Evidence

Dale Alan Bruschi*
Evidence: 1995 Survey of Florida Law

Dale Alan Bruschi

 TABLE OF CONTENTS

I. INTRODUCTION .................................. 167
II. RULINGS ON EVIDENCE ........................... 168
III. INTRODUCTION OF RELATED WRITINGS OR 
RECORDED STATEMENTS ........................... 170
IV. IMPEACHMENT .................................... 172
V. EXPERT OPINION TESTIMONY .................... 176
A. Scientific Evidence .............................. 176
B. Testimony by Experts ............................ 179
VI. HEARSAY ....................................... 181
A. The Postell Rule ................................ 181
B. The Child Hearsay Exception .................... 182
VII. AUTHENTICATION ............................... 184
VIII. ADDITIONS AND AMENDMENTS TO THE FLORIDA 
EVIDENCE CODE .................................. 185
A. Gender-Neutral Language ....................... 185
B. Domestic Violence Advocate-Victim 
Privilege ........................................... 186
C. Mode and Order of Interrogation and 
Presentation ....................................... 187
D. Hearsay Exception: Statement of 
Elderly Person or Disabled Adult .............. 188
IX. CONCLUSION .................................... 190

I. INTRODUCTION

Cases for this year's Survey of Florida Evidence demonstrate some of 
the same similarities as in previous years. Criminal evidentiary cases 
outnumbered civil evidentiary cases, and relevancy and hearsay issues were 
the most prolific topics. During the survey period, the Supreme Court of

* J.D. with honors, Nova University, 1987; B.A., University of Florida, 1978; Assistant 
County Attorney, Broward County, Florida, 1992-present; Partner in Bruschi, Eng, & 
Florida resolved some outstanding conflicts between the district courts of appeal on issues regarding expert testimony and hearsay; however, with the exception of these cases there were only a few noteworthy cases. The legislature added in a new evidentiary privilege and a new hearsay exception this year and made the language of the evidence code gender-neutral.

II. RULINGS ON EVIDENCE

Section 90.104\(^1\) of the *Florida Evidence Code* requires a timely objection in order to preserve a point for appeal.\(^2\) Objections which are not timely made are waived.\(^3\) The appellate courts are unable to consider an assertion of error in the admission of evidence, made in the trial court, if counsel fails to make a contemporaneous objection at trial.\(^4\) Only if the error is *fundamental* will an appellate court consider the issue on appeal.\(^5\) The Supreme Court of Florida has indicated that fundamental error will be found *infrequently.*\(^6\) However, as the following case indicates, the appellate courts of Florida occasionally turn this simple rule on its head in a pell-mell effort to correct what they perceive to be an injustice from the reading of a cold record.

In a case that arose from a certified question regarding the child hearsay exception of section 90.803(23)\(^7\) of the *Florida Statutes*, the Supreme Court of Florida followed the old adage that "'hard cases make bad law.'"\(^8\) In *Anderson v. State*,\(^9\) the defendant was charged with lewd and lascivious assault upon a child.\(^10\) Prior to trial the State gave notice that it intended to introduce testimony at trial that the child victim told two

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1. FLA. STAT. § 90.104 (Supp. 1994).
4. A proper objection has two ingredients, both of which are needed to preserve objections for appellate review. First, the objection must be *timely*. If counsel does not promptly object the problem is waived. Second, the objection must be *specific*. See, e.g., Glendening v. State, 536 So. 2d 212 (Fla. 1988), cert. denied, 492 U.S. 407 (1989). Failure to state the correct grounds for objection will waive it. The appellate courts have strictly monitored this rule.
5. FLA. STAT. § 90.104(3) (Supp. 1994).
6. Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970) (citations omitted) ("The appellate court should exercise its discretion under the doctrine of fundamental error very guardedly."); see also CHARLES W. EHRHARDT, FLORIDA EVIDENCE, § 104.6 (5th ed. 1994).
9. Id. at 1118.
10. Id. at 1119.
adults that the defendant touched her with his penis.\textsuperscript{11} There was no other corroborating eyewitness or physical evidence tying the defendant to the crime. The State contended that the testimony fell within the exception to the hearsay rule for statements made by child victims set forth in section 90.803(23).\textsuperscript{12}

At trial the hearsay was entered and there was no objection by the defendant, nor was there a hearing held as was contemplated by section 90.803(23).\textsuperscript{13} Additionally, the trial court ruled that the child was not competent to testify as the child could not give consistent answers regarding whether she knew what it meant to tell the truth.\textsuperscript{14} The defendant’s motion for judgment of acquittal was denied and the jury returned a guilty verdict.\textsuperscript{15}

On appeal to the district court the defendant argued that his conviction was based solely upon hearsay that was never determined to be reliable nor corroborated.\textsuperscript{16} The district court affirmed the conviction finding that there was no objection at trial to the testimony.\textsuperscript{17} The Supreme Court of Florida reversed the district court of appeal, despite finding that: 1) where there are no objections made to hearsay the evidence is admitted and the issue is barred from appellate review;\textsuperscript{18} 2) the trial court’s failure to make sufficient findings under section 90.803(23) of the \textit{Florida Statutes} is not fundamental error;\textsuperscript{19} 3) and finally, and most disturbing, had an objection been made, the Supreme Court of Florida indicated that the statement might have been

\textsuperscript{11} Id.
\textsuperscript{12} \textit{Anderson}, 655 So. 2d at 1119.
\textsuperscript{13} Id. The competency of the defending trial attorney must surely be questioned given the facts of the case. The evidence code specifically requires a hearing before the hearsay statement can be utilized in court. \textit{FLA. STAT.} § 90.803(23)(a)(1) (1991). To ask what type of trial strategy was being used when crucial damning testimony is let in without the required hearing \textit{or even an objection} boggles the imagination. However, poor lawyering is fostered when the appellate courts bail out an incompetent attorney, instead of having the conviction collaterally attacked for ineffective assistance of counsel under Rule 3.850. \textit{See} \textit{FLA. R. CRIM. P.} 3.850. Based on the facts reported in the opinion the issues were not preserved for appeal and should not have been reversed by the Supreme Court. The proper procedure was a collateral attack of the conviction for ineffective assistance of trial counsel.
\textsuperscript{14} \textit{Anderson}, 655 So. 2d at 1119.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{19} \textit{See} State v. Townsend, 635 So. 2d 949 (Fla. 1994).
admissible as an excited utterance.\textsuperscript{20} The supreme court spent much of the opinion stating that their holding "should be specifically limited to the facts of this case."\textsuperscript{21} As well it should, since section 90.104 of the Florida Statutes requires a specific and timely objection.\textsuperscript{22} It seems that the supreme court is already forgetting their prior rulings, in a host of other cases, that have come down hard on predicated a reversal when a contemporaneous objection is lacking and the error is not fundamental.\textsuperscript{23} The only guidance this case offers is the extent that the appellate courts will sometimes go to prevent a perceived injustice.

