. Burn marks will often indicate the wind direction and height of the fire.[2] In addition, an overview of the entire area outside of the structure will give an investigator the opportunity to look for physical evidence such as paint or gasoline cans left behind by an arsonist.

Doors and windows should be checked from the outside. If there is evidence of forced entry, fire department personnel should be questioned to verify their method of entry. If there is a forced entry which firefighters did not cause, the fire may have been preceded by a burglary. If no other forced entry is found, the fire could have been set by someone who had a key.

After an investigator has thoroughly viewed a partially burned structure from the outside, the general area of the fire's origin very often can be established. Armed with this knowledge, the investigator should begin the examination of the building's interior.

Generally, the interior investigation should proceed from areas of least damage to those showing extensive damage. While following the path of least to greatest damage, the investigator should look for other indications of the fire's origin. Important considerations include:

(1) The "direction of char." As a fire spreads from room to room, it ignites furniture and structural elements, such as door frames, on the side of origin first. The result is a deeper charring on the side from which the fire originated;

(2) Deformed, unbroken light bulbs which will distend toward the source of heat and therefore, the origin;

(3) Burn patterns across the ceiling. Fire burns upward, and when it reaches a horizontal surface such as ceiling, it will burn across and down another wall. The greatest damage should be directly above the origin;

(4) Burn patterns on walls. When fire burns up a wall it generally burns in a

V-pattern and the bottom of the V often points to the origin. However, if a flammable liquid is involved, the V will be inverted, with the wide end directed toward the point of origin; and

(5) Burn patterns on the floor. Exceptionally deep char might indicate a point of origin. Also, irregular patterns such as deep blistering on wood or blotch-shaped burns on concrete or tile indicate the use of flammable liquids.[3]

One author suggests reconstructing the scene as nearly as possible as it was before the fire. Placing furniture, doors studs and other materials in their original positions and examining exposed surfaces of furniture and of the structure in relation to the furniture will aid in the origin determination. As noted above, the most severely burned surfaces will point toward the fire's origin.[4]

After an area of origin has been determined, the investigator can ascertain the level of origin by examining the legs of furniture, bottoms of shelving, ledges, and mouldings. In many cases the lowest point of char will be the point of origin;[5] however, this is not always the case. Sometimes falling, burning material can falsely indicate the lowest level of char. Also, because the pattern produced by a fallen piece of burning debris will closely resemble that left by a pool of flammable liquid, an investigator's conclusion may be erroneous.[6]

A usually valid assumption is that existence of multiple origins of a fire indicates arson. However, a fire which ignites items which burn intensly enough to create two areas of equally deep char will also create the appearance of more than one origin. When presented with such a situation, the investigator must again analyze the direction of the char. If the path of char is consistent from one apparent origin to the other, the probability is that the fire spread. If no path of char is evident, the probability of arson is increased.[7]

After the origin of the fire has been determined, the investigator will concentrate on finding the cause of the blaze. In order for a fire to be considered incendiary, all natural and accidental causes must be eliminated. The most common non-incendiary causes include: (1) faulty electrical systems (usually overloaded circuits, defective switches, fixtures, or junction boxes, or deteriorated insulation); (2) painting equipment which has been carelessly stored; (3) defective heating units or clothing being dried near a heater or fireplace; (4) careless disposal of smoking materials; and (5) natural causes such as lightning.[8]

Although electrical systems cause less than seven percent of all structural fires, their elimination in the proof of arson is essential. An electrical fire is usually obvious: first, because the origin will normally be clearly marked at the location at which some malfunction occurred; and second, because burned insulation and wire can indicate whether the heat buildup was within the wire or applied externally.

Electrical wires which are burned through from an external source will appear pointed and irregularly shaped at the ends. Wires which have shorted will fuse on the ends at the break, creating small beads.

Defense claims that the fire was caused by an electrical short can be further refuted if the insulation on the wire has melted and adhered to the wire. The insulation on a shorted wire will burn from the inside out, leaving the insulation loose on the wire.[9]

After natural and accidental causes have been eliminated as causes for the fire, the investigator should begin searching for positive proof of arson. Indications that a fire was intentionally set include the intensity of the fire and the color of the smoke. A rapid, intense fire in a modern building indicates the use of an accelerant. White smoke early in the blaze indicates the presence of phosphorus; black smoke indicates the burning of a petroleum based product; and reddish-brown or yellow smoke is produced by the burning of nitrocellulose, fibre sulphuric, or nitric or hydrochloric acid. If none of these substances are regularly kept on the premises, incendiarism can be suspected.

The color of the flames is a good indicator of the intensity of the fire. The gradations are as follows:

(1) reddish glow is a heat of about 500 degrees centigrade;

(2) light red flame indicates a heat of about 1000 degrees centigrade (which may also indicate the use of a petroleum product);

(3) a yellow glowing fire has a heat of about 1110 degrees centigrade; and

(4) a white hot flame, indicates a temperature of at least 1500 degrees centigrade.

A highly intense fire in a structure normally unlikely to support such a blaze should be suspected as arson.[10]

The patterns in charred wood will also indicate the intensity of the fire. Alligatoring, or a criss-cross pattern, appears in wood which has been burned.

Deep, heavy alligatoring suggests an intense fire and a rapid build-up of heat. Finally, a light baked crazing appears from long exposure to a low heat.[11]

The elimination of natural and accidental causes, the char patterns, the color of the smoke, and the color of the fire itself may all indicate whether a fire is of incendiary origin. However, the most conclusive evidence of an arsonous fire is the discovery of an ignition device, a "plant" which is material placed around the ignition device to feed the fire, or a "booster" which is commonly a flammable liquid. Also indicative of a set fire is the discovery of "trailers" which are used to spread the fire to various "plants" located throughout a structure.

Commonly used ignition devices include candles, matches, electric heating elements, and various chemicals. Newspapers, wood shavings, rags, curtains, and excelsior are often used to initially fuel the fire, and rope made of rags or newspaper soaked with an accelerant or just a trail of flammable liquid alone are commonly used as trailers.[12] Ignition devices, plants, and trailers are seldom completely destroyed in a blaze, and if a flammable liquid has been used, traces can almost always be detected.

SAMPLING AND PRESERVATION OF EVIDENCE

If an arson investigator finds evidence of arson at a fire scene — especially the presence of flammable liquids — samples should definitely be taken for laboratory analysis. After taking the necessary samples, their preservation is as important to an arson case as the determination that the fire was of incendiary origin. Without clearly documented, uncontaminated evidence there is no case.

When taking samples or other evidence from a fire scene, the containers in which they are placed should be labeled and sealed. Note on the labels who found the evidence, exactly where it was found in the building, the date, time, and any eyewitnesses present.[13] Enclose different samples in separate containers; solid evidence with possible fingerprints might be suspended in a box to minimize the possibility that the prints will be destroyed.[14]

One author suggests following these steps when evidence is discovered at a fire scene:

(1) Photograph the evidence in the exact location in which it's found.

(2) Take samples of solid evidence, such as charred wood, and place them in clean, air-tight containers. (A new, emtpy one-quart paint can works well). The container should be labeled with the investigator's name, company or department; location from which the sample was taken; date on which the sample was taken; address and date of the fire.

(3) Conduct burn tests on possible flammable liquids found at the scene. A burn test is performed by simply pouring some of the liquid into a small container outside the building and lighting it. If the liquid burns, the investigator can testify to this fact in court. A sample of the liquid should also be placed in an airtight vial and sent to a laboratory for professional analysis; the results of the analysis will confirm the investigator's findings.[15]

Types of materials which might be collected for later analysis are: ignition devices such as fuse traiiers, candles, wicks, or rags; ash debris from probable origins and from several other spots; soil samples (which may have been saturated by accelerants); evidence more typically associated with traditional criminal investigations, such as hair, clothing, fingerprints, or blood stains; plaster, upholstery, or wood which may have been saturated with flammables (collect any stained pieces); and any tools or pieces of metal at the fire scene.

All evidence suspected of containing accelerant traces should be sealed in air-tight, clean paint cans. "Liquids should be collected in air-tight glass bottles or absorbed onto a clean cloth and placed in an air-tight container." Never use plastic containers since they are petroleum based and will obfuscate the presence of accelerants.[16]

As in all criminal prosecutions, the chain of custody question is essential. The state must prove that the evidence being introduced at trial is the same evidence, in its original condition, which was taken from the fire scene. The prosecution must call as a witness each person who has handled the evidence to testify that it has not been altered in form. After a piece of physical evidence is sealed in an air-tight container and labeled by the investigator, it should be handled by as few persons as possible. During the trial it will be necessary to trace each piece of evidence from the fire scene to the evidence collection room, to the lab, and back.

Even if the prosecution can present testimony that the evidence analyzed was in the same state as collected, a good defense attorney needs only to cast a reasonable doubt into a single juror's mind as to its consistency. This is much easier to accomplish if a number of witnesses were involved for each piece of evidence.

Ideally, the investigator who collects the evidence should deposit it with the evidence room clerk and should accompany the evidence to trial.

A final note of caution: All evidence which is to be presented at trial must have been legally taken from the scene. Investigators should be familiar with the recent laws of search and seizure which will be covered later in this manual.

ASCERTAINING THE USE OF AN ACCELERANT

Flammable liquids are commonly used to commit arson. If the investigator suspects the presence of a flammable liquid, it is essential that the physical evidence be chemically analyzed to establish that fact. The investigator may testify to the odor of flammable liquid at the fire; however, his testimony should be corroborated by the testimony of the analyst who examined the evidence.

Although the human nose is fairly sensitive to many fire accelerant vapors, it may suffer olfactory fatigue from prolonged exposure to such vapors. Further, the odor of fire accelerant may be masked by other strong odors such as that of burnt debris.[17] Because an investigator's sense of smell may be questioned at trial, it is well to substantiate the existence of accelerant vapors with a mechanical device. The most common device which is used at the fire scene is the hydrocarbon detector or "sniffer."[18]

There are two main types of hydrocarbon fuels: natural gas and petroleum. Petroleum may be distilled to produce petroleum ether, gasoline, kerosene, vaseline, parafin, and wax.

Although gasoline is more volatile, kerosene has long been popular with persons setting fires deliberately. Kerosene vaporizes less quickly and presents less danger of explosion. It often allows an arsonist to accomplish complete destruction while minimizing the physical danger involved.[19]

A hydrocarbon detector can be used to detect the presence of gasoline or kerosene. However, it must be used soon after the fire is extinguished. The device operates by detecting fumes from flammable liquids. The more volatile the fuel, the more quickly it evaporates, and if the time between the fire and the investigation allows the accellerant traces to evaporate, the hydrocarbon detector will be of little value.[20]

As well as being a valuable investigative tool on its own merits, the hydro-

carbon detector can be an excellent indicator of where samples should be collected. A positive reading indicates the need for a laboratory test.[21]

Most laboratory testing done with respect to flammable liquid detection is accomplished through the use of a gas chromatograph.[22] Developed around 1960, the device is highly efficient in separating gases or vaporized liquids as they are carried through a long, thin column. The sample of the suspected accelerant is injected into the column or tube with an inert gas such as helium, which is used to separate the various chemical components of the sample and carry them through the tube. The components are measured as they emerge from the tube.

The gas chromatograph method of accelerant detection determines how many different components are involved in a mixture, as well as the quantity of each component. After a sample is separated into its different chemicals while still in the tube, the chemicals emerge at different times. The number of components and the quantity of each is recorded by means of a thermal conductivity detector, which produces a readout similar to that of a polygraph. Once the components of a sample have been recorded they may be identified by comparison to readouts of various known substances.

As noted, the testimony of the laboratory analyst will substantially bolster the investigator's own observations. If a thorough, accurate lab analysis is done, proof of the existence of an accelerant might well be left entirely to the analyst, with the investigator describing only the location from which the samples were taken.

EVIDENCE DOCUMENTATION — PHOTOGRAPHY AND SKETCHES

Photography, properly done, is an indispensable tool in the prosecution of arson. An arson investigator will surely testify in court to conditions at the scene which led him or her to believe the fire was of incendiary origin. Photographs and sketches will clarify many terms and investigative techniques with which the jurors will be unfamiliar.

First, photographic equipment used by the arson investigator should be simple unless he or she is also an expert in its operation. The use of telephoto or wide angle lenses may result in the photos being declared inadmissible as evidence if their use cannot be justified. One experienced investigator relies primarily on a

Polaroid camera for its ease of operation and instant development, which allows an immediate comparison to the actual object photographed.

Since fire scenes commonly lack sufficient light, a high quality flash strobe must be used to ensure proper reproduction. Also, a flashlight should be directed at the subject of the picture to provide enough light for precise focusing of the camera.[23]

Although black and white photographs are adequate, color photography provides a more accurate representation of the object or scene being documented.[24] A notebook should be kept, detailing the date and location of the fire, the location of the object within the building, and a description of each object or portion of the structure photographed. If the photo is taken outside of the building, the notebook entry should also include where the photo was taken and what side of the building (i.e., northeast side) was photographed. Also include the pertinent points which the photograph is intended to convey. If an instant developing camera is used, the information should be written directly on the back of the photo.

An investigator should never be frugal with film. Although a prosecutor will limit the number of pictures to those which are relevant, every potential piece of evidence should be photographed.

Subjects of the photography might include: complete interior and exterior views of the building (pieced together from several photos); the direction of char; the point of origin and the area below the point of origin; all windows, with particular emphasis on the condition of the glass (which may indicate a fire's intensity); electric clocks which have stopped, indicating the time of the fire; and in a business establishment, the stock supply, especially if it is uncommonly low.[25]

Finally, if visible evidence of an ignition device, a trailer or a plant remains in the fire debris, photograph it. A picture can simplify explanation and bolster an investigator's credibility at trial.

In addition to photos taken after the fire is put out, color photography during the fire can corroborate later trial testimony on the color of flame, type of smoke, or wind direction. A photograph of the direction of travel of the fire moving in a direction opposite of wind direction would certainly indicate the use of an accelerant or a prearranged opening of doors and windows to create unnatural drafts.[26] Photos of the early stages of the fire may also help pinpoint the fire's

origin.

In addition, fire scenes should be thoroughly sketched to provide a basis for comparison of locations of evidence with the photographs taken. Sketches can prove invaluable at trial when the arson investigator is establishing the corpus delicti of the fire. They can show the locations, relationships, and distances between separate fires within the building to clarify and substantiate the investigator's testimony concerning cause and origin. This is especially so if multiple fires of independent origin are discovered.

As in the case of any demonstrative expert testimony, diagrams of the fire scene should be professional looking and prepared in advance. Often the building plans can be procured from the building department to verify on-site measurements and aid in preparation of the evidence. Finally, diagrams should be drawn to scale and clearly labeled to facilitate the jury's understanding of the information sought to be conveyed.[27]

FOOTNOTES — TECHNIQUES AND ASPECTS OF INVESTIGATION

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4. R. Carter, supra note 1, at 82. See Stickney, How to Identify Fire Causes, NFPA FIREMEN MAGAZINE (Nov./Dec. 1960).
5. Stickney, supra note 4, at 4.
6. R. Carter, supra note 1, at 84.
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9. J. Barracato, supra note 3, at 17-18.
10. Gwertzman, supra note 8, at 828-29.
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12. Gwertzman, supra note 8, at 831-32.
13. THE ICEBERG CRIME: WHAT POLICE OFFICERS SHOULD KNOW ABOUT ARSON 17.
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15. J. Barracato, supra note 3, at 25.
16. Wisconsin Department of Justice, CRIMINAL INVESTIGATION AND PHYSICAL EVIDENCE HANDBOOK 68-69 (2d ed. 1973).
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19. Id. at 42-45.
20. Id. at 146-47.
21. Id. at 147.
22. See Thaman, A Manual for the Operation of a Portable Gas Chromatograph, ARSON HANDBOOK FOR OHIO PROSECUTORS 91 (1979).
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24. See S. Simmons, MODERN PHOTOGRAPHY FOR POLICE AND FIREMEN

§ 12.28 (1971) for a thorough analysis of arson photography.

25. J. Barracato, supra note 3, at 22-23.

26. S. Sansone, supra note 24, at § 12.28.

27. J. Kennedy, FIRE AND ARSON INVESTIGATION 273-79 (1962).

SEARCH AND SEIZURE

Although the investigatory authority of the State Fire Marshal and his agents is established in Chapter 633 of the Florida Statutes, the investigation must nevertheless proceed in a manner which will ultimately make evidence gathered of value to the prosecution. The fire investigator should know of the legal limitations on the search and seizure of physical evidence and be aware of what is expected of him at trial. It is the prosecutor's duty to familiarize investigators as to when such warrants will be required and precisely what proof requirements are involved in each element of arson.

THE REASONABLE EXPECTATION OF PRIVACY TEST

The law of search and seizure in criminal cases revolves around the landmark case of Katz v. United States,[1] which initiated the current standard for warrantless searches and seizures. Although the fourth amendment assures that "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" unless a warrant is issued based on probable cause.[2] It was Katz which defined the standard of reasonableness that has governed law enforcement officials since.

In Katz, the Supreme Court considered the admissibility of a recording of a telephone conversation made by the defendant. The tape recorder had been placed on top of the telephone booth from which the call was made, and no physical entry was made into the booth to obtain the recording.[3]

The Court departed from the principle enunciated in Olmstead v. United States[4] and in Goldman v. United States[5] that absent a physical entry to seize evidence, no fourth amendment protection was violated.[6] Katz, rather, was decided on the basis of whether the defendant had a "reasonable expectation of freedom from governmental intrusion" in the act of conversing itself, rather than whether the phone booth was a constitutionally protected area.[7] The Court found Katz had such an expectation and reversed his conviction.[8]

Although Katz dictates that a person's expectations of privacy be reasonable, a few very important exceptions exist to the warrant requirement, even in situa-

tions which would normally present such a reasonable expectation. Especially relevant to our interests are the plain view doctrine and the emergency situation or exigent circumstances doctrine.

MICHIGAN v. TYLER AND MINCEY v. ARIZONA

The recent cases of Michigan v. Tyler[9] and Mincey v. Arizona[10] represent the United States Supreme Court's latest interpretations on the reasonableness of warrantless searches and seizures. In each case the respective state argued that an exigency or emergency existed which served to justify the extensive search and seizure for which no warrant or consent was obtained.

In Mincey, the Arizona Supreme Court created a "murder scene exception" to the warrant requirement prescribed by the fourth and fourteenth amendments. The case involved a typical crime scene investigation which stemmed from a shoot-out between a suspected drug dealer and a narcotics agent.[11]

After arranging to buy a quantity of heroin from the defendant, the narcotics agent and several other plainclothes policemen went to the defendant's apartment to effectuate his arrest. The agent and the defendant became involved in a shootout in which the officer was fatally wounded. The other policemen secured the apartment, and a homicide team arrived in approximately ten minutes to begin an exhaustive investigation which lasted four days.[12]

Mincey was convicted of murder, assault, and three counts involving narcotics offenses. The evidence used against him at trial was gathered during the four-day search of his apartment.[13] Although the Arizona Supreme Court reversed the murder and assault convictions because of improper jury instructions, it upheld the warrantless search and seizure of the evidence as being pursuant to "establishing the circumstances of death or 'relevant to motive and intent.' "[14]

The Supreme Court found that the Arizona court had erroneously established an additional exception to the warrant requirement of the fourth amendment. While recognizing the right of law enforcement officers to respond to emergency situations, the Court held that a possible homicide presented no exigency beyond that which would justify a "prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises. The need to protect or

preserve life or avoid serious injury is justification for what would otherwise be illegal absent an exigency or emergency."[15] The Court found that the "murder scene exception" to the warrant requirement was constitutionally impermissible, because it conferred

> unbridled discretion upon the individual officer to interpret such terms as "reasonable. . . search", "serious personal injury with the likelihood of death where there is reason to suspect foul play", and "reasonable period." It is precisely this kind of judgmental assessment of the reasonableness and scope of a propsed search that the Fourth Amendment requires be made by a neutral and objective magistrate, not a police officer.[16]

Mincey is indicative of the trend of Supreme Court decisions interpreting warrantless searches and seizures in emergency situations. In Michigan v. Tyler,[17] the Court also dealt with the reasonableness of searches and seizures. The decision is of great importance, especially to those persons involved in arson investigation. The Court in Tyler analyzed the reasonableness of a warrantless, non-consensual search and seizure in light of the exigencies of a fire scene emergency.

The Tyler case involved a suspicious midnight fire in a furniture store located in Oakland County, Michigan. The fire was subdued in the early morning hours, and, although two plastic containers of flammable liquid were found in the building, investigators — the fire chief and a police detective — abandoned their effort because of excessive smoke and steam. Firefighters and investigators left the scene unattended at 4:00 a.m. and took the two containers to the fire station.[18]

The fire chief and assistant fire chief returned to the scene at 8:00 a.m., made a brief examination and left. The assistant chief returned at 9:00 a.m. with the police detective and found bits of tape which suggested a fuse trail. After leaving to obtain tools, the two returned and removed pieces of carpet and parts of a stairway to preserve evidence of burn marks indicative of arson. No consent from the defendant-lessee of the building was obtained nor was a search warrant procured.

Several other warrantless inspections of the premises followed — one as long as twenty-five days after the fire — during which various evidence was collected and opinions were formed which were later used against the defendant in his trial for arson.[19]

In Tyler, the Supreme Court held that the warrantless inspection and seizure of evidence obtained the morning after the fire could be used against the defendant.

Under the circumstances, the Court considered the morning after searches as an extension of the emergency situation which justified the initial entry. However, the Court also held that all subsequent searches and seizures should have been preceded by a warrant and disallowed the use of any evidence or testimony resulting from those occasions.[20] In the words of the Court:

> [A]n entry to fight a fire requires no warrant, and . . . once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze. Thereafter, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches.[21]

The Supreme Court underscored the warrant requirement by a further holding that if any evidence of arson is discovered either during the initial emergency investigation or during an investigatory search made pursuant to an administrative warrant, any "further access to gather evidence for a possible prosecution" may be made only if a warrant is obtained "upon a traditional showing of probable cause applicable to searches for evidence of a crime."[22]

It is important to note that Tyler distinguished between the two types of warrants which may be required for search of a fire scene after the emergency has subsided and after the scene has been released by fire officials. Administrative and traditional search warrants and the probable cause necessary to satisfy each is covered later in this section.

THE EMERGENCY EXCEPTION

The emergency or exigent circumstances doctrine has been recognized by the United States Supreme Court as a clear exception to the warrant requirement of the fourth amendment. Consequently, seizures made pursuant to this doctrine have traditionally been viewed as reasonable in a variety of situations. Exigencies most often viewed as requiring reasonable warrantless searches are hot pursuit and entry to prevent the destruction of evidence. Although hot pursuit will have little application in terms of a fire scene investigation, the Supreme Court in Warden v. Hayden[23] upheld the warrantless entry of a dwelling, finding that "under the circumstances of the case, 'the exigencies of the situation made that course imperative.' "[24]

The imminent destruction of evidence has also justified warrantless intrusions

into situations which would be within reasonable expectations of privacy. In Ker v. California,[25] the warrantless seizure of marijuana was upheld because of the exigent circumstances created by its probable distribution or concealment.

