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Abstract

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1. Introduction

Florida evidence law continued to develop according to a well-established and predictable pattern during the present survey period. Although the 1988 Florida Legislature made one change in the Florida Evidence Code, few important recent evidentiary developments are a result of legislative action. Florida evidence law developments still continue to be mainly a product of case-by-case judicial interpretation of the Florida Evidence Code and of various special evidentiary provisions found in other parts of the Florida Statutes.*

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1. This is the fourth annual survey of Florida evidence law that Nova Law Review has published. The three previous survey articles covered a twelve month period extending approximately from December of one calendar year through November of the next year. At the Nova Law Review's request, the authors of this survey have only considered Florida evidence decisions from December 1987 through September 1988.
This survey covers Florida decisions reported in volume 515 through volume 531 of the Southern Reporter, Second, and also volume 24 through volume 28 of Florida Supplement, Second. During the ten month survey period, there were 145 cases mentioning evidentiary issues in the Southern Reporter, Second and 15 cases discussing evidence issues in Florida Supplement, Second.
As in previous survey periods, evidence issues continued to arise more frequently in reported criminal cases. During the ten month 1988 survey period, 112 out of the 160 cases discussing evidentiary issues were criminal, 70%, while 48, 30%, were civil cases.
2. 1988 Fla. Laws 33 amended the Florida Dead Man's Statute, Fla. Stat. § 90.602 (Supp. 1988), by replacing the word "insane" with the words "mentally incompetent." Former Fla. Stat. § 90.602 (1987) did not explicitly define who should be considered "insane." 1988 Fla. Laws 33 broadly defines a "mentally incompetent person" as "one who because of mental illness, mental retardation, senility, excessive use of drugs or alcohol, or other mental incapacity" cannot either "manage[e] his property or ca[e] for himself...."
3. As noted in earlier surveys, Florida's Evidence Code is highly patterned after the Federal Rules of Evidence. The United States Supreme Court in recent years has
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For both completeness sake and primarily as a reference to readers, the authors note that the following evidence topics, which are not discussed in the article's main text, are discussed in an appendix: contemporaneous objection rule, offers of proof, preliminary questions, prohibition on judicial comment, limited admissibility of evidence, rule of completeness as to a document's contents, judicial notice, civil presumptions, general relevancy concerns, routine practice, subsequent remedial measures, offers to compromise, offers to plead guilty, attorney-client privilege, psychotherapist-patient privilege, privilege against self-incrimination, informer privilege, journalist privilege, public records, dead man's act, interpreters, impeachment of jury verdicts, identity of "adverse" witnesses for purposes of impeachment, general limitations on cross-examination's subject matter, impeachment by character evidence, impeachment by prior convictions, impeachment by specific acts, impeachment by prior inconsistent statements, anticipatory rehabilitations, authentication, the rule on witnesses, real evidence, demonstrative evidence, and the rape shield law.

II. Judicial Conduct of Trial

All modern evidence codes give judges much discretion on how best to conduct trials so as to achieve a fair process. Florida trial judges are required to strive for this goal. Florida Statutes, "section 90.612(1)"

been increasingly willing to consider non-constitutional cases involving interpretations of the Federal Rules. So far Florida courts have been willing to "follow the leader" when discussing a Florida Evidence Code provision modeled after the Federal Rules. Florida practitioners thus need to carefully watch the United States Supreme Court's evidentiary pronouncements.

4. See Appendix following this article on page 1088.

5. Fla. Stat. § 90.612(1) (1987). Section 90.612 specifies the purposes behind this requirement as: "(a) Facilitate, through effective interrogation and presentation, the discovery of the truth. (b) Avoid needless consumption of time. (c) Protect witnesses from harassment or undue embarrassment."

6. See Fla. Stat. § 90.615(2) (1987) stating that "[w]hen required by the interests of justice, the court may interrogate witnesses, whether called by the court or by a party. For a recent case upholding this judicial right of interrogation, see Martens v. State, 517 So. 2d 38, 39 (Fla. 5th Dist. Ct. App. 1987). Judicial interrogation of a witness was not excessive since the interrogation "was to clarify the benefit of the jury the swearing match engaged in between the victim and the defendant.").

7. See Bullard v. State, 521 So. 2d 223, 224 (Fla. 5th Dist. Ct. App. 1988) (Trial court erred by interrogating and restricting a murder defendant's testimony about events at the homicide which could have been shown self-defense. "[A]n accused has an absolute right to tell his story of the events exactly as he remembers them without any restrictions by the trial judge."). Thus the trial judge erred in refusing to allow Bullard to repeat language used at the homicide scene on the basis that the words were racially inflammatory.

8. See Gibson v. State, 13 Fla. L. Weekly 5905 (Fla. 5th Dist. Ct. App. 1988) (Trial court deprived a defendant of his right to confrontation by allowing a one-way mirror to be placed between a child sexual abuse victim and the defendant during the child's testimony).

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states in part that a “judge shall exercise reasonable control over the mode and order of the interrogation of witnesses and the presentation of evidence.” Usually, cases discussing the judicial conduct of trial are of minor importance, since they involve well-settled principles. All of the Florida cases during this survey period fit this pattern. Florida appellate courts re-affirmed that trial judges have the right to interrupt the interrogation when necessary to clarify matters. However this right must not unfairly interfere with a witness’s ability to present complete testimony about an event. Likewise, trial judges must be careful not to adopt procedures for taking testimony that interfere with a criminal defendant’s rights.

The United States Supreme Court in Perry v. Leeke recently resolved a major issue involving how much control a judge can exercise over testifying witnesses in criminal cases. Perry had been charged under South Carolina law with murder, kidnapping, and sexual assault. He denied actively participating in either of the first two crimes and claimed duress as a defense to the assault. At trial, the trial judge ordered a fifteen minute recess between Perry’s direct examination and his cross-examination. The judge also ordered Perry not to talk with anyone during these fifteen minutes. After the trial resumed, defense counsel unsuccessfully moved for a mistrial claiming that the court’s

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prohibition had denied Perry his right to assistance of counsel. Perry was convicted and subsequently raised his sixth amendment right to the assistance of counsel argument both in state appellate proceedings and through petition for a federal writ of habeas corpus.

The Supreme Court in *Geders v. United States* held that a trial court order "preventing [an accused] from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct- and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment." *Geders* recognized that "[t]he trial judge's power to control the progress and, within the limits of the adversary system, the shape of the trial includes broad power to sequester witnesses before, during, and after their testimony." However the Court noted that sequestration orders affect accusers in a special way, totally different from how they affect ordinary witnesses. Defendants have a right to consult with counsel that an ordinary witness does not, such consultation may be necessary for an accused to understand the trial process and thus receive a fair trial. Defendants also may not be sequestered unless testifying, since an accused has a right to be present at all stages of his trial. *Geders* recognized that there may be a problem with defense counsel "coaching" an accused during a recess but felt there were other ways to deal with it. Even assuming these methods might not always work, *Geders* declared "[t]o the extent that conflict remains between the defendant's right to consult with his attorney during a long overnight recess ... and the prosecutor's desire to cross-examine the defendant without the intervention of counsel, with the risk of improper "coaching," the conflict

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10. The Supreme Court of South Carolina affirmed Perry's convictions. State v. Perry, 278 S.C. 490, 299 S.E.2d 324 (1983). This court rejected Perry's sixth amendment claim on the grounds that "[i]nformationally counsel is not permitted to confer with his defendant client between direct examination and cross examination." Id. at ___. 299 S.E.2d at 325.

11. After the federal district court found Perry's rights were not violated since there is no "right to counsel during a brief recess." Perry, 109 S. Ct. at 597. The Court of Appeals for the Fourth Circuit reversed this finding but decided Perry's convictions should stand, because he had not been prejudiced. Perry v. Leeke, 832 F.2d 837 (4th Cir. 1987).


13. Id. at 89.

14. Id. at 87.

15. The Court suggested that cross-examination could be designed to explore the existence and depth of any coaching or that a trial court could refrain from granting a

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16. Id. at 91.

17. "We need not reach, and we do not deal with, limitations imposed in other circumstances." Id. at 91.


19. Id. at 601.

20. Id.

21. Id. at 602. Such matters included general trial tactics, availability of other witnesses, or negotiating a plea bargain.

Ironically the Court distinguished its opinion from *Geders* by claiming that the overnight prohibition on consultation in *Geders* interfered with "matters that go beyond the content of the defendant's own testimony - matters that the defendant does have a constitutional right to discuss with his lawyer."
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The Supreme Court in Geder v. United States held that a trial court order "preventing [an accused] from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment." Geder recognized that "[t]he trial judge's power to control the progress and, within the limits of the adversary system, the shape of the trial includes broad power to sequester witnesses before, during, and after their testimony." However the Court noted that sequestration orders affect accuseds in a special way, totally different from how they affect ordinary witnesses. Defendants have a right to consult with counsel that an ordinary witness does not, such consultation may be necessary for an accused to understand the trial process and thus receive a fair trial. Defendants also may not be sequestered unless testifying, since an accused has a right to be present at all stages of his trial. Geder recognized that there may be a problem with defense counsel "coaching" an accused during a recess but felt there were other ways to deal with it. Even assuming these methods might not always work, Geder declared that the extent that conflict remains between the defendant's right to consult with his attorney during a long overnight recess and the prosecutor's desire to cross-examine the defendant without the intervention of counsel, with the risk of improper "coaching," the conflict must . . . be resolved in favor of the right to the assistance and guidance of counsel."

