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## Survey: Evidence

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# Survey: Evidence

Mark M. Dobson and Randolph Braccialarghe

## **Abstract**

Twenty-one years ago Chief Justice Earl Warren appointed an advisory committee to propose evidentiary rules for the federal courts, thus beginning a movement which has worked a minor revolution in substantive evidence law.

**KEYWORDS:** evidence, judicial, cases

# Survey: Evidence

By Mark M. Dobson\* and Randolph Braccialarghe\*\*

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## I. Introduction

Twenty-one years ago Chief Justice Earl Warren appointed an advisory committee to propose evidentiary rules for the federal courts, thus beginning a movement which has worked a minor revolution in substantive evidence law.<sup>1</sup> Besides reforming federal law, the Federal Rules of Evidence have been a model for evidentiary reform in many states. Florida became one of the earliest states to adopt the federal courts' lead and consider revising its substantive evidence law.<sup>2</sup> After several unsuccessful attempts at reform, the Florida Legislature passed the Florida Evidence Code in 1976.<sup>3</sup> However, the Evidence Code's effective date was delayed several times while possible conflicts between the Florida Supreme Court and the Florida Legislature were resolved.<sup>4</sup>

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1. Chief Justice Warren appointed the committee in March 1965. The Committee circulated a Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates in 1969. *See* 46 F.R.D. 161. After a Revised Draft was circulated in 1971, the Supreme Court prescribed the Rules effective as of July 1, 1973. *See* 56 F.R.D. 183. However, Congress deferred the effective date until it expressly approved the Rules. Following Congressional action, the Federal Rules of Evidence became effective July 1, 1975. Pub. L. No. 93-595; 88 Stat. 1926 (1976).

2. Besides Florida, twenty-seven other states have adopted evidence Codes modeled after the Federal Rules: Alaska, Arizona, Arkansas, Colorado, Delaware, Hawaii, Iowa, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin and Wyoming. The Federal Rules were also the model for the Uniform Military Rules of Evidence and for Puerto Rico's evidence Code.

For an article discussing the Federal Rules and Florida's substantive evidence law before passage of the Florida Evidence Code, *see* Note, *The Federal Rules of Evidence and Florida Evidence Law Compared*, 3 FLA. ST. U.L. REV. 384 (1975).

3. *See* 1976 FLA. LAWS 237. For a brief description of the Florida Law Revision Council's attempts to pass earlier versions, *see* Ehrhardt, *A Look at Florida's Proposed Code of Evidence*, 2 FLA. ST. U.L. REV. 1, 1-3 (1974) and Note, *supra* note 2, at 385 n.8.

4. The Evidence Code originally was to have taken effect on July 1, 1977. However, 1977 FLA. LAWS 77 delayed the effective date until July 1, 1978. Subsequently 1978 FLA. LAWS 379 delayed the effective date until July 1, 1979. After this legislative action, the Florida Supreme Court noted that article V, section 2(a) of the Florida Constitution gave it the sole authority to "adopt rules for the practice and procedure in all courts. . . ." Recognizing that portions of the evidence code may be procedural, rather than substantive, the Court temporarily approved and adopted the evidence code as originally enacted and amended by 1978 FLA. LAWS 379. *See In re Florida Evidence Code*, 372 So. 2d 1369 (Fla. 1979). Following the receipt of comments from the Florida Bar and Florida Academy of Trial Lawyers, the Florida Bar Board of Governors expressed its general approval with the Evidence Code to the Florida Supreme Court.

During the delay period, several amendments to the Code were passed, but the original 1976 text is the same for most provisions.<sup>5</sup> The Florida Evidence Code finally became effective on July 1, 1979, applying to all crimes committed after that date and to all other proceedings pending or brought after October 1, 1981.<sup>6</sup>

This article discusses the major Florida evidentiary case law developments which occurred during most of 1985.<sup>7</sup> During this period, the Florida courts confronted a number of evidentiary issues.<sup>8</sup> As with most surveys, the authors do not discuss each decision. Some opinions are so brief that attaching any real significance to them is impossible. Other opinions merely restate settled evidence law with which most readers would be well familiar. Those areas discussed have been so selected for three reasons: (1) because a new evidentiary development has occurred in the area, (2) because a particular case presents an excellent example of a fundamental principle involved in a particular area, or (3) because the sheer number of times that a particular area presents evidentiary issues makes it an important one for practitioners and for the courts. By way of inconclusiveness, the authors note the following evidentiary areas not dealt with in this article generated decisions during

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However, the Bar noted that provisions of § 90.103 concerning the Code's applicability to civil actions could create problems and suggested changes therein. The Florida Supreme Court agreed clarification was needed but considered this a legislative responsibility. *See In re Florida Evidence Code*, 376 So. 2d 1161 (Fla. 1979). The legislature followed the court's suggestion and amended the Evidence Code once more to cure this problem. *See* 1981 FLA. LAWS 93. The Florida Supreme Court approved and adopted all aspects of the 1981 legislature changes. *See In re Amendment of Florida Evidence Code*, 404 So. 743 (Fla. 1981).

5. Other than the provisions extending the Evidence Code's effective date, 1978 FLA. LAWS 361 and 1981 FLA. LAWS 93 both amended substantive language in various code sections.

For an article comparing the original 1976 Evidence Code before amendment with both the Federal Rules of Evidence and pre-code Florida evidence law, *see* Hicks and Matthews, *Evidence*, 31 U. MIAMI L. REV. 951 (1977).

For an excellent one volume work on present Florida evidence law, *see* C. EHRHARDT, *FLORIDA EVIDENCE* (2d. ed. 1984).

6. *See* FLA. STAT. § 90.013(2) (1985).

7. This article discusses cases in 462 So. 2d through 476 So. 2d.

8. There were 154 reported cases during the survey period which dealt with evidentiary issues. Most, but not all, of these issues involved various sections of the Florida Evidence Code.

the survey period: offers to compromises;<sup>9</sup> guilty pleas;<sup>10</sup> character evidence;<sup>11</sup> competency of witness;<sup>12</sup> dead man's statute;<sup>13</sup> rape shield law;<sup>14</sup> academic privilege;<sup>15</sup> informer's privilege;<sup>16</sup> medical review com-

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9. See FLA. STAT. § 90.408 (1985); *H.R.J. Bar-B-Q, Inc. v. Shapiro*, 463 So. 2d 403, 404 (Fla. 3d Dist. Ct. App. 1985) (offer made to plaintiff upon being fired was not a compromise since there was no "claim . . . disputed as to validity or amount at the time the offer was made"); *Benoit, Inc. v. District Bd. of Trustees*, 463 So. 2d 1260 (Fla. 5th Dist. Ct. App. 1984) (§ 90.408 excludes all statements made in compromise negotiations as well as the actual compromise offers themselves).

10. See FLA. STAT. § 90.410 (1985); *Ellis v. State*, 475 So. 2d 1021, 1022 (Fla. 2d Dist. Ct. App. 1985) (defendant's statements to a police officer made two months after guilty plea, in effort to render substantial assistance in return for a reduced sentence were not made in connection with plea negotiations or the plea itself when there was "no showing that the guilty plea was part of any bargain with the state to accept defendant's cooperation and thereupon recommend a reduction. . .").

11. See FLA. STAT. § 90.404(1)(a); *Von Carter v. State*, 468 So. 2d 276, 278 (Fla. 1st Dist. Ct. App. 1985), *remanded on other grounds*, 478 So. 2d 10 (1985), *rev'd on other grounds*, 482 So. 2d 533 (Fla. 1st Dist. Ct. App. 1986) (prosecutor's reference to scar on defendant's neck during defendant's cross-examination for a burglary-robbery allegedly committed with a knife was an "insinuation of bad character" violating principle that a defendant must place his character in issue before the state can attack it); *Wolack v. State*, 464 So. 2d 587 (Fla. 4th Dist. Ct. App. 1985), *review denied*, 476 So. 2d 676 (Fla. 1985) (insufficient foundation for admission of reputation evidence when knowledge of reputation was based solely on witness' official position as a police officer).

12. See FLA. STAT. § 90.601, 90.604 (1985); *State v. Barber*, 465 So. 2d 264 (Fla. 2d Dist. Ct. App. 1985) (trial court should not have excluded witness' testimony even though it believed he had perjured himself in two depositions concerning the criminal charges, since the jury is the sole judge of witness' credibility); *Howard Bros. v. Sotuyo*, 472 So. 2d 1264 (Fla. 1st Dist. Ct. App. 1985) (witness had adequate foundation based on personal knowledge despite his lack of authority to fire employees to testify about what police jobs an injured police officer-plaintiff could hold).

13. See FLA. STAT. § 90.102 (1985); *Comodeca v. Comodeca*, 464 So. 2d 662, 663 (Fla. 2d Dist. Ct. App. 1985) (wife of a claimant against an estate is an "interested party" under the dead man's statute since she was "closely allied with her husband . . . [and] would directly gain or lose from the resolution of the case").

For a general discussion of Florida's Dead Man Statute see Note, *The Dead Man's Statute Before and After The Florida Evidence Code - A Step in the Right Direction*, 4 FLA. ST. U.L. REV. 480 (1976).

14. See FLA. STAT. § 794.022 (1985); *Gonzalez v. State*, 471 So. 2d 214 (Fla. 4th Dist. Ct. App. 1985) (error in sexual battery case when defense was fabrication to exclude victim's forged note which showed her prior fantasizing of sexual activity); *Kemp v. State*, 464 So. 2d 1238 (Fla. 1st Dist. Ct. App. 1985) (defense properly excluded from asking about victim's virginity since this was irrelevant where its purpose was to impeach her testimony that she was unfamiliar about sexual relations and to impeach her by showing she lied to the examining physician when asked if she had ever

mittee privilege;<sup>17</sup> and the attorney-client privilege.<sup>18</sup> Likewise this arti-

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had sex before the attack); *Marr v. State*, 463 So. 2d 391 (Fla. 1st Dist. Ct. App. 1985), *partially rev'd on other grounds*, 470 So. 2d 703 (Fla. 1st Dist. Ct. App. 1985) (en banc) *review denied*, 475 So. 2d 696 (Fla. 1985) (no denial of defendant's Sixth Amendment Right to Confrontation in precluding evidence of sexual relations between victim and her boyfriend since defendant was able to show their close relationship by other means and thus argue the victim was biased against him for having told authorities of her boyfriend's alleged criminal activity).

However, both *Marr* and *Kaplan v. State*, 451 So. 2d 1386 (Fla. 4th Dist. Ct. App. 1984) suggest that a complete exclusion of any evidence in reliance on § 794.022 showing the victim's bias towards the defendant may violate the Confrontation Clause. For a general discussion of potential constitutional problems with rape shield laws see Tanford and Bocchino, *Rape Shield Laws and the Sixth Amendment*, 128 U. Pa. L. Rev. 544 (1980).

15. See *Procter & Gamble Co. v. Swilley*, 462 So. 1188, 1195 (Fla. 1st Dist. Ct. App. 1985) (court declared "there is no academic privilege in Florida", citing *Marshall v. Anderson*, 459 So. 2d 384 (Fla. 3d Dist. Ct. App.) in partially overruling company's objection to request for production of documents).

16. See *Aldazabal v. State*, 471 So. 2d 639 (Fla. 3d Dist. Ct. App. 1985) (conviction reversed when state failed to determine and provide defense with the address of an informer who was a vital witness); *State v. Carnegie*, 472 So. 2d 1329, 1330 (Fla. 2d Dist. Ct. App. 1985) (mere defense assertion that informer is vital witness and should be produced is not sufficient when no defense was specified and the informer was not "the sole material witness to the events").

17. See former FLA. STAT. § 768.04(4) (1983), now FLA. STAT. § 768.40(5) (1985); *Mercy Hosp. v. Department of Professional Regulation*, 467 So. 2d 1058 (Fla. 3d Dist. Ct. App. 1985) (hospital per review committee records are not privileged from subpoena by the Department conducting disciplinary investigation of two doctors); *HCA of Florida, Inc. v. Cooper*, 475 So. 2d 719 (Fla. 1st Dist. Ct. App. 1985) (even though they are not explicitly protected by statutory language, a party must still show exceptional need to justify production of medical review committee records).

18. See FLA. STAT. § 90.502 (1985). Two opinions discussed when the state can call defense counsel as witnesses in criminal cases. In *Perez v. State*, 474 So. 2d 398 (Fla. 3d Dist. Ct. App. 1985) *review denied*, 484 So. 2d 10 (Fla. 1986), the court found error in the state's listing of defense counsel as a witness, since the testimony desired was available from other sources. The listing compelled the attorney to withdraw and forced the defendant to accept a continuance beyond the speedy trial rule's limits. The court reversed the defendant's conviction and ordered his discharge.

In *State v. Schmidt*, 474 So. 2d 899 (Fla. 5th Dist. Ct. App. 1985), defense counsel successfully appealed from an order finding him in contempt for refusing to be a witness. The attorney's client had been granted immunity in partial return for his testimony in a first-degree murder trial. When the client was deposed, his counsel was not present. At the deposition, the client testified about communications with counsel in which the client had made a confession. Afterwards, the attorney was subpoenaed to testify about the confession but claimed the lawyer-client privilege. The Fifth District Court of Appeal found that the client had wanted counsel at the deposition but had



cle does not discuss any statutory amendments passed in 1985.<sup>19</sup>

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been persuaded to go ahead by assurances from the attorneys present that they would protect his interests. This was obviously not done, since neither deposing counsel nor the state's attorney had warned the client he could not limit his answers to the mere fact that he had previously shown defense counsel a confession. Given these circumstances, the court refused to find a valid waiver occurred at the deposition and reversed the contempt order.

On the civil side, the Florida Supreme Court decided two major cases involving the attorney-client privilege. In *City of North Miami v. Miami Herald Publishing*, 468 So. 2d 218 (Fla. 1985), the court addressed the relation between the Florida Public Records Act, FLA. STAT. §§ 119.01 *et seq.* (1985) and section 90.502. The court found that the lawyer-client privilege "does not exempt written communications between lawyers and governmental clients from disclosure as public records." *Id.* at 220. However, the court found FLA. STAT. § 119.07(3)(o) (1985) created a limited attorney work product disclosure exception for any document which may qualify as a public record "until the conclusion of the litigation or adversarial proceedings" for which the document had been prepared. Similarly, in *Neu v. Miami Herald Publishing Co.*, 462 So. 2d 821 (Fla. 1985), the Florida Supreme Court rejected arguments that section 90.502 required an exception to Florida's Sunshine Law, FLA. STAT. § 286.011 (1985), for a meeting between a city council and its attorney to discuss pending litigation.

These last two decisions were not chosen for review since they have already been thoroughly discussed in two articles. *See Comment, Florida's Open Government Laws: No Exceptions for Attorney-Client Communications*, 13 FLA. ST. U.L. REV. 388 (1985); Smith, *The Public Records Law and The Sunshine Law: No Attorney-Client Privilege Per Se, and Limited Attorney Work Product Exception*, 14 STETSON L. REV. 493 (1985).

19. The Florida legislature passed several bills which will affect evidentiary issues in future cases. One made minor textual changes to clarify FLA. STAT. § 90.606, relating to interpreters and translators and FLA. STAT. § 90.605(2) relating to what a child must understand before being found competent to testify. *See* 1985 Fla. Sess. Law Serv. 85-53, §§ 2, 3 (West).

Almost all the major legislative changes concerned evidence in child abuse cases. The first recognized the privilege for confidential communications to clergy when dealing with abuse cases concerning the elderly, disabled or children. *See* 1985 Fla. Sess. Law. Serv. 85-28, §§ 1, 2 (West). The second provided for the use of video taped testimony or testimony by closed circuit television in child abuse and child sex abuse cases. *See* 1985 Fla. Sess. Law. Serv. 85-53, §§ 5, 6 (West). The third created a new hearsay exception, FLA. STAT. § 90.803(23) (1985), for out-of-court statements of children eleven or younger reporting sexual abuse, provided the trial court does not find the statements are untrustworthy. *See* 1985 Fla. Sess. Law Serv. 85-53 § 4 (West).

FLA. STAT. § 90.803(23) (1985) clearly attempts to avoid Confrontation Clause problems. When the state actually calls the child as a witness, as well as admitting his out-of-court statements under this provision, no constitutional question exists. However, when a child is not a witness, for the out-of-court statements to be admissible under the new exception, the child must be unavailable under FLA. STAT. § 90.804(1) and the trial court must find that having the child testify would cause emotional or mental

Before discussing cases dealing with specific evidence issues, a brief statistical overview is in order. Probably to no one's surprise, the majority of cases presenting evidentiary issues were criminal.<sup>20</sup> However, a surprising number of both criminal and civil cases were reversed for evidentiary error.<sup>21</sup> Whether this survey period included an unusually high number of reversals is impossible to say since no statistics are available for prior years. Any explanation for the number of reversals would be somewhat speculative. Florida trial courts may perhaps be too lax in their evidence-rulings. Alternatively, the appellate courts may

harm. Furthermore, there must be some corroborating evidence that the abuse actually occurred. The dual requirement of unavailability under § 90.804(1) and that testifying would cause the child harm is somewhat puzzling. If the trial court finds a child unavailable under § 90.804(1) any confrontation problems should be solved. Similar state hearsay exceptions require only unavailability and corroboration, see MINN. STAT. § 595.02(3) (1984).

While § 90.803(23) makes radical changes in Florida evidence law, child abuse hearsay exceptions have been passed in at least eleven other states. See ARIZ. REV. STAT. ANN. § 13-1416 (1985); COLO. REV. STAT. § 18-3-411(3); ILL. ANN. STAT. CH. 37, para. 704-6(4)(c); (Smith-Hurd 1984) IND. CODE § 35-37-4-6 (1984); IOWA CODE ANN. § 232.96(6) (1985); KAN. STAT. ANN. § 60-460(dd) (1982); MINN. STAT. § 595.02(3) (1984); S.D. CODIFIED LAWS ANN. § 19-16-38 (1984); UTAH CODE ANN. § 76-5-411 (1983); VT. R. EVID. 803(24) (1985); WASH. REV. CODE § 9A.44.120 (1982).

As can be expected, these new exceptions have received much recent attention from commentators. For discussion of various state provisions dealing with new hearsay exceptions in child abuse cases see Pierron, *The New Kansas Law Regarding Admissibility of Child-Victim Hearsay Statements*, 52 J.B.A.K. 88 (1983); Skoler, *New Hearsay Exceptions for a Child's Statement of Sexual Abuse*, 18 JOHN MARSHALL L. REV. I (1984). Some authors claim that the new hearsay exceptions are unconstitutional. See e.g. Note, *Confronting Child Victims of Sex Abuse: The Unconstitutionality of the Sexual Abuse Hearsay Exception*, 7 U. PUGET SOUND L.REV. 387 (1984) arguing that Washington's law, which is similar to Florida's except that it only requires unavailability and corroboration, is unconstitutional. *State v. Ryan*, 691 P.2d 197 (Wash. 1984) (en banc), found the new hearsay exception did not violate a defendant's confrontation rights.

For a recent article discussing the constitutional problems presented by both the new child abuse hearsay exceptions and the use of closed circuit television or videotape statements, see Graham, *Indicia of Reliability and Face-to-Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19 (1985).

20. Of the 154 total cases, 98 or 64% were criminal, while 56 or 36% were civil.

21. Florida appellate courts found evidentiary error in 64 out of 154 cases or 42%. Criminal cases produced a lower percentage of reversals, 40 out of 98 or 41%, than civil cases, 27 out of 56 or 43%. Since the forty reversals in the criminal cases include five where the state secured reversals of trial court evidence errors on interlocutory appeals, the percentage of cases where criminal defendants prevailed is even smaller.

possibly be stricter than those in other states. Most likely the reason partially lies in the frequent use Florida appellate courts make of *per curiam* affirmances. Appellate courts may often be writing opinions only where necessary to instruct lower courts or where a new issue of law demanding extensive consideration is presented.

In line with the statistical overview, it is important to recognize that the number of reversals could have been even higher. Florida appellate courts, like those of most states, will not review and reverse trial courts' rulings in certain situations worth noting. First, the appellate courts realize they review cases on a cold record, removed from the sometimes hectic fray of trial courts. Thus they regularly defer to trial court evidence rulings, except when clear error had been committed.<sup>22</sup> Second, trial counsel inaction often lead to procedural defaults when objections to admission of evidence were not made timely.<sup>23</sup> In most

22. See *Merchant v. State*, 476 So. 2d 331, 332 (Fla. 1st Dist. Ct. App. 1985) "A trial court has wide discretion in . . . admission of evidence, and, unless an abuse of discretion can be shown, its rulings should not be disturbed on appeal." *Id.*

23. FLA. STAT. § 90.104 (1985) provides in part that:

- (1) A court may predicate error . . . on the basis of admitted or excluded evidence when a substantial right of the party is adversely affected and:
- (2) when the ruling is one admitting evidence, a timely objection . . . appears on the record, stating the specific ground of objection . . . .

Florida appellate courts almost always refuse to consider evidentiary arguments when trial counsel has not made a proper contemporaneous objection. This includes the failure to object at all and the failure to object until after the questioned evidence has been admitted. See *S.C. v. State*, 471 So. 2d 1326, 1328-29 (Fla. 1st Dist. Ct. App. 1985) where the court refused to hear argument on one evidence issue since no objection to admission was ever made and likewise refused to hear arguments concerning a witness' competency to testify since no objection was made about this until the close of the state's case.

In *Troedel v. State*, 462 So. 2d 392 (Fla. 1984), the Florida Supreme Court explained the contemporaneous objection rule's rationale while refusing to consider a defense argument that neutron activation test results should not have been admitted to help show the defendant had probably fired a gun used to kill two victims.

If appellant had objected . . . on the ground he now relies upon, the trial court could have made a determination of whether there was an adequate reason for excluding the evidence. The court could have inquired into the questions of whether the precise quality or substance of the solution used should be a matter of predicate to the admissibility of the test by reason of its effect on the test's reliability. . . . An appellate court is in a weak position to rule on the legal issue of admissibility of scientific evidence when because of the lack of an objection or motion below, there is no unfolding of the factual basis upon which the legal question turns.

*Id.* at 396.

instances, even previously made motions in limine would not suffice to preserve the record for appeal, if there were no timely objection at trial.<sup>24</sup> Third, trial counsel also sometimes failed to preserve evidentiary issues for review by not making adequate offers of proof.<sup>25</sup> However, if the trial court has previously granted an opponent's motion in limine excluding a party's desired proof, there is no necessity to attempt to introduce it at trial to preserve the issue for appeal.<sup>26</sup> Finally, application of the harmless error rule prevented reversals in some cases even when evidentiary error did occur.<sup>27</sup>

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During this survey period, Florida courts also applied the contemporaneous objection rule to workmen's compensation proceedings, *see Rinker Materials Corp. v. Hill*, 471 So. 2d 119 (Fla. 1st Dist. Ct. App. 1985); but refused to find that counsel's failure to object to an improper calculation of points in a sentencing proceeding barred review of the sentence. *See Smith v. State*, 475 So. 2d 1336 (Fla. 2d Dist. Ct. App. 1985).

For other cases citing the lack of a contemporaneous objection as a ground to reject evidence arguments, *see Barclay v. State*, 470 So. 2d 691 (Fla. 1985); *Dougan v. State*, 470 So. 2d 697 (Fla. 1985), *cert. denied sub nom. Dougan v. Florida*, 106 S. Ct. 1499 (1986).

24. *See, e.g., Phillips v. State*, 476 So. 2d 194 (Fla. 1985) (even though a motion in limine to exclude prior crimes evidence had already been denied, failure to renew objection to admission at trial waived the issue for appeal).