The emergency doctrine has found support in both Florida and lower federal courts. United States v. Barone held that screams in the night created a sufficient emergency for officers to enter without a warrant and to subsequently seize evidence.[26] In Webster v. State police viewed a motionless body through an open window. The Webster court noted that an emergency does exist "within the meaning of the exigency rule whenever police have credible information that an unnatural death has occurred, or may have occurred."[27] Webster upheld the right of police to enter in such a situation.[28] The exigency created by the imminent destruction of evidence is closely related to that created by a fire. As noted, the Supreme Court in Michigan v. Tyler recognized the clear exception to the entry warrant requirement presented by a fire scene emergency and included the investigation of the fire scene as part of the exigency.

> A burning building clearly presents an exigency of sufficient proportions to render a warrantless entry "reasonable." Indeed, it would defy reason to suppose that firemen must secure a warrant or consent before entering a burning structure to put out a blaze. . . . . Fire officials are charged not only with extinguishing fires, but with finding their causes. Prompt determination of the fire's origin may be necessary to prevent its recurrence as through the detection of continuing dangers such as faulty wiring or a defective furnace. Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction. . . . For these reasons, officials need no warrant to remain in a building for a reasonable time to investiage the cause of a blaze after it has been extinguished.[29]

The Court also held that seizure of evidence made during such a search is constitutionally valid.[30]

United States v. Green,[31] a federal case originating in Florida, involved a fire in a private apartment which the court held created a sufficient emergency for both firemen and the Florida deputy state fire marshal to enter the premises.

The fire marshal arrived at the apartment to conduct his investigation just after the blaze had been extinguished. He had no warrant and no consent from the lessee. In the course of his investigation, the fire marshal unexpectedly discovered several copper plates which were later confirmed to be capable of printing counterfeit $20.00 bills. The fire marshal turned the plates over to a secret service agent at the scene, and the plates were subsequently introduced into evidence at defendant

Green's trial for possession of counterfeit plates. In affirming the conviction, the Fifth Circuit Court of Appeal held that the emergency situation justified the initial warrantless intrusion by the firemen and that "investigation of an actual fire is logically and factually inseparable from the fireman's job of suppressing the blaze."[32] Additionally, the court held that once the fire marshal had unexpectedly come upon the plates he had every right to seize them within his authority as a law enforcement officer. Although the evidence in the Green case was unrelated to arson, it is clear from that court's holding that a fire marshal certainly has the right, indeed the duty, "to seize evidence relevant to his investigation of the fire's cause."[33]

A Florida case supportive of the Green position is Castle v. State.[34] In Castle, the fire marshal was called to investigate the cause of a fire of suspicious nature on a sailboat. The fire had been extinguished before the fire marshal was called, but the fire chief did not leave the boat unattended during the interim. The state fire marshal seized evidence consisting of flammable liquids and containers which were later used to help convict Castle of arson. Neither the fire chief nor the fire marshal obtained a warrant. The Fourth District Court of Appeal upheld the fire marshal's right to remove the flammables for public safety reasons when he discovers such material while performing his lawful duties.[35]

The exigencies of a fire scene emergency will justify only a warrantless entry, however. The essential gathering of information may be done without a warrant only pursuant to the closely related plain view doctrine.

PLAIN VIEW DOCTRINE

The plain view doctrine is well established as obviating the requirement that a warrant be obtained prior to any search or seizure. In Katz v. United States itself, the Supreme Court recognized the validity of the doctrine stating "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[36] Numerous federal and Florida decisions since Katz have continued to uphold the doctrine.

The basis of the plain view doctrine was illustrated by the Florida Supreme Court in State v. Ashby.[37] Ashby involved a lawful intrusion onto the defendant's property by law enforcement officials who, once on the property, looked through

a partially open garage door to notice a stolen boat in plain view. The boat was seized and used as evidence at the defendant's trial for grand larceny, and he appealed his conviction, alleging an unreasonable, warrantless seizure of the boat.[38]

The Ashby court observed that "a 'search' is generally accepted to be an inspection or examination of places closed from public or general view, and requires some measure of force or intrusion," however slight. Finding no such intrusion, the court upheld the use of the evidence. "It is not a search to observe, and to seize, what is so placed where it may be seen by an officer who is where he has a legal right to be."[39]

The plain view doctrine becomes important in the context of fire scene investigations when, in the course of an investigation, a fire official discovers contraband which may be used as evidence of arson or evidence of another crime. As previously noted, the fire investigator's presence at the fire scene is justified under the emergency doctrine. The Supreme Court in Coolidge v. New Hampshire noted that "Where the initial intrusion that brings the police within plain view of such an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate."[40]

Indeed, Michigan v. Tyler established that the investigator has a lawful right to be at the fire scene and to search for the cause and origin of the fire. Any evidence which falls into his plain view during the course of that investigation is not rendered inadmissible for lack of a search warrant.[41]

United States v. Green[42] presented just such a situation. Recalling Green, the deputy state fire marshal's investigation was encompassed by the same emergency situation which justified the firemen's warrantless entry. The court went on to hold that the counterfeit plates discovered in the box which was the apparent source of the blaze fell into the fire marshal's plain view.

Finding that the plain view doctrine was applicable to the unexpected discovery of evidence, the court held that the seizure of the plates was not unreasonable as defined by the fourth amendment.[43] It is essential to note that in any situation involving seizure by a law enforcement officer of items in plain view, the officer must discover such items inadvertently while performing a legitimate duty other than a detailed search for evidence. The items falling into the officer's plain

view must also be within an area in which the officer has a legitimate right to be.

Finally, the plain view doctrine will only justify a warrantless seizure when the items seized are obviously "evidence", fruits, or instrumentalities of a crime. As the Supreme Court noted in Coolidge v. New Hampshire,

> the extension of the original justification [for entry] is legitimate only where it is immediately apparent to the police that they have evidence before them; the plain view doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.[44]

THE SEARCH WARRANT REQUIREMENT

Although the previous discussion points out that there are exceptions to the general search warrant requirement prescribed by the fourth and fourteenth amendments, the warrant should be obtained in any situation in which the reasonableness of the seizure would be in question. Two kinds of warrants and the probable cause necessary to support each will be considered.

As noted, the Court in Michigan v. Tyler drew a distinction between traditional criminal search warrants and administrative warrants.[45] In the investigation of a fire scene, once the initial emergency has subsided, it will no longer justify a warrantless entry. One of the two types of warrants will be required.

ADMINISTRATIVE SEARCHES

An example of an administrative search might involve a building inspector asserting what he or she considers to be an inherent right to inspect a private dwelling for local housing code violations. The United States Supreme Court considered just such a situation in Camara v. Municipal Court.[47] Camara, a lessee of the ground floor of an apartment building, refused to allow city inspection of his leased premises without a search warrant. He was arrested for violating the San Francisco Municipal Code, and he filed a petition of a writ of prohibition. Holding that the writ should have been granted, the Court specifically overruled Frank v. Maryland,[48] in which warrantless public health and safety inspections were considered to be "reasonable" as contemplated by the fourth amendment. By overruling Frank, the Camara Court brought administrative searches under the umbrella of protection offered against unreasonable searches and seizures.[49] However, in

dicta, the Court indicated that the Camara holding would have no effect on inspections which were conducted under emergency situations. Specifically mentioned were the validity of warrantless seizures of unwholesome food, compulsory smallpox vaccination, summary destruction of tubercular cattle, and compulsory health quarantine.[50]

The Supreme Court extended the Camara doctrine to include warrantless inspections of commercial structures in See v. City of Seattle.[51] Norman See was convicted of violating the Seattle fire code by refusing entry to the city's fire inspector who had no warrant and no probable cause to suspect a violation.[52] The Supreme Court reversed See's conviction, holding that "administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution of physical force within the framework of a warrant procedure."[58]

It is clear, according to Tyler, that once fire damaged premises are vacated, a warrant will be required for re-entry absent consent. If, however, the purpose of the re-entry is limited to a search to determine the cause of the fire, only an administrative warrant will be required. In Marshal v. Barlow's, Inc.[54] the Supreme Court reinforced the Camara holding that probable cause necessary to secure an administrative warrant would be significantly less than that required for a traditional warrant. Camara, noting the less stringent standard of probable cause required, had stated that " 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied. . . ."[55] However, the Court went on to hold, "If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant."[56]

Barlow's, Inc., which held that statutorily authorized warrantless inspections by an OSHA inspector were unreasonable, substantiated the lessor showing of probable cause required for administrative searches. The Court noted, "Probable cause in the criminal law sense is not required."[57] Rather, two factors may justify the issuance of such a warrant: a showing of probable cause to believe that a violation exists; and a showing of legislative or administrative standards which include the specified establishment.[58] In the context of a fire scene investigation, an

administrative search warrant may be obtained — if required under the Tyler standards — by a showing of (1) the statutory authority of the state fire marshal to investigate the cause of all fires of unknown origin in which property is destroyed and (2) that such a fire has occurred and its cause has not been determined.

CRIMINAL SEARCH WARRANTS

According to Tyler, once arson is suspected as a cause, the context of a search of the fire damaged premises changes. If the premises are vacated, non-consensual re-entry to search for evidence must be made pursuant to a warrant obtained by a traditional showing of probable cause. The following checklist is instructive.[59]

CHECKLIST OF ELEMENTS CONSTITUTING PROBABLE CAUSE IN SEARCH WARRANT AFFIDAVITS

I. Law Enforcement Background of Affiant

1. Period of time in particular agency.
2. Present position or area of investigation.
3. Familiarity with offense which is subject of present affidavit (i.e., narcotics, lottery).
4. Number of arrests for specific offense (preferably in the same area as present subject of affidavit).
5. Familiarity with paraphernalia used in connection with offense (if applicable).

II. Past Reliability of Confidential Informant

1. Period of time affiant personally acquainted with.
2. Number of occasions on which information supplied.
3. Type of information supplied (i.e., identity of and/or location of persons, vehicles, premises involved in illegal activity).
4. Type of offense revealed in said information.
5. Familiarity with type of offense involved in affidavit.
6. Familiarity with paraphernalia used in connection with offense involved in affidavit.
7. Results obtained from reliance on past information.
   - (A) Number of arrests affected (if any).
   - (B) Seizure of contraband or paraphernalia on persons, premises, or in vehicles, named or specified by confidential informant.
   - (C) Specific facts as to identity and/or location of persons, premises or vehicles corroborated by affiant or other law enforcement officer.

NOTE: When specifying any of above mentioned sub-sections (A,B, or C) preferenced should be placed on arrests, seizures and/or corroboration of facts in connection with type of offense present in affidavit.

   - (D) Number of convictions obtained (if any, or if "pending" so state).

NOTE: If possible, state names of persons arrested and/or convicted and the dates same were obtained, as well as locations where contraband or paraphernalia were seized.

III. Information Presently Supplied by Informant

1. Date, time, and place of meeting with informant.
2. Substance and content of information.
   (A) Date, time, and place informant obtained information (should not be more than 30 days prior to execution of affidavit).
   (B) Source of informant's information.
      (1) Personal observation.
      (2) Communication with another person (if this source is used, reliability of said person must also be established).
      (3) Communication (oral) with suspect who is subject of affidavit.
      (4) Facts upon which informant concluded offense was, is being, or is about to be committed.

NOTE: Attempt to elicit from informant as many facts of being corroborated as possible, for example:

(1) Address of suspect's residence, telephone number.
(2) Physical description of suspect.
(3) Name of suspect.
(4) Occupation of suspect.
(5) Vehicles owned and/or operated by suspect, physical description and license tag number.
(6) Physical description of suspect's residence.
(7) Times at which suspect may be observed at premises or within described vehicle.

IV. Corroboration of Information Supplied

1. Named suspect listed as residing at named and described premises.
2. Named telephone number listed to suspect and named premises.
3. Named vehicle registered to named suspect.

In addition to items specified in the traditional search warrant, (i.e, charred wood, traces of accelerant), investigators may seize other items which are not described if they are evidence of a past crime and if they fall into plain view inadvertently while the investigator is searching for specified evidence.[60] However, when preparing the inventory of seized items, the items not described in the warrant itself should not be listed on the inventory to the warrant, but should be listed separately; a separate receipt should be given.[61]

FOOTNOTES — — SEARCH AND SEIZURE

1. 389 U.S. 347 (1967).
2. U.S. Const., amend. 4.
3. 389 U.S. at 348-49.
4. 277 U.S. 438 (1928).
5. 316 U.S. 129 (1942).
6. 389 U.S. at 352.
7. Id. at 351-52.
8. Id. at 359.
9. 436 U.S. 499 (1978).
10. 437 U.S. 385 (1978).
11. Id. at 387, 390.
12. Id. at 387-89.
13. Id. at 387-88.
14. Id. at 388, 390.
15. Id. at 392 (citations omitted).
16. Id. at 395.
17. 436 U.S. 499 (1978).
18. Id. at 501-02.
19. Id. at 502-03.
20. Id. at 510-11.
21. Id. at 511 (emphasis supplied).
22. Id. at 511-12.
23. 387 U.S. 294 (1967) (police entered a home without a warrant in hot pursuit of a robbery suspect and seized evidence used at trial).
24. Id. at 298.
25. 374 U.S. 23, 42 (1963).
26. 330 F.2d 543 (2d Cir.), cert. denied, 377 U.S. 1004 (1964).
27. 201 So. 2d 789, 792 (Fla. 4th DCA 1967).
28. Id.
29. 436 U.S. at 509-10.
30. Id. at 510.

31. 474 F.2d 1385 (5th Cir. 1973)

32. Id. at 1388.

33. Id. at 1390.

34. 305 So. 2d 794 (Fla. 4th DCA 1974).

35. Id. at 796.

36. 389 U.S. 347, 351 (1967).

37. 245 So. 2d 225 (Fla. 1971).

38. Id. at 226-27.

39. Id. at 227-28.

40. 403 U.S. 443, 465 (1971).

41. 436 U.S. at 510.

42. 474 F.2d 1385 (5th Cir. 1973).

43. Id. at 1390.

44. 403 U.S. at 466.

45. 436 U.S. 499, 511-12 (1978).

46. Id.

47. 387 U.S. 523 (1967).

48. 359 U.S. 360 (1959).

49. 387 U.S. at 533-34.

50. Id. at 539.

51. 387 U.S. 541 (1967).

52. Id.

53. Id. at 545 (footnote omitted).

54. 436 U.S.307 (1978).

55. 387 U.S. at 538.

56. Id. at 539 (emphasis supplied).

57. 436 U.S. at 320.

58. Id.

59. Reprinted from B. Kircher, The Search Warrant Annotated (1975) (unpublished memo in the Office of the State Attorney, Palm Beach County, Florida).

60. Alford v. State, 307 So. 2d 433 (Fla. 1975).

61. R. Powell, Search Warrants (unpublished memo in the Office of the State Attorney, Orlando, Florida).

ARSON AND RELATED STATUTES

This section of the manual seeks to introduce several possible charging vehicles for arson related offenses. Statutes which might be utilized include the Florida arson or fire bomb laws, the federal or Florida RICO acts, or the federal mail fraud and conspiracy statutes.

Of prime importance to Florida prosecutors is Chapter 806 of the Florida Statutes, which contains the laws relating to first and second degree arson and fire bombs. It is important to note that the chapter underwent major amendment in 1979. The section of the manual entitled "Florida Arson Law — Chapter 806, F.S." consists of a law review article which outlines the history of Florida arson law, interprets the language of the new law, and details the 1979 legislative action on the arson law amendment. Comment, Fla. Stat. § 806.01: Florida Arson Law — The Evolution of the 1979 Amendments, 8 FLA. ST. U.L. REV. 81 (1980), is reprinted with permission of the Florida State University Law Review.

The RICO, mail fraud and conspiracy statutes are presented as alternatives to charging under the Florida arson law. Although only the Florida RICO Act is available to Florida State Attorneys, the federal acts should be considered when proof is insufficient to establish a prima facie case of arson against a defendant. The Section "RICO and Related Laws" capsulizes each of the statutes mentioned and briefly describes its applicability to an arson situation.

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RICO AND RELATED LAWS

This section of the manual is included to present Florida prosecutors with what may be viable alternatives to charging under arson or related statutes. The Florida RICO statute and several applicable federal laws are presented.

Although Florida State Attorneys will not be charging under federal law, a brief look at the types of federal offenses under which acts of arson might fall is instructive. Evidence which is inadequate to prove a prima facie case of arson under Florida's own arson law may very well be sufficient to show a violation of one of several federal criminal statutes. Laws considered here are the federal Racketeer Influenced and Corrupt Organization (RICO) Act,[1] conspiracy act,[2] and mail fraud.[3]

FEDERAL RICO ACT

The federal RICO Act, 18 U.S.C. 1961, et. seq., was enacted pursuant to Congress' power under the Commerce Clause of the Constitution.[4] It centers around a prohibition of acquiring an enterprise with ill-gotten funds, of maintaining an interest in such enterprise through illegal activity, or using the entity to commit illegal acts. The statute also provides for penalties for conspiring to effect any of the preceding acts. It is important for our purposes because arson is a designated racketeering activity covered under the RICO Act.[5]

Basic elements of proof of the federal RICO Act include: (1) a showing of federal jurisdiction; (2) a showing that an "enterprise" within the meaning of the Act was involved; (3) a showing of a "pattern of racketeering activity"; and (4) a showing that the enterprise was aquired with illegal funds or maintained with or used for illegal activity.[6]

The intent of the federal RICO Act was to prevent legitimate organizations from being taken over or used by organized crime. Since the act's inception, however, case law has consistently interpreted the act to include illegal organizations within the meaning of the term "enterprise."[7] Courts have also included public entities such as police departments,[8] prison facilities,[9] and state agencies.[10] Also included are organizations other than merely business organizations and

unions. Any organization which is engaged in or affects interstate commerce is covered under the act.[11]

A "pattern of racketeering activity" requires a showing that racketeering activity was involved and that a pattern of this activity can be developed. As noted, arson is by definition included as a racketeering activity.[12] To be classified as racketeering, the activity must be "chargeable under State law and [be] punishable by imprisonment for more than one year."[13] Arson, a first degree felony, is definitely included.[14]

A "pattern" is established under the federal RICO law by requiring "at least two acts of racketeering activity, one of which" must have taken place after the effective date of the act. The second occurrence, which would establish the pattern, must occur within ten years of the first.[15] Although the act allows for one or more incidents of racketeering activity to have occurred before the enactment of the law, courts have held that no constitutional rights against ex post facto laws or bills of attainder were infringed by the provision.[16]

One federal case interpreted the term "pattern" to require some connection by a common scheme, plan or motive. It held that certain isolated, disconnected incidents could not be classed as "a pattern of racketeering activities."[17]

Finally, conviction under the federal RICO Act requires a showing that an enterprise as defined by the act was acquired, maintained or controlled, or used for an illegal purpose. For instance, money acquired through the operation of an arson ring and invested or used to acquire a legitimate enterprise would constitute a violation.[18] In such a case, the funds invested in the enterprise must be traced to the illegal activity. If the enterprise acquired is legitimate, it makes no difference if the acquisition is legal in all respects. The important factor to show a violation of the act is that the funds used in the enterprise were acquired through a pattern of racketeering activity.

Based on case law, use of the funds to maintain the operation of the arson ring itself — an "enterprise" — would also violate the Act.[19] Similarly, use of the arson ring to commit arson would constitute a violation of the prohibition against using an enterprise to commit illegal acts.[20]

The federal RICO statute also contains a civil remedy available to both the

United States and victims of racketeering activity.[21] This remedy, which was created to further free legitimate business from the corruption of racketeering, provides for federal district courts to hear civil actions brought by the United States to: (1) divest a person of any direct or indirect interest in any enterprise; (2) prohibit future activites of a person in similar enterprises; or (3) dissolve or reorganize any enterprise, providing for rights of innocent persons.[22]

The civil RICO section also provides for the Attorney General to initiate these proceedings on behalf of the United States.[23] In addition to civil RICO actions brought by the United States, the statute provides a similar remedy to "[a]ny person injured in his business or property by reason of a violation" of one or more of the prohibited activities previously discussed.[24] A successful plaintiff in such a suit can recover treble damages, cost of the suit, and reasonable attorney's fees.[25]

Although the civil RICO section is not designed as an alternative to criminal prosecution,[26] it obviously may be used in such a manner. Further, it is not necessary that this private cause of action be conditioned on a previous criminal conviction under the act. Rather, in this action the plaintiff need only prove the elements of civil RICO by a preponderance of the evidence.[27] On the other hand, the conviction of a defendant in a criminal RICO action does not preclude him from being civilly liable in a private cause of action.[28]

Despite the independent nature of the criminal and civil RICO actions, filing a civil action prior to an anticipated criminal proceeding should be carefully considered. Disclosure of confidential informants is required under civil federal rules of discovery. Also to be considered when filing a criminal case prior to a civil RICO action is the use of the victim as a witness. Because of the liberal remedy available to the victim of racketeering activity under civil RICO, a serious bias could be exposed under intense cross-examination as to his motive for testifying.

Finally, with respect to civil actions brought by the United States, a previous criminal conviction will prevent the defendant from "denying the essential allegations of the criminal offense in any subsequent civil proceedings."[29]

THE FLORIDA RICO ACT

The Florida RICO Act,[30] which became effective in 1977, was enacted "[i]n an effort to eliminate infiltration of legitimate businesses by racketeers."[31] Although the Florida RICO statute tracks the language of its federal counterpart it includes significantly more illegal acts under the definitions of "racketeering activity."[32] The breadth of crimes listed in the Florida statutes has led one commentator to suggest that the legislature should edit the act to eliminate numerous non-serious misdemeanors from the definition.[33]

The thrust of the Florida RICO statute basically parallels the federal act. It provides for a violation in one of four ways:

(1) To invest funds derived from a pattern of racketeering activity in any enterprise or real property;

(2) To maintain or control any enterprise or real property;

(3) To participate in an enterprise through a pattern of racketeering activity as an employee or associate; and

(4) To conspire to violate any of the above.

Conviction under the Florida RICO statute is a first degree felony and subjects a person to up to thirty years in prison.

To date, the constitutionality of the Florida RICO statute has been considered twice by the Florida Supreme Court. This statute was first challenged as being vague and overbroad in Moorehead v. State.[37] In State v. Whiddon[38] the application of the statute was attacked as punishing activity retroactively.

The defendant in Moorehead appealed his conviction and argued that the definition of a "pattern of racketeering activity" was so vague that "men of ordinary intelligence cannot ascertain when repeated criminal conduct becomes interrelated" so as to become a "pattern."[39] The court held that the Florida RICO statute, by incorporating the federal RICO Act's definition of "pattern of racketeering activity," required that the interrelated incidents of criminal conduct not be isolated. This requirement, said the court, prevented the definition from being unconstitutionally vague.

The court withheld decision on the appellant's argument that the law was overbroad because of the inclusion of certain misdemeanors, a series of which

would constitute a violation of the RICO statute. Finding that the defendant had been charged with auto theft, the court held that the defendant's argument had no application to the instant case. His conviction was affirmed.

State v. Whiddon presented a question dealing with the retroactive application of the RICO law. The state in Whiddon argued that because the defendants were engaged in an ongoing enterprise, no specific act of racketeering need be alleged after the effective date of the act. The supreme court rejected this argument.[41] The statute defines "pattern of racketeering activity" as engaging in at least two of the prohibited acts, one of which occurred before the act's effective date.[42] The court refused to extend the statute and affirmed the trial court's dismissal of action against defendants who had not engaged in at least one prohibited act after such date.[43]

The decisions in Whiddon and Moorehead closely paralleled responses by various federal courts to similar arguments. Although the overbreadth argument posed by defendant Moorehead might cause certain of the misdemeanor crimes to be stricken from the act should they be challenged in context, it is apparent that the Florida RICO statute is destined to be a useful tool in prosecuting serious crimes.