Despite such broad language, other language in Geder suggested that the Court might hold differently on another set of facts. In Perry, the Court granted certiorari to "consider whether the Geder rule applies to a similar order entered at the beginning of a 15-minute afternoon recess." Even before addressing this question, the Court found that a specific act of prejudice was not necessary for reversal of an accused's conviction once a Geder violation had occurred. However, the Court found that the South Carolina trial court's order had not deprived Perry of his right to assistance of counsel. Justice Stevens, writing for the majority, stated the Court's conclusion that even when the possibilities of unethical "coaching" by defense counsel are removed, a trial's truth-seeking function allows a trial judge to determine "after listening to the direct examination of any witness . . . that cross-examination is more likely to elicit truthful responses if it goes forward without allowing the witness an opportunity to consult with third parties." The Court admitted that an accused differs from an ordinary witness for purposes of sequestration. However, Justice Stevens declared that when an accused becomes a witness, "the rules that generally apply to other witnesses - rules that serve the truth-seeking function of the trial - are generally applicable to [the accused] as well."

The Perry Court distinguished its opinion from Geder by claiming that the overnight prohibition on consultation in Geder interfered with "matters that go beyond the content of the defendant's own testimony - matters that the defendant does have a constitutional right to discuss with his lawyer."

Unfortunately Perry is likely to cause many problems for trial
judges and criminal defense attorneys. The Court in Perry noted that “the line between the facts of Geders and the facts of this case is a thin one.” The Court unfortunately did not go beyond this statement to specify whether the primary difference between Perry and Geders was one of kind or of degree. Would a prohibition of client-counsel consultation during a two hour lunch recess that also coincides with the break between the accused’s direct and cross-examination be unconstitutional? Do only those prohibitions between client-counsel consultation that extend from one day to the next violate Geders? Perry tells trial courts that bans on client-counsel consultation that are no more than fifteen minutes will not be unconstitutional, but beyond that Perry’s oblique language leaves matters uncertain.

Perry also suggests that a trial judge could allow client-counsel contact during a recess between the accused’s direct and cross-examination but “forbid discussion of ongoing testimony.” Indeed, Justice Stevens even admits that “it may well be appropriate to permit such consultation.” However, the Court furnishes no guidelines to trial courts on how to judge when such consultation may be appropriate and when it may not. The majority ends its vague opinion by stating that trial judges are not constitutionally required “to allow the defendant to consult with his lawyer while his testimony is in progress if the judge decides that there is a good reason to interrupt the trial for a few minutes.”

Perry should work some change in Florida’s approach to attorney-counsel consultation during breaks in an accused’s testimony. After

A. Accident Report Privilege

Florida law requires every driver involved in an accident causing one hundred dollars worth of damage to file an accident report with the state unless an investigating police officer has done so. Since some
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22. Id. at 600.
23. For a pre-Perry Florida case holding that Geders's reasoning would apply here, see Stripling v. State, 349 So. 2d 187 (Fla. 3d Dist. Ct. App. 1977), cert. denied, 359 So. 2d 1220 (Fla. 1978).
24. Justice Marshall, joined by Justices Brennan and Blackmun, in his dissent, pointed out several problems created by the Perry opinion's vagueness. Justice Marshall contended that "[i]tly not even providing a practical framework in which to answer these questions, the majority ensures that defendants, even those in adjoining courtrooms, will be subject to inconsistent practices." Perry 109 S. Ct. at 608.
25. Id. at 602 n.8. The dissent suggests that it may be impossible for attorneys to distinguish between matters that concern the accused's ongoing testimony and matters that concern general strategy. The dissent argues that counsel wanting to avoid violating a trial court's order will err on the side of caution and thus deprive their clients of the right to discuss matters even the majority would deem appropriate for discussion during a brief recess. Id. at 608 n.8.
26. Id. at 602.
27. Id. (Emphasis added).

III. Privileges

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Florida law requires every driver involved in an accident causing one hundred dollars worth of damage to file an accident report with the state unless an investigating police officer has done so. Since some

28. 410 So. 2d 1343 (Fla. 1982). For a more recent Florida Supreme Court opinion declaring unconstitutional a defendant-counsel consultation ban during a brief state requested recess, see Thompson v. State, 507 So. 2d 1074 (Fla. 1987). Both Justices Enbich and Shaw concurred specially in Thompson and suggested that Bow's consultation ban was constitutionally distinguishable from that in Geders due to its short duration. Several of the reasons Justice Shaw gave for such a distinction also appear in Perry.
29. Since the ban in Bow came during, and not before, the accused's cross-examination, there is probably more reason than in Perry for presuming that any consultation would have been about Bow's ongoing testimony.
30. One Florida case during this survey period refused to impose a ban on prosecutor-witness consultation during a recess. Kingery v. State, 523 So. 2d 1199, 1204 (Fla. 1st Dist. Ct. App. 1988). The defendant argued that this consultation deprived him of his confrontation rights since it necessarily would have made his cross-examination less effective. Kingery recognized that such consultation "affords the prosecutor an opportunity to calm a combative witness, and thus may have a chilling effect on the resumed cross-examination," but still found no error. Id. at 1205.
drivers would understandably be reluctant to make damaging statements against themselves, the Florida Legislature enacted a special provision to insure drivers' cooperation in filing the required reports and to protect their privilege against self-incrimination when doing so. Florida Statutes, section 316.066(4) provides in general that "[e]ach accident report made by a person involved in an accident shall be without prejudice to the individual so reporting." The same section also specifically provides that “[n]o such report shall be used as evidence in any trial, civil or criminal, arising out of an accident." The reports are for the Department of Highway and Motor Vehicles and other appropriate state agencies confidential use. However there are two important statutory exceptions to the reports general confidentiality. Results of tests taken to determine if a driver was under the influence of drugs and/or narcotics are not privileged merely because they are contained in an accident report. A report may also be used to identify who was the driver of a particular motor vehicle.

Although cases interpreting the Accident Report Privilege are fairly common, most of them usually do not raise significant, new issues. This continued to be the situation during the present survey period, with one exception. Florida courts reaffirmed the privilege does not cover matters a police officer merely observed while making an accident investigation, but only excludes a driver's statements to an investigating officer about the accident. This exclusion also covers a driver's non-verbal conduct when the conduct is essentially offered as a statement. Florida courts also found that while section 316.066(4)'s language talks about accident reports being "for the confidential use of the department [of Highway Safety and Motor Vehicles] or other state agencies having use of the records for accident prevention purposes," this is subject to the provisions of the Florida Public Records Act. However, even though accident reports are public records which can be inspected and copied, section 316.066(4) confidentiality provisions still exempt drivers' statements contained in an accident report from disclosure.

Department of Highway Safety & Motor Vehicles v. Corbin gave the First District Court of Appeal an opportunity to discuss the accident report privilege in an unusual setting. Corbin was a state highway patrol officer who received a short suspension following his one-car accident. The accident occurred in the early morning hours when Corbin was on duty. While Corbin was the only eye witness to the accident, a second highway patrolman investigated the accident and filed the accident report. Based upon information obtained from Corbin at the accident scene, the Department concluded Corbin caused the accident by driving too fast under foggy conditions. Corbin requested a hearing before the Public Employee's Relations Commission (PERC) to review his suspension. At the hearing, Corbin invoked the accident report privilege to exclude any statements he made at the accident scene to the investigating officer. Corbin claimed that a heavy patch of fog surprised him on the morning and also claimed he had not seen any

32. One Florida court recently held the Florida accident report privilege applies even when the driver whose statements are involved is not a party to the lawsuit on trial. See Cahill v. Dorn, 519 So. 2d 56 (Fla. 4th Dist. Ct. App. 1988).

33. For a recent case illustrating this exception, see State v. Fernandez, 25 Fla. Supp. 2d 76 (Fla. Cir. Ct. 1987) (Trial court found that defendant's statement to a police officer who had arrived to investigate an accident that the defendant was the driver of a truck involved in the accident was not privileged.)

34. See Thomas v. Godfrie, 520 So. 2d 622, 623 (Fla. 4th Dist. Ct. App. 1988) (Privilege did not prevent police officer from later testifying in a civil case that the officer did not notice the plaintiff being injured at the accident scene.) However when what initially appears to be a mere observation by a police officer turns out to be partially based on a driver's statements, the accident report privilege will exclude the information. See Hammond v. Jim Hinton Oil Co., 530 So. 2d 995, 997 (Fla. 1st Dist. Ct. App. 1988) (Trial court erred when it admitted two diagrams the investigating police officer made of a vehicular homicide scene, since the diagrams were "based in part on the testimony of a driver of one of the vehicles involved in the accident.").

35. Early Florida cases on the accident report privilege distinguished between a driver's statements made in conjunction with a civil versus criminal investigation. Later cases have eliminated this distinction. Thus any driver's statement to an investigating officer should be privileged. For a recent case illustrating this, see Korugas v. State, 520 So. 2d 681 (Fla. 1st Dist. Ct. App. 1988).

36. This prohibition also covers a driver's non-verbal conduct when the conduct is essentially offered as a statement. See Thomas, supra note 68, holding that the Accident Report precluded a police officer from testifying that the driver did not complain of injuries at an accident scene.

The court's conclusion is clearly correct, since any other decision would significantly diminish the privilege's protection, as well as open up all sorts of issues as to why the driver did not complain to the officer. As Thomas noted, "[t]he effect, however, is the same. It would be illogical to hold that the statutory privilege would preclude the officer from testifying that Mr. Thomas stated he was not injured but would not preclude the officer from testifying that Mr. Thomas made no complaint of injury." Thomas, 520 So. 2d at 623.