However, one recent case seems to have created a limited exception. In *Fincke v. Peoples*, 476 So. 2d 1319 (Fla. 4th Dist. Ct. App. 1985), just before jury selection the trial court overruled a motion in limine to exclude certain deposition testimony. After opening statements, one deposition was read and counsel objected to it. As expected, the trial court overruled the objection. Since two other depositions had also been covered by the motion in limine, counsel asked that a continuing objection be recognized to admission of these also. Since the trial court agreed to this procedure and had only a short time before overruling what would have been the same objection by denying the motion in limine, the record was adequately preserved for review.

25. FLA. STAT. § 90.104(1)(b) (1985), allows reversal for evidentiary error only if substantial rights are affected and if "[w]hen the ruling is one excluding evidence, . . . the evidence was made known to the court by offer of proof. . . ."

Both lack of any offer of proof at all, *see Connell v. Guardianship of Connell*, 476 So. 2d 1381 (Fla. 1st Dist. Ct. App. 1985) and inadequate responses to an opponent's objections come within this requirement. *See Tillman v. State*, 471 So. 2d 32 (Fla. 1985) (since counsel only argued the relevancy of excluded evidence to the trial court, an argument that the statements were against a declarant's penal interest could not be raised on appeal).

26. *See Bender v. State*, 472 So. 2d 1370 (Fla. 3d Dist. Ct. App. 1985).

27. FLA. STAT. § 90.104(1) (1985) embodies the harmless error rule by its requirement that error can only be found if "a substantial right of the party is adversely affected." In cases of federal constitutional error, *Chapman v. California*, 386 U.S. 18, 24 (1967) requires that an appellate court "be able to declare a belief that [the error] was harmless beyond a reasonable doubt."

## II. Judicial Notice

The Florida Evidence Code covers judicial notice both of facts and of law.<sup>28</sup> Usually cases involving the propriety of taking judicial notice are very straightforward and uncomplicated. That situation prevailed during this survey period.<sup>29</sup>

*In the Interest of A.D.J. and D.L.J.*,<sup>30</sup> is worth noting since it presents a good example of the proper limits of judicial notice and its inadequacy to cure major defects in procedure and proof. The Department of Health and Rehabilitation Services (HRS) filed dependency petitions on two minor children claiming they had been physically, mentally and sexually abused. At the initial hearing, both parents appeared and waived their right to appointed counsel. The mother admitted the children should be in HRS custody; but the father neither denied nor admitted the petitions' allegations, nor did he give up the children's custody. Despite this, the Duval County Circuit Court entered a written order finding both parents stipulated to dependency. Over one year later, HRS petitioned for permanent commitment of the children to it for adoption, alleging that the mother consented to this and that the father had sexually abused the children. The commitment petitions were filed as new cases rather than as part of the dependency proceedings.

At the commitment hearing, HRS asked the court to judicially notice the two dependency cases. The father's counsel objected because the files were not adequate evidence of abuse for commitment purposes

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Besides the 64 cases reversed because of evidentiary error, there were 12 opinions where the appellate courts found evidentiary error but held it was harmless.

28. See FLA. STAT., § 90.201-202 (1985).

29. See *Hill v. State*, 471 So. 2d 567 (1985), *aff'd*, 486 So. 2d 1372 (Fla. 1st Dist. Ct. App. 1986) (motion to strike appendix to brief on grounds it contained documents not in record granted; documents possibly could have been judicially noticed by trial court but not proper for appellate court to do so); *Rook v. Rook*, 469 So. 2d 172 (Fla. 5th Dist. Ct. App. 1985) (local guidelines which set child support for dependents do not meet test for judicial notice and could not be considered part of the appellate record).

Neither *Hill* nor *Rook* explain why the appellate court could not have taken judicial notice of the matters involved. To that extent, they have little informational value. At least one Florida decision has found that the appellate courts are not required to take judicial notice of matters covered by § 90.202. See *Hillsborough County Bd. of Comm'rs v. Public Emp. Rel. Comm'n*, 424 So. 2d 132 (Fla. 1st Dist. Ct. App. 1982).

30. 466 So. 2d 1156 (Fla. 1st Dist. Ct. App. 1985), *review denied*, 475 So. 2d 693 (Fla. 1985).

and because the abuse allegations had to be proved independently at the commitment hearing. The circuit court overruled the objections and noticed the files. Once this occurred, HRS argued all questions of abuse had already been proven in the dependency proceedings, so that only the issue of disposition was left. The father's counsel unsuccessfully argued that the father had been unrepresented at the dependency adjudication so that the abuse must be proved before any disposition consideration was proper. The circuit court found, in reliance on the two judicially noticed files, that the abuse element needed for termination of parental rights had been proved by the parents' supposed stipulations.

The district court of appeal first examined whether judicial notice of the prior files was proper when the father had been unrepresented in the dependency proceedings. While it recognized that a court can judicially notice its own files,<sup>31</sup> such a procedure would have been unnecessary here if HRS had filed the commitment petitions as supplements to the original dependency proceedings rather than as separate actions. The filing procedure used *required* the circuit court to judicially notice the other cases to show continuing jurisdiction over the children.

However, even a showing of continuing circuit court jurisdiction was not enough to uphold the commitment action. This only demonstrated the circuit court had authority to proceed; it did not demonstrate that the father had abused the children. Apparently in judicially noticing the prior files, the circuit court never specified what records or exhibits from those cases it was making a part of the commitment proceedings. This being so, not all the records from the dependency cases, especially the crucial one which would allegedly show the parents' stipulation to the dependency petition, were before the appellate court. Even after the record was ordered supplemented, the alleged stipulation could not be found. The district court of appeal, therefore, could not find the father had agreed in the dependency proceedings that he abused the children. Since no independent proof of abuse was offered in the commitment action, the circuit court's commitment order was reversed and the case remanded for a new evidentiary hearing in the commitment issue.

While the same result may occur after the second commitment hearing, the court of appeal's decision was certainly correct. Noticing the mere existence of another judicial proceeding is different from judi-

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31. See FLA. STAT. § 90.202(6) (1985).

cially noticing documents allegedly introduced therein as proof. Had the father signed a stipulation waiving counsel and stipulating to the alleged abuse, it should be easy to produce. Even if no such statement were signed, as long as the father had stated, somewhere on the record, his agreement with the dependency petitions' allegations, that could arguably have been introduced as an admission. Of course, if both the dependency and commitment petitions had been filed under the same number, there would have been no need to judicially notice the earlier files in any respect. Failure to follow this simple procedure created a major gap in proof which judicial notice could not cure.

### III. Relevancy

#### A. *In General*

The Florida Evidence Code follows the Federal Rules in its approach to relevancy. The Code expresses the general desire that all relevant evidence should be permitted "except as provided by law."<sup>32</sup> Evidence will be relevant if it has a tendency "to prove or disprove a material fact."<sup>33</sup> That the Evidence Code does not go beyond this brief definition is not surprising. No category of information can be considered inherently relevant to all cases. What will be material or immaterial<sup>34</sup> is not a function of substantive evidence law but rather of the underlying claims and defenses in a particular trial.<sup>35</sup> Likewise, whether certain information tends to prove a material fact depends upon the strength or weakness of the logical connection between the information and the matter it is being offered for. Since relevancy is a function of logical deduction and substantive law, merely changing a few facts can produce major results. As a result, cases discussing the general relevancy of certain evidence are seldom of much precedential

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32. FLA. STAT. § 90.402 (1985).

33. FLA. STAT. § 90.401 (1985).

34. F.R. Evid. 401, defining Relevant Evidence, does not use the words "material fact" because of the ambiguity which the drafters felt was inherent in this term. *See* F.R. Evid. 401 Advisory Comment. However, the same concept is expressed by F.R. Evid. 401's language that the fact involved must be "of consequence to the determination of the action".

35. Evidence can even be admissible as to one issue but not as to another issue. FLA. STAT. § 90.107 expressly recognizes the concept of limited admissibility. During this survey period, *Parsons v. Motor Homes of Am., Inc.*, 465 So. 2d 1285 (Fla. 1st Dist. Ct. App. 1985) presented the unusual situation of a reversal because the trial court expressly refused to admit evidence for only limited purposes.

value. Only one general relevancy case decided during the survey period is likely to be of much importance.<sup>36</sup>

In *Pitts v. State*,<sup>37</sup> an ex-deputy sheriff was charged with vehicular homicide arising from the operation of his patrol car while responding to a fellow officer's call for back-up assistance. After receiving the call, Pitts notified his central communications office that he was responding but failed to mention he was operating "code one." This was office terminology for proceeding with both lights flashing and the siren on. On his way to the call, Pitts attempted to make a car proceeding in the same direction yield. Since this was near the call's vicinity, Pitts had turned the siren off as police academy training had directed. When the car did not yield, Pitts tried to pass after checking for incoming traffic but met a second car coming in the opposite direction. Although evidence showed Pitts drove into a guardrail to avoid hitting this car, a collision still occurred and the car's driver was killed. At trial, the defense and state disputed how fast Pitts was driving when he tried to pass. State experts estimated his speed at close to eighty miles per hour, while the defense claimed it was between fifty-five and sixty. Evidence also showed that the passing may have been attempted in a no-passing zone with a fifty miles per hour speed limit.

Besides this evidence, the state called a captain in Pitts' office and through him introduced the office manual requiring an officer deciding to respond "code one" to inform the communications center of such. The state cross-examined Pitts about whether he violated department regulations by proceeding "code one" without telling anyone and argued on closing that his violation of the manual helped show Pitts drove recklessly.<sup>38</sup> Furthermore, the trial court instructed the jury that

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36. For other cases discussing the general relevancy of evidence decided during the survey period see *Smith v. Telophase Nat. Cremation Soc'y, Inc.*, 471 So. 2d 163 (Fla. 2d Dist. Ct. App. 1985) (evidence of defendant's past practices in cremating deceased persons admissible on issue of whether conduct in the case was outrageous); *Ryder Truck Rental, Inc. v. Johnson*, 466 So. 2d 1240 (Fla. 1st Dist. Ct. App. 1985), (evidence that driver had not been cited for traffic violation following an accident should have been inadmissible and inquiry about such should have been mistrial); *Donahue v. Albertson's, Inc.*, 473 So. 2d 482 (Fla. 4th Dist. Ct. App. 1985), (evidence that two months after plaintiff had been injured by a door's improper closing the door switch snapped because the door had been slammed into, was not so remote as to be irrelevant when a defense expert claimed any impact on the switch, from door being mistakenly slammed into, would be negligible).

37. 473 So. 2d 1370 (Fla. 1st Dist. Ct. App. 1985), *review denied*, 484 So. 2d 10 (Fla. 1986).

38. FLA. STAT. § 782.071 (1981) under which the defendant was charged with



while a violation of the manual alone was not sufficient proof of recklessness, “[Y]ou may consider this circumstance together with the other circumstances in the evidence considering whether the vehicle of the defendant was operating in a reckless manner.”<sup>39</sup>

The district court of appeal reversed the conviction finding the manual’s admission was error for several reasons. The court found that no evidence was ever introduced to help explain to the jury the manual’s purpose or the purpose of the “code one” reporting regulation. Indeed the manual itself contained a preface stating it was “for internal use only, and does not enlarge an officer’s civil or criminal liability in any way.”<sup>40</sup> Without any guidance, the jury could only speculate as to what connection Pitts’ reporting violation had with the charges.

Perhaps even more important to the court’s decision was its finding that introducing the manual could have contributed to an erroneous decision by introducing a false standard. Florida case law recognizes that evidence describing what is the standard practice or custom for certain occupations is often introduced to help show whether someone has breached the appropriate level of conduct for his profession, thus possibly being negligent. However, in a criminal case the same evidence is irrelevant when the question is not whether the party has been negligent but has violated a higher standard of care. Here Pitts should have been found not guilty if he was merely negligent. Pitts was charged with a crime for violating a statutory standard of care, recklessness in operating a motor vehicle, not for violating a department rule. Since the state did not show a connection between the two, admission of Pitts’ non-reporting violation was reversible error.<sup>41</sup>

## B. *Similar Happenings and Circumstances in Civil Cases*

No specific rule in either the Florida Code or Federal Rules of

vehicular homicide provided in part: “Vehicular homicide is the killing of a human being by the operation of a motor vehicle by another in a reckless manner likely to cause the death of, or great bodily harm to, another. . . .”

39. 473 So. 2d at 1373.

40. *Id.*

41. The court rejected state arguments that since Pitts forgot to follow the reporting procedure this demonstrated recklessness.

Even if Pitts had been sued civilly for wrongful death, evidence of his non-reporting should not be admissible unless some showing is made that this was negligence causing the other driver’s death. This author believes such a causal connection is not possible.

Evidence governs the admissibility of other occurrences similar to the event involved in the present civil litigation. The admissibility of similar happenings evidence is treated as a subspecies of relevancy. However, this type of evidence is offered so frequently in civil cases that courts are often faced with questions in this area. Two basic questions arise in dealing with similar happenings evidence in civil cases: (1) is what the proponent claims the evidence shows relevant,<sup>42</sup> and (2) has a sufficient degree of similarity between the extraneous event and the one involved in the litigation been established.<sup>43</sup> Unless both questions can be answered affirmatively, trial judges are justified in excluding this type of information.

Trial courts must be careful to allow proponents a fair chance to establish the predicate similarity necessary or else reversal is merited. *Saunders v. Florida Keys Electric Co-op Association*<sup>44</sup> presents an example of how hasty discovery rulings may later cause reversals because they affect evidentiary trial rulings in this area. The plaintiff was injured when the mast of his trailered sailboat hit an overhead power line in a marina parking lot. During depositions, plaintiff learned that the defense knew of other incidents where sailboat masts had hit overhead power lines in nearby marinas. However, the trial court ruled any discovery about the details of these incidents was irrelevant. At trial, Saunders tried to prove the defendant knew the lines in his marina

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42. Evidence of similar happenings appears to be most frequently used to prove notice. However, the possible relevancy of similar happenings is limitless and purely depends on the underlying substantive law.

An interesting use of similar happenings evidence recently occurred in *Trees by and Through Trees v. K-Mart*, 467 So. 2d 401 (Fla. 4th Dist. Ct. App.) *review denied*, 479 So. 2d 119 (Fla. 1985). The plaintiff filed a malicious prosecution/false arrest suit claiming damages stemming from her shoplifting arrest and charge which the store later dropped. To show no damages, the defense introduced evidence that the plaintiff had previously been arrested for shoplifting and taken to a police station, like in the instant case. Those charges were resolved by juvenile services counseling, and the plaintiff suffered no psychological injury from them. The trial court's ruling that the two events were sufficiently similar for the defense to claim that *Trees* had likewise suffered no emotional trauma from the K-Mart arrest was affirmed on appeal.

Similar happenings evidence in criminal cases is governed by Florida's *Williams Rule*, FLA. STAT. § 90.404(1). For discussion of this area *see infra* text accompanying notes 69-107.

43. For a recent case finding reversible error in the improper admission of evidence because the two events dealt with dissimilar matters, *see 3-M Corp. v. Brown*, 475 So. 2d 994 (Fla. 1st Dist. Ct. App. 1985).

44. 471 So. 2d 88 (Fla. 3d Dist. Ct. App. 1985), *review denied*, 482 So. 2d 348 (Fla. 1986).

presented a danger to people towing sailboats by introducing evidence that the defendant knew about the nearby marina incidents. However, the court sustained an objection that no showing was made that these other accidents were similar to Saunders'. After a defense verdict, plaintiff appealed.

The court of appeal found reversal merited for two reasons. The early ban on discovery had been incorrect as evidence about how the other accidents occurred was clearly relevant. "Evidence of similar incidents at locations other than the place where the incident in question occurred is relevant . . . for the purpose of showing the existence of a danger or defect and notice or knowledge of."<sup>45</sup> When the trial court subsequently rejected evidence of the other incidents, the error in its discovery ruling became even more critical. In essence, the two rulings unfairly put the plaintiff in an impossible position since he had been unable to obtain the needed predicate trial evidence due to the earlier incorrect discovery ruling.

*Saunders* demonstrates the use of similar happenings evidence to show actual knowledge of a dangerous condition. However, actual knowledge may not always be necessary in order for an injured party to recover. In some instances, similar circumstances evidence will be relevant to show constructive notice instead of actual notice. In *Fazio v. Dania Jai-Alai Palace, Inc.*,<sup>46</sup> plaintiff sued when she slipped on liquid in an aisle at the defendant's premises. To prove defendant's constructive notice of the aisle's condition, Fazio tried to call witnesses who would have testified that the aisles were commonly littered with spilled drinks and food. However, the trial court limited plaintiff's proof to evidence of the aisle's condition the evening she slipped and fell. After a defense verdict, the court of appeal reversed.

*Fazio* presents an interesting contrast to *Saunders*. Both plaintiffs attempt to use events happening at other times to prove the notice element of their negligence claims. In *Saunders*, the question involved proving sufficient similarity between the two events. However, in *Fazio*, there was no serious question about the similarity. All the occurrences involved the same part of the same premises and were allegedly caused by the same factor. Thus, *Fazio* had to be resolved on the issue whether the other incidents at other times could ever be relevant to show constructive notice. As the court of appeal noted, this question was controlled by the underlying substantive law. In Florida, amuse-

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45. *Id.* at 89.

46. 473 So. 2d 1345 (Fla. 4th Dist. Ct. App. 1985).

ment places, where large numbers of patrons congregate, are held to a higher standard of care than other public places and must be kept in "reasonably safe condition commensurate with the business conducted."<sup>47</sup> Previous cases had allowed circumstantial proof to be offered on the issue of notice and had not limited this to conditions on the day of an accident, but extended it to similar conditions on the same premises at other times.<sup>48</sup> Thus, the plaintiffs excluded similar circumstance evidence should have been admitted to show "necessary or ongoing problems, which could have resulted from operational negligence or negligent maintenance."<sup>49</sup>

### C. *Habit Evidence*

The concept of habit has been aptly described as "one's regular response to a repeated situation."<sup>50</sup> Assuming someone has adopted a regularized method of dealing with a particular situation, it is logical to assume that the person followed this method on an occasion in question unless there is strong proof showing otherwise. Habit evidence is admissible in most jurisdictions, assuming sufficient evidence has been introduced to prove such a habit actually existed.

Comparison of the Federal Rules of Evidence language with that of the Florida Evidence Code would logically lead a reader to believe that habit evidence is not admissible in Florida. Like Federal Rule of Evidence 406,<sup>51</sup> section 90.406 of the Florida Statutes<sup>52</sup> specifically provides for the admission of evidence concerning the routine practice of an organization. However, unlike the Federal Rules, there is no mention of habit evidence in section 90.406. Since the Evidence Code's drafters expressly approved admission of routine organizational practices but did not do so with habit evidence, the statutory construction

47. *Wells v. Palm Beach Kennel Club*, 35 So. 2d 720, 721 (Fla. 1948).

48. *See, e.g., Firth v. Marhoefer*, 406 So. 2d 521 (Fla. 4th Dist. Ct. App. 1981); *Bennett v. Mattison*, 382 So. 2d 873 (Fla. 1st Dist. Ct. App. 1980).

49. 473 So. 2d at 1348.

50. C. McCORMICK, EVIDENCE § 195 at p. 575 (3d ed. 1984).

51. F.R. Evid. 406 states in part that: "Evidence of the habit of a person or of the routine practice of an organization . . . is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."

52. FLA. STAT. § 90.406 states in part: "Evidence of the routine practice of an organization . . . is admissible to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice."

principle "expressio unius est exclusio alterius" would seem to have eliminated habit as an admissible mode of proof in Florida.<sup>53</sup> However, despite the logic of such statutory construction, Florida courts have consistently admitted habit evidence.<sup>54</sup> Decisions during this survey period show the continuation of this policy.<sup>55</sup>

*Fincke v. Peebles*<sup>56</sup> is an important habit evidence case since it discusses the foundational predicate. This was a medical malpractice suit arising from the death of a seventeen year old boy following knee

53. At least one article commenting on the new Florida Evidence Code believed the statutory omission of any reference to habit evidence meant that such proof was not admissible. See Hicks and Matthews, *supra* note 5, at 967.

54. The Law Revision Council note following § 90.406 specifically states that "[t]his section is not applicable to the habit of an individual." Professor Ehrhardt claims that any mention of habit was deleted because of the drafters' "feeling that it should be left to the court to determine as a matter of circumstantial evidence whether there was sufficient probative value to allow the admission of the habit evidence." C. EHRHARDT, *FLORIDA EVIDENCE* (2d ed. 1984). From this he concludes that "[t]his exclusion should not be interpreted as intention to prohibit the introduction of all habit evidence." *Id.*

Examined closely, this is not a sufficient justification to conclude that habit evidence should still be admissible. In every case, whether § 90.406 expressly mentioned habit or not, the courts would have to decide "whether there was sufficient probative value to allow the admission of the habit evidence." This language merely means that courts will have to decide on a case-by-case basis whether a sufficient predicate to prove habit has been shown. However, this should not be something surprising. Federal Rule 406 allows habit evidence but leaves it up to the courts to decide whether the evidence is logically relevant in individual cases and whether a sufficient predicate has been established in an individual case.

Professor Ehrhardt offers a second and stronger justification why habit evidence is still recognized in Florida despite § 90.406's language. Section 90.102 provides that the Evidence Code "shall replace and supersede existing statutory or common law in conflict with its provisions." Since § 90.406 arguably does not *directly conflict* with pre-code Florida cases allowing habit evidence, then its failure to expressly mention habit should not matter. The weakness with this argument comes from the fact that pre-code Florida law also admitted evidence of routine organization practice. Under Professor Ehrhardt's second argument, § 90.406 becomes completely superfluous as it merely codifies, either directly or indirectly, pre-code Florida evidence law. One question why the drafters bothered to take what would be such a purely meaningless act.

55. Only one case during the survey period discussed evidence of a routine practice of an organization, see *Hartford Accident and Indem. Co. v. Ocha*, 472 So. 2d 1338 (Fla. 4th Dist. Ct. App.), *petition for review dismissed*, 478 So. 2d 54 (Fla. 1985) (drivers' license examiner's testimony that she always required minor applicants to secure signed parental consent form was sufficient to help prove the defendant had signed such, even though a copy could not be found).

56. 476 So. 2d 1319 (Fla. 4th Dist. Ct. App. 1985).

surgery. After surgery, Thomas Peeples was taken by the surgeon and the anesthesiologist to the hospital's recovery room. The factual issues revolve around whether he was given proper care following his arrival. Both the anesthesiologist and a recovery room nurse testified about the proper procedures regarding the removal of an endotracheal tube which had been used to help Peeples' breathing during the operation. The anesthesiologist testified that unless a patient was fighting the tube it should not be removed. The danger in doing so is that the patient might still be unconscious, unable to breathe on his own. Even when the tube is removed, there is the danger a patient might react to the anesthesia and stop breathing. To prevent this, a recovery room nurse is supposed to monitor the patient's condition. At trial, the recovery room nurse testified that the anesthesiologist removed the tube as soon as Peeples entered the recovery room. Her testimony was partially corroborated by the surgeon who momentarily left the recovery room after arrival and returned to find Peeples had been extubated. Shortly thereafter, Peeples' heart stopped beating. Even when the tube was reinserted, Peeples never regained consciousness and died almost two weeks later.

