Evidence: 2014 Survey Of Florida Law

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Abstract

This Survey discusses major Florida evidentiary case law developments during the 2014 calendar year. As in most years since the Florida Evidence Code’s (“the Code”) passage, few significant statutory changes occurred in 2014.

KEYWORDS: negotiations, child, molestation
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I. INTRODUCTION

This Survey discusses major Florida evidentiary case law developments during the 2014 calendar year. As in most years since the Florida Evidence Code’s (“the Code”) passage, few significant statutory changes occurred in 2014. Florida attorneys must continue to look to the state’s appellate courts for guidance on the Code and other evidentiary related issues.* As with most survey years, not every recent decision merits discussion.* Cases have been selected for discussion in this Survey on the basis of three criteria: (1) the case represents a new or relatively new evidentiary development, (2) the case provides a good example of fundamental principles in a certain area, or (3) evidentiary issues in a particular area arose so commonly, that they are important for discussion to both practitioners and the courts. As a service to readers, the author notes that the following evidentiary areas, not discussed in the Survey’s main text, generated opinions during 2014:* judicial notice, accident report privilege, judicial notice, accident report privilege,

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1. See infra Parts II–VII.
3. See infra Parts II–VII.
4. See infra Parts II–VII. The author does not claim this footnoted list is a complete catalogue of all evidentiary issues discussed in the 2014 decisions. For example, neither the Survey’s main text nor this list includes cases discussing expert testimony.
5. See FLA. STAT. §§ 90.201–.204. When judicial notice is taken of information not offered in open court, fairness requires the parties to be given a chance to challenge it and to offer contradictory proof. Id. In Glaister v. Glaister, the court found a general master in a domestic relations case erred sua sponte by taking judicial notice of an IRS tax guide without affording a challenge opportunity as required by section 90.204(3) of the Florida Statutes. Glaister v. Glaister, 137 So. 3d 513, 516–17 (Fla. 4th Dist. Ct. App. 2014); see also FLA. STAT. § 90.204(3).
informer privilege, litigation privilege, trade secrets, impeachment on collateral matters, impeachment by showing potential bias.

As mentioned above in note 1, the 2014 Florida Legislature added a fourth subsection to section 90.204 of the Florida Statutes, providing for the emergency taking of judicial notice in family law cases when imminent danger to persons or property exists. Ch. 2014-35, § 2, 2014 Fla. Laws at 678 (codified at Fla. Stat. § 90.204(4)); see also supra note 1 and accompanying text.

6. See Fla. Stat. § 316.066(4). In Wetherington v. State, the defendant’s felony driving under the influence conviction was reversed because the trial court erroneously allowed the investigating police officer to testify to statements Wetherington made identifying himself as the driver of a crashed vehicle in a one car accident. Wetherington v. State, 135 So. 3d 584, 585, 587 (Fla. 1st Dist. Ct. App. 2014). These statements were made before either the defendant waived his Miranda rights or otherwise waived his privilege against self-incrimination. Id. at 586 n.1. This violated the accident report privilege. Id. at 586; see also Fla. Stat. § 316.066.

7. See State v. Powell, 140 So. 3d 1126, 1127, 1130 (Fla. 5th Dist. Ct. App. 2014) (arising from the State’s petition for a writ of certiorari requesting reversal of a trial court’s order to disclose the identity of confidential informants who provided police information used in an application for a wiretap). The State’s general privilege in withholding a confidential informant’s identity can only be overcome if either the informant will be a witness at trial or if disclosing the informant’s identity is essential to a fair determination of the case. Id. As the only purpose of disclosure was to provide information to contest probable cause for issuance of the wiretap application, identity disclosure was not constitutionally required. Id. at 1132.

For a recent short article discussing the informer’s privilege, see Stephen A. Saltzburg, Trial Tactics: Informant Privilege, CRIM. JUST., Summer 2015, at 60.

8. See Pomfret v. Atkinson, 137 So. 3d 1161, 1162–64 (Fla. 4th Dist. Ct. App. 2014). Although there is no absolute privilege for an attorney’s alleged defamatory statements during ex-parte, out-of-court statements to a potential, non-party witness, such statements may be protected by a qualified privilege. Id. When the statements have some relation to an underlying lawsuit, the party alleging defamation must show express malice. Id. at 1164. Express malice means that the statements were made with a desire to harm the person allegedly defamed. Id.; R.H. Ciccone Props., Inc. v. JP Morgan Chase Bank, N.A., 141 So. 3d 590, 591–92 (Fla. 4th Dist. Ct. App. 2014) (specifying that the litigation privilege did not support the trial court’s order dismissing appellant’s quiet title action against a bank after the bank voluntarily dismissed its foreclosure action against the appellant).

9. See Fla. Stat. § 90.506 (generally protecting trade secrets as privileged, as long as recognizing the “privilege will not conceal fraud or otherwise work injustice”). This section does not define what is a trade secret, leaving this instead to section 688.002 of the Florida Statutes. Fla. Stat. § 688.002(4). When information is claimed to be a trade secret, the court must first decide if it qualifies as such, and then hold a hearing on its disclosure, and on how it is necessary to determine the underlying issues in the litigation. See Bright House Networks, LLC v. Cassidy, 129 So. 3d 501, 505–06 (Fla. 2d Dist. Ct. App. 2014) (finding that customer lists not publicly available can be trade secrets, thus requiring an in camera review to determine such, and to also determine the opposing party’s need to access them for the litigation).

For another recent case involving disclosure of trade secrets, see Laser Spring Inst., LLC v. Greer, 144 So. 3d 633, 633–34 (Fla. 1st Dist. Ct. App. 2014), finding that billing and
with prior inconsistent statements, the rape shield statute, the Sixth Amendment’s Confrontation Clause, authentication of photographs taken

collection documents which admittedly were trade secrets could not be ordered disclosed without a hearing making particularized findings for their need.

10. See FLA. STAT. § 90.608(5) (permitting “[p]roof by other witnesses that material facts are not as testified to by [a] witness”). This language forbids impeachment by offering contradictory proof on purely collateral matters, introduced only to contradict the witness’s testimony on a minor point. See id. What is collateral or not must necessarily be determined on a case-by-case basis. See Anderson v. State, 133 So. 3d 646, 647–48 (Fla. 1st Dist. Ct. App. 2014), cert. denied, 135 S. Ct. 1006 (2015) (finding that whether a sexual battery victim wore jogging clothes or pajamas at the time of the alleged attack was collateral, even if the victim’s characterization of her dress as jogging clothes was false); Cokely v. State, 138 So. 3d 1204, 1208–09 (Fla. 4th Dist. Ct. App. 2014) (finding that the witness’s proffered testimony would not have been collateral, as it would have contradicted the victim’s direct examination testimony related to the material contested issue of whether the victim had been trespassing on the defendant’s property before the defendant allegedly attacked the victim).

One area where the Florida courts have held as a matter of law that proof will never be considered collateral is where it demonstrates potential bias. Id.

11. See Brown v. Mittelman, 152 So. 3d 602, 604–05 (Fla. 4th Dist. Ct. App. 2014) (finding that the financial relationship between a treating doctor and a referring plaintiff’s law firm is discoverable as potential bias evidence in a negligence case).

12. See Wilcox v. State, 143 So. 3d 359, 377–79 (Fla. 2014), cert. denied, 135 S. Ct. 1406 (2015) (finding that the trial court only harmlessly erred in sustaining objection to the attempted impeachment of a witness by using another person’s statement).

13. FLA. STAT. § 794.022. This section, commonly known as the Rape Shield Statute, although not part of the Code, is clearly meant to regulate proof in some criminal cases. See id.; Cooper v. State, 137 So. 3d 530, 531 (Fla. 4th Dist. Ct. App. 2014). While the section forbids the introduction of a victim’s prior sexual acts with persons other than the defendant, by its explicit terms, it does so only in sexual battery prosecution cases under section 794.011 of the Florida Statutes. FLA. STAT. § 794.022(2). Thus, when such acts are asked about in cases not being brought under this chapter, section 794.022 of the Florida Statutes does not forbid the inquiry, despite a charge’s sexually related nature. Id. § 794.022; see also Cooper, 137 So. 3d at 531 (arguing that where the state confessed on appeal that section 794.022 of the Florida Statutes should not have prohibited cross-examination of a victim about her prior sexual experiences in a lewd and lascivious molestation and battery case). Despite this confession of error, the Fourth District Court of Appeal declined to reverse because the defense had not argued the section’s inapplicability at trial when the State objected to the defense’s inquiry. Cooper, 137 So. 3d at 531–32. Furthermore, the defense had not proffered what the defense’s questions would have revealed. Id. at 531 n.1. The Fourth District summarily rejected the argument that excluding the potential testimony was fundamental error. Id. at 531.

The result in Cooper illustrates the requirements that are ignored all too often by trial counsel. See id. The contemporaneous objection rule requires that counsel object promptly, precisely, and correctly when seeking to exclude evidence. FLA. STAT. § 90.104. On the other side, when an objection is made, the attorney wishing to introduce certain information must correctly explain to the trial court why the objection should be overruled. See id. If the objection is sustained, the proponent of the information must make an adequate offer of proof to preserve the issue for appeal. See id. Failure to satisfy any of these
from videotapes, sequestration of witnesses, lay opinion testimony, and various hearsay rule issues.

requirements will almost always lead to an appellate court declining to address an evidentiary issue. E.g., McGee v. State, 19 So. 3d 1074, 1078–79 (Fla. 4th Dist. Ct. App. 2009). As Cooper also shows, fundamental error arguments are often given short shrift and rarely lead to reversals. See 137 So. 3d at 531–32. Furthermore, the defense had not proffered what its questions would have revealed. See id. at 531 n.1.

14. U.S. Const. amend. VI (applied to the states in Pointer v. Texas, 380 U.S. 400 (1965)). The Sixth Amendment to the U.S. Constitution guarantees an accused the right “to be confronted with the witnesses against him.” Id.

Several cases during this Survey period briefly discussed the scope of this clause’s protection. E.g., McKenzie v. State, 153 So. 3d 867, 879 (Fla. 2014). Although the clause protects the accused against the admission of testimonial hearsay in a criminal trial, it does not protect against the State using all non-cross-examined hearsay. Id. at 882. Particularly, when the defendant’s own statement constitutes the hearsay, the Confrontation Clause will not bar its use by the prosecution. Id. (finding no evidentiary error in the State using a self-represented defendant’s opening statement at trial against him as evidence of guilt); Peterson v. State, 129 So. 3d 451, 453 (Fla. 2d Dist. Ct. App. 2014) (finding that an automobile’s computer-generated air bag control system report was non-testimonial, as it was non-accusatory and did not describe any specific wrongdoing). Although the court did not reject the defendant’s argument on this basis, the author believes a better ground is that the report was not hearsay to begin with, as it did not constitute an assertion by any person. See Fla. Stat. § 90.801(1)(a); Peterson, 129 So. 3d at 453. Thus, there was no statement under the definition of the hearsay rule. Peterson, 129 So. 3d at 453 (defining statement); see also Fla. Stat. § 90.801(1)(a).

The right to confrontation does not protect an accused against the introduction of physical evidence or testimony about unavailable physical evidence. See Yero v. State, 138 So. 3d 1179, 1184 (Fla. 3d Dist. Ct. App. 2014) (finding no Confrontation Clause violation when the State introduced testimony from several witnesses who described how a theft defendant had appeared on subsequently destroyed video evidence). The video had been overwritten before the State was able to secure it for trial. Id. at 1183. However, Yero’s confrontation rights were satisfied by his ability to cross-examine at trial the witness who testified about the tape’s contents. Id. at 1184.

15. See Lerner v. Halegua, 154 So. 3d 445, 447 (Fla. 3d Dist. Ct. App. 2014) (finding that to admit still photographs taken of frames from a video surveillance tape, someone who knew about the operation and storage procedures for the tape was necessary to authenticate them to show their reliability).

16. Fla. Stat. § 90.616(1). Although this rule provides for the sequestration of witnesses upon a party request or a court order, it does not specify what remedies there are for violation of a sequestration order. Id.

In Cokely v. State, a proposed defense witness violated the trial court’s sequestration order by being present at a pre-trial stand-your-ground defense hearing and hearing an alleged battery victim testify. Cokely v. State, 138 So. 3d 1204, 1205–07 (Fla. 4th Dist. Ct. App. 2014). At trial, the court, as a matter of law, excluded this witness’s testimony for violating its order without holding any hearing into the violation’s circumstances. Id. at 1207 n.4. The Fourth District reversed the defendant’s subsequent conviction. Id. at 1209.

In this situation, trial courts need to balance the defendant’s Sixth Amendment right to present a defense against violation of the court’s sequestration order. See U.S. Const. amend. VI; Cokely, 138 So. 3d at 1208. This requires the trial court to determine first,
II. RELEVANCY AND ITS GENERAL CONSIDERATIONS

Section 90.401 of the Code states that information that tends “to prove or disprove a material fact” is relevant. Beyond this brief statement, relevancy cannot be defined by any code or set of rules. Relevancy contains two sub-categories: materiality and probative value. Materiality is usually a function of either the underlying claims and defenses in a particular lawsuit or of matters properly affecting witnesses’ credibility. Whether information tends to prove or disprove a material fact, and thus, is probative, depends upon the strength or weakness of the logical connection between the information and what it is offered to prove.

Since relevancy is mainly a function of logical deduction and substantive law, altering facts even slightly can affect information’s potential relevancy greatly. Thus, cases discussing relevancy in general under whether the defendant or defense counsel had been involved in causing the violation, and second, even if there was active defense involvement, the violation’s effect on the witness’s proposed testimony. If the witness’s testimony would not have been substantially affected by hearing what the witness should not have heard, complete witness’s exclusion is too harsh a remedy. Since the trial court never held any hearing on these issues, its virtually automatic exclusion of the witness was erroneous.

17. Fla. Stat. § 90.701 (permitting lay opinion testimony if doing so is necessary to convey the witness’s testimony and the opinions “do not require a special knowledge, skill, experience, or training”). Two cases during this Survey discussed this rule. See Alvarez v. State, 147 So. 3d 537, 542 (Fla. 4th Dist. Ct. App. 2014); Herring v. State, 132 So. 3d 342, 346 (Fla. 4th Dist. Ct. App. 2014). In Herring, the court found that witnesses who knew and had seen the defendant around the time he had killed his father should have been allowed to give their opinion as to his sanity. See 132 So. 3d at 344–46. The witnesses were the defendant’s mother and a police officer, who apparently came to the victim’s home shortly after the killing while the defendant was still there. Id. at 344. However, the error was found harmless. Id. at 346.

However, in Alvarez, the same district court of appeal found reversible error in letting a police officer, testifying as a lay witness, give his opinion as to the skin color and race of a robbery and murder perpetrator who was captured on surveillance tape during the crime. 147 So. 3d at 538–39, 544. The tape was admitted into evidence; thus the jurors could view it just as well as the officer and come to their own conclusions as to what it showed. See id. at 539, 542. The officer’s opinion was thus unnecessary, and any opinion as to identity should have been let to the jurors. See id. at 542.

18. See infra Part VII.
20. Id.
22. Id.
23. Id.
24. See id. There is a common assertion that no item of information is inherently relevant. See id. As a general proposition, this saying is correct. See 1 Ehrhardt, supra note 21, at § 401.1.
section 90.401 of the Florida Statutes seldom have much precedential value as they are so fact specific. During this Survey period, no case discussing general relevancy alone under section 90.401 of the Florida Statutes was unusual enough to merit extended discussion.

However, general relevancy is not the end of the story for admissibility under the Code. Once logical relevancy requirements have been satisfied, the Code expresses a preference that “[a]ll relevant evidence [be] admi[tted] except as provided by law.” This language encompasses reasons extending from evidence being excluded because of its substantive nature, such as hearsay or privilege, to evidence being excluded because of procedurally related problems, such as a question being asked outside the scope of cross-examination or evidence being offered to bolster a witness’s character for truthfulness before the witness’s credibility has been attacked. The substantive reason for excluding evidence that would otherwise be admissible under section 90.401 of the Florida Statutes may also stem from the information’s inherently prejudicial nature or the potential the evidence has for being confusing. In certain specific situations, the Code expressly provides for the exclusion of otherwise probative information.

No statutory scheme or evidence code can possibly specify every factual instance where evidence should be excluded because of its prejudicial or confusing nature. The Code generally follows the Federal Rules of Evidence by providing for exclusion of otherwise relevant evidence when “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.”

There are two important points which should be remembered about this language. First, only unfairly prejudicial types of evidence merit exclusion. Evidence that fairly hurts the other side’s case or fairly advances the case of the proponent should not be excluded. Second, even

26. Id. § 90.401.
27. See id. § 90.407 (excluding evidence of subsequent remedial measures when offered “to prove negligence, the existence of a product defect, or culpable conduct in connection with [an] event” causing injury or harm). During this Survey period, no reported cases discussed this exclusionary rule. See id. § 90.401; supra Part I.
29. See id.
unfairly prejudicial evidence will not be excluded unless its unfair prejudice *substantially* outweighs any probative value the information has.  

There is a preference for admission when the balance between relevancy and prejudice, or other section 90.403 of the Florida Statutes concerns, is close or even. Only a fairly gross disproportion of section 90.403’s general concerns merits excluding any relevant evidence. As with cases discussing logical relevancy, cases discussing section 90.403 are likely to be so *fact bound* that their precedential value is questionable. However, one decision during 2014, refusing to reverse a death sentence for admission of potentially unfair prejudicial evidence, merits discussion.  

Unfair prejudice exists when certain evidence is likely to arouse the jurors’ emotion in a way that would lead them to decide a matter on an improper basis. Poole v. State (Poole II) certainly has to potentially be considered such a situation, if one ever existed. Poole was convicted of first-degree murder, attempted first-degree murder, armed burglary, armed robbery, and sexual battery. The two victims, Loretta White and Noah Scott who lived together, went to sleep late one night after playing video games at their mobile home. Later that night, White woke up with Mark Poole on top of her pushing a pillow down on her face. He started to sexually assault her, and White begged him to stop and physically resisted.

30. *Id.* The words *any probative value* are purposefully used here to illustrate a very simple but often overlooked point with regard to arguments on admissibility. *See id.* When arguing relevancy issues, attorneys should be careful to do so in a logical order. If an attorney first argues that information should be excluded because its probative value is outweighed because of section 90.403 concerns, the attorney has implicitly conceded the information’s relevancy. *See id. § 90.403.* To then next argue the same information should be excluded under section 90.401 makes no sense. *See Fla. Stat. § 90.401.* If information has no relevancy under section 90.401, the considerations in section 90.403 do not matter. *Id. §§ 90.401, 403.* The information should be excluded for lack of helpfulness to begin with. *See id. § 90.401.*

32. *Id.* at 414. For example, deciding a case on the basis of a party’s sexual orientation, race, or religion. *Id.* at 409; *see also Fl. Const. art. I, § 23.*
33. 151 So. 3d 402 (Fla. 2014), cert. denied, 135 S. Ct. 2052 (2015).
34. *See id.* at 414–16.
35. *Id.* at 405.
36. Poole v. State (Poole I), 997 So. 2d 382, 387 (Fla. 2008). The two victims obviously had different last names. *Id.* Whether they were married to each other is not stated in either opinion discussing the case. Poole II, 151 So. 3d at 406; Poole I, 997 So. 2d at 387. This fact is however completely irrelevant to the charges against the defendant. Poole II, 151 So. 3d at 406; Poole I, 997 So. 2d at 387.
37. Poole II, 151 So. 3d at 406.
38. *Id.*
39. *Id.*
Poole then struck her several times with a tire iron, severing one finger and part of another finger from her hand. 40 Scott woke up, attempted to help White, and in turn he was beaten by Poole with the tire iron. 41 Scott died from the blunt force head trauma suffered in this beating. 42 Poole finally left, and White passed out from his attacks. 43 She recovered early the next morning and called the police who came and found Scott dead. 44 Besides losing the fingers, White suffered multiple face and head wounds plus a concussion. 45 The evidence against Poole was extremely strong 46—so strong that at trial his defense counsel in closing argument conceded his guilt on the sexual battery, robbery, and burglary charges. 47 However, defense counsel argued he was not the person who inflicted the other injuries on the two victims. 48 Not surprisingly, a jury convicted Poole of all charges and after a sentencing hearing, recommended death by a twelve to zero vote. 49 The trial judge agreed with the jury and imposed a death sentence. 50

On direct appeal in Poole v. State (Poole I), 51 the Supreme Court of Florida affirmed the defendant’s conviction but vacated the sentence and remanded for another hearing. 52 Although Poole argued numerous errors had affected the fairness of the guilt phase of his trial, the court found that defense counsel’s failure to make contemporaneous objections waived many of these points for appeal. 53 On the one point, defense counsel had promptly objected to an erroneous comment on the defendant’s silence at trial in closing argument, the Supreme Court of Florida found the trial court had not abused its discretion by refusing to declare a mistrial. 54 But when it came to the claimed errors in the sentencing hearing, the Supreme Court of Florida

40.  Id.
41.  Id.
42.  Poole II, 151 So. 3d at 406.
43.  Id.
44.  Id.
45.  Id.
46.  Id. Witnesses placed Poole near the trial the night of the attack. Poole II, 151 So. 3d at 406. He was found with several items stolen from the trailer and was found to have sold several others. Id. at 407. DNA evidence from a vaginal swab matched him to White’s attack, and other scientific evidence, such as fingerprints and blood stains, connected him to the crimes. Id.
47.  Poole I, 997 So. 2d 382, 390 (Fla. 2008).
48.  Id.
49.  Poole II, 151 So. 3d at 407.
50.  Id.
51.  997 So. 2d 382 (Fla. 2008).
52.  Id. at 397.
53.  Id. at 390–91. Many of these claims of error involved the prosecutor’s statements in the closing argument, commenting on Poole’s silence after arrest and on his failure to testify at trial. Id. at 391.
54.  Id. at 389.
reached a different result. Here, the court found that the defense counsel’s objections to improper cross-examination of the defense witness, about Poole’s prior convictions that were not statutory aggravating factors and about the content of a tattoo on Poole’s stomach that said *Thug Life*, required reversal for a new sentencing proceeding.

A new sentencing hearing was held, after which the jury voted eleven to one for death, and the trial court again sentenced Poole accordingly. On appeal from this second sentence, the Supreme Court of Florida affirmed the sentence. Again, defense counsel failed to preserve certain issues for appeal, either by not making prompt contemporaneous objections or by not making certain legal arguments at the trial court level. However, one preserved issue brought up the issue of the evidence’s probative value versus potentially unfair prejudicial effect in a starkly dramatic fashion.