39. Id. at 988.

40. 527 So. 2d 868 (Fla. 1988).
drivers would understandably be reluctant to make damaging statements against themselves, the Florida Legislature enacted a special provision to insure drivers' cooperation in filing the required reports and to protect their privilege against self-incrimination when doing so. Florida Statutes, section 316.066(4) provides in general that "[e]ach accident report made by a person involved in an accident shall be without prejudice to the individual so reporting. . . ." The same section also specifically provides that "[n]o such report shall be used as evidence in any trial, civil or criminal, arising out of an accident. . . ." The reports are for the Department of Highway and Motor Vehicles and other appropriate state agencies confidential use. However there are two important statutory exceptions to the reports general confidentiality. Results of tests taken to determine if a driver was under the influence of drugs and/or narcotics are not privileged merely because they are contained in an accident report. A report may also be used to identify who was the driver of a particular motor vehicle.

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Department of Highway Safety & Motor Vehicles v. Corbin gave the First District Court of Appeal an opportunity to discuss the accident report privilege in an unusual setting. Corbin was a state highway patrol officer who received a short suspension following his one-car accident. The accident occurred in the early morning hours when Corbin was on duty. While Corbin was the only eye witness to the accident, a second highway patrolman investigated the accident and filed the accident report. Based upon information obtained from Corbin at the accident scene, the Department concluded Corbin caused the accident by driving too fast under foggy conditions. Corbin requested a hearing before the Public Employee's Relations Commission (PERC) to review his suspension. At the hearing, Corbin invoked the accident report privilege to exclude any statements he made at the accident scene to the investigating officer. Corbin claimed that a heavy patch of fog surprised him on the morning and also claimed he had not any knowledge about the accident should be privileged. For a recent case illustrating this, see Kriyaga v. State, 520 So. 2d 681 (Fla. 1st Dist. Ct. App. 1988).

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other fog that morning. If allowed to testify, the investigating officer would have contradicted Corbin's assertions. According to the officer, Corbin had told him at the accident scene that it had been foggy throughout the county that morning. After Corbin won before the hearing officer and PERC, the Department appealed claiming it was error to allow Corbin to invoke the accident report privilege.

The First District affirmed in an important and well reasoned decision. The Department claimed the accident report privilege was inapplicable to an administrative hearing because by its very language Florida Statutes, section 316.066(4) only provides that "[a]n such [accident] report shall be used as evidence in any trial." Since this was an administrative disciplinary action, and not a trial, the Department argued the privilege did not apply. The First District Court of Appeal noted that the Commission's decision was not based on its interpretation of the accident report privilege's language, but rather on its interpretation of the statute and model rules applicable to agency hearings. The court noted that under the Florida Administrative Procedure Act's terms, each agency is bound by the Administrative Commission's model rules of procedure unless the agency adopts specific rules otherwise. The model rules for conduct of administrative hearings specifically provided that "[t]he rules of privilege shall be effective to the same extent that they are now or hereafter may be recognized in civil actions." Since PERC had not adopted its own rules of evidence for its hearings, the Commission was bound to respect all valid privilege claims. The court thus found Corbin could validly claim the accident report privilege excluded his statements to the investigating officer.

The Corbin decision is much more important than just a mere affirmation of how the Commission correctly interpreted the Florida Administrative Procedure Act. The First District Court of Appeal's opinion indicated that it would refuse to adopt a literal interpretation of section 316.066(4), when examination of the privilege's purpose indicated it should be otherwise. The court in Corbin recognized the legislature's promulgation of the accident report privilege reflected a substantive decision that getting information about how accidents occurred so as to prevent future accidents outweighed other considerations. Even without the privilege, drivers could still claim their privilege against self-incrimination to protect them from criminal actions arising out of an accident. However, the accident report privilege extends to both civil and criminal trials. According to Corbin, "by extending the privilege to civil trials, the legislature has manifested its choice between two competing goals - on the one hand, safer highways for society, and on the other, unrestricted availability of the product of the state's investigative processes by litigants." The First District Court of Appeal recognized that the privilege made it harder, and sometimes perhaps impossible, for tort plaintiffs to prove a defendant driver was negligent. Since the legislature felt this risk was worth the benefits of gathering information about accidents, the court decided that "it is probable that the legislature also intended to bear the risk that a state employee in a disciplinary proceeding might go undisciplined for his negligent driving." After viewing the balancing process which the legislature must have contemplated when creating the privilege, Corbin concluded that "to narrowly interpret the accident report privilege as being applicable only in civil and criminal 'trials,' in the literal sense of these terms, but not in administrative proceedings, would be to substantially diminish its effectiveness to accomplish the purposes for which the privilege was created." Corbin's rationale applies to all administrative proceedings where an agency has not adopted special rules concerning privileges. Indeed, when considering Corbin's well-reasoned analysis of the legislative purpose behind the accident report privilege, agencies should think twice before adopting special administrative rules which would abrogate the privilege's protection. As the First District Court of Appeal recognized, privileges were meant to foster the communication of certain information in particular settings. A privilege's recognition may sometimes lead to exclusion of relevant information at a trial or administrative hearing. However, if the privilege is well thought out, society should benefit more in the long run by its existence. If society does not, then the choice is not to abrogate the privilege in a particular setting but to consider abolishing it altogether.

41. See Fla. Stat. § 320.54(10) (1987) which states in part that "the appropriate model rules shall be the rules of procedure for each agency . . . to the extent that each agency does not adopt a specific rule of procedure covering the subject matter contained in the model rules applicable to that agency."  

42. Corbin, 327 So. 2d at 872.
43. Id.
44. Id. The First District Court of Appeal noted that "[i]f a public employee knows that his statement to an officer investigating the accident can be used to discharge him, he will be less motivated to be truthful, and the state's goal of obtaining accurate accident data will be frustrated." Id.
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B. Medical Review Committee Privilege

Florida Statutory law recognizes a Medical Review Committee Privilege for statements made to a medical review committee and for the committee's records themselves. Former Florida Statutes, section 768.40(5) specifically provided that "[t]he investigations, proceedings and records of [medical review committees] . . . shall not be subject to discovery or introduction into evidence in any civil action against a provider of professional health services arising out of matters which are the subject of evaluation and review by such committee. . . ." Additionally, former Florida Statutes, section 768.40(3)(a) provided that "[t]here shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any member of a duly appointed medical review committee, or any health care provider furnishing any information . . . to such committee, or any person, including any person acting as a witness . . ." for any medical review committee proceeding.

Previous Florida caselaw gave this privilege an expansive construction. The Florida Supreme Court in Holly v. Auld held that the Medical Review Privilege's protection extended to all civil actions and not just those based upon medical malpractice. The court determined that the legislative purpose behind the privilege was to "encourage a degree of self-regulation by the medical profession through peer review and evaluation" thus, hopefully controlling rising health costs. Holly specifically recognized that limiting the medical review committee privilege to only medical malpractice actions would have severely restricted this legislative purpose. Medical review committee exist for many purposes besides just determining whether medical malpractice has occurred in a particular situation. One major purpose for a review committee's existence is to decide whether applicants should be allowed professional staff services at a particular facility. One important part of making this determination is soliciting opinions from fellow professionals who have dealt with the applicant before. Holly recognized that physicians would be hesitant to criticize their colleagues if they knew that their statements could later be used in tort actions against them. The court specifically found that "a doctor questioned by a review committee would reasonably be just as reluctant to make statements, however truthful or justified, which might form the basis of a defamation action against him as he would be to proffer opinions which could be used against a colleague in a malpractice suit." Thus, the court found that the legislature intended that the privilege apply to all civil actions.

Feldman v. Giuroff recently gave the Florida Supreme Court another major opportunity to discuss the extent of the medical review privilege's protection. Dr. Feldman brought a civil lawsuit against members of a hospital medical review committee claiming that they had defamed him during proceedings which resulted in the revocation of his local hospital. The Third District Court of Appeal granted the defendant's motion for summary judgment finding that "the language of the statute creates an absolute privilege and means that any existing defamation action has been abolished" by the medical review committee privilege. However, the district court certified several questions regarding the medical review committee privilege to the Florida Supreme Court as being of great public importance.

The Florida Supreme Court reversed the Third District Court of Appeal's determination and remanded the lawsuit for further proceedings. Feldman found that "a defamation claim . . . is not totally abolished by the medical review committee privilege since a plaintiff may proceed with such an action if he or she can establish [it through] extrinsic evidence." The supreme court found that the statute creating

49. 450 So. 2d 217 (Fla. 1984).
50. Id. at 220.
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49. 52 So. 2d 574 (Fla. 3d Dist. Ct. App. 1986).

50. 31, 522 So. 2d 798 (Fla. 1988).

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the medical review privilege, while generally abolishing lawsuits against committee members, allowed these if the committee members intentionally acted to injure the plaintiff. Medical review proceedings were specifically privileged from discovery. However, any "testimony or documents which were not part of the record of those proceedings," are not so privileged and could be used in defamation actions. Thus, the medical review committee privilege did not abolish defamation actions against committee members; it just made it harder to be successful in bringing them. The court found that this type of limited immunity was consistent with that present in other professional disciplinary and licensing proceedings where the public interest depended upon full and frank disclosure of all facts. The trial court's order granting summary judgment for the defendants was accordingly erroneous, while its order denying discovery of any medical review committee proceeding records was not.