The plaintiffs attempted to introduce deposition testimony of the recovery room nurse regarding other times when she felt the anesthesiologist had extubated patients in the recovery room prematurely. The nurse's deposition testimony also mentioned how she and other nurses had talked about the anesthesiologist and how they felt patients were being extubated too soon. Plaintiffs offered this evidence to show that the anesthesiologist had a habit of prematurely extubating patients and that the hospital was on notice of this. While upholding the verdict in favor of the plaintiffs, the court of appeals rejected their position that the nurse's deposition testimony, giving her opinion about the doctor's habit, supplied a sufficient foundation to show that such a habit existed. *Fincke* apparently limits proof of habit to testimony regarding a number of specific instances of conduct which the court finds have been repeated sufficiently to arise to the level of a constant practice. Opinions, whether or not a person has a particular habit without detailed testimony based on concrete factual observances as to why the witness has such a belief, will no longer be a sufficient foundation. Clearly, in this case, the nurses involved in the recovery room could have seen the doctor repeatedly extubate patients too early on many occasions, thus rising to the level of habit evidence. However, without their testimony

relating this, their opinions alone that this occurred were insufficient.<sup>57</sup>

*Fincke* and other cases during this survey period<sup>58</sup> show whether Florida courts are interpreting section 90.406 correctly or not. The courts have and will most likely continue to allow the introduction of habit evidence. This being so, the Florida legislature should either amend section 90.406 to expressly include habit evidence as an admissible mode of proof or amend section 90.406 to make it clear that only routine practice of an organization, and not habit evidence, should be admissible.

#### D. *Subsequent Remedial Measures*

Florida Statute section 90.407 follows the common law and Federal Rules of Evidence by prohibiting evidence of remedial conduct after an event to show an opponent's negligence or culpable conduct. Generally, before applying this prohibition courts must find the action taken was both (1) subsequent and remedial and (2) is being offered for a forbidden purpose. Two widely debated issues involve the admissibility of subsequent remedial measures when they are offered in a strict liability case and when they were made by a third person, rather than a party involved in the litigation. Two recent district court of appeal cases take a pro-defendant approach to both these issues.<sup>59</sup>

##### 1. *Third-Party Action*

Subsequent remedial measures are excluded for several reasons. One is the public policy rationale that parties should be encouraged to promptly take warranted safety measures without having to fear creating damaging evidence against themselves. Another reason claims that

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57. This comes close to rejecting Professor Ehrhardt's position that "[h]abit may be proved by opinion testimony from a witness with adequate knowledge." C. EHRHARDT, *supra* note 5, § 406.1, at 158.

58. The only other case dealing with habit evidence during the survey period was *Hall v. Spencer*, 472 So. 2d 1205 (Fla. 4th Dist. Ct. App.), *review denied*, 479 So. 2d 118 (Fla. 1985) where the court recognized a party's right to introduce habit evidence relating to past instances of a defendant's intoxication and driving.

59. Two other cases during the survey period briefly dealt with subsequent remedial measures. However, the references to § 90.407 in both are so brief that the discussions have little value. *See Donahue v. Albertson's Inc.*, 472 So. 2d 482, 484 (Fla. 4th Dist. Ct. App. 1985); *3-M Corp. v. Brown*, 475 So. 2d 994, 998 (Fla. 1st Dist. Ct. App. 1985).

when a party seeks safety measures after an accident, this should not necessarily be construed as an admission of fault. The party could have been completely without culpability in not acting sooner and is only acting as a good citizen should, in now trying to prevent future harms. From this second rationale, arguments have been made that when third persons make subsequent remedial measures, rather than parties to the action, the prohibitory ban against evidence of these is inapplicable.<sup>60</sup> Despite this argument at least one district court of appeal appears to have taken a *per se* ban against all evidence of subsequent measures used to prove uncontraverted issues, no matter who made the repairs.

In *Thursby v. Reynolds Metal Co.*,<sup>61</sup> a worker sued after his fingers were injured in an aluminum can press the defendant designed. Thursby alleged claims both in strict liability and negligence, arguing that Reynolds had defectively designed and manufactured the machine. The press used a piston to stretch aluminum pieces into a can. Occasionally, the press jammed and had to be cleared of deformed cans before continuing operations. Thursby's job was to do this. A door guarded the area surrounding the piston. Inside was a limit switch which stopped the machine while it was being cleared. However, merely opening the guard door did not automatically do so. Proper procedure for clearing the machine required hitting two switches turning off electrical power and oil to the press before opening the door and hitting the limit switch. Thursby was injured when he forgot to turn off the electrical switch before opening the guard door and hitting the limit switch. Although the limit switch was activated, the piston still operated, injuring Thursby's hand. At trial, he presented proof that the switch failed and that a defective design contributed to this. After a defense verdict, Thursby claimed the trial court erroneously excluded evidence that a fellow employee had examined the limit switch after the accident and replaced it with another type the employee felt was more reliable.

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60. See C. McCORMICK, *supra* note 50, § 275, at 667, claiming that when a third party makes the changes, "the policy ground for exclusion is no longer present." Some courts allow third party changes and reject the argument these are implied admissions. See, e.g., *Brown v. Quick Mix Co.*, 454 P.2d 205, 210 (Wash. 1969) (evidence that guard was installed the day after an accident admissible against manufacturer even though feasibility of design changes was not contested "since the [manufacturer] did not make the changes . . . the fact such changes were made could not conceivably raise . . . an inference [the manufacturer] had admitted it was negligent in not making the changes sooner").

61. 446 So. 2d 245 (Fla. 1st Dist. Ct. App. 1984).



Prior Florida law case law seemed to support Thursby's position that section 90.407 does not apply when a non-party makes the subsequent measures. In *Hartman v. Opelika Machine and Welding Co.*,<sup>62</sup> the same district court of appeal had allowed in evidence that plaintiff's employer, who was not a party in the litigation, had made remedial changes after plaintiff was hurt. The First District Court of Appeal seemed to be adopting a general position in "upholding the admission of such evidence when the change is made by one not a party to the action."<sup>63</sup> However, in *Thursby*, the same court limited *Hartman* to the unusual factual circumstances presented there. In *Hartman*, the defendant introduced the evidence to place blame on the third-party employer for the accident, while in *Thursby*, the plaintiff attempted to use the subsequent measures evidence to place blame on the defendant, as would be the case in most lawsuits. The First District found the evidence was being used to show Reynolds' negligence or culpability and must be excluded by section 90.407. Unfortunately, the reasoning in *Thursby* is very confusing. The court found that under *Hartman* the evidence must still be relevant, no matter who made the subsequent remedial measures. Since neither feasibility nor any other issue except lack of negligence or culpability was controverted in *Thursby*, the First District found evidence of the switch's replacement was irrelevant. Yet, feasibility of repair would always seem to be relevant in a strict liability case. Under *Thursby's* analysis, the fact that a third party took the remedial action is immaterial. If evidence is irrelevant, it should not come in at all — no matter who did the actions involved. Unfortunately, *Thursby's* analysis confuses the relevancy issue with the policy analysis behind excluding evidence of subsequent measures. Such measures are only admissible when controverted, but the reason for this is not a lack of relevancy but a public policy desire to promote repairs. Once a third party takes the remedial action, the public policy dissolves, but the relevancy of the evidence remains. Surely feasibility was relevant, and no good reasons seem to require this issue to be controverted when a third person not a party to the litigation takes the remedial action.<sup>64</sup> Hopefully, other Florida courts will not follow *Thursby*.

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62. 414 So. 2d 1105 (Fla. 1st Dist. Ct. App. 1982), *review denied*, 426 So. 2d 27 (Fla. 1983).

63. 414 So. 2d at 1110.

64. The First District Court of Appeal further indicated its misunderstanding of the policy behind excluding subsequent remedial actions by stating that the third-party post-accident change could not "be attributed to Reynolds as an admission of pre-acci-

## 2. Strict Liability Claims

*Voynar v. Butler Manufacturing Co.*,<sup>65</sup> addressed the issue whether section 90.407's subsequent remedial measure evidence should apply to strict liability cases. A construction worker had stepped on an unsecured roof panel which buckled underneath him causing the worker to fall to his death. His widow sued the roof panel manufacturer in negligence and strict liability. After the fall, the manufacturer took two steps which arguably could have prevented the death. First, it attached warning flyers about where to walk on the panels to each bundle of panels, rather than just having these in the instructions assembly manual. Second, it changed the substance used to coat the panels for shipping so that the new protective coating would begin evaporating after exposure to air. The Fourth District Court of Appeal affirmed a defense verdict, finding the evidence of these measures was properly excluded. The court noted there is a split of authority about the admissibility of subsequent measures.<sup>66</sup> Although it acknowledged contrary case law existed, *Voynar* held that evidence of subsequent remedial measures is not admissible in strict liability actions, as it is not in negligence claims, unless an issue like feasibility of change is contested<sup>67</sup> or

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dent culpability . . .," 466 So. 2d at 249. Of course it could not be an admission by conduct since Reynolds did not make the changes. However, Thursby never offered it as such — only as evidence of the feasibility of a safer design!

65. 463 So. 2d 409 (Fla. 4th Dist. Ct. App.), *review denied*, 475 So. 2d 696 (Fla. 1985).

66. See e.g., *Ault v. International Harvester Co.*, 13 Cal. 3d 113, 528 P. 2d 1148, 117 Cal. Rptr. 812 (1974); *Caprara v. Chrysler Co.*, 52 N.Y.S.2d 114, 417 N.E.2d 545 (N.Y. Ct. App. 1981); *Siruta v. Hesston Corporation*, 232 Kan. 654, 659 P.2d 799 (1983); *Robbins v. Farmers Union Grain Terminal Assoc.*, 552 F.2d 788 (8th Cir. 1977) rejecting arguments that admission of subsequent measures evidence in strict liability cases would discourage corrective measures; compare *Cann v. Ford Motor Co.*, 658 F.2d 54 (2d Cir. 1981) *cert. denied* 456 U.S. 960 (1981), finding the rationale behind excluding subsequent measures evidence in negligence claims is also applicable to strict liability actions.

One completed study examining practical problems under the Federal Rules of Evidence has concluded that the most significant issue concerning F.R. Evid. 407 is "the application of the Rule to products liability actions, particularly when claims of strict liability in tort (Restatement (second) of Torts § 402A) and breach of implied warranty are alleged." See, *Emerging Problems Under the Federal Rules of Evidence*, 126 AMER. BAR ASSOC. SECTION OF LITIGATION (1983). The study recommended the exclusionary approach to this issue.

67. FLA. STAT. § 90.047 (1985), unlike Fed. R. Evid. 407, contains no second sentence which provides examples of issues, other than proving negligence or culpable

the evidence would impeach an opposing witness. The court believed defendants would be discouraged from making improvements if the opposite view was taken. Whether the case was a negligence or strict liability claim was immaterial. Strict liability in Florida does not make manufacturers absolute insurers but only requires they not put an unsafe product out. When events occur which demonstrate how an already "safe" product can be made even safer, manufacturers should not be discouraged from taking such action. The court felt that an opposite ruling would make evidence of subsequent changes admissions of fault and discourage their implementation.<sup>68</sup>

### E. *Other Crimes, Wrongs, or Acts*

Florida Statute section 90.404(2) codifies what is often called by its pre-code name, the "*Williams*" Rule.<sup>69</sup> This section prohibits the introduction in a criminal case of evidence concerning the defendant's other bad acts or crimes when the sole purpose is to show propensity. However, when there is another legitimate purpose for the evidence, evidence of bad acts may be admissible.<sup>70</sup> This section drew more attention in reported cases during the survey period than any of the other

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conduct, for which subsequent measures would be admissible providing these issues are controverted. However, the Florida courts have consistently adopted the Federal Rules approach in this area. See *Voynar*, 463 So. 2d at 411.

68. The court relied heavily on *Werner v. Upjohn Co.*, 628 F.2d 848 (4th Cir. 1980) for its position. The Fourth Circuit's approach was the one specifically recommended by the A.B.A.'s Federal Rules of Evidence study. See *supra* note 66.

Although no Florida decision expressly disagrees with *Voynar*, given the amount of tort litigation in Florida courts, the Florida Supreme Court should consider definitively resolving this question soon.

69. See *Williams v. State*, 110 So. 2d 654 (Fla. 1959), *cert. denied* 361 U.S. 849 (1959).

Surprisingly, other crimes evidence has generated little discussion among Florida evidence writers. For one of the few articles discussing this area, See Comment, *Prior Crime Evidence Admissible Only When Relevant to Crime Charged*, 2 FLA. ST. U.L. REV. 197 (1974).

70. In such situations, FLA. STAT. § 90.404(2)(b) requires the state to provide the defense pre-trial notice of its intention to introduce other crimes evidence and provides for mandatory limiting instructions as to the evidence's purpose.

Like any other offered information, other crimes evidence is always subject to exclusion under the general provisions of FLA. STAT. § 90.403 that it may generate "unfair prejudice" or cause "confusion of issues." As a practical matter, trial courts are unlikely to use this provision to exclude other crimes evidence offered for a non-propensity purpose.

relevancy rules. Not surprisingly, cases discussing other crimes evidence also generated a high percentage of reversal.<sup>71</sup>

Unfortunately, most *Williams* rule cases during this survey period offer little significant discussion.<sup>72</sup> Evidence of other crimes was found erroneous when there was insufficient evidence to connect defendants with the other crimes<sup>73</sup> and when the other acts were not sufficiently similar to be relevant to the crimes charged.<sup>74</sup> However, several important other crimes cases were decided during this time.

### 1. *Williams* Rule Errors Not State Caused

*Brown v. State*<sup>75</sup> presents an unusual fact situation which all prosecutors should carefully note. The defendant, convicted of petty theft, and another woman visited the victim's hotel room twice during one day. Both times a second man was present. The second time the other woman grabbed the victim's wallet and both women ran. The trial judge granted a motion in limine preventing the victim from testifying that on her first trip to the room, Brown had her arm around his friend and it looked as if she were trying to get into the friend's pocket. On cross-examination, defense counsel's questions forced the victim to admit that the woman who grabbed his wallet was not Brown. When counsel then asked, "And, the only thing you saw that girl [Brown] do was run?"<sup>76</sup> the victim blurted out that he also saw her trying to get his friend's wallet. Both the trial court and circuit court refused to find this caused error since they believed the cross-examination had invited such

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71. Five out of seventeen decisions found reversible error in admission of other crimes evidence. A sixth found evidentiary error but also found it harmless.

Both the number of other crimes evidence opinions and the number of reversals due to admission of other crimes evidence are apparently not unique to Florida. See Imwinkelreid, *Uncharged Misconduct Evidence*, 12 Litigation 25, 67 (ABA Fall 1985).

72. In the following cases, treatment of *Williams* Rule issues is so summary that one wonders why the courts even bothered to discuss the issue at all given the short shrift it received. See *Howard v. State*, 471 So. 2d 208 (Fla. 5th Dist. Ct. App. 1985); *Ellis v. State*, 475 So. 2d 1021 (Fla. 2d Dist. Ct. App. 1985); *Lawson v. State*, 470 So. 2d 109 (Fla. 4th Dist. Ct. App. 1985); *Medina v. State*, 466 So. 2d 1046 (Fla. 1985).

73. See, e.g., *Diaz v. State*, 467 So. 2d 1061 (Fla. 3d Dist. Ct. App. 1985) (evidence in a possession of more than 20 grams of marijuana case was insufficient to connect defendant with marijuana found in his brother's car when there was no connection shown between the defendant and the car).

74. See *McKinney v. State*, 462 So. 2d 46 (Fla. 1st Dist. Ct. App. 1984).

75. 472 So. 2d 475 (Fla. 2d Dist. Ct. App. 1985).

76. *Id.* at 476.

a response. The district court of appeal agreed with the trial court's ruling that the evidence was inadmissible. However, it rejected the idea that the doctrine of invited error precluded Brown from complaining about the admission of the evidence. The court noted that when other crimes evidence is relevant only to show propensity, the Florida Supreme Court has presumed the error harmful "because of the danger that a jury will take the bad character of propensity to crime thus demonstrated as evidence of guilt of the crime charged."<sup>77</sup> Here the error was clearly harmful since Brown's two previous trials for the same offense produced hung juries. Accordingly, the district court reversed the conviction and remanded for future proceedings.

*Brown*, confined to its unusual circumstances, does make sense even with the district court's cryptic opinion. As this was the third trial, surely the victim-witness knew he was not supposed to bring this information up. While reversing punishes the state for error it may not have caused, making it bear this burden is fairer than having the defendant do so. The state should have counseled the witness again before trial about the court's ruling. Certainly after *Brown*, state attorneys will have to be even more careful in preparing their witnesses so as to avoid reversible error.

Unfortunately, *Brown* does not explain why the doctrine of invited error did not apply.<sup>78</sup> Thus, the opinion is not clear about what trial courts should do in future similar situations. When witnesses blurt out unexpected answers containing information about other crimes, which is not properly relevant, is mistrial automatic? If the trial court had immediately struck the evidence and given the jury proper instructions, would mistrial still be merited?

*Finklea v. State*,<sup>79</sup> while not factually identical to *Brown*, strongly suggests that at least the First District Court of Appeal would adopt the automatic mistrial position. Finklea and a co-defendant were charged and tried jointly for robbing a Pensacola business. At trial, one of the two victims could identify the co-defendant, but neither could identify Finklea. The only testimony against Finklea came from his al-

77. *Id.* at 477 (citing *Straight v. State*, 397 So. 2d 903 (Fla. 1981)).

78. The district court of appeal's sole statement on this point was that: "The circuit court in its appellate review was clearly in error in affirming on a notion of invited error. The petitioner had every right to claim error in the unsolicited and previously prohibited testimony . . . . The petitioner's motion for mistrial should have been granted." *Id.*

79. 471 So. 2d 596 (Fla. 1st Dist. Ct. App. 1985)

leged admission to a third state witness. On cross-examination, the co-defendant's attorney tried to force this witness to admit he had lied in earlier deposition testimony. However, the witness unexpectedly claimed he and counsel were "talking about two different robberies"<sup>80</sup> in which the defendants had been involved. Finklea's counsel objected to the remark and moved for mistrial. After the court denied the motion, Finklea's attorney did not request a cautionary instruction. On appeal, the district court found the failure to request the instruction did not waive review since "the introduction of a prior unrelated criminal act is too prejudicial for the jury to disregard."<sup>81</sup> Even though the state had no part in eliciting the testimony, this did not lessen its effect; thus, reversal was required.

Like *Brown*, *Finklea* could be read as approving automatic mistrial or reversal whenever other crimes evidence is wrongfully introduced. However, the First District may have intended to still use a harmless error approach, stating that the evidence "was *unfairly* prejudicial. This is especially true in light of the scant evidence in this case relating to Finklea."<sup>82</sup> Unfortunately, like in *Brown*, the court's cryptic opinion leaves some doubt which approach the district court meant to adopt.<sup>83</sup> Hopefully, the Florida courts will adopt a harmless error approach when *Finklea* and *Brown* issues arise in the future. Since Florida courts sometimes will not reverse based on the harmless error doctrine when the state erroneously introduces the other crimes evidence, it would be illogical to take an opposite stand when a defendant or co-defendant does so.

## 2. *Nolle Prosses* and *Williams* Rule Evidence

When the defendant has been previously acquitted of charges involving other crimes, many courts follow the United States Supreme

80. *Id.* at 597.

81. *Id.*

82. *Id.* (Emphasis added).

83. *See also* Howard v. State, 471 So. 2d 208 (Fla. 5th Dist. Ct. App. 1985) which can be read as meaning that the Fifth District would approve a harmless error approach when a witness blurts out inadmissible other crimes testimony.

Like *Brown* and *Finklea*, *Howard* is an extremely short opinion. After reading the *Williams* Rule cases during this survey period, this author is of the firm opinion that appellate courts should either write fully reasoned and thoroughly explained opinions in this area or not bother writing them at all.

Court's decision in *Ashe v. Swenson*<sup>84</sup> and bar the state from using evidence about the acquitted crime in subsequent trials relating to different but similar charges.<sup>85</sup> In *Ashe* the Court found that after a defendant was acquitted of robbing one player at a poker game, collateral estoppel prevented the state from subsequently charging him with robbing the other players. The Court's examination of the first trial's evidence showed that the jury must have found that *Ashe* was not the robber. As this "issue of ultimate fact"<sup>86</sup> was once determined in a final judgment, collateral estoppel prevented it from being tried again. However, even those courts following *Ashe* have not excluded other crimes evidence where the prior acquittal was not based on the same issue which the state subsequently wishes to use the other crimes evidence to prove.<sup>87</sup> In *State v. Perkins*,<sup>88</sup> the Florida Supreme Court seemed to adopt this approach. To help convict Perkins of attempted rape on a child, the state introduced testimony from another child who claimed that Perkins had tried to use the same method, entering the bedroom late at night, to rape her. However, Perkins had been tried for and acquitted of this previous attack. The Florida Supreme Court noted *Ashe* only prohibits "the admission in a subsequent trial of evidence of an acquitted collateral crime only when the prior verdict clearly decided in the defendant's favor the issue for which an admission is sought."<sup>89</sup> Since the issue in both charges seemed to be identity, the court found that once the defendant was acquitted of the prior charge it was "fundamentally unfair"<sup>90</sup> to allow the state to introduce other crimes evidence concerning this charge in a subsequent proceeding. Doing so would force the defendant to defend himself a second time against the charge for which he has once been acquitted. However, the court left open the question whether evidence of collateral crimes for which acquittals had not been obtained could be used.

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84. 397 U.S. 436 (1970).

85. See, e.g., *State v. Irons*, 230 Kan. 138, 630 P.2d 1116 (1981).

86. 397 U.S. at 443.

87. For cases in which a prior acquittal did not prevent use of other crimes evidence see *Oliphant v. Koehler*, 594 F.2d 547 (6th Cir. 1979) (rape charge, previous rape acquittals on consent defense stemming from same factual claims admissible to show pattern or plan); *State v. Darling*, 197 Kan. 471, 419 P.2d 386 (1966) (charge of intent to procure abortion, previous acquittal on similar charge did not prevent admissions since evidence admissible to show intent).

88. 349 So. 2d 161 (Fla. 1977).

89. *Id.* at 163.

90. *Id.*

In *Holland v. State*,<sup>91</sup> the Florida Supreme Court decided whether evidence of a defendant's participation in a collateral offense which has been nolle prossed could ever be admissible in a subsequent proceeding on another charge. Holland was charged with the December 5, 1979, armed robbery of a bank. His first conviction resulted in an acquittal but was overturned because of error in the jury instructions.<sup>92</sup> At Holland's first trial the state introduced other crimes evidence through the testimony of a bank employee who identified Holland as the person who robbed her bank twelve days after the December 5th robbery. Following Holland's conviction, the state nolle prossed any charges relating to the December 17th robbery. After Holland's conviction was reversed, defense counsel moved to preclude state use of the crime's evidence, because it had previously nolle prossed the charges relating to the December 17th robbery. The trial court denied this motion and also denied Holland's request to inform the jury that the collateral crime charged had been nolle prossed. After his second conviction on the December 5th bank robbery charge, Holland appealed to the First District Court of Appeal, which affirmed.<sup>93</sup> However, the First District certified the issue relating to the *Williams* Rule use of prior crimes for which any charges have been nolle prossed as a question of great public importance to the Florida Supreme Court.

The Florida Supreme Court refused to extend *Perkins* to the situation "where the defendant has been charged with the collateral offense and subsequently had the charges dropped."<sup>94</sup> Unlike a *Perkins* and *Ashe* situation, the court felt that there was a major difference in using other crimes evidence after a state nolle prosee as opposed to an acquittal of prior charges. Since a nolle prosee does not necessarily mean that the evidence of the other crime is weak or nonexistent, there is no fundamental unfairness when it is subsequently introduced against the defendant in another trial. The Florida Supreme Court also felt that a contrary ruling, given the procedural facts of *Holland*, would result in an indefensible windfall to the defendant. During his first trial the December 17th charges were still pending. It was only after his first conviction that the state made the decision to drop these. Since his conviction was overturned for reasons unrelated to the *Williams* Rule, a decision now preventing the state from introducing evidence of the De-

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91. 466 So. 2d 207 (Fla. 1985).