The act is especially well suited for arson-for-hire cases. Since many professional "torches" are repeat offenders, the RICO Act is a perfect vehicle to curtail such activity.

CONSPIRACY AND MAIL FRAUD

The federal conspiracy act[44] and the mail fraud act[45] have been successfully used in situations where evidence, although potentially insufficient to convict under Florida's arson law, supported an indictment for using the United States mail for the purpose of defrauding fire insurance companies.

The companion cases of United States v. Leach[46] and United States v. Marler[47] are examples of the use of these statutes in an arson situation. Leach and Marler were involved in an arson ring in Walton County, Florida, but not enough proof was available to conclusively establish which of the parties in the ring actually did the burning.

Because proof pointing to a specific arsonist was lacking, the investigation centered on fraudulent insurance claims submitted for the contents of the several burned buildings. Although titles to the buildings were held in different names, evidence showed that in several cases the very same contents inventory list was submitted to different insurance companies. Also, an investigation of bank records showed that defendant Marler often split insurance proceeds with the record owners of the damaged property, thus giving rise to the conspiracy charges. Leach and Marler were convicted in separate trials of mail fraud, conspiracy to commit mail fraud, and interstate travel to commit racketeering (as a result of out-of-state travel in preparation for the scheme). Their convictions were affirmed on appeal.

The Leach and Marler cases are presented only as examples of what can be accomplished under the broad conspiracy and mail fraud statutes in an arson situation. Even with the lesser proof requirements of the new Florida Arson Law, it is likely that some situations will arise where evidence is insufficient to charge arson. Be aware of the alternatives available, and stand ready to assist federal prosecutors if federal charges would apply.

FOOTNOTES — RICO AND RELATED LAWS

1. 18 U.S.C. § 1961-1968 (1976).

2. Id. at § 371 (1966).

3. Id. at § 1341-1343.

4. United States v. Vignola, 464 F. Supp. 1091 (E.D. Pa. 1979).

5. 18 U.S.C. § 1961(1)(A) (1976 & Supp. II 1978).

6. Id. at § § 1961-1968.

7. See United States v. Rone, 598 F.2d 564 (9th Cir. 1979); United States v. McLaurin, 557 F.2d 1064 (5th Cir. 1977), cert. denied, 434 U.S. 1020 (1978); United States v. Castellano, 416 F. Supp. 125 (E.D.N.Y. 1965).

8. See United States v. Brown, 555 F.2d 407 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978).

9. United States v. Davis, 576 F.2d 1065 (3d Cir.), cert. denied, 439 U.S. 830 (1978).

10. United States v. Frumento, 563 F.2d 1083 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978).

11. Id.

12. 18 U.S.C. § 1961(1)(A) (1976 & Supp. II 1978).

13. Id.

14. FLA. STAT. § 775.082(3)(b) (1979).

15. 18 U.S.C. § 1961(5) (1976).

16. United States v. Brown, 555 F.2d 407 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); United States v. Campanale, 518 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); United States v. Field, 432 F. Supp. 55 (S.D.N.Y. 1977), aff'd mem. 578 F.2d 1371 (2d Cir. 1978).

17. United States v. Stofsky, 527 F.2d 237 (2d Cir. 1975).

18. See 18 U.S.C. § 1962(a) (1976).

19. Id.; see United States v. McLaurin, 557 F.2d 1064 (5th Cir. 1977), cert. denied, 434 U.S. 1020 (1978) (prostitution ring held to be an "enterprise").

20. See 18 U.S.C. § 1962(c) (1976).

21. Id. at § 1964.

22. Id. at § 1964(a).

23. Id. at § 1964(b).

24. Id. at § 1964(c).

25. Id.

26. United States v. Cappetto, 502 F.2d 1351 (7th Cir.), cert. denied, 420 U.S. 925 (1974).

27. Farmers Bank v. Bell Mortgage Corp., 452 F. Supp. 1278 (D. Del. 1978).

28. Id.

29. 18 U.S.C. § 1964(d) (1976).

30. FLA. STAT. § § 943.46-943.464 (1979). See Note, Racketeers and Non-Racketeers Alike Should Fear Florida's RICO ACT, 6 FLA. ST. U.L. REV. 483 (1978), for an excellent coverage of Florida's RICO ACT and for comparison to its federal counterpart.

31. Note, supra note 30, at 483.

32. Compare FLA. STAT. § 943.461(1)(a) (1979) with 18 U.S.C. § 1961(1) (1976 & Supp. II 1978).

33. Note, supra note 30, at 503. The commentator points out the inequity of sentencing a person convicted for a single misdemeanor to one year, yet through RICO subject the person to thirty years imprisonment for committing the same misdemeanor in a pattern. Id.

34. FLA. STAT. § 943.462(1)-(4) (1979).

35. Id. at § 943.463(1).

36. Id. at § 775.082(3)(b).

37. 383 So. 2d 629 (Fla. 1980).

38. No. 55, 741, (Fla. July 17, 1980).

39. 383 So. 2d at 630.

40. Id. at 630-31

41. No. 55, 741, (Fla. July 17, 1980), at 2.

42. FLA. STAT. § 943.461(1)(b)(4) (1979).

43. No. 55, 741 (Fla. July 17, 1980), at 2.

44. 18 U.S.C. § 371 (1976).

45. 18 U.S.C. § § 1341-1343 (1976).

46. 613 F.2d 1295 (1980).

47. 614 F.2d 47 (1980).

THE PRE-TRIAL STAGE

The pre-trial stage of an arson case is, of course, the logical extension of the arson investigation. If the prosecutor has been involved during the investigative stage, much of the information garnered will already be in the case file and a good rapport will have been established with the investigator and laboratory experts involved.

This portion of the manual presents sections dealing with the arson charge itself, discovery, preparation of witnesses, and preparation of a trial outline.

"Charging Arson" illustrates the methods of charging arson in Florida, points to related Florida laws which should be considered as possible charging vehicles and provides tactical considerations on charging in an arson situation.

The "Discovery" section outlines the prosecutor's obligation of disclosure under various rules of procedure and case law and specifically discusses the status of police reports, Brady discovery, prosecutor case files, Williams Rule evidence, and alibi demands. The section also outlines sanctions available to the court in the event of a discovery violation.

Finally, each stage of any prosecution is important to the overall case. Detailed witness preparation and a complete trial outline should be emphasized in an arson prosecution, however. Since arson is a clandestine crime, most of the evidence will be circumstantial; the jury must not become confused. The "Preparation of Witnesses" and "Preparing a Trial Outline" sections focus on the importance of these facets of case preparation and offer suggestions to tailor them to an arson prosecution.

CHARGING ARSON

If your fire scene investigation has been successful, the fire has been identified as incendiary in nature, and evidence has been obtained to prove it. Similarly, you have identified the arsonist responsible and have obtained enough evidence to take him to trial. To start the formal prosecution process moving, the defendant must be charged. In Florida the vehicles for charging arson are indictment by grand jury and information filed by the State Attorney.

In each circuit the State Attorney has developed a personal policy toward use of the grand jury. Prosecution upon indictment of the grand jury is mandated in capital cases only. In all other cases it is a tactical consideration. A grand jury can be used to initiate investigations in its investigative capacity, or to supplement outside agency investigations prefatory to its charging capacity — a useful function in arson cases. A grand jury can subpoena witnesses to appear before it and give testimony; it can also compel production of books, records and documents through subpoena duces tecum. Significantly, such matters are generally not discoverable by defense counsel if they do not become evidence at trial (subject to the limitations discussed in the chapter on discovery, infra). See Minton v. State, 113 So. 2d 361 (Fla. 1959).

If a witness is compelled under subpoena to appear and testify or to produce documents before a grand jury, he is being placed in conflict with his fifth amendment rights against self-incrimination. In Florida, this conflict is resolved by operation of law: Section 914.04 of the Florida Statutes vests transactional immunity in any witness compelled to appear before a grand jury with regard to the subject of his testimony. (In federal court a witness only receives use immunity). Thus, by compelling a witness to appear before a grand jury a prosecutor is effectively eliminating a prospective defendant. Any witness with a potential of being implicated in the investigation should not be subpoenaed.

Surprisingly, many potential defendants actually request to appear before the grand jury in the hope of exculpating themselves. A witness may waive all fifth amendment rights and appear before the grand jury as a voluntary witness. If such a situation develops in your arson case, make sure a written waiver of immunity is obtained in advance and properly documented. Once before the jury, you then

have the opportunity to develop damning testimony from the witness which can greatly assist your case. Also, if the witness has any alibi to offer, he will expose it and give you an early indication of his defense strategy. The actual substance of his testimony can become admissible as direct evidence. However, be aware that the grand jury witness, even the voluntary witness, may still be protected by the fifth and sixth amendments under Miranda principles. Federal district and circuit courts have found that witnesses who are "putative defendants" are entitled to full Miranda protections. See United States v. Morado, 454 F.2d 167 (5th Cir. 1972); United States v. Phelps, 443 F.2d 246 (5th Cir. 1971); and United States v. Luxenberg, 374 F.2d 241 (6th Cir. 1967). Florida has expressly ruled to the contrary in Wheeler v. State, 311 So. 2d 713 (Fla. 4th DCA 1975), cert. denied, 426 U.S. 948 (1976).

The United States Supreme Court addressed the issue in United States v. Mandujano, 425 U.S. 564 (1976), and also ruled expressly to the contrary. The Mandujano decision and the several concurrences left open the possibility of a later reconsideration of the issue, however, and certainly it is best to avoid any potential constitutional issues in your case. If you have a willing witness who is a potential suspect, it is suggested that you read full Miranda warnings into the record and avoid any problems.

Another consideration for using the grand jury in the charging process is rooted in the historical concept of a grand jury. In theory at least, a grand jury acts as an insulating layer between the prosecuting authorities and the public. A grand jury is considered to be above any personal or political considerations. Thus, cases involving public officials, prominent figures, or law enforcement personnel are traditionally presented to a local grand jury to avoid any suggestion of political or personal influence on the part of the State Attorney. More importantly, grand jury indictment avoids potential jury sympathy at trial for such an official.

Unfortunately, there are two sides to that coin. It is ironic that those same outside influences which we seek to shield our justice system against by use of a grand jury can penetrate the grand jury and color its decisions. Personal bias, friendships, business relationships and family relationships can, and often do, influence the grand jurors in their deliberations. The human factor remains an integral part of the system. Fortunately, the options are not foreclosed at that point.

Any non-capital crime may be charged by information filed by or on behalf

of the State Attorney. Fla. Const. art. V; and Fla.R.Crim.P. 3.140(a). The United States Supreme Court has expressly upheld this authority in Gerstein v. Pugh, 420 U.S. 103 (1975). The decision to charge by information is, again, a matter of local policy. Certainly, where a grand jury will not indict it becomes the only alternative. It is also a means to achieve prompt prosecution of an individual where the evidence is strong and the investigation fairly complete. It may be an advisable method to utilize in arson prosecutions under such circumstances.

Whichever instrument is used to charge arson, the significant question is: Which charges will be filed? The typical arson case involves the possibility of several associated charges. The decision on selecting charges must be carefully undertaken. It is well established that a defendant cannot be tried twice, even on different charges, for matters arising out of the same criminal episode. Aside from purely legal considerations of which charges can be filed, there is a tactical consideration of which charges should be filed.

The "shotgun" theory, charging every possible offense suggested by the facts, is not an advisable practice. Sometimes you want to load up on charges against a defendant because of who he is or what he has done. It is often defended as a tool in plea negotiations, to give you leverage. Any good defense attorney will be able to tell which charges are valid and which are groundless, however, so that is not a justification. It is sometimes done out of desperation, to offer a jury a variety of charges in a weak case in the hope they will convict on something. That is not a valid excuse, either. In fact, if you include charges that a jury is almost certain to acquit on, you may be destroying your entire case. Jurors are likely to lose faith in your case if they see several groundless charges, and the jury will probably "snowball" the verdicts, acquitting on all charges. You should also be aware of your ethical responsibilities as a prosecutor, and not file charges which cannot be proved.

The proper course of action is to carefully evaluate all possible charges against a defendant and file all provable charges consistent with a sound prosecutorial strategy. You may well decide not to file certain provable charges to maintain a focus on the most important charges you are prosecuting. On the other hand, you may wish to charge more than the central crime of arson, to ensure a conviction on the collateral charges, if not on the arson charge. Most arson incidents

involve several attendant crimes, such as burglary, theft or assault. In addition, the arsonous act itself may constitute several chargeable offenses under the Florida Statutes. They are:

> Section 817.233 Burning to Defraud Insurer. This section proscribes the willful burning of any insured structure to collect the proceeds and thereby defraud the insurer. A third degree felony.
>
> Sections 806.10(1) and (2) Preventing or Obstructing Extinguishment of Fire. Subsection (1) makes it a third degree felony to in any way injure or destroy, or interfere with the use of, any equipment, tool, vehicles, etc. used in fire detection and extinguishment. Subsection (2) makes any assault upon or hindrance of a firefighter in his performance of duties a third degree felony.
>
> Section 806.101 False Alarm of Fires. A first degree misdemeanor for first offenses, a third degree felony for subsequent convictions. A common diversionary tactic of the arsonist.
>
> Section 806.111 Fire Bombs. A third degree felony to make, possess or transport any defined "fire bomb" with the intent to commit arson. The arsonist will usually be guilty of this offense in the commission of the arson.

Finally, the charges you decide to prosecute upon must be legally and factually sufficient in the charging instrument. Legal sufficiency is met if the indictment or information fairly and fully apprises the defendant of the charges for which he is being prosecuted and allows him to adequately prepare a defense to the charges. See. Fla.R.Crim.P. 3.140(b) through (k). The language of the charging instrument is sufficient if it substantially sets forth the language of the statute, alleging all essential elements of the crime and identifying the time, place (venue) and manner in which the crime was committed. See Blair v. State, 161 So. 2d 233 (Fla. 3d DCA 1964). Any attack upon the sufficiency of the charging instrument must be made at, or prior to, arraignment or such claim is waived. Fla.R.Crim.P. 3.190. The allegations contained in the indictment or information need not be strictly proven, unless a statement of particulars has been filed; allegations must be strictly proven in conformity with the statement of particulars. State v. Beamon, 298 So. 2d 376 (Fla. 1974), cert. denied, 419 U.S. 1124 (1975). If the proof at trial varies from the allegations of the charging instrument absent a statement of particulars, it is generally harmless. Fla.R.Crim.P. 3.1400. However, if the variance affirmatively prejudices the defense, a directed verdict may be granted. See Sharp v. State, 328 So. 2d 503 (Fla. 3d DCA 1976); Stephens v. State, 324 So. 2d 190 (Fla. 1st DCA 1975).

DISCOVERY

The discovery process in an arson prosecution can be tedious and time consuming to the prosecutor, but failure to carefully complete discovery and comply with the applicable rules of procedure can create problems later.

Rule 3.220 of the Florida Rules of Criminal Procedure is the controlling Florida law. The broad discovery permitted defendants under 3.220 is far greater than that allowed by federal law (Rule 16) and by most, if not all, other states' laws. With only a few exceptions nearly all materials in the prosecutor's possession must be disclosed to the defense. The nature of arson investigation is such that you will be receiving materials from numerous sources over a period of time. You must make sure that all discoverable materials are furnished to the defense. A good way to ensure you do so is to maintain a checklist in your file, showing materials received, qualified as discoverable or nondiscoverable, and furnished to defense counsel. Keep in mind that an arson prosecution will entail the use of lay witnesses and expert witnesses alike. Scientific evidence will be introduced; opinion testimony will be elicited; slides, photographs and diagrams will be employed; bank records and insurance records may be utilized. All of these must be made known to the defense upon demand. Your duty to disclose is a continuing responsibility, as well. You must continuously update discovery.

Be aware that certain evidence will always be part of an arson case; don't assume that you have been provided all necessary materials. An arson investigator's lapse of memory could cost you your case! Just as a drug prosecution requires the analysis and testimony of a chemist and as a homicide prosecution requires the use of a pathologist's report, an arson prosecution will require the chemical analysis of accelerants and the analysis of burned materials from the fire scene. If you don't have those reports in your file, ask why not. Find them and furnish copies to defense counsel, even though he or she may already know the results and conclusions of those reports.

Several particular issues of discovery you may be faced with in your arson prosecution are discussed below.

issue in certain cases and can reasonably be anticipated as a defense tactic in arson prosecutions.

Under Rule 3.220(a) (2), Florida prosecutors are bound to disclose any "material . . . which tends to negate the guilt of the accused" from whatever source. Common examples are confessions of other persons, unidentified fingerprints on critical evidence, etc. You should have no trouble with the obvious.

Brady, however, goes one step further in requiring disclosure of materials merely "favorable" to the defense, as well as those which actually negate guilt. Your sense of prosecutorial ethics and fair play will guide you in making voluntary Brady disclosures. When the defense makes a "Brady motion" you feel you must oppose, you should be prepared to show the court legal grounds for denying the motion.

In Florida, a Brady motion is a remedy for the defense to seek when traditional discovery methods have proved insufficient or unavailable. Accordingly, the predicate to any Brady motion is the denial of the defendant's Demand for Discovery with a specific request for the desired materials; then the Brady motion may be filed. The motion must allege that the materials sought are favorable to the defense, with supporting grounds that the materials are necessary to the adequate preparation of the defense and that the materials are otherwise relevant and material within an evidentiary context. So stated, it is legally sufficient. The next step is an "in camera" review of the materials by the court. If the court is satisfied that the material is favorable, necessary, and relevant as outlined in the Brady decision, it will order the materials disclosed. You may request the court to excise all non-Brady matters before disclosure to the defense. For further guidance see Giglio v. United States, 405 U.S. 150 (1972); Williams v. Dutton, 400 F.2d 797 (5th Cir. 1968), cert. denied, 393 U.S. 1105 (1969); Resnick v. State, 287 So. 2d 24 (Fla. 1973); State v. Gillespie, 227 So. 2d 550 (Fla. 2d DCA 1969).

THE PROSECUTOR AS WITNESS AND OTHER EXTRAORDINARY DISCOVERY METHODS

The prosecutor's participation at the fire scene is to be encouraged. Not only can you be of vital importance as an on-scene legal advisor, but your understanding

of the crime scene by personal observation will greatly enhance your ability to effectively present the case to a jury. Defense counsel have been known to try to turn this circumstance against the prosecutor, even to the point of removing you from the case. Some prosecutors have expressed a reluctance to visit an active crime scene for this reason. This is a groundless fear, however. The Supreme Court of Florida has squarely faced this issue in Eagan v. DeManio, 294 So. 2d 639 (Fla. 1974), and ruled in favor of the prosecutor. In the Eagan decision, a subpoena duces tecum was issued by defense counsel and directed at the assistant state attorney prosecuting the case. The subpoena directed the prosecutor to appear, give oral deposition testimony, and duces tecum, produce his case file for inspection. A motion to quash was denied by the trial judge on the grounds that the prosecutor had acted, not in a prosecutorial capacity, but in an investigative capacity. A writ of mandamus was sought in the supreme court to compel the granting of the motion to quash.

The court's opinion first noted that investigation was inherent and necessary in the efficient execution of the prosecutor's duty. Before filing an information under oath, (Fla. Const. art. 1, § 15), the State Attorney must investigate the allegations of the offense so as to be able to execute the statutory oath required under Section 923.03(2) of the Florida Statutes. It reads:

> (T)he allegations as set forth in the foregoing information are based upon facts that have been sworn to as true and which, if true, would constitute the offense therein charged.

Legislative recognition of this investigative function is evidenced by the statutory authority of State Attorneys to employ investigators (Fla. Stat. § 27.25 (1)), who are empowered to serve warrants and subpoenas, and carry weapons -- the traditional investigative functions of police (Fla. Stat. § 27.255).

Accordingly, the Eagan court held that since investigation was a necessary function of the prosecutor's office, it would be unduly burdensome to routinely subject prosecutorial files to discovery and inevitably reveal "work product" in the process. Existing generous discovery rights of defendants are adequate to provide for a fair trial, the court held.

Although the court did not address the issue, note that the process of sub-

poena duces tecum is not even available to defendants in criminal proceedings for state witnesses. Even under the Florida Rules of Civil Procedure it is only applicable to non-parties, and if they object the adverse party must secure an order of the court before the documents must be produced. Rule 1.410(d) (1), Fla.R. Civ. P.; Heath v. Becktell, 327 So. 2d 3 (Fla. 1976).

The Eagan decision went on to point out that the defense may be able to secure such material through the provisions of Rule 3.220(a) (5) Fla.R.Crim.P. which provides:

> Upon a showing of materiality to the preparation of the defense, the court may require such other discovery to defense counsel as justice may require.

This provision of the discovery rules serves as a catch-all remedy for materials not otherwise discoverable as traditional 3.220 matters, and which are neither "negative of guilt" under 3.220(a) (2), nor "favorable" as the subject of a Brady motion. However, before a court will grant a discovery motion under subsection (a) (5), the defense must first exhaust all traditional discovery methods and make and affirmative showing of "materiality" to the defense.

DISCOVERY OF ALIBI

A companion provision of the Florida Rules of Criminal Procedure which should be part of your discovery process is Rule 3.200, Notice of Alibi. Note that this is not included in reciprocal discovery. You must file a Demand for Notice of Alibi from the defense. Alibi testimony can reasonably be expected in an arson trial, based on circumstantial evidence as most are, so you need to be able to rebut this alibi. Note that you must file a list of your alibi rebuttal witnesses within five days of receiving the defendant's Notice of Alibi.

WILLIAMS RULE OF DISCOVERY

The use of so-called "Williams Rule" evidence has been a powerful tool for Florida prosecutors. In an arson prosecution it can be your strongest weapon. A pattern of suspicious, incendiary burnings connected with the defendant may destroy a claim of innocent circumstances or lack of criminal intent. There are stringent

limitations on its application in criminal prosecutions which you must be aware of. Be aware, also, that you must provide the defense with your "Williams Rule" evidence under discovery and put them on notice that you will be using it at trial.

DISCOVERY SANCTIONS

If you get caught in a discovery violation, or you catch the defense in a violation, be aware of the sanctions available to the court in its discretion. Before imposing any sanction, however, the court must inquire into the surrounding circumstances, to determine whether the violation was willful or inadvertent, and prejudicial or harmless. If the court finds the violation to be harmless and inadvertent, it will allow the testimony or evidence to be admitted nonetheless. If, on the other hand, the court finds the violation to have been prejudicial and/or willful, it may: exclude the testimony or evidence; declare a mistrial; or grant a continuance at the expense of the violating party if the violation is discovered prior to trial. See Richardson v. State, 246 So. 2d 771 (Fla. 1971); Johnson v. State, 312 So. 2d 231 (Fla. 2d DCA 1975); Carnivale v. State, 271 So. 2d 793 (Fla. 3d DCA), cert. denied, 277 So. 2d 534 (Fla. 1973).