Feldman is important not only because it recognized plaintiffs' right to still bring defamation actions against medical review committee members in limited situations, but also because it preserved the integrity of the medical review committee privilege. Undoubtedly, physicians will find it more difficult to successfully bring defamation actions against medical review committees. However, when balanced against the increased benefits of better health care through a peer review structure, the legislative balance struck by the privileges is a wise one.

C. Potential Statutory Penalty for Invoking a Privilege

The Florida Evidence Code contains a provision regarding potential penalties for invoking a privilege which has no counterpart in the Federal Rules of Evidence. Florida Statutes, section 90.510 states in part that when "a party claims a privilege as to a communication necessary to an adverse party, the court . . . may dismiss the claim for relief or the affirmative defense to which the privileged testimony would relate." The Fifth District Court of Appeal, in an important decision, recently rendered one of the few opinions construing this little used provision. In re Forfeiture of $13,000.00 U.S. Currency involved the state's petition to forfeit $13,000.00 found during a drug arrest. George Bond was arrested for trafficking in cocaine and conspiracy. The cocaine was found in his wife's car trunk. Bond responded to the forfeiture petition by filing an answer allegedly his lawful ownership of the cash. However, Bond consistently invoked his privilege against self-incrimination when the state attempted to have him deposed or to answer any written discovery. His wife partially refused to cooperate in the state's discovery attempts to prove Bond's ownership by invoking the marital communications privilege regarding any conversations between herself and Bond. After this occurred, the state successfully requested the trial court, pursuant to section 90.510, to dismiss Bond's claim and to enter a default in the state's favor.

The Fifth District Court of Appeal reversed in a short opinion narrowly construing section 90.510. The court found that "the privileged testimony [did] not relate to Bond's claim as owner, but relates to the state's claim for forfeiture under the forfeiture act." The Fifth District Court of Appeal did not consider Bond's ownership claim either a "claim for relief or [an] affirmative defense." Thus the trial court improperly applied the penalty provisions of section 90.510.

The Fifth District Court of Appeal's opinion, besides merely being one of the few to discuss section 90.510, is important for two other reasons. First, this case indicates that Florida courts will probably apply section 90.510's language extremely literally. Thus fewer penalties
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meaningful access to the courts, see Defamation ruling gives podiatrist the boot, Broward Review, Annual Special Report on the Florida Supreme Court, Feb. 27, 1989, p. 16.


57. Feldman, 522 So. 2d at 800.

58. This language is consistent with that found in Fla. Stat. § 766.101(5) (Supp. 1988) and similar prior provisions that “information, documents, or records otherwise available from original sources are not to be construed as immune from discovery or use in any civil action merely because they were presented during proceedings of such committee.”

59. For other recent cases discussing the medical review committee privilege, see Burton v. Becker, 516 So. 2d 283 (Fla. 2d Dist. Ct. App. 1987) (The trial court erred in requiring defendants in a medical malpractice action to produce hospital peer review records, since these are privileged under former Fla. Stat. § 768.40(5) (1987)); see Fla. Stat. § 766.101(5) (Supp. 1988).; supra v. Bay Medical Center, 27 Fla. Supp. 2d

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may be imposed on those litigants invoking a privilege claim. Second, the court's decision is very pro-privilege. Privilege communications were made free from disclosure to protect certain relationships and societal values. When the protection of these values through recognition of a privilege clashes with a litigant's desire to obtain and to present all relevant information, some argue that the privilege should give way. Yet the failure to uphold a valid privilege claim in these situations or the penalizing of someone invoking a valid claim is to partially, if not totally, abolish the privilege as a practical matter. The Fifth District Court of Appeal's construction of section 90.510 implicitly recognizes this very important point.

IV. Competency of Witnesses

The common law created numerous categories of witnesses who were deemed incompetent to testify. Modern evidence codes recognized the artificiality of such categories and have revolutionized the rules regarding competency of witnesses. Usually this modernization has taken the simple form of abolishing earlier restrictions on witness competency. Some special restrictions on witness probably still exist in every jurisdiction. However all jurisdictions now accept the notion that finding a prospective witness incompetent to testify about anything should be the exception rather than the rule.

Florida Statutes, section 90.601 provides in general that "[e]very person is competent to be a witness." There are only three reasons why a witness may be deemed incompetent under Florida evidence law: (1) the witness cannot somehow communicate sufficiently to make the witness's testimony helpful; (2) the witness does not understand the obligation of being truthful; or (3) the witness will not make the necessary pledge to be truthful while testifying. Since one of these factors is rarely present, there are relatively few significant cases in this area. During this survey period, however, several Florida cases worth noting discussed the general competency of a person to be a witness.

A. Competency of Child Witnesses

The Florida Supreme Court's opinion in Lloyd v. State recently presented a model for trial courts on how to resolve questions of a child witness's competency to testify. The state charged Lloyd with the contract murder and robbery of a young woman. One of the state's crucial witnesses was the victim's five year old son. The son had allegedly been present when Lloyd shot his mother, and he saw Lloyd leave the victim's house and drive off in a van. Additionally, less than one day after the shooting, the five year old picked out Lloyd's photograph from a non-suggestive five photographic spread as the man who did the shooting.

The trial court wisely employed a number of measures to evaluate the five year old's competency. First, an independent defense expert was appointed to evaluate the witness. Second, after the defense expert prepared a report from records of the defense furnished, a competency hearing was actually held. The court and counsel for both sides questioned the child, and the defense expert also testified at this hearing. Third, a state expert subsequently gave the five year old six different psychological tests, the results of which were furnished to the defense expert. Fourth and finally, the defense expert was given one hour to examine the five year old. The trial court ruled the boy was competent to testify about the event and about the pre-trial photographic identification one day after the killing. However, the court refused to let the witness make an in-court identification, since on the first day of trial the five year old had identified another person in a second photographic spread which also contained Lloyd's picture. Evidence of this misidentification was presented at trial.

The Florida Supreme Court acknowledged that at common law any person under fourteen years of age was considered incompetent to testify. However, even before the Florida Evidence Code's passage,
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65. See e.g., Fla. Stat. § 90.602 (Supp. 1988), the Florida Dead Man's Act,
which has survived several calls for its abolition. Florida's other special competency
provisions, found in Fla. Stat. § 90.607 (1987), which disqualify the presiding judge
and a sitting juror from testifying in the trial they are involved in are probably found in
some form in every jurisdiction. See, e.g., Fed. R. Evid. 606 which has similar
disqualifications.


67. See id. § 90.603(1) disqualifying someone who is "[i]ncapable of expressing
himself concerning the matter . . . as to be understood, either directly or through
interpretation.

68. See id. § 90.603(2) disqualifying someone who is "[i]ncapable of understand-
ing the duty of a witness to tell the truth."

69. See id. § 90.605. Even this prerequisite may be waived at the court's discre-
tion for a child witness. See id. § 90.605(2).

70. 524 So. 2d 306 (Fla. 1988).

71. Id. (citing Radiant Oil Co. v. Herring, 200 So. 376 (Fla. 1941)).

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Florida abandoned this arbitrary age limitation in both civil and criminal cases. The court in Lloyd reiterated the test for infant witness competency as whether the infant "has sufficient intelligence to receive a just impression of the facts about which he or she is to testify and has sufficient capacity to relate them correctly, and appreciates the need to tell the truth." Additionally, the supreme court mentioned that the trial court's determination on this should only be reversed for abuse of discretion.

The Florida Supreme Court had no trouble affirming the decision to let the five year testify. Indeed, considering the extensive procedures the trial court employed to aid its decision and considering the standard for review, any other decision would have been surprising. Lloyd should be a guide to all trial judges on what procedures to follow in making infant witness competency determinations.

The Lloyd test for infant witness competency also should be a guide for all trial lawyers in working with their experts. The defense expert in Lloyd probably did not understand the test the trial court would use to evaluate the five year's competency. Indeed, the expert claimed no one under six could clearly separate fact from fantasy. The expert also claimed no one under the mental age of seven could understand the oath to testify truthfully. Since this same expert found the boy was an average five-and-one-half to six year child, the expert believed the boy was not competent. The very same age categorization process used by this expert is actually what Lloyd and previous cases had rejected. Lloyd should be a broader reminder to all counsel to make sure (1) an expert knows the legal standard a court will use in making a preliminary determination of competency and (2) the expert tries to use this standard in performing his/her own evaluation.

8. Physical and Mental Examination of Witnesses

Two other Florida cases recently presented interesting issues related to witness competency. Unfortunately, judges and lawyers often interchange the terms "competency" and "credibility". The two are not the same and should be carefully distinguished. Competency, as the term is generally used, involves a determination whether a prospective witness satisfies necessary requisites for testifying. Credibility concerns an evaluation of whether a witness, who has already been found competent to testify, should be believed, and if so, how much. Competency issues are preliminary questions for a court's determination. Credibility issues are for the trier of fact, judge or jury as the case may be.