92. *Holland v. State*, 400 So. 2d 767 (Fla. 1st Dist. Ct. App. 1981).

93. *Holland v. State*, 432 So. 2d 60 (Fla. 1st Dist. Ct. App. 1983).

94. 466 So. 2d at 207.



ember 17th robbery would “unfairly prejudice the state’s case.”<sup>95</sup>

*Holland* is clearly a correctly decided case even apart from its unusual procedural circumstances. Other crimes evidence is commonly introduced in criminal cases against the defendant even though the defendant has not even been charged. Why the state should decide to nolle pros a case often depends on matters unrelated to the strength of the evidence. *Holland* provides a perfect example of this. After first securing a conviction on the December 5th robbery, the state could reasonably presume that Holland’s sentence would not be extended by a subsequent conviction on the December 17th robbery. Therefore, considering an expeditious use of prosecutorial and judicial resources, it is difficult to fault the decision to drop the second prosecution. If *Holland* had been decided differently, fear of reversals on appeal would mandate that the state sometimes needlessly prosecute defendants for multiple charges even though it would not be in the overall public interest to do so.

Certain language in the Florida Supreme Court’s decision is troubling however. The court notes that there is no indication that the state dropped the charges because of matters involving how strong the evidence was. Hopefully, the lower courts will not read this language to mean that in subsequent cases involving the proposed admission of *Williams* Rule evidence relating to a nolle prossed charge, the defendant has a right to inquire into the state’s motive behind dropping the charges. There are two good reasons for not doing so. First, this would only introduce another issue and allow the defendant to perhaps divert the jury’s and the court’s attention from the central issue of guilt or innocence on the crime charged, rather than on a previous one. Secondly, assuming that the state did indeed drop the other crimes evidence because proof of it was weak, then in most situations it would not have been able to lay the correct factual predicate for the introduction of other crimes evidence either.

The Florida Supreme Court never ruled expressly on Holland’s second point that assuming the other crime’s evidence is admissible despite the nolle prosee, then Holland should be allowed to testify that at the time of his second trial he was not charged with the collateral offense. Chief Justice Boyd, although concurring in the court’s decision that *Perkins* should not be extended to cover the situation involving nolle prossed crimes, would have allowed the defendant to so testify.

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95. *Id.* at 209.

Justice Boyd felt that such a ruling was necessary because "the defendant has a right to inform the jury of all the circumstances pertaining to the evidence adduced against him."<sup>96</sup> Fortunately, he was not able to convince other members of the court on this point. If the court had adopted Justice Boyd's reasoning, then the state may feel compelled to offer explanations as to why defendants such as Holland were not under charge for the other offenses. Once the state offered such reasons, the defense would perhaps feel compelled to counter these reasons or to cross examine the state about them. The jury might end up examining whether the decision to drop the other crimes charges was based on a lack of evidence and whether that same lack of evidence could be inferred over to the present case. Such a scenario would only introduce collateral issues diverting the jury's attention from the central goal at hand, the resolution of the criminal charges pending before it.

### 3. *Miscellaneous Williams Rule Cases*

The remainder of the cases discussing section 90.404(2) presented rather standard issues. In all of them, the state used *Williams* Rule evidence to prove such issues as intent<sup>97</sup> and/or identity.<sup>98</sup> Some of these cases are not interesting enough to merit much discussion. The others are briefly discussed below.

#### a. *Identity*

When other crimes evidence is used to prove identity, a multi-step inferential process is used. First, there must be sufficient evidence to connect the defendant with the other act or crime. Second, the other crimes evidence must be unique. Third, the crime charged must also be of the same unique character. From this, the inference drawn is that the defendant is the one responsible for both unique acts or crimes.

When several crimes or attempted crimes are committed with an unusual *modus operandi*, it is logical to infer the same individual is

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96. *Id.* at 210.

97. See *Phillips v. State*, 476 So. 2d 194 (Fla. 1985); *Hyer v. State*, 462 So. 2d 488 (Fla. 2d Dist. Ct. App. 1984); *Zarate v. State*, 466 So. 2d 1176 (Fla. 3d Dist. Ct. App. 1985); *Bricker v. State*, 462 So. 2d 566 (Fla. 3d Dist. Ct. App. 1985); *Randolph v. State*, 463 So. 2d 186 (Fla. 1984), *cert. denied*, 105 S. Ct. 3533 (1985).

98. *Smith v. State*, 464 So. 2d 1340 (Fla. 1st Dist. Ct. App. 1985); *Larkin v. State*, 474 So. 2d 1282 (Fla. 4th Dist. Ct. App. 1985); *Wright v. State*, 473 So. 2d 1277 (Fla. 1985), *cert. denied*, 106 S. Ct. 870 (1986).

involved each time. *Smith v. State*<sup>99</sup> demonstrated the successful use of other crimes evidence having an unusual *modus operandi* to prove identity. Smith was charged for a first degree murder occurring by arsenic poisoning in 1975. At trial, the court admitted evidence of an attempted arsenic poisoning murder which occurred in November, 1981. After conviction, the First District Court of Appeal affirmed. The court noted that mere similarity between a collateral crime and one charged is not enough to make the other crimes evidence admissible. Rather, "there must be something so unique or particularly unusual about the perpetrator or his *modus operandi* that it would tend to independently establish that he committed the crime charged."<sup>100</sup> *Smith* found arsenic poisoning to possess this unique quality. Unfortunately, the court's opinion does not relate the circumstances connecting Smith to both acts and what the evidence was, as to how the arsenic had been given both times.<sup>101</sup>

An event like attempted arsenic poisoning almost has its own stamp of uniqueness, perhaps explaining why the *Smith* court assumed this without discussion. However, two quasi-ordinary events may be shown to be so similar by the sheer number of common features they share that inferring the same person was involved in both is perfectly logical. In *Larkin v. State*,<sup>102</sup> the defendant was charged with the gun-point robbery of a Plantation pharmacy on August 12, 1983. The pharmacist testified the robber came into the store, asked for something for a sore throat and then drew a gun. The robber ordered that a "closed for inventory" sign be put on the front door, after which he demanded certain drugs be put in a garbage bag. He then took the watches and wallets of the pharmacist and the pharmacist's father, took some Timex watches from a display case, grabbed some Salem cigarettes and

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99. 464 So. 2d 1340 (Fla. 1st Dist. Ct. App. 1985).

100. *Id.* at 1341.

101. Besides identity, the court found the other crimes evidence was also "relevant to rebut appellant's defense that the victim committed suicide, and was introduced to establish a pattern of criminality on the part of appellant." *Id.* How the evidence rebutted a suicide defense is not explained. As to the notion that it established Smith's "pattern of criminality", this may be another way of saying the evidence was admissible to prove identity through *modus operandi*. Arguably *Smith* may even be read as not involving the use of other crimes evidence to prove identity but instead to prove a common scheme or plan. Unfortunately, this case appears to be yet another example where a court has so cryptically explained the reasons behind its decision and stated so little facts that a clear understanding of the opinion is difficult.

102. 474 So. 2d 1281 (Fla. 4th Dist. Ct. App. 1985).

left. At trial, the state introduced evidence about the robbery of a Deerfield Beach pharmacy after the Plantation robbery. The similarities between the two robberies were numerous and striking. The Deerfield Beach robber also ordered a "closed for inventory" sign be posted on the door, demanded many of the same drugs, used a garbage bag to carry the robbery proceeds, took the pharmacist's wallet and watches, grabbed some Salem cigarettes and took additional Timex watches from a display case. The pharmacist in the second robbery identified Larkin as the perpetrator.

The Fourth District Court of Appeal correctly affirmed admission of the *Williams* Rule evidence. Larkin had been linked to the other crime; the other crime was of the same nature and close in time and distance with the one charged. The method used by the robber in each case, once the robbery actually began, was strikingly similar. *Larkin* thus represents a classic use of other crimes evidence to show identity. Indeed, a contrary decision would cast doubt on when other crimes evidence could ever be so used.<sup>103</sup>

#### b. *Intent*

Other crimes evidence was used to prove intent more than any other issue. Like all use of other crimes evidence, this requires traveling through a series of inferential steps. First, the defendant must be sufficiently connected to the collateral crime evidence. Second, the two events must be sufficiently similar so that the intent on both occasions is logically the same. Third, the intent during the collateral crime must be clearly demonstrated.

*Bricker v. State*<sup>104</sup> illustrates that where the intent during the collateral act is not clear, *Williams* Rule evidence should not be admitted to prove intent on another occasion. Otherwise, the jury would be faced with evidence of two similar events where the intent both times is equally ambiguous and, thus, not helpful. Bricker was a beauty salon inspector, charged with bribery and receiving unauthorized compensation for official behavior. In fall 1982, Bricker told his supervisor he

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103. Besides showing how other crimes may be used to prove identity, *Larkin* and *Smith* are reminders that admissible other crimes evidence can occur either before or after the act on trial. What is important is how strong a logical connection there is between the collateral crime or act, the charge on trial and the proposition the other crime evidence is being offered to prove at trial - not the time of the other act or crime's commission.

104. 462 So. 2d 556 (Fla. 3d Dist. Ct. App. 1985).

believed a salon owner had tried to bribe him. The supervisor advised Bricker that unless he was actually given something nothing could be done. A week later, Bricker went to a second salon where a discussion of possible violation fines led the owner to believe Bricker was soliciting a bribe and Bricker to believe the owner was attempting to offer him one. At a second meeting between the two the owner actually gave Bricker money. Unknown to the defendant, the owner had contacted the state attorney's office after the first meeting and was wearing a body wire the second time. Bricker was arrested with the money outside the second salon. He told his supervisor he was trying to trap the salon owner but was still fired and charged. At trial, the court admitted testimony from the first salon owner claiming Bricker tried to solicit a bribe from him. After Bricker's conviction, the Third District Court of Appeal reversed finding that while the crimes were similar there was nothing "so unique or particularly unusual about the perpetrator or his *modus operandi* that it would tend to establish, independently of an identification of him by the collateral crime victim, that he committed the crime charged."<sup>105</sup>

In this author's view, the court correctly reversed but for the wrong reasons. The *Williams* Rule evidence was not being offered to prove identity, which is what the court's *modus operandi* discussion really related to, but to prove intent. Certainly, the intent was at worst ambiguous on both occasions. Indeed, a fair-minded person could even say that with respect to the first salon, intent clearly was missing since Bricker himself reported what he believed to be an attempted bribe. After his supervisor's comments, his actions at the second salon could be viewed as perfectly reasonable.

*Randolph v. State*<sup>106</sup> is the only other decision where the use of other crimes evidence to prove intent received more than cursory attention. Randolph was charged with the first degree murder of a robbery victim. At trial the state elicited testimony from Ginton, Randolph's girlfriend, that she worked for Randolph as a prostitute and gave her earnings to him. She testified that on the night of the homicide as she was leaving a customer, Randolph ran up and pushed her away. As she left, Ginton heard Randolph warn her customer not to do anything. Two gunshots followed. After the shooting, Randolph asked Ginton about the victim and returned to the shooting scene after she told him the victim had money. To prove intent, the state introduced evidence of

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105. *Id.* at 559.

106. 463 So. 2d 186 (Fla.), *cert. denied*, 105 S. Ct. 3533 (1985) .

another robbery two nights earlier. Randolph had robbed two victims after Ginton had finished with them. On this earlier occasion he also used a gun and was heard saying "he could have killed one of them because he [the victim] didn't have any money."<sup>107</sup>

While arguably his actions during the early crime do not reflect his intent during the later homicide, since Randolph actually did not shoot either victim, the Florida Supreme Court was probably correct in admitting the other crimes evidence. Certainly, both incidents were similar and Randolph participated in both. True, he did not shoot the one earlier victim, but this may have been because the other victim on that occasion did have money. During the later crime, Randolph apparently had no idea the homicide victim had any money when he shot him, or else why did Randolph find it necessary to ask Ginton about this and return to the scene following her affirmative reply. Finally, the mere fact that Randolph bothered to make the earlier statement during the partially successful earlier robbery reflects his state of mind at that time and that he had at least contemplated inflicting such "punishment" should another potential victim be so unfortunate as to not have any money.

#### IV. Privileges

##### A. *Marital Communications Privilege*

Florida, like many other states, recognizes a limited testimonial privilege for the marital relationship.<sup>108</sup> Under Florida Statute section

107. *Id.* at 189.

108. Two marital privileges have been recognized in the United States. One is the privilege for confidential marital communications, also called the husband-wife communications privilege, which Florida evidence law recognizes. This privilege only precludes one spouse from testifying about confidential communications between the couple while they were married. The second is the spousal immunity or anti-marital facts privilege. This "privilege" is actually a rule of competency since when applicable it prevents one spouse from giving *any testimony* against the other spouse in a criminal case, while the two are validly married. The holder of the spousal immunity privilege varies from jurisdiction to jurisdiction. *See, e.g., Trammel v. United States*, 445 U.S. 40 (1980), declaring that the witness-spouse rather than the defendant-spouse is the appropriate holder of this privilege in federal criminal actions. For a critical review of *Trammel*, see Lempert, *The Right to Every Woman's Evidence*, 66 IOWA L. REV. 725 (1981).

For a general discussion of Florida's Marital Privilege before passage of the Florida Evidence Code, see Hipler, *Confidential Communications: Developments in Flor-*

90.504 either spouse in a marriage has a privilege to refuse to disclose and to prevent the other spouse from disclosing confidential communications between the two during their marriage.<sup>109</sup> The privilege's purpose is to foster communication between the spouses and, to a certain extent, to protect the marriage relationship itself. Thus, the marital privilege, like other privileges, deprives the trier of fact of information which is often probative and trustworthy in order to foster relationships which the law deems worthy of protection.<sup>110</sup> Certainly there is a constant tension between the notion that a jury or judge should be allowed to hear all relevant evidence before making a decision and the notion of excluding information because it is privileged. Recognizing this tension, Florida law recognizes that matters which may be otherwise considered confidential can be waived. Florida Statute section 90.507<sup>111</sup> provides that a privilege will be considered waived in three separate situations: (1) when the holder "voluntarily discloses"<sup>112</sup> the communications; (2) when the holder "consents to disclosure of any significant part of the matter;"<sup>113</sup> or (3) when the holder makes the communication in a situ-

*ida's Marital Privilege*, 51 FLA. B.J. 697 (1977).

109. FLA. STAT. § 90.504 (1985) states in part that: "(1) A spouse has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, communications which were intended to be made in confidence between the spouses . . .

(2) the privilege may be claimed by either spouse. . . ."

110. Since privileges work a disposition of evidence, Wigmore felt that four conditions must be fulfilled before any valid privilege could be recognized:

(1) The communications must originate in a *confidence* that they would not be disclosed;

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and

(4) The *injury* that would insure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of litigation.

8 WIGMORE, HANDBOOK ON EVIDENCE § 2885 (3d ed.) (Emphasis in the original).

111. FLA. STAT. § 90.507 states in part that: "A person who has a privilege against the disclosure of a confidential matter . . . waives the privilege if he, . . . voluntarily discloses or makes the communication when he does not have a reasonable expectation of privacy, or consents to disclosure of, any significant part of the matter or communication."

112. *Id.* See *infra* text accompanying notes 116-117 for discussion of this language.

113. *Id.*

ation where "he does not have a reasonable expectation of privacy."<sup>114</sup>

*Koon v. State*<sup>115</sup> was the only husband-wife privilege case decided in this survey period. Koon was charged and convicted of first-degree murder for killing a government informant who implicated him in a counterfeiting scheme. Koon and his nephew allegedly lured the informant Dino to a private place where they beat him and then took him to a secluded rock pit in the Everglades. At the pit, Koon allegedly ordered Dino to walk away with him from the car. He then killed Dino with a shotgun. At trial, Koon's wife was forced to testify against her husband despite an assertion of the husband-wife privilege. Mrs. Koon testified that on the night of the alleged murder, Koon had telephoned her and admitted the crime. The state successfully convinced the trial court that since Koon had also told his mother-in-law and his son about killing Dino, this constituted a waiver under section 90.507. However, on appeal the Florida Supreme Court reversed the conviction finding that both spouses intended the telephone call to be privileged and "made the communications when they had a reasonable expectation of privacy."<sup>116</sup>

Like so many other opinions during this survey period, *Koon's* discussion of the evidentiary issues is extremely brief. However, careful reflection shows that the Florida Supreme Court was clearly correct. Although Koon's admissions to his mother-in-law and son may at first blush seem to constitute waivers under section 90.507, they were not. Privileges protect the content of the confidential communications — not the underlying information communicated itself! While section 90.507 uses the words "voluntarily discloses" with respect to a privilege's holder, the words apply to "the disclosure of a confidential matter or communication" and not to any information about the underlying event itself. Since Koon did not tell his mother-in-law and his son about the contents of the confidential phone call conversation with his wife, the marital communication was never voluntarily disclosed. What was voluntarily disclosed was the fact of the killing, not the fact Dino had told his wife about the killing. Forcing the wife to relate the phone

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114. *Id.* For an article discussing pre-code Florida law concerning this issue see Comment, *Husband-Wife Privileges - Testimony of Third Party Eavesdropper Concerning Privileged Communication Admissible Where Privileged Party Knows or Has Reason To Know of Eavesdropper's Presence*, 4 FLA. ST. U.L. REV. 553 (1976).

115. 463 So. 2d 201 (Fla.), cert. denied, 105 S. Ct. 3511 (1985).

116. *Id.* at 204. Evidently the nephew was not present when Koon made the telephone call to his wife since the court also found that "[n]o other party was present at the time of the incriminating conversation between appellant and his wife" *Id.*



conversation was error,<sup>117</sup> although having the mother-in-law and son testify about what Koon told them would not be.

## B. *Psychotherapist-Patient Privilege*

Florida Statute section 90.503 follows pre-code law by recognizing a psychotherapist-patient privilege.<sup>118</sup> The privilege prevents unwilling disclosure of confidential communications between a patient, seeking treatment or diagnosis, and a psychotherapist.<sup>119</sup> Unlike other confidential communication privileges, this one extends beyond communications between the parties and also covers records a psychotherapist would make in the course of treatment and diagnosis. During this survey period, section 90.503 generated more opinions than any other privilege. While some were merely restatements of settled law,<sup>120</sup> two important cases were decided.

### 1. *Child-Custody Cases and the Privilege*

Section 90.503(4)(c) expressly provides that the privilege will not be recognized “[f]or communications relevant to an issue of the mental or emotional conditions of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense. . . .”

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117. One pre-code case provides an example of what should still be considered voluntary disclosure of a confidential matter. In *Tibado v. Brees*, 212 So. 2d 61 (Fla. 2d Dist. Ct. App. 1968), one spouse testified in a deposition about a confidential communication with his wife. Since there was no objection at the deposition to this testimony, the court considered it waived. *Brees* is certainly a correct decision. Communicative privileges exist not merely to prevent admission of certain confidential communications but to prevent their disclosure. Failure to take prompt steps to prevent disclosure should be considered a waiver.

118. See FLA. STAT. § 90.503(2) (1985).

119. FLA. STAT. § 90.503 protects not only treatment for what may be considered standard mental or emotional problems but also for “alcoholism and other drug addiction.”

120. See *Hall v. Spencer*, 472 So. 2d 1205 (Fla. 4th Dist. Ct. App.), *review denied*, 479 So. 2d 118 (Fla. 1985) (§ 90.503 prevents disclosure of hospital records concerning defendant-driver’s alcohol treatment when driver does not plan to use his mental or emotional condition as a defense in automobile collision lawsuit), *Connell v. Guardianship of Connell*, 476 So. 2d 1381 (Fla. 1st Dist. Ct. App. 1985) (trial court erred in excluding deposition testimony of doctor in competency restoration proceeding, since § 90.503(4)(c) provides exception to exclusion when there is “an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim. . . .”).

This language is virtually identical to that in pre-code statutes governing the privilege.<sup>121</sup> Questions concerning this exclusionary language seem to arise frequently in child custody proceedings. Since custody awards are based on what is in the best interests of the child, an inquiry into the mental condition of one or both spouses may often appear needed. Depending upon the extent of such an inquiry, this could lead to divulgence of medical records and communications with a psychotherapist.

Pre-code Florida law rejected the position that merely asserting a claim for child custody constitutes a waiver of the psychotherapist-patient privilege. In *Roper v. Roper*,<sup>122</sup> both parties sought custody in a dissolution of marriage proceeding. The husband sought to depose the wife's psychiatrist over his wife's objection. The Fourth District Court of Appeal agreed that a patient's mental health "is a factor that the Court can and should consider in determining the best interests of the child."<sup>123</sup> However, *Roper* refused to adopt the position that a spouse, merely by seeking custody, waived any privilege claims to communications with a psychiatrist. The Fourth District admitted that "[t]he wife's mental condition may become an issue in the case"<sup>124</sup> but never established any clear guidelines when this would result in the privilege's waiver. The only concrete guidance *Roper* gave was that a spouse's own introduction of communications with the psychiatrist to prove mental condition would be construed a waiver. Since the wife had not done so here, the husband had no right to depose her psychiatrist.<sup>125</sup>

*Miraglia v. Miraglia*<sup>126</sup> apparently exemplifies one of those rare instances where a spouse's mental condition is not initially such an issue that requesting custody automatically constitutes a waiver,<sup>127</sup> but

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121. See former FLA. STAT. §§ 90.424(3)(b) and 490.32(2)(b).

122. 336 So. 2d 654 (Fla. 4th Dist. Ct. App. 1962).

123. *Id.* at 656.

124. *Id.*

125. *Roper* did suggest that the trial court under Fla. R.C.P. 3.160 could always order an examination by a court-appointed psychiatrist to explore a spouse's mental status.

126. 462 So. 2d 507 (Fla. 4th Dist. Ct. App. 1984).

127. During this survey period, the Fourth District Court of Appeal summarily re-affirmed its position that merely requesting custody does not waive the psychotherapist-patient privilege. See *Khairzadah v. Khairzadah*, 464 So. 2d 1311 (Fla. 4th Dist. Ct. App. 1985) (quashing trial order denying protective order motion filed when husband subpoenaed hospital record of wife's treatment during period prior to dissolution

where subsequent circumstances during the dissolution proceeding make a waiver necessary. There the trial court awarded custody to the wife and refused to admit testimony from her psychiatrist concerning her mental condition. After the final judgment, the wife attempted suicide and custody was transferred to the father. However, one week later, the trial court returned the children to the wife and denied the father's petition for rehearing. One reason for awarding the wife custody was to "help her resolve admitted emotional problems."<sup>128</sup> The Fourth District Court of Appeal found this an impermissible basis since it would effectively put the mother's best interests over that of the children. The Fourth District agreed that the court's initial decision excluding the wife's psychiatrist's testimony was correct. However, when the wife subsequently attempted suicide, this made her mental health a vital issue as to who should be awarded permanent custody. Thus, on remand, the husband would be able to introduce the psychiatrist's testimony over an assertion of privilege.

*Miraglia* is certainly a correct decision. If the wife's subsequent suicide attempt did not put her mental condition in issue, it would be difficult to see what would. However, why an event reflective of a spouse's mental status which occurs subsequent to a custody request is any more reflective than one which occurs before is puzzling. The *Roper-Miraglia* line of cases demonstrate the need for an explicit exception to the psychotherapist-patient privilege in custody cases. Even *Roper* admitted mental status was important to inquire into in determining custody. Then why should such extremely relevant evidence be excluded? Florida law refuses to recognize other confidential communications privileges where children may be concerned.<sup>129</sup> One argument against such an exception may be that the parties would try to introduce any and all evidence of mental or emotional treatment no matter how far removed. However, trial courts consider remoteness in ruling on the relevancy of all evidence, and there appears to be no reason why such a consideration would not keep out the truly irrelevant psychiatric data in custody proceedings any less than it would in other cases. If Florida truly wants to make custody determinations in the best interests of the children, legislative action creating such an exception is merited.