The better procedure would have been to uphold the conviction, since the issue was not preserved. The conviction could then be collaterally attacked under Rule 3.850\textsuperscript{24} for ineffective assistance of counsel. Only in this way will the courts of Florida foster proper lawyering while preserving the rights of the accused. Throwing in a "hard case makes bad law" decision, that is directly contrary to dozens of other decisions, offers neither guidance nor enlightenment for those attorneys who diligently read the appellate opinions for direction to competently try their cases and uphold the rights of their clients.

\section*{III. Introduction of Related Writings or Recorded Statements}

Section 90.108\textsuperscript{25} of the Florida Evidence Code allows a party to contemporaneously introduce a writing or recorded statement after a similar writing or recorded statement has been introduced by the opposing party. When a writing or recorded statement is introduced at trial, a misleading impression may be created by taking the matters contained in it out of context. Therefore, section 90.108 allows the adverse party to require the

\begin{footnotes}
\textsuperscript{20} An excited utterance under § 90.803 of the Florida Statutes is a firmly rooted hearsay exception, whose reliability and trustworthiness is grounded in the fact that "[a] person who is excited as a result of a startling event does not have the reflective capacity which is essential for conscious misrepresentation; therefore statements that are made by the person who is in a state of excitement are spontaneous and have sufficient guarantees of truthfulness." EHRHARDT, \textit{supra} note 6, § 803.2.
\textsuperscript{21} Anderson, 655 So. 2d at 1119.
\textsuperscript{23} See Rodriguez v. State, 609 So. 2d 493 (Fla. 1992); Glendening v. State, 536 So. 2d 212 (Fla. 1988); Clark v. State, 363 So. 2d 331 (Fla. 1978); Sanford v. Rubin, 237 So. 2d 134 (Fla. 1970); Atlantic Coast Line R. Co. v. Shouse, 91 So. 90 (Fla. 1922).
\textsuperscript{24} FLA. R. CRIM. P. 3.850.
\textsuperscript{25} FLA. STAT. § 90.108 (1993).
\end{footnotes}
remainder of the writing or document to be introduced if fairness requires that it be considered contemporaneously with the original writing or document. This principle is often called the "rule of completeness."

Section 90.108 has been greatly expanded by the decisional case law over the years. The strict interpretation of section 90.108 only allows introduction of the related writing or document at the time the original writings or documents are offered into evidence. The provision may not be utilized during cross-examination or during the party's own case. However, the decisional case law has expanded this section by allowing not only written statements, documents, and "recorded statements" but it also has been applied to testimony regarding part of a conversation. Additionally, some decisions have applied section 90.108 to questions asked during cross-examination, rather than requiring that the additional evidence be admitted at the time the witness testifies on direct examination.

A good example of the expansion of section 90.108 is seen in Johnson v. State. In Johnson, the defendant was convicted of manslaughter. When the defendant was arrested he told the police officer that he had been in a fight with the victim over a broken watch and that he hit the victim with a stick. Later at the police station the defendant gave a formal statement...
asserting that he hit the victim only after the victim threatened him and only after the victim hit him first.\textsuperscript{33}

During trial the State introduced the defendant’s first statement. The trial court refused to allow the defense to cross examine the officer concerning the second statement.\textsuperscript{34} The defendant was convicted at trial and the Third District Court of Appeal reversed the conviction. The district court cited section 90.108 as a basis for its finding that the State opened the door by eliciting testimony as to part of the conversation.\textsuperscript{35} Therefore, the defendant was entitled to cross-examine the witness about other relevant statements made during the conversation.

The district court reasoned that the “rule is not limited to segments of one conversation, but also allows admission of ‘other related conversations that in fairness are necessary for the jury to accurately perceive the whole context of what has transpired between the two.’”\textsuperscript{36} The defendant should have been allowed to cross-examine the officer regarding the second statement, since the second statement qualified or explained the first statement. By itself the first statement standing alone left the jury with an allegedly incomplete picture of the defendant’s behavior.

IV. IMPEACHMENT

In Peterson v. State,\textsuperscript{37} the Fourth District Court of Appeal held that a witness may be asked about prior convictions if the attorney has a good faith basis for asking the questions even though the certified copies of conviction are not in hand. Though this area of the evidence code would seem to be well-settled in Florida, it is actually far from that.

In Peterson, the defendant testified at trial regarding his claim that he acted in self defense when he stabbed the victim.\textsuperscript{38} By taking the stand the defendant placed his credibility in issue and was thus open to impeachment regarding his prior convictions. After the State closed its case, the defendant moved in limine to exclude any questioning regarding the defendant’s prior convictions when the defendant testified. Defense counsel acknowledged that the prosecution had supplied him with copies of reports

\textsuperscript{33} Id.
\textsuperscript{34} Id. Generally, the defendant’s self-serving exculpatory statement is inadmissible. It is hearsay that does not fall within an exception.
\textsuperscript{35} Id.
\textsuperscript{36} Johnson, 653 So. 2d at 1075 (citations omitted).
\textsuperscript{37} 645 So. 2d 10 (Fla. 4th Dist. Ct. App. 1994), review denied, 659 So. 2d 272 (Fla. 1995).
\textsuperscript{38} Id. at 11.
from the State of New York regarding the defendant’s criminal record. In addition, the prosecution had supplied the defense with an N.C.I.C.\textsuperscript{39} printout of the defendant’s convictions. The defense contended that the prosecution could not inquire into the defendant’s criminal record since these “rap sheets” were not certified copies of conviction.\textsuperscript{40}