At the new sentencing, the State introduced a jar of formalin liquid containing White’s severed fingertip. The defense apparently objected to this as unfairly prejudicial. What exactly was the prosecutor’s response to the objection at trial is unfortunately not clear from the Supreme Court of Florida’s opinion. In the Court’s words, “the prosecutor offered no credible reason as to why the severed fingertip was relevant to any issue in the penalty phase, much less any issue in dispute.” This language can be read in two ways. One, when the defense objected at trial, the prosecutor could not credibly articulate why the fingertip was relevant. Two, the prosecutor did specify a reason for admitting the fingertip at trial, but the defense just did not agree it was a credible one. If the Court meant the first interpretation, the remainder of its opinion is incredibly disturbing. If the prosecutor could indeed articulate no credible reason for admission at trial, then any reason

55. *See* Poole I, 997 So. 2d at 391.
56. *Id.* at 393.
58. *Id.* at 405.
59. *See id.* at 413. These missed objections were the failure to make contemporaneous objections to the prosecutor’s comments in the closing, disparaging the testimony of the defendant’s family members as *all that crap*, to the prosecution’s potential mischaracterizing intoxication evidence, and to the prosecution’s legally erroneous comments about merger of the aggravating circumstances. *Id.* at 415–17.
60. *Id.* at 413. Defense counsel’s failure to make legal arguments at trial that the State’s impermissible disparate questioning of prospective jurors had led to a racially impermissible use of preemptory challenges and waived this issue for appeal. Poole II, 151 So. 3d at 413–14.
61. *Id.* at 414.
62. *Id.*
63. Poole II, 151 So. 3d at 414.
given then and any reason the State came up with on appeal is arguably
disingenuous. A more favorable reading is the alternative, that the State had
a reason but the defense just did not find it a credible one.64

Regardless of which alternative reading one chooses, the remainder
of the Court’s opinion on this issue merits close inspection and criticism. The Court began by instructively laying out the process trial judges should
follow when ruling on section 90.403 of the Florida Statutes objections.65
This process involves two steps.66 “[T]he trial judge must first determine
that the evidence is relevant for a specific purpose.”67 Then, the Court “must
weigh the importance of the evidence to the specific purpose, against the
possibility that the evidence will unfairly prejudice” the other side.68 In
Poole II, the defense objected to the fingertip being unfairly prejudicial in
general and specifically objected to admitting the natural fingernails with the
skin attached.69 The trial court rejected this, saying the fingertip was not
difficult to look at, not unpleasant, and had no blood on it.70 Nowhere in the
opinion is there any specific purpose that the trial court determined the tip
was relevant for, nor does the Supreme Court of Florida mention any explicit
weighing process the trial court went through.

Despite this, the Supreme Court of Florida’s opinion articulates its
own basis for admission.71 As the fingertip “was severed during the same
criminal episode at issue in this penalty phase,”72 and it was “relevant to the
amount of force used during the attempted . . . murder,”73 it was relevant.74
Thus, the Supreme Court of Florida supplied its own specific purpose for
relevancy, despite the State’s potential inability to do so, and the trial judge’s
apparent failure to do likewise. Even if the State had articulated these two
purposes, the two-step process still requires the weighing contemplated by
step two. Amazingly, the Supreme Court of Florida totally ignores this step
and merely finds the fingertip’s admission was not an abuse of discretion.
Thus, the Supreme Court of Florida’s opinion ignores the very two-step
process it had articulated should be done only paragraphs earlier!

Since the Supreme Court of Florida did not do the second step of the
weighing process, it is appropriate to discuss what might have been the result

64. See id.
65. Id. at 414; see also Fla. Stat. § 90.403 (2014).
66. Poole II, 151 So. 3d at 414.
67. Id.
68. Id.
69. Id.
70. Id.
71. See Poole II, 151 So. 3d at 414–15.
72. Id. at 414.
73. Id.
74. Id.
had it done so. Assuming the fingertip had some relevancy, how necessary was its introduction to the State’s case? Put another way, would refusing to admit the severed fingertip as an exhibit have deprived the State of its fair opportunity to argue about the amount of force Poole used in committing his crimes? The State still could have produced testimony about the fingertip being severed and arguably would have had to do so to authenticate the exhibit. Thus, admission of the actual fingertip was to some extent cumulative to the voice testimony. Furthermore, assuming the victim, White, testified at the hearing, she might have been able to hold up her hand to show the jurors where her fingers had been severed, or there might have been photographs of her hand available. What is the potential unfair prejudicial effect? Obviously, the jury might become irrationally inflamed by seeing the fingertip, both during the admission of evidence and during its deliberations where they would have it available as an exhibit.

By not following the very process its own opinion sets forth, the Court never addresses the balancing question of relevancy versus unfair prejudice. Even more, by rendering the decision on this point that the court did, it arguably promotes bad lawyering. The prosecution had already been reversed once because of the errors it created. One would think it would have been extra careful to not do so again, but reading this opinion’s description of what the prosecution did gives a different impression. Finally, by rendering its decision on the basis it does, the Supreme Court of Florida also may send a message to trial judges that they will be protected from bad decisions. In fairness to the Poole II opinion, it did conclude this matter by finding that any error would have been harmless anyways.

Precedents and decisions send messages beyond just this is what the law is. Poole II could easily send the message that such potentially excessive lawyering will not only be excused by finding it harmless error in some cases, but also encouraged, by not finding it error to begin with. One hopes that this is not the standard type of lawyering a court would want to promote.

75. Id. If she did not, then how did the State authenticate the exhibit? Poole II, 151 So. 3d at 414–15.
76. See id. The crimes took place the evening of October 12 through 13 of 2001. Id. at 406. I say might here because White could have had cosmetic surgery done on her hand, so just displaying it would not accurately show the force. Id. at 414–15. Still, her testimony about this would have been available. See id.
77. See Poole II, 151 So. 3d at 408.
78. See id. at 418–19.
III. SPECIAL RELEVANCY CONCERNS

A. Statements in Plea Negotiations

Section 90.410 of the Florida Statutes protects offers to plead guilty, pleas of nolo contendere, and withdrawn guilty pleas from admission in any civil cases and most criminal cases. It also protects against admission of statements made in connection with negotiations for these pleas. The purpose behind this protection is to encourage the state and defense to engage in plea discussions and to resolve more charges without full-blown trials whenever possible. Promoting free discussion in negotiations without having the fear one’s words will come back to haunt a party is thought to further these two goals.

However, section 90.410 of the Florida Statutes does not define what should be considered plea negotiations—or to use the statute’s words, “statements made in connection with any of the [covered] pleas or offers.”

Thus, parties may still, on occasion, unwittingly make careless statements about possible plea offers that come back to haunt them. As most criminal defense lawyers also know, sometimes accused parties can become some of their own worst enemies. Both these principles were recently illustrated by a decision briefy discussing section 90.410 of the Florida Statutes. In Bass v. State, the State charged the defendant with second-degree murder and armed robbery. Sometime before trial, Bass had been incarcerated, and defense counsel received a potential twenty-year plea offer from the State. Counsel transmitted this potential plea offer to Bass, who decided he wanted to first talk to his mother about it. The facts do not indicate whether defense counsel knew of Bass’s desire to do this. Bass talked to his mother about the offer the day after defense counsel told Bass...
about it. Unfortunately for Bass, the State recorded his phone discussion with his mother and later offered it at his trial and again, in the State’s closing argument to show Bass’s consciousness of his own guilt.

Defense counsel, during a hearing on the State’s motion in limine to use the conversation, argued it should be protected since a plea had been made and Bass was talking with his mother in connection with this offer. The trial court disagreed, and the appellate affirmed this decision. The First District Court of Appeal said that to decide if statements were made in connection with plea offers and thus protected under section 90.410 of the Florida Statutes, the first step was looking at the plain meaning of the rule. If the answer was not clear from the rule’s plain meaning, then a totality of circumstances approach should be taken. This totality included two factors: “[W]hether the defendant had a subjective expectation of engaging in plea negotiations when the statements were made, and, if so, whether the expectation was . . . reasonable.” Under either step, the district court found against Bass. First, the State’s offer was not definite, only a pending one. Second, Bass’s statements about not taking twenty years but willing to accept less only came up in response to his mother’s question about the potential length of his sentence. Nothing Bass said about being willing or unwilling to take a certain length of time had yet, or later was, communicated to the State in response to the pending offer. Additionally, what Bass was really telling his mother was merely what his attorney had told him, not the traditional give and take one expects in plea discussions. His rejection of the State’s offer the next day after the conversation further indicated Bass did

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88. Id. at 1034–35.
89. Bass, 147 So. 3d at 1034–35. The State did not allow Bass to call his mother the day defense counsel relayed the plea offer but permitted Bass to do so the next day. Id.
90. Id. In the conversation, Bass told his mother he expected to have to serve some prison time, but told her he would not accept the twenty-year offer and would instead accept one of fifteen or sixteen years. Id. at 1034.
91. Id.
92. Bass, 147 So. 3d at 1034–35.
93. Id.
94. Id. at 1035; see also Fla. Stat. § 90.410 (2014).
95. Bass, 147 So. 3d at 1035; see also Fla. Stat. § 90.410; United States v. Robertson, 582 F.2d 1356, 1366 (5th Cir. 1978).
96. Bass, 147 So. 3d at 1035 (citing Robertson, 582 F.2d at 1366).
97. Id.
98. Bass, 147 So. 3d at 1035.
99. Id.
100. Id.
101. Id. at 1036.
not have a subjective expectation that he was engaging in plea discussions when talking with his mother.\textsuperscript{102}

The court’s opinion illustrates that there is a difference between actually engaging in plea discussions and talking about plea discussions in general—especially when the person the discussions are being talked about with is not one’s own attorney or an agent of the state. The decision also illustrates another important point that defense counsel should strictly follow. Never let your client talk about his case with anyone outside your presence, and especially, never let your client talk about his case with anyone else but counsel—even family members—during a phone call from a jail or correctional facility as these conversations are regularly recorded. Defense counsel, at their initial contact with clients, should remember to automatically warn them about this. \textit{Bass} illustrates that warning family members about this is also a good idea.\textsuperscript{103}

\textbf{B. Compromises and Offers to Compromise}

Similar to its provision on pleas and plea negotiations in criminal cases, the Code seeks to promote settlement negotiations as a favored way of resolving disputes between private parties.\textsuperscript{104} Section 90.408 of the Florida Statutes protects compromises, offers to compromise, and statements or conduct made during bona fide settlement negotiations conducted in good faith efforts to achieve resolutions before trial.\textsuperscript{105} A recent case demonstrates that Florida law is strict on this point, even stricter than its federal rule counterpart.\textsuperscript{106} \textit{Panama City-Bay County Airport & Industrial District v. Kellogg Brown & Root Services, Inc.},\textsuperscript{107} arose from litigation following the building of a new airport in Panama City.\textsuperscript{108} When the airport opened in 2010, a storm water retention pond had to be rebuilt to comply with Florida Department of Environmental Protection regulations.\textsuperscript{109} Four main parties had been involved in the planning and construction of the airport and pond: the Panama City Airport District (“the Airport”), a plans and specification designer (“Atkins North America” or “Atkins”), a construction and program

\begin{thebibliography}{99}
\bibitem{102} \textit{Id.}
\bibitem{103} \textit{See Bass}, 147 So. 3d at 1034–36.
\bibitem{104} \textit{See FLA. STAT. § 90.408 (2014)}.
\bibitem{105} \textit{Id.}
\bibitem{106} \textit{See Fed. R. Evid. 408; FLA. STAT. § 90.408; Pan. City-Bay Cty. Airport & Indus. Dist. v. Kellogg Brown & Root Servs., Inc., 140 So. 3d 1112, 1116–17 (Fla. 1st Dist. Ct. App. 2014), review denied, 163 So. 3d 510 (Fla. 2015).}
\bibitem{107} 140 So. 3d 1112 (Fla. 1st Dist. Ct. App. 2014), review denied, 163 So. 3d 510 (Fla. 2015).
\bibitem{108} \textit{Id.} at 1113.
\bibitem{109} \textit{Id.} at 1113–14.
\end{thebibliography}
management overseer ("Kellog Brown" or "KBR"), and a prime construction contractor ("Phoenix Construction Services" or "Phoenix"). After the pond had to be rebuilt, numerous claims, counterclaims, cross-claims, and third-party claims were filed among the four main parties.

By trial, only claims between the Airport and KBR remained. The rest had been disposed of by various settlements. One settlement was between the Airport and Phoenix. In that settlement, the Airport admitted liability to Phoenix. Phoenix accepted liquidated damages from the Airport in return for a share of any recovery in the lawsuit remaining between the Airport, KBR, and at that time, Atkins. Under the agreement, the Airport and Phoenix would cooperate in this remaining litigation by using the airport’s general counsel and common counsel paid for by Phoenix. The agreement also provided that both Phoenix and the Airport retained control of their own claims and could settle them independently. Both the Airport and Phoenix settled before trial with Atkins, and neither Atkins nor Phoenix remained a party when the case went to trial.

Before trial, the Airport’s counsel moved in limine to exclude any evidence of Phoenix’s settlement offer or of the Airport-Phoenix settlement agreement itself. The trial court excluded terms of any offer but permitted the agreement to be disclosed. KBR disclosed the agreement at trial, using it to impeach some of the Airport’s witnesses and to advance KBR’s counterclaims. After a jury verdict for KBR and denial of a new trial, the Airport appealed.

In a short but important opinion, the First District reversed. The district court’s opinion focused on both section 90.408 and section 46.015(3) of the Florida Statutes, which the court found required this result. Both statutory sections prohibited the admission of completed settlement

110. Id.
111. Id. at 1114.
112. Pan. City-Bay Cty. Airport & Indus. Dist., 140 So. 3d at 1114.
113. See id.
114. Id.
115. Id.
116. Id.
117. Pan. City-Bay Cty. Airport & Indus. Dist., 140 So. 3d at 1114.
118. Id.
119. Id.
120. Id.
121. Id. at 1114–15.
122. Pan. City-Bay Cty. Airport & Indus. Dist., 140 So. 3d at 1115.
123. Id.
124. Id. at 1117.
125. Id. at 1115–16; see also Fla. STAT. §§ 46.015(3), 90.408 (2014).
agreements, and section 46.015(3) additionally prohibited telling the jury a party has been dismissed from a lawsuit because of such.126

KBR made two arguments why the apparently complete statutory bans in the two provisions should not be followed.127 KBR claimed the settlement between the Airport and Phoenix amounted to a Mary-Carter style agreement that Florida case law had found outside the statutory bans.128 Mary-Carter agreements exist when one of multiple parties to litigation enters into a secret agreement with another party to reduce the first party’s exposure in the lawsuit and to have the second party remain in the lawsuit so that the two can secretly work against some or all of the remaining non-parties to the agreement.129 These agreements were found to undermine the openness and integrity of the trial process by creating sham adversary relationships between name parties.130 Thus, when such agreements are made, a non-party to them can inform the jury of their existence.131 However, here, the settlement arrangement was considered different.132 Phoenix did not remain a party to the litigation after the agreement with the Airport.133 Second, even though the Airport and Phoenix agreed to use common counsel, each retained control of its remaining claims and each did settle its remaining claims with some of the parties.134 Thus, the subterfuge and prospects of subterfuge existing in a Mary-Carter Agreement situation were not present.135

Finally, any argument that the settlement’s existence should be admissible to show possible bias was rejected.136 As the court said, these two statutory sections contain neither explicit nor implicit exceptions for impeachment.137 Thus, Florida evidence law, unlike the federal rule

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126. Pan. City-Bay Cty. Airport & Indus. Dist., 140 So. 3d at 1115–16; see also Fla. Stat. §§ 46.015(3), 90.408.
128. Id. at 1116.
129. Id.; Saleeby v. Rocky Elson Constr., Inc., 3 So. 3d 1078, 1083 n.3 (Fla. 2009) (defining Mary-Carter Agreement); Dosdourian v. Carsten, 624 So. 2d 241, 243 (Fla. 1993).
130. Saleeby, 3 So. 3d at 1083; Dosdourian, 624 So. 2d at 246; Pan. City-Bay Cty. Airport & Indus. Dist., 140 So. 3d at 1116.
131. Pan. City-Bay Cty. Airport & Indus. Dist., 140 So. 3d at 1116; see also Dosdourian, 624 So. 2d at 243.
132. Pan. City-Bay Cty. Airport & Indus. Dist., 140 So. 3d at 1117.
133. Id. at 1116.
134. Id. at 1114.
135. Id. at 1116.
136. Id. at 1115–17.
regarding settlements and offers, has made the policy choice in favor of broad exclusion of this type of evidence.

C. Character Evidence

Character is one area of evidence law which seems to present many problems. As a general rule, evidence is usually forbidden in any case, criminal or civil, to prove that a person has a certain general character or type of character trait, and acted consistently with this on a particular occasion. This is commonly called the propensity rule. Evidence is not admissible to show someone has a propensity to act a certain way and followed this propensity at a particular time. Character evidence can be shown by one of three methods: testimony as to one’s reputation in the community, testimony about a witness’s personal opinion of someone else’s character, or testimony about past specific acts of conduct of the person whose character is to be proven.

Despite the general prohibition, not every use of character evidence to show propensity is forbidden. Similarly, not every use of one of the three methods of proving character even involves character evidence at all. A recent case during this Survey period demonstrates both an exception to the ban on character evidence to show action in conformity therewith and also how proof of someone’s reputation may not necessarily involve character evidence at all.

involved charges against the accused of first-degree murder and of attempted first-degree murder, both by use of a

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138. Fed. R. Evid. 408. Federal Rule of Evidence 408 explicitly contains an impeachment exception to the rule’s broad provisions on exclusion to show validity or invalidity of claim. Id. Federal Rule of Evidence 408 by its explicit terms does not allow statements made in settlement negotiations to be used to impeach by inconsistent statements. Id.

139. Pan. City-Bay Cty. Airport & Indus. Dist., 140 So. 3d at 1117; see also Fla. Stat. § 90.408.

140. Fed. R. Evid. 404.


142. See Fed. R. Evid. 404(a)(1). This prohibition is embodied in the introductory language to section 90.404(1) of the Florida Statutes: “Evidence of a person’s character or a trait of character is inadmissible to prove action in conformity with it on a particular occasion . . . .” Fla. Stat. § 90.404(1).

143. Fed. R. Evid. 405(a)–(b).

144. See id. 404(a)(2)(A)–(C).

145. See id. 405(a)–(b).

146. See Antoine, 138 So. 3d at 1075–76.

147. 138 So. 3d 1064 (Fla. 4th Dist. Ct. App. 2014).
firearm.\textsuperscript{148} The jury could not reach a verdict on the first charge but convicted Antoine on the second one.\textsuperscript{149} Both charges arose from the same unfortunate incident at a Palm Beach nightclub late one evening.\textsuperscript{150} The two victims, Brandon Hammond and Jeffrey Thompson, had been ejected from the nightclub twice that evening for their rowdy behavior.\textsuperscript{151} They returned a third time and managed to get themselves thrown out again.\textsuperscript{152} After their third ejection, Hammond and Thompson had a confrontation outside the nightclub with some men who were leaving.\textsuperscript{153} The defendant, Narcisse Antoine, tried to intervene and make peace.\textsuperscript{154} The two victims turned their attention to Antoine both with racial statements and threats of violence.\textsuperscript{155}

The club’s bouncer, Tyrone Slade, was also present when this occurred.\textsuperscript{156} Slade testified that Thompson gave him “the impression . . . he was about to sneak up and attack.”\textsuperscript{157} Hammond then hit Antoine in the jaw, splitting his lip.\textsuperscript{158} Antoine gave Slade the drink he was holding and pulled out a handgun.\textsuperscript{159} Slade later testified about the subsequent events.\textsuperscript{160} Even then, Antoine did not immediately fire on either man.\textsuperscript{161} Hammond began “‘reaching in his pants as if he had a gun’”\textsuperscript{162} while racially cursing Antoine.\textsuperscript{163} Slade, the bouncer, heard Antoine asking Hammond if he was armed and if he planned to shoot Antoine.\textsuperscript{164} Slade also asked Hammond what he was reaching for and told him to stop.\textsuperscript{165} The defendant shot Hammond multiple times, killing him, and shooting Thompson.\textsuperscript{166} Thompson survived this shooting but was in a coma for some days afterward.\textsuperscript{167} At trial, he was unable to remember the events surrounding the

\begin{flushright}
148. \textit{Id.} at 1068.  \\
149. \textit{Id.}  \\
150. \textit{Id.}  \\
151. \textit{Id.}  \\
152. \textit{Antoine}, 138 So. 3d at 1067.  \\
153. \textit{Id.}  \\
154. \textit{Id.}  \\
155. \textit{Id.}  \\
156. \textit{Id.} at 1068.  \\
157. \textit{Antoine}, 138 So. 3d at 1068.  \\
158. \textit{Id.} at 1068.  \\
159. \textit{Id.} at 1069.  \\
160. \textit{Id.}  \\
161. \textit{Id.}  \\
162. \textit{Antoine}, 138 So. 3d at 1069.  \\
163. \textit{Id.}  \\
164. \textit{Id.}  \\
165. \textit{Id.} Slade supposedly told Hammond, “[Do not] do this Brandon.” \textit{Id.}  \\
166. \textit{Antoine}, 138 So. 3d at 1069, 1071.  \\
167. \textit{Id.} at 1071. 
\end{flushright}
shootings. A security guard at a nearby parking lot corroborated Slade’s testimony.

Antoine testified at trial, claiming self-defense for both shootings. He said that earlier that evening, he had intervened inside the nightclub to prevent a fight between Hammond, Thompson, and three other men. Then, when Antoine left, he saw Hammond and Thompson trying to provoke another fight outside. Hammond had punched him and then threatened him with physical harm, including a threat to kill. Antoine said that when Hammond reached inside his own shirt, he was convinced Hammond was going to kill him first. Antoine then shot Hammond and shot Thompson whom Antoine claimed appeared to be reaching for a gun and coming towards Antoine. Antoine drove off, talked to an attorney early the next morning and was arrested later on. Slade knew Hammond’s family and also knew Hammond’s reputation for violence and being a drunk. A second bouncer at the nightclub also gave reputation testimony about Hammond’s reputation for violence. The trial court used Florida Jury Instruction—Criminal 3.6(f)—on the significance of the reputation evidence to the self-defense claim. This instruction required that not only must a victim have a reputation for violence, but that a defendant must also know of this reputation before a jury could consider it. The defense objected to requiring Antoine to know of Hammond’s reputation and requested an additional instruction that the jury could independently consider the victim’s reputation for violence when determining who was the first aggressor. The judge denied the request and kept the instructions’ original wording.

Id.

Id. at 1069.

Id. at 1067.

Antoine, 138 So. 3d at 1070.

Id.

Id.

Id. (alteration in original).

Id. at 1070–71.

Antoine, 138 So. 3d at 1071.

Id. at 1072.

Id.

Id.

Id.