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proceeding).

128. 462 So. 2d at 507.

129. See, e.g., FLA. STAT. § 415.52 (1985) discussed *infra* in text accompanying notes 131-134.

## 2. Communications Made Under Court Order Exception

*Miraglia* construed one exception to the psychotherapist-patient privilege. The privilege also does not apply to "communications made in the course of a court-ordered examination of the mental or emotional condition of the patient."<sup>130</sup> Such communications probably most often occur when a defendant claims insanity and the court orders an examination.

In *Carson v. Jackson*,<sup>131</sup> parents brought a negligence and child abuse action against a babysitter and her husband. The babysitter had previously pled *nolo contendere* to a battery charge in a criminal case unconnected with the parents' suit. She had been placed on probation under the condition she would not babysit again until she was "examined and found fit by a psychologist."<sup>132</sup> To comply with this, both spouses saw a psychologist. As part of discovery, the plaintiffs sought to either depose the psychologist or have his records produced. After the trial court denied the defendants' motion for a protective order, they appealed.

The Fourth District Court of Appeal agreed with the babysitter's privilege claim stating that it did "not believe that the petitioners' visit to a psychologist under a plea agreement relating only to the continuation of doing business constitutes a 'court-ordered examination'"<sup>133</sup> under the psychotherapist-patient privilege's exception. Unfortunately, the court never stated why it adopted this belief. Possibly the court meant to distinguish between court-ordered examinations which are directly necessary to secure information in a pending proceeding and court-ordered examinations which are merely incidental in nature to a court proceeding. Whatever its reasoning, the court should have explained its ruling in this part of *Carson* so that trial courts could be given some guidance on this point.

However, even with the Fourth District's ruling on the psychotherapist-patient issue, the babysitter-defendants still were denied a protective order. *Carson* noted that Florida Statute section 415.512 expressly abrogates all statutory privileges except for attorney-client communications in "any situation involving known or suspected child abuse or neglect" and provides that a privilege claim is not a ground

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130. See FLA. STAT. § 90.503(4)(b) (1985).

131. 466 So. 2d 1188 (Fla. 4th Dist. Ct. App. 1985).

132. *Id.* at 1190.

133. *Id.*

for "failure to give evidence in any judicial proceeding relating to child abuse or neglect."<sup>134</sup> The defendants urged that section 415.512 should be construed to apply only to proceedings brought by the State Department of Health and Rehabilitative Services. They claimed that one purpose of the psychotherapist-patient privilege is to encourage individuals in need of treatment to seek such and that applying section 415.512 to abrogate the privilege beyond a HRS proceeding would discourage people from seeking voluntary treatment.

The Fourth District recognized the defendants' argument that section 90.503's purpose was valid. However, the court assumed the legislature had weighed the need to encourage individuals to voluntarily seek treatment, versus the need to deter child abuse by permitting the broad introduction of evidence in abuse related cases in civil lawsuits for damages. Thus, the Fourth District found section 415.512 required rejection of defendant's privilege claim.

In the author's view, the court was correct in its construction of section 415.512. Besides this, factually the babysitters should not have been given the benefit of a claim that an opposite construction was needed to voluntarily encourage people to seek mental care. Here the wife sought psychological help under a court order as a part of her probation, so her visit for treatment was clearly not voluntary.

### C. *Privilege Against Self-Incrimination*

Both the United States and Florida Constitutions recognize that all individuals have a privilege against self-incrimination.<sup>135</sup> Most discussions of these privileges occur in the context of addressing the admissibility of confessions or incriminating statements in criminal cases, an area beyond this article's scope. However, the courts have recog-

134. FLA. STAT. § 415.512 (1985) states in part:

*Abrogation of privileged communications in cases involving child abuse or neglect.* — The privileged quality of communication between husband and wife and between any professional person and his patient or client, and any other privileged communication except that between attorney and client shall . . . not apply to any situation involving known or suspected child abuse or neglect and shall not constitute grounds for failure to report, . . . or failure to give evidence in any judicial proceeding relating to child abuse or neglect.

135. See U.S. CONST. amend. V, and FLA. CONST. § 9, Declaration of Rights (both providing in part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself.").

nized that the privilege also extends to civil and administrative proceedings.

*Boedy v. Department of Public Regulation*<sup>136</sup> recently afforded the Florida Supreme Court an opportunity to revisit the privilege against self-incrimination's applicability to professional regulatory proceedings. The Department filed an administrative complaint against Boedy pursuant to the Medical Practice Act.<sup>137</sup> The complaint alleged Boedy suffered from a mental or emotional condition making him "unable to practice medicine with reasonable skill and safety"<sup>138</sup> under Florida law. Pursuant to its complaint the Department ordered Boedy to submit to a series of psychiatric examinations, the results of which would be used to determine his fitness to continue practicing medicine. When a Department hearing officer denied his claim that the examinations would violate his privilege against self-incrimination, Boedy appealed to the First District Court of Appeal<sup>139</sup> and then to the Florida Supreme Court, both of which also rejected his privilege argument. Since the supreme court relied heavily on the district court's opinion, a review of both is necessary.

The First District Court of Appeal carefully phrased the issue as whether the "privilege against compelled self-incrimination is applicable *in the circumstances of this case.*"<sup>140</sup> The answer depended on whether the practical effect of the proceedings could be considered penal in nature. The court acknowledged that the Florida courts had found the privilege applicable to Florida Real Estate Commission proceedings investigating allegations of misconduct<sup>141</sup> and to State Board of Medical Examiners investigation of unprofessional conduct claims.<sup>142</sup> In both cases, sanctions were sought for the unprofessional

136. 463 So. 2d 215 (Fla. 1985).

137. FLA. STAT. § 4358.301-349 (1985).

138. FLA. STAT. § 458.331 (1)(s) (1981).

139. 444 So. 2d 503 (Fla. 1st Dist. Ct. App. 1984).

140. *Id.* at 505 (Emphasis added).

141. *See State ex rel. Vining v. Florida Real Estate Comm'n*, 281 So. 2d 487 (Fla. 1973). The misconduct allegations included the following: failure to maintain trust funds in an escrow account; breach of trust and dishonesty in a business dealing; failure to obtain a new registration certificate or otherwise tell the Commission about an office address change; sharing offices with an attorney in violation of a Commission Rule; and a general charge that Vining's past conduct showed he was so incompetent and dishonest a client's money or property could not be trusted to him.

142. *See Lester v. Department of Prof. and Occ. Regulations*, 348 So. 2d 923 (Fla. 1st Dist. Ct. App. 1977) (involving allegation of receiving kickbacks from a hospital where the physician's patient had received services).

conduct alleged. The First District contrasted these situations with that in *Boedy*. The Department of Professional Regulation admittedly sought to at least temporarily curtail the doctor's ability to practice medicine, but this happened because his ability was impaired not because Boedy had engaged in professional misconduct meriting disciplinary action. The court noted that the United States Supreme Court has held that the privilege against self-incrimination is not implicated when a proceeding is for the purpose of assessing a civil penalty rather than a criminal one.<sup>143</sup> Examining the factors the United States Supreme Court used in *Kennedy v. Mendoza-Martinez*<sup>144</sup> to determine whether a penalty was criminal or civil in nature, the First District summarily concluded that the Department's proceeding against Boedy did not seek to impose a criminal penalty; thus, he had no privilege to refuse the examinations. However, the court certified the question to the Florida Supreme Court as one of great public importance.<sup>145</sup>

In a brief opinion, the Florida Supreme Court affirmed. Like the First District, the supreme court found the specific section of the Medical Practice Act involved in *Boedy* "does not deal with an issue of guilt or innocence."<sup>146</sup> No misconduct charges or the possibility of any pen-

143. See *United States v. Ward*, 448 U.S. 242 (1980).

144. 372 U.S. 144 (1963). The Court listed the factors as:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment, . . . whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . ."

*Id.* at 168-169.

145. The exact question certified was: "Whether the fifth amendment privilege against compelled self-incrimination applies to disciplinary proceedings initiated under section 458.331(1)(s), Florida Statutes, to determine whether a physician is unable to practice medicine with reasonable skill and safety to patients as a result of a mental or physical condition." *Boedy*, 444 So. 2d at 504.

146. 463 So. 2d at 217. The court relied on *Parkin v. State*, 238 So. 2d 817 (Fla. 1970), *cert. denied*, 401 U.S. 974 (1970) where a defendant claiming insanity as a defense refused to answer questions at a court ordered psychiatric evaluation. The Florida Supreme Court held that the privilege against self-incrimination would not be violated by requiring a defendant to answer questions in a psychiatric interview since any statements of the accused could only be properly used as evidence of mental status and not for the factual truth of the statements themselves. Indeed, *Parkin* specified that the state should only elicit the experts' opinion "as to sanity or insanity, and should not inquire as to information concerning the alleged offense provided by a defendant during

alty for misconduct were involved in a section 458.331(1)(s) proceeding. Rather the sole issue is a doctor's fitness to practice medicine "with reasonable skill and safety." The state clearly had a great interest in certifying and making sure that persons engaging in a professional discipline are physically and mentally able to do so. Since there is no absolute right to practice medicine free from any reasonable regulation, Boedy could not refuse the ordered psychiatric evaluations and continuing practicing. As long as the state did not seek to use anything Boedy might say during the evaluations against him in later criminal proceedings, there was no valid privilege claim. Since section 458.331(1)(s) prohibited such, this was not a bona fide issue.<sup>147</sup> The Florida Supreme Court thus found it "constitutionally permissible to deny authority to practice medicine to a physician who asserts the privilege against self-incrimination if his claim has prevented full assessment of his fitness and competence to practice."<sup>148</sup>

## V. Compulsory Process

In a criminal case, the United States and Florida constitutions guarantee the accused the right to subpoena witnesses to testify for the defendant.<sup>149</sup> The Compulsory Process Clause has been construed as affording an accused the right to present a defense free from arbitrary

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his interview. . . ." *Id.* at 820.

The Florida Supreme Court found that the examination in *Boedy* like that in *Parkin*, was not related to "guilt-in-fact", 463 So. 2d at 217, but to the presence or absence of a mental condition. This author believes the analogy drawn to *Parkin* is both strained and unnecessary. To claim that the *Parkin* examination was not related to "guilt-in-fact" is sophistry. If *Parkin* was insane at the time she committed the alleged criminal acts, she was not "guilty-in-fact" because she did not possess the requisite mental status! At any rate, once the Florida Supreme Court found that Boedy's proceeding did not seek to impose a criminal penalty, there should have been no need to even draw such an analogy.

147. FLA. STAT. § 458.331(1)(s) specifically stated that: "[I]n any proceeding under this paragraph, neither the record of proceedings nor the orders entered by the board shall be used against a physician in any other proceeding."

148. 463 So. 2d at 218.

149. U.S. CONST. amend. VI states in part that: "[i]n all criminal prosecutions, the accused shall have the right . . . to have compulsory process for obtaining witnesses in his favor. . . ." FLA. CONST. art. I, § 16, Declaration of Rights, states that "[i]n all criminal prosecutions the accused . . . shall have the right to compulsory process for witnesses. . . ."



and unreasonable state evidentiary rules.<sup>150</sup> In *State v. Montgomery*,<sup>151</sup> the Third District Court of Appeal resolved a conflict between an accused's right to present a defense and a proposed defense witness' legitimate claim of the privilege against self-incrimination. More specifically, the court decided whether a trial court can override the state's objection to giving a witness use immunity.

Montgomery was charged with various offenses, including resisting arrest, grand theft, and battery of a law enforcement officer. He claimed that a person named Downey had been present, had seen the incident giving rise to the charges and could give exculpatory information. Downey refused to testify unless immunized. When the state did not offer immunity, Montgomery asked the trial court to immunize Downey anyway, which the court did over state objection.

The district court noted that *Montgomery* was a case of first impression in Florida. The court found there were two kinds of defense witness immunity — statutory and judicial. Statutory immunity is “granted by the legislature to the executive branch through statute which gives a prosecutor authority to confer immunity on a witness in return for the witness' self-incriminating testimony.”<sup>152</sup> Traditionally, the decision to confer this lies with the state. However, the district court found that when prosecutorial misconduct interferes with a defendant's constitutional rights to present a defense, statutory immunity can be used as a remedy to avoid a court ordered acquittal. Thus, when the prosecution so threatens a defense witness with possible criminal charges that the witness invokes the privilege against self-incrimination instead of testifying<sup>153</sup> or when the prosecution intentionally refuses to grant immunity as a matter of trial strategy to keep exculpatory evidence out,<sup>154</sup> statutory immunity has been recognized as possible appropriate action. However, even so, the recognition of statutory immunity does not make its use mandatory. Since the executive has the authority

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150. See, e.g., *Washington v. Texas*, 388 U.S. 14, 23 (1967) holding that a state statute prohibiting persons charged as accomplices from being witnesses for each other violated a defendant's compulsory process rights since it “arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense.” *Id.*

151. 467 So. 2d 387 (Fla. 3d Dist. Ct. App. 1985).

152. *Id.* at 390.

153. See *United States v. Morrison*, 535 F.2d 223, 225 (3d Cir. 1976).

154. See *Government of Virgin Islands v. Smith*, 615 F.2d 964, 969 (3d Cir. 1980).

to decide whether statutory immunity is appropriate, even in instances of prosecutorial misconduct, the state still maintains that residual power. If the state wishes to continue prosecution when its misconduct has interfered with the defendant's constitutional right to call a witness, the state must grant the immunity or suffer dismissal. But the state must decide which choice is appropriate, not the trial court.

Since a dismissal is such a drastic remedy, *Montgomery* found that the defense has the burden of showing the state intentionally attempted to deprive the defendant of a fair trial by interfering with the right to call a witness.<sup>155</sup> Unfortunately for *Montgomery*, the record did not reflect this. The district court refused to accept the position that when the state declines to immunize a defense witness, the lack of any present intention to prosecute the witness is *per se* evidence of misconduct. Thus while the court recognized statutory immunity as a viable remedy, this was not an appropriate occasion for it.

As an alternative to statutory immunity, *Montgomery* also argued the theory that judicial immunity should exist whenever "the defendant is prevented from presenting exculpatory evidence which is crucial to his defense"<sup>156</sup> despite the lack of prosecutorial misconduct. Under this theory, judicial immunity is part of a court's inherent power to see that a defendant's rights are fulfilled. Unlike statutory immunity which has been favorably recognized by many courts and some commentators,<sup>157</sup> the district court found only the United States Court of Appeals for the Third Circuit favorably recognized judicial immunity.<sup>158</sup> Since granting immunity is a traditional executive decision, respect for the separation of powers doctrine has driven many courts away from recognizing judicial immunity. Furthermore, the time and information needed for a

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155. "The defendant must be prepared to show that the government's decisions were made with the deliberate intention of distorting the judicial fact finding process." 467 So. 2d at 391 (quoting *United States v. Herman*, 589 F.2d 1191, 1204 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979)).

156. 467 So. 2d at 392-393.

157. See Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses*, 91 HARV. L. REV. 1266, 1280 (1978) concluding that the "right to compulsory process guaranteed by the sixth amendment requires the State to grant use immunity to defense witnesses when doing so would not create significant burdens for the state;" Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 170 (1980) arguing that "[o]nce the state makes immunity available to the prosecution it should not be permitted arbitrarily to withhold it from the defense."

158. See *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980); *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978) *cert. denied*, 441 U.S. 913 (1979).

court to intelligently assess when judicial immunity is appropriate would lead to both "significant expenditures of judicial energy to the detriment of the judicial process overall, and would risk jeopardizing the impartiality of the judge at trial."<sup>159</sup>

Against these two reasons for declining to recognize judicial immunity, Montgomery again sought to utilize a compulsory process clause argument. However, the district court declined to recognize such. The clause gives defendants the right to subpoena witnesses and have their testimony heard free from prosecutorial conduct which would merit granting statutory immunity. However, "it does not carry with it the additional right to displace a proper claim of privilege, including the privilege against self-incrimination."<sup>160</sup> Thus, Montgomery had no valid compulsory process clause claim to judicial immunity for his witness.<sup>161</sup>

Ultimately, the district court found that only when there is sufficient prosecutorial misconduct can a court become involved in an immunity decision. Even then the ultimate choice between dismissal or immunity still remains with the state.<sup>162</sup>

## VI. Cross-Examination and Impeachment

Of the fourteen cases decided in late 1984 and 1985 that this survey will discuss that deal with cross-examination and impeachment, all but one of them are criminal cases. The first four cases involve reversals as a result of trial courts' improperly restricting the cross-examination by defendants of the main witnesses for the state.

### A. *Prior Conviction*

*Belton v. State*<sup>163</sup> involved a reversal of a defendant's conviction because "the trial court improperly limited cross-examination of the

159. 467 So. 2d at 394.

160. *Id.*

161. In so denying the claim, the district court noted a possible third policy reason why judicial immunity should not be recognized. This is the fear that co-defendants would intentionally try to create situations where they could utilize perjured testimony to mutually help each other, under the protection of use immunity.

162. *Montgomery* specifically adopted the Third Circuit Court of Appeal's position on statutory immunity. Counsel interested in seeing whether such immunity is necessary should consult this circuit court's decisions as well as future Florida ones.

163. 475 So. 2d 275 (Fla. 3d Dist. Ct. App. 1985).

State's principal witness . . . by precluding cross-examination with respect to an out-of-state conviction."<sup>164</sup> The out-of-state conviction in *Belton* was the crime of joy-riding which, while punishable by ninety days imprisonment, was a crime considered in both Michigan and Florida to involve a dishonest act, and therefore a crime with which a witness could be impeached under section 90.610(1), Florida Statutes.<sup>165</sup>

## B. Bias

In *Yolman v. State*,<sup>166</sup> the Second District Court of Appeal reversed a trial court's ruling that had prohibited the defendant on cross-examination from impeaching a state witness as to that witness' bias. The appellate court held that "[i]t is not necessary for matters tending to show bias or prejudice to have been within the scope of the direct examination to be proper cross-examination."<sup>167</sup> The appellate court also found that the trial court's error in not permitting the defendant to cross-examine the key state witness concerning that witness' bias or prejudice "was not made harmless by related testimony of appellant's husband, who was also co-defendant, and who had little credibility with the jury."<sup>168</sup> Furthermore, had the defendant taken advantage of the trial court's offer to permit the defendant to call the state's key witness as defendant's witness, defendant "would have been wrongfully deprived of her concluding closing argument. . . . This deprivation alone may have been reversible error."<sup>169</sup>

The Third District Court of Appeal held that it was error in *Wooten v. State*<sup>170</sup> not to permit a defendant to cross-examine a victim about the victim's having hired an attorney in contemplation of filing a civil suit against the defendant's employer.

A rare instance of an *Anders*<sup>171</sup> brief leading to a reversal of a guilty verdict is *Jackson v. Florida*.<sup>172</sup> *Jackson* involved an appeal of a theft conviction that resulted from the defendant's refusal to turn over

164. *Id.*

165. The Third District cited *State v. Page*, 449 So. 2d 813 (Fla. 1984) for the proposition that the crime was an act involving dishonesty.

166. 469 So. 2d 842 (Fla. 2d Dist. Ct. App. 1985).

167. *Id.* at 843.

168. *Id.*

169. *Id.* at 844.

170. 464 So. 2d 640 (Fla. 3d Dist. Ct. App. 1985).

171. *Anders v. California*, 386 U.S. 738 (1967).

172. 468 So. 2d 346 (Fla. 1st Dist. Ct. App. 1985).

a customer's payments, for work done on the customer's car, to the victim car repair shop. The defendant maintained that he was an independent contractor paying rent to the car repair shop plus 50% of the profits, while the owner of the car repair shop claimed that the defendant was an employee who received a commission and did some independent contracting. The trial court had refused to permit the defendant to cross-examine the victim (the owner of the car repair shop and the state's main witness) about the victim's having made romantic advances to the defendant's girlfriend. The defendant had also proffered the testimony of another employee who would have testified that the victim had made romantic advances to her as well and that the victim had promised to "get even" with the defendant. Saying that this was improper impeachment of the victim's character, the trial court had not permitted the proffered testimony.<sup>173</sup> However, the trial court was reversed as the proffered questions dealt with the victim's bias and "a trial judge should allow the defendant to inquire of the witness via cross-examination of the witness's bias."<sup>174</sup>

### C. Permitted Restrictions on Cross-Examination

The next three cases deal with permissible limitations on defendants' cross-examination of state witnesses.

#### 1. Prior Consensual Sex Acts

*Marr v. State*<sup>175</sup> involved an appeal from a trial court's limiting defendant's cross-examination of a rape victim's prior consensual sexual acts. The victim in *Marr* claimed that the defendant had forced her to undress and perform oral sex, but that after she bit the defendant's penis and escaped, she did not notify anyone until, after receiving several threatening phone calls and being assaulted outside of her home, she contacted the police. The defendant sought to cross-examine the victim about her prior consensual sexual acts with her boyfriend, but was only permitted by the trial judge to elicit from both the victim and the victim's boyfriend that their relationship was close and loving with-

173. *Id.* at 348.

174. *Id.* at 349. An interesting side note is that *Jackson* was a non-jury trial, so the trial court heard all the excluded evidence as a proffer. The appellate court assumed that: "[T]he trial court honored its own evidentiary ruling, and thus refused to consider the proffered testimony. . . ." *Id.*

175. 470 So. 2d 703 (Fla. 1st Dist. Ct. App. 1985).

out reference to any specific sexual acts.<sup>176</sup> The appellate court found no error in the trial court's ruling but reversed the conviction on other grounds.

## 2. *Pending Charges*

In *Francis v. State*,<sup>177</sup> the Florida Supreme Court affirmed a trial court's having restricted the defendant's cross-examination of two state witnesses against him. *Francis* involved the third first-degree murder conviction and death sentence (the previous two had been reversed) of the defendant for a 1975 murder. The trial court had prohibited the defendant from cross-examining one witness regarding pending murder charges against that witness. The Florida Supreme Court upheld the trial court's ruling that the witness' pending murder charge was irrelevant. The defendant had proffered neither what the witness' answers would be to his proposed questions nor how those answers would be relevant, other than to show that the witness had a bad character or a propensity towards violence, neither of which is permissible. Furthermore, the state alleged that no deals had been made with that witness and that witness had indeed later been convicted of the second degree murder of her husband.<sup>178</sup>

## 3. *Witness' Job Performance*

In affirming another first-degree murder conviction and death sentence, the Florida Supreme Court in *Rose v. State*<sup>179</sup> found no error in the trial court's restricting defendant's cross-examination of a police detective. The defendant "wanted to bring out the level of professionalism of Detective Luchan for the purpose of determining his credibility."<sup>180</sup> However, since section 90.608 of the Florida Statutes does not permit an attack on one's professionalism as a way of attacking credibility, the Florida Supreme Court found no abuse of the trial court's discretion in restricting the defendant's cross-examination.<sup>181</sup>

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176. *Id.* at 705.

177. 473 So. 2d 672 (Fla. 1985).

178. *Id.* at 674. One wonders if the result would have been the same had the defendant proffered that the questioning would have shown that the witness' motive for testifying might have been leniency in her own case.

179. 472 So. 2d 1155 (Fla. 1985).

180. *Id.* at 1157.

181. *Id.* at 1158.