PREPARATION OF WITNESSES

EXPERT WITNESS TESTIMONY

In an arson trial, expert testimony is the strongest weapon in your prosecutorial arsenal. It establishes the corpus delicti of your case, impresses the jury, and is basically unimpeachable by the defense. You will have expert testimony from your fire scene investigator, as to basic cause and origin, and from your laboratory expert as to scientific proof of the cause and origin and any physical evidence from the fire scene.

The strength of your case depends upon the effectiveness of your expert testimony, which depends in turn upon the preparation you put into that testimony.

Your laboratory expert will need some time to make his analyses and complete his findings. You must see that he is provided all the materials he will need at the earliest opportunity. Make sure that your investigators have delivered all those materials to the lab expert, especially if the materials are going to be adversely affected by a delay in analysis. The expert will also need enough advance notice to be available for the trial, and to make sure his findings are complete by that time. It is suggested that you contact your expert at the time the evidence is delivered to him, telling him briefly what the case is about, the tentative trial date and generally what you need by way of his analysis and testimony. This will help him get started. Then, after he has completed his analyses, plan to meet with him personally.

If possible, meet the expert at his office or lab, not your office. He will be more comfortable in his own evironment, and will appreciate your deference to his position.

Start by explaining in detail what your case is all about. Tell him what you have to prove in your case, and what his testimony needs to prove as part of your case. Then, let him explain to you what he has done in his analysis and what his conclusions are. Let him run completely through his presentation as you take notes. When he has finished, go back over it in detail and have him explain any matters you don't understand. This is your opportunity to be educated, not only in his area of expertise, but in his manner of presentation as well. Make sure you know the

terminology of his field. In this way you can more effectively examine your witness at trial; you know what to ask and how to ask it.

Have your investigator and laboratory experts anticipate cross-examination. Ask them what the weaknesses are in the investigatory and testing procedures, and in the hypotheses underlying their conclusions. How would they cross-examine themselves? How would they then rehabilitate their testimonies? If you prepare yourself and your experts for attacks on the testimony, you can then smoothly and effectively rehabilitate them on re-direct. The jury will see that cross-examination has not shaken your experts (nor you!), and the impact on the jury will be greatly diminished.

If either expert witness has never been qualified in court as an expert in his field, explain what is necessary in qualifying him. Go over the predicate questions you will be asking him. Let him provide you with a resume you can use at trial in qualifying him.

Ask your expert if he can prepare any diagrams or charts to illustrate his testimony; demonstrations or re-creations before the jury are always impressive. Realize, however, that many judges are hesitant to allow live demonstrations of flammable properties in their courtroom. Help your expert become an interesting witness. Encourage him to present his testimony in such a way that the jury will be both informed and entertained. The greater the attention a jury gives your expert's testimony, the greater the weight it will carry.

LAY WITNESS TESTIMONY

Preparing your lay witnesses for trial is, of course, also important. Some special considerations will apply as you prepare them for their trial testimony.

First, find out if your witness has ever testified before. Many fire personnel have never testified at trial, and most private citizens have never seen the inside of a courtroom. It can be a terrifying experience. A dress rehearsal in your office the week before trial may ease his nervousness and help you to anticipate his performance in the courtroom. Make your witness understand that a jury will be influenced not only by what he says, but how he says it. His manner of speech should be firm and confident, and it will be if you have adequately prepared him for what he will

be asked. His appearance is also important. Fire and police personnel should be in uniform, all others in conservative coat and tie or dress suit. The witness should be instructed to address his testimony to the jury, not to you. Eye contact between your witness and jury strengthens his credibility and focuses the jury's attention. These obvious points should be well known to you as a seasoned trial veteran. They are not well known to a witness who has never testified before, however, and it is your responsibility to orient your witness to these aspects of trial testimony.

Knowing what to say is important; knowing what not to say can be even more important. As a matter of law, your witness cannot express an opinion or conclusion except as to certain carefully limited areas (refer to the new Evidence Code, Chapter 90, Florida Statutes). Make sure your witness knows and understands this. Unfortunately, most lay witnesses are all too willing to express their opinion on just about anything. Defense attorneys delight in this, and will take your witness apart on cross-examination if he starts pontificating. You must stress to your witness the need for confining his testimony to facts and personal observations; the jury will reach the conclusions.

Finally, I suggest that you provide your witness a file on his testimony to review while sequestered awaiting his call to the stand. It keeps him from twiddling his thumbs and getting nervous, and it refreshes his memory again. Include any reports, statements or deposition testimony he has made pre-trial. Outline the questions you wil be asking him. Then, make sure you follow the "script". Don't ever surprise your witness with a new question that occurs to you when he is on the stand. He may give you an even greater surprise when he answers it! You may also rattle him with your surprise and destroy his confident image before the jury.

Careful preparation can strengthen the testimony of any witness, lay or expert. It is an effort you as a prosecutor must make, especially in an arson case. Because of the often circumstantial nature of arson cases, such preparation is vital to a successful verdict.

PREPARING A TRIAL OUTLINE

Most prosecutors will prepare a case outline of some sort before they go to trial on any charge. In an arson prosecution an outline is absolutely necessary. Keeping track of exhibits, evidence and testimony is essential to ensure that you prove all the elements of the crime of arson and submit all admissible evidence and testimony supporting that proof. Arson is one crime where you will never have too much evidence; you should introduce everything you have.

You will also need an outline to use at trial so your presentation of the case is orderly and coherent. If you are fumbling around for exhibits, stammering on direct examination of your witnesses, and generally looking like you are not very sure of what you're doing, the jury is not going to be favorably impressed. If you are presenting a complex case of arson and you look like you don't even understand it, don't expect the jury to understand it. A jury will never return a conviction against a defendant if they don't understand the case.

Your outline should begin where your prosecution should begin — at the fire scene. If you weren't called out to the fire scene at the time of the fire investigation, you've missed a valuable opportunity to truly understand what your case is about. But if you choose not to go to the fire scene even after the charges have been filed and the case is set for trial, you're failing in your duty as a prosecutor. All of you visit murder scenes to understand the scenario of events surrounding the crime; an arson fire scene doesn't just explain the crime, it is the crime. The very proof of the crime of arson is in the way the fire scene is found. You should visit the fire scene as soon as possible, make observations and take notes on what you see there and have your arson investigator point out the evidence of arson and the significance of that evidence. If you are not experienced in the investigative techniques of arson, the chances are that the questions raised in your mind will be raised in the jury's, also. Take note of those questions and make sure they are answered at the trial.

Your outline should include a "mini-outline" of the case for quick reference, showing the basic who, what, when, where and why of your case. Keep this handy for references to technical points of the case such as date, venue, etc.

The number of exhibits and items of physical evidence used in an arson prosecution is generally quite extensive. I suggest a roster or flow-chart be made for all physical evidence. The roster should itemize and number the exhibits so you can quickly know what your evidence is. In separate columns you can note the evidence as received or excluded, for identification or in evidence, with or without objection. The flow-chart should show the chain of custody of all physical evidence so that you don't overlook needed testimony on any point.

Your outline should always include witness summaries, highlighting their testimony and covering all the points they can testify to. You should note any weaknesses or problems in their testimony. For expert witnesses, a brief review of their credentials will be needed.

I suggest that your outline include a section on lab analysis, with a brief summary of the results of any lab test. Similarly, any on-scene analysis of materials by your arson investigator should be summarized.

If you are prosecuting an arson for profit case, you will be using bank records, insurance records, corporate records, etc. You will need to maintain an orderly check-list of these items as part of your outline. If you highlight the significance of these items in advance, you will not need to scramble through them at trial.

THE TRIAL

The trial of an arson case, although similar to most other prosecutions, has many unique characteristics ranging from jurors' views on circumstantial evidence to the special elements of proof involved in an arson prosecution. "The Trial" section of this manual presents special considerations of selecting a jury for an arson case, outlines typical proof involved in a case in chief, and offers arguments and supporting case law for rebutting a motion for judgment of acquittal. General suggestions are presented for the closing argument, jury instructions, and sentencing in an arson case. Sample jury instructions based on the 1979 Florida Arson Law are included in the "Appendix."

VOIR DIRE

The voir dire process in an arson prosecution is of particular significance. Recognizing that arson is a crime of unique characteristics which requires a specialized presentation to the jury, you should use careful preparation and planning in selecting the jury that will hear your case.

A necessary beginning point is pre-trial analysis of your case toward typifying the form of arson involved and identifying desirable jurors. Look for someone sensitive to the facts of your case — arson for profit, arson for vengeance, pyromania, etc. A case of arson for vengeance would likely be well received by the little old lady living alone, for example. If your case is an arson for profit, you will be utilizing bank records and financial statements; someone with an accounting or banking background will help the other jurors understand the case. Although these are things your common sense tells you, it is important to realize that an arson case requires plenty of advance planning. Be methodical, and know what you're looking for.

A valuable source of information to use in your advance planning may be as near as the next room. If you obtain a venire from the clerk's office, let your secretary look it over for any persons she knows, or knows about (this was one of my best resources!). Of course this applies equally to the other people in your office, your neighbors, your spouse, etc. Ideally, your investigator could develop a profile on all the prospective jurors if he obtains the venire sufficiently in advance.

These preliminary steps can enable you to approach voir dire with the sense of purpose and confidence that you want the jury to perceive when you go before them. A coherent, well-planned presentation at voir dire will have a positive impact on the jury and set the tone for your trial.

A crucial part of voir dire is surveying juror attitudes and educating the jury to a prosecutorial orientation. In an arson prosecution your first task is reshaping juror perception of arson. ARSON IS A CRIME — NOT JUST ANOTHER CATEGORY OF FIRE! Unless your jury understands that distinction, and appreciates its implications, you may never convince those six citizens that the arsonist is a criminal who must be prosecuted and punished, the same as the murderer, the

rapist, and the thief.

Perhaps the most common misconception jurors are under relates to circumstantial evidence, sometimes referred to as the "Perry Mason Syndrome." Most jurors equate "circumstantial" evidence with "weak" evidence. How many times have your jurors seen Perry Mason prove his client was framed, a "victim of circumstances"? How many times have your jurors heard the detective on the late show say, "They haven't got anything but a circumstantial case"? The public thinks circumstantial evidence is inferior evidence. Given that nearly all arson cases are circumstantial in nature, unless you can overcome this inherent bias in the jurors' minds, you will not obtain the conviction you seek. The voir dire process is your opportunity to show those jurors that not only is circumstantial evidence as competent and convincing as direct evidence, but that in some ways it is even better. People lie, but the facts don't. A witness can take the stand and tell you "I saw Joe set that building on fire." If that's all the evidence there is, it comes down to whether the individual is lying or telling the truth. He might be lying! Instead, show the jury: that Joe used to work in that building, but was recently fired (a fact); that the fire was set by gasoline (a fact); that an empty gas can was found nearby, with Joe's fingerprints on the can (a fact); and that the building was entered with a key and that Joe had a key in his pocket when arrested (a fact). Isn't this "circumstantial case" really stronger than my direct evidence case? Point out to the jury that one man can lie in a direct evidence case and send an innocent man to prison; a circumstantial case will require many different witnesses, all of whom would have to lie to convict an innocent man. Remember, you have only a few minutes to re-educate a jury which has been raised believing circumstantial evidence is second-class evidence. Don't underestimate the importance of this point, or you will find yourself playing the role of the D. A. Hamilton Burger in a Perry Mason rerun!

If you anticipate defense tactics, you can make a pre-emptive strike at voir dire before the trial even begins. Conditioning the jury to circumstantial evidence will reduce the impact of the defense attorney's closing argument when he shouts, "This is only a circumstantial case; we haven't seen one shred of direct evidence against my client!" And you had better believe that he's going to do it.

Another pre-emptive strike involves conditioning your jury to any "dirty" witnesses you may be using. Particularly in an arson for profit scheme, you may use the "torch" to testify against the building owner or against a co-defendant given immunity. They are not likely to be what your jury would consider model citizens. Find out what the jurors' reactions are going to be when they find out your star witness is a twice-convicted child molester or drug dealer. If a juror is so turned off by the character of your witness that he or she won't give credibility to the witness' testimony, it is time to use one of your peremptory challenges.

A favorite defense tactic at voir dire is to ask a prospective juror if he believes a policeman can be as mistaken or as capable of lying as anyone else, given the motive or opportunity. When you go back before the panel, follow up on that. Tell the jury that the point is well taken and that just as anyone is capable of lying, even a policeman, so is anyone capable of telling the truth, even a drug dealer. The defense counsel asked the jury not to believe a policeman's testimony "just because he is a policeman"; you should ask them also not to disbelieve a drug dealer's testimony "just because he is a drug dealer." Again, you are pre-empting a major defense argument to the jury, even before the trial begins.

These and other methods you already utilize at voir dire are, of course, subject to the limitations imposed under your local rules of practice. Hopefully, you will be allowed wide latitude in your circuit. If your trial judge starts to draw the reins in on you, you may have to take another approach. Tell the judge you only want to ensure that the jurors will uphold their oath to follow the law. Ask them "If the judge instructs you that circumstantial evidence is competent evidence, will you follow his instruction? If he tells you a well-connected chain of circumstances can be as compelling as direct evidence, will you follow his instruction?" You will still bring out all the points you want to make.

Ultimately, you know what works best in your circuit from your own experiences in other trials. The secret is using the voir dire process for more than just selecting your jury. It's a process of communication and education which can affect the outcome of your trial before the first witness takes the stand.

OPENING STATEMENT

The opening statement to the jury in an arson prosecution represents your opportunity to capture the jury's attention immediately, focus it on your evidence and testimony, and start the jurors on the path to conviction. Your opening statement should leave the jury believing that a conviction is the only "correct" verdict in the case and looking to your evidence to support that belief.

The first important function of an opening statement is to coherently and concisely outline the case you are about to present. More than most other trials, an arson trial is a fragmented, complicated and circuitous process. The many witnesses you need to establish your circumstantial case may wear down your jury and lose their attention. The significance of their testimony may be lost if the jury doesn't understand that those witnesses are each providing a small piece of the puzzle. Tell the jury what it all adds up to; let them see the big picture before the testimony starts. That way, the jury will not be distracted from a witness' testimony wondering why you have called him or what the significance of his testimony is supposed to be. Showing that you understand the case tells the jury it can, too.

A second important function of an opening statement is to create confidence in the state's case. Your confidence in outlining the case will be transmitted to the jury. You should be assertive, without overstating the strength of your case, showing that you believe in your case. You must project an objectivity in your interpretation of the case, however, or be accused of prosecutorial tunnel-vision. If your confidence in the case is perceived as that of a reasonable, objective person then the jury, viewing themselves as reasonable, objective persons can more readily adopt your interpretation of the case and convict.

The next important function of your opening statement should be to make the jury "concerned" about your case, empathetic to the victim, and punitive toward the arsonist. You must personalize your case; show the jury that your witnesses are real people and not characters in a play. Show the jury that the victim of this arson is not just another statistic, but a member of their community, a neighbor. You want the jury to share the victim's grief at his loss and his outrage

at the arsonist who victimized him. Make the jurors care what their verdict will be.

Finally, your opening statement should draw the interest of the jury. If you succeed at the other objectives stated above, you will be well on the way. But your opening statement should also pique the jury's curiosity and keep its attention focused on the trial. The use of scientific evidence in your trial can be framed so as to entertain the jurors rather than bore them. Outline the investigation of the case so the jury can watch it unfold at trial like a good detective novel.

Bearing these goals in mind, your opening statement should utilize certain techniques of presentation to achieve them.

Your first few words to the jury are what it will remember best and be most attentive to. Don't begin by lecturing the jurors on the history and purpose of the opening statement in American jurisprudence. Give your jurors enough credit to realize what's going on. They will know that you're trying to outline the case to them, and the judge has probably just explained it to them in his opening remarks.

Never begin by telling your jury not to believe what you are about to say. If you start by telling them, "What I say is not evidence, it is only my opinion or view of the evidence. . . " you will be telling them exactly that. The judge has already told them that; don't re-emphasize it. You want the jury to believe everything you say during the trial, even if it's not "evidence."

Present your opening statement as a story teller. Do not begin by saying, "The State of Florida is prepared to present the testimony of witness 'A' of the Arson Investigation Squad who will testify that . . ., witness 'B' will then be called to testify that . . ., etc." Use a narrative form: "John Smith sometimes doesn't sleep too well. The night of July 17th was one of those nights. About 3 A.M., John decided to get out of bed and get a glass of milk, and maybe read for a while. When John went into his kitchen he just happened to look out the window across his yard to his neighbor's house. As he looked out he saw a flicker of light on his neighbor's porch, and a young man suddenly run across his yard and down the street." Everybody loves a good story, and your jury is no different.

Don't use "legalese" and don't use "cop-ese." You are not writing a brief to the District Court of Appeal, and you are not the dispatcher at the police station. your jurors are neither appellate judges nor police officers. Talk to them as ordinary

citizens in a language ordinary citizens will comprehend. Where technical terms are essential to the case, explain to them what they mean in common language before you use them.

Understate your case rather than overstate it. If you are not positive you can prove a point beyond a reasonable doubt, don't tell the jury you will. When you fail to prove it, the jury will start looking to see what else you promised but did not deliver. If you can prove more than you said you would, the jury will think your case is even stronger than you said, and certainly strong enough to convict.

Finally, do not wait until voir dire is completed to start thinking about your opening statement. You should prepare your opening statement some time prior to trial. You should rehearse it, remember all the important points you want to cover, and be able to present it without using notes or cue-cards. Your preparation shows you think this case is important, and that you want the jury to think it is important.

CASE IN CHIEF

After all the preliminaries have been disposed of, the case will be presented to the jury. Since most arson cases usually involve a great number of witnesses, each of whom will provide a small piece of the puzzle, the presentations should be coordinated so as to show an orderly development of the crime to minimize jury confusion.

Although time and sequence in presentation of evidence and testimony are of the utmost importance in an arson case, circumstantial evidence cases can be long and drawn out. Extreme care should be used; keep the jury's attention focused on each piece of evidence and on each witness presented. You should have anticipated this as you prepared your trial outline and the investigator's and chemist's testimonies. Their use of demonstrative evidence such as charts, photographs and the like and their absention from the use of sophisticated, technical terms without explanation are essential to maintaining the jury's interest.

Basically, a Florida arson prosecution will be a three stage process. First, you must prove that a fire or explosion occurred, damaging the specified structure or,

in some cases, its contents. Then you must prove the fire or explosion was of incendiary origin. Finally, you must show that the defendant was criminally responsible for the fire or explosion. As in all criminal cases, venue must be established, and the defendant must be identified as the person charged.

Naturally, each of your witnesses must be evaluated in terms of what he or she can offer to prove the necessary elements. The direct examination of the witnesses should be designed to elicit all relevant information proving those elements in a manner which enhances the jury's understanding of the case.

Arson cases will consist primarily of circumstantial evidence, especially involving proof linking the defendant to the crime.

BURDEN OF PROOF

To obtain a conviction in an arson case, as in all criminal cases, the burden of proof is on the state to prove the elements of the crime and link the crime to the defendant beyond and to the exclusion of any reasonable hypothesis of innocence. However, absolute proof is not required. According to the Georgia case of Smith v. State, 68 S.E.2d 393 (Ga. Ct. App. 1951), it is not required that the evidence "exclude every possibility or every inferrence that may be drawn from proved facts" in order to convict. Rather, the court noted it is necessary to exclude all reasonable hypotheses of innocence which may be drawn from all the facts. A reviewing court will be reluctant to overturn a conviction, even one based entirely on circumstantial evidence if it concludes that all the evidence was fairly received and considered by the jury. As noted in Knight v. State, 53 So. 541 (Fla. 1910), the weight of all the evidence is a matter for the jury to decide; unless the evidence is not inconsistent with all reasonable hypotheses of innocence, the conviction will stand.

CIRCUMSTANTIAL EVIDENCE

All of the evidence which is used to prove a case of arson must of course, be relevant. The Florida Evidence Code defines relevant evidence as "evidence tending to prove or disprove a material fact." Fla. Stat. Ann. § 90.401 (West 1979). Although much of the evidence presented in an arson case will be circumstantial,

especially that evidence offered for the purposes of linking the defendant to the crime, it too will be admissible as relevant if it tends to merely elucidate the inquiry. Cannon v. State, 107 So. 360 (Fla. 1926); New v. State, 211 So. 2d 35 (Fla. 2d DCA 1968).

According to Davis v. State, 90 So. 2d 629 (Fla. 1956), circumstantial evidence consists of "proof of certain facts and circumstances from which the trier of fact may infer that the ultimate facts in issue either existed or did not exist." Davis stressed that the conclusion as to the ultimate facts must be one in which the common experience of men may reasonably be made on the basis of known facts and circumstances. Davis at 631. Thus, the evidence need not be dispositive of the ultimate facts in issue; it need only shed light to be relevant.

Circumstantial evidence has long been regarded as adequate to prove material facts in issue in Florida courts, especially where certain matters, by their very nature, are shrouded in secrecy. See Orman v. Barnard, Adams & Co., 5 Fla. 528 (Fla. 1854). The same holds true in a criminal context. Arson is by its very nature shrouded in secrecy, and all elements may be proved through the use of circumstantial evidence. Sawyer v. State, 132 So. 188 (Fla. 1931); Dodson v. State, 334 So. 2d 305 (Fla. 1st DCA 1976), cert. denied, 341 So. 2d 1081 (Fla. 1977).

CORPUS DELICTI

Bearing in mind that most circumstantial evidence will go toward linking the defendant with the crime, your first step toward obtaining an arson conviction is proof of the corpus delicti. In a Florida arson case, this simply means showing that there was indeed a fire or explosion, that it was the result of some criminal agency, and that damage resulted.

LAY WITNESSES

Since the first element of proof involves showing that a fire or explosion occurred, call the person who discovered the fire first. Extract testimony from that person of the time, location, and physical characteristics of the fire or explosion. Although this lay witness can offer no opinion as to the cause of the conflagration, his or her description of it will lay the groundwork for later expert

testimony.

It may be that the witness who discovered the fire will have testimony which would tend to prove more than the mere fact of a fire (if he or she saw the defendant in the vicinity, for instance). In that case, his or her testimony may better serve to prove another element, and might be re-ordered to avoid presentation of the motive early in the trial.

Proof of a fire, and possibly an explosion, may be elicited from the firefighters responding to the scene. In addition to establishing a basic element required in an arson case, the firemen's testimonies will be very important in terms of weather conditions, physical characteristics of the fire, and description of the premises at the time of the fire. Recalling the "Cause and Origin Determination" section of this manual, facts such as color of smoke and flame, intensity of fire, odor of fire, locked doors and windows, holes in walls, etc. will have been most apparent to those persons on the scene. A list of possible questions to be put to the first persons — or first firefighters — who observed the fire is included in the Appendix. Elicit this information from them.

If photographs were taken of the fire in process, have these witnesses verify them as an accurate representation of the scene and offer them into evidence at this time. You will undoubtedly use them later in your direct examination of the arson investigator, but photos become relevant at the first point in the trial when they can be verified, and they should be admitted at that time. For several excellent sources concerning the admissibility of photographic evidence see the citator at the end of the Appendix to this manual.

Be very aware of potential pitfalls in any witness' testimony before he or she takes the stand. A skillful cross-examiner will be sure to point out inconsistencies or omissions of relevant facts the witness would be expected to know. For instance, if a fireman has had a basic course in arson detection he would be expected to check for locked or open doors and windows, color of smoke and flame, and holes in the walls or ceilings. He should also notice the people in the area of the fire and license numbers of cars hurrying away from the scene. If defense counsel can show the jury that the witness failed to observe several key facts, it will surely tend to weaken his credibility as to things he can testify to accurately.