Id. The exact instruction the trial court gave was as follows: If you find that Brandon C. Hammond had a reputation of being a violent and dangerous person, and that their [sic] reputation was known to the defendant, you may consider the fact in determining whether the actions of the defendant were those of a reasonable person in dealing with an individual of that reputation. Antoine, 138 So. 3d at 1072.
The Fourth District Court of Appeal reversed and remanded for a new trial due to error in this instruction. Section 90.404 of the Florida Statutes establishes one of the statutory exceptions to the ban on circumstantial use of character evidence. This exception explicitly provides that “evidence of a pertinent trait of character trait of the victim of the [alleged] crime” is admissible when offered by the accused to prove the victim acted in conformity therewith. Furthermore, when the character evidence is so offered, reputation testimony is the appropriate method of doing so. Thus, the trial court’s instructions were erroneous for two reasons: First, they conditioned the jury’s consideration of Hammond’s reputation for violence on Antoine’s knowledge of this fact. Second, they did not tell the jury that if it found Hammond had such a reputation, the jury could use this in considering whether he acted in conformity therewith before the shooting, namely engaged in violent acts or threatening violent acts that caused Antoine to react in self-defense. Why is the defendant’s actual knowledge of the victim’s reputation for violence required? As the district court said, “because the evidence is offered to show the conduct of the victim, rather than the defendant’s state of mind.” If Antoine’s self-defense claim had been predicated on previous violent acts of Hammond towards others, Antoine would have had to know about them for them to be relevant as they would have gone to his state of mind, not the victim’s conduct. Indeed, under Florida evidence law, previous acts of someone are usually not allowed to prove that person’s subsequent action in conformity therewith.

Would Antoine’s knowledge of Hammond’s reputation have been helpful to his self-defense claim? Yes, in that case Antoine would have been able to use the reputation evidence two ways, instead of one: First, to show Hammond’s action in conformity therewith as the first aggressor; second, to show the reasonableness of Antoine’s claim that he feared he would be shot and so fired first. But just because the second way was foreclosed due to the defendant not actually knowing Hammond’s reputation, this should not legally prevent him from using it the other way.

182. Id. Unlike the Federal Rules of Evidence, Florida does not allow proof of circumstantial character by personal opinion.
183. Id. at 1075.
184. Id. (quoting Dwyer v. State, 743 So. 2d 46, 48 (Fla. 5th Dist. Ct. App. 1999)).
186. See Antoine, 138 So. 3d at 1076; Fla. Stat. § 90.404(1).
187. See Antoine, 138 So. 3d at 1076.
188. See id. at 1075–76. The jury had deadlocked on the murder charge involving Hammond’s death but convicted on the attempted murder charge for shooting.
D. Williams Rule Issues–Other Crimes, Wrongs, or Acts

As noted above, when character evidence is used to prove the defendant has a certain character trait to further prove the defendant has a tendency to act in accord with this trait, the propensity rule is violated.\(^{189}\) This violation occurs however the character trait would be proven—whether by reputation, opinion, or specific acts of past conduct.\(^{190}\) Evidence law recognizes that a person’s past bad acts can be relevant for legitimate non-propensity purposes.\(^{191}\) In Florida, this use of collateral crimes evidence is called Williams Rule evidence.\(^{192}\)

The Code has codified the Williams Rule.\(^{193}\) Section 90.404(2)(a) of the Florida Statutes states that “[s]imilar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue... but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.”\(^{194}\) What might these material facts be? The section lists them as “including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”\(^{195}\)

While the Williams Rule has a similar counterpart in the Federal Rules of Evidence,\(^{196}\) there are several differences between the two that are actually more favorable to defendants in Florida. First, in Florida, the state must give the defense notice of its intent to use such evidence and a description of it ten days before trial.\(^{197}\) In a federal court, the prosecution must only provide reasonable notice of such.\(^{198}\) Second, under the federal rules, the existence of the accused’s other crimes must only be shown by a preponderance of the evidence.\(^{199}\) In Florida, it must be established by clear

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Thompson. Id. at 1068. However, since both charges stemmed from the same series of events, if the jury had found Antoine’s actions in shooting Hammond reasonable, it might have also done so in connection with the immediate shooting of Thompson afterwards. See id. at 1075–76. Thus, reversal was needed. See id. at 1078.

189. See FED. R. EVID. 404(a)(1).
190. See id. 404(a)(1), 405.
192. Id. at 659.
193. Id.; see also FLA. STAT. § 90.404 (2014).
194. FLA. STAT. § 90.404 (2)(a).
195. Id.
196. See FED. R. EVID. 404(b).
197. FLA. STAT. § 90.404(d)(1).
and convincing evidence. Third, in Florida the evidence cannot be so focused upon that it becomes a feature of the trial.

More reported cases discussed this section of the relevancy rules than any other. Cases discussing section 90.404(2)(a) of the Florida Statutes generated a fair number of reversals.

1. To Prove Matters Independent of Section 404(2)

a. Inextricably Intertwined Evidence

Sometimes to tell a coherent story, the State must introduce other acts evidence that is not directly related to the crimes charged. When this happens, the other crimes evidence is admissible. Some jurisdictions call this evidence of the res gestae. In Florida, this type of other crimes evidence is referred to as inextricably intertwined evidence. Technically speaking, it is not Williams Rule evidence because its purpose is not to prove or disprove an element of the case. Rather its purpose is to prevent the story of the case from becoming confused, broken, or disjointed. Thus, some courts then do not require the State to follow section 90.404(2) of the Florida Statutes’ usual notification provisions.

200. See McLean v. State, 934 So. 2d 1248, 1256 (Fla. 2006).

201. Id.; see also Barnett v. State, 151 So. 3d 61, 63 (Fla. 4th Dist. Ct. App. 2014) (during this Survey period rejecting the argument that the Williams Rule evidence had improperly become a feature of the trial).

202. McLean, 934 So. 2d at 1251; Carlisle v. State, 137 So. 3d 479, 486 (Fla. 4th Dist. Ct. App. 2014); Barnett, 151 So. 3d at 63.

203. See FLA. STAT. § 90.404(2)(a) (2014). There was reversal in six cases where the state introduced evidence of other crimes, wrongs, or acts, and reversal in one case where the defense was denied the right to introduce Reverse Williams Rule evidence. See Moore v. State, 143 So. 3d 468, 469 (Fla. 5th Dist. Ct. App. 2014); Parker v. State, 142 So. 3d 960, 965 (Fla. 4th Dist. Ct. App. 2014); Kyne v. State 141 So. 3d 759, 764 (Fla. 2d Dist. Ct. App. 2014); Jackson v. State, 140 So. 3d 1067, 1073 (Fla. 1st Dist. Ct. App. 2014); Carlisle, 137 So. 3d at 487. The one Reverse Williams Rule case was Carlisle, where the court found the defense should have been allowed to cross-examine an alleged sexual battery victim about her earlier recantation of other sexual claims against the defendant. Carlisle, 137 So. 3d at 483–84, 487. The questioning would have been admissible to show a motive to falsify on the victim’s part. Id. at 484.


205. Id.


207. Kyne, 141 So. 3d at 762.

208. See Williams v. State, 621 So. 2d 413, 414–15 (Fla. 1993); Kyne, 141 So. 3d at 762.

209. Kyne, 141 So. 3d at 762.

210. See FLA. STAT. § 90.404(2) (2014). Kyne v. State, where the State argued no notice was due because the defense as evidence of prior threats between the defendant and
When other crimes or acts evidence is offered under the *inextricably intertwined* rationale, courts must be especially careful to make sure the evidence is necessary or else risk a high chance of reversal. 211 This is especially true because the other acts evidence is often potentially inflammatory in nature. 212 During this Survey period, four cases where the State introduced evidence under the inextricably intertwined rationale resulted in conviction reversals. 213 Three of the four shared a common characteristic. 214 They all involved evidence of possession of handguns or other firearms as the alleged inextricably intertwined acts. 215

*Parker v. State* 216 provides the most overall instructive discussion of the three. Parker’s vehicle was pulled over for a traffic routine stop, during which an officer saw a gun partially sticking out between the vehicle’s seats. 217 The officer had Parker exit the vehicle and arrested him when it was discovered Parker was a convicted felon. 218 Later, during an inventory search, officers discovered illegal narcotics inside the vehicle. 219 Parker was charged with multiple drug possession offenses as well as being a felon in possession of a firearm. 220 The State severed the firearm possession charge

his step-father weeks before the defendant allegedly strangled his mother, was inextricably intertwined with the killing. *Kyne* v. *State*, 141 So. 3d at 760–61. The district court of appeal rejected this argument and also held that while the evidence might have been otherwise admissible as *Williams* Rule evidence, this could not be considered on appeal due to the state’s failure to supply the notice required under section 90.404(2)(d)(1) of the Florida Statutes. *Id.* at 763; see also *Fla. Stat.* § 90.404(2)(d)(1).

*Kyne* sends an important message to the state. If other acts are allegedly admissible as both *inextricably intertwined* with charged offenses’ facts and also separately admissible as *Williams* Rule evidence, careful prosecutors will always provide notice of intent to use such. *Kyne*, 141 So. 3d at 763. Thus, if an appellate court later rejects the *inextricably intertwined* grounds, the state can preserve its ability to argue *Williams* Rule evidence as a fall back position. *Id.* 211. *Id.* 212. *See Williams*, 621 So. 2d at 415. 213. Parker v. State 142 So. 3d 960, 963 (Fla. 4th Dist. Ct. App. 2014); see also *Kyne*, 141 So. 3d at 761; Tolbert v. State, 154 So. 3d 1141, 1142–43 (Fla. 2d Dist. Ct. App. 2014); Francois v. State, 132 So. 3d 1206, 1207 (Fla. 3d Dist. Ct. App. 2014). 214. *Parker*, 142 So. 3d at 963; *Tolbert*, 154 So. 3d at 1142; *Francois*, 132 So. 3d at 1207–08. *Kyne* is the fourth and only non-weapons case where admission of other bad acts evidence caused reversal as not being inextricably intertwined with events surroundings the charges and not otherwise admissible under the *Williams* Rule. *Kyne*, 141 So. 3d at 763. 215. *See Parker*, 142 So. 3d at 963; *Tolbert*, 154 So. 3d at 1142; *Francois*, 132 So. 3d at 1207–08.

216. 142 So. 3d 960 (Fla. 4th Dist. Ct. App. 2014). 217. *Id.* at 962. 218. *Id.* 219. *Id.* 220. *Id.*
before trial. The defense moved to exclude any evidence relating to the gun found in car as unnecessary to prove the remaining drug charges. The State claimed that testimony about finding the gun was needed to explain why the vehicle was searched and the drugs subsequently found. The trial court agreed with this argument. At trial, the first officer was allowed to talk about finding the gun and how the defendant’s hand was near where the gun was actually found. Not only was this testimony given but also the State physically introduced the gun as an exhibit. A second officer testified Parker had been arrested for possessing the weapon, but the trial court sustained an objection to this, and the jury was instructed to ignore it.

The Fourth District listed four instances where uncharged acts or crimes evidence would be considered inextricably intertwined with the charges against an accused. When the evidence was necessary to “(1) adequately describe the deed; (2) provide an intelligent account of the crime(s) charged; (3) establish the entire context out of which the charged crime(s) arose, or (4) adequately describe the events leading up to the charged crime(s).” Here, it seemed as if the State was relying on either the third or fourth reasons to justify the testimony and the gun’s admission. Whatever the State’s reason was, the Fourth District of Appeal reversed the conviction. The court found that testimony about the gun was totally unnecessary to prove the drug charges. The State could have just produced testimony about finding the drugs in Parker’s car during a search car. Additionally, error in admitting the gun-related testimony was compounded by admitting the gun itself as an exhibit. The gun’s admission aggravated matters by “giving the weapon featured billing during the trial.”

221. Parker, 142 So. 3d at 962.
222. Id.
223. Id.
224. Id.
225. Id.
226. Parker, 142 So. 3d at 962.
227. Id.
228. Id. at 963.
229. Id. (quoting McGee v. State, 19 So. 3d 1074, 1078 (Fla. 4th Dist. Ct. App. 2009)).
230. See Parker, 142 So. 3d at 962.
231. Id. at 965.
232. Id. at 963–64.
233. Id. at 963.
234. Id.
Perhaps the most flagrant of the three cases involving reversals for uncharged weapons testimony is *Francois v. State*.235 There the State charged the accused with armed robbery and conspiracy to commit armed robbery.236 The robbery victim and other witnesses said a handgun had been used in the crime.237 This gun was never found.238 Police officers went to the defendant’s residence and found four rifles there, one of which was under a bed and another sticking out from a mattress.239 The State argued that evidence of the rifles in the home showed Francois could have also once possessed the handgun and hidden it after the robbery.240 Evidently, the reasoning went something like this—people who possess firearms in general are likely to possess a particular type of firearm and when that firearm is used in a crime they are likely to hide it. Of course, part of this reasoning rests on using evidence for prohibited propensity purposes. The other part—that someone who commits a crime with a weapon is likely to hide the weapon to avoid detection—could have been made without introduction of any evidence about the rifles at all. The trial court termed this argument “tenuous, at best, and labeled it far-fetched.”241 Surprisingly after declaring such, the judge admitted the rifles believing “the evidence comprised part of the police investigation and that Francois would not be prejudiced by the testimony.”242 In a short opinion, the Third District Court of Appeal reversed finding the evidence totally irrelevant to prove anything about the missing handgun.243 Additionally, there was no proof that Francois’s possession of the rifles was not perfectly legal.244 The court recognized that admitting testimony evidence about the rifles created a very real risk that “the jurors [would] conclude . . . Francois exhibited a propensity to commit crimes.”245

All three cases could be described as good examples of prosecutor attempts at *overkill* causing reversals.246 Unfortunately, there are also examples where trial courts did not give careful scrutiny to arguments and

235. 132 So. 3d 1206, 1209 (Fla. 3d Dist. Ct. App. 2014).
236. *Id.* at 1207.
237. *Id.*
238. *Id.*
239. *Id.*
240. *Francois*, 132 So. 3d at 1207.
241. *Id.*
242. *Id.* (emphasis added).
243. *Id.* at 1209.
244. *Id.*
245. *Francois*, 132 So. 3d at 1209.
246. *See id.* 132 So. 3d at 1209; *Parker*, 142 So. 3d at 964; *Tolbert*, 154 So. 3d at 1143. The third case is *Tolbert v. State*, which involved testimony about a handgun found in the same bag as illegal drugs. Tolbert v. State, 154 So. 3d 1141, 1142 (Fla. 2d Dist. Ct. App. 2014). There was no proof connecting Tolbert to the gun, nor proof that he illegally possessed it. *Id.* at 1142–43.
The lesson to be learned from all three reversals is simple: Inextricably intertwined is not a magic argument or phrase that will automatically allow in other crimes or acts evidence not essentially connected to the crimes charged. This is especially so when the other acts involve weapons possession.

b. To Legally Establish an Element of the Charged Offense

There is another, probably an even more rare, non-Williams Rule reason to legitimately present uncharged collateral crimes evidence. There may be a legal necessity to present other crimes evidence when proof of an earlier act or crime is an essential element of a later charged offense. In this situation, the extent of the other crimes evidence should be determined by the elements of the charged offense.

Spipniewski v. State involved charges of aggravated stalking, aggravated assault with a deadly weapon, and misdemeanor battery. The victim and defendant were neighbors who had once been on good terms. Trouble started when the victim who had been giving the defendant food, rides, and money told him she would no longer do so. The charges concerned events that happened from January to December 16, 2011. The State produced evidence that the defendant had punched the victim in November 2011, approached her swinging a bat in December 2011, and pulled her hair and bit her in December 2011. The November punching incident was also the subject of a separate misdemeanor charge in county court.

The Third District found the punching incident testimony relevant to the charge of aggravated stalking. As part of this charge, the State had to show the defendant had engaged in a course of conduct designed to repeatedly harass her, and that the defendant threatened the victim with

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247. Id. at 1142–43; Parker, 142 So. 3d at 961, 964; Francois, 132 So. 3d at 1208–09.
249. See id.
250. 134 So. 3d 563 (Fla. 3d Dist. Ct. App. 2014).
251. Id. at 564. Originally, there was a fourth charge—harassing the victim—but the State dropped this before trial. Id. The opinion does not explain why. See id.
252. See id.
253. Spipniewski, 134 So. 3d at 564.
254. Id.
255. Id. at 564–65.
256. Id. at 565.
257. Id.
intent to make her fearful of death or bodily injury.\textsuperscript{258} \textit{Course of conduct} as defined in the aggravated stalking statute is “a pattern of conduct composed of a series of acts over a period of time, however short, which evidences a continuity of purpose.”\textsuperscript{259} Thus, the other acts evidence was directly relevant and legally necessary to prove the aggravated stalking charge.\textsuperscript{260} Ultimately, the jury convicted the defendant of simple stalking; thus, in any event, admission of the other acts would have been harmless even if done in error.\textsuperscript{261}

2. To Prove Traditional \textit{Williams} Rule Issues

As mentioned, section 90.404(2)(a) of the Florida Statutes lists a number of reasons why other crimes or acts evidence is relevant, besides solely showing propensity.\textsuperscript{262} The list follows the \textit{inclusionary} approach, and is not intended to be exclusive but merely to give examples of the most common, legitimate \textit{Williams} Rule purposes.\textsuperscript{263} During this Survey, \textit{Williams} Rule evidence was admitted to prove a number of matters, mentioned\textsuperscript{264} and unmentioned\textsuperscript{265} in the section.\textsuperscript{266} Some decisions show how careless counsel is in urging admission of this evidence and how careless courts are in going along with their arguments. It should never be sufficient for counsel to just \textit{laundry list} the issues given in the Rule as reasons why the evidence should be admitted. Courts should not allow such \textit{laundry listing} to occur, but sometimes this happens.\textsuperscript{267} Fortunately one opinion during this Survey provides an excellent example of the careful

\textsuperscript{258} \textit{Spipniewski}, 134 So. 3d at 566; see also \textit{Fla. Stat.} § 784.048(3) (2014).
\textsuperscript{259} \textit{Fla. Stat.} § 784.048(1)(b).
\textsuperscript{260} \textit{Spipniewski}, 134 So. 3d at 566.
\textsuperscript{261} \textit{Id.}
\textsuperscript{262} \textit{Fla. Stat.} § 90.404(2)(a).
\textsuperscript{263} \textit{See id.; Williams v. State}, 110 So. 2d 654, 659–60 (Fla. 1959).
\textsuperscript{264} \textit{Two cases involved \textit{Williams} Rule evidence offered at trial to prove intent. See }\textit{Barnett v. State}, 151 So. 3d 61, 63 (Fla. 4th Dist. Ct. App. 2014); \textit{Jackson v. State}, 140 So. 3d 1067, 1070 (Fla. 1st Dist. Ct. App. 2014). \textit{Two cases involved used it to show identity. See }\textit{Barnett}, 151 So. 3d at 63–64; \textit{Lewis v. State}, 143 So. 3d 998, 1000, 1002 (Fla. 4th Dist. Ct. App. 2014).
\textsuperscript{265} \textit{See }\textit{Peralta-Morales v. State}, 143 So. 3d 483, 485 (Fla. 1st Dist. Ct. App. 2014) (finding the evidence admissible to show \textit{consciousness of guilt}). The author strenuously disagrees with this conclusion and believes the evidence was improperly admitted as proof of propensity.
\textsuperscript{266} \textit{See }\textit{Fla. Stat.} § 90.404(2)(a).
\textsuperscript{267} \textit{See, e.g., Barnett}, 151 So. 3d at 63 (where this happened at the trial level). On appeal, the Fourth District affirmed the admission of the evidence but after conducting a much more careful analysis and after correctly concluding it was admissible to prove identity and motive. \textit{Id.} at 63–64.
analysis the trial, and appellate courts should engage in before approving use of Williams Rule evidence.268

_Jackson v. State_269 involved an appeal from a conviction for burglary of a dwelling and for battery.270 The State claimed that in March 2011, Jackson broke into his ex-girlfriend’s apartment and attacked her with a knife.271 Over defense objection, the trial court allowed the State to produce evidence of two prior incidents to prove the defendant had the intent needed to commit the March 2011 crimes.272 The first incident occurred in June 2010, when Jackson had pulled the victim from a car and attacked her.273 The second one occurred in November 2010, when Jackson had come to the victim’s apartment at her invitation, but had battered her there.274 In a thoughtful opinion, the First District reversed the convictions.275 The court acknowledged that Williams Rule evidence is admissible to prove material facts in a case.276 However, it differed from the trial court as to how materiality should be determined.277 Just because an issue is technically an element of an offense does not make it automatically material for Williams Rule purposes.278 Instead, the issue must be a truly contested one at trial. Jackson did not raise any issue of intent.280 Rather, he claimed he had never been at the victim’s apartment on the particular date in March and thus did not commit any crime there.281

“Even if intent [had been] a [true] material issue,” the other incidents were not substantially similar enough to demonstrate it.282 The first incident did not take place at the victim’s residence, and while the second one did, Jackson had been invited over to the apartment.283 Thus, while both incidents allegedly involved batteries, neither one of them came close to involving a burglary and so, were not relevant in determining if he

268. _Jackson_, 140 So. 3d at 1071–73.
269. 140 So. 3d 1067 (Fla. 1st Dist. Ct. App. 2014).
270. _Id._ at 1069.
271. _Id._
272. _Id._ at 1069–70.
273. _Id._ at 1070.
274. _Jackson_, 140 So. 3d at 1070.
275. _Id._ at 1070–73.
276. _Id._ at 1069–70.
277. _Id._ at 1070–71.
278. _Id._ at 1071; see also _Williams_, 110 So. 2d at 659.
279. _Jackson_, 140 So. 3d at 1070–71.
280. _Id._ at 1071.
281. _Id._
282. _Id._ at 1071–72; see also _McLean v. State_, 934 So. 2d 1248, 1255 (Fla. 2006).
283. _Jackson_, 140 So. 3d at 1070.
committed a burglary.\textsuperscript{284} As to the battery charge, the First District found the other acts’ relevancy was solely based on pure propensity reasoning—he attacked this woman twice in the past, so that makes it more likely he attacked her here—which is what the Williams Rule explicitly forbids!\textsuperscript{285}

Overall, Jackson is an excellent example of the thorough analysis trial, and appellate courts should engage in when faced with Williams Rule questions. As this type of evidence has the potential to be unfairly prejudicial to defendants, it should not be admitted unless its materiality is truly factually an issue and not just an issue in a formal legal sense.