During a hearing regarding the use of the impeachment material, the trial court reviewed the rap sheets with counsel. The prosecutor stated that he had a good faith belief that the defendant had at least three felony convictions. The trial court agreed to allow the prosecutor to ask the standard two questions: 1) Have you ever been convicted of a felony?; and 2) How many times?\textsuperscript{41} The defense on redirect examination asked the defendant how long ago the convictions were. The defendant stated they were twenty years ago.\textsuperscript{42} The district court found that the procedures utilized by the trial court were sufficient to allow the impeachment without having the certified copies of conviction in hand.\textsuperscript{43}

On appeal, the defendant cited Cummings v. State,\textsuperscript{44} for the “rule” prohibiting questions regarding prior convictions unless the prosecutor has certified copies of conviction in hand to introduce as impeachment. The district court noted that this was neither the Cummings court’s “holding in the case nor an absolute proscription requiring reversal in every case where the suggested procedure is not followed.”\textsuperscript{45} The district court correctly posited that Cummings only addressed the proper form of the questions to be asked on impeachment under the newly enacted Florida Evidence Code.\textsuperscript{46} The Cummings court did not develop a blanket rule of law that certified copies of conviction must be in hand to allow impeachment.

\textsuperscript{39} This is an acronym for “National Crime Index Computer” printout. The printout is for law enforcement eyes only and it is improper to give this type of printout to anyone outside of law enforcement.

\textsuperscript{40} Peterson, 645 So. 2d at 11. The defense did not challenge the accuracy of the “rap sheets” since the defense did not think that the State could inquire into his client’s criminal records without certified copies of conviction.

\textsuperscript{41} Id. During the actual cross examination the prosecutor asked the standard questions but when the defendant stated that he had one less felony than the rap sheets indicated the prosecutor followed up his questioning by asking if the defendant had “ever been convicted of a misdemeanor involving dishonesty” to which the defendant answered “yes.” This was the proper question to ask under the Florida Evidence Code. See EHRHARDT, supra note 6, § 610.6.

\textsuperscript{42} Peterson, 645 So. 2d at 11.

\textsuperscript{43} Id. at 11-12.

\textsuperscript{44} 412 So. 2d 436 (Fla. 4th Dist. Ct. App. 1982).

\textsuperscript{45} Peterson, 645 So. 2d at 12.

\textsuperscript{46} Id.
The district court realized that had the defendant in *Peterson* denied his prior convictions, the only way the prosecution could impeach him was by entering certified copies of his prior convictions in their rebuttal case. The "rap sheets" would not have been admissible for such a purpose and further questioning on the subject would not be allowed.\(^{47}\) Without the certified copies of conviction the prosecution would have been stuck with the defendant's denial of his prior convictions.\(^{48}\)

Florida evidence writers have generally acknowledged that before the prosecution can ask about prior convictions, the prosecution must have certified copies of conviction in hand. No per se "good faith" exception has technically existed. The reasoning is simple: if the prosecution asks the defendant if he's ever been convicted of a felony, and the defendant denies the question,\(^{49}\) the jury could be left with the indelible impression that the defendant has prior criminal convictions. This could mislead the jury if the defendant was, in fact, charged but never convicted or was merely arrested but never convicted. Without the ability to prove up the prior convictions, the state has the immutable advantage of misleading the jury regarding the defendant's prior criminal record. Therefore, "good faith" has never technically existed.\(^{50}\)

However, in the situation that existed in *Peterson* the trial court had a very strong argument for allowing the impeachment questions to be asked. Both of the State's "rap sheets" indicated convictions and defense counsel's argument to the trial court indicated that his client had been previously convicted of felonies.\(^{51}\) Since a trial is a search for the truth, the defendant has no constitutional right to lie under oath.\(^{52}\) The defense attorney's

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47. See Irvin v. State, 324 So. 2d 684 (Fla. 4th Dist. Ct. App.), *cert. denied*, 334 So. 2d 608 (Fla. 1976).

48. Of course the defendant's statement denying his prior convictions could later be used against the defendant in a perjury charge if the defendant, in fact, lied under oath during trial.

49. Or, likewise if the defendant denies the number of convictions.

50. But see Alvarez v. State, 467 So. 2d 455 (Fla. 3d Dist. Ct. App.), *review denied*, 476 So. 2d 675 (Fla. 1985), where the Third District Court of Appeal attempted to establish a "good faith" exception.

51. *Peterson*, 645 So. 2d at 11. Defense counsel stated that at least one of the defendant's three prior felony convictions was not true and the defendant would deny that one. *Id.* This indicated that the defendant did, in fact, have two valid felony convictions that he would not deny. *Id.*

52. When the prosecution does not have certified copies of conviction, but has some indication that the defendant/witness may have prior convictions, the proper procedure should be for the defendant to be questioned under oath, outside the presence of the jury. Since the defendant/witness does not have a constitutional right to lie under oath, the prosecution has some indication of prior felony convictions (or misdemeanors involving dishonesty or false
argument to the court impliedly acknowledged that the defendant had prior convictions, and the prosecution had a strong good faith belief of the defendant's prior convictions through two "rap sheets." Therefore the impeachment was properly allowed.53 The Fourth District Court of Appeal's withdrawal from an inflexible rule of impeachment to a more flexible rule will not violate a defendant's constitutional right to a fair trial and will insure that a trial will still be a search for the truth.54

statement) because a trial is a search for the truth and the credibility of the defendant/witness is often a crucial point of the trial, this procedure should be utilized.