#### D. "Impeachment" of One's Own Witness

In two cases, appellate courts held that it was not impeachment and therefore not improper for the state to bring out the weaknesses of its own witnesses on direct examination, thereby weakening defendant's subsequent cross-examination. *Sloan v. State*<sup>182</sup> involved an appeal from a conviction of burglary and grand theft. During direct examination of its own witness, a co-perpetrator, the state elicited that its witness had given a prior inconsistent statement. The Second District Court of Appeal held that this was not an attempt by the state to impeach its own witness, "but rather to bolster his credibility by revealing his earlier inconsistent statements."<sup>183</sup>

Adopting a reasoning that is sounder than the dicta of a previously decided Fourth District Court of Appeal case,<sup>184</sup> the Second District Court of Appeal in *Bell v. State*<sup>185</sup> ruled consistently with *Sloan*,<sup>186</sup> that it was permissible for the state on direct examination of its own witness to bring out that the witness had previously lied under oath. The appellate court found no merit to the defendant's contention that the state was attempting to impeach its own witness.

In contrast to the well-reasoned Second District Court of Appeal opinions in *Sloan* and *Bell*, a bad evidentiary ruling from Florida's Fifth District Court of Appeal is *Price v. State*.<sup>187</sup> *Price* involved a retrial of a defendant accused of a narcotics offense; the first trial had ended in mistrial. During the retrial, a state witness testified that the defendant had given her quaaludes, testimony that was inconsistent with that witness' testimony at the first trial, during which the witness testified that she had not received drugs from the defendant. Over defendant's objection, the trial court permitted the prosecutor on direct examination to let his witness explain the prior inconsistent testimony and the reason for it — that the witness had been threatened by the defendant. Reasoning that the prosecutor was trying to rehabilitate his witness before that witness had been impeached and that this is tantamount to attacking the credibility of one's own witness which is prohibited by section 90.608, Florida Statutes, the appellate court in *Price* reversed the defendant's conviction. An explanation for the Fifth Dis-

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182. 472 So. 2d 488 (Fla. 2d Dist. Ct. App. 1985).

183. *Id.* at 490.

184. *Ryan v. State*, 457 So. 2d 1084, 1092 (Fla. 4th Dist. Ct. App. 1984).

185. 473 So. 2d 734 (Fla. 2d Dist. Ct. App. 1984).

186. 472 So. 2d 488 (Fla. 2d Dist. Ct. App. 1985).

187. 469 So. 2d 210 (Fla. 5th Dist. Ct. App. 1985).

trict Court of Appeal's error here may be that the appellate court did not understand that the prosecutor was not impeaching his own witness, but rather was attempting to bolster the credibility of that witness.<sup>188</sup>

However, it is error for the prosecution to elicit on direct examination that the state's witness has never been convicted of a crime: the witness must first be impeached by the defense. Such was the ruling of *Mohorn v. State*.<sup>189</sup> However in that case, the error was not reversible, in light of "[t]he totality of the evidence against the defendant, including her admission of guilt. . . ."<sup>190</sup>

### E. *Opening the Door on Direct*

In two cases, the state's otherwise impermissible questioning was permitted because the defendant had opened the door on his direct examination. *Jefferson v. State*<sup>191</sup> involved an appeal from a manslaughter conviction. The appellate court affirmed a trial court's ruling that permitted the state to cross-examine the defendant on defendant's failure "to subpoena two competent and available witnesses where the defendant's own presentation of testimony had indicated that these witnesses could exonerate him."<sup>192</sup>

In affirming a conviction for sexual battery and burglary, the Second District Court of Appeal in *Ashcraft v. State*<sup>193</sup> held that the trial court properly allowed cross-examination of the defendant by the state into the details of the defendant's prior crimes. During his direct examination, the defendant referred to his prior crimes and stated "that he had never hurt anyone during those prior crimes."<sup>194</sup> Consequently, the trial court permitted the state to cross-examine the defendant about a prior rape conviction.

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188. While it may be merely coincidental, one notes in passing that the Fifth District Court of Appeal is the only one of Florida's appellate districts which does not have a law school in its district. On the other hand, Stetson Law School is located within the boundary of the Second District Court of Appeal, whose evidentiary rulings in *Sloan and Bell* were correctly decided.

189. 462 So. 2d 81 (Fla. 4th Dist. Ct. App. 1985).

190. *Id.* at 82.

191. 471 So. 2d 181 (Fla. 3d Dist. Ct. App. 1985).

192. *Id.* at 182.

193. 465 So. 2d 1374 (Fla. 2d Dist. Ct. App. 1985).

194. *Id.* at 1375.



## F. *Illegally Obtained Confessions*

Where a confession has been ruled coerced and involuntary, that confession may not be used to impeach a defendant who takes the stand and tells a different story. *Hawthorne v. State*<sup>195</sup> involved an appeal from a manslaughter conviction, the defendant's third trial,<sup>196</sup> in which the trial court had permitted the state to impeach the defendant on cross-examination by using the defendant's prior statement that had been illegally obtained. The fact that the state did not refer to the previously suppressed statement did not save the impeachment attempt since the state used information from the previously suppressed statement to impeach the defendant.

### 1. *The Civil Case*

The one civil case involved two issues of improper impeachment which the trial court permitted and one instance of permissible impeachment as to bias.

## G. *Sequestration Rule Violation*

*Del Monte Banana Co. v. Chacon*<sup>197</sup> was a suit by an employee against shipowners for injuries which the employee said occurred in an accident on one of defendant's ships. The defendant's main witness, the captain of the ship, was required to wait outside of the courtroom during testimony of the other witnesses. A woman friend of the captain would watch some of the testimony in court and then come out and sit by and talk to the captain. The appellate court ruled that the trial court improperly permitted plaintiff's attorney to impeach the captain (defendant's witness) regarding this supposed violation of the Sequestration Rule without a prior determination by the judge that the Rule had been violated. The appellate court held that before cross-examination of a witness regarding a violation of the Sequestration Rule would be permitted, the court must first make a determination that the Rule had been violated.<sup>198</sup>

The appellate court in *Del Monte* also held that it was improper to

195. 470 So. 2d 770 (Fla. 1st Dist. Ct. App. 1985).

196. The first trial had resulted in a conviction for murder in the first degree and the second trial had ended in a conviction for murder in the second degree.

197. 466 So. 2d 1167 (Fla. 3d Dist. Ct. App. 1985).

198. *Id.* at 1171.

permit cross-examination of the captain insinuating that the captain had been fired because of plaintiff's injury, since there had been no proof that the captain was fired, merely that the captain had left the job with defendant for another job. "It is axiomatic that counsel cannot ask questions of a witness that have no basis in fact and are merely intended to insinuate the existence of facts to a jury."<sup>199</sup>

On the other hand, the appellate court approved the trial court's having permitted the plaintiff to cross-examine the captain as to bias and party alignment, specifically by inquiring into the fact that before the trial, the captain had been rehired by defendant company as a mate and promised a position as a captain as soon as that position opened up.

## VII. Impeachment By Prior Inconsistent Statements

The nine cases which deal with impeachment by prior inconsistent statements are all criminal cases. In a pair of cases, discussed above, *Sloan v. State* and *Bell v. State*, the Second District Court of Appeal permitted the state on direct to bring out and have the state witnesses explain prior inconsistent statements, thereby stealing the thunder of defendant's cross-examination of those witnesses. In *Price v. State*, criticized above, the Fifth District Court of Appeal refused to permit the state witness to explain during direct examination a prior inconsistent statement.

Technically, neither *Sloan* nor *Bell* nor *Price* — the Fifth District Court of Appeal notwithstanding — concern impeachment by prior inconsistent statements.

In a case involving the question of what use can be made of a witness who recants his testimony before trial, the First District Court of Appeal in *Austin v. State*,<sup>200</sup> severely restricted the prosecution's use of a witness' unsworn prior statement that incriminated the defendant. After reversing a robbery conviction on other grounds, the court in *Austin* also addressed improper use of a witness' unsworn prior statements. During the defense side of the case, the defense called a witness who claimed to have been with the defendant and a state witness at a time when the state witness claimed the defendant had made admis-

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199. *Id.* at 1172. While the defendant didn't raise it as a ground for objection either at trial or on appeal, the appellate court noted that had the captain actually been fired, that might have been a prohibited line of inquiry as a subsequent remedial measure under FLA. STAT. § 90.407. *Id.* at 1173 n.5.

200. 461 So. 2d 1380 (Fla. 1st Dist. Ct. App. 1984).

sions. The defense witness maintained that he did not hear the defendant make any admissions.<sup>201</sup> The defense to the robbery charge was that the defendant had been in Georgia for about one week before the robbery was committed in Jacksonville. On rebuttal, the prosecution asked the court to call as a court witness the defense witness previously mentioned. Since the defense witness claimed to have no memory of just when he was with defendant on Jacksonville Beach, the court permitted the prosecution to elicit from the defense witness that the defense witness had previously told an assistant state attorney and an investigator that the defense witness and the defendant had been together on Jacksonville Beach one day before the robbery. The appellate court made the distinction between the witness who was hostile, which this defense witness certainly was, and one who was adverse, distinguishing between the witness whose testimony is not beneficial and the witness who gives testimony that is prejudicial to the cause of the party calling him.<sup>202</sup> In the instant case, the defense witness' testimony was not adverse, even though the defense witness himself may have been hostile to the state. Consequently, the appellate court ruled that the trial court had erroneously permitted the prosecutor to get around section 90.608 of the Florida Statutes, which requires a showing of adversity before a prior inconsistent statement can be used to impeach a witness. Moreover, the appellate court ruled that even had the prosecutor been permitted to impeach the defense witness, the prior inconsistent statement would only have come in for impeachment and not as substantive evidence since the prior statement had not been under oath.<sup>203</sup>

A conviction for trafficking in cannabis was reversed in *Williams v. State*<sup>204</sup> because the trial court refused to permit defendant to impeach the state's main witness by a prior inconsistent statement. The trial court had erroneously ruled that since the prior inconsistent statement had been an oral statement, impeachment would not be permitted. In reversing, the appellate court stated:

The prior inconsistent statement may be oral and unsworn and may be drawn out on cross-examination of the witness himself and, if on cross-examination the witness denies, or fails to remember, making such a statement, the fact that the statement was made may be

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201. *Id.* at 1382.

202. *Id.* at 1383.

203. *Id.*

204. 472 So. 2d 1350 (Fla. 2d Dist. Ct. App. 1985).

proved by another witness.<sup>205</sup>

The appellate court would have permitted the introduction of extrinsic evidence in the instant case even though the oral statement had been made to defendant's attorney and defendant's attorney would have had to become a witness in the case.<sup>206</sup>

After reading the quoted passage from *Williams* above, it comes as no surprise that the Second District Court of Appeal's sister court in *Courtney v. State*,<sup>207</sup> reversed a conviction because of the trial court's failure to permit extrinsic evidence of a prior inconsistent statement of a state's eyewitness. *Courtney* was an appeal of a murder conviction and during the cross-examination by defendant of the state's only eyewitness, the state's witness denied having told another person that the state's witness had not seen the crime. The defense attorney sought to lay the predicate for impeaching the state's witness but the prosecutor's objection was sustained by the trial court. The defense attorney then made a proffer of the testimony of three impeachment witnesses. The proffer of the testimony of one of them, Adams, was that the state's eyewitness had told Adams that the state's witness had seen nothing.<sup>208</sup> In reversing the conviction, the appellate court affirmed the trial court's decision to exclude extrinsic evidence by another impeachment witness since the state's eyewitness had admitted having made that statement.

In *Toranco v. State*<sup>209</sup> the court permitted the state to use a prior inconsistent statement that had not been given to the defense during discovery because that statement had been in a police report that was furnished to the defendant. *Delgado-Santos v. State*<sup>210</sup> reversed a first-degree murder and armed robbery conviction because a prior inconsistent statement, of an alleged accomplice, of the defendant made during police interrogation was admitted as substantive evidence. The court held that a police interrogation was not a "proceeding" under section 90.801(a) of the Florida Statutes, even though defendant had been under oath and had been given his *Miranda* rights at the time he made the statement.<sup>211</sup> In reaching its decision, the appellate court looked to

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205. *Id.* at 1352 (citing *United States v. Sisto*, 534 F.2d 616 (5th Cir. 1976) and FLA. STAT. § 90.614(23) (1983)).

206. *Id.* at 1352-53.

207. 476 So. 2d 301 (Fla. 1st Dist. Ct. App. 1985).

208. *Id.* at 302.

209. 471 So. 2d 1355 (Fla. 3d Dist. Ct. App. 1985).

210. 471 So. 2d 74 (Fla. 3d Dist. Ct. App. 1985).

211. *Id.* at 75-77.

interpretations of Federal Rule of Evidence 801(d)(1)(A), including the Congressional history reprinted in the U.S.C.A. found in the comments after each section of the Evidence Code.<sup>212</sup>

Lastly, in affirming a conviction for first-degree murder and vacating a stay of execution, the Florida Supreme Court in *Demps v. State*<sup>213</sup> reaffirmed the general rule that evidence of prior consistent statements, to bolster a witness' testimony, is inadmissible unless there has been an attempt to attack that witness' credibility.<sup>214</sup> *Demps* involved a post-conviction hearing on the defendant's claim that the state had interfered with a defense witness. Since the prosecutor declined to cross-examine one of the defense witnesses at that hearing, the trial court correctly prohibited the defense from calling other witnesses to bolster his testimony.

### VIII. Confrontation

The Confrontation Clause was invoked in 1985 as the grounds for appeal in six Florida cases and one federal case which this survey will discuss. In the federal case, *Harris v. Wainwright*,<sup>215</sup> the Court of Appeal for the Eleventh Circuit affirmed the granting of habeas relief by a district court to a defendant who had been convicted on hearsay evidence. Harris had been convicted of attempted first-degree murder and attempted robbery. The state contended that after demanding money from and shooting the victim, Harris fled the scene of the crime in a yellow Cadillac. The victim's son chased and rammed the Cadillac, from which three men fled.<sup>216</sup> A photograph of Harris was identified by the victim as that of the robber. At trial, rather than prove ownership of the yellow Cadillac, the prosecutor asked the police officer if he received any information concerning the ownership of the Cadillac and what did the police officer do after receiving the information, to which the officer replied that he made a photographic lineup.<sup>217</sup> Since the sole purpose of the officer's testimony was to tie the defendant to the rob-

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212. In reaching its decision, the Third District Court of Appeal in *Delgado* eschewed the Fifth District Court of Appeal's case by case analysis of *Robinson v. State*, 455 So. 2d 481 (Fla. 5th Dist. Ct. App. 1984) for a "bright line" test. It is difficult to read *Delgado* without being persuaded by its reasoning.

213. 462 So. 2d 1074 (Fla. 1984).

214. *Id.* at 1075.

215. 760 F.2d 1148 (11th Cir. 1985).

216. *Id.* at 1149.

217. *Id.* at 1150.

bery and attempted murder by means of defendant's connection with the yellow Cadillac, the court of appeal affirmed the district court's finding that the error was not harmless.<sup>218</sup>

Another attempted first-degree murder conviction was reversed in *Carrasco v. State*.<sup>219</sup> Carrasco and Edward Morales were accused of shooting a man and stealing his car. Carrasco was tried separately from Morales, but during Carrasco's trial, the police officer who had taken Morales's confession, told the jury that the confession implicated Carrasco.<sup>220</sup> Finding a violation of Carrasco's sixth amendment right to confront Morales, the district court of appeal reversed the conviction.<sup>221</sup>

Restricting a defendant's right to cross-examination resulted in reversals in two cases, *Rivera v. State*<sup>222</sup> and *Alvarez v. State*.<sup>223</sup> *Rivera* involved an appeal from an aggravated assault conviction. The victims alleged that while they were driving in a car, someone in Rivera's car shouted obscenities and pointed a gun.<sup>224</sup> While the victims had been able to note the car's license number, neither one was very sure about identifying Rivera from a photo lineup until the investigating police officer pointed out Rivera's picture and said that he was the registered owner of the car whose license plate they had recorded.<sup>225</sup> During the trial, the prosecutor asked neither the victim nor the police officer about the photo lineup and the prosecutor successfully objected to the defendant's attempt to cross-examine both witnesses about the photo lineup. This forced the defense to call both witnesses as defense witnesses, thereby prohibiting the defense from impeaching these witnesses by calling another witness to testify that the pointing out of the defendant's photograph was not standard police procedure.<sup>226</sup>

*Alvarez* involved an appeal from a first-degree murder conviction by a defendant whose conviction rested entirely on the testimony of two witnesses, an accomplice and an accessory after the fact. The district court of appeal reversed Alvarez's conviction because the trial court

218. *Id.* at 1153. Florida's Court of Appeal for the Third District had found in *Harris v. State*, 414 So. 2d 242 (Fla. 3d Dist. Ct. App. 1982) that the error was harmless.

219. 470 So. 2d 858 (Fla. 1st Dist. Ct. App. 1985).

220. *Id.* at 860-61.

221. *Id.* at 861.

222. 462 So. 2d 540 (Fla. 1st Dist. Ct. App. 1985).

223. 467 So. 2d 455 (Fla. 3d Dist. Ct. App. 1985).

224. 462 So. 2d at 541.

225. *Id.* at 541-42.

226. *Id.* at 542.

had refused to permit Alvarez on cross-examination of the accomplice to bring out that the accomplice "had served less than eight months of a thirty-two month sentence by virtue of an agreement with the state to recommend an-'early parole' in return for 'telling the truth.'"<sup>227</sup> The district court of appeal also ruled that the defendant should have been able to cross-examine the accomplice, and accessory after the fact, about their past convictions, even though those convictions had occurred in Cuba and the defense attorney had no record of the conviction and hence lacked the evidence necessary for impeachment. The district court of appeal so ruled, even though the defense attorney had no knowledge of the witnesses' prior convictions.<sup>228</sup>

On the other hand, a defendant's right to cross-examination was held not to have been violated when his cross-examination of the main state witness was limited in *Mills v. State*.<sup>229</sup> *Mills* involved an appeal from a first-degree murder conviction that arose out of a burglary of a residence. Mills and an accomplice, Ashley, had entered the victim's house at night and Mills had shot the victim with a shotgun. Mills' attorney, the public defender, had previously represented Ashley at the beginning of the case and in other unrelated charges. The public defender withdrew from representation of Ashley once he became aware that Ashley was involved in the burglary and murder. The trial court restricted Mills' cross-examination of Ashley by not permitting Mills to ask about statements Ashley had made to a public defender investigator and not permitting the use of those statements to impeach Ashley. In finding that the attorney/client privilege claimed by Ashley was correctly used to bar the attempted impeachment,<sup>230</sup> Florida's Supreme Court noted that Mills had been permitted to impeach Ashley with several prior inconsistent statements and with Ashley's bargaining for immunity in return for his testimony.<sup>231</sup> Consequently, the supreme court found no abridgement of Mills' right to confront his accuser.

A defendant's right to confront his accusers requires a reversal where in an attempt to perpetuate a witness's testimony by taking a pretrial deposition, the prosecution fails to notify the defendant and produce the defendant at the deposition. In *Brown v. State*<sup>232</sup> the Flor-

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227. 467 So. 2d at 455-56.

228. *Id.* at 456.

229. 476 So. 2d 172 (Fla. 1985).

230. *Id.* at 175-76.

231. *Id.* at 176.

232. 471 So. 2d 6 (Fla. 1985).

ida Supreme Court reversed the defendant's conviction for first-degree felony murder because the state, while notifying the defense counsel of its intention to take a deposition and perpetuate testimony of a witness, failed to notify the defendant and also failed to produce the defendant, who was in custody at the time, at the deposition. Brown's conviction was reversed even though his lawyer failed to object at the trial to the introduction of the deposition and only raised the lack of notice to the defendant and defendant's absence from the deposition for the first time on appeal.<sup>233</sup>

Important as the right to confront one's witnesses is, that right can be waived, as was found by the defendant in *Lara v. State*.<sup>234</sup> *Lara* involved an appeal from a conviction of attempted robbery and second-degree murder. The trial had been a non-jury trial and the defendant agreed to stipulate that the testimony at the trial would be based on the discovery taken by both parties prior to trial, thereby obviating the necessity of calling witnesses. In affirming the conviction, the district court of appeal held that there was no necessity for an affirmative showing that the defendant voluntarily and intelligently waived his right to confront the witnesses against him.<sup>235</sup>

## IX. Testimony of Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.<sup>236</sup>

### A. *Factual Basis Need Not Be Given*

In eliciting an opinion from an expert, a party on direct examination need not establish the factual basis for that opinion.<sup>237</sup> In *City of*

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233. *Id.* at 7.

234. 475 So. 2d 1340 (Fla. 3d Dist. Ct. App. 1985).

235. *Id.* at 1341.

236. FLA. STAT. § 90.702 (1985).

237. FLA. STAT. § 90.705 (1985).



*Hialeah v. Weatherford*,<sup>238</sup> the appellate court affirmed a trial court's permitting a physician to give his opinion that had paramedics examined the plaintiff's decedent, they would have found that the decedent was having a heart attack and the decedent would not have died from a heart attack the next day. The defendant city objected to the opinion being given and failed to cross-examine the doctor as to the basis for the opinion. In affirming, the appellate court cited to section 90.705 of the Florida Statutes and held:

[T]he statute eliminates the requirement formerly placed on the party calling an expert witness to present underlying data and factual support for expert testimony. Under current law, the burden of challenging the sufficiency of the basis for the opinion rests with the party against whom it is offered.<sup>239</sup>

### B. *May Be Based on Inadmissible Evidence*

Also, an expert's opinion may be based on inadmissible hearsay, and that otherwise inadmissible hearsay may be made known to the jury.<sup>240</sup> The appellate court in *Bendor v. State* overturned a defendant's attempted murder conviction because the trial court refused to permit defendant's expert witness, a psychiatrist, from testifying about the results of a computerized brain scan upon which the expert relied in reaching his diagnosis that the defendant suffered from organic brain syndrome. This testimony went to the defendant's defense that he was incapable of forming the necessary intent to commit the crime charged.<sup>241</sup> The appellate court relied on section 90.704 of the Florida Statutes in reaching its result.

### C. *Reasonable Certainty Not Necessary*

It may not even be necessary for a medical expert to give his opinion within the bounds of reasonable certainty either for that opinion to be admitted or for a jury verdict to be based on that opinion. *Brate v. State*<sup>242</sup> was an appeal of a manslaughter conviction. The victim in

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238. 466 So. 2d 1127 (Fla. 3d Dist. Ct. App. 1985).

239. *Id.* at 1129.

240. *Bendor v. State*, 472 So. 2d 1370 (Fla. 3d Dist. Ct. App. 1985).

241. *Id.* at 1371.

242. 469 So. 2d 790 (Fla. 2d Dist. Ct. App. 1985).

*Brate* had died from abdominal bleeding. While there had been testimony that the defendant had stomped the victim once in the chest or abdomen, there was also testimony that before he was stomped, the victim might have hit his chest against the dash board of a speeding car that he was riding in. The medical examiner testified that the blow to the victim's chest "would have been consistent with either a stomp with a cowboy boot or a passenger's thrusting impact with the dashboard of a vehicle . . . [and] that stomping a passenger who had sustained an abdominal injury in a broadside collision *probably* would materially contribute to the cause of death."<sup>243</sup> The doctor "conceded that he could not state with reasonable medical certainty that a boot stomp killed the decedent or materially contributed to his death."<sup>244</sup> The appellate court affirmed the admission of the opinion testimony by the trial court and the conviction even though the doctor "was unwilling to testify within the bounds of reasonable certainty that such a stomp actually caused or materially contributed to decedent's death."<sup>245</sup> Reasoning that expert testimony "generally is deemed advisory in nature and ordinarily not conclusive on the judgment of the jury,"<sup>246</sup> the appellate court cited to *Baker v. State*,<sup>247</sup> for the proposition that medical testimony advancing a reasonable theory of causation would be sufficient to uphold the conviction where that testimony is supplemented by other evidence.<sup>248</sup> The supplemental other evidence in *Brate* was eye witness testimony that the victim had been stomped once by the defendant.<sup>249</sup>

In 1985, Florida appellate courts affirmed trial court rulings permitting experts to testify to the identity of a victim through old dental records,<sup>250</sup> the results of a neutron activation analysis to show a probability that the defendant fired a gun, even though that test does

243. *Id.* at 792-93.