3. To Prove Child Molestation Charges

Both the Code and the Federal Rules of Evidence have added special provisions relating to the admission of other crimes, wrongs, or acts evidence in child molestation cases.\textsuperscript{286} Section 90.404(2)(b)(1) of the Florida Statutes provides that in criminal child molestation cases, “evidence of the defendant’s commission of other crimes, wrongs, or acts of child molestation is admissible and may be considered for its bearing on any matter for which it is relevant.”\textsuperscript{287} This section’s language indicates the legislature intended to allow what is usually not permitted in criminal case—evidence admitted largely for its propensity purposes. Evidently, the legislature felt that when it comes to certain types of sex crimes, there is a very real risk of repeat offenders, so that evidence that an accused had committed an earlier sexual offense is strong indication he committed a later criminally charged one. In McLean \textit{v. State},\textsuperscript{288} the Supreme Court of Florida held that even when this section merely serves “as a conduit for evidence that corroborates the victim’s testimony that the crime occurred rather than to prove the identity of the alleged perpetrator,”\textsuperscript{289} it does not violate due process.\textsuperscript{290} \textit{McLean} did not find that evidence of prior acts of molestation was automatically admissible, despite the statutory wording that could be construed that way. Instead, the court focused on the words “and may be considered for its bearing on any

\begin{itemize}
  \item 284. \textit{Id.} at 1072.
  \item 285. \textit{Id.} at 1070, 1072; \textit{see also} Williams \textit{v. State}, 110 So. 2d 654, 659, 661, 663 (Fla. 1959).
  \item 286. \texttt{FLA. STAT.} § 90.404(2) (2014); \texttt{FED. R. EVID.} 414.
  \item 287. \texttt{FLA. STAT.} § 90.404(2)(b)(1). There is a similarly worded provision for evidence of “other crimes, wrongs, or acts” in a \textit{sexual offense} charge case. \textit{See id.} § 90.404(2)(c)(1). The Florida Legislature passed these sections in 2001. \textit{Act effective July 1, 2001, ch. 2001-221, § 1, 2001 Fla. Laws 1938, 1938.}
  \item 288. 934 So. 2d 1248 (Fla. 2006).
  \item 289. \textit{Id.} at 1251.
  \item 290. \textit{Id.}
\end{itemize}
matter [for] which it is relevant.”

291. When it comes to relevancy and other acts, relevancy must be evaluated first by how similar the other sexual acts are to the crime charged.

292. The more similarity, the more probative they are.

293. Likewise, the less similar, the less probative, and the more likelihood they will generate unfair prejudicial against an accused and should be excluded by section 90.403 of the Florida Statutes.

294. McLean set out a four-part test to determine admissibility of other acts of molestation.

295. First, how similar are the other acts and the charged ones in terms of when, where, how, and to whom they occurred?

296. Second, how close in time are the other acts and the ones charged?

297. Third, how frequently did the other acts occur?

298. Finally, are there any intervening circumstances between the other acts and the ones charged?

299. Four reported opinions discussed this type of evidence in child sexual victim cases during the Survey period. Not surprisingly, the appellate courts affirmed admission in three out of the four cases. Stewart v. State represents what is probably a typical approach to admission of this type of evidence. The accused was charged with sexually battering a person between twelve and eighteen years of age while he was in a position of familial authority. The State introduced proof Stewart had previously sexually battered his step-daughter and also his wife’s daughter, both when the girls were young. In affirming his conviction, the First District described this as Williams Rule evidence even though it seems to have been introduced solely for its propensity. The court described section

291. Id. at 1254.

292. Id.

293. McLean, 934 So. 2d at 1255.

294. FLA. STAT. § 90.403 (2014); McLean, 934 So. 2d at 1256.

295. McLean, 934 So. 2d at 1262.

296. Id.

297. Id.

298. Id.

299. Id.


301. Harrelson, 146 So. 3d at 175; Stewart, 147 So. 3d at 124; Fincher, 137 So. 3d at 442; Peralta-Morales, 143 So. 3d at 486.

302. 147 So. 3d 119 (Fla. 1st Dist. Ct. App. 2014).

303. See id. at 123–24.

304. Id. at 120; see also FLA. STAT. § 794.011(8)(b) (2014).

305. Stewart, 147 So. 3d at 121.

306. Id. at 123–24. The court found it “showed an underlying pattern of molestation where the appellant was in a familial or custodial setting with the victims and the molestation occurred in the home.” Id. at 121.
90.404(2)(b) of the Florida Statutes as establishing a \textit{relaxed standard of admissibility} \textsuperscript{307} even though similarity between the charged offense and the past acts was still important. \textsuperscript{308} The court emphasized that similarity did not mean the two sets of offenses had to be identical or the same in all respects. \textsuperscript{309} Here, sufficient similarity to uphold admission existed because the victims were all underage females, the offenses all took place in the family home, the defendant was in a familial or custodial role each time, and the victims were all vulnerable due to being either asleep or under anesthesia. \textsuperscript{310} The fact that some of the acts involved digital penetration, and some involved penile penetration did not outweigh the other similarities. \textsuperscript{311}

Ironically, the only decision reversing a conviction for improper admission of this type of evidence also came from the First District. \textsuperscript{312} In \textit{Harrelson v. State}, \textsuperscript{313} the appellate court reversed and remanded, for further proceedings, the defendant’s conviction for lewd, lascivious, or indecent assault on a child under sixteen. \textsuperscript{314} The victim was either the defendant’s daughter or step-daughter. \textsuperscript{315} Harrelson and her mother were divorced when the acts allegedly occurred. \textsuperscript{316} The defendant was alleged to have grabbed the victim’s hand and made her touch his penis during a visit to Harrelson’s mother’s home. \textsuperscript{317} At least some of the claimed other acts also occurred during other visits to Harrelson’s father’s home. \textsuperscript{318}

The State gave the defense the required notice of intent to use. \textsuperscript{319} However, the trial court and defense undertook an unusual and ultimately legally reversible procedure to determine admissibility. Defense counsel

\textit{See id.} at 123. It shows Stewart had a propensity to sexually molest young girls when he got them in the home. \textit{See id.} at 121. Thus, he must have molested the young victim here. \textit{See Stewart}, 147 So. 3d at 123–24.

\textsuperscript{307} \textit{Id.} at 123 (quoting Easterly v. State, 22 So. 3d 807, 814 (Fla. 1st Dist. Ct. App. 2009)); \textit{FLA. STAT.} § 90.404(2)(b).

\textsuperscript{308} \textit{Stewart,} 147 So. 3d at 124.

\textsuperscript{309} \textit{Id.}

\textsuperscript{310} \textit{Id.}

\textsuperscript{311} \textit{Id.} The other two opinions, not discussed in this Survey’s text, affirming admission of other acts of molestation are \textit{Fincher and Peralta-Morales}. \textit{Fincher} v. \textit{State}, 137 So. 3d 437, 442 (Fla. 4th Dist. Ct. App. 2014); \textit{Peralta-Morales} v. \textit{State}, 143 So. 3d 483, 486 (Fla. 1st Dist. Ct. App. 2014); \textit{see also supra} note 365 (briefly criticizing \textit{Peralta-Morales}).

\textsuperscript{312} \textit{Harrelson v. State}, 146 So. 3d 171, 175 (Fla. 1st Dist. Ct. App. 2014). Both opinions were per curiam. Judge Rowe is the only judge named as being on both panels.

\textsuperscript{313} 146 So. 3d 171 (Fla. 1st Dist. Ct. App. 2014).

\textsuperscript{314} \textit{Id.} at 172, 175.

\textsuperscript{315} \textit{See id.} at 174.

\textsuperscript{316} \textit{Id.} at 174.

\textsuperscript{317} \textit{Id.} at 173.

\textsuperscript{318} \textit{Harrelson}, 146 So. 3d at 174.

\textsuperscript{319} \textit{Id.} at 173.
suggested the trial court should first do the required weighing under section 90.403 of the Florida Statutes of probative value versus unfair prejudice before making a finding that the other acts had been proven by clear and convincing evidence.\(^{320}\) The trial judge did so and ruled the *substantial similarity* between the alleged offenses outweighed any potential prejudice.\(^{321}\) The trial court then concluded that no finding of *clear and convincing evidence* was needed as the other crimes involved the same victim, the same conduct, and the same approximate timeframe as the charged offense.\(^{322}\) The defense cross-examined the victim about the other acts and also called Harrelson’s mother as a defense witness.\(^{323}\) She testified some of the furniture supposedly in the home at the time was gone by then, all in an effort to dispute the acts’ existence.\(^{324}\)

In a brief opinion, the First District reversed.\(^ {325}\) The court ruled that findings that other crimes, wrongs, or acts exist by a clear and convincing evidence standard are legally mandated in all cases.\(^ {326}\) The fact that the alleged other crimes involved the same, instead of different, victims did not change this requirement.\(^ {327}\) As the defense had at trial denied their existence with strong proof, the court could not say there was not a strong possibility this evidence did not influence the jury.\(^ {328}\) However, a new trial was not necessarily required.\(^ {329}\) As the trial court had already done the required section 90.403 of the Florida Statutes balancing, only a hearing to see if the State could meet the clear and convincing evidence standard was required.\(^ {330}\) If so, the conviction should have been re-instated.\(^ {331}\) If not, a new trial was necessary.\(^ {332}\)

*Harrelson* is important because it emphasizes to both counsel and trial courts the importance of following the complete procedure discussed in *McLean* for determining the admissibility of other acts of child molestation. Also, as *McLean* has been cited as requiring clear and convincing proof for any *Williams* Rule evidence, this multi-step procedure should be strictly

\(^{320}\) *Id.*; *see also* F.L.A. STAT. \$ 90.403 (2014).

\(^{321}\) *Harrelson*, 146 So. 3d at 173.

\(^{322}\) *Id.*.

\(^{323}\) *Id.*.

\(^{324}\) *Id.*.

\(^{325}\) *Id.* at 175.

\(^{326}\) *Harrelson*, 146 So. 3d at 173.

\(^{327}\) *Id.* at 173–74.

\(^{328}\) *Id.* at 174.

\(^{329}\) *Id.*

\(^{330}\) *Id.* at 174–75; *see also* F.L.A. STAT. \$ 90.403 (2014).

\(^{331}\) *Harrelson*, 146 So. 3d at 175.

\(^{332}\) *Id.*
followed for all evidence of other crimes, wrongs, or acts no matter what the offense charged.

IV. WITNESS EXAMINATION ISSUES

Witness examination issues can arise in any number of ways. During this Survey period, one case provided the factual background for the Supreme Court of Florida’s discussion of several of them. The prosecution in Wilcox v. State charged the defendant with first-degree murder, armed kidnapping, and armed robbery. Wilcox had called his cousin, Richaundu Curry, and asked if he could stay at her Lauderhill townhome. Curry shared her home with her brother, her sister, and Curry’s ex-boyfriend. The four of them lived next to the victim, Nimoy Johnson. The day Wilcox arrived, someone burglarized Johnson’s home. Johnson initially blamed it on someone living in Curry’s townhome, and the two of them had words about this. After Curry had assured Johnson they were good neighbors, he apologized, and everything seemed fine. About one week later, an intruder came to Johnson’s home, and got him to call three female friends of his to come over. The intruder had Johnson tie up the three women and then took Johnson from the room they were in. Later that evening, someone stole one of the women’s car. After they had freed themselves, they found Johnson shot dead in his home. Eyewitness testimony placed Wilcox around Johnson’s home at the time of the kidnapping and murder. Besides this, DNA evidence linked him to a cigarette the intruder had smoked in the home. Wilcox had even admitted that morning in a phone call to Curry’s brother that he had killed

335. See id. at 369.
336. Id. at 366.
337. Id.
338. Id.
339. Wilcox, 143 So. 3d at 366.
340. Id.
341. Id.
342. Id.
343. Id. at 367.
344. Wilcox, 143 So. 3d at 368.
345. Id.
346. See id. at 367–68.
347. Id. at 369.
Johnson the night before or earlier that same morning. 348 Abundant other evidence linked Wilcox to the charged crimes. 349

At trial, Wilcox claimed he did not perpetrate these crimes. 350 He claimed never to have been to the county where the crimes took place and claimed he was in a neighboring county that weekend. 351 Wilcox was arrested at an apartment complex where the stolen car was found but claimed Curry’s brother gave it to him three days after the crimes. 352 At the guilt phase, Wilcox represented himself, with standby counsel appointed for his assistance if Wilcox wished to ask for help. 353 This self-representation decision led to several evidentiary issues discussed below.

A. Refreshing Recollection

Sometimes witnesses forget for various reasons and need help in remembering so they can give or continue giving testimony. The process of doing this is called refreshing recollection. 354 Although this process is not laid out in statute or rules, it is so common that questions about it seldom arise. To prove its case against Wilcox, the State called his cousin, Richaunda Curry, whose home was next to the victim’s home. 355 Curry testified that in a second police interview after the crimes, detectives had asked her if she knew someone with gold teeth. 356 She had not yet told police about her cousin, Wilcox because she did want to tell them she believed he was involved in the crimes. 357 When she learned police were looking for someone with gold teeth, she felt comfortable telling them about Wilcox and his gold teeth. 358 On cross-examination by Wilcox, she denied knowing anyone else with gold teeth, including her sister or her sister’s

348. Id. at 368.
349. See Wilcox, 143 So. 3d at 368–71.
350. See id. at 369.
351. Id. at 369.
352. Id. at 368–69.
353. Id. at 369, 373.
354. See Wilcox, 143 So. 3d at 378. Some jurisdictions may alternatively call this refreshing memory, but the concept is the same. E.g., Fla. Stat. § 90.613. Both the Code and the Federal Rules of Evidence imply this process is available, although neither one directly says so. See id.; Fed. R. Evid. 612. Certainly, a trial judge’s inherent power to control proceedings under section 90.612(1)(a) of the Florida Statutes to “[f]acilitate, through effective interrogation and presentation, the discovery of . . . truth” permits judges to allow this. Fla. Stat. § 90.612(1)(a). Also, the existence of section 90.613 of the Florida Statutes, Refreshing the Memory of a Witness, implies this. See id. § 90.613.
355. See Wilcox, 143 So. 3d at 375.
356. Id. at 377.
357. Id.
358. Id.
Specifically, Curry testified in response to a question from Wilcox that “[you are] the only one that got gold teeth, that I know of.”\textsuperscript{360} After another question and brief answer, Wilcox asked, “can I refresh your memory, please?”\textsuperscript{361} The State objected to lack of a proper foundation to refresh recollection, and the judge told Wilcox to rephrase his question.\textsuperscript{362} Wilcox then asked “do you think any document . . . would refresh your memory as to who all had gold that was at your respective apartment?”\textsuperscript{363} After Curry said probably, the State again objected, but the judge let Wilcox proceed.\textsuperscript{364}

Up to now, one cannot hardly find fault with the proceedings on this point. Technically speaking, there may not have been an absolute need to refresh recollection, but the judge acted wisely in giving a pro se defendant, especially one in a capital case, leeway. What happened next provoked error, although the Supreme Court of Florida found all trial errors harmless given the overwhelming proof against Wilcox.\textsuperscript{365}

Wilcox then tried to refresh Curry’s memory by using the statement of another witness, Jean, which was summarized in and attached to the affidavit for his arrest.\textsuperscript{366} According to the summary, Jean was the victim’s friend and had talked with Johnson about a week before the charged crimes.\textsuperscript{367} The summary claimed Johnson told Jean about confronting two people, one of whom had gold teeth, regarding Johnson’s home being burglarized.\textsuperscript{368} The man with gold teeth allegedly told Johnson he was not afraid of Johnson, and Johnson had allegedly threatened to shoot him.\textsuperscript{369} The

\begin{footnotes}
\footnotetext[359]{Id.}
\footnotetext[360]{Wilcox, 143 So. 3d at 377.}
\footnotetext[361]{Id.}
\footnotetext[362]{Id. at 377–78. Technically, it seems that the State’s proper objection was lack of a predicate to refresh recollection. See id. Curry never said she could not remember whom else she knew who had gold teeth or that she was not sure if she knew someone else with gold teeth. Id. at 377. Lawyers are not entitled to refresh recollection any time they get an answer they may not like or expect. See Fla. Stat. § 90.613 (2014). There must be a need to do so caused by a witness’s complete or partial inability to recall. See id. At common law, a witness had to have complete memory failure about a matter. See NLRB v. Fed. Dairy Co., 297 F.2d 487, 488–89 (1st Cir. 1962). This is not required by the Federal Rules of Evidence or the Code. See Fed. R. Evid. 612; Fla. Stat. § 90.613.}
\footnotetext[363]{Wilcox, 143 So. 3d at 377.}
\footnotetext[364]{Id. at 377–78.}
\footnotetext[365]{Id. at 378–79.}
\footnotetext[366]{Id.}
\footnotetext[367]{Id.}
\footnotetext[368]{Wilcox, 143 So. 3d at 378.}
\footnotetext[369]{Id.}
\end{footnotes}
prosecutor objected to Curry being refreshed by Jean’s statement, and the trial court refused to let Wilcox use the document to do so. 370

The Supreme Court of Florida found error in this ruling. 371 When a witness needs his or her memory refreshed, “a party may show the witness a writing or other object to attempt to refresh . . . recollection.” 372 If a writing is being used to refresh, it does not have to be one actually written by the witness. 373 Nor does it have to be otherwise admissible into evidence. 374 The witness should not be allowed to read parts of the writing aloud, nor should the questioning attorney do so, as that would cause potential hearsay issues. 375 If the witness’s memory is successfully refreshed, and the witness’s testimony is based on remembering an event, not on remembering the contents of whatever is shown to the witness, “that which prompted the witness’s memory is immaterial.” 376 Thus, Wilcox should have been allowed to use the arrest affidavit summary to refresh Curry’s memory, if it could.

B. Impeachment with Prior Convictions

Section 90.608 of the Florida Statutes recognizes that any party may impeach a witness and that there are multiple ways of doing so. 377 One standard method of impeaching a witness’s credibility is by showing the witness has committed certain crimes that theoretically cast doubt on the witness’s ability to tell the truth. 378 Section 90.610(1) of the Florida Statutes limits these crimes to ones “punishable by death or imprisonment in excess of [one] year” in the jurisdiction of conviction 379 or ones that involved “dishonesty or a false statement regardless of the punishment.” 380

370. Id. The court also refused to let Wilcox use the summary to impeach Curry. Id.
371. Id.
372. Wilcox, 143 So. 3d at 378.
374. Wilcox, 143 So. 3d at 379; see also FLA. STAT. § 90.613 (2014).
375. See Garrett, 336 So. 2d at 569.
376. Wilcox, 143 So. 3d at 378. Sometimes the witness’s memory of the underlying event or fact is not truly refreshed. See K.E.A. v. State, 802 So. 2d 410, 411 (Fla. 3d Dist. Ct. App. 2001). Rather what the witness has used as the basis for his or her subsequent testimony is what has been just shown to the witness. See id. When opposing counsel suspects this is the case, section 90.613 of the Florida Statutes requires that the item used to refresh recollection be produced so opposing counsel can use it to demonstrate this continued memory failure. FLA. STAT. § 90.613.
377. Id. § 90.608.
378. Id. § 90.610.
379. Id. § 90.610(1). These are commonly called felonies, as the quoted language is the standard definition for a felony at common law. See id. § 90.610; State v.
While section 90.610 of the Florida Statutes sets out what general crimes qualify for impeachment, case law has delineated the proper procedure for doing so. The questioning attorney should ask, “have you ever been convicted of a felony or a crime involving dishonesty [or false statement]?”381 If the witness admits committing crimes of these types, then the questioner is limited to asking either, if so, how many? Or just how many?382 If the witness answers both questions accurately, further questions about the witness’ criminal record should not be asked; at least not for purposes of impeaching by a prior conviction.383

In the Wilcox case described above, problems also arose about the proper way of doing this type of impeachment.384 Wilcox testified and denied his involvement in the murder, kidnappings, and robbery.385 On cross-examination the prosecutor asked him: “[H]ave you been previously convicted of a felony or crime involving dishonesty?”386 After a short exchange between the two, Wilcox admitted, “I have been convicted of a crime.”387 When again asked if he had been convicted of a felony or crime involving dishonesty, Wilcox replied saying, “[g]ot to make me understand. As far as dishonesty is concerned, I do [not] see where I lied about anything.”388 The prosecutor told him it was not the state’s job to make him understand and asked for the third time about felonies or crimes of dishonesty.389 Wilcox replied by saying, “I got to say no.”390

The prosecutor responded by inquiring if Wilcox had been convicted of second degree murder, armed robbery, and grand theft motor vehicle.391 Wilcox admitted he had, but added it was as an accomplice.392 The
prosecutor then asked Wilcox about each crime in turn and whether he considered that type crime to be a crime of dishonesty or dishonest, beginning with the theft conviction and ending with the second degree murder conviction.\textsuperscript{393}

The defendant argued that allowing the State to impeach him by mentioning his specific crimes was improper, because the prosecutor had to exploit his confusion about the questions to do so.\textsuperscript{394} In turn, the State argued Wilcox was being \textit{cagey}\textsuperscript{395} and wrongfully tried to resist answering the State’s questions.\textsuperscript{396} Additionally, the State argued this issue had not been preserved for appeal by a contemporaneous objection.\textsuperscript{397}

The Supreme Court of Florida partially agreed with both sides.\textsuperscript{398} The Court found that Wilcox was genuinely confused by the questioning itself when he said, “[y]ou [g]ot to make me understand” that he may have been confused about the proper way to object to the cross-examination and that the trial court was aware of this confusion.\textsuperscript{399} As there was no indication Wilcox did not fail to object to gain a tactical advantage; and also with the leeway pro se defendants should be given, the Court found the claim of error preserved.\textsuperscript{400}

As to the merits of Wilcox’s claim, the Court found that the trial judge did not abuse his discretion in letting the State initially inquire about Wilcox’s criminal record for the three convictions.\textsuperscript{401} The convictions were all felonies, thus permissible for impeachment.\textsuperscript{402} Besides this, Wilcox was given several chances to ask for help from standby counsel but did not do so.\textsuperscript{403} Although he truthfully said one time that he had been convicted of \textit{a crime}, he had also twice explicitly said \textit{no} when asked about this.\textsuperscript{404} Thus, the State was entitled to clear this up at trial.\textsuperscript{405}

However, even with this entitlement, the State’s follow up questions about whether Wilcox considered certain of the felonies crimes of dishonesty

\textsuperscript{393.} \textit{Id.}
\textsuperscript{394.} \textit{Id.}
\textsuperscript{395.} \textit{Id.}
\textsuperscript{396.} \textit{Id.}, 143 So. 3d at 372.
\textsuperscript{397.} \textit{Id.}
\textsuperscript{398.} \textit{Id.} at 373–74.
\textsuperscript{399.} \textit{Id.} at 372–73.
\textsuperscript{400.} \textit{Id.} at 373.
\textsuperscript{401.} \textit{Wilcox}, 143 So. 3d at 373–74.
\textsuperscript{402.} \textit{Id.} at 374.
\textsuperscript{403.} \textit{Id.} at 373.
\textsuperscript{404.} \textit{Id.} at 372–73.
\textsuperscript{405.} \textit{Id.} at 373–74. The Supreme Court may have found that Wilcox likely was, or at least probably was, partially lying at trial. \textit{See Wilcox}, 143 So. 3d at 372. The Court declared that “[a] reasonable person could conclude that Wilcox was being, as the State contends, \textit{cagey} with his responses to the prosecutor’s questions.” \textit{Id.} at 373.
was erroneous. 406 Once the State was able to show he had a past criminal record of certain type felonies, questioning about them should have stopped. 407 Florida law recognizes that some crimes involve dishonesty or false statement and some do not. 408 However, this distinction is important for impeachment purposes only when the crimes are misdemeanors, not felonies. 409 Since any felony can be used to impeach under section 90.610(1) of the Florida Statutes, whether the felony additionally involved dishonesty was irrelevant. 410 What the prosecution tried to do here was to get double mileage from the same felony conviction. 411 The Supreme Court of Florida concisely summed up its ruling on this point. After a witness’s prior convictions are displayed by name and number before a jury, “the prosecution may not then continue to question the witness regarding whether his or her prior felony convictions are also crimes of dishonesty.” 412

The prosecution’s impeachment by prior convictions was also incorrect for other points not discussed by the Court. First, robbery and motor vehicle theft are crimes of dishonesty under Florida law. Second, none of the prosecutor’s questions about the crimes being ones of dishonesty ever should have been allowed for another reason. The questions asking whether Wilcox considered certain crimes to involve dishonesty asked for Wilcox’s opinions about what he had done in the past. 413 This is irrelevant for prior conviction impeachment purposes. What should count is not what Wilcox felt about his crimes being ones of dishonesty, but whether as a matter of Florida law, they were. Both the prosecutor and trial judge seem to have ignored this distinction, and the Supreme Court of Florida’s opinion surprisingly fails to comment on it.