If the defendant/witness admits the prior convictions outside of the presence of the jury, then the questions should be allowed to be asked in the presence of the jury. If the defendant/witness then denies the prior convictions in front of the jury, the prosecution can prove up the prior statements by calling the court reporter to testify to the defendant/witness' prior statements regarding his prior convictions. The defendant/witness could also be charged with perjury. See Alvarez, 467 So. 2d at 455. Alvarez was later disapproved by the Supreme Court of Florida in Riechmann v. State, 581 So. 2d 133 (Fla. 1991), cert. denied, 113 S. Ct. 405 (1992), but only to the extent that it allowed the trial court to determine that a conviction was punishable by death or imprisonment in excess of one year under the law of this country and not the country where the conviction occurred. The proper procedure is to establish that the law was punishable by death or imprisonment in excess of one year under the law of the foreign country where the defendant was convicted, before it can be used for impeachment.

53. Peterson, 545 So. 2d at 13. The Fourth District Court of Appeal noted a conflict with Peoples v. State, 576 So. 2d 783 (Fla. 5th Dist. Ct. App. 1991), aff'd on other grounds, 612 So. 2d 55 (Fla. 1992). The Peoples case followed Cummings in excluding impeachment evidence when the certified copies of conviction are not in hand. But as noted, supra note 45, the Fourth District Court of Appeal recognized that Cummings did not reach such a holding. Therefore, the Fifth District Court of Appeal's reliance on Cummings for this proposition is inaccurate.

54. The procedure outlined in note 51, supra, is the proper and correct way to proceed when there are no certified copies of conviction in hand, but there is a "good faith" belief that the defendant/witness has convictions. The "good faith" belief will foster judicial economy, since precious judicial resources will not be spent sending the jury out if there is no basis for the prosecution to even ask the question. This procedure will guard against the prosecution asking about criminal convictions when it cannot prove them up, and therefore, leave an improper impression on the jury. If the prosecution gets a denial to the questions and does not have certified copies of conviction, it will not be allowed to repeat the questions before the jury.

This procedure will safeguard the integrity of the trial court as a search for the truth, since an acknowledgment of the prior convictions should be allowed to be repeated in the presence of the jury even though certified copies of conviction are not in hand. The jury will then be able to properly evaluate the defendant/witness' testimony. However, an improper denial by the defendant/witness will not allow the individual to subvert the system to his own end, since such a denial could subject him to a prosecution for perjury even if the individual is successful in the original trial. No individual has the constitutional right to subvert justice and the search for the truth by being fortunate enough to have his convictions in a distant
V. EXPERT OPINION TESTIMONY

A. Scientific Evidence

During the survey period the Supreme Court of Florida delved into the area of expert testimony on scientific evidence under section 90.702 of the Florida Evidence Code. Ramirez v. State is of value because the supreme court discusses the procedure to use when utilizing novel scientific principles under the Frye standard. In Ramirez, testimony revealed that the murder victim was stabbed twelve times. The State introduced into evidence a knife linked to the defendant. During trial the expert gave an opinion that the defendant’s knife was the only knife that could have been used in the murder.

Prior to trial, the State requested a special hearing to present testimony and evidence to the trial judge relating to the reliability of knifemark comparison evidence. The hearing was held and the State presented evidence regarding the theory, practice, and procedures involved in knifemark comparisons. After the State’s presentation at the pretrial hearing, the defense offered an expert to testify, against the scientific reliability of knife mark comparisons. The trial judge refused to allow the defense expert to testify, stating that such testimony was for the jury and not relevant to the issue of basic admissibility.

The supreme court analyzed the factors needed when expert testimony concerns a new or novel principle:

The admission into evidence of expert opinion testimony concerning a new or novel scientific principle is a four-step process. First, the trial

jurisdiction that has a poor or slow record keeping system.
55. FLA. STAT. § 90.702 (Supp. 1994).
56. 651 So. 2d 1164 (Fla. 1995).
57. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).
58. Ramirez, 651 So. 2d at 1166. The State could have avoided this second appeal and reversal, by simply following the supreme court’s advice in the first appeal and reversal to present testimony that the wounds on the victim were consistent with the defendant’s knife. Id. However, the State decided that it would be wiser to prove that this was the only knife that could have been used in the murder. They will now, of course, get to try this case for a third time.
59. Id. This was done in response to the supreme court’s request after this case was reversed in the first trial. See Ramirez v. State, 542 So. 2d 352 (Fla. 1989), appeal after remand, 651 So. 2d 1164 (Fla. 1995).
60. Ramirez, 651 So. 2d at 1166.
61. Id.
62. Id.
judge must determine whether such expert's testimony will assist the jury in understanding the evidence or in determining a fact in issue. Second, the trial judge must decide whether the experts testimony is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs." This standard, commonly referred to as the "Frye test," was expressly adopted by this court in *Bundy v. State*, 471 So. 2d 9, 18 (Fla. 1985), cert. denied, 479 U.S. 894 (1986) and *Stokes v. State*, 548 So. 2d 188, 195 (Fla. 1989). The third step in the process is for the trial judge to determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue. § 90.702, Fla. Stat. (1993). All three of these initial steps are decisions to be made by the trial judge alone. Fourth, the judge may then allow the expert to render an opinion on the subject of his or her expertise, and it is then up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject.  

The supreme court found the second inquiry to be especially important to the process. Basically, when a novel type of scientific opinion is offered, the party offering the evidence must demonstrate the requirements of scientific acceptance and reliability in the particular field in which it belongs. The burden is on the proponent of the evidence to prove the general acceptance of the underlying scientific principle, and the testing procedures used to apply that principle to the facts of the case. The trial judge will determine this question. The issue of general acceptance under the Frye test is established by a preponderance of the evidence. A hearing on the admissibility of novel scientific evidence is adversarial. Both sides may present conflicting evidence to the trial judge as the trier of fact. The testimony of both parties is needed, otherwise the trial judge is denied a full presentation of the relevant evidence. The supreme court found that it was impossible to determine whether the evidence presented by the State was sufficient to prove the reliability of knifemark comparisons because the defendant was denied the right to present any evidence to the contrary at the pretrial hearing. Therefore, the case was reversed and remanded.