1. Mental Examinations for Competency or Credibility

State v. Coe involved the state's petition for a writ of certiorari from a trial court's order that a sexual battery victim undergo a psychiatric examine to determine her credibility. The defense claimed that the sexual relations were consensual and that the alleged victim was fabricating. The Second District Court of Appeal noted that the petition presented two separate issues: (1) do trial judges have the authority to order such examinations and (2) if so, was the trial judge correct in doing so here. Coe noted that jurisdictions had split on the first issue and that strong policy arguments existed against finding such

72. Id. at 400. The court in this case found a six year old personal injury victim competent to testify.
73. Id. (citing Bell v. State, 93 So. 2d 575 (Fla. 1957)). However, in Bell, the supreme court reversed a trial court's finding of witness competency. There does not seem to have been the same extensive evaluation procedures in Bell as in Lloyd. Additionally, the supreme court condemned the use of leading questions on direct examination of this nine year old witness.
74. Id. (citing Williams v. State, 400 So. 2d 471 (Fla. 5th Dist. Ct. App.) affirmed 406 So. 2d 1115 (Fla. 1981)).
75. There is one procedure the Lloyd trial court followed that should not be emulated in future cases. The trial court allowed the defense expert only one hour to examine the five year old, because the state only had one hour to do the same. The Florida Supreme Court found no error in this, since the expert never indicated a need for more time to conduct the evaluation and the test results did not show a need for further examination. However, trial courts should still avoid setting arbitrary time limits on infant witness examinations for competency purposes.
76. Lloyd, 524 So. 2d at 400.
77. For another recent case discussing infant witness competency and employing the Lloyd test in reversing a trial court's finding that a four year old was competent to testify, see Griffin v. State, 526 So. 2d 752 (Fla. 1st Dist. Ct. App. 1988) (Trial court's decision reversed due to application of wrong standard for infant witness competency and due to inadequate examination procedures.).
79. 521 So. 2d 373 (Fla. 2nd Dist. Ct. App. 1988).
80. Id. at 375.
Florida abandoned this arbitrary age limitation in both civil and criminal cases. The court in *Lloyd* reiterated the test for infant witness competency as whether the infant “has sufficient intelligence to receive a just impression of the facts about which he or she is to testify and has sufficient capacity to relate them correctly, and appreciate the need to tell the truth.” Additionally, the supreme court mentioned that the trial court’s determination on this should only be reversed for abuse of discretion.

The Florida Supreme Court had no trouble affirming the decision to let the five-year-old testify. Indeed, considering the extensive procedures the trial court employed to aid its decision and considering the standard for review, any other decision would have been surprising. *Lloyd* should be a guide to all trial judges on what procedures to follow in making infant witness competency determinations.

The *Lloyd* test for infant witness competency also should be a guide for all trial lawyers in working with their experts. The defense expert in *Lloyd* probably did not understand the test the trial court would use to evaluate the five-year-old’s competency. Indeed, the expert claimed no one under six could clearly separate fact from fantasy. The expert also claimed no one under the mental age of seven could understand the oath to testify truthfully. Since this same expert found the boy was an average five-and-one-half to six-year-old, the expert believed the boy was not competent. The very same age categorization process this expert used is exactly what *Lloyd* and previous cases had rejected. *Lloyd* should be a broader reminder to all counsel to make sure (1) an expert knows the legal standard a court will use in making a preliminary determination of competency and (2) the expert tries to use this standard in performing his/her own evaluation.

8. Physical and Mental Examination of Witnesses

Two other Florida cases recently presented interesting issues related to witness competency. Unfortunately, judges and lawyers often interchange the terms “competency” and “credibility.” The two are not the same and should be carefully distinguished. Competency, as the term is generally used, involves a determination whether a prospective witness satisfies necessary requisites for testifying. Credibility concerns an evaluation of whether a witness, who has already been found competent to testify, should be believed, and if so, how much. Competency issues are preliminary questions for a court’s determination. Credibility issues are for the trier of fact, judge or jury as the case may be.

1. Mental Examinations for Competency or Credibility

State v. *Coe* involved the state’s petition for a writ of certiorari from a trial court’s order that a sexual battery victim undergo a psychiatric examine to determine her credibility. The defense claimed that the sexual relations were consensual and that the alleged victim was fabricating. The Second District Court of Appeal noted that the petition presented two separate issues: (1) do trial judges have the authority to ever order such examinations and (2) if so, was the trial judge correct in doing so here. Coe noted that jurisdictions had split on the first issue and that strong policy arguments existed against finding such
inherent authority.\textsuperscript{81} The court agreed with a Fourth District Court of Appeal opinion finding that trial courts have this authority in the absence of a controlling statutory provision.\textsuperscript{82} However, Coe still granted the state’s petition and quashed the trial court’s order since “the defendant presented neither a strong nor compelling reason for requiring the victim to submit to a psychiatric examination for the purpose of determining her credibility.”\textsuperscript{83} The only defense proffer on the need for an examination came through two unsung motions alleging the victim did not know the duty to be truthful, the victim might have had psychological problems as to credibility, the victim had alcohol problems, and the victim had a jealous relationship with her boyfriend who was not the defendant.\textsuperscript{84}

The trial court correctly considered the defendant’s proffer insufficient for several reasons. First, as the Second District Court of Appeal itself noted, the defense did not offer anything concrete “to suggest that the victim had a history of psychiatric or psychological problems that would have affected her credibility.”\textsuperscript{85} Thus the defense motion appeared little more than a fishing expedition. Since Coe recognized the potential for abuse which psychiatric examinations of witness can have,\textsuperscript{86} trial courts must be given specific facts to justify ordering these examinations. Second, even though Coe did not mention this as a reason for reversal, many of the matters supposedly justifying the examination could arguably have been presented without it. The boyfriend could have been deposed, and others who knew the victim well could have testified about her alleged alcohol problems and about her reputation for truthfulness. Thus, the Second District Court of Appeal correctly refused to permit the examination on the best grounds of all—lack of necessity.

Coe should be read as a decision concerning mental examinations on credibility, competency. There was no showing, other than a bare unsung allegation, that the victim did not appreciate the duty to testify truthfully under oath. Indeed, since the victim was not an infant and could communicate sufficiently to be understood, any trial court should consider her competent to testify but still might not find her testimony credible.

2. Physical Examination of Prospective Witness

The First District Court of Appeal in \textit{State v. Diamond}\textsuperscript{87} faced an issue very similar to that in Coe. Diamond was accused of sexually battering two eight year old girls. The victims had voluntarily given statements about the alleged acts and also voluntarily submitted to a state pediatrician’s examination. The defense contended that an examination, by its own gynecologist was needed, since there were inconsistencies between the victims’ statements about how the alleged sexual relations occurred and the examination’s findings. The defense offered to have its doctor conduct the examination in the children’s parents’ presence at the state pediatrician’s office. However, the parents and the state both opposed the examination. The trial court found that there was no controlling state rule or statute and that both children enjoyed a state constitutional right to privacy.\textsuperscript{88} However, the trial court found that this right had to be balanced against the defendant’s own due process right to a fair trial. After so doing, the trial court concluded that Diamond was entitled to have the examination done, especially where the state had already been granted access to the physical evidence of the girls’ condition.\textsuperscript{89}

The First District Court of Appeal affirmed in a short but carefully considered opinion.\textsuperscript{90} Like the trial court, the First District Court

\textsuperscript{81} The court noted that three different rationales have been relied on by courts finding no such authority exists: (1) that appointing a psychiatrist to examine a witness for credibility usurps the fact-finder’s role; (2) that to require a psychiatrist to “touch” for the witness’ credibility would be another form of required corroboration of sex offenses which has been repealed by the legislatures in these jurisdictions; and (3) that such requirement would invade the victims’ privacy and would likely result in fewer victims reporting a sexual battery for fear of having to subject themselves to a psychiatric examination.

Id. at 375-76 (footnote omitted).

\textsuperscript{82} Id. (citing Diskin v. State, 244 So. 2d 148 (Fla. 4th Dist. Ct. App. 1971)). The Coe opinion also implies that the Third District Court of Appeal has implicitly followed Diskin. See Hudson v. State, 368 So. 2d 437 (Fla. 3d Dist. Ct. App. 1979); Fulton v. State, 352 So. 2d 581 (Fla. 3d Dist. Ct. App. 1977).

\textsuperscript{83} Coe, 521 So.2d at 376.

\textsuperscript{84} Id.

\textsuperscript{85} Id.

\textsuperscript{86} See supra note 81.

\textsuperscript{87} 13 Fla. L. Weekly 641 (Fla. 1st Dist. Ct. App. 1988).

\textsuperscript{88} The trial court, and later the appellate court, found this constitutional right to privacy in Fla. Const. art. I, § 23.

\textsuperscript{89} Diamond, 13 Fla. L. Weekly at 644.

\textsuperscript{90} The First District Court of Appeal read the trial court’s order as giving the
inherent authority. The court agreed with a Fourth District Court of Appeal opinion finding that trial courts have this authority in the absence of a controlling statutory provision. However, Coe still granted the state's petition and quashed the trial court's order since "the defendant presented neither a strong nor compelling reason for requiring the victim to submit to a psychiatric examination on the purpose of determining her credibility." The only defense proffer on the need for an examination came through two unworn motions alleging the victim did not know the duty to be truthful, the victim might have had psychological problems as to credibility, the victim had alcohol problems, and the victim had a jealous relationship with her boyfriend who was not the defendant.