Even with these additional errors, the Supreme Court of Florida’s finding of harmless error is easily defensible given the apparent overwhelming evidence of Wilcox’s guilt and lack of credibility. 414

C. Inappropriate Witness Dress in Criminal Cases

The next witness examination issue does not involve actual witness questioning.

406. Id. at 374.
407. Id.
408. See State v. Page, 449 So. 2d 813, 815 (Fla. 1984).
409. Wilcox, 143 So. 3d at 374.
410. Id. at 374; FLA. STAT. § 90.610(1) (2014).
411. See Wilcox, 143 So. 3d at 374.
412. Id.
413. Id. at 372, 374.
414. See id. at 374–75.
Hopefully, it also arises so rarely that seeing a case having to discuss it is surprising indeed. Finally, the fact that the issue could have been easily avoided by the use of good judgment is especially disappointing since it led to reversible error.415

In Hayes v. State,416 the State claimed the defendant and another man committed armed robbery and assault against a single victim.417 Hayes was tried alone.418 The victim identified Hayes at trial, and the jury was not told if the second person had ever been caught.419 The robbery took place in the front yard of a man named Pharory Greene.420 Greene appeared as a defense witness, claimed that he saw the robbery take place, and that Hayes was not one of the perpetrators.421

The problem was not with what Greene said but how he had to say it. Greene, at the time of Hayes’s trial, was incarcerated in the jail for an unnamed offense.422 The offense apparently had no connection with the robbery on trial. Greene, over defense objections, had to testify wearing jail clothes.423 Days before the trial, defense counsel had brought clothes to the jail for Greene to change into before taking the stand.424 When Greene was brought to court in jail garb, defense counsel objected to this.425 He argued that the State would not ordinarily be permitted to cross-examine the witness about his incarceration;426 but that once Greene appeared in jail clothes, his prisoner status would be obvious.427 The trial court overruled this objection stating, “[w]e [do not] dress out witnesses” no matter whom they would testify for.428 Counsel also argued the jury would think Greene was a codefendant, while he in fact was not.429 The defense wanted to bring this out but declined to do so when the trial judge said it would open up Greene

415.  Id. at 1108–09.
416.  140 So. 3d 1106 (Fla. 1st Dist. Ct. App. 2014).
417.  Id. at 1107.
418.  See id.
419.  Id.
420.  Id.
421.  Hayes, 140 So. 3d at 1108.
422.  Id. at 1107.
423.  Id. at 1107–08.
424.  Id.
425.  Id. at 1107.
426.  Hayes, 140 So. 3d at 1107. The opinion never mentions the exact offense for which Greene was jailed. See id. at 1107–08. However, it was obviously one that was unavailable for impeachment by prior conviction under section 90.610(1) of the Florida Statutes. See id. at 1107; FLA. STAT. § 90.610(1) (2014).
427.  Hayes, 140 So. 3d at 1107.
428.  Id. (first alteration in original).
429.  Id.
to inquiry about his criminal history. Greene ultimately testified in jail clothes, and the jury never heard he was not a codefendant to the robbery charge.

In a short but well-reasoned opinion, the First District reversed and remanded for a new trial. The court first discussed the prohibition against forcing a defendant to testify in jail clothing. To do so would violate several of an accused’s fundamental rights. First, it would violate his presumption of innocence. Secondly, it would also violate his right to equal protection of the law as forcing defendants to testify in jail clothes would usually only affect those who could not make bail before trial.

As to forcing a defense witness to testify dressed in jail clothes, only the Second District Court of Appeal had previously addressed this issue. In Mullins v. State, the court found such to be error as it could have an indirect effect on the accused’s presumption of innocence. Witnesses do not have the same presumption of innocence as defendants, but defendants should not be exposed to the dangers of guilt by association or to having their witness’s credibility unfairly undermined by matters that would be otherwise unusable for impeachment.

The First District agreed with this reasoning and noted that courts from other states agreed with it as well. Hayes also commented that at least one other state court had found that forcing a defense witness to testify in jail clothes generally “‘further[s] no vital State interest.’” The First District recognized there could be unusual situations when safety concerns or other circumstances justified requiring witnesses to testify in jail clothes or even physical restraints. But this was not the case here. Instead, it

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430. Id. at 1107–08.
431. Id. at 1108.
432. Hayes, 140 So. 3d at 1108–09.
433. Id. at 1108.
434. Id.
435. Id.
436. Id.
437. See Hayes, 140 So. 3d at 1108; Mullins v. State, 766 So. 2d 1136, 1136 (Fla. 2d Dist. Ct. App. 2000).
438. 766 So. 2d 1136 (Fla. 2d Dist. Ct. App. 2000).
439. Id. at 1137.
440. See id.
441. Hayes, 140 So. 3d at 1108.
442. Id. (quoting State v. Artwell, 832 A.2d 295, 303 (N.J. 2003)).
443. Id. at 1109.
444. Id.
seemed that it was merely “not the common practice” for this judge to let prisoner witnesses’ change into civilian clothes before testifying.

The appellate court refused to find harmless error. Greene’s testimony that Hayes was not one of the robbers was critical to Hayes’s defense; thus, anything detracting from Greene’s credibility could hurt this. The court thus could not say there was “no reasonable possibility that the error contributed to the conviction.”

Three things in general should happen as a result of this decision. First, this practice should be stopped. Indeed, it is almost inconceivable that it happened in the first place. Perhaps, the First District’s opinion should be required reading for newly elected or appointed judges when they attend judge school. Second, defense counsel should be alert, like the one here, to object to this when it might take place. Finally, prosecutors should also try to prevent such errors from taking place. Prosecutors have an ethical obligation to seek justice and not just try to get convictions at all cost. Additionally, why would any smart prosecutor want this to happen when it might easily lead to reversible error like it did here? In fairness to the State in this case, there is no mention of the State ever objecting to Greene testifying in civilian clothes or objecting to a short continuance while he changed. In the future, prosecutors should join with defense counsel to see that this scenario is never repeated.

D. \textit{Impeaching a Hearsay Declarant}

Occasionally, statements from someone who does not actually testify get admitted as substantive proof. If offered for their truth, the statements are hearsay. When this happens, section 90.806(1) of the Florida Statutes provides in part that the declarant’s credibility “may be attacked . . . by any evidence that would be admissible for those purposes if the declarant had testified as a witness.” Cases construing this provision seldom arise for

\begin{itemize}
\item 445. \textit{Id.}
\item 446. \textit{Hayes}, 140 So. 3d at 1109.
\item 447. \textit{Id.}
\item 448. \textit{See id. at 1107–09.}
\item 449. \textit{Id.} at 1109 (quoting State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986)).
\item 450. \textit{See MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. 1 (Am. Bar Ass’n 2013).}
\item 451. \textit{See FLA. STAT. § 90.801(1)(c) (2014).}
\item 452. \textit{Id.}
\item 453. \textit{Id.} § 90.806(1). This subsection also provides that if so attacked, the declarant’s credibility “may be supported by any evidence that would be admissible for those purposes if the declarant had testified as a witness.” \textit{Id.}
various reasons. First, it is more persuasive to rely on testimony from actual witnesses than from someone’s statement about what someone else said. Second, the Sixth Amendment’s Confrontation Clause acts as a partial check on admission of some hearsay from unavailable declarants.

One instance where counsel may try to admit hearsay from unavailable declarants involves defendants who want their exculpatory out-of-court statements admitted without their having to testify and be fully cross-examined. Provisions of section 90.806(1) of the Florida Statutes stand as a partial obstacle for those defendants who wish to have their cake and eat it too by doing this. One 2014 case illustrates both the danger to the criminally accused in trying to do so and also sets parameters on the extent of the State’s ability to impeach hearsay declarants.

In Mathis v. State, the State charged James Mathis with possession of cocaine and possession of drug paraphernalia. The drugs were found when the police executed a search warrant at Mathis’ residence. He was home and arrested after the drugs were found. On cross-examination, a police officer admitted talking with Mathis the day of the arrest. The officer conceded Mathis never made any admissions during their conversation. The trial court, on the State’s request, ruled the defense had introduced exculpatory testimony during the cross-examination, thus entitling the State to introduce copies of Mathis’ eight felony convictions and one misdemeanor conviction for a crime of dishonesty. The State did so, and Mathis was convicted.

On appeal, Mathis argued the officer’s cross-examination testimony was not exculpatory. The Second District disagreed as the conversation established Mathis “presumably denied . . . the drugs belonged to him.”

454. *See* FLA. STAT. § 90.806; 1 EHRHARDT, *supra* note 21, at § 801.1.
455. *See* 1 EHRHARDT, *supra* note 21, at § 801.1.
456. *See* U.S. CONST. amend. VI; FLA. STAT. § 90.806.
458. *See* FLA. STAT. § 90.806(1).
460. Id.
461. Id. at 485.
462. Id.
463. Id.
464. Id.
465. Id.
466. Id.
467. Id.
468. Id.
469. Id. This ruling seems undoubtedly correct. Why would the defense have asked the question involved if not to elicit exculpatory testimony?
Thus, the State could impeach him by prior convictions. However, the appellate court agreed the State’s actual impeachment of Mathis went too far. While the State was entitled to impeach Mathis with his past criminal record, it was not automatically entitled to introduce copies of the prior convictions themselves. Had Mathis taken the stand and testified, he could have been impeached by prior conviction under section 90.610 of the Florida Statutes. Under this rule, the State could have asked Mathis if he had ever been convicted of a felony or any crimes involving dishonesty or false statements. If Mathis had said yes, the State would then have been allowed to ask him how many? or how many times? If Mathis had given accurate answers to both questions, further interrogation on his prior convictions would have been disallowed. The State would only have been able to introduce copies of his prior convictions if Mathis had answered untruthfully to one of the two previous answers.

In Huggins v. State, the Supreme Court of Florida permitted introduction of a defendant’s prior convictions after he elicited his own statements as favorable hearsay but limited the procedure for doing so. The trial court told the jury of the number of the accused’s convictions and whether they were for felonies or for crimes of dishonesty or false statement. The trial court also gave a special limiting instruction on the permissible use of the convictions. The names of the convictions were never mentioned. After Huggins, in Freeman v. State, the district court of appeal suggested an added procedure. The trial court should wait until the defense rests before deciding on a state’s request to impeach a hearsay declarant.

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470. Id.
471. Id.
472. Id. at 485–86.
473. Id.; see also Fla. Stat. § 90.610 (2014).
474. Mathis, 135 So. 3d at 485–86; see also Fla. Stat. § 90.610.
475. Mathis, 135 So. 3d at 487.
476. Id. at 486–87.
477. Id. at 487.
478. 889 So. 2d 743 (Fla. 2004).
479. Id. at 755–56.
480. Id. at 754.
481. Id.
482. Id. at 756–57.
483. 74 So. 3d 123 (Fla. 1st Dist. Ct. App. 2011).
484. See Huggins, 889 So. 2d at 755–57; Freeman, 74 So. 3d at 125.
485. Freeman, 74 So. 3d at 125.
could proceed according to the usual procedure.\textsuperscript{486} If not, the impeachment would follow as Huggins discussed.\textsuperscript{487}

The trial court in \textit{Mathis} followed neither procedure.\textsuperscript{488} It did not wait to see if Mathis would ultimately testify.\textsuperscript{489} It also did not give a cautionary jury instruction to use Mathis’ prior convictions only to evaluate the credibility of his out-of-court statements and not as substantive proof of guilt, which would have been improper propensity use of the convictions.\textsuperscript{490} Finally, it improperly admitted copies of the convictions, thus allowing the jury to see the exact crimes he was convicted for.\textsuperscript{491} The Second District declined to find these errors were harmless.\textsuperscript{492} Only one witness said the drugs were Mathis’, and her own credibility was in question because of her prior convictions.\textsuperscript{493}

\section*{V. ATTORNEY-CLIENT PRIVILEGE}

The privilege for attorney-client confidential communications is recognized by all states and by federal case law as well.\textsuperscript{494} Section 90.502(2) of the Florida Statutes provides that “[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing the contents of confidential communications when such other person learned of the

\begin{itemize}
\item \textsuperscript{486} \textit{Id.}
\item \textsuperscript{487} \textit{Id.; Huggins}, 889 So. 2d at 755–57.
\item \textsuperscript{488} \textit{Mathis v. State}, 135 So. 3d 484, 486 (Fla. 2d Dist. Ct. App. 2014); see also \textit{Huggins}, 889 So. 2d at 755–57; \textit{Freeman}, 74 So. 3d at 125.
\item \textsuperscript{489} \textit{Mathis}, 135 So. 3d at 486–87.
\item \textsuperscript{490} \textit{Id.} The cautionary instruction in \textit{Freeman} is a good example of what the jurors should have been told. \textit{Id.} at 486; see also \textit{Freeman}, 74 So. 3d at 125. “[E]vidence of prior convictions should be considered only for the purpose of assessing the defendant’s credibility of statements he allegedly made that were related by a witness and are not to be considered as proof of guilt for the charged offense.” \textit{Freeman}, 74 So. 3d. at 125.
\item \textsuperscript{491} \textit{Mathis}, 135 So. 3d at 485. The court’s opinion does not say whether this happened, but if the copies had been allowed back into the jury room during deliberations, this would have been further error. \textit{See id.} at 485–87.
\item \textsuperscript{492} \textit{See id.} at 487.
\item \textsuperscript{493} \textit{Id.} at 487.
\item \textsuperscript{494} \textit{See, e.g., Ford Motor Co. v. Leggat}, 904 S.W.2d 643, 647 (Tex. 1995). Federal Rule of Evidence 501 recognizes several general types of privileges: Those recognized at common law; those in the U.S. Constitution; those created by federal statute; and those created by the rules of the Supreme Court of the United States. \textit{Fed. R. Evid.} 501. When a common law version of a privilege conflicts with any of the latter three types, the common law version gives way. \textit{Id.}

The attorney-client privilege has long been recognized as existing at common law and thus, continues to exist under federal case law. \textit{See id.} 501, 502. Federal Rule of Evidence 502 specifically discusses waiver limitations and inadvertent disclosure of material otherwise protected by the attorney-client privilege and its closely related common law cousin, work product. \textit{Id.} 502.
communications because they were made in the rendition of legal services to the client.495 Cases on the privilege decided during this Survey period seemed to fall within two main areas.496 They involved questions about the privilege’s scope and its waiver, or about the crime-fraud exception to the privilege.497 Each of these areas deserves brief discussion.498

A. Scope and Waiver of the Attorney-Client Privilege

The privilege does not protect all interchange of information between clients and their lawyers, only those communications that are considered confidential and made to get or give legal advice.499 Florida law places the burden on the party claiming the privilege to show it exists and also to show it has not been waived.500 During this Survey period, Florida courts found the following protected by the privilege: fee arrangements between clients and their attorneys,501 billing records between clients and attorneys,502 and original draft responses to interrogatories sent from the client to her attorney.503 However, information that would not be protected in a client’s possession does not become protected by transfer to an attorney.504 Thus, trust account wire receipts reflecting payments into a law firm’s trust accounts after judgment was obtained against a judgment debtor are not protected by the privilege.505

As with other privileges, the one for attorney-client communications can be waived.506 This may be done by answering questions at a

495. FLA. STAT. § 90.502(2) (2014).
496. See Genovese v. Provident Life & Accident Ins. Co., 74 So. 3d 1064, 1065–66 (Fla. 2011), review denied, 157 So. 3d 1043 (Fla. 2014); Merco Grp. of the Palm Beaches, Inc. v. McGregor, 162 So. 3d 49, 50 (Fla. 4th Dist. Ct. App. 2014); RC/PB, Inc. v. Ritz-Carlton Hotel Co., 132 So. 3d 325, 326 (Fla. 4th Dist. Ct. App. 2014); infra Sections V.A–V.B.
497. See Genovese, 74 So. 3d at 1065–66; McGregor, 162 So. 3d at 50; RC/PB, Inc., 132 So. 3d at 326; infra Sections V.A–V.B.
498. See infra Sections V.A–V.B.
499. See FLA. STAT. § 90.502(1)(c)(1).
500. RC/PB, Inc., 132 So. 3d at 326.
502. Id. at 599.
505. Id.
506. See FLA. STAT. § 90.507 (2014) (discussing waiver in general for all privileges); infra Part VI (discussing waiver of the psychotherapist-privilege).
deposition\textsuperscript{507} or by using the communications as the basis for arguments or answering questions at a hearing.\textsuperscript{508}

One recent case concerning the privilege’s scope in bad faith tort actions is worthy of discussion.\textsuperscript{509} Insurance companies owe a duty of good faith to their insureds in defending them in lawsuits.\textsuperscript{510} The companies also owe a duty of good faith to the plaintiffs bringing such lawsuit to process the plaintiffs’ claims in a reasonable manner.\textsuperscript{511} When a plaintiff is awarded a judgment against an insured in excess of the insured’s policy limits, both first-party and third-party bad faith actions against the company become a possibility.\textsuperscript{512}

\textit{Boozer v. Stalley}\textsuperscript{513} involved the following factual background. Benjamin Hintz was severely injured in a motor vehicle accident involving Emily Boozer.\textsuperscript{514} Boozer was covered by two Allstate policies totaling $1.1 million coverage.\textsuperscript{515} Douglas Stalley, Hintz’s guardian, sued Boozer for negligence and recovered a $11.1 million verdict.\textsuperscript{516} Allstate paid its policy limits exposure, leaving $10 million unsatisfied.\textsuperscript{517} Virgil Wright, an attorney, had been retained to defend Boozer.\textsuperscript{518} When Stalley filed a third-party bad faith action against Allstate to collect the unsatisfied balance, Wright continued to appear on Boozer’s behalf in the post judgment proceedings.\textsuperscript{519} Stalley wished to both depose Wright and to subpoena his files in the underlying negligence action.\textsuperscript{520} Wright moved for a protective order, asserting attorney-client privilege.\textsuperscript{521} Wright argued that communications between he and Boozer were privilege protected and that she had not assigned any first-party bad faith claim she might have against

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{507} See Montanez, 135 So. 3d at 512. However, here, the court found the actual answers did not constitute a waiver. \textit{Id.} at 512–13.
\item \textsuperscript{508} See Butler v. Harter, 152 So. 3d 705, 713–14 (Fla. 1st Dist. Ct. App. 2014). Here, the court found that an attorney’s affidavit merely listing the number of hours worked on a case and the fees incurred did not disclose privileged information. \textit{Id.} at 714.
\item \textsuperscript{509} Boozer v. Stalley, 146 So. 3d 139, 140 (Fla. 5th Dist. Ct. App. 2014) (en banc).
\item \textsuperscript{510} \textit{Id.} at 143.
\item \textsuperscript{511} \textit{Id.} at 143–44, 44 n.1.
\item \textsuperscript{512} \textit{Id.} at 142.
\item \textsuperscript{513} 146 So. 3d 139 (Fla. 5th Dist. Ct. App. 2014) (en banc).
\item \textsuperscript{514} \textit{Id.} at 139.
\item \textsuperscript{515} \textit{Id.}
\item \textsuperscript{516} \textit{Id.}
\item \textsuperscript{517} \textit{Id.}
\item \textsuperscript{518} Boozer, 146 So. 3d at 141.
\item \textsuperscript{519} \textit{Id.}
\item \textsuperscript{520} \textit{Id.}
\item \textsuperscript{521} \textit{Id.}
\end{itemize}
\end{footnotesize}
Allstate to Stalley. Wright appeared at a deposition with his litigation file. He answered general questions about his case management system and also about how his files were organized. He refused to answer any questions or produce documents relating to his direct representation of Boozer. Both Wright and Boozer petitioned for a writ of certiorari claiming the trial court erred by not granting them a protective order. Stalley responded that since he had filed a third party action, he stood in Boozer’s shoes and should be able to obtain any communications that would be available to her as a client.

After deciding that certiorari review was an appropriate means to address the legal issues here, the Fifth District Court of Appeal undertook an extensive review of the law in this area. Boston Old Colony Insurance Co. v. Gutierrez was deemed the first modern decision to consider whether an attorney representing both an insured and an insurer could be deposed and required to produce a litigation file in a third-party bad faith action brought without an assignment of claim from the insured. There, the court found the plaintiff was entitled to the insured’s attorney’s entire file from the lawsuit’s start until the date judgment was entered in the underlying action. This was so because the excess judgment creditor now stood in the position of the insured as far as bringing a bad faith action. Following Gutierrez, the Fifth District in Dunn v. National Security Fire & Casualty Co., had rejected claims of both work product and attorney-client privilege protection against disclosure of original litigation files in third party bad faith actions.

In Boozer, the Fifth District acknowledged both those decisions supported the trial court’s ruling that Stalley should be able to review parts of Wright’s litigation file and to depose him about his representation of her. However, the Court found two subsequent Supreme Court decisions left the

\[522. \text{Id.} \]
\[523. \text{Boozer, 146 So. 3d at 141.} \]
\[524. \text{Id.} \]
\[525. \text{Id.} \]
\[526. \text{Id.} \]
\[527. \text{Id.} \]
\[528. \text{Boozer, 146 So. 3d at 141–48.} \]
\[529. 325 \text{So. 2d 416 (Fla. 3d Dist. Ct. App. 1976).} \]
\[530. \text{Id. at 416–17.} \]
\[531. \text{Id. at 417.} \]
\[532. \text{Id.} \]
\[533. 631 \text{So. 2d 1103 (Fla. 5th Dist. Ct. App. 1993).} \]
\[534. \text{Id. at 1105; see also Gutierrez, 325 So. 2d at 417.} \]
\[535. \text{Boozer v. Stalley, 146 So. 3d 139, 139, 140, 142, 147–48 (Fla. 5th Dist. Ct. App. 2014) (en banc).} \]
holdings in Gutierrez and Dunn in question. Allstate Indemnity Co. v. Ruiz, had held that in statutory first-party bad faith actions, work product material was discoverable depending upon whether the requesting party could show both a need for such and substantial hardship unless it is able to do so. In so doing, the court refused to draw any distinction for discovery purposes between first-party and third-party bad faith actions.