244. *Id.* at 793.

245. *Id.*

246. *Id.*

247. 30 Fla. 41, 11 So. 492 (1892).

248. 469 So. 2d at 794.

249. While the *Brate* court appears to be correct in not finding a difficulty with the doctor's inability to give an opinion within a reasonable degree of medical certainty as to cause of death, and in permitting the doctor's testimony that the victim's injuries were consistent with the boot stomp, on redirect examination, the doctor said his conclusion was "within the bounds of reasonable medical certainty." *Id.* at 793.

250. *Stand v. State*, 473 So. 2d 1282, 1287 (Fla. 1985).

not conclusively establish whether a gun has been recently fired,<sup>251</sup> and the number of assailants as well as their relative strength vis-a-vis the victim based on strangulation marks.<sup>252</sup> On the other hand, experts were not permitted to testify about false confessions,<sup>253</sup> the defects of a model of a device other than the device implanted in plaintiff,<sup>254</sup> testimony resulting from hypnosis,<sup>255</sup> polygraph answers,<sup>256</sup> thermogram results,<sup>257</sup> the cause of brain damage,<sup>258</sup> and testimony about the battered woman syndrome.<sup>259</sup>

*3-M Corp. v. Brown*<sup>260</sup> involved a suit against the manufacturer of a mammary implant by a plaintiff who was injured as a result of the implant's rupture. The appellate court found that the trial court erred in permitting an expert to testify about the design defects of one model of breast implant without any testimony that that model was similar to a different model, the one actually implanted in plaintiff's breast.<sup>261</sup> The appellate court also held that the plaintiff's medical expert "was erroneously allowed to testify as to the "possibility" of future medical treatment and complications."<sup>262</sup> This speculative type of testimony is "not probative of . . . future damages."<sup>263</sup>

#### D. Hypnosis

In affirming Theodore Bundy's conviction in *Bundy v. State*,<sup>264</sup> the Florida Supreme Court held "that hypnotically refreshed testimony is *per se* inadmissible in a criminal trial in this state, but hypnosis does not render a witness incompetent to testify to those facts demonstra-

251. *Mills v. State*, 476 So. 2d 172, 176-7 (Fla. 1985).

252. *Endress v. State*, 462 So. 2d 872, 873 (Fla. 2d. Dist. Ct. App. 1985).

253. *Stand*, 473 So. 2d at 1287.

254. *3-M Corp. v. Brown*, 475 So. 2d 994 (Fla. 1st Dist. Ct. App. 1985).

255. *Bundy v. State*, 471 So. 2d 9 (Fla. 1985).

256. *Carter v. State*, 474 So. 2d 397 (Fla. 3d Dist. Ct. App. 1985).

257. *Crawford v. Shivaskankar*, 474 So. 2d 873 (Fla. 1st Dist. Ct. App. 1985).

258. *Executive Car and Truck Leasing, Inc. v. DeSerio*, 468 So. 2d 1027 (Fla. 4th Dist. Ct. App. 1985).

259. *Hawthorne v. State*, 470 So. 2d 770 (Fla. 1st Dist. Ct. App. 1985).

260. 475 So. 2d 944 (Fla. 1st Dist. Ct. App. 1985).

261. *Id.* at 996.

262. *Id.* at 998.

263. *Id.* (citing *Crosby v. Flemming and Sons, Inc.*, 447 So. 2d 347, 349 (Fla. 1st Dist. Ct. App. 1984)).

264. 471 So. 2d 9 (Fla. 1985).

tively recalled prior to hypnosis."<sup>265</sup> However, Bundy's conviction was affirmed because the Florida Supreme Court found that totally apart from the hynoptically refreshed testimony, the witness was able to testify to other facts that he recalled prior to the hypnosis.<sup>266</sup>

The appellate court in *Carter v. State*<sup>267</sup> affirmed a trial court's denial of the defendant's motion to compel production of a victim's answers to a polygraph which the polygraph examiner felt were untrue.<sup>268</sup> The defendant had been given a copy of the victim's statement to the polygraph examiner, the questions asked and her answers. The appellate court found that to compel production of specific answers which the polygraph examiner found untrue would not have aided the defense as that information could not have been used in evidence.

Refusal to admit thermograms was upheld in *Crawford v. Shivashankar*.<sup>269</sup> Crawford claimed to have sustained injury to her neck as a result of an automobile accident. Although their objective findings were slight, four doctors testified that Crawford had suffered some degree of permanent injury.<sup>270</sup> The trial court refused to permit Crawford to introduce thermogram photographs or to have a neurologist give his opinion that thermographic examination showed soft tissue injury. Not only had Crawford not listed the thermograms as proposed evidence in her pre-trial statement, but she "had failed to show that thermography was a well-established and reliable technique for detecting soft tissue injury."<sup>271</sup> While the appellate court found that it was error for the trial court to exclude the neurologist's opinion, the appellate court found the error to be harmless as four other doctors had testified that there was injury and that it was permanent, hence making the neurologist's testimony cumulative. After examining the evidence that Crawford elicited as to the reliability and acceptability of thermography, the appellate court refused to find an abuse of discretion in the trial court's exclusion of the thermography evidence based on the facts of that case.<sup>272</sup>

It is not necessary for a clinical psychologist to be a medical doctor in order to testify to the existence of organic brain damage. This

265. *Id.* at 18.

266. *Id.* at 19.

267. 474 So. 2d 397 (Fla. 3d Dist. Ct. App. 1985).

268. *Id.* at 398.

269. 474 So. 2d 873 (Fla. 1st Dist. Ct. App. 1985).

270. *Id.* at 874.

271. *Id.*

272. *Id.* at 875.

was the holding of *Executive Car and Truck Leasing, Inc. v. DeSerio*.<sup>273</sup> *Executive Car and Truck* involved an appeal from a judgment arising out of an automobile collision. DeSerio's neurosurgeon testified that he could not detect any permanent organic brain damage and so he referred DeSerio to a clinical psychologist for psychological testing, something which he commonly does. The clinical psychologist testified that he then gave DeSerio psychological tests commonly used by psychologists to identify organic brain damage, and based on those tests, it was his opinion that DeSerio had suffered organic brain damage.<sup>274</sup> Because neurosurgeons rely on psychological testing to detect organic brain damage, the appellate court affirmed the trial court's "allowing a clinical psychologist who is not a medical doctor to testify to the existence of organic brain damage."<sup>275</sup> Noting that the Florida Supreme Court had previously held that medical testimony is not always necessary to show causation between an occurrence and damages,<sup>276</sup> the appellate court found that allowing the clinical psychologist to testify that the automobile accident caused the organic brain damage was harmless error. Consistent with *Executive Car* is *G.I.W. Southern Valve Co. v. Smith*,<sup>277</sup> which cited *Executive Car* in support of its ruling that a clinical psychologist who is not a medical doctor could not testify "that because of the accident, plaintiff's brain would deteriorate much more rapidly in the future. . . ."<sup>278</sup>

### E. Battered Woman Syndrome

Psychiatric testimony about the battered woman syndrome was addressed in *Terry v. State*,<sup>279</sup> *Hawthorne v. State*,<sup>280</sup> and *Ward v. State*.<sup>281</sup> *Terry* reversed the trial court's exclusion of expert testimony as to the battered woman syndrome. The appellate court found that specialized knowledge of an expert would aid the jury in understanding the defense of self defense. The court noted that admission of the bat-

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273. 468 So. 2d 1027 (Fla. 4th Dist. Ct. App. 1985).

274. *Id.* at 1028.

275. *Id.* at 1029.

276. *Id.* at 1030 (citing *Clark v. Choctawhatchee Elec. Coop.*, 107 So. 2d 609 (Fla. 1958)).

277. 471 So. 2d 81 (Fla. 2d Dist. Ct. App. 1985).

278. *Id.* at 82.

279. 467 So. 2d 761 (Fla. 4th Dist. Ct. App. 1985).

280. 470 So. 2d 770 (Fla. 1st Dist. Ct. App. 1985).

281. 470 So. 2d 100 (Fla. 1st Dist. Ct. App. 1985).

tered woman syndrome testimony is based on a trial court determination that the "expert is qualified and the field is sufficiently developed to support an expert opinion."<sup>282</sup> *Hawthorne v. State* involved an appeal from a manslaughter conviction.<sup>283</sup> The appellate court held that the trial court did not abuse its discretion in refusing to permit defendant's proffered expert, Dr. Lorraine Walker, from testifying that the defendant was a battered woman. The trial court held three days of hearings and decided it "is not convinced that she has knowledge necessary to give such testimony . . . [and that the] depth of study in this field had not yet reached the point where an expert witness can give testimony with any degree of assurance that the state of the art will support an expert opinion. . . ."<sup>284</sup> *Hawthorne* was reversed for other reasons and the majority invited the defendant to again attempt to qualify an expert in the battered woman syndrome. In a lengthy dissent as to that part of the case, Judge Ervin argued for overturning the trial court's refusal to permit Dr. Walker to testify as an expert. In affirming a second degree murder conviction, the appellate court in *Ward v. State*<sup>285</sup> found that the defendant had not made a sufficient record for appeal to permit the appellate court to review the question of admissibility of the battered wife syndrome.<sup>286</sup> After the first of two proposed defense witnesses had been excluded, the defendant then decided without any court ruling to not call the second witness who would have testified to the battered wife syndrome. By failing to give the trial court an opportunity to evaluate the qualifications of the second witness and the syndrome, the defendant had precluded any possible action by the appellate court.<sup>287</sup>

Finding that an expert opinion must be relevant to be admissible, it must prove or tend to prove a fact in issue, the Florida Supreme Court in *Stano v. Florida*<sup>288</sup> affirmed a trial court's refusal to permit a psychiatrist to testify that certain people confessed to crimes which they did not commit, finding the proffered testimony to be irrelevant. The Florida Supreme Court ruled this way even though the defendant was also prepared to put on testimony of a police officer to whom the

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282. 467 So. 2d at 765.

283. The defendant's previous conviction of first-degree murder had been reversed, as was her subsequent second-degree murder conviction.

284. *Id.* at 773.

285. 470 So. 2d 100 (Fla. 1st Dist. Ct. App. 1985).

286. *Id.* at 101.

287. *Id.*

288. 473 So. 2d 1282 (Fla. 1985).

defendant had confessed a murder which the defendant had not committed and even though the defendant's theory of defense was that the defendant had killed someone other than the victim.<sup>289</sup> What the supreme court found lacking was a proffer that the defendant's confession in the instant case "was infirm or tainted."<sup>290</sup>

## X. Hearsay

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.<sup>291</sup>

Out of court statements can be introduced for their truth under one of the many exceptions to the general proscription of hearsay.

### A. Admissions

Admissions, statements of one party offered against that party, are one of the easiest exceptions to meet. In two of the six cases that fall under direct admissions, *S. C. v. State*<sup>292</sup> and *Adams v. School Board of Brevard County*,<sup>293</sup> the admissions addressed were those of the parties themselves. The case of *S. C.* involved an appeal from a circuit court order adjudicating a child as dependent and placing the child in foster care. Two other children had previously been taken away from the parents of *S. C.* and the evidence issues involved the admissibility of (1) the hearsay testimony of a woman to what *S. C.*'s father had told her as the reason the two other children had been removed (a six-year old girl suffering from venereal disease and a five-year old boy from neglect) and (2) the father's testimony as the state's adverse witness as to the reason that the other two children had been taken away from their parents. The district court of appeal found that the woman's testimony, while hearsay, was an exception as an admission by the father, whom the appellate court declared to be a party.<sup>294</sup> The father's statements as an adverse witness were found not to be hearsay (why he

289. *Id.* at 1285-86.

290. *Id.* at 1286.

291. FLA. STAT. § 90.801(1)(c) (1985).

292. 471 So. 2d 1326 (Fla. 1st Dist. Ct. App. 1985).

293. 470 So. 2d 760 (Fla. 5th Dist. Ct. App. 1985).

294. 471 So. 2d at 1328.

was told the other children had been taken away) but rather information based on his own personal knowledge.<sup>295</sup>

*Adams* involved the appeal by several students of their expulsion from high school for using, possessing or selling controlled substances or substances that are held out to be controlled substances. While hearsay is admissible at administrative hearings, there must also be other competent evidence.<sup>296</sup> Consequently, those students who made statements to administrative deans had their expulsions affirmed, as those statements were deemed to be admissions.<sup>297</sup>

One can remain silent and by his silence be deemed to have adopted the out-of-court statement of another, which out-of-court statement is then admissible as an adoptive admission. *Drake v. State*<sup>298</sup> was an appeal from a conviction of attempted second-degree murder, aggravated battery and armed robbery with a deadly weapon. Drake was accused of stealing money from a church where his wife worked and of hitting his wife on the head with a hammer. Even though his wife had no memory of the incident, a police officer was permitted to testify that while she was in the wife's hospital room, she heard the wife say to the defendant, "You don't care for me at all."<sup>299</sup> The defendant said that he did care, to which his wife responded, "Well, you certainly don't act like it." When the husband asked why the wife said that, she replied "How would you like me to hit you on your habit?"<sup>300</sup> The police officer then testified that the defendant said nothing and then left the hospital room. The police officer followed the defendant into the hall and he looked back at her twice.<sup>301</sup> The appel-

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295. *Id.* A witness who testifies to what he has actually perceived is said to have personal knowledge under § 90.604 of the Florida Statutes. While this may seem a strange response to hearsay, examples include: one's name (perhaps hearsay if based on what one's parents said but personal knowledge if based on one's observations of how one is addressed by parents and others); one's physical condition (again, perhaps hearsay if told by a doctor but personal knowledge if based on one's perception of pain inside and maybe a protruding bone); etc.

In the instant case, the appellate court found that the father's statements were "not a repetition of statements made to him by Connecticut authorities but [were] of his personal knowledge of the reasons for the children's commitment." *Id.*

296. 470 So. 2d at 762. See also *infra* notes 335-46 which address the use of hearsay at dependency, probation and forfeiture proceedings.

297. 470 So. 2d 762-63.

298. 476 So. 2d 210 (Fla. 2d Dist. Ct. App. 1985).

299. *Id.* at 211.

300. *Id.* at 212.

301. *Id.*



late court affirmed the admission of the wife's comment to her husband and his silent response as an admission by silence.<sup>302</sup> In the event that the victim's words were not an accusation but were meaningless, the appellate court conceded that the police officer's testimony would be irrelevant and claimed that in that circumstance would also be harmless.<sup>303</sup>

Another example of a statement that would be admitted against a party as an admission is a statement made by a servant or an employee about a matter within the scope of the employment.<sup>304</sup> *Poitier v. School Board of Broward County*<sup>305</sup> involved an appeal by a plaintiff who failed to recover for injuries to her daughter when her daughter slipped and fell on a wet floor in a school cafeteria. The appellate court reversed the case based on the trial court's erroneous exclusion of the mother's conversation with a school employee, a janitor, after the accident. The mother proffered that the janitor said that the janitors knew they were supposed to put up ropes and signs when they cleaned an area, but that they generally did not do so.<sup>306</sup> The appellate court found that the janitor's statement to the mother was an admission and should have been introduced as an exception to hearsay since the janitor was an employee of the school board and the janitor's statement was about a matter within the scope of his duties.<sup>307</sup>

Statements of a co-conspirator can also be introduced against one as one's own statements, and hence exceptions to hearsay. An example is found in *State v. Wilson*,<sup>308</sup> a petition for a writ of certiorari by the state of a judge's denial of a pretrial motion to permit the state to use statements of co-conspirators against the defendants. However, to preserve for appeal a trial court's erroneous exclusion of testimony that would fit under an admissions exception to the hearsay rule, one must

302. *Id.* at 215.

303. *Id.*

304. FLA. STAT. § 90.803(18)(d) (1985).

305. 475 So. 2d 1274 (Fla. 4th Dist. Ct. App. 1985).

306. *Id.* at 1275.

307. *Id.* While the appellate court reached the correct evidentiary result, its language was rather sloppy, specifically in referring to the janitor's statement as "an admission against the interests of his employer." *Id.* The court seems to confuse "admissions" (§ 90.803(18)) with "declarations against interest" (FLA. STAT. § 90.804). The reason for this becomes apparent when one notes that the appellate court cited not to the Florida Evidence Code but to case law. The Sponsors' Note to § 90.803(18) mentions that some courts tend to make this confusion.

308. 466 So. 2d 1152 (Fla. 2d Dist. Ct. App. 1985).

assert the ground for admissibility at trial.<sup>309</sup>

### B. *Spontaneous Statements and Excited Utterances*

Statements made describing or explaining an event or condition while the declarant was perceiving the event or condition, or immediately thereafter, as well as statements relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition may be admitted in court as the exceptions to the hearsay rule known as spontaneous statements and excited utterances.<sup>310</sup>

The circumstantial guarantee of [a spontaneous statement] is that when a spontaneous statement of narration is made simultaneously with perception, the substantial contemporaneity of event and statement negates the likelihood of deliberate or conscious misinterpretation. The theory of [an excited utterance] is simply that when an excited utterance is made, the circumstances produce a condition of excitement which temporarily stills the capacity of reflection and produces utterance free of conscious fabrication. The key element in both is spontaneity.<sup>311</sup>

An example of each is found in *Preston v. State*.<sup>312</sup> *Preston* was an appeal from a conviction of sexual battery. After having dinner and drinks with her boyfriend, the victim went to a bar close to where her boyfriend worked to wait for him. While waiting for her boyfriend, the victim met and drank with the defendant. When her boyfriend didn't come back for her, the victim left with the defendant who had offered to take her to her home, stopping at the Elks Club where they had more drinks. After the club closed, the defendant and the victim left and the victim claimed that the defendant forced her to perform oral sex on him in his van. When the van stopped at a traffic signal, the victim ran to the nearest house and reported the incident.<sup>313</sup> At trial, a fourteen-year old boy testified to what the victim told him about the incident without objection from the defense. The appellate court stated

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309. *Rezzarday v. West Fla. Hosp.*, 462 So. 2d 470 (Fla. 1st Dist. Ct. App. 1985).

310. FLA. STAT. §§ 90.803(1) and (2), respectively.

311. Sponsors' Note to FLA. STAT. §§ 90.803(1) and (2).

312. 470 So. 2d 836 (Fla. 2d Dist. Ct. App. 1985).

313. *Id.* at 836-37.

that the victim's statements to the boy were admissible either as a spontaneous statement or an excited utterance.<sup>314</sup> However the defense unsuccessfully objected to testimony by the victim's boyfriend and a police officer as to what the victim told them about the incident. Because between one and two hours had elapsed since the incident and the telling of the story, because the victim had left the bar with the defendant "for several hours of drinking and 'partying', as described by several witnesses, she had a possible reason to contrive a story or misrepresent to her boyfriend," and because the victim appeared to be nervous and upset, the appellate court reversed the conviction finding that the statements were inadmissible hearsay as there had been time for reflection and a motive to fabricate by the victim.<sup>315</sup> The appellate court was clear to point out that the statements were excluded because of all of the factors of the case, taken together, rather than any single factor.<sup>316</sup>

### C. *Then Existing Mental, Emotional, or Physical Conditions*

An out-of-court statement may be an exception to the hearsay rule if the statement regards the declarant's existing state of mind, emotion or physical sensation, including a statement of intent, plan, motive, design, mental feeling which is offered to prove the declarant's state of mind.<sup>317</sup> An example is found in *Peede v. State*,<sup>318</sup> an appeal from a murder conviction. Before going to meet the defendant, the victim told her daughter that she was going to the airport to pick up the defendant, and "that she was nervous and scared that she might be in danger, that her daughter should call the police if she was not back by midnight, that she was afraid of being with the other people he had

314. *Id.* at 837.

315. *Id.*

316. The appellate court also found that the statements were not admissible as prior consistent statements under § 90.801(2)(b), as they were made after the existence of a motive to fabricate.

In another case, *Cox v. State*, 473 So. 2d 778 (Fla. 2d Dist. Ct. App. 1985), statements made by a defendant's wife on learning that her husband had been in an accident were admissible as excited utterances. The statements were made immediately upon being notified of her husband's accident, "an occurrence startling enough to produce nervous excitement and render the utterances spontaneous and unreflecting." 473 So. 2d at 782 (cite omitted). As the statements were not given, nothing further can be gleaned from *Cox*.

317. FLA. STAT. § 90.803(3) (1985).

318. 474 So. 2d 808 (Fla. 1985).

threatened to kill, and that he would kill them all on Easter.”<sup>319</sup> The Florida Supreme Court affirmed the trial court’s having permitted the daughter to testify to what the victim had told the daughter. In *Peede*, the Florida Supreme Court found that the victim’s mental state was at issue regarding elements of the kidnapping which formed the basis of the state’s felony-murder theory, i.e. it was necessary for the state to prove forcible abduction of the victim against her will. It is not apparent why the *Peede* court felt it had to address the issue since it points out that the testimony came in at trial without any hearsay objection.<sup>320</sup>

#### D. *Business Records*

Records that are kept in the ordinary course of a business may be admitted as exceptions to the hearsay rule.<sup>321</sup> However, the supplier of the information in the business record must have a business duty to supply the information, i.e. he must work for the business whose records are sought to be introduced.<sup>322</sup> Computer printouts can be business records, but before someone can testify to what was on a computer printout, the foundation must be laid to admit the computer printout as a business record.<sup>323</sup>

Where the business record is prepared solely in anticipation of litigation, it lacks trustworthiness and may not be admitted as a business record.<sup>324</sup> *Stambor v. One Hundred Seventy-Second Collins Corp.* involved an appeal from a suit against a restaurant by a customer who slipped and fell. The manager of the restaurant immediately filled out

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319. *Id.* at 816.

320. *Id.*

321. FLA. STAT. § 90.803(6) (1985).

322. *See Eichelz v. Pepo Petroleum Co.*, 475 So. 2d 1244 (Fla. 1st Dist. Ct. App. 1985).

323. *Cofield v. State*, 474 So. 2d 849, 851 (Fla. 1st Dist. Ct. App. 1985). *Cofield* involved an appeal from a grand theft conviction. The appellate court held that the state failed to adequately prove the value of the stolen equipment. The state witness had no personal knowledge as to the value but used a computer printout prepared by someone else that listed the cost of each item stolen.

It is difficult to tell from the decision, but it doesn’t appear that the state tried to offer the computer print-out as evidence. Since the computer print-out was not offered as a business record, it remained hearsay and the state witness could not use that record to testify to the value of the goods stolen. *Id.*

324. *See Stambor v. One Hundred Seventy-Second Collins Corp.*, 465 So. 2d 1296 (Fla. 3d Dist. Ct. App. 1985).

an accident report stating that nothing was on the floor and forwarded that report to the restaurant's insurance carrier in anticipation of litigation.<sup>325</sup> The appellate court found the accident report to be inadmissible as business record because of its lack of trustworthiness: the report was made solely to help defend against an anticipated claim; the manager had a business motive to fabricate and no business motive to be truthful; accident reports have generally been considered "work product" and therefore not discoverable because they are prepared solely for litigation and have no business purpose.<sup>326</sup>

### E. *Absence of Public Record or Entry*

Another exception to the hearsay rule is the certification that a diligent search failed to disclose a public record, when offered to prove absence of the record that would have been made and preserved by a public office or agency.<sup>327</sup> An example of an absence of a public record is found in *Terranova v. State*.<sup>328</sup> Terranova was convicted of engaging in the business of a contractor without being duly registered or certified. The appellate court affirmed the trial court's having admitted into evidence a certificate of nonlicensure by the Construction Industry Licensing Board.<sup>329</sup>

### F. *Unavailable Declarant*

There are some circumstances where the unavailability of a declarant will permit his declaration to be admitted as an exception to the hearsay rule. The test is two-pronged: the declarant must be unavailable — able to assert a privilege, refuses to testify, has suffered lack of memory, illness or death prevents his attendance or the proponent cannot procure his appearance — and the statement must be one of the several recognized exceptions — former testimony subject to cross-examination, dying declaration, statement against interest or a statement of personal or family history.<sup>330</sup> *Stano v. State*<sup>331</sup> involved an appeal from a conviction of first-degree murder. The defendant's first trial had

325. *Id.* at 1297.