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83. Coe, 521 So.2d at 376.
84. Id.
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The First District Court of Appeal affirmed in a short but carefully considered opinion. Like the trial court, the First District Court

88. The trial court, and later the appellate court, found this constitutional right to privacy in Fla. Const. art. I, § 23.
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of Appeal found there was no controlling statute or rule about ordering physical examinations of witness in a criminal case.** Diamond also found that there were no Florida cases clearly on point.** However, the court noted both the Second District Court of Appeal’s recent opinion in Coe and the Fourth District Court of Appeal’s opinion in Dinkins requiring mental examinations of prospective witnesses. Despite the absence of statutory or case precedent, the First District Court of Appeal found that “a court always has the inherent power to insure that a party before it is accorded constitutional rights of due process and a fair trial!” ** Diamond accordingly held in part that “a trial court . . . has the power to consider defendant’s motion for a physical examination of the complaining witnesses and . . . to grant the motion upon a showing of strong and compelling reasons that denial of such relief would amount to a denial of due process of law.”**

While Diamond essentially adopted the Coe test for when a witness can be examined upon court order, the ultimate outcome in Diamond was different. The First District Court of Appeal refused to overturn the trial court’s order as an abuse of discretion. The court noted that the defense asserted cogent reasons why an examination was needed to present a defense. Here Diamond claimed no repeated sexual intercourse took place as the victims asserted. The examination was necessary to see first, if the state pediatrician’s diagnosis was correct.

state a choice of either having the victims examined or being precluded from presenting any evidence about the state pediatrician’s examination. Diamond clearly indicated that the trial court’s ruling could not go beyond this, claiming there is no “authority granting the trial court power to curtail the state’s proceedings of criminal charges for sexual battery upon failure of the complaining witness to submit to a physical examination.” ** Id. at 1965.

91. The First District Court of Appeal also found that the state could present the issue pre-trial through a petition for certiorari. Id. at 1964-65.

92. Id. at 1965. Diamond rejected the state’s argument that the Florida Supreme Court’s opinion in State v. Smith, 260 So.2d 489 (Fla. 1972) had precluded such examinations. Smith involved an appeal from a trial court order requiring the vision of witnesses in a murder case to be examined. Smith noted that the only basis alleged for such an examination was that this essentially an eyewitness case. The supreme court avoided the fundamental issue whether authority existed to ever order a witness to be physically examined, since “[e]ven assuming, that in some rare instance, justice may require some type of physical examination of a witness, more must be shown.” ** Id. at 491. Diamond’s conclusion that Smith is not controlling as to a trial court’s authority to order physical examinations of witnesses is thus correct.

93. Id.

94. Id.

and second, if the “sexual intercourse charged could not have taken place as described by the children.”** The trial court balanced this need against the privacy rights of the children and gave them the chance to voluntary consent to another examination. Even after the children and their parents did not consent, the trial court did not order one done but rather took other steps to protect the defendant’s own right to a fair trial. The court rejected the state’s claims that the trial court’s order would lead to future abuse in sexual battery since the defense here was unusual.**

Diamond and Coe both recognize a trial court’s inherent authority to protect a defendant’s due process right to a fair trial by ordering a physical or mental examination where extremely necessary. The Florida Supreme Court has never definitively settled this issue. Hopefully a definitive answer will be forthcoming as the First District Court of Appeal wisely certified the question as being of great public importance.**

V. Cross Examination

A. Impeachment by Bias

The Florida Evidence Code indirectly recognizes that impeaching a witness’s testimony by showing the witness is biased for or against a party is a permissible method of cross-examination.** In criminal cases,
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95. Id.
96. As the First District Court of Appeal noted, “it would seem to be somewhat unusual to defend such a charge on the premise that evidence from a medical examination shows a physical impossibility for the offense to have occurred as contended by the victim.” Id.
97. The exact issue certified was:
Whether trial court’s order requiring the complaining child witnesses to voluntarily consent to a physical examination by the accused’s expert gynecologist under the conditions stated therein constitutes a violation of a clearly established principle of law resulting in a miscarriage of justice.
Id. at 1967. As of March 17, 1989, all proceedings were stayed pending decision on a motion for reconsideration which had been filed September 6, 1989 with the First District Court of Appeal.
98. See Fla. Stat. § 90.606 (13)(b) (1987) stating that “[i]f any party, except the party calling the witness, may attack the credibility of a witness by showing the witness is biased.” The Federal Rules of Evidence do not mention the word “bias” anywhere in their text. However, the United States Supreme Court has declared that bias impeachment is a permissible method of cross-examination under the Federal Rules. See United States v. Abel, 469 U.S. 45 (1984). Neither the Florida Evidence Code nor the Federal Rules of Evidence define bias impeachment. The Supreme Court
bias impeachment has been declared part of an accused's sixth amendment right to confrontation. Although cases discussing bias impeachment arise fairly frequently, usually they just declare that a party should or should not have been allowed to cross-examine a witness on certain matters allegedly showing bias. The Florida cases discussing bias impeachment during this survey period are all of this nature.

The United States Supreme Court has noted that the policy behind state evidence rules or statutes may have to give way when balanced against an accused's confrontation rights. One recent United States Supreme Court case indicates that the rationale of an earlier Florida decision on whether the Florida Rape Shield Law's limitations may sometimes violate a defendant's Confrontation Clause Rights should be reconsidered. Florida Statutes, section 794.022 establishes a procedure for deciding the admissibility of a victim's previous sexual

[^100]: See Lask v. State, 531 So. 2d 1377, 1382 (Fla. 2d Dist Ct. App. 1988).
[^102]: Davis v. State, 527 So. 2d 962, 963 (Fla. 5th Dist Ct. App. 1988).
[^103]: Florida courts have held that state evidence rules precluding the admission of certain information may have to give way. The Florida Supreme Court admitted that "in a particular case, where the State has held that the State evidence rules precluding the admission of certain information may have to give way."

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conduct and restricts the subjects on which this is relevant. The section presumes evidence of previous sexual conduct ordinarily is inadmissible. In *Marr v. State,* the Florida Supreme Court rejected arguments that application of section 794.022's limitations violated a defendant's confrontation clause rights. At trial, the state relied exclusively on the victim's testimony. Marr denied any sexual battery and attempted to introduce evidence about the sexual intimacy between the victim and her boyfriend to show the victim's bias against Marr. This bias supposedly arose from the fact that Marr had told the state attorney about the boyfriend's alleged criminal activity. The trial court excluded evidence of the sexual relations between the victim and her boyfriend but allowed Marr to cross-examine the victim about their relationship in general. The First District Court of Appeal found Marr was not denied his sixth amendment right to confrontation, since he had been able to show the close relationship between the victim and the boyfriend by the evidence presented. The Florida Supreme Court affirmed.

The supreme court found that section 794.022 makes an alleged victim's sexual activity with a third person relevant only "when such evidence may show that the accused was not the perpetrator of the crime or the defense is consent." Neither situation existed in *Marr* as the defendant claimed the alleged sexual battery had been fabricated, thus the rape shield law excluded evidence of the victim's relations with her boyfriend. *Marr* correctly noted that the United States Supreme Court had previously held that when a defendant's constitutional rights were involved, state evidence rules precluding the admission of certain information may have to give way.

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in Abel declared that "[b]ias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." Abel, 469 U.S. at 52.

100. See Lake v. State, 531 So. 2d 1377, 1382 (Fla. 2d Dist. Ct. App. 1988) (Trial court erred in not allowing defense counsel to impeach an alleged battery victim by evidence that the victim was on probation at the time of the trial, 'since it tended to show [the victim's] possible bias in attempting to curry favor with the state through his testimony'); O'Reilly v. State, 516 So. 2d 106, 107 (Fla. 4th Dist. Ct. App. 1987) (Court reversed defendant's conviction and ordered a new trial, merely stating that trial court erred in not allowing victim's mother to be cross-examined on her bias, without specifying the evidence of bias); Davis v. State, 527 So. 2d 962, 963 (Fla. 5th Dist. Ct. App. 1988) (Trial court erred in excluding evidence that victim's mother had filed a criminal complaint against the victim's boyfriend. This evidence would have shown that the victim was possibly motivated to bring false sexual conduct charges against her father to get back at her mother); State v. Gonzalez, 27 Fla. Supp. 2d 111, 113 (Fla. Cir. Ct. 1988) (Evidence a state witness was awaiting sentencing on a criminal charge was relevant to show her possible motive in testifying against the defendant). 101. See Davis v. Alaska, 415 U.S. 308, 319 (1974), holding that a state evidence rule making prior juvenile adjudications confidential could not constitutionally exclude evidence of a juvenile witness' probative status when that status was relevant to show bias.

In Powell v. Foxman, 528 So. 2d 91, 92 (Fla. 5th Dist. Ct. App. 1988), the court found that a sexual battery defendant's right to confrontation included the right to production of testimony taken at a juvenile dependency hearing when the testimony may reveal inconsistencies in state witnesses' testimony. The court acknowledged that state law made juvenile records generally inadmissible as evidence, see Fla. Stat. § 39.41(f)(6) (1987), but declared the intent in keeping juvenile records confidential must give way to the accused's right to confrontation.

conduct and restricts the subjects on which this is relevant. The section presumes evidence of previous sexual conduct ordinarily is inadmissible.102 In Marr v. State,103 the Florida Supreme Court rejected arguments that application of section 794.022's limitations violated a defendant's confrontation clause rights. At trial, the state relied exclusively on the victim's testimony. Marr denied any sexual battery and attempted to introduce evidence about the sexual intimacy between the victim and her boyfriend to show the victim's bias against Marr. This bias supposedly arose from the fact that Marr had told the state attorney about the boyfriend's alleged criminal activity. The trial court excluded evidence of the sexual relations between the victim and her boyfriend but allowed Marr to cross-examine the victim about their relationship in general. The First District Court of Appeal found that Marr had not denied his sixth amendment right to confrontation, since he had been able to show the close relationship between the victim and the boyfriend by the evidence presented.104 The Florida Supreme Court affirmed.