The Fifth District found Ruiz’s possible impact potentially countered by the Supreme Court of Florida’s later holding in Genovese v. Provident Life & Accident Insurance Co., a first-party bad faith action case that refused to extend Ruiz’s holding to discovery issues involving attorney-client privileged communications. Genovese noted a clear distinction between the purposes behind each privilege. The work product privilege exists to protect an attorney’s efforts to prepare, bring and defend litigation. However, it can be overcome in circumstances of need and hardship. The attorney-client privilege exists to foster open communications in the attorney-client relationship. Unlike work product, claims of need and hardship are not sufficient to abrogate this privilege. As there is no statutory exception for disclosure of this privilege’s protected communications in first-party bad faith actions, the privilege protected communications between an insurer and its attorney in these cases.

The Fifth District noted that the certified question in Genovese was limited to first-party action cases. However, Boozer examined cases from Florida’s state and federal courts that found the same result should be

536. Genovese v. Provident Life & Accident Ins. Co., 74 So. 3d 1064, 1069 (Fla. 2011), review denied, 157 So. 3d 1043 (Fla. 2014); Allstate Indem. Co. v. Ruiz, 899 So. 2d 1121–22 (Fla. 2005); see also Gutierrez, 325 So. 2d at 417; Dunn, 631 So. 2d at 1105.
537. 899 So. 2d 1121 (Fla. 2005).
539. Ruiz, 899 So. 2d at 1122.
540. Id. at 1131. Ruiz contains a helpful discussion on the evolution of third-party and first-party actions in Florida. Id. at 1129.
541. 74 So. 3d 1064 (Fla. 2011), review denied, 157 So. 3d 1043 (Fla. 2014).
542. Id. at 1069; see also Ruiz, 899 So. 2d at 1132.
543. Genovese, 74 So. 3d at 1067.
544. Id.
545. Id. at 1068.
546. Id. at 1067.
547. Id. at 1068.
548. See Genovese, 74 So. 3d at 1068; FLA. STAT. § 90.502(c) (2014).
549. Genovese, 74 So. 3d at 1065–66.
obtained in third-party bad faith actions. Thus, it found the protective order should have been granted in Boozer.

The court in so doing, recognized the uncertainty in this area and certified the following question as one of great public importance:

“DO THE DECISIONS IN ALLSTATE INDEMNITY CO. V. RUIZ . . . AND GENOVESE V. PROVIDENT LIFE & ACCIDENT INSURANCE CO. . . . SHIELD ATTORNEY-CLIENT PRIVILEGED COMMUNICATIONS FROM DISCOVERY IN THIRD-PARTY BAD FAITH LITIGATION?”

The Supreme Court of Florida accepted jurisdiction on this question. However, before any briefs were filed, both parties moved to dismiss, and the court granted the motion. Justices Pariente and Lewis both filed dissents from the dismissal. Both justices argued that once the court accepted jurisdiction, it could still decide the issue regardless of the parties’ motions. Justice Pariente noted that the underlying bad faith claim had been removed to federal court. Thus, the privilege issue might arise again there, and the Supreme Court of Florida could be asked to decide it on a certified question. Both justices also recognized the present uncertainty that exists in this area and the need for its resolution.

This is an issue that is not likely to go away. When and how the Supreme Court of Florida ultimately resolves it cannot be determined. The author believes that proponents of the privilege protection have the better argument. If Florida is to recognize the privilege, then it should recognize it for all cases unless exceptional reasons exist for doing otherwise. Since the privilege is a creature of statute, any exceptions should be recognized first by the legislature. Yes, application of the privilege may mean that in some individual cases it will be very difficult, if not impossible, for plaintiffs like Stalley to successfully bring a claim. But that is the price to be paid whenever privilege protection exists. The legislature has decided so far that this price is one generally worth paying. The decision whether to change this should be left in its hands.

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552. Boozer, 146 So. 3d at 144.
553. See id. at 141, 148.
554. Id. at 148 (citations omitted).
556. Id.
557. Id.
558. Id.
559. Id. (Pariente, J., dissenting).
560. Stalley, 40 Fla. L. Weekly S221b (Pariente J., dissenting).
561. Id. (Pariente and Lewis, JJ., dissenting).
B. Crime-Fraud Exception

Statutorily, there are five exceptions where otherwise confidential communications are not protected by the attorney-client privilege. Statutorily, there are five exceptions where otherwise confidential communications are not protected by the attorney-client privilege. The most commonly invoked and discussed exception is the one dealing with claims of crime or fraud. The whole purpose for the privilege’s existence in the first place is to encourage people to seek legal advice without creating situations where either what prospective clients tell attorneys or what attorneys tell clients will come back to haunt the client. Lawyers need accurate and complete information from clients in order to best advise them, and clients should not be afraid their attorneys’ advice will be disclosed to the world unless the client chooses to do so. However, when a client seeks assistance for legally unworthy purposes, such as for advice on how to commit a crime or on how to hide assets from creditors after the fact, the privilege’s purposes are not being furthered.

During this Survey period, one case provided important instruction on how trial courts should proceed when claims of the crime-fraud exception are made. In Merco Group of the Palm Beaches, Inc. v. McGregor, judgment creditors served subpoenas upon Merco Group’s lawyers, seeking documents on the location and treatment of funds that had been put into Merco’s lawyers’ trust account. Merco opposed the subpoena, claiming the records were attorney-client privilege protected among other reasons. The trial court rejected all other reasons except the privilege claim. As to that, the judge ordered production of all documents for in camera review and also instructed Merco to file a privilege log identifying each specific document it claimed privileged. After this and an additional hearing on issues of relevancy, the judge ordered production of the documents, finding prima facie evidence Merco had used the attorney-client relationship to

563. Id. § 90.502(4)(a)–(e).
564. Id. § 90.502(4)(a). No case during this Survey period discussed any of the four other exceptions.
565. See Genovese, 74 So. 3d at 1065–66.
566. See id.
567. See Merco Grp. of the Palm Beaches, Inc. v. McGregor, 162 So. 3d 49 (Fla. 4th Dist. Ct. App. 2014).
568. See id. at 51.
569. 162 So. 3d 49 (Fla. 4th Dist. Ct. App. 2014).
570. Id. at 50.
571. Id.
572. Id. The opinion does not state what these reasons were. Id.
573. McGregor, 162 So. 3d at 50.
574. Id.
conceal assets that should have been discoverable. \textsuperscript{575} From this order Merco petitioned for certiorari. \textsuperscript{576}

The Fourth District agreed that the trial court’s procedure was improper and that its production order should be at least temporarily quashed. \textsuperscript{577} There was no error in ordering the in camera inspection of the documents. \textsuperscript{578} The court also did not address whether the trial judge’s conclusion that the creditors had made a prima facie of fraud was correct. Where the trial court erred was in not holding a subsequent evidentiary hearing after this finding where Merco could try to provide a “reasonable explanation of its conduct or communications.” \textsuperscript{579} Thus, whenever there is a claim the crime-fraud exception requires production of otherwise privileged information, at least two hearing should be required. \textsuperscript{580} The first hearing should be to address whether the exception might lie. \textsuperscript{581} This should be followed by in camera inspection that would protect the privileged information if the privilege claim is sustained. \textsuperscript{582} If the trial finds a prima facie case that the exception applies, an evidentiary hearing must be afforded the party claiming the privilege to further explain why the court’s tentative conclusion is incorrect. \textsuperscript{583} Only after rejecting any explanations from the privilege’s proponent should disclosure be ordered. \textsuperscript{584}

The hearing at which a party claims the exception applies must be noticed as an evidentiary one if the party plans to introduce proof there. \textsuperscript{585} Otherwise, counsel cannot fairly defend against claims the privilege is inapplicable. \textsuperscript{586} Failure to properly notify an opponent that a scheduled hearing is meant to be evidentiary in nature should mean that both any finding of fraud made there and any in camera inspection order should be quashed on certiorari. \textsuperscript{587} This situation occurred in Trans Health Management, Inc. v. Nunziata \textsuperscript{588} during this Survey period. \textsuperscript{589}

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575. \textit{Id.} at 50–51. The opinion also does not state what the judgment against Merco was for and how much it was for. \textit{Id.} at 50.
576. \textit{Id.} at 51.
577. \textit{McGregor}, 162 So. 3d at 51–52.
578. \textit{Id.} at 51.
579. \textit{Id.}
580. \textit{Id.}
581. \textit{Id.}
582. \textit{McGregor}, 162 So. 3d at 51.
583. \textit{See id.} at 50–51.
584. \textit{See id.} at 51.
585. \textit{See id.}
586. \textit{Id.}
587. \textit{McGregor}, 162 So. 3d at 51–52; \textit{see also} Trans Health Mgmt., Inc. v. Nunziata, 159 So. 3d 850, 859–60 (Fla. 2d Dist. Ct. App. 2014).
588. 159 So. 3d 850 (Fla. 2d Dist. Ct. App. 2014).
589. \textit{See id.} at 859–60.
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VI. PSYCHOTHERAPIST-PATIENT PRIVILEGE

Florida law contains a statutory privilege for confidential communications between a psychotherapist and patient. Section 90.503(2) of the Florida Statutes provides in part that patients have a general privilege against disclosure of confidential communications to their psychotherapist with several statutory exceptions. The broad nature and scope of this privilege is obviously to encourage people to seek assistance for their mental or emotional problems without having their discussions about them revealed to the world. During 2014, three reported cases discussed various aspects of this privilege.

A. The Privilege in General

*S.P. ex rel. R.P. v. Vecchio* demonstrates that the privilege affords protections to some persons who are not formal parties to litigation. Vecchio was accused of multiple sexual offenses against a fourteen-year-old child. The child told a night security guard at a condominium she had escaped from a man who molested her. The child received a physical exam from a Child Protection Team doctor which revealed semen in her vaginal area. Police interviewed Vecchio after the security guard identified him from surveillance footage in one of the condominium’s elevators. Vecchio admitted

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590. *FLA. STAT.* § 90.503(1)(a)(1)–(4) (2014). The definition of psychotherapist under this privilege is extremely broad. *See id.* It includes medical doctors, psychologists, credentialed clinical social workers, mental health counselors, family therapists, and treatment personnel of certain statutorily listed facilities if these persons “are engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction.” *Id.*

The definition also includes advanced registered nurse practitioners who are engaged in similar diagnosis or treatment care. *Id.* § 90.503(1)(a)(5).

591. *Id.* § 90.503(1)(b). A patient is someone who consults or is interviewed by a psychotherapist for “diagnosis or treatment of mental or emotional condition[s], including alcoholism and other drug addiction.” *FLA. STAT.* § 90.503(1)(b).

592. *See id.* § 90.503(2)–(4).


594. 162 So. 3d 75 (Fla. 4th Dist. Ct. App. 2014).

595. *Id.* at 77.

596. *Id.*

597. *Id.*

598. *Id.*
performing sexual acts with the victim.\footnote{S.P., 162 So. 3d at 77.} The semen discovered in the exam also was found to be the defendant’s.\footnote{Id.}

The victim had been sent out of state for treatment.\footnote{Id.} Unfortunately, she relapsed after ten months of treatment when she heard the case against Vecchio had not been concluded.\footnote{See id.} The treatment center filed a declaration of her unavailability, and the state said it would proceed without her as a witness.\footnote{Id. at 77–78.} Vecchio moved to subpoena her medical, psychiatric, and other records.\footnote{S.P., 162 So. 3d at 78.} The trial court conducted an \textit{in camera} review of the records and made one of them available to the defense.\footnote{Id.} The others were re-sealed.\footnote{Id.} After this, the defendant pled open “to lewd or lascivious battery, lewd or lascivious molestation, and battery on a child.”\footnote{S.P., 162 So. 3d at 78.} The State’s sentencing memorandum mentioned the victim’s continuing emotional distress, and her father testified about the same.\footnote{Id. at 79.} Vecchio moved the trial court to unseal the victim’s records, so he could raise a discovery violation on appeal.\footnote{Id.} S.P., the victim’s natural guardian opposed unsealing the records, arguing they were private and privileged.\footnote{Id.} The trial court granted Vecchio’s motion, and the State petitioned for certiorari review, which was granted.\footnote{Id. at 81.}

The Fourth District quashed the trial court’s order for several reasons.\footnote{Fla. Const. art. I, § 23.} Under Florida law, the Florida Constitution’s Right to Privacy\footnote{Id.; S.P., 162 So. 3d at 79.} protected the victim’s medical records from disclosure.\footnote{Fla. Stat. § 456.057(7)(a) (2014); S.P., 162 So. 3d at 79.} Florida statutory law also protects confidential medical records from disclosure.\footnote{S.P., 162 So. 3d at 79.} Finally, the psychotherapist-patient privilege protected her confidential communications to her doctors and others, made so she could get treatment.\footnote{Id. at 81.} The privilege admittedly created three statutory exceptions where disclosure was allowed: “(1) during involuntary commitment proceedings, (2) when . . . a court order[s] mental examination[s], [and] (3)
when the patient . . . relies on [his] mental condition . . . as [a] claim or defense” in litigation. However, none of these applied. The Fourth District also recognized that the privilege could be breached if good cause was shown but declined to find such here. The records would only have confirmed the victim’s trauma already shown at the sentencing hearing. As to any potential Brady v. Maryland discovery violation, the defendant did not meet his burden of showing this existed. The Fourth District also commended the trial court’s in camera review of the victim’s records as ensuring no exculpatory evidence was withheld.

The Fourth District’s last point, commending the trial court’s in camera review of alleged privileged records to see if an exception or good cause existed for their disclosure, stands in partial contrast to what happened in Scully v. Shands Teaching Hospital & Clinics, Inc. There, the appellant had filed a perceived disability based claim under the Florida Civil Rights Act alleging she had been wrongly constructively discharged. The alleged constructive discharge came from Scully’s refusal to give Shands a copy of a monitoring contract with the Professional Resource Network (“PRN”). Scully had been “admitted to a psychiatric hospital [due to] an adverse reaction to . . . medication for her psychiatric condition.” PRN assured Shands she could safely return to work and was in the process of establishing a monitoring contract with PRN.

Scully sought to protect her PRN records from discovery. The trial court denied her a protective order and ordered their production. Scully sought certiorari review in the district court.

The First District found the records relevant and not protected by the psychotherapist-patient privilege as “Scully placed her medical and psychiatric condition[s]” in issue by both the basis of her “claim and her

617. Id. at 79–80; see also Fla. Stat. § 90.503(4)(a)–(c).
618. S.P., 162 So. 3d at 80.
619. Id. at 79; see also Fla. Stat. § 394.4615(2)(c).
620. S.P., 162 So. 3d at 79–80.
621. Id. at 80.
623. S.P., 162 So. 3d at 79–80.
624. Id. at 80.
625. Id.; 128 So. 3d 986, 988 (Fla. 1st Dist. Ct. App. 2014).
626. Scully, 128 So. 3d at 988.
627. Id. at 987.
628. Id.
629. Id.
630. Id. at 988.
631. Scully, 128 So. 3d at 988.
632. Id.
request for emotional . . . damages. "633 Thus, a statutory exception contained in the privilege existed634 and some disclosure was appropriate.635

However, the disclosure’s scope was inappropriate.636 PRN had made its determination Scully could safely return to work in November 2011.637 The discovery request asked for any medical records and information about her without setting any time limitations.638 The trial court compounded this problem, but not limiting its order to the time period related to Scully’s claims.639 Furthermore, unlike the trial court in S.P., the trial court here had conducted no in camera review to make sure only records relevant to Scully’s claim were ordered disclosed.640 Thus, the case was remanded for the trial court to do so.641

The message collectively sent about the psychotherapist-privilege by these two decisions should be clear. Florida law seeks to protect as privileged, psychotherapist-patient confidential communications unless there is a clear good reason for not doing so.642 Even then, the privilege must be protected to all extent possible consistent with the legitimate needs of the parties.643 Thus, even when a statutory exception or other good cause for disclosure exists, trial courts should do in camera records review to make sure their disclosure orders are not broader than they should be.

2. Confidential Communications and Third Party Presence

Like any other privilege, the psychotherapist-patient privilege can be waived by its holder.644 Section 90.503(1)(c) of the Florida Statutes defines a confidential communications as one “not intended to be disclosed to third persons”645 except for three instances.646 Usually the presence of a third party to an otherwise confidential communication will destroy the

633. *Id.*
634. See *FLA. STAT. § 90.503(4)(c) (2014)* (providing that there is no privilege when any party “relies upon the [mental or emotional condition of the patient] as an element of [the party’s] claim or defense.”).
635. *Scully*, 128 So. 3d at 988.
636. *Id.* at 989.
637. *Id.* at 987.
638. *Id.* at 988.
639. *Id.* at 988–89.
641. *Scully*, 128 So. 3d at 989.
642. See *FLA. STAT. § 90.503 (2014).*
643. *S.P.*, 162 So. 3d at 79.
645. *FLA. STAT. § 90.503(1)(c).*
646. *Id.* § 90.503(1)(c)(1)–(3).
communication’s confidentiality and waive the privilege.647 The Fourth District in a case of first impression recently discussed a situation where it found that should not be so.648

Avery Topps stabbed a dog to death and then tried to be admitted to a hospital.649 A deputy sheriff went to the hospital to arrest Topps.650 An emergency room doctor acting as a psychotherapist to possibly provide either for the defendant’s psychiatric commitment or for his clearance to be jailed examined Topps with the deputy in the room.651 The deputy was present to provide for the medical staff’s safety.652 As standard part of Topps’ psychiatric evaluation, the doctor asked Topps why he came to the hospital.653 Topps then told the doctor about the stabbing.654 The State argued Topps waived any privilege by making the statements in the officer’s—a third party—presence.655

The trial court agreed with Topps and granted his motion to exclude the statement as privileged.656 In so doing, the judge found the officer had been present for multiple reasons: to keep custody of Topps, to ensure medical staff’s safety, and to make sure Topps got needed medical attention.657 Thus, as Topps had sought the treatment himself, “the deputy’s presence furthered the interest of the patient by allowing the examination to take place even though he was in custody as an arrestee.”658

The Fourth District acknowledged the general rule that when a third party hears a communication, that can often destroy confidentiality and make testimony about it admissible.659 However, the privilege statutory language recognizes there are times when third parties may be needed to help communication in the therapeutic setting or otherwise aid the patient’s interest in getting diagnosis or treatment.660 One of those third party groups are “[t]hose persons present to further the interest of the patient in the consultation, examination, or interview.”661 Another group includes

647. Topps, 142 So. 3d at 981.
648. Id. at 978.
649. Id. at 979.
650. Id.
651. Id.
652. Topps, 142 So. 3d at 979.
653. Id.
654. Id.
655. Id.
656. Id.
657. Topps, 142 So. 3d at 979.
658. Id.
659. Id. at 979–80.
660. Id. at 980; see also Fla. Stat. § 90.503(1)(c) (2014).
“persons necessary for the transmission of the communication.” 662 The deputy fell into both of these groups.663

The deputy’s presence furthered Topps’s interest in getting care because without it, no attempt to treat him would have occurred.664 Topps would not have been left alone with the doctor without law enforcement there.665 So the deputy’s presence was essential to Topps getting any help at all.666 The deputy was also a person whose presence was needed for the transmission of the communication because again, without the deputy being present, Topps would not have been allowed to be with the doctor.667 The doctor needed Topps’s statement as to why Topps came to the hospital for help.668 Topps would never have been able to make this statement if he had been immediately removed from the hospital itself.669 Additionally, no follow-up on the statement could be done without it being made in the first place.670

The Fourth District noted that sometimes a third party’s presence when a statement is made implies a waiver of an otherwise privileged communication.671 That should not be the case here because the deputy’s presence was not voluntary on Topps’s part.672 As long as Topps stayed in the room with the doctor, the deputy would be there whether Topps wished it or not.673 Since waivers usually must be voluntary or at least be implied voluntary from reasonable circumstances, no express or implied waiver was found here.674

The Topps opinion also gives several cogent policy reasons why waiver should not be found here. The policy behind the privilege is to not only protect certain communications patients do not want widely revealed but also to encourage those who feel in need of mental health care to seek it. Finding waiver here would discourage persons who commit criminal acts from seeking the mental health assistance they need. Finally, as the court

662. Id. § 90.503(1)(c)(2). A third group is “persons who are participating in the diagnosis and treatment under the direction of the psychotherapist.” Id. § 90.503(1)(c)(3). This third group clearly did not exist in State v. Topps. See id. § 90.503(1)(c)(3); Topps, 142 So. 3d at 978, 980–81.
663. See Topps, 142 So. 3d at 979, 981–82.
664. Id. at 981.
665. Id. at 981–82.
666. See id.
667. Id.
668. Topps, 142 So. 3d at 981.
669. See id. at 981–82.
670. See id. at 982.
671. Id. at 981.
672. Id.
673. Topps, 142 So. 3d at 979, 981.
674. Id. at 981–82.
noted, people should not have to give up their privilege against self-incrimination to seek medical treatment and diagnosis.675

Several points apparently not raised by the State are not addressed by the court’s opinion. Topps could have arguably whispered his answer to the doctor or have insisted the deputy stand far enough away so the deputy could not hear the answer.676 In theory, either of these could have been done. To insist that they be done to preserve the privilege would be ridiculous. First, Topps was already having problems or believed he had serious problems. Why else would he have gone to the hospital? To require under these circumstances that he whisper his answer would be to require extraordinary action from him. People should not have to go to extreme lengths to preserve their privileges. Second, even if Topps had wanted the deputy to stand far enough away so the deputy could not hear, the deputy might not have agreed to do so. Indeed, if concern for medical staff safety was one reason for the deputy’s presence, having him stand far away from Topps and the doctor could actually increase the risk of harm to medical staff. Topps supposedly had just engaged in a violent act, what is there to say he might not do so against the doctor?

The court’s opinion is a wise accommodation between the need for safety, security, and the need to have certain communications protected, so they will be made to begin with. True, the exclusion of Topps’s statement may mean there is not sufficient evidence to convict him. But the loss of potential evidence is always the price that must be paid to recognize and enforce a privilege’s protection. The legislature has decided this is not too great a price to pay to promote psychotherapist-patient interchange.677 Topps goes far in respecting and furthering that decision.

VII. HEARSAY

Unless someone is a hermit and lives alone in a cave or is a castaway stranded alone on a deserted island without any modern means of contact with the outside world, communication with other people is a daily fact of life. Indeed, one can hardly go through an ordinary day without it. As a result, many to most trials involve some testimony about what people say or write to one another.678 When these out-of-court statements are offered for their truth at trial, hearsay issues arise.679

675. Id. at 982; see also U.S. CONST. amend. V.
676. Topps, 142 So. 3d at 979–81.
677. See FLA. STAT. § 90.503(c) (2014).
678. See id. § 90.801(1); Topps, 142 So. 3d at 978–79; infra notes 800–10 and accompanying text.
679. See FLA. STAT. § 90.801(1)(c).
Section 90.801 of the Florida Statutes defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or [other] hearing offered in evidence to prove the truth of the matter asserted.” In theory, hearsay is inadmissible at trial. However, any experienced lawyer or judge knows this is a myth. Despite the general prohibition against admitting hearsay statements, most hearsay statements fall within either one of three statutory exemptions or one of the thirty exceptions to the general prohibition in the rules.