63. *Id.* at 1166-67 (citations omitted).
64. *Id.* at 1167.
66. *Ramirez*, 651 So. 2d at 1168.
67. *Id.*
In a somewhat related case the Second District Court of Appeal dealt with the *Frye* standard from the standpoint of DNA statistical analysis. In *Brim v. State*, the issue presented to the district court was whether,

in considering a request for admission of the statistical consequences of the analysis of matching DNA samples, a court must exclude all or part of that analysis if the court is presented with evidence of two differing but generally accepted views within the scientific community concerning the proper population frequency statistics to be applied.  

The statistical analysis is critical to DNA testing for the extremely persuasive probability estimates (one in a billion) that are associated with the testing.

In analyzing the statistical probabilities in *Brim*, two divergent views emerged. First, the statistical probabilities would change depending on which sample populations database was utilized. This essentially means that use of one database would demonstrate that one in one billion had the same genetic DNA code as the defendant, while utilization of another population database would yield a figure of one in nine thousand.

In *Brim*, both statistical theories were presented. It was argued that both theories are generally accepted in the scientific community. The *Brim* court, citing to the *Ramirez* decision, found that where there are two differing, but two generally accepted deductions that can be made from generally accepted scientific evidence, they may *both* be admitted, provided that the underlying scientific evidence satisfies *Frye*.

The district court, finding an anomaly in the *Ramirez* decision, stated

[w]e conclude that the issue before us, the admissibility of expert testimony using comparison statistics to provide evidence regarding the relevant force of a generally accepted scientific procedure, is encom-

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68. 654 So. 2d 184 (Fla. 2d Dist. Ct. App. 1995).
69. Id. at 184.
70. Id. at 185. These sample populations were taken from the field of human population genetics. The statistical significance is measured by the frequency with which a particular DNA pattern would be observed in a sample population.
71. Id.
72. Id.
73. *Brim*, 654 So. 2d at 188.
passed in steps three and four of the analysis in Ramirez and does not require application of the Frye test to those steps.\textsuperscript{74}

In other words, the deductions can be admitted as long as the scientific theory satisfies \textit{Frye}. However, language in the Ramirez decision indicates that deductions drawn from an accepted scientific theory \textit{must also} satisfy \textit{Frye}.\textsuperscript{75} The Brim decision conflicts with Vargas v. State,\textsuperscript{76} in finding that DNA population statistics do not need to meet the stringent \textit{Frye} test.\textsuperscript{77} The district court certified conflict between the two cases.\textsuperscript{78}

B. \textit{Testimony by Experts}

The Supreme Court of Florida settled a conflict among the district courts regarding the use of expert testimony in the case of Angrand v. Key.\textsuperscript{79} Angrand arose out of a wrongful death suit. During the course of the trial, the plaintiff introduced expert testimony on the issue of grief and bereavement.\textsuperscript{80} The trial judge was reluctant to admit the testimony, since the expert did not testify to anything that was outside the common experience of the jury.\textsuperscript{81} However, the trial judge admitted the evidence based on \textit{Holiday Inns, Inc. v. Shelburne}.\textsuperscript{82}

\textsuperscript{74. Id.}  
\textsuperscript{75. Ramirez, 651 So. 2d at 1168.}  
\textsuperscript{76. 640 So. 2d 1139 (Fla. 1st Dist. Ct. App. 1994), review granted, 659 So. 2d 273 (Fla. 1995). The district court in Vargas found that the method used to arrive at probabilities was not generally accepted in the relevant scientific community.}  
\textsuperscript{77. Brim, 654 So. 2d at 187.}  
\textsuperscript{78. Id.}  
\textsuperscript{79. 657 So. 2d 1146 (Fla. 1995).}  
\textsuperscript{80. Id. at 1147.}  
\textsuperscript{81. Id.}  
\textsuperscript{82. 576 So. 2d 322 (Fla. 4th Dist. Ct. App.), review dismissed, 589 So. 2d 291 (Fla. 1991). Shelburne allowed the testimony of an expert on grief and bereavement. Doctor Platt, who testified in Angrand, was also the expert witness in Shelburne. In Shelburne, Dr. Platt testified about grief and bereavement and how the plaintiffs, whose son had been killed, worked their way through the grief process. The testimony included where the plaintiffs were in the grief process at the time of trial, what factors had affected their response to their son's death, and what grief they would experience in the future. The Fourth District Court of Appeal upheld the trial courts ruling that the testimony was not outweighed by any prejudicial effect, and that this testimony assisted the jurors in understanding an area that was not within a person's normal everyday comprehension.}

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The Third District Court of Appeal reversed, finding that the expert did not testify to anything that was outside the common experience of the jury. The district court felt that most of the jurors had experienced the death or loss of a loved one. Additionally, the district court found that close family relationships and the loss of loved ones could be demonstrated adequately with lay witness testimony. The district court concluded that expert testimony on grief and bereavement was unduly prejudicial, since a jury might give this testimony undue weight because it came from an expert witness. In Angrand, the Third District Court of Appeal noted direct conflict with the Shelburne case.

The Supreme Court of Florida resolved the conflict between Angrand and Shelburne by narrowing the Shelburne decision. The supreme court found that a trial court is afforded broad discretion in determining the subject matter on which an expert may testify. The Shelburne decision, however, limited the trial court’s discretion by making a general determination that the subject matter of that case, grief and bereavement, is not within the juror’s everyday understanding. The supreme court found that the trial judge’s discretion should not be so limited.

The trial court should exercise its discretion so that only expert testimony which will assist the trier of fact will be admitted. Expert testimony cannot be admitted to put otherwise inadmissible evidence before the jury, to relay matters that are within the jurors common understanding, or to summarize lay witness testimony. The supreme court concluded that the trial judge in Angrand should have been able to exercise his discretion to exclude Dr. Platt’s testimony on grief, since it was not outside the jury’s common understanding. Binding the trial judge’s discretion in this area was error. Because Shelburne foreclosed the exercise of the trial court’s discretion regarding the admission of expert testimony, the supreme court properly limited its scope.