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102. See Fla. Stat. § 794.022(2) (1987) stating in part that "[s]pecific instances of prior consensual activity between the victim and any person other than the offender shall not be admitted into evidence in a prosecution [for sexual battery]."
103. 494 So. 2d 1139 (Fla. 1986).
105. Marr, 494 So. 2d at 1142.
106. Id. at 1143. The Florida Supreme Court specifically noted the United States Supreme Court's decision to this effect in Davis, supra note 101.
107. Marr, 494 So. 2d at 1143.
testimony from both parties that they had an intimate relationship and were in love. Any further relevancy to showing bias that exposing the sexual relations between the two might have was outweighed by the rape shield law's policies.

Early in the 1988 Term, the United States Supreme Court in Olden v. Kentucky reversed a Kentucky Court of Appeals decision upholding a Kentucky trial court's refusal to allow Olden to cross-examine an alleged rape victim about her present cohabitation with another state witness, her boyfriend both at the time of trial and the time of the alleged rape. The victim alleged she became intoxicated in a bar while waiting for a girlfriend of hers to leave. When the victim could not find her friend, she claimed she left the bar with Olden and another man to look for her. Olden and the victim knew one another since Olden was half-brother to the victim's boyfriend. The victim alleged the two men drove her to an isolated area and raped her at knife point. Olden admitted having sexual relations with the victim but claimed they were consensual.

Olden and his half-brother, Russell, were both black, while the victim was white. When the rape was allegedly committed, Russell and the victim were married to other people but were having an affair. By the time of trial, the two had separated from their spouses and were living together. Olden's consent defense claimed the victim fabricated the rape story to protect her affair with Russell, because Russell had seen her with Olden the night in question. The trial court prohibited Olden from eliciting any evidence about the cohabitation. The Kentucky Court of Appeals found the evidence relevant but concluded its prejudicial impact would outweigh its probative value. The court hinged this determination on the inflammatory effect against the victim it felt evidence of the extramarital interracial affair would have.

The Court, in a per curiam opinion, reversed Olden's conviction finding that Olden had been deprived of his right to confrontation by the trial court's ruling. The Court noted that once a court finds evidence relevant it may only impose reasonable limitations on the defendant's right to cross-examine about it. Possible animosity against a victim stemming from jurors' potential racial bias was not a legitimate reason for limiting or excluding otherwise appropriate cross-examination.

Does Olden signal that the Florida Supreme Court's decision in Marr is no longer good law? Olden rejects unreasonable limitations on cross-examination to foster another social goal. Certainly both cases are very similar in that another person with whom the defendant had consensual sexual relations was the alleged motivating factor behind the victim's complaint. If evidence of sexual relations with another man was relevant to show motive in Olden, why would it not be just as relevant in Marr? The answers to these questions are not clear. Perhaps Marr is distinguishable since the trial court allowed the defendant to produce evidence of the strong affection between the victim and her boyfriend. Olden suggests, however, that evidence of sexual conduct with another man is relevant not only to show the witness's motivation for testifying against a defendant, but also to show exactly how strong that motivation may be.

B. Cross Examination on the Defendant's Silence

Florida evidence law recognizes that in some circumstances silence can be probative of a person's responsibility for certain actions. However, a person's silence can never be an admission. Before custodial interrogation begins the United States Supreme Court has held that a suspect must be given the well-known Miranda warnings to apprise the subject of his fifth amendment rights and the potential consequences of waiving them. When a suspect asserts his fifth amendment privilege after receiving these warnings, the state cannot use this silence against the suspect at trial. In Doyle v. Ohio the Court found two reasons for banning the use of a defendant's silence after receiving Miranda warnings as impeachment at trial. First, the Court was unsatisfied that the state could properly consider such matters as "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that [would be] repetitive or only marginally relevant." Id. (quoting Delaware v. Van Arsdall, 475 U.S. 673 (1986)).

Id. 111. Id. 112. Id. at 482. The Kentucky Court of Appeals specifically found that the state's rape shield law did not exclude evidence of the cohabitation. Id. at 481. The Court mentioned that reasonable limitations on cross-exam-

108. Id.
110. Id. at 481.
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bile to discern the probative value of silence in this situation, since "[silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous. . . ."

Second, since the warnings specify that anything a warned suspect says can be used against him, the warnings carry an implicit "assurance that silence will carry no penalty". Thus Doyle held that using a person's silence after being warned violated the due process clause.

Spivey v. State recently gave the Florida Supreme Court an opportunity to consider the implications of Doyle in an unusual setting. Spivey and a co-defendant were charged with conspiracy to commit murder and the murder of the co-defendant's estranged husband. The state claimed Spivey committed the actual killing, assisted by some other men. Spivey admitted at trial that he was in the victim's house during the homicide but claimed another man killed the husband. The wife's attorney on cross-examination, over objections from Spivey, inquired into Spivey's post-Miranda silence in an attempt to show Spivey's testimony was a partial fabrication. The jury convicted Spivey on both charges and convicted the wife of conspiracy to commit murder.

Spivey appealed claiming that the trial court's decision to allow his impeachment by post-Miranda silence was erroneous for two reasons. First, Spivey claimed this violated the Court's ruling in Doyle. Second, Spivey contended the silence was not probative to begin with. The Florida Supreme Court found error had been committed but considered it harmless in light of overwhelming evidence of Spivey's guilt.

The supreme court surprisingly found that Spivey had not been deprived of his Due Process rights because of a Miranda-Doyle violation. The court found that these cases were "addressed to the actions of the state and its agents." Thus state action would be needed to find a violation of them. Since the state did not do the impeachment by silence, this component was missing. However, the court agreed with Spivey's second argument. Although there was no direct Doyle violation, Doyle's logic on the ambiguity of post-Miranda silence still applied to make such silence potentially irrelevant. The court specifically found that "post-arrest silence has little, if any, probative value and that assigning a meaning to such silence would be an exercise in pure speculation.

Accordingly Spivey held that neither the state nor a co-defendant can cross-examine an accused in these circumstances.

Spivey should be carefully noted by all criminal practitioners and criminal trial courts. The trial court had allowed the impeachment by silence on the basis that this was necessary to protect the co-defendant's confrontation rights. Spivey's results essentially makes two comments on this reasoning. First, the cross-examination was not necessary to protect the co-defendant's rights, since the Florida Supreme Court found the silence irrelevant. As there is no constitutional right to introduce irrelevant evidence, the co-defendant's cross-examination on Spivey's silence could have been precluded. Second, even if this cross-examination was constitutionally required, one defendant's rights could not be sacrificed to uphold another's defendant's rights. Thus, the only solution in this situation is to sever the two defendants' cases for separate trials. Spivey may require defense attorneys who wish to cross-examine a co-defendant about his/her silence to promptly move to have the cases severed for trial or possibly find their cross-examinations precluded at trial. Spivey should also remind state attorneys not to op-

117. Id. at 617 (emphasis added).
118. Id. at 618.
119. 529 So.2d 1088 (Fla. 1988).
120. Id. at 1089.
121. Id. at 1090.
122. Id. at 1091.
123. Id. at 1095.
124. Id. at 1091.
125. According to Spivey, when the impeachment by silence began, "the state
ble to discern the probative value of silence in this situation, since "silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous." Second, since the warnings specify that anything a warned suspect says can be used against him, the warnings carry an implicit "assurance that silence will carry no penalty". Thus Doyle held that using a person's silence after being warned violated the due process clause.

Spivey v. State recently gave the Florida Supreme Court an opportunity to consider the implications of Doyle in an unusual setting. Spivey and a co-defendant were charged with conspiracy to commit murder and the murder of the co-defendant's estranged husband. The state claimed Spivey committed the actual killing, assisted by some other men. Spivey admitted at trial that he was in the victim's house during the homicide but claimed another man killed the husband. The wife's attorney on cross-examination, over objections from Spivey, inquired into Spivey's post-Miranda silence in an attempt to show Spivey's testimony was a partial fabrication. The jury convicted Spivey on both charges and convicted the wife of conspiracy to commit murder.

Spivey appealed claiming that the trial court's decision to allow his impeachment by post-Miranda silence was erroneous for two reasons. First, Spivey claimed this violated the Court's ruling in Doyle. Second, Spivey contended the silence was not probative to begin with. The Florida Supreme Court found error had been committed but considered it harmless in light of overwhelming evidence of Spivey's guilt.

The supreme court surprisingly found that Spivey had not been deprived of his Due Process rights because of a Miranda-Doyle violation. The court found that these cases were "addressed to the actions of the state and its agents." Thus state action would be needed to find a violation of them. Since the state did not do the impeachment by silence, this component was missing. However, the court agreed with Spivey's second argument. Although there was no direct Doyle violation, Doyle's logic on the ambiguity of post-Miranda silence still applied to make such silence potentially irrelevant. The court specifically found that "post-arrest silence has very little, if any, probative value and that assigning a meaning to such silence would be an exercise in pure speculation." Accordingly Spivey held that neither the state nor a co-defendant can cross-examine an accused in these circumstances.

Spivey should be carefully noted by all criminal practitioners and criminal trial courts. The trial court had allowed the impeachment by silence on the basis that this was necessary to protect the co-defendant's confrontation rights. Spivey's results essentially make two comments on this reasoning. First, the cross-examination was not necessary to protect the co-defendant's rights, since the Florida Supreme Court found the silence irrelevant. As there is no constitutional right to introduce irrelevant evidence, the co-defendant's cross-examination on Spivey's silence could have been precluded. Second, even if this cross-examination was constitutionally required, one defendant's rights could not be sacrificed to uphold another defendant's rights. Thus, the only solution in this situation is to sever the two defendants' cases for separate trials. Spivey may require defense attorneys who wish to cross-examine a co-defendant about his/her silence to promptly move to have the cases severed for trial or possibly find their cross-examinations precluded at trial. Spivey should also remind state attorneys not to op-

117. Id. at 617 (emphasis added).
118. Id. at 618
119. 529 So. 2d 1088 (Fla. 1988).
120. Id. at 1089.
121. Id. at 1090.
122. Id. at 1091.
123. Id. at 1095.
124. Id. at 1091.
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pose a severance motion in such circumstances.