EXPERT WITNESSES

Proof of the corpus delicti of arson will be complete upon a showing that the fire or explosion was caused by a criminal agency — in Florida a "willful and unlawful" act. Fla. Stat. § 806.01 (1979). This can be accomplished through the expert testimonies of the arson investigator and probably a laboratory chemist. The importance of preparing these witnesses has already been alluded to in the "Pre-Trial" section of this manual. It cannot be overstressed in an arson prosecution. Unlike most firemen, who are lay witnesses, an expert witness in Florida will be allowed to express an opinion as it is applied to evidence at trial. Fla. Stat. Ann. § 90.702 (West 1979). Although presentation of expert testimony is limited to situations where the trier of fact will be assisted in understanding the evidence or determining a fact in issue, evidence that a fire is of incendiary origin surely falls outside the common juror's understanding. Id. at § 90.703 (sponsor's note).

Qualification of the arson investigators will be unlike that of most other expert witnesses. Because most of the criteria for qualifying as an expert in arson investigation is based on experience rather than formal training, few standards exist by which their qualifications can be judged. As prosecutor, you should analyze the characteristics and schooling of your investigator-expert, find out what deficiencies may exist and explain them during direct examination. For example, a defense attorney may ask an investigator on cross-examination what published books he has read or studied. Although the investigator may have studied pamphlets and papers prepared for seminars, they are not published books. Defense counsel may also stress the investigator's possible lack of college education or his failure to take formal courses in physics, chemistry or engineering while in college.

To avoid embarrasment, or worse a disqualification of the arson investigator as an expert, get to know the expert's background in the pre-trial stages. If deficiencies exist, such as a lack of schooling, which are potentially damaging to the expert's credibility, expose them on direct examination and let the investigator dispel any notion that he or she is an inferior expert witness.

Even though you run the risk of bringing possible shortcomings of the arson investigator to the attention of defense counsel, never accept offers to stipulate

to the investigator's expertise. "Let the jury hear, and be impressed by, the qualifications." It is quite likely that if an offer to stipulate is made, little or no attack will be made on the expert's qualifications on cross-examination. To aid in the qualification of an arson investigator as an expert, a list of items to be considered is included in the Appendix to this manual. See 19 AM. JUR. TRIALS, Preparation and Trial of Arson Case 685, 775-76 (1972).

After the investigator has been duly qualified, his testimony will go toward proving that the fire or explosion — the occurence of which has already been established through lay testimony — was of incendiary origin. The fact that a criminal agency was involved is essential to arson. To reiterate briefly what has been discussed in earlier sections of this manual, proof of an incendiary origin of a fire involves not only a showing of facts which point to an intentional fire setting, but also eliminating possible accidental and natural causes of the fire. For instance, the state must show "that the fire did not start from faulty electrical wiring, furnaces, gas ranges or other appliances." Flynn, Proof of the Corpus Delicti in Arson Cases, 45 J. CRIM. LAW 185, 186 (1954). To eliminate these accidental causes, present evidence that all appliances and wiring were in good condition or that the fire did not originate near these danger spots. The Arson Investigator's Checklist, located in the Appendix, contains a section on cause and origin determination and should be used while preparing an investigator's testimony. Make sure you have at least considered and accounted for all the items on the list.

Corpus delicti of a crime must always be proven before evidence can be accepted which links the defendant to it. Since the arson investigator's job is to both determine the cause of the blaze and to ascertain who was responsible for it, his testimony will concern facts which he discovered concerning the defendant's motive, financial situation, and insurable interest in the property damaged. (Again, see the Arson Investigator's Checklist.)

Theoretically, such evidence should not be introduced until the corpus delicti has been shown. However, courts have held that introduction of evidence tending to prove the accused's guilt for purposes of proving the corpus delicti is not error. Holland v. State, 22 So. 298, 301 (Fla. 1897); State v. Alcorn, 64 P. 1014, 1016-17 (Idaho 1901).

Examples of evidence which have been offered to show corpus delicti include:

(1) purchases of inflammable materials (admissible). State v. O'Hagen, 144 N.W. 410 (Minn. 1913);

(2) prior removal of furniture or inventory (admissible). State v. Berkowitz, 29 S.W.2d 150 (Mo. 1930); and

(3) evidence of a contemporaneous crime which was covered by the fire (inadmissible as not relevant). State v. McCall, 42 S.E. 894 (N.C. 1902).

In many arson cases, the testimony of a laboratory expert, generally a chemist, will also be required usually to show the presence of an accelerant. The sole purpose of this expert's testimony is to make relevant any evidence the arson investigator submitted to the lab which in fact contains accelerant traces (e.g., pieces of wood or furniture which may have been soaked with a flammable liquid). The evidence will already have been identified by the arson investigator; becomes admissible evidence upon the lab expert's testimony.

Qualifying the laboratory analyst is much the same as for most other experts. A list of predicate questions has been included in the Appendix.

CRIMINAL AGENCY OF ACCUSED

Evidence tending to implicate the defendant with the arson may have been presented while establishing the corpus delicti. Because the arson investigator's testimony will reveal most of the evidence pointing to the defendant as the culprit, especially in a circumstantial case, much of this evidence will be presented before all evidence establishing corpus delicti is shown (e.g., before the lab expert's testimony).

MOTIVE

Inevitably, the arson investigator will have developed evidence which tends to show the defendant's motive for causing the fire or explosion. Although motive is not a necessary element of proof in a criminal case, Washington v. State, 276 So. 2d 587, 588 (Ala. 1973), evidence tending to establish motive is relevant and admissible. See generally 87 A.L.R. 2d 891 (1963).

Circumstances which go toward showing motive in a commercial fire may

include: depleted inventory; an audit of the books to show poor business conditions; a change in market conditions; a change in the neighborhood characteristics; and overinsurance.

In a dwelling fire suspected of being arson, potential proof of motive may be revealed by: physical condition of the premises (any structural defects); a showing that the house has been on the market either for sale or rent and that the owner has had little success in moving the property; exposing a wish to move from the area; or, finally, evidence of domestic problems. Hopper, Circumstantial Aspects of Arson, 46 J. CRIM. LAW 129, 132 (1955).

In Sawyer v. State, 132 So. 188 (Fla. 1931), evidence of insurance held by defendant's father was admissible as tending to show that the accused intended to burn the property so his father could collect insurance proceeds. Similarly, in Rausch v. State, 159 So. 2d 926 (Fla. 3d DCA 1964), evidence of motive, as well as of incendiary origin of the fire, consisted of previous experience of the accused collecting insurance claims for fire damage. Although the evidence was purely circumstantial in nature, the court found that "the only reasonable deduction therefrom was the guilt of" the defendant. Id. at 927. See Williams v. State, 143 So. 2d 484 (Fla. 1962) (circumstantial evidence offered was inadmissible to prove motive). See also Miles v. State, 36 So. 2d 182 (Fla. 1948), and Duke v. State, 185 So. 422 (Fla. 1938) (evidence of insurance admissible to show motive).

Family hostility has also been introduced as circumstance to show guilt of accused. Clinton v. State, 50 So. 580 (Fla. 1909). Also, threats by defendants have been held admissible in other states to show an ill will toward a building's owner or occupant. Hale v. State, 101 So. 774 (Ala. Ct. App.), cert. denied, Ex parte Hale, 101 So. 775 (Ala. 1924); Gamble v. State, 99 So. 662 (Ala. Ct. App. 1924); Harris v. State, 88 S.E. 121 (Ga. Ct. App. 1916). Although it has been held that threats made may be too remote to be relevant as competent evidence to show motive for reasons other than time lapse, Springs v. Commonwealth, 248 S.W. 535 (Ky. 1923), threats are generally held not to be diminished by the period of time between the threat and the arsonous act. The weight given the threat may be affected, however. Commonwealth v. Quinn, 23 N.E. 54 (Mass. 1890); People v. Eaton, 26 N.W. 702 (Mich. 1886).

Naturally, the defense may offer evidence in rebuttal to the prosecution's claim of motive to commit the crime charged. Specifically, the accused may show that other persons had a like motive for committing the arson. He may not, however, name the persons alleged. The defendant may also introduce evidence which may tend to explain incriminating evidence. Gardner v. Commonwealth, 289 S.W. 1087 (Ky. 1927). If the defendant seeks to introduce evidence of friendly relations between himself and the owner or occupant of the burned property to dispel accusations of hostility, he must give a time reference to show this want of motive. Moore v. State, 103 S.W. 188 (Tex. Crim. App. 1907).

CONFESSIONS

If a confession is obtained from the accused, it is admissible to connect him or her to the crime. However, a confession alone is insufficient to establish that the crime actually occurred. The corpus delicti must be established by independent evidence which corroborates the confession. Hodges v. State, 176 So. 2d 91 (Fla. 1965); Dawson v. State, 139 So. 2d 408 (Fla. 1962). See 7 Wigmore, EVIDENCE § 2071 (Chadbourn rev. 1978); 127 A.L.R. 1130 (1940); Flynn, Proof of the Corpus Delicti in Arson Cases, 45 J. CRIM. LAW 185, 189-90 (1954).

One commentator points out the importance of this rule of evidence which should be passed along to our arson investigator. He notes that many investigators tend to let down once a confession is obtained. He stresses the importance of immediately reviewing the available evidence to assure that the crime itself — the corpus delicti — will be provable through corroborating evidence. Hopper, Arson's Corpus Delicti, 47 J. CRIM. LAW 118 (1956).

The introduction of a confession as substantive evidence is basically an order of proof problem, albeit one of great import. Although most courts hold that corroborating evidence establishing the corpus delicti should be introduced first, it is not necessary to prove the corpus delicti beyond a reasonable doubt before the confession is admitted. If sufficient independent evidence is subsequently presented which tends to show that a crime was committed, the confession will be admitted. State v. Allen, 335 So. 2d 823 (Fla. 1976); Miles v. State, 36 So. 2d 182 (Fla. 1948). Additionally, in Anthony v. State, 32 So. 818 (Fla. 1902), the court held that, although the confession was proffered as evidence prematurely,

subsequent showing of sufficient corroborating evidence cured any error. See Hodges v. State, 176 So. 2d 91 (Fla. 1965).

In an arson case, the confession will most likely be introduced as part of the arson investigator's testimony. If substantial proof of the corpus delicti still remains to be shown through testimony following that of the investigator, it may be preferable to recall the investigator for purposes of introducing the confession after all other witnesses have testified to the existence of the crime.

As mentioned, an arson case will usually involve a great many witnesses, each of whose testimony will involve very little factual information. The arson investigator's testimony will contain a great deal of information, much of which may be substantiated through the testimony of insurance personnel, business associates, neighbors and the like. Because the investigator provides the basis for so much of the case, it is imperative that he or she make a favorable impression on the jury as an expert witness.

The orchestration of a case such as an arson prosecution can be mastered only by thorough preparation. Know well what each witness' testimony is expected to reveal, and formulate a checklist to assure all points are covered. Finally, the investigator is the keystone of your case. Be especially aware of his or her qualifications, the process used to establish that an arson was indeed committed, and the evidence accumulated which will tie the defendant to the specific crime.

DIRECTED VERDICT ARGUMENTS

At the close of the state's case, and at the close of all the evidence in the cause, it is virtually automatic that a motion for a judgment of acquittal will be made by defense counsel. Rule 3.380(a) of the Florida Rules of Criminal Procedure governs the procedure for seeking a judgment of acquittal, also known as a directed verdict. The rule provides that either the state or defense may move for a directed verdict (though it's hard to imagine a prosecutor asking the court to direct a verdict against himself!), or that the court may so move of its own motion.

The motion must allege that the state has failed to present evidence which, taken in the light most favorable to the state, is legally sufficient to support a conviction. Failure to lay venue, prove every element of the charge (i.e., establish a

prima facie case) or identify the defendant are reasons for which a court might enter a directed verdict. Downer v. State, 375 So. 2d 840 (Fla. 1979). A court may not base a directed verdict on the credibility or weight of the testimony or evidence; factual sufficiency is a jury determination. If, however, the weight of the evidence is such that it reaches the level of legal insufficiency rather than factual insufficiency, the court must direct a verdict. Delgado v. State, 319 So. 2d 610 (Fla. 3d DCA 1975).

The court must construe every aspect of the state's case in the most favorable light conceivable under the facts of the case. In other words, the state must get the benefit of the doubt in construing the evidence. This is important in responding to a directed verdict motion, for the defense will attempt to substitute the judge for the jury. Not only must the judge not substitute his judgment for that of the jury's, he must actually give preference to the state's evidence in evaluating a motion for a directed verdict. If there is any way the jury could return a verdict of guilty under the law, they must be given the opportunity to do so.

If your case is circumstantial, and most arson cases are, there is a special standard by which your evidence will be evaluated. Your evidence must be consistent with guilt and inconsistent with innocence, and you must exclude every reasonable hypothesis of innocence. The judge must grant a directed verdict if you have failed to exclude any reasonable hypothesis of innocence. See McArthur v. Nourse, 369 So. 2d 578 (Fla. 1979). Your argument, of course, is that any suggested hypothesis of innocence would be "unreasonable" under the facts of the case. Remind the judge that whether a particular hypothesis of innocence is reasonable is largely a question of fact, which should be submitted to the jury for its determination. Further, show that there is some direct evidence of guilt. Hopefully, part of your case will be based on direct evidence. Focus on that evidence in an effort to avoid the limitations of a purely circumstantial case.

Finally, make sure that the defense attorney and the judge understand the new revisions to the arson statute. In particular, stress the common law departures and simplified requirements of proof discussed earlier in this manual. Establishing a case sufficient to submit to the jury was not easy under the old statute; many cases were lost at that level. One of the major benefits of the 1979 revisions to

Chapter 806 will be the ability of the prosecutor to get the case to a jury. Hopefully, your own experiences will bear this out.

CLOSING ARGUMENT

Closing argument has a strange mystique with trial attorneys. Certainly it is the most exciting part of the trial for the lawyers; having been essentially spectators while the witnesses were in the limelight, it is their turn to take center stage and command the jury's attention. It is undoubtedly the most dramatic part of a trial, as impassioned pleas and stirring arguments fill the air. Whether it is the most important part of the trial, however, is questionable. We may be overstating our own self-importance if we think so. Perhaps the closing argument is not really your opportunity to show the jury what verdict they should reach, but rather an opportunity to either reinforce or change the verdict they have already reached. In this way, closing argument may be your last chance to lose a case if you are not careful. Creating a reasonable doubt is easier than removing one.

Your first objective in closing argument is review. While a jury may have been quite attentive during the trial as a whole, nobody can be expected to pay attention to all the details in the testimony of all the witnesses. It is your responsibility in closing to know every important detail, and condense the many hours of testimony into a few minutes of highlights. A trial is something like an easter-egg hunt: somewhere in the wide field of testimony can be found the few vital pieces of evidence you need the jury to gather for a conviction. You as prosecutor must guide the jury to that evidence in your closing argument.

Having pointed out the important evidence to the jury, you must then link it together and link it to the defendant. These connections are the essence of your circumstantial case. As you did in your voir dire and opening statement, you must stress the reliability of circumstantial evidence. Don't apologize for presenting a circumstantial case, be proud of it! Tell the jury that you are not relying on the frailties of human eyesight, hearing and memory; tell them instead you are relying on cold, objective facts to prove your case. Show the jury your chain of circumstantial evidence is strong and unbroken, linked only to the defendant.

Stress the expert testimony in your case. It will probably be uncontroverted, unimpeached evidence. Point that out. Tell the jury that you have proven by scientific analysis how the fire occurred, and how the defendant is connected to the fire. Challenge the defense to contradict your experts; they cannot do so.

If you have used the testimony of an accomplice or co-conspirator, you must corroborate that testimony by independent evidence. Show the jury how you have done so. Itemize the corroborating evidence to the jury for maximum impact. Anticipate defense attacks on your accomplice witness. Point out that the accomplice was the one person in a position to know the real truth; he was there when it happened. Remind the jury that you did not select the accomplice as a witness; the defendant did when he committed a crime in the presence of the accomplice. He was not the state's friend, he was the defendant's. If the accomplice is made out by the defense as a low-life character, tell the jury that tells them something about the defendant's character. Birds of a feather flock together, as the saying goes. However, be careful not to vilify the defendant.

A defense lawyer will often try to narrow the jury's focus to the credibility of the accomplice. Discrediting the accomplice, the defense will urge acquittal on that basis, as if the case hung on that point alone. You must remind them of your corroborating evidence, your scientific evidence, and everything else you have. The defense may wish the jury would overlook all the other evidence, but they cannot.

If you have tried three cases, you have heard the defense lawyer tell the jury "you can't guess a man into prison." Your response should be that they won't have to make a guess. You have given them testimony and evidence which their common sense tells them points to the defendant's guilt. Using common sense in carefully evaluating the state's evidence is not guessing.

Along similar lines, you can expect the defense to argue that the case has not been proven "beyond a reasonable doubt." There has never been a case prosecuted which did not have some doubt as to some aspect of the case. Remind the jurors in your closing that, as the judge will instruct them the state need not prove every fact in the case beyond a reasonable doubt, only the material elements of the offense. Tell the jurors what those elements are and how you have proven

them. Tell them that if they believe those elements have been proven, they must return a verdict of guilty, whether they believe anything else about the case or not.

Don't let a defense lawyer intimidate your jurors into acquittal. He's going to prey on their consciences by telling them that they can't guess the defendant into prison, that he will be locked away for 15 years of his life, and that they must have some doubts about the case. He will try to equate reasonable doubt with certainty — don't let him! You should have laid the proper foundation at voir dire, which you can now remind the jury of. Remind the jurors that they told you they would not hold the state to proof by certainty, and that they understood a reasonable doubt meant a doubt with a good reason. Nothing in human affairs is certain, nobody is perfect, and you don't expect them to be any different from everyone else. Their common sense will tell them what is reasonable to believe and what is not.

By way of pursuing this point, defense lawyers often tell the jury your interpretation of the case is "unreasonable," that nobody would do things the way you have suggested, and that your interpretation is itself a reasonable doubt. Crime is unreasonable, however, and criminal behavior is unreasonable behavior; it is the fact criminals act unreasonably which causes them to be ultimately caught.

In terms of motive, however, most arsonists act reasonably or at least "explainably" and you must be prepared to argue motive to the jury, even though it is not an element of proof. Pyromania is irrational but it may explain the arsonist's motive in setting the fire. Don't neglect to cover this point with the jury; it's something they will be thinking about.

Finally, try to use some of the words and terminology of the jury instructions in your closing. Tell them, for instance, that all your evidence is "consistent with guilt and inconsistent with innocence," that your case is a "well-connected chain of circumstances," and, that if the jurors will just "use their common sense, the same common sense they use in their everyday affairs," they will find the defendant guilty. Then, when the judge instructs the jury on the law, he will be repeating your closing argument, re-emphasizing your points and effectively giving the weight of law to your closing.

Of course, your own skill in closing argument will be developed from the experiences in your local court. What works in Quincy may not work in Miami, and vice-versa. Your knowledge of the local community and its jurors is, ultimately, your best resource.

JURY INSTRUCTIONS

It has been said that people remember best what they hear last. If this is true, the instructions to the jury at the close of a trial merit special attention.

The Florida Standard Jury Instructions are a compilation of standardized instructions prepared by a committee and approved by the Florida Supreme Court. They are designed to ensure uniformity and objectivity in the instruction process. Inevitably, however, they do so by generalizations which often do not reflect the needs of your particular case. In recognition of this problem the Florida Rules of Criminal Procedure provide for submission of special instructions from counsel under Rule 3.390(c).

At the end of all testimony, or sooner, the court will call a charging conference in chambers to review with counsel the standard instructions the court will be giving and to receive any special instructions counsel may offer to the court. Any submitted instructions from the defense, as well as the standard instructions the court intends to give, should be closely scrutinized to ensure that all instructions which must be given to the jury are indeed given.

In every trial certain instructions must be given as a matter of course. The court must instruct the jury on "the law of the case." Fla.R.Crim.P. 3.390(a). This includes instruction on the material elements of the offense which the state is required to prove and on the necessity of proving those elements beyond a reasonable doubt. See Hall v. State, 83 So. 513 (Fla. 1919). If a confession is admitted in the case, a cautionary instruction on the weight it is to be given is mandatory. Harrison v. State, 5 So. 2d 703 (Fla. 1942). In a circumstantial case, such as most arson cases, an instruction on the weight of circumstantial evidence and how it is to be received is required. McCall v. State, 156 So. 325 (Fla. 1934); Lee v. State, 362 So. 2d 692 (Fla. 4th DCA 1978) (an arson case); Newsome v. State, 355 So. 2d 483 (Fla. 2d DCA 1978). This is only mandated in totally circumstantial cases, however. Leavine v. State, 147 So. 899 (Fla. 1933); Boyd v. State, 122 So. 2d 632 (Fla. 1st DCA 1960). In cases where an accomplice testifies against the defendant, an instruction on accomplice testimony is required. Johnson v. State, 25 So. 2d 801 (Fla. 1946).

Lesser included offenses must be instructed if they fall under the guidelines of Brown v. State, 206 So. 2d 377 (Fla. 1968). Brown is the definitive statement on lesser includeds. Four categories of lesser included offenses were set forth:

1) Degrees of the charged offense
2) Attempts
3) Necessarily included offenses
4) Offenses included by the evidence.

As to category 1 or 2 offenses, if such are crimes under the Florida Statutes, they must be included. Category 3 or 4 offenses must be included if they can be derived from the charging instrument's allegations and sufficient proof of the offenses is adduced at trial to support a conviction thereon. Stated another way, "the probata must conform to the allegata." Gilford v. State, 313 So. 2d 729 (Fla. 1975).

Other jury instructions are permissive rather than mandatory, and depend upon the evidence developed in the trial or a special request from counsel. Any fact proved by competent evidence may be the subject of a special instruction. Polk v. State, 179 So. 2d 236 (Fla. 2d DCA 1965). However, special instructions relating to a defense theory supported by competent evidence need not be given if the standard jury instructions adequately cover the defense theory advanced. Carrizales v. State, 356 So. 2d 274 (Fla. 1978). Although the language of Fla.R.Crim.P. 3.390(a) would seem mandatory, it has been held that instruction on the penalty for the offense charged is within the discretion of the trial judge. Johnson v. State, 308 So. 2d 38 (Fla. 1975); Cuba v. State, 362 So. 2d 29 (Fla. 3d DCA 1978). Also, the court need not instruct on the penalties for any lesser included offenses. Mitchell v. State, 304 So. 2d 466 (Fla. 3d DCA 1974).

Specially requested instructions are generally within the discretion of the trial judge. Only where the failure to give a requested instruction is construed to be fundamental error under the particular facts of a case will it warrant a reversal of the conviction. Williams v. State, 247 So. 2d 425 (Fla. 1971). Requested instructions going to the credibility of a particular witness' testimony are properly refused as invading the province of the jury. Hall v. State, 83 So. 513 (Fla. 1919).