83. Key v. Angrand, 630 So. 2d 646 (Fla. 3d Dist. Ct. App.), review granted, 645 So. 2d 450 (Fla. 1994), rev’d, 657 So. 2d 1146 (Fla. 1995).
84. Id. at 650.
85. Id.
86. Id.
87. Id.
88. Town of Palm Beach v. Palm Beach County, 460 So. 2d 879 (Fla. 1984).
89. Shelbourne, 576 So. 2d at 335-37.
90. Town of Palm Beach, 460 So. 2d at 885.
91. Angrand, 657 So. 2d at 1148.
92. Id.
93. Id.
In a wrongful death action, the statute does not designate "grief" as a recoverable damage. However, the statute does allow for loss of companionship and for mental pain and suffering. The relevant testimony on these subjects comes from lay witnesses who are generally friends and survivors. These individuals testify as fact witnesses, not as experts. Since there is no objective standard to measure this kind of damage, precise calculations are hard to make. The jury is generally guided by its common understanding and everyday life experiences in determining this type of damage. Therefore, expert testimony in an area generally guided by common life experiences may lead to an unfair assessment of damages. The supreme court recognized this pitfall and reversed the Angrand case on the issue of damages. However, the supreme court felt that the expert testimony was not so prejudicial as to require a reversal on the issue of liability.

VI. HEARSAY

A. The Postell Rule

In Trotman v. State, the district court reversed the case for violation of the Postell Rule. The defendant in Trotman was convicted for armed robbery and armed burglary. At trial, the investigating officer testified that after speaking to an unidentified, nontestifying juvenile, the officer went to the location of the victim's stolen car and arrested the defendant. The district court realized that the only inference a jury could draw from this testimony was that the juvenile told the officer that the defendant committed...
the crime.\textsuperscript{101} Since the juvenile was not subject to cross-examination as required under section 90.801(2)(c), the statement of identification of the defendant was improper.\textsuperscript{102} Additionally, the statement did not fall under another hearsay exception.

This situation almost inevitably arises when the prosecution has a gap in their evidence. This gap is due, in part, to three possibilities: First, the nontestifying witness may have simply disappeared; second, the nontestifying witness may not have been identified by the investigating officer in his police report, rendering the witness unknown; or third, the attorney may have simply forgotten to subpoena the witness. In any case, the prosecuting attorney must now try to fill the gap between the crime and the defendant's arrest. This is done in an attempt to strengthen his or her case, and lay it out in a logical manner. However, to avoid the hearsay objection that occurs when the officer is questioned regarding what the nontestifying witness told him, the prosecuting attorney usually resorts to asking the officer what he did \textit{after} he spoke with the witness.\textsuperscript{103} The logical inference to be drawn from this is that the witness told the officer that the defendant committed the crime.

Hearsay does not have to be verbal in order to be hearsay. When a statement, belief, or assertion can be implied from the \textit{conduct} or statement of a person, the implied assertion is within the definition of hearsay.\textsuperscript{104} Though the case does not add any new case law to this field, it is a good reminder for attorneys that hearsay can take non-verbal as well as verbal forms.

\textbf{B. The Child Hearsay Exception}

Section 90.803(23) of the \textit{Florida Statutes} creates a limited exception to the hearsay rule for statements by children eleven years of age or younger. The statement must describe an act of sexual abuse in the presence of, with, by, or on the declarant child.\textsuperscript{105} During the survey

\begin{itemize}
\item \textsuperscript{101} Id.
\item \textsuperscript{102} FLA. STAT. § 90.801(2)(c).
\item \textsuperscript{103} The prosecutor generally tells the officer not to repeat any statements of the nontestifying witness. He is instructed to tell just what he did after he spoke with this witness. The argument to the trial court is that since no statements were given, there can be no hearsay violation.
\item \textsuperscript{104} See Michael H. Graham, \textit{Handbook of Federal Evidence} § 801.7 (3d ed. 1991); Ehrhardt, \textit{supra} note 6, § 801.2 at 552.
\item \textsuperscript{105} FLA. STAT. § 90.803(23) (Supp. 1994).
\end{itemize}
period, the Supreme Court of Florida settled a conflict between the district
courts of appeal regarding this statutory provision.

In State v. Dupree, the defendant was tried for the first-degree
murder of two-year-old Jirisha Thompson. Before the trial, the State gave
the requisite ten days notice pursuant to its intention to rely on section
90.803(23) for statements made by the six-year-old brother concerning the
crime. The defense objected on the grounds that the hearsay exception did
not apply to a declarant who was not the victim of the crime in ques-
tion.

At trial, the six-year-old testified regarding what he had seen on the
night of the victim’s death. Several adult witnesses testified to what the six-
year-old told the Department of Health and Rehabilitative Services (HRS)
investigator during an interview regarding the events leading up to the
victim’s death. The witnesses observed this interview through a two-
way mirror with the help of an audio system. The defense objected to the
use of these hearsay statements made to the HRS investigator.

The defendant in Dupree was convicted at trial. On appeal, the First
District Court of Appeal reversed the conviction. The district court held that
the hearsay exception was not applicable to the child’s statements because
the child was not the victim of the charged offense.

In Russel v. State, the Fifth District Court of Appeal came to the
opposite conclusion, holding that “[s]tatements made by a child who
witnessed sexual battery and aggravated child abuse and who otherwise
meets the statutory criteria are not excepted from admissibility merely
because this child was not the object of the attack.” The Fifth District
reasoned that “[a] victim is a victim regardless of any charging docu-
ment.”

The Supreme Court of Florida affirmed the Dupree case and disap-
proved of the decision of the Russell court. The Supreme Court of

106. 639 So. 2d 125 (Fla. 1st Dist. Ct. App.), review granted, 648 So. 2d 724 (Fla.
1994), aff’d, 656 So. 2d 430 (Fla. 1995).
107. Dupree, 656 So. 2d at 431.
108. Id.
109. Id.
110. Id.
111. 572 So. 2d 940 (Fla. 5th Dist. Ct. App. 1990), review denied, 583 So. 2d 1036
(Fla. 1991).
112. Id. at 942 (emphasis added).
113. Id.
114. Dupree, 656 So. 2d at 431.
Florida followed prior rulings of the Supreme Court of the United States and found that where statements do not fall within firmly rooted hearsay exceptions, they are presumptively unreliable and inadmissible for Confrontation Clause purposes. The Supreme Court of Florida declined to expand child hearsay statements to statements made by children who were not victims. Therefore, for hearsay statements of a child to be admissible under section 90.803(23) of the Florida Statutes, "the prosecution of the defendant must be based upon the victimization of the child whose statements are being related."