The key to handling hearsay issues is to first determine if a statement is hearsay to begin, with and, if so, then consider whether it falls within an exemption or exception. If a statement is not being offered for its truth, it is not hearsay. If hearsay falls within an exemption, it also is not considered hearsay, despite having all the attributes of a classical hearsay statement.

At one time, a number of common misconceptions as to what was or was not hearsay were prevalent. One would think that after almost forty years under the Code these misconceptions would no longer exist. Unfortunately, one recent case meriting brief mention shows that this is not so. In Taylor v. State, a victim told a police officer about the defendant’s alleged threats against her shortly after they happened. The defense objected to her testifying about these statements and convinced the trial court her statements

680. Id. § 90.801(1)(c).

681. Id. § 90.802. This principle is embodied by section 90.802 of the Florida Statutes, which states that “[e]xcept as provided by statute, hearsay evidence is inadmissible.”

682. See Fla. Stat. § 90.801(2)(a)–(c). Section 90.801 of the Florida Statutes, after defining hearsay, provides three explicit situations where statements, which would otherwise fall within this definition, are declared exempt from the prohibition: (1) prior inconsistent statements under oath; (2) prior consistent statements offered to rebut claims the declarant has a motive to falsify or fabricate; and (3) prior statements of identification. Id. § 90.801(1)(c), (2)(a)–(c). All three exemptions require that the declarant’s whose statement is being introduced testify and be subject to cross-examination about the earlier statement. Id. § 90.801(2)(a)–(c).

683. Section 90.803 of the Florida Statutes, which does not require declarant unavailability, contains twenty-four exceptions. See id. § 90.803. Section 90.804 of the Florida Statutes, which does have a declarant unavailability condition, has an additional six exceptions. See id. § 90.804.

684. Fla. Stat. § 90.801(1); Caballero v. State, 132 So. 3d 369, 371 (Fla. 4th Dist. Ct. App. 2014) (finding that a victim’s prior inconsistent statement that the defendant had not sexually battered her at a certain time was not hearsay, as it would have been admissible for impeachment purposes and not for its truth).

685. See Fla. Stat. § 90.801.


687. 146 So. 3d 113 (Fla. 5th Dist. Ct. App. 2014).

688. Id. at 114.
did not fall within the excited utterance exception. However, the trial court ruled her statements were *not hearsay at all* because the victim, the declarant, was available and subject to cross-examination at trial. As the Fifth District declared, “[i]n so ruling, the trial [court] articulated a common misconception about the hearsay rule.” Only if the victim’s out-of-court statements, which were clearly offered as a truthful account of what just happened to her, fell within one of the three exemptions in the rule could they be considered non-hearsay. As they did not, the statements were hearsay despite the declarant’s availability for cross-examination at trial.

As with other areas of evidence law, not every case mentioning the hearsay rule merits. Thus, this Survey does not discuss cases arising during 2014 concerning the following issues of hearsay: hearsay in restitution hearings, hearsay in probation revocation hearings, corpus delicti rule, prior consistent statements, state of mind exception, and past

689. *Id.* at 115; see also Fla. Stat. § 90.803(2). As the Fifth District said on appeal, this ruling was wrong. *See Taylor*, 146 So. 3d at 115–16.

690. *Id.* at 115.

691. *Id.*

692. *Id.*

693. *See Fla. Stat.* § 90.801(2); *Taylor*, 146 So. 3d at 115.

694. *Taylor*, 146 So. 3d at 115.

695. *See Phillips v. State*, 141 So. 3d 702, 705, 707 (Fla. 4th Dist. Ct. App. 2014) (finding a trial court erred in allowing a victim to testify as to the value of stolen items when the testimony was based on a website the victim had consulted).

696. *See McDoughall v. State*, 133 So. 3d 1097, 1100 (Fla. 4th Dist. Ct. App. 2014) (finding hearsay admissible at probation revocation hearings, but it cannot provide the only basis for revocation).

697. *Burks v. State*, 613 So. 2d 441, 446 (Fla. 1993) (Shaw, J., concurring and dissenting). Before the State can introduce an accused’s statement’s to prove an offense, it must offer evidence to independently prove the corpus delicti of the crime charged. *Id.* at 443. The corpus delicti has been defined as “the fact that a crime has actually been committed, that someone is criminally responsible” for it. *Id.* (internal quotation omitted); see also J.B. v. State, 166 So. 3d 813, 815–17 (Fla. 4th Dist. Ct. App. 2014) (reversing defendant’s petit theft conviction where the only evidence other than her admissions to the theft was inadmissible hearsay testimony from store employees who did not see the crime itself but only testified to an absent declarant’s statements).

The general corpus delicti rule is not statutorily codified, but comes from cases construing the Code’s exception for personal admissions. *See Fla. Stat.* § 90.803(18)(a). In certain types of sexual abuse crimes, the corpus delicti rule has statutorily been relaxed. *See id.* § 92.565(2) (provides that in certain prosecutions for sexual crimes, an accused’s statements can be introduced without proof of the corpus delicti if the trial court finds that “the state is unable to show the existence of each element of the crime, and . . . finds that the defendant’s confession or admission is trustworthy”). However, this does not preclude the state from introducing a defendant’s confession by satisfying the traditional requirements of corpus delicti needed for other, non-sexual offenses. *See Ramirez v. State*, 133 So. 3d 648, 652 (Fla. 1st Dist. Ct. App. 2014) (finding that when the state meets the traditional corpus
recollection recorded exception. Several significant cases on hearsay topics are discussed below.

A. Excited Utterances

1. In General

One of the traditionally recognized exceptions to the hearsay rule is that of excited utterances. Section 90.803(2) of the Florida Statutes defines these as “[a] statement or excited utterance relating to a startling event or condition made while the declaring was under the stress of

delicti requirement, the hearing and findings required under section 92.565 of the Florida Statutes do not apply).

698. See Fla. Stat. § 90.801(2)(b); Howard v. State, 152 So. 3d 825, 828–29 (Fla. 2d Dist. Ct. App. 2014) (finding that statement did not qualify under the exemption for prior consistent statements, under section 90.801(2)(b) of the Florida Statutes, as a state witness’s prior consistent statements elicited on direct examination were used prematurely to improperly bolster the witness’s testimony before any cross-examination had been done suggesting the witness was being untruthful).

699. See Fla. Stat. § 90.803(3)(a); Combs v. State, 133 So. 3d 564, 567 (Fla. 2d Dist. Ct. App. 2014) (finding that statements of a third party that he and another man planned to rob a bank defendant was accused of robbing should have been admitted under the state of mind exception). The statements showed the declarant’s present intent to do a future act, and the actual robbery provided enough of a basis to show the declarant had acted consistent with this intent. Fla. Stat. § 90.803(3)(a); see also Combs, 133 So. 3d at 567.

Under this exception, the statements must be offered to prove the declarant’s, not someone else’s state of mind or subsequent acts, and the declarant’s state of mind must be relevant. Fla. Stat. § 90.803(3)(a); see also Combs, 133 So. 3d at 567. For a recent case finding error in admitting statements under this exception when the declarant’s state of mind was not relevant, see Henderson v. State, 135 So. 3d 472, 476 (Fla. 2d Dist. Ct. App. 2014).

700. See Fla. Stat. § 90.803(5); Blount v. State, 152 So. 3d 29, 30–31 (Fla. 1st Dist. Ct. App. 2014) (finding the deposition of a victim who claimed he could not completely remember the event testified to in the deposition qualified as past recollection recorded when the other requirements for the exception were met); McNeal v. State, 143 So. 3d 1078, 1079–80 (Fla. 1st Dist. Ct. App. 2014) (finding that before a writing qualifies under this exception, the declarant must verify its accuracy or correctness. Here the victim’s failure to do so for her written out-of-court statement disqualified it under this exception.).

This Survey’s author notes that the defense did not object to the deposition being entered at trial on grounds that it would have violated the accused’s Confrontation Clause rights. See U.S. Const. amend. VI; Blount, 152 So. 3d at 30. Hopefully such an objection would be made if the state tries to make similar use of deposition in the future. See Blount, 152 So. 3d at 30. Whether the accused would have had a prior opportunity to cross-examine the victim for confrontation purposes would then have to be addressed. See Yero v. State, 138 So. 3d 1179, 1184 (Fla. 3d Dist. Ct. App. 2014). To the author’s knowledge, no reported case in Florida has addressed this issue.

701. See infra Sections VII.A–C.

702. See Fla. Stat. § 90.803(2).
excitement caused by the event or condition. 703 This exception and its requirements have been discussed in many reported cases. 704 Depending upon which case one wishes to cite, the exception has either two or three elements. 705 State v. Jano 706 appears to have the most complete one. There the Court found three requirements for the exception: (1) there must be an event sufficient to cause nervous excitement, (2) the declarant must in fact have been excited by the event, and (3) the declarant’s statement was made while the excitement from the event was continuing. 707 Another way of saying this by use of a trilogy is that there must be an excited statement made by an excited person whose excitement was caused by an exciting event. As this exception comes up fairly frequently, especially in criminal cases, the cases mentioning it during this Survey period are worth reviewing.

Nine-one-one telephone calls present a common scenario where a party, usually the State, argues there are excited utterances. 708 Emergency phone calls seem to so intuitively involve excited utterances that courts and attorneys may make the mistake of assuming this is so. 709 With any other exception, the proponent of the hearsay has the burden of demonstrating its requirements are met. 710 When an objection is made, the trial court should hold a brief hearing or make explicit findings on the record concerning the exception’s requirements before admitting the statements. 711 Failure to do so can often result in reversal. 712

Unless the declarant or someone who knew and heard the declarant when the call is made testifies, it will be difficult, if not impossible, to satisfy the exception’s requirements. For example, in Brandon v. State 713, a 911 caller identified the defendant as the person who had assaulted the caller and threatened her husband. 714 When the caller could not be at trial to testify

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703. Id.
705. See Jano, 524 So. 2d at 661; Taylor, 146 So. 3d at 115; Brandon, 138 So. 3d at 1152.
706. 524 So. 2d 660 (Fla. 1988).
707. Id. at 661; see also Stoll v. State, 762 So. 2d 870, 873–74 (Fla. 2000) (later discussed these same requirements but merely combined the second and third ones, so as to find two, instead of three requirements. Substantively this makes no difference).
709. See Morrison, 161 So. 3d at 565.
710. See Brandon, 138 So. 3d at 1152.
711. See id. at 1151–52; FLA. STAT. § 90.803(2) (2014).
712. See, e.g., Brandon, 138 So. 3d at 1152.
713. 138 So. 3d 1150 (Fla. 1st Dist. Ct. App. 2014).
714. Id. at 1151.
about the events, the State offered the call’s contents to prove them.\textsuperscript{715} After the contents were admitted and the accused convicted, the appellate court reversed.\textsuperscript{716} As neither the caller nor someone who knew her testified, the State never proved the caller’s identity.\textsuperscript{717} Likewise, since the State only could produce testimony from the person who received the call, there was no proof whether the caller was excited at the time, and even more importantly, how long after the alleged assault and threats the call had been made.\textsuperscript{718} Without showing the time element, the State could not establish that the declarant had no time to contrive or to reflect on the alleged event.\textsuperscript{719} In fairness to the State, it appears the prosecution may have been surprised by the alleged victim’s absence.\textsuperscript{720} However \textit{Brandon} shows that in some instances it is better to just drop charges than try to stretch meager facts to fit an exception. At least the wasted cost of trial and appeal is not incurred then. \textit{Taylor}, referred to above, shows the requirement that the declarant be excited cannot be taken to an extreme.\textsuperscript{721} The defendant allegedly threatened and shot at the victim who drove away in her car.\textsuperscript{722} She went to a restaurant to call 911 but stopped from doing so when she saw a police officer.\textsuperscript{723} Instead, the victim promptly told the officer what happened.\textsuperscript{724} The trial court allowed the officer to testify about what the victim had said on the erroneous ground it was not hearsay, after making the equally erroneous finding the statements were not excited utterances.\textsuperscript{725} After \textit{Taylor}’s conviction, the Fifth District found the statements should have been admissible as excited utterances, even though they clearly were hearsay.\textsuperscript{726} The officer testified the victim had calmed down some so she could tell him what happened; however, she was still shaking, crying, and appeared excited.\textsuperscript{727} Thus “[a]lthough she may have calmed down enough to speak”\textsuperscript{728} as the officer had said she did, the overall excitement from the shooting and

\begin{enumerate}
\item\textit{Id.}
\item\textit{Id.} at 1152.
\item\textit{Id.}
\item\textit{Brandon}, 138 So. 3d at 1152.
\item\textit{Id.}
\item\textit{See id.} at 1151.
\item\textit{See Taylor v. State}, 146 So. 3d 113, 115–16 (Fla. 5th Dist. Ct. App. 2014).
\item\textit{Id.} at 114.
\item\textit{Id.}
\item\textit{Id.}
\item\textit{Id.} at 114–16.
\item\textit{Taylor}, 146 So. 3d at 115–16.
\item\textit{Id.} at 116.
\item\textit{Id.}
\end{enumerate}
threats just minutes previously existed. Therefore, the statements fell within the exception.

2. The First Complaint Exception

Under the Code, hearsay statements are only admissible as provided by statute. Thus, theoretically only exceptions explicitly listed in the Code should be recognized. However, some Florida courts continue to recognize a common law exception not explicitly listed, sometimes similar to the one for excited utterances. Twenty years ago, Pacifico v. State found that if the alleged victim of a sexual assault or battery makes a statement “at [the] first opportunity to complain to anyone other than [the alleged attacker] after the sexual encounter,” the statement would be admissible over a hearsay objection. Subsequent case law found that even if the victim’s first try to complain to another person is unsuccessful, later statements to that same person about the assault may fall under the first complaint exception if they are not made after “an unduly long period of time.”

Pacifico suggests the statements would be admissible even if they do not qualify under any other hearsay exception. Another court, soon after the Pacifico decision, took a slightly more restrictive approach to the first complaint exception. In Burgess v. State, the court took an approach that might be described as an attempt to split the baby, even though it is hard to view this decision as having much Solomonic quality. Burgess recognized the exception’s existence but limited its contents to “only the fact of the report of the sexual battery but not the details.” Burgess would require that statements reporting the details satisfy the statutory elements of another hearsay exception—one mentioned in the Code—suggesting this would probably be either one for excited utterances or for present sense impressions. This presents the unusual situation that under the first complaint exception, a jury might be able to hear the victim say she had reported being attacked but would not be able to hear any details from the

729. Id.
730. Id.
731. FLA. STAT. § 90.802 (2014).
733. Id. at 1186.
735. Pacifico, 642 So. 2d at 1186–87.
736. Burgess, 644 So. 2d at 591–92.
737. 644 So. 2d 589 (Fla. 4th Dist. Ct. App. 1994).
738. Id. at 591.
739. FLA. STAT. § 90.803(1)–(2) (2014); Burgess, 644 So. 2d at 591–92.
victim about the attack unless, of course, the statement describing the details falls within a statutory exception. So then why is first complaint exception needed in the first place?

Apparently, the answer is that a relatively prompt first complaint rebuts any claim the victim had consented to the sexual acts involved. Case law before passage of the Code admits such complaints to corroborate the victim’s testimony. If the victim complained about being attacked when she first had a chance, then her actual testimony about the attack in court is more likely to be true. Under this theory a statement giving details of the attack is not necessary for corroboration. The complaint is not being offered for its details but for the fact that it was made relatively promptly thereafter. Under this theory, the statement is not being offered for its truth but for the mere fact it was made; but then, it would not be hearsay in the first place. So why is an exception needed? Probably because courts realize that the mental gymnastics this line of reasoning requires juries to perform is difficult or impossible for them to do. Juries will almost undoubtedly take a complaint to someone that I have been attacked as proof the attack happened and not as proof that the victim is not lying when she says at trial it happened.

Thus, the exception itself rests on the theory that juries will perform mental exercises it is almost impossible for a reasonable person to do, regardless of whether a limiting instruction is given them or not. However, if the statement is admissible under an exception, then—in theory—no limiting instruction is required. So then, why not also allow testimony under the exception about the details?

Besides this problem with the exception, there is another difficulty with it. The exception apparently rests on the now fallaciously proven idea that any female sexually attacked would of course report it at the very first chance. What if the female does not do so? Then, the sexual act must either never have taken place or have been consensual to begin with. However, modern studies show that it is not unusual for victims to delay reporting

740. Ellis v. State, 6 So. 768, 770 (Fla. 1889) (noting that this is supposedly the first case to recognize this exception). The Court there declared that:

The female outraged should seek the first opportunity to complain, and the fact that she does complain goes to the jury as evidence; but her detailed statement of the circumstances under which she was outraged cannot be given in evidence . . . by the party to whom she made the statement. Such testimony is hearsay, and it is calculated to confuse and mislead the jury, and is not permissible.

Id.

741. See Custer v. State, 34 So. 2d 100, 106 (Fla. 1948) (en banc).


743. Custer, 34 So. 2d at 106. Modern medical testimony now can much more effectively rebut this assertion. See Pacifico, 642 So. 2d at 1181.
being attacked for various reasons, not including consent.\textsuperscript{744} Thus, the need for the \textit{first complaint} exception is based on outdated, fallacious reasoning, both about sexual attack victims and the mental ability of juries.

More recent case law has questioned the legitimacy of recognizing such an exception and suggested it is beyond the power of courts to judicially do so.\textsuperscript{745} The latest case questioning the exception’s very existence was decided during this Survey period.\textsuperscript{746} In \textit{Browne v. State},\textsuperscript{747} a college student intern at a doctor’s office claimed that the doctor had attempted to sexually batter her late one evening after her intern hours.\textsuperscript{748} The victim claimed she fought the defendant off, drove home, and called a friend about being upset because Browne was following her.\textsuperscript{749} The victim went to the friend’s home where she met the friend’s boyfriend.\textsuperscript{750} The defendant claimed the victim had consented to the encounter, and the State called the victim’s friend to testify about what the victim had told her that night.\textsuperscript{751} Over defense objection, the friend was allowed to repeat the victim’s account based on either the \textit{first complaint} or excited utterance exceptions.\textsuperscript{752}

The Fourth District found error in admission of the friend’s testimony and reversed the convictions.\textsuperscript{753} As to the excited utterance exception, the State failed to establish how much time had passed between the alleged attack and when the statements were made; thus it did not satisfy the requirement that the victim had not had time for reflection.\textsuperscript{754} As to the \textit{first complaint} exception argument, the court’s opinion was even more detailed.\textsuperscript{755}

The court noted that while some courts still accepted the existence of the \textit{first complaint} exception, others did not.\textsuperscript{756} Section 90.802 of the Florida Statutes explicitly provided that the only exceptions to the hearsay rule were,
thus, statutorily recognized in the Code. Section 90.102 of the Florida Statutes provides that “[t]his chapter—[chapter 90]—shall replace and supersede existing . . . common law in conflict with its provisions.” Thus, section 90.802 of the Florida Statutes had effectively abolished the common law first complaint exception, and the legislature had not codified it. Therefore, the court found the exception no longer existed in Florida.

Browne’s reasoning seems hard to refute. Although the court did not use this, it clearly was invoking the principle of statutory construction that a specific provision should control over a more general one. Section 90.802 of the Florida Statutes specifically abolished all but statutory exceptions; thus, the first complaint exception no longer existed despite section 90.102 of the Florida Statutes’ general language. Browne also provides interesting authority that the exception is no longer valid in Florida since the Fourth District had recognized the exception earlier in Burgess. Although Browne did not expressly overrule Burgess, it certainly does so by implication.

The Supreme Court of Florida has not yet decided this issue. Until it does so, some courts may recognize the exception. Better courts and good prosecutors will seek to avoid invoking it and instead try to use a statutory one in its place.

B. Market Reports and Commercial Publications

As mentioned above, the Code has three statutory exemptions and thirty statutory exceptions to the ban against using hearsay. Most attorneys know the common ones. Once in a great while, a decision will discuss what might be called one of the exotic exceptions to hearsay, in the sense that this exception is rarely, if ever, encountered in practice.

757. FLA. STAT. §§ 90.802, .803.
758. Id. § 90.102.
759. See id. §§ 90.102, .802; Browne, 132 So. 3d at 316.
760. Browne, 132 So. 3d at 316–17; see also FLA. STAT. §§ 90.102, .802. The court also found that even if the exception still had existed, the friend’s testimony went beyond just testifying about the complaint and recited the details of the alleged attack—something the exception did not allow. Browne, 132 So. 3d at 316–17.
Finally, Browne rejected the argument that the victim’s statement was admissible as a prior consistent statement under section 90.801(2)(b) because the court found the victim had a motive to falsify before the statements were made. Browne, 132 So. 3d at 317–18; see also FLA. STAT. § 90.801(2)(b).
761. FLA. STAT. §§ 90.102, .802; see also Browne, 132 So. 3d at 315–16.
762. See Browne, 132 So. 3d at 316; Burgess v. State, 644 So. 2d 589, 591–92 (Fla. 4th Dist. Ct. App. 1994).
763. See Browne, 132 So. 3d at 316–17.
764. See FLA. STAT. §§ 90.801, .803–.804.
Section 90.803(17) of the Florida Statutes contains one of the less frequently invoked exceptions to hearsay. This section provides that “[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations if, in the opinion of the court, the sources of information and method of preparation were such as to justify their admission" are not excluded by the hearsay rule. This is commonly called the trade reports exception.

Until 2014, only one reported Florida case discussed this exception. In Health Options, Inc. v. Palmetto Pathology Services, P.A., the court upheld a party’s use of American Medical Association (“AMA”) terms and categories used for computer billings to establish damages for uncompensated services. The opposing party had used the same terms and codes, and these came from a trustworthy source, the AMA’s Current Procedural Terminology Editorial Panel.

During this Survey period, Hardy v. State, held that information in the Florida Department of Health’s computer database about prescription drugs did not come within the trade reports exception for two reasons. First, section 90.803(17) of the Florida Statutes, unlike its federal counterpart, Federal Rule of Evidence 803(17), requires the information to be published. The First District interpreted this to mean it must be available to the public. As access to the database was limited to certain authorized state employees, it did not qualify. Second, the court looked at the exception’s general title and found the database was not like a market.

765. See id.
766. Id. § 90.803(17).
767. Id.
768. See id.; Hardy v. State, 140 So. 3d 1016, 1019 (Fla. 1st Dist. Ct. App. 2014).
770. 983 So. 2d 608 (Fla. 3d Dist. Ct. App. 2008).
771. Id. at 616.
772. Id.
773. 140 So. 3d 1016 (Fla. 1st Dist. Ct. App. 2014).
774. Id. at 1019–20.
775. FED. R. EVID. 803(17); FLA. STAT. § 90.803(17) (2014). Federal Rule of Evidence 803(17) states that “[m]arket quotations, lists, directories, or other compilations [that are] generally . . . relied [on] by the public or by persons in particular occupations” are not excluded by the hearsay rule. FED. R. EVID. 803.
776. FLA. STAT. § 90.803(17); Hardy, 140 So. 3d at 1020; see also FED. R. EVID. 803(17).
777. Hardy, 140 So. 3d at 1020.
778. Id.
report or other compilation commonly used in commerce. Thus, even if the data had been freely available to the public, it would still not fall within the exception.