Due to the 1979 revisions to Florida's arson statute, new standard instructions on first and second degree arson and on fire bombs must be developed. The sub-

stantial changes from the old statute render most of the old instructions inapplicable; they do not recognize the reduced proof requirements which are of great advantage to the prosecutor. Until such time as standard instructions are developed for new Chapter 806, the courts will have to create their own instructions. Suggested instructions on the new arson statute are included in the Appendix of this manual for your consideraton or for submission to your trial judge.

POST INSTRUCTION CONSIDERATIONS

At the point the jury has received the case and retired to deliberate, your principal concern will be waiting out its verdict. However, it should be noted that even at this stage of the trial issues may arise which could affect the outcome of the case, particularly at the appellate level.

Rule 3.400, Fla.R.Crim.P., speaks to the materials the jury may take with them when they commence their deliberations. Those include: a copy of the indictment or information; verdict forms; jury instructions given; and items of physical evidence admitted in the case. Note that the langauge of Rule 3.400 is permissive and not mandatory. The discretion of the trial judge will control. However, if the jury requests a copy of the instructions given and the court summarily denies such request without notice to the defendant and both counsel, or without their presence, it may be prejudicial error. See Isley v. State, 354 So. 2d 457 (Fla. 1st DCA 1978). (Generally, any jury request after deliberations have begun must be received in the presence of the defendant and his attorney and the prosecutor). Note also that if the jury is furnished any instruction they must be furnished all instructions given by the court. See Morgan v. State, 377 So. 2d 212 (Fla. 3d DCA 1979).

If during deliberations the jury requests to be re-instructed on a point, the court must give complete instructions on that subject. See Henry v. State, 359 So. 2d 864 (Fla. 1978); Hedges v. State, 172 So. 2d 824 (Fla. 1965); Faulk v. State, 296 So. 2d 614 (Fla. 1st DCA 1974). Thus, if the jury requests re-instruction on one element of the charge, the court must fully re-instruct as to that element. It need not completely re-instruct on all elements of the charge, however. See Bristow v. State, 338 So. 2d 553 (Fla. 3d DCA 1976).

If your case involves taped statements of the defendant, these may be, and

should be, sent with the jury in deliberations, assuming they were received into evidence. You may not, however, send a transcript of the statement. See Waddy v. State, 355 So. 2d 477 (Fla. 1st DCA 1978). If the tapes were not initially sent back with the jurors, and they subsequently request to hear them, the tapes may be sent back to the jury room with a recorder to play them, The jury need not return to the courtroom to hear them.

If the jurors cannot agree as to the substance of a witness' testimony, they may not ask the witness to repeat his testimony, nor may they ask the judge what the witness actually said. The proper procedure is to have the court reporter read back the testimony from the stenographic notes, or play back the tapes of the testimony if it was recorded. The witness' testimony should be repeated in whole.

Finally, make sure there is no improper contact with the jurors during deliberations. The sanctity of the deliberations is held highly by courts, and if someone should improperly contact a juror or attempt in any way to influence his or her decision, a mistrial will likely be granted. The person most likely to cause a problem in this area, surprisingly, is the bailiff. Bailiffs know better than to intentionally do anything improper, but they may do something improper inadvertently. Often a juror may cause the problem, by idle conversation with the bailiff during meal times or breaks, or by volunteering a remark about the case to which the bailiff may quite naturally respond. It's hard to fault the bailiff when this occurs, and certainly you can't act as watchdog over the bailiff and jury. About all you can do is caution the bailiff in a diplomatic way, and hope the message gets through. For the implications of a bailiff's remarks to a jury, see McQuay v. State, 352 So. 2d 1276 (Fla. 1st DCA 1977) and Holzapfel v. State, 120 So. 2d 195 (Fla. 3d DCA 1960).

SENTENCING

If you have reached the point where you are concerned with the sentence to be imposed on the arsonist — congratulations! You have done your job well. Your only remaining task is to see that an appropriate disposition is made.

Of course, the matter of sentencing is in the sole discretion of the trial judge. Your input in the sentencing process is not to be overlooked, however. Your vehicle for such input is the pre-sentence investigation (PSI) provided under Rule 3.710 Fla.R.Crim.P. Rule 3.710 provides that the use of the PSI is discretionary with the trial judge except where the defendant is under 18 years of age or has been convicted of a felony for the first time. In those cases the PSI is mandatory if the court contemplates a sentence other than probation.

If the defendant should seek to waive PSI, or if the court of its own motion waives PSI, your best opposing argument is suggesting that the court should have the benefit of a complete investigation into the offense, that there are several agencies involved, and that the case presents a complex factual background which can only be brought out fully and fairly through a PSI. Hopefully, the court will agree.

Once the PSI has been ordered, you should contact the probation officer who will be preparing it. Tell him you will be making a comment and will have it prepared for him. Tell him you want all the investigating agencies to be represented in the PSI. Make sure he contacts the victim for his comments, as well. Then contact those agencies and the victim, and explain to them what they may comment on in the PSI. Many fire-control personnel have never been acquainted with a PSI, and almost certainly your victim has not. Encourage them to make any relevant comments they feel appropriate, in detail. Your own comments, of course, will be vitally important to the court's consideration. Take the time to draft a well-articulated comment on the case. Unfortunately, judges are not immune from the misconceptions of the general public on the nature of arson as a crime; indeed, yours may be the only arson case he has ever passed sentence on. Remind the judge of the seriousness of arson as a crime. Point out the legislature's intent to treat arson as a major crime, which is reflected in the strong sanctions of the new

statute. Then urge the court to impose a sentence consistent with the severity of the offense and the facts of the case.

The greatest incentive to the arsonist remains the low risk of detection and punishment. When arson ceases to be a safe bet, we can look for a decline in the incidence of arson. Effective prosecution and certain punishment are the means to that end.

ARSON INVESTIGATOR'S CHECKLIST

THE INCIDENT

1. Date and time of alarm.
2. Location of fire, verify correct address.
3. Property description (1-2-3 stories, construction, occupancy).
4. Proper name of fire company that responded.
5. Official designation of cause by fire department records.
6. Person who discovered fire.
   - A. Name, address, sex, race, DOB, POB.
   - B. His or her observations.
7. Person who turned in alarm.
   - A. Name, address, sex, race, DOB, POB.
   - B. His or her observations.
   - C. Means of reporting fire.
   - D. Delay in reporting (cause for delay).
8. Fatalities or injuries.
   - A. Name, address, sex, race, DOB, POB.
   - B. If fatality, official cause of death from medical examiner, carbon monoxide and alcohol content of blood.
   - C. If injury, extent of burns.

THE BUILDING: Ownership/Insurance/Occupancy/Physical Characteristics

1. Ownership.
   - A. Financial Interest in Building.
   - B. Is the owner sole owner or part of partnership or joing tenancy?
   - C. How did owner acquire property?
     - (1) From whom? When? Cost?
     - (2) Who was the real estate agent; title company attorneys?
     - (3) How was property conveyed?
     - (4) Who holds the mortgage?

a. Down payment?

b. Monthly payments? (Are they current?) Paid to whom?

c. Relationship between current owner, seller, and mortgagee.

(5) Has the building changed hands more than once in the last two years?

(6) Are property taxes and bills relating to property paid?

D. Was the building rental property?

(1) Was it rented or vacant at the time of the fire?

(2) Were rent payments current?

(3) Was the property residential or commercial?

(4) What were the terms of the lease, if any?

2. Condition of Building.

A. Defects before fire?

B. Has the building been up for sale? (Offers and asking price).

C. General condition of the area?

(1) Recent trends (including zoning changes).

D. Inventory of contents from owner (check against the photos).

(1) Owner-prepared diagram of location of furniture — valuable objects (if owner occupied).

(2) Was anything removed from the building before the fire? After the fire?

E. Check into recent building and housing inspections.

(1) Building code violations?

(2) Was the building condemned?

3. Insurance.

A. Was building insured?

B. Name of Insurance Company and policy number.

(1) Name of insurance agency and address.

(2) Dates of policy (inception and lapse).

(3) Amounts of insurance (building, contents, business interruption, etc.).

(4) Person who approved policy.

(5) Beneficiary of insurance policy.

C. Limits of insurance.

(1) How was the amount of insurance determined?

(2) How does the appraised value compare to the property limits?

(3) Has the level of insurance been raised recently? (An inordinate amount).

D. Was a claim made on the policy?

(1) Who made the claim? (by mail?).

(2) Who was the adjuster?

(3) Get a copy of proof of loss.

a. Are there material misstatements?

b. Any evidence of false statements?

(4) Has the insurance company investigated the claim?

a. Get any relevant information from the insurance investigator.

b. Get any depositions given by the insured.

(5) Was the claim approved or disapproved?

a. Who approved the claim?

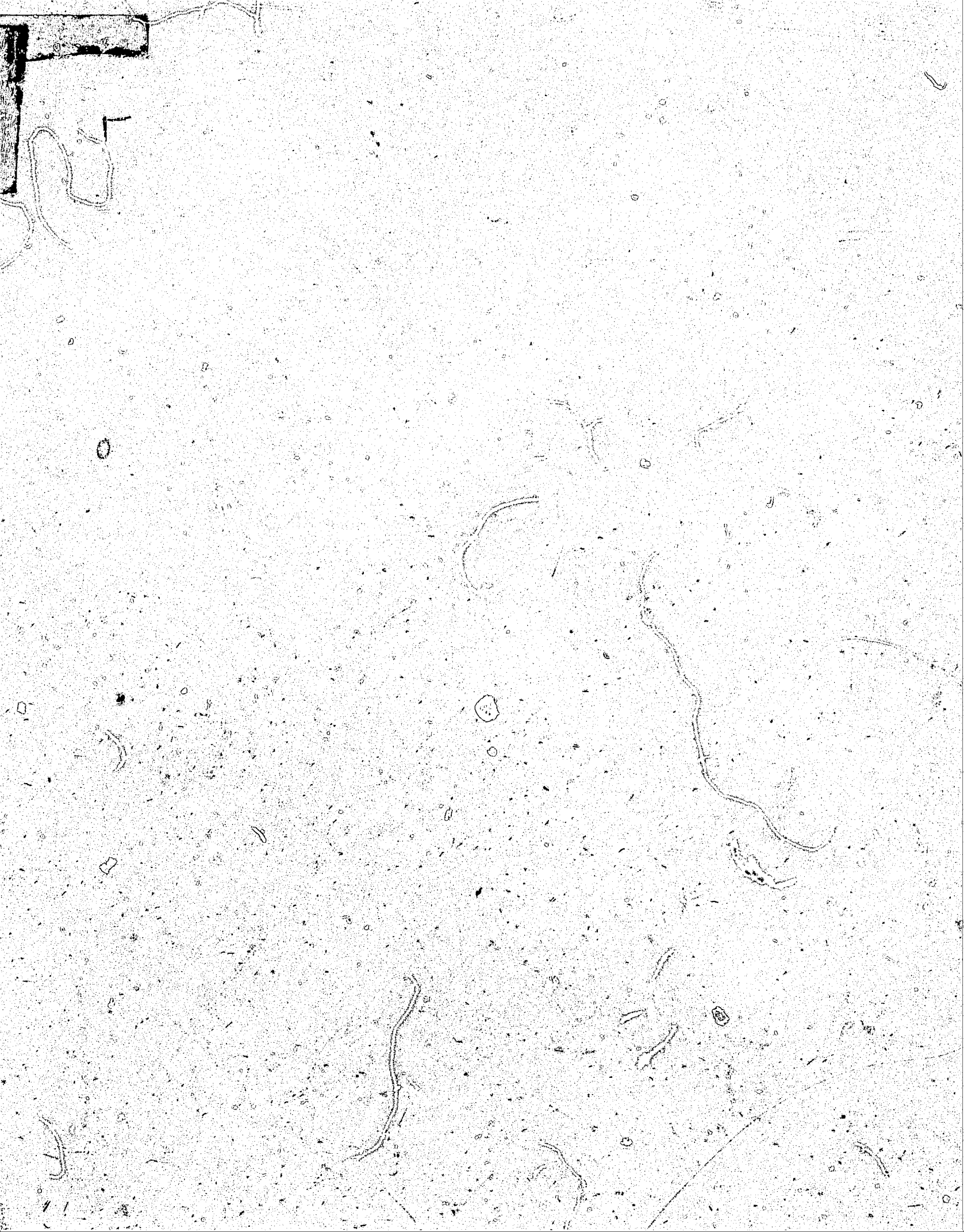
b. By whom and to whom were checks made?

c. Was payment made through the mail (possible mail fraud charges)?

E. What is the loss history of the insured? Of the mortgagee(s)?

EXTERIOR VIEW: Concurrent with Sketch and Photography.

1. Fire extent and intensity.
2. Character of destroyed parts.
3. Fire outlet from openings — note window glass.
4. Condition of doors and windows.
   A. Open or closed.
   B. Locked or unlocked.
   C. Forced.
5. Tire tracks, footprints, containers.
6. Locate electrical and/or gas supply.
7. Indicate compass setting, weather, wind direction.



CONTINUED

1 OF 2

INTERIOR VIEW: Concurrent with Sketch and Photography.

1. Locate interior partitions.
2. Locate objects and furniture throughout.
3. Observe heat line.
4. Indicate path of travel of fire, heat and smoke — natural or unnatural.
5. Fire development — normal or accelerated.
6. Determine portion involvement.
7. Absence of furniture, pictures, etc.
8. Latent print possibility, (below heat line).
9. Character of char pattern, depth, flash over, high, low, drop down fire possibility.
10. Fire aimed at destruction of records.
11. Worthless items substituted for valuable items.

POINT OF ORIGIN SEARCH AND CAUSE AND SOURCE OF IGNITION

1. Single.
2. Multiple.
   - A. Unconnected and simultaneous.
   - B. Principles of heat transfer application.
     - (1) Convection-heat particles in motion.
     - (2) Conduction-direct contact, solid-liquid-gas.
     - (3) Radiation-direct line to object.
3. Flammable liquid accelerant.
   - A. Odor of petroleum product.
   - B. Floor or floor covering burn pattern.
   - C. Container at scene (common or uncommon to occupancy).
   - D. Floor char greater than ceiling char.
   - E. Spalling of concrete flooring.
   - F. Sand or earth under suspect area.
   - G. Liquid under baseboard edge, in cracks in floor.
   - H. Bottom edge of door charred.
   - I. Explosimeter.

4. Incendiary devices.
   A. Candles.
   B. Cigarette with match book cover.
   C. Trailers.
   D. Timing device.
   E. Chemicals.
5. Sources of ignition.
   A. Open flame.
   B. Electric arcs, short circuits.
   C. Heating and cooking devices.
   D. Moving machinery (friction).
   E. Chemical processes.
   F. Spontaneous ignition.
6. Condition of electrical system.
   A. Fuses, bridged, pennies behind fuss or circuit breaker — heat indication.
   B. Overload circuit.
   C. Switch and wall outlet condition.
   D. Aluminum vs. copper wiring.
   E. Insulation condition (loose or melted to wire).
   F. Short circuits (ping short vs. hold short).
   G. Pointed wire ends indicate caused by fire.
7. Condition of electrical equipment.
   A. Approved type.
   B. Defective — intentional or unintentional.
   C. Material in contact with heat element — light bulb, etc.
8. Condition of heating equipment.
   A. Defective stove (electric, gas or kerosene).
   B. Defective heating unit (electric, gas or kerosene).
   C. Overheated steam pipes (Pyphoric Carbon).
   D. Faulty flue.
   E. L.P.G. involved.

CHECK LIST FOR INTERVIEW OF WITNESSES: Persons to contact; eye witnesses; neighbors; tenants; owners; firefighters.

1. Name, address, sex, race, DOB, POB.
2. Reason for presence in and around area.
3. Smoke (color and odor classification).
4. Flame.
   - A. Intensity and color.
   - B. High or low.
   - C. Where first observed.
   - D. Travel of flame.
5. Persons or cars in area.
6. Last person to leave and departure time.
7. Re-enact activities of last person to leave.
8. Keys to building.
9. Money — stock — equipment shortage.
10. Friction between employer and employee.
11. Marital problems.
12. Threats.
13. Union organizers.
14. Organized crime.
15. Radical movement (Weatherman, etc.).
16. Competitors.

ATTEMPT TO DEVELOP MOTIVE

1. Fraud.
2. Hate — spite — revenge.
3. Cover up another crime.
4. Pyromania.
5. Emotionally disturbed.
6. Vandalism.
7. Anger.
8. Juveniles.

9. Labor disputes.
10. Thrills.

CONSENT TO INVESTIGATE FOR FIRE CAUSE

I, _____ (name of person giving consent), the _____ (owner, tenant, etc.) of a _____ (type of building, vehicle or vessel) located at _____ (complete address — including city or township) _____ do hereby freely and voluntarily give my consent to _____ (name of official) of the _____ (department) or his designate to examine the above-described premises for the purpose of discovering and determining the cause of a fire which occurred at the above-described premises on _____ (date) _____. I hereby further give my consent to the aforementioned persons to remove any and all items, which may be related to the cause of the aforementioned fire for further examination, analysis and/or testing.

(Signed) _____

(Witness) _____

Date: _____

Time: _____

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT,
IN AND FOR _____ COUNTY.

STATE OF FLORIDA
COUNTY OF _____.

AFFIDAVIT FOR ADMINISTRATIVE WARRANT

BEFORE ME, _____ (Judge) _____, personally appeared affiant, _____ (Name) _____, a _____ (Position) _____ with the _____ (Agency) _____ Department, who first being duly sworn makes this affidavit in support of the issuance of an administrative warrant, and, on oath, says:

1) Florida Statutes Section 633.03 provides for the State Fire Marshal or his agents to conduct an investigation to determine the cause and origin of every fire in the State in which property is damaged or for which there exists probable cause to believe the fire was the result of carelessness or design.

2) That a fire occurred at

(Briefly describe property to be searched; include the address and time and date of the fire and comments on the occupance and/or security of the premises; state that property has been damaged.) (Caveat: Always verify correct address - Use legal description of property rather than street address or describe location and premises with particularity.)

and the cause of the fire is presently under investigation.

3) The affiant believes that for the purpose of public safety, so as to prevent such fires from re-occurring and to provide information for training of public safety personnel, it is necessary to determine the cause and origin of the aforementioned fire.

4) Affiant believes the only effective means and method for determining the cause and origin of the aforementioned fire is to physically enter the premises, examine the premises including the photography of same and, if necessary, remove samples of materials that may be connected to the cause and origin of the fire for further examination, analysis and/or testing.

WHEREFORE, the affiant requests this court to issue an administrative

warrant for the purpose of permitting affiant and other fire and law enforcement officials, as reasonably necessary to conduct this investigation, to enter the aforementioned premises for the purpose of determining the cause and origin of the aforementioned fire. Said entry or entries will be made (describe when) with whatever equipment as is necessary to make an investigation for said purpose.

_____
(Affiant)

Sworn and subscribed to before me, this _____ day of _____, 19 ____.

_____
County / Circuit Court Judge

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT,
IN AND FOR _____ COUNTY.

STATE OF FLORIDA
COUNTY OF _____.

ADMINISTRATIVE SEARCH WARRANT

TO ANY FIRE AND LAW ENFORCEMENT OFFICIAL OF SAID COUNTY:

THE ATTACHED AFFIDAVIT having been sworn to by the affiant,

(Name) _____, (Department) _____,

before me this day, based upon the facts stated therein, cause having been found, in the name of the State of Florida, I command that you enter the following described place:

_____ located at

(Legal Description) _____

in _____ County, State of Florida, to locate the point of origin and determine the cause of a fire that occurred therein on (Date) _____. You are authorized to enter, inspect, photograph and remove samples of material, which may be connected to the origin or cause of the fire for further examination, analysis and/or testing. Said entry or entries will be made (Describe when) _____ with whatever equipment as is reasonably necessary to complete the examination to determine cause and origin of this fire.

WITNESS my hand and seal this _____ day of _____, 19 ____.

_____
County / Circuit Court Judge

RETURN TO ADMINISTRATIVE WARRANT

STATE OF FLORIDA
COUNTY OF _____.

I HEREBY CERTIFY AND RETURN that by virtue of the within search warrant to me directed, I have searched for those items of physical evidence related to the origin and cause of a fire, at the place therein described:

(Use one of the following.)

1.) And that I have such items of physical evidence related to the origin and cause of a fire before the Court described as follows:

(List and describe or attach separate inventory page if needed.)

2.) And that I have been unable to find such items of physical evidence related to the origin and cause of a fire.

Signed: _____
(name)

_____
(department)

Dated: At _____, Florida, this

_____ day of _____, 19 ____.

ADMINISTRATIVE WARRANT INVENTORY

I, _____, in the presence of

_____, at _____

_____

County of _____, State of Florida, did seize the following items from the above described location, on _____

_____, 19 _____.

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Dated: _____, 19 _____.

Signed: _____

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
IN AND FOR _____ COUNTY.

STATE OF FLORIDA
COUNTY OF _____.

AFFIDAVIT AND APPLICATION FOR SEARCH WARRANT

BEFORE ME, _____,

in and for _____ County, Florida, personally appeared the affiant,

_____, who first being duly

sworn said affiant believes and has reason to believe that a certain (vehicle) (premises)

located in _____ County, Florida, described as follows:

(Describe the structure and its components, e.g.: a four room apartment, the ground floor front of a multiple dwelling; a garage, etc. Describe vehicle or boat as to make, model, year, serial number, and photo where possible. Give extremely detailed directions to the location, from a well-known reference point in town.)

being the (vehicle owned, registered) (premises) occupied by or under the control of

_____

and there is now being kept on the above described (vehicle) (premises) certain items,

to-wit:

(Refer to Fla. Stat. Sec. 933.18. Evidence of Arson which would be searched for and seized include: charred wood; fuse trails; accelerant traces.)

which is being kept and used in violation of the laws of the State of Florida, to-wit

the laws prohibiting Arson, and the probable cause of affiant is as follows:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

On the basis of your affiant's experience and from the facts set forth herein, your affiant believes and has good reason to believe that the property (and curtilage) described herein to be searched, as heretofore more particularly described, are being used to violate the laws of the State of Florida, prohibiting:

(insert the statutory offenses)

WHEREFORE, the affiant requests this court to issue a warrant permitting affiant and other authorized fire and law enforcement officials to enter aforementioned premises for the above described material evidence and to seize and secure same, if found, with whatever equipment is necessary.

(Affiant)

Sworn and subscribed before me, this ____ day of _____, 19 ____.

County / Circuit Judge

The above application for Search Warrant coming on to be heard and having examined the application under oath and the above sworn affidavit set forth and the facts alleged therein and thereupon being satisfied that there is probable cause to believe that the grounds set forth in said application and the facts alleged to exist and that the law is being violated as alleged, I so find a Search Warrant is hereby allowed and issued.

This ____ day of _____, 19 ____.

JUDGE in and for _____ County, Florida.

IN THE CIRCUIT COURT OF THE
____ JUDICIAL CIRCUIT,
IN AND FOR _____ COUNTY.

STATE OF FLORIDA
COUNTY OF _____.

SEARCH WARRANT

IN THE NAME OF THE STATE OF FLORIDA, TO ALL AND SINGULAR:

The Sheriff of _____ County, Florida, and his lawful Deputies, All Police Officers in _____ County, Florida, The Commissioner of the Florida Bureau of Law Enforcement or any of his Duly Constituted Agents; The State Fire Marshal or any of his Duly Designated Agents.