326. *Id.* at 1298.

327. FLA. STAT. § 90.803(10) (1985).

328. 474 So. 2d 1206 (Fla. 2d Dist. Ct. App. 1985).

329. *Id.* at 1208-9.

330. FLA. STAT. § 90.804 (1985).

331. 473 So. 2d 1282 (Fla. 1985).

ended in a mistrial and the victim's parents refused to testify during the second trial and were therefore unavailable under section 90.804(1)(b) of the Florida Statutes. Consequently, the court permitted the state to read in the victim's parents' former testimony under section 90.804(2)(a), Florida Statutes. Since the parents had said sanctions would not induce them to testify and the defendant had the opportunity for a full cross-examination of the parents in the prior trial, the Florida Supreme Court affirmed the conviction. The Florida Supreme Court affirmed another first-degree murder conviction in *Brown v. State*.<sup>332</sup> Brown and two accomplices burglarized the home of an eighty-one year old woman who was also raped and killed. One of Brown's co-defendants testified against him and also stated that the third man, Rickey, was the defendant's stepson. This testimony was found to be an exception to hearsay as the stepson was unavailable at the time of the trial (the police were still looking for him) and the statement of the relationship was permitted by the second prong, a statement of personal or family history, under section 90.804(2)(d) of the Florida Statutes.<sup>333</sup> *Johns-Manville Sales Corp. v. Janssens*<sup>334</sup> involved an asbestos products liability action in which the plaintiff sought to introduce depositions of two witnesses taken in other actions. Since the defendant or its predecessor in interest had an opportunity to cross-examine the witnesses during their depositions in the prior actions and since the witnesses had both since died, the appellate court affirmed the trial court's permitting the plaintiff to read into evidence the depositions from the other lawsuits.<sup>335</sup>

### G. *Dependency, Probation and Forfeiture Proceedings*

Lawyers must be attentive to hearsay problems in dependency proceedings, probation revocation hearings and forfeiture proceedings as well as at trials. In reversing an order declaring children to be dependent and placing the children in the custody of the Department of Health and Rehabilitative Services, the appellate court in *In re S.J.T. and T.N.T.*<sup>336</sup> held that admission of numerous exhibits including case summaries and observations of field workers and doctors who had vis-

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332. 473 So. 2d 1260 (Fla. 1985).

333. *Id.* at 1264.

334. 463 So. 2d 242 (Fla. 1st Dist. Ct. App. 1984).

335. *Id.* at 259-62.

336. 475 So. 2d 951 (Fla. 1st Dist. Ct. App. 1985).

ited the family and observed the treatment of the children, the trial court had erroneously admitted hearsay evidence. The appellate court noted that in conducting adjudicatory hearings in dependency actions, a judge is required to apply "the rules of evidence in use in civil cases. . . ."337

While hearsay evidence is admissible in a probation revocation proceeding,<sup>338</sup> a probation revocation may not be premised solely on the basis of hearsay evidence.<sup>339</sup> *Bass v. State*<sup>340</sup> involved an appeal from a trial court's order revoking probation for failure to work diligently, make restitution and pay a fine.<sup>341</sup> Because Bass had admitted the violations, the appellate court found that the probation had not been revoked solely on hearsay evidence, but also on non-hearsay admissions.<sup>342</sup> *Davis v. State*<sup>343</sup> also involved an appeal from a revocation of probation. The appellate court ordered excised from the written order of revocation the probationer's failure to pay the cost of supervision, as the only evidence of that had been hearsay.<sup>344</sup> In reversing a trial court's order forfeiting an automobile used in the commission of a

337. *Id.* at 953 (citing FLA. STAT. § 39.408(2)(b)). The appellate court notes that some of the evidence could have been introduced as a business records exception if the proper foundation had been laid.

Another dependency case, *In re A.D.J. and D.L.J.*, 466 So. 2d 1156 (Fla. 1st Dist. Ct. App. 1985), found no reversible error in admitting hearsay statements and reports as: "The record reflects that the trial judge was aware of appellant's several hearsay objections and gave no probative effect to the inadmissible hearsay." *Id.* at 1162.

*In Re A.D.J. and D.L.J.* is a frustrating opinion to read because of its lack of detail about the statements themselves and how the appellate court knew the trial judge did not consider the statements. It was reversed for other reasons.

338. *Cuciak v. State*, 410 So. 2d 916, 918 (Fla. 1982).

339. *Turner v. State*, 293 So. 2d 771 (Fla. 1st Dist. Ct. App. 1974) and *Curry v. State*, 379 So. 2d 140 (Fla. 4th Dist. Ct. App. 1980).

340. 473 So. 2d 1367 (Fla. 1st Dist. Ct. App. 1985).

341. *Id.* at 1368.

342. *Id.* at 1369 (The order revoking Bass's probation was reversed, however, because the trial court failed to make a factual determination that Bass had an ability to make restitution and pay the fine).

343. 474 So. 2d 1246 (Fla. 4th Dist. Ct. App. 1985).

344. *Id.* at 1246. The appellate court affirmed the violation as to the probationer's failure to file written reports but remanded to permit the trial court to reconsider whether the probation should be revoked solely for failure to file written reports. Both the opinion of the appellate court and the concurring opinion specifically mentioned that the trial court was free to reach the same conclusion as before and revoke the probation solely for the failure to file the required reports. *Id.* at 1247.

crime, the appellate court in *Doersam v. Brescher*<sup>345</sup> held that "hearsay evidence should not be admitted in a final hearing in forfeiture proceedings and, of course, such evidence may not form the basis for a factfinder's decision that the property was utilized in the commission of a crime."<sup>346</sup> In arriving at its decision, the *Doersam* court noted that even in administrative hearings, hearsay evidence was not sufficient but could only be used to supplement or explain other evidence.<sup>347</sup>

#### H. *Prior Inconsistent & Consistent Statements*

Out-of-court statements may be introduced for reasons other than their truth, in which case they are not subject to the prohibition against hearsay. One example is a trial witness' prior consistent statement which is offered to rebut a charge of improper influence, motive, or recent fabrication.<sup>348</sup> *Parker v. State*<sup>349</sup> was an appeal from a conviction of first-degree murder. Parker and two co-defendants had been charged with robbing a convenience store and killing the convenience store's clerk. The girlfriend of one of the co-defendants had spoken to Parker when Parker was in jail and in answer to the girlfriend's question of who had shot the convenience store clerk, Parker stated that he had shot the clerk. The co-defendant's girlfriend then told her mother and sister what Parker had told her. At the trial, not only was the prosecutor permitted to introduce the testimony of the co-defendant's girlfriend, but was also permitted to call the girlfriend's mother and sister to show that the girlfriend's story was not a recent fabrication. The Florida Supreme Court agreed with Parker that permitting the girlfriend's sister and mother to testify was error because the girlfriend's motive to testify (to keep her boyfriend out of the electric chair) existed at the time the co-defendant's girlfriend had made the statements to her mother and sister.<sup>350</sup> However, the Florida Supreme Court found that the error was harmless and affirmed the conviction.

Another example of an out-of-court statement, that is not coming in for its truth, is a prior inconsistent statement.<sup>350.1</sup> *Busch v. State*<sup>351</sup>

345. 468 So. 2d 427 (Fla. 4th Dist. Ct. App. 1985).

346. *Id.* at 428.

347. *Id.* (citing FLA. STAT. § 120.58(1)(a) (1985)).

348. FLA. STAT. § 90.801(2)(b) (1985).

349. 476 So. 2d 134 (Fla. 1985).

350. *Id.* at 137.

350.1 FLA. STAT. § 90.614.

351. 466 So. 2d 1075 (Fla. 3d Dist. Ct. App. 1985).



was an appeal from a conviction of attempted first-degree murder and shooting into an occupied building. Busch admitted the shooting but claimed that the weapon had accidentally discharged while he was in his truck outside the building. A key state witness was Busch's female companion of the evening who at trial testified that the firing of the weapon had been intentional. When originally questioned about the incident, Busch's female companion has stated that the weapon discharged accidentally. At the trial the prosecutor brought out both the prior inconsistent statement and the motivation for that statement, that the witness was afraid of Busch.<sup>352</sup> While the appellate court does not appear to be sure whether the complained-of testimony was hearsay<sup>353</sup> or whether it was error to permit the testimony,<sup>354</sup> the appellate court decided that if the testimony were error, it was harmless.<sup>355</sup>

Under certain circumstances, prior inconsistent statements are not merely admissible, but may actually be accepted as substantive evidence.<sup>356</sup> However, as the case of *Moore v. State*<sup>357</sup> indicates, even as substantive evidence, the prior inconsistent statement may not be sufficient to sustain a conviction in the absence of competent corroborating evidence. *Moore* involved an appeal from a conviction of second-degree murder. Moore had been indicted by a Grand Jury for first-degree murder based on the testimony of two witnesses who had identified Moore as the murderer. Both witnesses later recanted their statements

352. *Id.* at 1077, 1079.

353. "While the testimony introduced was allegedly hearsay. . . ." *Id.* at 1079.

354. "While it may have been error to permit the allegedly hearsay testimony. . . ." *Id.*

355. *Id.* From the opinion, it is not clear if the panel was bothered by what they perceived as an attack on the defendant's character or by the witness' reason or basis for her fear. The opinion does not contain the testimony to which the defendant objected. Even assuming that the witness had said she was afraid of the defendant because she had been told he was dangerous, that testimony would not be objectionable as hearsay because it would not be coming in for its truth, but rather to show the witness' basis for her fear. The distinction may be a fine one, but it is the job of appellate courts, no less than trial courts and evidence teachers, to make these distinctions until Florida chooses to permit hearsay evidence in its courts.

356. § 90.801(2)(a) states that:

A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:

(a) Inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition. . .

357. 473 So. 2d 686 (Fla. 4th Dist. Ct. App. 1984).

in depositions and Moore had successfully moved to dismiss the indictments. An appellate court reinstated the indictment,<sup>358</sup> a decision the Florida Supreme Court approved<sup>359</sup> holding that:

[U]nder section 90.801(2)(a), Florida Statutes (1981), the prior inconsistent statement of a witness at a criminal trial, if given under oath before a Grand Jury, is excluded from the definition of hearsay and may be admitted into evidence not only for impeachment purposes but also as substantive evidence on material issues of fact.<sup>360</sup>

Before Moore was tried, both witnesses who had accused him before the Grand Jury pled guilty to perjury. At trial, the witnesses testified that their Grand Jury testimony had been false and that their deposition testimony had been true. Nevertheless, the jury convicted Moore of second-degree murder. The appellate court reversed the conviction, holding that: “[P]rior inconsistent statements standing alone do not constitute sufficient evidence to sustain a conviction.”<sup>361</sup>

In reversing the conviction, the appellate court distinguished *Webb v. State*<sup>362</sup> because “in *Webb* the State had introduced other corroborating evidence in addition to the witness’s recanted testimony.”<sup>363</sup>

## XI. Photographs and Demonstrative Evidence

Seven of the eight cases dealing with photos or demonstrative evidence that this survey will examine are criminal cases. The state’s introduction of photographs was either proper or, if erroneous, harmless in six of those cases and the trial court’s refusal to let the defendant introduce photos and demonstrative evidence in the seventh case was affirmed.

If a defendant is going to contend that the improper admission of photographs contributed to his conviction, he must do so on direct appeal and not in a motion for post-conviction relief.<sup>364</sup> The “admission of photographic evidence is within the trial court’s discretion and . . . a

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358. *State v. Moore*, 424 So. 2d 920 (Fla. 4th Dist. Ct. App. 1982).

359. *Moore v. State*, 452 So. 2d 559 (Fla. 1984).

360. *Id.* at 562.

361. 473 So. 2d at 688.

362. 426 So. 2d 1033 (Fla. 5th Dist. Ct. App. 1983).

363. 473 So. 2d at 687.

364. *Gentry v. State*, 464 So. 2d 659, 661 (Fla. 4th Dist. Ct. App. 1985).

court's ruling will not be disturbed on appeal unless there is a showing of clear abuse."<sup>365</sup> Even gruesome or inflammatory photographs maybe admitted if they are relevant.<sup>366</sup> *Mills v. State*<sup>367</sup> involves an appeal from a conviction of first degree murder. The state's main witness was a co-defendant who claimed that Mills hit the victim on the back of the head with a tire iron and then shot the victim with a shot gun.<sup>368</sup> Mills contended that it was error for the trial court to admit a photograph of the victim's skull because the photograph was irrelevant to any disputed issue, cumulative and prejudiced the jury. In affirming the conviction, the Florida Supreme Court disagreed with the defendant's contentions, and found the photograph relevant because it "helped establish how long the victim had been dead . . . [and] explain the lack of medical evidence that the victim had received a blow to the skull by Mills, as [the co-defendant] had testified."<sup>369</sup>

Similarly, the Florida Supreme Court affirmed three first degree murder convictions and the trial court's admission of photographs that the defendant contended were gruesome in *Henderson v. State*.<sup>370</sup> Henderson had been accused of binding, gagging, and killing three hitchhikers. The Florida Supreme Court seemed peaked that the defendant would challenge the introduction of the photographs,<sup>371</sup> and stated that the photographs of the victims' partially decomposed bodies "were relevant to show the location of the victims' bodies, the amount of time that had passed from when the victims were murdered to when their bodies were found, and the manner in which they were clothed, bound and gagged."<sup>372</sup>

Even where irrelevant and unfairly prejudicial photographs are erroneously admitted, if the error is harmless, a conviction will be affirmed. *Little v. State*,<sup>373</sup> involved an appeal by two defendants of their

365. *Duest v. State*, 462 So. 2d 446, 449 (Fla. 1985).

366. *Adams v. State*, 412 So. 2d 850 (Fla. 1982), *cert. denied*, 459 U.S. 882 (1982); *Straight v. State*, 397 So. 2d 903 (Fla. 1981), *cert. denied*, 454 U.S. 1022 (1981), *cited in Mills v. State*, 462 So. 2d 1075, 1080 (Fla. 1985) and *Henderson v. State*, 463 So. 2d 196, 200 (Fla. 1985).

367. 462 So. 2d 1075 (Fla. 1985).

368. *Id.* at 1078.

369. *Id.* at 1080.

370. 463 So. 2d 196 (Fla. 1985).

371. "Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." *Id.* at 200.

372. *Id.*

373. 474 So. 2d 331 (Fla. 1st Dist. Ct. App. 1985).

convictions for armed robbery. Based on a tip from a confidential informant, the police went to an apartment expecting to find Little. While in the apartment, they arrested Little's co-defendant and while searching the apartment for Little they found photographs of Little and his co-defendant posing with their guns pointed at the photographer, as well as a photograph of a bag with a gun protruding from it.<sup>374</sup> The appellate court affirmed the convictions, finding admission of the photographs harmless error even though none of the guns seen in the photographs were positively identified as those used in the robbery and, because the poses would suggest to the jury that the defendants were of poor character, the photographs were thus unfairly prejudicial.<sup>375</sup> In the words of the appellate court:

The trial judge erroneously admitted into evidence the photographs seized during the search over the objections of the defendants. As to their relevancy, there is no evidence as to where or when the photographs were taken. They do not depict a prior similar act of robbery. The record does not reveal that the association of appellants was at issue and the photos were therefore not properly admitted as probative of that issue. Nor were any of the four guns seen in the photographs positively identified as those used in the robbery. Moreover, the prosecution had placed two guns into evidence which it alleged were those used in the robbery. We also find that the photographs were likely to be unfairly prejudicial to the appellants because the poses would suggest to the jury that appellants were of poor character. We conclude that the photos were irrelevant, not material to any issue in controversy, and had a tendency to be inflammatory and potentially confusing to the jury.

Notwithstanding the error committed in the admission of the photographs, the convictions are affirmed, as we find that the error was harmless.<sup>376</sup>

It is not an abuse of discretion for a trial court to prohibit counsel from showing demonstrative exhibits to the jury during closing arguments if those exhibits were not introduced into evidence during the trial.<sup>377</sup> *Walker v. State* involved an appeal of a conviction of attempted second degree murder and two counts of aggravated assault. During his cross examination of state witnesses, defense counsel had

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374. *Id.* at 331.

375. *Id.* at 332.

376. *Id.*

377. *Walker v. State*, 473 So. 2d 694, 696 (Fla. 1st Dist. Ct. App. 1985).

used a drawing, but he had not put that drawing in evidence in order to "sandwich" the prosecution's closing argument. During the defense closing, the prosecutor successfully objected to the defense counsel's use of the drawing in argument to the jury. The appellate court affirmed the trial court, finding no abuse of discretion in prohibiting defense counsel from showing exhibits to the jury since those exhibits had not been introduced into evidence.<sup>378</sup>

Relevant evidence may be inadmissible if its probative value is substantially out-weighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.<sup>379</sup> In *State v. Wright*,<sup>380</sup> the appellate court affirmed a trial court's excluding defense evidence, including photographs and demonstrative evidence, which "was of dubious probative value . . . [and whose] potential for confusion of issues and misleading the jury was substantial."<sup>381</sup> *Wright* involved a defendant convicted of raping a fourteen-year-old girl. The defense was that the defendant's penis was so large as to make the rape unlikely if not impossible. The victim had testified that she had been raped twice, each time over a twenty minute period and that "the rapist moved rapidly up and down. . . ."<sup>382</sup> On cross examination of the examining physician, the defendant brought out that violent thrusting by a nine inch penis would be likely to cause vaginal lacerations, which were not found in the victim. However, the physician would not equate violent thrusting with rapid thrusting. The defendant's girlfriend and wife both testified that intercourse with the defendant was very painful and had been accompanied by bleeding. Two other individuals were permitted to testify that the defendant's penis was eight and one half inches long. However, the trial court refused to permit one of the witnesses to testify that the circumference of the defendant's penis was five and one half inches and refused to permit the defendant to introduce photographs, a wooden model and to display his penis to the jury.<sup>383</sup> The appellate court affirmed the conviction finding that "[t]he potential for confusion of issues and misleading

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378. *Id.* The appellate court also affirmed the trial court's having permitted the prosecutor to introduce photos of the defendant. The photos had been taped so that numbers and dates were not visible, thereby permitting no inference that the defendant had been arrested before. *Id.* at 698.

379. FLA. STAT. § 90.403 (1985).

380. 473 So. 2d 268 (Fla. 1st Dist. Ct. App. 1985).

381. *Id.* at 270.

382. *Id.* at 269.

383. *Id.*

the jury was substantial."<sup>384</sup>

## XII. Best Evidence

Except as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph.<sup>385</sup>

While the Florida Evidence Code has a Best Evidence Rule, one requiring introduction of an original document under certain circumstances, the Florida Evidence Code liberally permits the admissibility of duplicates<sup>386</sup>, which includes photocopies as well as carbon copies.<sup>387</sup> Two cases involving reversals of trial courts for failure to admit duplicates were *Gastroenterology Associates v. Matuson*<sup>388</sup> and *Tillman v. Smith*.<sup>389</sup> *Gastroenterology Associates* involved an appeal from an unsuccessful suit by doctors against a patient who had not paid them. The trial court refused to permit one of the doctors to prove the services rendered either by oral testimony or by business records, reasoning that the Best Evidence Rule required that original hospital records were the only evidence that would be permitted.<sup>390</sup> In reversing the trial court, the circuit court, sitting in its appellate capacity, ruled that since the doctors' records contained photocopies of the originals, the records should have been received as duplicates under section 90.953 of the Florida Evidence Code.<sup>391</sup> Moreover, the appellate court pointed out that the doctor's records were his business records and would have been admissible on that score alone, and the doctor's oral testimony should

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384. *Id.* at 270. The opinion does not state whether the defense also included identity. If it did, then the trial court's ruling excluding the evidence and the appellate court's affirmance would appear to be erroneous.

If, on the other hand, the defense was not misidentification, but only that no penetration or intercourse occurred, then the ruling is correct as the examining physician found sperm in the victim's vagina, as well as engorged blood vessels — hence the proffered evidence would be of questionable probative value and would likely lead to confusion of the issues.

385. FLA. STAT. § 90.952 (1985).

386. FLA. STAT. § 90.953 (1985).

387. FLA. STAT. § 90.951 (4)(1985).

388. 9 Fla. Supp. 2d 94 (11th Cir. Ct. 1985).

389. 472 So. 2d 1353 (Fla. 5th Dist. Ct. App. 1985).

390. 9 Fla. Supp. 2d at 95.

391. *Id.* at 95-96.

also have been be admissible.<sup>392</sup> In *Tillman*, the trial court had refused to accept into evidence a duplicate copy of an antenuptial agreement under the theory that the antenuptial agreement was a document involving the payment of money, and hence inadmissible under section 90.953 (1) of the Florida Statutes. In rejecting the trial court's ruling excluding the antenuptial agreement, the appellate court's language seems to hold that the only duplicates which are excluded under section 90.953 (1) of the Florida Statutes are negotiable instruments.<sup>393</sup>

### XIII. Conclusion

Florida courts discussed so many different evidentiary issues during this time that drawing any conclusions is difficult. In the criminal procedure area, the Florida Supreme Court decided important cases dealing with the *Williams* Rule, privilege against self-incrimination, restrictions on cross-examination of a witness about pending charges and hypnotically related testimony. Also in criminal cases, the district courts of appeal split over whether the state can "impeach" its own witnesses on direct examination by exposing their weaknesses before defense counsel has an opportunity to do so. Ideally the Florida Supreme Court will soon resolve this issue, if it has not done so before this article's publication.<sup>394</sup>

On the civil side, Florida District Courts of Appeal took a defense-oriented, conservative approach to admission of subsequent remedial measures evidence. Likewise, the Florida courts continue to take a restrictive position toward admission of psychotherapist-patient communications in child custody cases. Finally the admission of expert testimony concerning thermograms was denied.

Judging various opinions to try to discern a general overall trend is almost like comparing apples with oranges. However, both authors believe that Florida courts need to write better opinions when dealing

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392. *Id.* at 96.

393. 472 So. 2d at 1354. Another opinion dealing with duplicates is *E.F.K. Collins Corp. v. S.M.M.G., Inc.*, 464 So. 2d 214 (Fla. 3d Dist. Ct. App. 1985). The *Collins* court does not report enough facts to permit a determination as to why a trial court's admission of a copy of a sublease was erroneous.

394. On July 10, 1986, the Florida Supreme Court resolved the conflict in favor of permitting a direct examiner to bring out his own witness' weakness. The Florida Supreme Court correctly ruled that such questioning was not impeachment. *See Bell v. State*, 491 So. 2d 537 (Fla. 1986); *Sloan v. State*, 491 So. 2d 276 (Fla. 1986); *State v. Price*, 491 So. 2d 536 (Fla. 1986).

with evidentiary issues. Too often, courts stated the general principle of law involved and jumped straight to a conclusion with little or no explicit factual analysis. Evidentiary questions are almost always “fact-bound.” Thus, for appellate opinions to have any real effect in this area, they must present complete analysis of both the facts and the law. At times this happened during the survey period, such as in the Third District Court of Appeal’s well-reasoned Compulsory Process Clause decision. Our hope is that all future evidentiary opinions will be as thorough.