VII. AUTHENTICATION

In Macht v. State, the Fourth District Court of Appeal attempted to clear up a misconception regarding the use of transcripts when a tape recorded conversation has been admitted into evidence. In Macht, the arresting officer testified that he pulled the defendant's car over. The officer was tape recording the conversation with the defendant from the moment he stopped the defendant's car. At trial, the tape of the conversation was admitted into evidence through the arresting officer who made the tape. However, the defendant claimed that the trial court committed reversible error by allowing the jury to view the transcript, which was not properly authenticated, of the tape recording that had been entered into evidence.

The district court stated that the rule announced in Stanley v. State, prohibiting the use of transcripts of tapes when the tapes have been introduced into evidence, has been superseded by the Supreme Court's of Florida's ruling in Hill v. State. Hill authorized a jury to view an accurate transcript of an admitted tape recording as an aid in understanding.
the tape so long as the unadmitted transcript does not go back to the jury room or become a focal point of the trial.\textsuperscript{125}

During trial, the defendant in \textit{Macht} objected that the transcript of the tape was not properly authenticated because the individual who prepared the transcript did not testify.\textsuperscript{126} However, the arresting officer who made the tape recording testified at trial that the transcript was accurate.\textsuperscript{127} Since the arresting officer testified that the transcripts were an accurate reproduction of the tape recordings, no further authentication or proof was needed.\textsuperscript{128} Additionally, the trial court clearly instructed the jury that if there were any discrepancies between the tape and the transcript, the jury should rely on the tape, since it was the tape that was in evidence.\textsuperscript{129} Hopefully, the district court's opinion will help clarify any further problems with the use of transcripts at trial when a tape recording has been admitted.

\section*{VIII. ADDITIONS AND AMENDMENTS TO THE \textit{FLORIDA EVIDENCE CODE}}

During the survey period, the Florida Legislature made various additions and amendments to the \textit{Florida Evidence Code}. The new Code sections bear directly on the admissibility of evidence at trial.

\subsection*{A. Gender-Neutral Language}

The \textit{Florida Evidence Code} was rewritten in gender-neutral language.\textsuperscript{130} When possible, the Code employed the use of plural instead of singular pronouns to avoid both gender-specific language and awkwardness. Changes made for gender-neutral purposes were made throughout the Code, and are not detailed in this article. No substantive changes were intended by these amendments.

\begin{itemize}
\item \textsuperscript{125} \textit{Id.} at 182.
\item \textsuperscript{126} \textit{Macht}, 642 So. 2d at 1138.
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} \textit{Id.} at 1138-39. The trial transcripts did not go back to the jury room and did not become a focal point of the trial. Therefore, the use of the transcripts as an aid in understanding the tape was proper. \textit{Hill}, 549 So. 2d at 182.
\item \textsuperscript{130} See, e.g., Ch. 95-147, § 471, 1995 Fla. Sess. Law Serv. 171, 538 (West) (amending \textsc{Fla. Stat.} §90.105 (1993)).
\end{itemize}
B. Domestic Violence Advocate-Victim Privilege

A new privilege was also added to the Florida Evidence Code.\(^{131}\) Section 90.5036 now allows communications between a domestic violence

131. Ch. 95-187, § 7, 1995 Fla. Sess. Law Serv. 1368, 1371-72 (West) (to be codified at FLA. STAT. § 90.5036). The section reads as follows:

90.5036. Domestic violence advocate-victim privilege

(1) For purposes of this section:

(a) A “domestic violence center” is any public or private agency that offers assistance to victims of domestic violence, as defined in s. 741.28, and their families.

(b) A “domestic violence advocate” means any employee or volunteer who has 30 hours of training in assisting victims of domestic violence and is an employee of or volunteer for a program for victims of domestic violence whose primary purpose is the rendering of advice, counseling, or assistance to victims of domestic violence.

(c) A “victim” is a person who consults a domestic violence advocate for the purpose of securing advice, counseling, or assistance concerning a mental, physical or emotional condition cause by an act of domestic violence, an alleged act of domestic violence, or an attempted act of domestic violence.

(d) A communication between a domestic violence advocate and a victim is “confidential” if it relates to the incident of domestic violence for which the victim is seeking assistance and if it is not intended to be disclosed to third persons other than:

1. Those persons present to further the interest of the victim in the consultation, assessment, or interview.

2. Those persons to whom disclosure is reasonably necessary to accomplish the purpose for which the domestic violence advocate is consulted.

(2) A victim has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made by the victim to a domestic violence advocate or any record made in the course of advising, counseling, or assisting the victim. The privilege applies to confidential communications made between the victim and the domestic violence advocate and to records of those communications only if the advocate is registered under s. 415.605 at the time the communication is made. This privilege includes any advice given by the domestic violence advocate in the course of that relationship.

(3) The privilege may be claimed by:

(a) The victim or the victim’s attorney on behalf of the victim.

(b) A guardian or conservator of the victim.

(c) The personal representative of a deceased victim.

(d) The domestic violence advocate, but only on behalf of the victim.

The authority of a domestic violence advocate to claim the privilege is presumed in the absence of evidence to the contrary.

\(Id.\)
worker and a victim to be privileged. The new section provides for those persons to whom the communication can be disclosed without waiving the privilege. The new section also has a provision regarding the confidentiality of records and who may claim the privilege.