WHEREAS, complaint on oath and in writing, supported by affidavit has this day been made before me, the undersigned Judge of the _____ Court, in and for _____ County, Florida, by _____ _____. That affiant has reason to believe and does believe certain (premises) (vehicle) located in _____ County, Florida, described as follows, to-wit:

(Describe as indicated in the affidavit. For rural locations give explicit directions, beginning with a well known intersection and mileage to the structure — also attach photo if possible).

being the (premises) (vehicle) occupied by or under the control of _____ _____ and there is being kept on or in said (premises) (vehicle) certain _____ _____ _____ _____ _____

which is being kept and used in violation of the Laws of the State of Florida, to-wit, the laws prohibiting the _____ _____,

contrary to Chapter _____, Florida Statutes.

That the facts tending to establish the grounds and the probable cause of affiant for believing such facts exist as follows:

And it appears to the Court that affiant is a reputable citizen of _____ County, Florida, and that the facts set forth in said affidavit show and constitute probable cause for the issuance for this WARRANT and the Court being satisfied of the existence of said grounds in said application, or that there is probable cause to believe in their existence.

NOW, THEREFORE, you, or either of you, are hereby COMMANDED IN THE NAME OF THE STATE OF FLORIDA, in the daytime or in the nighttime, upon any day of the week, including Sunday, to enter the hereinbefore specified property (and the curtilage thereof), and to search therein for said property, and if the same, or any part thereof shall be found on said premises, then you are hereby authorized and commanded to seize said property and to bring it before this court or a court of competent jurisdiction and to arrest any person or persons found violating the law in connection with the same, and to bring them before the Honorable Court of competent jurisdiction to be dealt with according to law, and to forthwith make return of your doing in the premises upon the execution of this warrant, which you are hereby ordered to execute within ten days of issuance, as provided by law.

YOU ARE FURTHER COMMANDED, in the event that you seize any of the said property hereinbefore described, to make up, at the time and place of seizure, a full and complete inventory of all things seized and taken, in duplicate, signed by you, and to deliver one copy of said duplicate to the person named in the warrant, if said person is not present or should no person be named herein, then to some person in charge of, or living on the premises, and in the absence of any such person, to leave the same on the premises.

WITNESS my hand and seal this ____ day of _____, 19___.

_____

JUDGE, in and for _____ County, Florida.

Received this search warrant on _____, 19 ____,
and executed the same on _____, 19 ____, at
_____,
by delivering a true copy thereof to _____,
and at that time showing _____,
this original search warrant and reading to _____,
and explaining to _____, the contents thereof,
and my making diligent search as herein described, upon which search I found:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

I, _____, the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property, appliances, paraphernalia and devices taken by me on the said warrant.

_____

Sworn and subscribed before me this
____ day of _____, 19 ____.

_____

My Commission Expires:

BUSINESS RECORDS SEARCH CHECKLIST

1. General ledgers.
2. General journals.
3. Cash disbursement journal.
4. Cash receipts journal.
5. Vouchers.
6. Paid bills.
7. Invoices.
8. Billings.
9. Bank statements.
10. Cancelled checks and check stubs.
11. Payroll records.
12. Contracts and copies of contracts.
13. Subcontracting agreements and purchase orders.
14. Records of equipment rental.
15. Financial statements.
16. Bank deposit tickets.
17. Retained copies of income tax forms.
18. Retained copies of payroll tax returns.
19. Purchase journals.
20. Accounts payable ledgers.
21. Accounts receivable ledgers.
22. Stock transfer book.
23. Corporate minutes.
24. Corporate charter.
25. Records of permits and license fees.
26. Requisitions by separate subcontractors and trade payment breakdowns.
27. All other requisitions, invoices, and estimates.
28. Bids, solicitations to bids, and worksheets prepared in connection.
29. Records of payment for all materials, supplies, and equipment rentals.
30. Written communications or records of oral communications with subcontractors, vendors, suppliers, architects, public officials, autorities, and public utilities.

SUBJECT MATTER OF TESTIMONY OF FIREMAN WITNESS

The following sample questions were reprinted with permission from Fladwed and Kirk, Preparation and Trial of Arson Case, 19 AM. JUR. TRIALS 685, 770-73 (1972).

OBSERVATIONS ON APPROACH TO FIRE

Q. What type of building was on fire?

Q. How tall was it?

Q. Did it appear to be occupied?

Q. How was it constructed?

Q. Where on the block was it located?

Q. From what direction did you approach it?

Q. Was there any wind?

Q. What direction did the wind come from?

Q. How strong was it blowing?

Q. What was the color of the smoke?

Q. How much smoke was there?

Q. Did the fire appear to be spreading rapidly?

Q. Did you observe any people leaving the area?

Q. Did they appear to be hurrying?

Q. Were any of them in cars?

Q. What were the license numbers?

OBSERVATIONS ON ARRIVAL AT FIRE

Q. How did you get into the building?

Q. Did you have to break the door window and force your way in?

Q. Before doing so did you check to see if the door window was locked?

Q. Did you check to see if anyone had entered the building before you?

Q. Did you check to see if the door or window had been jimmied before you got in there?

Q. After you got in did you see in how many places the fire was burning?

Q. In what direction did the fire travel?

Q. How rapidly did it travel?

Q. Did the heat seem unusually intense?

Q. What color were the flames?

Q. Was there any odor of gasoline in the area?

Q. What was the first thing you did after you got into the building?

Q. Did you have any difficulty in extinguishing the fire?

Q. Did you use anything other than water in fighting it?

CONDITION AND CONTENTS OF BUILDING

Q. The fire was in the bedroom, was it not?

Q. The window curtains were not pulled down, were they?

Q. There was no furniture in front of the windows, was there?

Q. Nothing obstructed your view in the building to the outside, did it?

Q. Were the closet doors open?

Q. The closet was full of clothes, wasn't it?

Q. The room had the usual bedroom furniture in it, did it not?

Q. None of the dresser drawers were open, were they?

Q. Were there any holes in the walls?

Q. Were there any holes in the floor?

Q. Were any of the interior doors open between the various rooms?

Q. Was the sprinkling system working?

Q. Were the fire doors in working order?

Q. None of the doors were fastened open, were they?

MISCELLANEOUS INDICIA OF ARSON

Q. When you arrived at the fire it was burning in only one portion of the building, was it not?

Q. Did you explore the building to ascertain if there was another fire burning anywhere else?

Q. Did you examine the building to see if there was any plant or place where there had been an unsuccessful attempt to start the fire?

Q. Were there any electrical appliances in the vicinity of the place where the fire was burning?

Q. Did you check to see if there were any unburned matches, matchbooks or cigarette stubs anywhere around on the floors?

Q. Did you check the gas appliances to see if there was any escaping gas?

Q. Did you notice any odors? Gasoline, or anything of that nature?

Q. You know what we mean by trails between fires, do you not?

Q. What are they?

Q. Did you see any of them?

Q. Did you check to see whether there were any buckets or cans around there, in the vicinity of the fire?

ARSON INVESTIGATOR EXPERT QUALIFICATION CHECKLIST

The following checklist is reprinted with permission from Fladwed and Kirk, Preparation and Trial of Arson Case, 19 AM. JUR. TRIALS 685, 767-68 (1972):

1. Years of experience as fireman.
2. Years of experience on arson squad.
3. Duties on arson squad.
4. Rank or rating in the department and length of time post held.
5. Experience in other fire-fighting agencies. This might include duty as a fire control officer in the military service.
6. Investigative experience with a national fire protective association, the National Board of Fire Underwriters, or other agencies.
7. Experience in investigative work other than arson.
8. Experience with agencies testing fire hazards of materials or types of construction. This might include such diverse groups as Factory Mutual Engineering Division, National Bureau of Standards, Stanford Research Institute, or innumerable other organizations.
9. Experience in fire marshal's office.
10. Academic training in arson investigation.
11. Academic training in chemistry, physics, or engineering.
12. Special institutes on arson investigation attended.
13. Seminars on arson investigation attended.
14. Courses taken or taught at various places.
15. Articles on arson investigation which witness has written.
16. Membership in International Association of Fire Chiefs.
17. Membership in International Association of Fire Fighters.
18. Membership in International Association of Arson Investigators.
19. Membership in National Association of Fire Investigators.

    The two latter organizations appear to be somewhat competitive; it is doubtful if any one individual would be a member of both.
20. Membership in Society of Fire Prevention Engineers.

21. Individual membership in National Fire Prevention Association.

22. Number of fires investigated.

23. Number of times he has testified as an expert.

24. Courts in which he has testified as an expert.

LABORATORY EXPERT QUALIFICATION CHECKLIST

The following checklist of questions is reprinted from A. Moenssens and F. Inbau, SCIENTIFIC EVIDENCE IN CRIMINAL TRIALS 52-53 (2d ed. 1978).

Q. I am going to ask a few preliminary questions about yourself, your work, and your experience, so the jury will know just who you are, what you have done, and your qualifications to speak in the field about which you have been called to testify.

Q. What is your title?

Q. What position do you hold?

Q. You are a (Chemist, pathologist, ect.), is that correct?

Q. Will you briefly describe, please, what is the subject matter of that specialty?

Q. And do you specialize within that field?

Q. What is your subspecialty?

Q. What is that concerned with?

Q. Are you also certified as a specialist in the field of . . . ?

Q. What does that certification involve?

Q. How long have you been so certified?

Q. Concerning your formal education, will you state what colleges and universities you attended, if any, and what degrees you may have received?

Q. Was that degree in any major field?

Q. What field was that?

Q. Are you licensed as a . . . in the state of . . . ?

Q. How long have you been licensed?

Q. How long have you been in practice in that specialty?

Q. Will you tell us, please, what positions you have held since the completion of your formal education, and the number of years in each?

Q. You said (with respect to prior important work) you were at . . . ; will you tell us what you did there?

Q. What are the duties and functions of your present position?

Q. How long have you held that position?

Q. In the course of your work, have you had occasion to conduct examinations of (specifying sort involved here)?

Q. How many such examinations have you conducted?

Q. Have you done any teaching or lecturing in the field of . . . ?

Q. When and where?

Q. Have you published any works in the field of . . . ?

Q. What are the titles of those works?

Q. Are you a member of any professional associations?

Q. Do you hold any special positions therein? (As to this, of course, a cross examiner may inquire as to whether the only qualification for membership is dues payment; so if that be the case the question should be omitted.)

Q. Have you ever previously testified as an expert witness in court?

Q. And has that been on a number of occasions?

ARSON – FIRST DEGREE
F.S. 806.01(1)

2.06 Crime

It is the crime of arson in the first degree for any person to willfully and unlawfully damage or cause to be damaged by fire or explosion any dwelling or its contents, or any other structure or contents thereof where persons are normally present, or any structure where persons are not normally present if the person damaging or causing damage knew or had reasonable grounds to believe that the structure was occupied by a human being.

2.07 Elements

The essential elements of this offense which must be proved beyond a reasonable doubt before there can be conviction in this case are that:

1. There was a structure as designated in the information (indictment) in this case.

2. The structure was a dwelling.[1]

   a. The structure was one in which human beings are normally present.[1]

   b. The defendant knew or had reasonable grounds to believe that the structure was occupied by a human being.[1]

3. The defendant did damage or did cause to be damaged the structure or its contents by fire or explosion.[2]

   a. The defendant did damage such structure by fire or explosion.[3]

4. Such damage was done willfully and unlawfully.

Definitions

"Willfully" means intentionally, knowingly and purposely.

"Unlawfully" means wrongfully, intentionally, without legal justification or excuse.

As used in this case, "structure"[4] means any building of any kind, any enclosed area with a roof over it, any real property and appurtanances thereto, any tent or other portable building, and any vehicle, vessel, watercraft, or aircraft.

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[1]Use only one of these charges, depending on the structure involved.

[2]Use this instruction only if the structure involved is a dwelling or a structure presumed to be occupied (with instructions 2 or 2a).

[3]Use this instruction if the structure involved requires proof as to the defendant's knowledge or belief that it was occupied.

[4]This definition should be used only when the charge or evidence makes it necessary to enlarge upon the generally-accepted meaning of "structure."

Structures where persons are presumed normally present at all hours of the day include jails, prisons or detention centers; hospitals, nursing homes, or other health care facilities.

Structures where persons are presumed present during normal operating hours include: department stores, office buildings, business establishments, churches, and educational institutions.

Proof

In the case of damage to a structure not presumed to be occupied, if the other elements of this offense are proved beyond a reasonable doubt, but it is not proved beyond a reasonable doubt that the defendant knew or should have known that there was another human being in the structure damaged by the defendant as charged in this case, you should find the defendant guilty of the lesser included offense of willful and unlawful damage of an unoccupied structure by fire or explosion.

ARSON — SECOND DEGREE
F.S. 806.02(2)

2.06 Crime

It is the crime of arson in the second degree for any person to willfully and unlawfully damage or cause to be damaged by fire or explosion any structure, whether property of himself or another person.

2.07 Elements

The essential elements of this offense which must be proved beyond a reasonable doubt before there can be conviction in this case are that:

1. There was a structure as designated in the information (indictment) in this case.

2. The defendant did damage such structure by fire or explosion.

3. Such damage was done willfully and unlawfully.

Definitions

"Willfully" means intentionally, knowingly and purposely.

"Unlawfully" means wrongfully, intentionally, without legal justification or excuse.

As used in this case, "structure"[1] means any building of any kind, any enclosed area with a roof over it, any real property and appurtenances thereto, any tent or other portable building, and any vehicle, vessel, watercraft, or aircraft.

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[1] This definition should be used only when the charge or evidence makes it necessary to enlarge upon the generally-accepted meaning of "structure".

ARSON – FIRE BOMB
F.S. 806.111

2.06 Crime

It is a crime for any person to manufacture, possess, transport, or dispose of a fire bomb with intent that it will be willfully and unlawfully used to damage by fire or explosion any structure or property.

2.07 Elements

The essential elements of this offense which must be proved beyond a reasonable doubt before there can be a conviction in this case are that:

1. The defendant did manufacture, possess, transport, or did give, give away, loan, offer, offer for sale, sell, or transfer to (person alleged) a fire bomb.

2. At the time he did so he had a fully-formed conscious intent and purpose that the fire bomb would be willfully and unlawfully used to damage by fire or explosion a structure or property.

Definitions

"Willfully" means intentionally, knowingly and purposely.

"Unlawfully" means wrongfully, intentionally, without legal justification or excuse.

A "fire bomb" is a container containing flammable or combustible liquid with a flash point of two hundred degrees Fahrenheit or less, having a wick or similar device capable of being ignited or other means capable of causing ignition, but not a device commercially manufactured primarily for light, heating or cooking, such as a lamp or lantern, a portable heater, or a camp stove.[1]

As used in defining this crime, "dispose of" means to give, give away, loan, offer, offer for sale, sell or transfer.

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[1]This highly technical statutory definition requires the testimony of an expert as to the flashpoint of the liquid. It is simpler for the expert to explain the definition than for the court to try to restate it in simple terms in the instructions.

CITATIONS AND REFERENCES

THE ARSON INVESTIGATION

STATE FIRE MARSHAL'S AUTHORITY

Chapter 633 of the Florida Statutes:

633.01 — Shall enforce all laws and provisions relating to suppression of arson and the investigation of fires.

633.02 — Shall appoint agents as may be necessary to carry out his duties.

633.03 — Shall investigate cause, origin, and circumstances of every fire where property is damaged in which there is probable cause to suspect arson.

633.101 — May take sworn testimony, may cause arrests, may summon and compel attendance of witnesses involved in an investigation, and may seize personal property to be held for evidence.

633.111 — Shall maintain records and files which are confidential and exempt from public inspection and not subject to subpoena absent court order.

633.13 — State Fire Marshal's authority may be exercised by his agents individually or in conjunction with other state and local officials.

633.14 — Agents have authority to serve summonses, make arrests, carry firearms, and make court authorized searches and seizures.

633.175 — May require any insurance company investigating property loss through fire to release information concerning the loss.

TECHNIQUES AND ASPECTS OF INVESTIGATION

The following sources were used in this section. These and many other excellent references on investigative technique are on file with the Office of the Florida State Fire Marshal.

Barracato, J., FIRE . . . IS IT ARSON? (1979).

Carter, R., ARSON INVESTIGATION (1978).

Gwertzman, Arson and Fraud Fires, 12 FORUM (pt. 2) 827 (1977).

Kennedy, J., FIRE AND ARSON INVESTIGATION (1962).

Kirk, P., FIRE INVESTIGATION (1969).

National College of District Attorneys, Technical Methods in Arson

Investigation, ARSON INVESTIGATION AND PROSECUTION HANDBOOK (1980).

Sansone, S., MODERN PHOTOGRAPHY FOR POLICE AND FIREMEN (1971).

Stickney, How to Identify Fire Causes, NFPA FIREMAN MAGAZINE (Nov./Dec. 1960).

Thaman, A Manual for the Operation of a Portable Gas Chromatograph, ARSON HANDBOOK FOR OHIO PROSECUTORS (1979).

Thaman, Sampling Procedures in Suspected Arson Cases, ARSON HANDBOOK FOR OHIO PROSECUTORS (1979).

THE ICEBURG CRIME: WHAT POLICE OFFICERS SHOULD KNOW ABOUT ARSON (undated pamphlet).

Wisconsin Department of Justice, CRIMINAL INVESTIGATION AND PHYSICAL EVIDENCE HANDBOOK (2d ed. 1973).

SEARCH AND SEIZURE

THE REASONABLE EXPECTATION OF PRIVACY TEST

Katz v. United States, 389 U.S. 347 (1967) (set forth the reasonable expectation of privacy test; physical invasion to violate privacy no longer required).

Olmstead v. United States, 277 U.S. 438 (1928) (wiretap did not involve physical invasion of property).

Goldman v. United States, 316 U.S. 129 (1942) (also physical invasion doctrine; overruled by Katz).

THE EMERGENCY EXCEPTION

Michigan v. Tyler, 436 U.S. 499 (1978) ("fire scene emergency" justifies arson investigator's immediate search and seizure operations; subsequent investigations must be pursuant to administrative or criminal search warrants, depending on circumstances).

Mincey v. Arizona, 437 U.S. 385 (1978) (Arizona's murder scene exception to search warrant requirement declared unconstitutional).

Warden v. Hayden, 387 U.S. 294 (1967) (hot pursuit emergency exception to search warrant requirement upheld).

Ker v. California, 374 U.S. 23 (1963) (Imminent destruction of evidence created sufficient emergency to uphold warrantless seizure).

United States v. Barone, 330 F.2d 543 (2d Cir.), cert. denied, 377 U.S. 1004 (1964) (emergency created by screams in middle of night justified warrantless entry).

Webster v. State, 201 So. 2d 785 (Fla. 4th DCA 1967) (probability of unnatural death creates emergency situation).

United States v. Green, 474 F.2d 1385 (5th Cir. 1973) (a fire recognized as sufficient emergency for firemen to enter to extinguish blaze and for investigator to enter to ascertain cause).

Castle v. State, 305 So. 2d 794 (Fla. 4th DCA 1974) (sufficient emergency created by a fire for initial entry and public safety reasons justified removal of dangerous evidence — a gasoline can).

PLAIN VIEW DOCTRINE

Katz v. United States, 389 U.S. 347 (1967) (items in plain view of the public are not subject to fourth amendment protection).

State v. Ashby, 245 So. 2d 225 (Fla. 1971) (stolen property seizure was upheld because it was in officer's plain view from a place where he had a legal right to be).

Coolidge v. New Hampshire, 403 U.S. 443 (1971) (seizure of items in plain view would be upheld even if officer's presence on property was pursuant to emergency exception).

Michigan v. Tyler, 436 U.S. 499 (1978) (items which fall into an arson investigator's plain view during the course of the investigation may be lawfully seized).

United States v. Green, 474 F.2d 1385 (5th Cir. 1973) (fire scene emergency justified officer's presence and items which fell in plain view could be lawfully seized).

ADMININISTRATIVE AND CRIMINAL SEARCHES

Camara v. Municipal Court, 387 U.S. 523 (1967) (administrative search — local building code inspection of a private dwelling — was held to fall within the warrant requirement of the fourth amendment; note, however, this does not apply in emergency situations).

Frank v. Maryland, 359 U.S. 360 (1959) (warrantless public health and safety inspections upheld; overruled by Camara).

See v. City of Seattle, 387 U.S. 541 (1967) (warrantless administrative inspections of commercial premises held invalid).

Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (OSHA inspector's attempted warrantless search of business premises held invalid; administrative search warrant requires less than probable cause — valid public interest will suffice).

Alford v. State, 307 So. 2d 433 (Fla. 1975) (evidence not specified in search warrant may be seized if it falls into view inadvertently while officer is conducting search pursuant to a warrant).

ARSON AND RELATED STATUTES

FLORIDA ARSON LAW — CHAPTER 806, F.S.

Comment, Fla. Stat. § 806.01: Florida Arson Law — The Evolution of the 1979 Amendments, 8 FLA. ST. U.L. REV. 81 (1980), as reprinted in "Florida Arson Law — Chapter 806, F.S." of this manual, contains several notations of legislative history on the 1979 Florida Arson Law. They are found at footnotes 47, 55, 57, 59, 66, 75, 79, 92 and accompanying text.

State v. Tomblin, No. 80-241 (Fla. 5th DCA) (appeal pending as of Aug. 1, 1980) (state appeal of dismissal of case brought under 1979 Florida Arson Law).

Williams v. State, 132 So. 186 (Fla. 1930) (Florida common law arson defined as "the willful and malicious burning of the dwelling house of another"; burning of an outbuilding within the curtilage of a dwelling house is arson).

Holland v. State, 65 So. 920 (Ala. Ct. App. 1914) (burning of outbuildings within the curtilage of the dwelling house was deemed arson at common law; whether a building is within the curtilage can be decided by the court as a

matter of law).

Sawyer v. State, 132 So. 188 (Fla. 1930) (allegation in information of ownership rather than physical possession failed to show the house as a place for human habitation and was fatal to an arson charge).

Hicks v. State, 29 So. 631 (Fla. 1901) (the person in possession of dwelling burned must be alleged in the information, rather than the owner).

Love v. State, 144 So. 843 (Fla. 1932) ("the mere burning per se of one's own property is not made a crime." A showing of malice is required, malice is not an element of the crime of burning to defraud, however).

State v. Nelson, 561 P.2d 1093 (Wash. Ct. App. 1977) (arson is a general intent crime; it is not necessary to prove specific intent).

Morris v. State, 27 So. 266 (Ala. 1900) (malice may be presumed from the deliberation of the act and need not be specifically proven).

King v. State, 199 So. 38 (Fla. 1940) (arson and burning to defraud an insurer are separate and distinct crimes and the acts relating to each are separate and distinct, so acquittal on an arson charge does not preclude trial on burning to defraud).

D'Allessandro v. Tippens, 133 So. 332 (Fla. 1931) (malice is an essential element of the crime of arson and must be charged in the indictment).

Gould v. State, 312 So. 2d 225 (Fla. 1st DCA 1975) (although the evidence would support a charge of burning to defraud an insurer, it was insufficient to show malicious intent to commit arson).

Crow v. State, 189 S.W. 687 (Tenn. 1916) (because the statute prohibited the burning of "a building" the burning of a jail was considered arson; a burning is complete if the nature of the fiber of the combustible is changed or charred).