Judge Rowe wrote a protracted dissent in which he interpreted the word *published* more broadly than the majority. According to him, “the court’s focus should be the purpose for which the information was disseminated rather than how widespread the information was disseminated.” The judge acknowledged the database was not *published* in the ordinary sense of the word but was still published to not only authorized Department of Health employees but also some law enforcement officers for limited purposes. He also argued that the database should be considered “within the category of other publications in the same ilk as a tabulation or list as set forth in the statute” even if it was not a compilation commonly used in commerce.

Judge Rowe’s dissent, while forcefully argued and well-written, ignores the exception’s express language. The exception does not use the words *other publications*; it says *other published compilations*. So long as this database is not published within the ordinary sense of that word, under basic principles of statutory construction, the majority’s opinion has the better of this argument.

C. Business Records in Foreclosure Cases

Business records are among the commonly used hearsay exceptions, especially in commercial cases. During this Survey period, a number of reported decisions discussed the business records exception. All but one

779. Id.
780. See id.
781. Id. at 1022 (Rowe, J., dissenting).
782. Hardy, 140 So. 3d at 1022 (Rowe, J., dissenting).
783. Id.
784. Id.
785. See id.
787. Id. § 90.803(6). This section provides in part that:
A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such . . . are not excluded by the general prohibition against hearsay.

Id.

of them involved the introduction of bank records in loan foreclosure actions. The foreclosing party’s failure to either attempt to introduce any business records or failure to lay a proper foundation for their introduction resulted in a number of reversals.

The required elements for the business records exception are not in debate. In *Yisrael v. Florida*, the Supreme Court of Florida clearly stated that proponents of business records must demonstrate four elements: “(1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the

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789. See Caldwell v. State, 137 So. 3d 590, 590–91 (Fla. 4th Dist. Ct. App. 2014). *Caldwell* was the one reported decision not involving loan foreclosure. See id. There the court reversed the defendant’s robbery conviction because of the admission of a booking report. *Id.* at 590, 592. The booking report and statements in it were used to prove the defendant’s height and weight at the time of his arrest. *Id.* at 590–91. Although the court found such reports could be business records under the hearsay exception, the State’s failure to lay a foundation for when the information in them was received, how the reports were kept, and that it was a regular practice to keep reports like this made this report inadmissible hearsay. *Id.* at 591–92.

790. See Beauchamp v. Bank of N.Y., 150 So. 3d 827, 828 (Fla. 4th Dist. Ct. App. 2014). *Beauchamp* reversed judgment for the bank because a loan service company representative’s testimony was admitted based on the records that had never been introduced into evidence and thus were inadmissible hearsay. *Id.* at 827–29. Although the opinion does not mention this, the testimony also violated the best evidence rule as it was about the material contents of a document that had not been admitted or otherwise accounted for. See *id.* at 827–28.

791. See Kelsey v. Suntrust Mortg., Inc., 131 So. 3d 825, 826 (Fla. 3d Dist. Ct. App. 2014). Six reported decisions discussed the foundation for the business records. See Burdeshaw v. Bank of N.Y. Mellon, 148 So. 3d 819, 822–26 (Fla. 1st Dist. Ct. App. 2014); Wolkoff v. Am. Home Mortg. Servicing, Inc., 153 So. 3d 280, 282–83 (Fla. 2d Dist. Ct. App. 2014); Cayea v. Citimortgage, Inc., 138 So. 3d 1214, 1216–17 (Fla. 4th Dist. Ct. App. 2014); *Hunter*, 137 So. 3d at 572; Lindsey v. Cadence Bank, N.A., 135 So. 3d 1164, 1167–68 ( Fla. 1st Dist. Ct. App. 2014); *Kelsey*, 131 So. 3d at 826. Four of them found reversible error for failure to lay a proper foundation for admission under the business records exception. See *Burdeshaw*, 148 So. 3d at 820; *Wolkoff*, 153 So. 3d at 281–82; *Hunter*, 137 So. 3d at 571; *Kelsey*, 131 So. 3d at 826. Two affirmed judgments foreclosing on loans, finding no error in admission of bank records under the business records exception. See *Cayea*, 138 So. 3d at 1215; *Lindsey*, 135 So. 3d at 1169. From this number of reversals, one might conclude that there are often problems introducing business records under the exception in loan foreclosure actions. See, e.g., *Kelsey*, 131 So. 3d at 826. This conclusion may not be correct as the number of the reported cases does not give any idea of how many cases there were actually tried or decided on summary judgment where there was no issue about a proper foundation. *Contra id.* Perhaps the best that can be said from the reported decisions is that when the issue of business records foundations is raised on appeal in foreclosures, the courts are carefully scrutinizing the trial record to make sure the exception’s requirements have been satisfied. See *Burdeshaw*, 148 So. 3d at 821–22; *Wolkoff*, 153 So. 3d at 281–82; *Hunter*, 137 So. 3d at 571–72; *Kelsey*, 131 So. 3d at 826.

792. 993 So. 2d 952 (Fla. 2008).
ordinary course of a regularly conducted business activity; and (4) that it was
regular practice of that business to make such a record.”

Thus, what must be shown should be no surprise to business records
proponents. The problem seems to be how to do so. Choosing the right
person or persons to authenticate the records and lay their foundation under
the exception is the critical choice. Two recent decisions provide good
representative examples as to how and how not to go about laying the
foundation needed for the business records exception.

To successfully foreclose on a loan, the foreclosing party must show
an agreement between the borrower and the plaintiff or a subsequent legal
transfer of the loan to the plaintiff, the borrower’s default on payments, an
acceleration of the debt to maturity, and the amount remaining due on the
loan. When the original lender transfers the loan to another party, laying
the business records foundation to show all this has caused problems.
Usually to do so, the plaintiff attempts to introduce loan payment history
records that are computer generated. Such computer printouts may qualify
as business records assuming the proper foundation is laid even though the
actual printout was done in connection with a particular lawsuit. The
person called to authenticate the records and lay the foundation must,
therefore, be familiar with the business practices of more than one company
and with how each company takes, records, and keeps payments on loans.

While a witness’s testimony that certain computer programs and certain
practices are standardly used in the lending industry is helpful, a witness’s
testimony must also be specific with respect to how a particular company
services its loans. When a witness working for one company cannot
testify about how another company who had been involved with the loan
does this, then foundation problems occur unless additional witnesses are

793. Id. at 956.
794. See, e.g., Cayea, 138 So. 3d at 1217; Kelsey, 131 So. 3d at 826.
795. See Burdeshaw, 148 So. 3d at 824; Cayea, 138 So. 3d at 1217; Hunter,
137 So. 3d at 572–73; Kelsey, 131 So. 3d at 826; Wolkoff, 153 So. 3d at 282.
796. Cayea, 138 So. 3d at 1217; Kelsey, 131 So. 3d at 826.
797. Kelsey, 131 So. 3d at 826.
798. Wolkoff, 153 So. 3d at 281.
799. See, e.g., Cayea, 138 So. 3d at 1216.
800. See id. at 1217 (stating that “[p]rintouts of data prepared for trial may be
admitted . . . even if the printouts themselves are not kept in the ordinary course of business so
long as a qualified witness testifies as to the manner of preparation, reliability, and
trustworthiness”).
801. See id. at 1217–18.
802. See id.; Burdeshaw v. Bank of N.Y. Mellon, 148 So. 3d 819, 826 (Fla. 1st
Dist. Ct. App. 2014); Hunter v. Aurora Loan Servs. LLC, 137 So. 3d 570, 573 (Fla. 1st Dist.
called who can do so.\textsuperscript{803} This was the case in both \textit{Hunter v. Aurora Loan Services, LLC}\textsuperscript{804} and \textit{Burdeshaw v. Bank of New York Mellon}\textsuperscript{805} where the employee of the subsequent loan assignees could not testify how previous holders of loans kept and recorded their information.\textsuperscript{806} While a witness does not have to be the person who actually makes entries for payments on the loan—the person who actually keeps the loan records or the person who prepared the records for trial—the witness must know how the companies concerned do so.\textsuperscript{807}

These two decisions suggest that counsel for foreclosing lenders should be especially careful when more than one holder of a note or mortgage is involved. Counsel should then always ask, “do I need more than one witness”, and “do I have the right witnesses to satisfy the business records foundation?” Counsel must make their own investigation and evaluation to ensure this and not just assume that whomever the foreclosing party wants to send as a witness is sufficient.

Contrary to these two cases, it is what happened in \textit{Cayea v. Citimortgage, Inc}.\textsuperscript{808} There, Citimortgage was the original loan holder, making matters easier than in multiple holder cases.\textsuperscript{809}

A company employee in its default research and litigation department testified about Citimortgage’s regular practice of inputting payments, whether made electronically or by mail, into its system by payment processing department employees.\textsuperscript{810} He also testified how payment entries were kept and that it was the lender’s regular practice to do so.\textsuperscript{811} Although he did not work in the payment department himself and had not done any of the actual inputting or record keeping on this loan, his testimony was sufficient to admit computer printouts of the loan history as business records.\textsuperscript{812}

Foundations for business records should be no problem if an attorney takes the time to understand how a particular business or company is run and selects the proper witnesses to testify about this. The \textit{Burdeshaw} decision provides a helpful multi-page summary of the cases dealing with this

\textsuperscript{803} See \textit{Burdeshaw}, 148 So. 3d at 823; \textit{Hunter}, 137 So. 3d at 573.

\textsuperscript{804} 137 So. 3d 570 (Fla. 1st Dist. Ct. App. 2014), review denied, 157 So. 3d 1040 (Fla. 2014).

\textsuperscript{805} 148 So. 3d 819 (Fla. 1st Dist. Ct. App. 2014).

\textsuperscript{806} \textit{Burdeshaw}, 148 So. 3d at 826; \textit{Hunter}, 137 So. 3d at 573.

\textsuperscript{807} \textit{Burdeshaw}, 148 So. 3d at 823; \textit{Hunter}, 137 So. 3d at 573.

\textsuperscript{808} 138 So. 3d 1214 (Fla. 4th Dist. Ct. App. 2014).

\textsuperscript{809} See \textit{id.} at 1215.

\textsuperscript{810} \textit{id.} at 1215–16.

\textsuperscript{811} \textit{id.}

\textsuperscript{812} \textit{id.} at 1217.
exception in loan foreclosure cases. 813 This should be a required reading for counsel in this field.

VIII. BEST EVIDENCE RULE

Section 90.952 of the Florida Statutes provides in part that “an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph.” 814 This requirement is commonly known as the Best Evidence Rule. 815 The rule does not usually apply unless the contents of the writing, recording, or photograph are considered material to the issues in a case. 816 Additionally, modern versions of the rule do not strictly enforce the requirement of the original. 817 Indeed, copies of a writing are now freely admissible unless there is some reason to believe that the proponent of such has either acted in bad faith or that the offered substitute is not accurate.

The rule usually is so easily satisfied that it does not generate many evidentiary issues. However, during this Survey period, three cases arose that deserve brief discussion. 818

A. Videotape Evidence

Two best evidence rule cases involve admission of videotape surveillance against an accused in a criminal case. 819 Photographs are broadly defined under the rule to include more than just still pictures. 820 Videotapes are explicitly included within this definition. 821 When videotapes that actually capture a crime are introduced to show an accused’s guilt, there is no best evidence rule problem. 822 Problems arise when the videos are not produced at trial, and the state still wants to benefit from them. 823 The reason

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818. See infra Section VIII.A.
819. T.D.W., 137 So. 3d at 575; Yero, 138 So. 3d at 1181.
820. Fla. Stat. § 90.951(2). Section 90.951 of the Florida Statutes defines photographs as including “still photographs, X-ray films, videotapes, and motion pictures.” Id.
821. Id.
822. See Yero, 138 So. 3d at 1184–85.
823. See id. at 1185.
behind the videos’ absence can make all the difference in the world as illustrated by two recent cases.824

In Yero v. State,825 the State charged the accused with theft of a woman’s wallet.826 The victim and her fiancée were at a bar late at night when they were approached by Yero who stood between them and spoke with them briefly.827 The wallet was sticking out of the victim’s purse, which was hung over a chair’s back.828 After speaking with them, Yero excused himself, went outside, came back and bought the couple drinks.829 He then paid his own bar bill and left.830 Five minutes later, the victim noticed her wallet missing, and the sheriff’s office was called.831 A deputy arrived and learned the bar had surveillance cameras.832 The deputy and the two patrons watched the video.833 It showed Yero, at first, had no bulge in his pockets until after he stood between the couple.834 The bulge’s shape matched that of the missing wallet.835 The video further showed Yero leaving the bar, coming back inside, no longer having the same bulge in any pocket.836

All three testified at trial and described what they had seen on the video.837 The video itself was not shown as it had been overwritten by the bar’s security system.838 The deputy testified he had tried to get the video that night but was told it was unavailable.839 Nine days later, when the deputy returned to the bar, the tape was already overwritten.840 The system automatically recorded over any previous surveillance footage after five days, but no one ever told the deputy this.841 Thus, the tape was lost for use at trial.842 However, the trial court still allowed testimony about its contents
after the State elicited proof about how it was unavailable. 843 Yero appealed his conviction claiming the State had lost in bad faith the exculpatory evidence, violating both his Due Process rights and the Best Evidence Rule. 844 As to his Due Process rights, the Third District found no bad faith on the State’s part and further found the tape would have been inculpatory, not exculpatory, in any event. 845 On the best evidence claim, the district court noted that the rule statutorily provided for instances where originals were not required. 846 One instance is when “[a]ll originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith.” 847 As the facts showed there was no bad faith, the witnesses’ testimony about the tape’s contents was permissible even in its absence. 848

What if a videotape is shown at trial, but the State elicits testimony about the contents of another tape that is not? T.D.W. v. State 849 presented that very scenario and led to a reversal. 850 The State charged the defendant with being involved in a home burglary. 851 A detective testified he was able to identify T.D.W. as one of the burglars from the angle shown on a surveillance video the detective viewed outside of trial. 852 Even though other videotapes were shown at trial, the one showing the angle the detective referenced was not. 853 This proved to be crucial evidence against the defendant leading to his conviction. 854

On appeal, the Fourth District reversed. 855 The detective had testified the missing video clearly showed the accused’s face as one of the burglars. 856 Unlike in Yero, the State never offered any explanation for the video view’s absence. 857 Even though the State contended on appeal the tape

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843.  *Id.*
844.  *Id.* at 1182–84.
845.  *Yero*, 138 So. 3d at 1183.
846.  *Id.* at 1184–1185; see also *Fla. Stat.* § 90.954(1) (2014).
847.  *Fla. Stat.* § 90.954(1).
848.  *Yero*, 138 So. 3d at 1185. Section 90.954 of the Florida Statutes lists three other instances when testimony about the contents of a missing writing does not violate the best evidence rule: The original cannot be obtained by judicial process, the opposing party controls the original and is on notice it will be needed at hearing or trial, and the original is not material. *Fla. Stat.* § 90.954(2)–(4).
849.  137 So. 3d 574 (Fla. 4th Dist. Ct. App. 2014).
850.  *Id.* at 575, 578.
851.  *Id.* at 575.
852.  *Id.*
853.  *Id.*
854.  *T.D.W.*, 137 So. 3d at 575.
855.  *Id.* at 575, 578.
856.  *Id.* at 576.
857.  *Id.* at 577; see also *Yero* v. *State*, 138 So. 3d 1179, 1182 (Fla. 3d Dist. Ct. App. 2014).
was lost or destroyed, unlike in *Yero*, it never offered any proof at trial to back up this assertion.\textsuperscript{858} The State, as the proponent of the tape, had the burden to demonstrate the reason behind its absence, especially because its contents were clearly material.\textsuperscript{859} Thus, it would be “unfair, under the circumstance, to admit the duplicate in lieu of the original.”\textsuperscript{860} The Fourth District found that “when offered to prove [a] crime without introduction of the video in evidence, a witness’s in-court description of the actions depicted on the video is content-based testimony that violates the best evidence rule.”\textsuperscript{861}

B. *Promissory Notes*

As mentioned, duplicates are usually admissible to the same extent as originals under the Best Evidence Rule.\textsuperscript{862} One exception to this general rule of free substitution is when there is a negotiable instrument or other special kind of commercial document.\textsuperscript{863} This includes promissory notes.\textsuperscript{864} *Alavi v. Garcia*\textsuperscript{865} involving promissory notes, summary judgment hearings and the best evidence rule is a recent case of first impression.\textsuperscript{866}

The appellants had summary judgment entered against them in an action on a promissory note.\textsuperscript{867} Florida Rule of Civil Procedure 1.510 governs summary judgment proceedings in Florida.\textsuperscript{868} Subsection (c) of Rule 1.510 requires that any motion for summary judgment must be served

\textsuperscript{858.} *T.D.W.*, 137 So. 3d at 577; see also *Yero*, 138 So. 3d at 1182.

\textsuperscript{859.} *T.D.W.*, 137 So. 3d at 577.

\textsuperscript{860.} *Fla. Stat.* § 90.953(3) (2014). The court did not actually quote this subsection, but the gist of its opinion clearly reflects this language. See *T.D.W.*, 137 So. 3d at 577.

\textsuperscript{861.} *Id.* at 576.

\textsuperscript{862.} See *Fla. Stat.* § 90.953; *T.D.W.*, 137 So. 3d at 576–77.

\textsuperscript{863.} *Fla. Stat.* § 90.953(1). Admissibility of duplicates, states in part that [a] duplicate is admissible to the same extent as an original, unless: (1) the document or writing is a negotiable instrument, . . . a security, . . . or any other writing that evidences a right to the payment of money, is not itself a security agreement or lease, and is of a type that is transferred by delivery in the ordinary course of business with any necessary endorsement or assignment.

*Id.* The Federal Rules of Evidence do not have similar language and seem to have no special provisions about commercial documents under the best evidence rule. See *Fed. R. Evid.* 1003.

\textsuperscript{864.} See *Fla. Stat.* § 90.953(1).

\textsuperscript{865.} 140 So. 3d 1141 (Fla. 5th Dist. Ct. App. 2014).

\textsuperscript{866.} *Id.* at 1142. Although the court’s opinion does not label itself as one of first impression on the issue it decides, it does say “there appears to be no precedent directly on point.” *Id.*

\textsuperscript{867.} *Id.*

on the opposing party twenty days before the hearing date, and the motion
must include copies of any evidence the movant relies upon.\textsuperscript{869} The motion
must identify any “materials as would be admissible in evidence ‘summary
judgment evidence’ on which the movant relies.”\textsuperscript{870} Subsection (e) furthers
requires any affidavits “shall set forth such facts as would be admissible in
evidence.”\textsuperscript{871} It also requires that “[s]worn or certified copies of all papers or
parts thereof referred to in an affidavit shall be attached thereto or served
[therein].”\textsuperscript{872} When Garcia filed for summary judgment, he did not file the
original of the promissory note twenty days before the hearing.\textsuperscript{873} Appellants
argued this required reversal as the best evidence rule had been violated by
the failure to do so.\textsuperscript{874}

The Fifth District declined to find the best evidence rule applicable
to summary judgment hearings.\textsuperscript{875} The court found the rule “applies to
proceedings wherein evidence is introduced”\textsuperscript{876} but that evidence is not
formally introduced in summary judgment hearings.\textsuperscript{877} The hearings are held
to see if there are any material issues of fact meriting a trial.\textsuperscript{878} If not, the
trial court simply renders judgment as a matter of law.\textsuperscript{879} Under the
summary judgment rule’s own language, the movant need only show proof
that would be\textsuperscript{880} admissible later at trial.\textsuperscript{881} For a promissory note, at trial the
note would have to be authenticated and the original produced at trial.\textsuperscript{882}
However, an affidavit setting forth facts supplying the authentication and
attaching a copy of the original is all that is needed for summary judgment.\textsuperscript{883}
The court also declared that “[e]ven assuming that the best evidence rule
applies in the summary judgment context, we hold that the presentation of
the original note at or before the hearing satisfies [the] rule”,\textsuperscript{884} thus serving
it on the opposing party twenty days before the hearing would not be

\begin{footnotes}
\begin{footnote}3. Alavi v. Garcia, 140 So. 3d 1141, 1142 (Fla. 5th Dist. Ct. App. 2014).
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\begin{footnote}4. Id. at 1143.
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\begin{footnote}5. Id.
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\begin{footnote}6. Id.
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\begin{footnote}7. See id.
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\begin{footnote}8. Alavi, 140 So. 3d at 1143.
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\begin{footnote}10. FLA. R. CIV. P. 1.510; Alavi, 140 So. 3d at 1143.
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\begin{footnote}11. FLA. R. CIV. P. 1.510; Alavi, 140 So. 3d at 1143.
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\begin{footnote}12. Alavi, 140 So. 3d at 1143.
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\begin{footnote}13. Id.
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\begin{footnote}14. Id. The court noted the Fourth District had also found production of the
original at the hearing sufficient to satisfy the rule. Id.; see also Deutsche Bank Nat’l Tr. Co.
v. Clarke, 87 So. 3d 58 (Fla. 4th Dist. Ct. App. 2012).
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needed.\textsuperscript{885} The court did note that surrender of the original note was needed before final judgment could be entered unless it was proven the note had been lost or destroyed.\textsuperscript{886}

Admittedly this case is as much about summary judgment as it is the best evidence rule. However, it serves as a reminder that some proceedings require the originals of certain commercial documents if they are available. The court’s construction of the summary judgment rule’s wording as would be admissible also seems a very reasonable one. If the rule had intended a different result, one would expect it to read, \textit{that is admissible at trial or in the same form that would be admissible at trial}. One would also not expect the words summary judgment evidence to have been used. The use of these three words clearly indicates that there is a distinction between it and trial evidence. Finally, the case serves as a reminder to counsel moving for summary judgment–bring the originals of documents to hearings in case the trial court decides they are mandatorily required there.\textsuperscript{887} As the saying goes, “better safe, than sorry.”

\textbf{IX. CONCLUSION}

Overall, 2014 was probably a typical year for evidentiary developments.\textsuperscript{888} Few statutory changes were made in the Code.\textsuperscript{889} Likewise, the courts decided few cases of first impression.\textsuperscript{890} This shows that after over thirty years, major issues under the Code have largely been resolved. Now that this is so, attorneys and courts have to be careful in the judgment they use presenting and deciding evidentiary issues. Unfortunately some of the cases discussed in this Survey could fall under the category of \textit{can you believe that} ones. Trial counsel and trial courts are on the front line as \textit{guardians} of the Code, even though the appellate courts and Florida Legislature are its ultimate \textit{guardians}. All of us must take this responsibility seriously.

\textsuperscript{885} Alavi, 140 So. 3d at 1143. \\
\textsuperscript{886} Id. \\
\textsuperscript{887} See id. at 1142–44. \\
\textsuperscript{888} See supra note 2 and accompanying text. \\
\textsuperscript{889} See supra Parts II–VII. \\
\textsuperscript{890} See supra Parts II–VII.