C. Mode and Order of Interrogation and Presentation

During the survey period, the Florida Legislature altered subsection three of section 90.612 of the Florida Statutes, which deals with the use of leading questions. The section appears to merely codify parts of rule 1.450(a) of the Florida Rules of Civil Procedure, dealing with evidence and the interrogation of witnesses. Subsection three reiterates the use of direct-examination questions on direct and leading questions on cross-examination, with some caveats. The amendment to subsection three allows leading questions on direct-examination when attempting to develop a

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132. Id. (to be codified at FLA. STAT. § 90.5036(1)(d)).
133. Id. (to be codified at FLA. STAT. § 90.5036(1)(d)(1), (2)).
134. Id. (to be codified at FLA. STAT. § 90.5036(2), (3)).
135. Ch. 95-179, § 1, 1995 Fla. Sess. Law Serv. 1307, 1308 (West) (amending FLA. STAT. § 90.612(3) (1993)). The section was amended to read as follows:

90.612. Mode and order of interrogation and presentation.

(3) Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness, and adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. Except as provided by rule of court or when the interests of justice otherwise require.--

(a) A party may not ask a witness a leading question on direct or redirect examination.--

(b) A party may ask a witness a leading question on cross-examination or re-cross-examination.

Id.

136. FLA. R. CIV. P. 1.450(a). This section reads as follows:

Rule 1.450 EVIDENCE

(a) Adverse Witness. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party and interrogate that person by leading questions and contradict and impeach that person in all respects as if that person had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also and may be cross-examined by the adverse party only upon the subject matter of that witness' examination in chief.

Id.
witness' testimony, when the witness is hostile, an adverse party, when the witness is identified with an adverse party, or when the interests of justice otherwise require it.\textsuperscript{137}

D. Hearsay Exception: Statement of Elderly Person or Disabled Adult

During the survey period a new hearsay exception was added to the Florida Evidence Code.\textsuperscript{138} Section 90.803(24) now allows the statement

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\textsuperscript{137} Ch. 95-179, § 1, 1995 Fla. Sess. Law Serv. at 1308 (West) (amending FLA. STAT. § 90.612(3) (1993)).

\textsuperscript{138} Ch. 95-158, § 1, 1995 Fla. Sess. Law Serv. 1263, 1263-64 (West) (to be codified at FLA. STAT. § 90.803(24)). The section reads as follows:

90.803. Hearsay exceptions; availability of declarant immaterial.

The provision of § 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(24) HEARSAY EXCEPTION; STATEMENT OF ELDERLY PERSON OR DISABLED ADULT.

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by an elderly person or disabled adult, as defined in s. 825.101, describing any act of abuse or neglect, any act of exploitation, the offense of battery or aggravated battery or assault or aggravated assault or sexual battery, or any other violent act on the declarant elderly person or disabled adult, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination the court may consider the mental and physical age and maturity of the elderly person or disabled adult, the nature and duration of the abuse or offense, the relationship of the victim to the offender, the reliability of the assertion, the reliability of the elderly person or disabled adult, and any other factor deemed appropriate; and

2. The elderly person or disabled adult either:

a. Testifies; or

b. Is unavailable as a witness, provided that there is corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the elderly person's or disabled adult's participation in the trial or proceeding would result in a substantial likelihood of severe emotional, mental, or physical harm in addition to findings pursuant to s. 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before the trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the elderly person's or disabled
of an elderly or disabled person describing any act of abuse, neglect, exploitation, battery, aggravated battery, assault, aggravated assault, sexual battery, or any other violent act on the declarant into evidence in any civil or criminal proceeding.\textsuperscript{139} The statements are admissible if certain prerequisites are met.

For this hearsay testimony to be admissible, the trial court must hold a hearing regarding the time, content, and circumstances of the statement to ensure its reliability.\textsuperscript{140} The factors the court is to consider in this determination are the mental and physical age of the elderly or disabled adult, the nature and duration of the abuse or offense, the relationship of the victim to the offender, the reliability of the assertion of the elderly or disabled adult, and any other appropriate factor.\textsuperscript{141}

In addition to the trial court's initial findings, the elderly or disabled person must either testify or be unavailable.\textsuperscript{142} Unavailability includes a finding that the trial or proceeding would result in severe emotional, mental or physical harm, in addition to findings of unavailability which the court must make under section 90.804(1).\textsuperscript{143}

In criminal proceedings, a notice provision has been added before any hearsay statement falling under section 90.803(24) can be used.\textsuperscript{144} Since any mention of civil actions was excluded from this notice provision section, it naturally follows that the ten-day notice provision is not applicable to civil proceedings.

\begin{itemize}
\item \textit{of an elderly or disabled person describing any act of abuse, neglect, exploitation, battery, aggravated battery, assault, aggravated assault, sexual battery, or any other violent act on the declarant into evidence in any civil or criminal proceeding.}\textsuperscript{139} The statements are admissible if certain prerequisites are met.
\item For this hearsay testimony to be admissible, the trial court must hold a hearing regarding the time, content, and circumstances of the statement to ensure its reliability.\textsuperscript{140} The factors the court is to consider in this determination are the mental and physical age of the elderly or disabled adult, the nature and duration of the abuse or offense, the relationship of the victim to the offender, the reliability of the assertion of the elderly or disabled adult, and any other appropriate factor.\textsuperscript{141}
\item In addition to the trial court's initial findings, the elderly or disabled person must either testify or be unavailable.\textsuperscript{142} Unavailability includes a finding that the trial or proceeding would result in severe emotional, mental or physical harm, in addition to findings of unavailability which the court must make under section 90.804(1).\textsuperscript{143}
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\end{itemize}
actions.\textsuperscript{145} However, the trial judge must make specific findings of fact on the record whenever section 90.803(24) is utilized. This requirement applies to both criminal and civil actions.\textsuperscript{146}

IX. CONCLUSION

The Supreme Court of Florida's resolution of conflicts between jurisdictions on expert evidence and child hearsay will help trial judges and attorneys better prepare their cases. However, the supreme court's occasional blatant disregard in overturning a lower court's decision when the error has neither been preserved nor found to be fundamental, continues to be an area of some consternation. The legislature's addition of yet another hearsay exception and evidentiary privilege is sure to generate additional case law in the coming year, and keep our appellate courts busy.

\textsuperscript{145} Id.

\textsuperscript{146} Id. (to be codified at FLA. STAT. § 90.803(24)(c)).