Smith v. State, 5 S.W. 219 (Tex. Ct. App. 1887) (the burning of a jail was considered arson because of its dwelling house nature; defendant's possible intent to escape rather than intent to commit arson was immaterial).

State v. Schwartz, 166 A. 666 (Del. Ct. Gen. Sess. 1932) (case illustrates the common law and majority statutory law requirement that some burning occur to constitute arson and that the burning be of a dwelling house).

Hurst v. State, 160 So. 355 (Fla. 1935) (case construed an early Florida

statute which defined arson as "burning" or "setting fire to"; either of the acts committed alone constituted arson).

Washington v. State, 276 So. 2d 587 (Ala. 1973) (some burning must occur, however slight, to complete the crime of arson).

Jones v. State, 3 So. 2d 388 (Fla. 1941) (information charging "unlawfully and willfully" burning was not fatal to state's case even in light of statute which required "willfully and maliciously").

Carter v. State, 155 So. 2d 787 (Fla. 1963) (the term "unlawfull" as used in a now-repealed abortion statute was found to be unambiguous when construed with a companion abortion-manslaughter statute).

Walsingham v. State, 250 So. 2d 857 (Fla. 1971) (the term "unlawful" again construed in an abortion context; held constitutionally unambiguous but conviction was overturned for lack of second instruction on the abortion-manslaughter statute).

Honey v. State, 17 S.W.2d 50 (Tex. Crim App. 1929) (mere smoke discoloration or scorching does not produce a burning sufficient to charge arson).

Johnson v. State, 188 So. 2d 61 (Fla. 3d DCA 1966) (house was held not to be a dwelling because absence of owner who was confined to a mental hospital was more than temporary).

Williams v. State, 132 So. 186 (Fla. 1930) (an unfinished building is not a dwelling house for arson purposes).

Sawyer v. State, 132 So. 186 (Fla. 1931) (temporary absence of tenant will not take away character as a dwelling house).

For further guidance on common law and early statutory arson concepts see:

A. Curtis, THE LAW OF ARSON (1936).

Cohn, Convicting the Arsonist, 38 J. CRIM. LAW 286 (1947).

Flynn, Proof of the Corpus Delicti in Arson Cases, 45 J. CRIM. LAW 185 (1954).

Gwertzman, Arson and Fraud Fires, 12 FORUM 827 (1977).

Sadler, The Crime of Arson, 41 J. CRIM. LAW 290 (1950).

Stevens, Evidence of Arson and its Legal Aspects, 44 J. CRIM. LAW 817

(1954).

RICO AND RELATED LAWS

FEDERAL RICO ACT

United States v. Vignola, 464 F. Supp. 1091 (E.D. Pa. 1979) (federal RICO Act was enacted pursuant to Congress' power under the Commerce Clause; government need not prove that defendant's own racketeering affected interstate commerce, however).

United States v. Rone, 598 F.2d 564 (9th Cir. 1979) (the term "enterprise" held to encompass illegal organizations as well as legitimate businesses; here an association of persons to commit extortion was an "enterprise").

United States v. McLaurin, 557 F.2d 1064 (5th Cir. 1977), cert. denied, 434 U.S. 1020 (1978) (maintaining an illegal enterprise such as a prostitution ring was in violation of RICO; the "enterprise" maintained or acquired need not be legal).

United States v. Castellano, 416 F. Supp. 125 (E.D.N.Y. 1965) (the term "enterprise" extends to illegitimate as well as legitimate businesses; here loan-sharking was found to be covered by the statute).

United States v. Brown, 555 F.2d 407 (5th Cir. 1977) (the term "enterprise" includes public entities such as police departments; here police officers were involved in protection of vice-related activities).

United States v. Davis, 576 F.2d 1065 (3d Cir.), cert. denied, 439 U.S. 836 (1978) (prison facilities are included in the term "enterprise"; here prison warden's illegal acts consisted of accepting bribes for exercise of his discretion).

United States v. Frumento, 563 F.2d 1083 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978) (state agency charged with enforcement of tax laws on interstate industry is an "enterprise").

United States v. Campanale, 518 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976) (antiracketeering statute is not unconstitutionally vague because it specifies the number of acts and the time which acts are required to have been committed).

United States v. Field, 432 F. Supp. 55 (S.D.N.Y. 1977), aff'd mem., 578

F.2d 1371 (2d Cir. 1978) (RICO Act is not prohibited as an ex post facto law; one who committed a specified act before the law's effective date has notice that another, connected act would subject him to liability).

United States v. Stofsky, 527 F.2d 237 (2d Cir. 1975) ("pattern" would be established if illegal acts involved were connected by a common scheme, plan, or motive; here a common scheme to make pay offs to fur manufacturers was viewed as a "pattern").

United States v. Cappetto, 502 F.2d 1351 (7th Cir.), cert. denied, 420 U.S. 925 (1974) (civil remedy provided by RICO section is not unconstitutionally vague; it may be used in addition to, rather than as a substitute for, the criminal RICO section and the remedy is one founded in equity).

Farmers Bank v. Bell Mortgage Corp., 452 F. Supp. 1278 (D. Del. 1978) (in civil RICO action plaintiff need only prove elements by preponderance of evidence).

FLORIDA RICO ACT

Note, Racketeers and Non-Racketeers Alike Should Fear Florida's RICO Act, 6 FLA. ST. U.L. REV. 483 (1978) (a synopsis of the Act and its legislative history; also, a good review of the federal RICO act).

Moorehead v. State, 383 So. 2d 629 (Fla. 1980) (Florida RICO statute upheld in the face of a constitutional challenge as being vague and overbroad).

State v. Whiddon, No. 55, 714, (Fla. July 17, 1980) (although the Florida RICO Act does not punish retroactively, at least one act of criminal activity which forms the "pattern" must have occurred after passage of the act).

CONSPIRACY AND MAIL FRAUD

United States v. Leach, 613 F.2d 1295 (5th Cir. 1980) (an arson ring situation in which defendants were charged with mail fraud and conspiracy to commit mail fraud through the use of the mail for sending insurance claims).

United States v. Marler, 614 F.2d 47 (5th Cir. 1980) (companion case to Leach).

THE PRE-TRIAL STAGE

CHARGING ARSON

When charging in a typical arson situation the following sections of the Florida Statutes should be considered:

806.01 — Arson, first and second degree.

817.233 — Burning to Defraud Insurer.

806.10 — Preventing or Obstructing Extinguishment of Fire.

806.101 — False Alarm of Fires.

806.111 — Fire Bombs.

Minton v. State, 113 So. 2d 361 (Fla. 1959) (grand jury testimony and materials generally not discoverable).

United States v. Morado, 454 F.2d 167 (5th Cir. 1972) (a grand jury witness who is not the "focus" of the investigation and thus, not in custody is not entitled to Miranda warnings prior to testifying).

United States v. Phelps, 443 F.2d 246 (5th Cir. 1971) (custody may arise and Miranda warnings may be required even in interrogation at the defendant's home or place of business and even in the absence of a formal arrest).

United States v. Luxenberg, 374 F.2d 241 (6th Cir. 1967) (although a "virtual defendant" must be given Miranda warnings before testifying before a grand jury, an indictment subsequently returned against one who is merely a witness before a grand jury need not be dismissed for lack of Miranda warnings).

Wheeler v. State, 311 So. 2d 713 (Fla. 4th DCA 1975), cert. denied, 426 U.S. 948 (1976) (witness testifying before a grand jury is not entitled to Miranda warnings nor to advance notice of the nature of the inquiry).

United States v. Mandujano, 425 U.S. 564 (1975) (four justices held that Miranda warnings need not be given to a grand jury witness who is called to testify about criminal activities in which he may have been personally involved).

Gerstein v. Pugh, 420 U.S. 103 (1975) (Florida's procedure for charging by information in non-capital cases specifically upheld).

Blair v. State, 161 So. 2d 233 (Fla. 3d DCA 1964) (information need only include each element of crime to adequately apprise defendant of the charge).

State v. Beamon, 298 So. 2d 376 (Fla. 1974), cert. denied, 419 U.S. 1124

(1975) (although state has some leeway in proving everything in the information, the statement of particulars must be strictly proved).

Sharp v. State, 328 So. 2d 503 (Fla. 3d DCA 1976) (variance between allegations and proof are fatal only when defendant is misled in case preparation).

Stephens v. State, 324 So. 2d 190 (Fla. 1st DCA 1975) (variance between allegata and probata held to be fatal to state's case).

DISCOVERY

Kimbrough v. State, 219 So. 2d 122 (Fla. 1st DCA 1969) (no error for refusal of defense demand for discovery of a police report when such report is not used to refresh witness' memory).

Johnson v. State, 284 So. 2d 198 (Fla. 1973) (police report is discoverable if it is used for purposes of impeaching witness' testimony — within the discretion of the trial court).

Brady v. Maryland, 373 U.S. 83 (1963) (evidence favorable to the defendant which is in the state's possession must be disclosed to the defendant).

Giglio v. United States, 405 U.S. 150 (1972) (promise of non-prosecution for cooperation by United States attorney must be disclosed in order to avoid a violation of due process).

Williams v. Dutton, 400 F.2d 797 (5th Cir. 1968), cert. denied, 393 U.S. 1105 (1969) (prosecution has an affirmative duty in a criminal case to produce evidence materially favorable to the defense although non-discoverable material may be exised by the judge in an in camera inspection).

Resnick v. State, 287 So. 2d 24 (Fla. 1973) (withheld evidence favorable to defendant was relevant only to the credibility of a witness which was already in question; no new trial).

State v. Gillespie, 227 So. 2d 550 (Fla. 2d DCA 1969) (prosecution need only disclose favorable evidence if defendant cannot obtain through other reasonable means).

Eagan v. DeMario, 294 So. 2d 639 (Fla. 1974) (prosecuting attorneys are not subject to oral deposition on the grounds that they acted in an investigative

capacity).

Heath v. Becktell, 327 So. 2d 3 (Fla. 1976) (defendant in criminal case must secure order of the court to compel clerk's office to issue subpoena duces tecum).

Carnivale v. State, 271 So. 2d 793 (Fla. 3d DCA), cert. denied, 277 So. 2d 534 (Fla. 1973) (trial court's refusal to make inquiry into prejudicial effect of codefendant's testimony was reversable error).

Richardson v. State, 246 So. 2d 771 (Fla. 1971) (state's failure to give defense counsel name of "contact man" in an alleged arson and trial court's failure to make proper inquiry as to his existence was prejudicial error).

Johnson v. State, 312 So. 2d 231 (Fla. 2d DCA 1975) (trial court erred in permitting witness testify who was not on state's witness list without inquiring as to whether the violation was inadvertent or willfull.

CASE IN CHIEF

Smith v. State, 68 S.E.2d 393 (Ga. Ct. App. 1951) (absolute proof is not required in a criminal case; exclusion of all reasonable hypotheses of innocence will suffice).

Knight v. State, 53 So. 541 (Fla. 1910) (weight to be given all the evidence is a jury consideration).

Cannon v. State, 107 So. 360 (Fla. 1926) (circumstantial evidence need not be conclusive; it need only elucidate the inquiry) (circumstantial evidence, taken as a whole, must create more than a strong possibility of guilt; it must be inconsistent with innocence).

New v. State, 211 So. 2d 35 (Fla. 2d DCA 1968) (relevance of circumstantial evidence depends on its sufficiency to merely elucidate the inquiry).

Davis v. State, 90 So. 2d 629 (Fla. 1956) (circumstantial evidence is "proof of facts and circumstances from which the trier of fact may infer that the ultimate facts in issue either existed or did not exist").

Orman v. Barnard, Adams & Co., 5 Fla. 523 (Fla. 1854) (circumstantial evidence is adequate to prove material facts especially on matters shrouded in secrecy).

Sawyer v. State, 132 So. 188 (Fla. 1931) (proof that defendant's father had house insured was competent evidence to show arson).

Dodson v. State, 334 So. 2d 305 (Fla. 1st DCA 1976), cert. denied, 341 So. 2d 1081 (Fla. 1977) (circumstantial evidence of previous marital conflict held admissible to show defendant burned former wife's house).

Holland v. State, 22 So. 298 (Fla. 1897) (although a confession must be corroborated by other proof of the crime, the corpus delicti may be established after the confession is admitted into evidence).

State v. Alcorn, 64 P. 1014 (Idaho 1901) (the order in which evidence proving the different material facts is introduced is not material).

State v. O'Hagen, 144 N.W. 410 (Minn. 1913) (defendant's purchase of inflammable materials admissible to prove corpus delicti).

State v. Berkowitz, 29 S.W.2d 150 (Mo. 1930) (defendant's removal of furniture and inventory prior to fire admissible to prove corpus delicti).

State v. McCall, 42 S.E. 894 (N.C. 1902) (testimony of "torch" that defendants hired him to burn church to cover up prvious arson of a mill held to be inadmissible as not relevant to prove corpus delicti).

Washington v. State, 276 So. 2d 587 (Ala. 1973) (state is not required to prove motive as an element of the offense of arson).

Sawyer v. State, 132 So. 188 (Fla. 1931) (proof of motive of burning to collect insurance proceeds admissible).

Rausch v. State, 159 So. 2d 926 (Fla. 3d DCA 1964) (proof of motive to collect insurance consisted of previous experiences of accused in collecting insurance proceeds for fire damage).

Williams v. State, 143 So. 2d 484 (Fla. 1962) (evidence of another crime is admissible to show motive even though the evidence is circumstantial in nature; however, evidence must bear some relevancy to present case or it will be excluded).

Miles v. State, 36 So. 2d 182 (Fla. 1948) (evidence of insurance admissible to show motive to commit arson).

Duke v. State, 185 So. 422 (Fla. 1938) (evidence of insurance admissible to show motive to commit arson).

Clinton v. State, 50 So. 580 (Fla. 1909) (evidence of hostility between families is admissible to show motive).

Hale v. State, 101 So. 774 (Ala. Ct. App.), cert. denied, Ex parte Hale, 101 So. 775 (Ala. 1924) (evidence of dispute between defendant and owner of burned building was admissible to show motive).

Gamble v. State, 99 So. 662 (Ala. Ct. App. 1924) (evidence of disputes between accused and victim of burning admissible to show motive).

Harris v. State, 88 S.E. 121 (Ga. Ct. App. 1916) (proof of threats to the person whose domicile was burned were admissible to show motive).

Springs v. Commonwealth, 248 S.W. 535 (Ky. 1923) (conditional threats made to the owner of the burned property were inadmissible as remote and indefinite considering continued friendly relations between owner and defendant).

Commonwealth v. Quinn, 23 N.E. 54 (Mass. 1890) (evidence of threats made by defendant against owner of burned property was admissible although made three years before the burning; the lapse of time affected only the weight to be given the testimony).

People v. Eaton, 26 N.W. 702 (Mich. 1886) (evidence of threats made by the defendant two years prior to the burning was admissible as competent and material evidence).

Gardner v. Commonwealth, 289 S.W. 1087 (Ky. 1927) (evidence tending to explain incriminating evidence is material and admissible).

Moore v. State, 103 S.W. 188 (Tex. Crim. App. 1907) (if the defendant seeks to introduce evidence to rebut incriminating evidence, he must show a time reference so as to make the evidence relevant).

Hodges v. State, 176 So. 2d 91 (Fla. 1965) (where corpus delicti of crime of larceny could not be proved in absence of defendant's confession, trial court correctly granted a new trial).

Dawson v. State, 139 So. 2d 408 (Fla. 1962) (independent proof of the corpus delicti was sufficient to admit defendant's confession into evidence).

State v. Allen, 335 So. 2d 823 (Fla. 1976) (circumstantial evidence to show corpus delicti of manslaughter was sufficient to allow introduction of

defendant's confession).

Miles v. State, 36 So. 2d 182 (Fla. 1948) (circumstantial evidence of arson was sufficient to establish corpus delicti of arson and render defendant's confession admissible).

Anthony v. State, 32 So. 818 (Fla. 1902) (premature introduction of confession can be cured by subsequent proof of corpus delicti).

The following additional sources, some of which are cited in the "Case in Chief" section, may be valuable in the preparation of an arson case:

Feahey, Suggestions for Improving Arson Investigations, 47 J. CRIM. LAW 357 (1956) (good for preparing your arson investigator's testimony).

Flynn, Proof of the Corpus Delicti in Arson Case, 45 J. CRIM. LAW 185 (1954) (for an overview of your case in chief).

Hopper, Arson's Corpus Delicti, 47 J. CRIM. LAW 118 (1956) (overview of proving the fact of an arson).

Hopper, Circumstantial Aspects of Arson, 46 J. CRIM. LAW 129 (1955) (use of circumstantial evidence in an arson case, including how to establish motive).

Sadler, The Crime of Arson, 41 J. CRIM. LAW 290 (1950) (anticipated defense to an arson prosecution).

Shifflett, Investigating Automobile Fires, 49 J. CRIM. LAW 276 (1958) (for preparation of investigator's testimony in such a fire).

Stevens, Evidence of Arson and Its Legal Aspects, 44 J. CRIM. LAW 187 (1954) (for establishing motive, intent and anticipated defenses).

The following annotations deal with expert testimony relating to fire cause determination and arson generally:

88 A.L.R.2d 230 (1963) (Expert and opinion evidence as to cause of fire).

76 A.L.R.2d 354 (1961) (Admissibility of experimental evidence to determine chemical or physical qualities of material or substance).

62 A.L.R.2d 1426 (1958) (Safety of condition, place, or appliance as proper subject of expert or opinion evidence in tort claims).

131 A.L.R. 1113 (1941) (Expert and opinion evidence as regards fire).

76 A.L.R.2d 524 (1961) (Burning of building by mortgagor).

97 A.L.R.2d 891 (1963) (Admissibility, in prosecution for criminal

burning of property, or for maintaining fire hazard, of evidence of other fires).

5 AM. JUR. PROOF OF FACTS, Fires 135 (1960).

14 AM. JUR. PROOF OF FACTS, Electrical Wiring 663 (1964).

3 AM. JUR. TRIALS, Preparing and Using Experimental Evidence 462 (1965) (See sections 29 – 38 for evidence relating to fires).

15 AM. JUR. PROOF OF FACTS, School Fires 485 (1964) (See section 83 for Qualification of Fire Protection Engineer).

14 AM. JUR. PROOF OF FACTS, Proof of Qualification of Criminalist 325 (1964).

22 AM. JUR. PROOF OF FACTS, Identification of Substances by Instrumental Analysis 385 (1969). (See pocket part for recent developments).

The following annotations are relevant to the admissibility of photographic evidence:

9 A.L.R.2d 899 (1950) (Authentication or verification of photograph as basis for introduction in evidence).

53 A.L.R.2d 1102 (1957) (Admissibility in evidence of colored photographs).

20 AM. JUR. Evidence § 1204 (1939) (Photographs).

DIRECTED VERDICT ARGUMENTS

Downen v. State, 375 So. 2d 840 (Fla. 1979) (state need only prove each material element of the offense to establish a prima facie case; however, proof of authorization to place restrictive signs is not an element of tresspass statute).

Delgado v. State, 319 So. 2d 610 (Fla. 3d DCA 1975) (probative value and credibility of witnesses' testimony should not be determined on a motion for directed verdict).

McArthur v. Nourse, 369 So. 2d 578 (Fla. 1979) (where criminal conviction is reversed on the grounds that evidence was insufficient to sustain a conviction, retrial was prohibited by the fifth amendment of the United States Constitution).

JURY INSTRUCTIONS

Hall v. State, 83 So. 513 (Fla. 1919) (instruction required on the necessity of the state to prove all material elements of the offense beyond a reasonable doubt).

Harrison v. State, 5 So. 2d 703 (Fla. 1942) (cautionary instruction on weight to be given to a confession, if one is admitted).

McCall v. State, 156 So. 325 (Fla. 1934) (instruction required on weight of circumstantial evidence).

Lee v. State, 362 So. 2d 692 (Fla. 4th DCA 1978) (where there was no direct evidence that defendant set fire in his cell, court should have given instruction on circumstantial evidence).

Newsome v. State, 355 So. 2d 483 (Fla. 2d DCA 1978) (where prosecution relied substantially on circumstantial evidence, failure to instruct on circumstantial evidence was reversible error).

Leavine v. State, 147 So. 897 (Fla. 1933) (circumstantial instruction required when state relies totally or substantially on circumstantial evidence).

Boyd v. State, 122 So. 2d 632 (Fla. 1st DCA 1960) (when state relies primarily on direct evidence and some circumstantial evidence, an instruction on circumstantial evidence is not required).

Johnson v. State, 25 So. 2d 801 (Fla. 1946) (if an accomplice testifies against the defendant, an instruction on accomplice testimony is required).

Brown v. State, 206 So. 2d 377 (Fla. 1968) (the definitive Florida case on instructions required for lesser included offenses).

Gilford v. State, 313 So. 2d 729 (Fla. 1975) (proof of lesser included offenses must be presented to justify an instruction on lesser includeds).

Polk v. State, 179 So. 2d 236 (Fla. 2d DCA 1965) (any fact proved by competent evidence can be the subject of a special instruction).

Johnson v. State, 308 So. 2d 38 (Fla. 1975) (an instruction on penalties is discretionary in trial judge).

Cuba v. State, 362 So. 2d 29 (Fla. 3d DCA 1978) (instruction regarding penalties provided for offense charged and for lesser included offenses was in discretion of trial court).

Mitchell v. State, 304 So. 2d 466 (Fla. 3d DCA 1974) (no instruction is required for the penalties for any lesser included offense).

Williams v. State, 247 So. 2d 425 (Fla. 1971) (specially requested instructions are in the discretion of the trial judge).

POST-INSTRUCTION CONSIDERATIONS

Isley v. State, 354 So. 2d 457 (Fla. 1st DCA 1978) (if the trial court summarily denies a request from the jury for a copy of instructions without notice to counsel, it may constitute prejudicial error).

Morgan v. State, 377 So. 2d 212 (Fla. 3d DCA 1979) (if the jury is furnished with any instruction, it must be furnished with all instructions given by the court).

Henry v. State, 359 So. 2d 864 (Fla. 1978); Hedges v. State, 172 So. 2d 824 (Fla. 1965); Faulk v. State, 296 So. 2d 614 (Fla. 1st DCA 1974) (if the jury requests re-instruction on a particular point, the court must give complete instructions on that subject).

Bristow v. State, 338 So. 2d 553 (Fla. 3d DCA 1976) (although a re-instruction must be complete as to a particular point, the court need not re-instruct on all elements of the charge).

Waddy v. State, 355 So. 2d 477 (Fla. 1st DCA 1978) (a taped statement of the defendant may be sent in with the jury; a transcript of the tape may not).

McQuay v. State, 352 So. 2d 1276 (Fla. 1st DCA 1977) (bailiff's reply to a juror's question concerning the jury's failure to come to a decision was reversable error).

Holzapfel v. State, 120 So. 2d 195 (Fla. 3d DCA 1960) (if the jury received instructions from the bailiff outside of presence of defendant and trial judge, it is reversable error).

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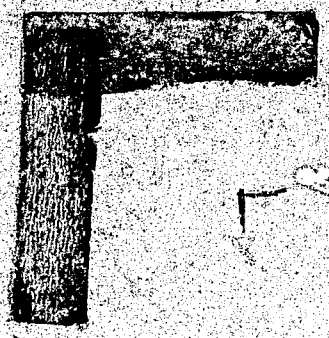

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