V. Other Crimes, Wrongs, or Acts

Florida Statutes, section 90.404(2) codifies the pre-evidence code "Williams Rule"359 prohibiting introduction of evidence about a defendant's other crimes, wrongs, or acts for the sole purpose of proving the defendant's propensity to commit crime in general or to commit a particular type of crime. However, when there is another legitimate use, evidence of other crimes may be admissible.360 As in past years, many Florida appellate decisions address Williams Rule issues. Indeed, other than hearsay issues, the Williams Rule probably generated more decisions than any other evidence area.361 There was also a high reversal percentage for errors in Williams Rule cases.362 Florida courts most frequently found error when the other crimes or acts were not similar enough to the charged offense to be relevant on anything but propensity363 or when there was insufficient proof the defendant had commit-

plicating Davis. Instead, a limiting instruction, although usually constitutionally inadequate, was sufficient. "To force other alternative dispositions on the trial court as a consequence of listening to the tarty motion would do no more than discourage 'entertainment' of meritorious motions.")359
130. See Fla. Stat. § 90.404(2)(a) (1987) which states: Similar fact evidence of other crimes, wrongs or acts is admissible to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.
131. There were thirty-two reported decisions discussing Williams Rule issues during this survey. Thirty of these decisions came from the appellate courts, while two were trial court rulings.
132. Sixteen of the thirty reported Florida appellate decisions found in favor of the defense on Williams Rule issues. In one of these decisions, the Florida Supreme Court affirmed a district court of appeal decision for the defendant. Thus fifty percent of the newly raised Williams Rule issues during this survey period resulted in defense reversals.

Similarly, the two trial court rulings on Williams Rule issues both were for defendants. Although the Williams Rule can also apply in civil litigation, all recent reported other crime evidence decisions, except one, arose in criminal cases. The one exception discussed use of other crimes evidence in a child dependency proceeding. See I.T. v. State, Department of Health & Rehabilitative Services, 532 So. 2d 1085 (Fla. 3d Dist. Ct. App. 1988).
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133. Florida courts have consistently stated that the search to find sufficient simi-
Most cases discussing section 90.404(2) presented rather standard issues. Indeed with one exception, the Williams Rule cases deciding during the survey, offered little new significant discussion.134 Once again, other crimes evidence was offered most frequently to prove identity.135 Other crimes evidence was also offered to show intent,136 motive,137 absence of mistake,138 and modus operandi.139 Florida courts in recent cases also sanctioned two unusual uses for Williams Rule evidence for impeachment of a witness140 and for demonstrating a convicted defendant’s character in a death sentencing hearing.141 Florida also continued to sanction use of other crimes evidence in familial sex abuse cases to support the credibility of alleged victims even though...

134. Each time Williams Rule evidence was admitted for this reason in recent cases, appellate courts found it was error. See Fulton v. State, 523 So. 2d 1197 (Fla. 2d Dist. Ct. App. 1988); Butterworth v. State, 522 So. 2d 1039 (Fla. 4th Dist. Ct. App. 1988); Herbert v. State, 526 So. 2d 709 (Fla. 4th Dist. Ct. App. 1988).

135. For recent cases finding other crimes evidence erroneously admitted for this purpose, see Garrison v. State, 528 So. 2d 353 (Fla. 1988); Herbert v. State, 526 So. 2d 709 (Fla. 4th Dist. Ct. App. 1988).

The Florida Supreme Court did find that other crimes evidence admissible to show motive in Jackson v. State, 522 So. 2d 802 (Fla. 1988). There testimony that Jackson argued with and actually assaulted a homicide victim during an earlier drug deal between the two was relevant to show Jackson’s motive for killing the victim during an argument in a later drug deal.

139. See Herbert v. State, 526 So. 2d 709 (Fla. 4th Dist. Ct. App. 1988), finding the other crimes evidence inadmissible to show this since the defendant did not dispute how an alleged act of aggravated child abuse occurred but only contended what she did did not amount to a crime.

140. See Buenano v. State, 527 So. 2d 194 (Fla. 1988) where the supreme court held that evidence that defendant's first husband and her boyfriend both died of arsenic poisoning and that defendant received insurance proceeds from both deaths admissible. See also Domberg v. State, 518 So. 2d 1360 (Fla. 1st Dist. Ct. App. 1988); Edmond v. Scott, 521 So. 2d 269 (Fla. 2d Dist. Ct. App. 1988).

141. See Lask v. State, 531 So. 2d 1377 (Fla. 2d Dist. Ct. App. 1988) finding the defendant should have been allowed to impeach a state witness claiming to be a believable person with evidence the witness had assaulted several people.

See Hildeswin v. State, 531 So. 2d 124 (Fla. 1988) finding that where a defendant introduces evidence of his peaceable character as a mitigating factor in a death penalty sentencing hearing, the state is entitle to rebut this by other crimes evidence even if the defendant had not been convicted for the other crime.
Most cases discussing section 90.404(2) presented rather standard issues. Indeed with one exception, the Williams Rule cases deciding during the survey, offered little new significant discussion. Once again, other crimes evidence was offered most frequently to prove identity. Other crimes evidence was also offered to show intent, modifying the alleged victims’ father to testify that defendant had told the father, he “couldn’t help himself,” and that he had the same problem with his own daughter, since there was no corroborative evidence the defendant had ever molested his own child; Elin v. State, 531 So. 2d 219 (Fla. Dist. Ct. App. 1988) (Defendant charged with murder of her second husband for insurance proceeds was entitled to a new trial when an insurance agent’s testified that Elin’s first husband had received insurance money from the drowning death of her first husband, since there was no showing the first husband’s death was a result of criminal activity.).

Once the requisite for admission of other crimes evidence is met subsequent events will not require a reversal for its use. Thus even if the state after a trial in which Williams Rule evidence is admitted dismises charges stemming from the defendant’s alleged other acts or even if the defendant is tried and acquitted of these other acts, no reversal is mandated. For a recent case illustrating this see, Burr v. State, 518 So. 2d 903 (Fla. 1987).

135. Indeed, the discussion of other crimes evidence in several recent cases was so summarily done that these opinions are of little or no help. See Swamford v. State, 533 So. 2d 270 (Fla. 1988); Domburg v. State, 518 So. 2d 1360 (Fla. Dist. Ct. App. 1988); Garza v. State, 521 So. 2d 193 (Fla. Dist. Ct. App. 1988); Florida v. State, 522 So. 2d 1039 (Fla. Dist. Ct. App. 1988). 136. Other crimes evidence can be used to prove help in two ways. First, the other crimes evidence is truly offered as similar fact evidence. Here, the defendant is connected with another crime or wrong that has a sufficient number of similarities with the charged offense that it is reasonable the same person committed both acts or sets of acts. For recent Williams Rule cases illustrating this, see Correll v. State, 523 So. 2d 562 (Fla. 1988) (Evidence that defendant had slashed murder victim’s tires two years before killing admissible to prove his identity as the killer, since the tires of a man the victim had been dating were found slashed the night of the killing.); State v. Gonzalez, 27 Fla. Supp. 2d 112 (Fla. Cir. Ct. 1988) (Defence allowed to introduce other crimes evidence to show that a state witness could have committed theft defendant was charged with.)

For recent cases where other crimes evidence was determined too dissimilar to show identity, see Richardson v. State, 528 So. 2d 981 (Fla. 1st Dist. Ct. App. 1988); Robinson v. State, 522 So. 2d 869 (Fla. 2d Dist. Ct. App. 1987); Fulton v. State, 523 So. 2d 197 (Fla. Dist. Ct. App. 1988); Whitehead v. State, 528 So. 2d 345 (Fla. 4th Dist. Ct. App. 1988); Correll v. State, 526 So. 2d 535 (Fla. 4th Dist. Ct. App. 1988).

In the other method of proving identity, other crimes evidence is not offered as similar fact evidence. Rather, there is usually some instrument used in the other crime charged the defendant committed which the state claims was also used in the present crime charged. From one common fact, the state argues that the same person can rationally be considered responsible for both acts. For recent cases discussing this, see...
this is clearly use of Williams Rule evidence for propensity.\textsuperscript{143} Finally Florida courts routinely found that where another crime is so involved with the crime charged that separating the two is difficult, proof of the other crime is admissible to effectively explain the context in which both arose.\textsuperscript{144}

A. Harmless Error in Williams Rule Cases

Only one significant Florida other crimes case was decided during the present survey, Lee v. State\textsuperscript{145} recently settled any questions about the appropriate standard for deciding whether erroneous admission of other crimes evidence is harmful error. Lee had been convicted of multiple offenses arising from an armed kidnapping, rape, and robbery. The victim and two friends who were with her when she was kidnapped identified Lee at trial. Additionally, scientific evidence established that someone in Lee's blood group had attack the victim. Finally, Lee's fingerprints were found in the victim's car. Despite all this evidence, the state still found it necessary to produce testimony that one day after the abduction and rape in Panama City, Lee robbed a bank in Tallahassee. The state argued the robbery evidence was admissible as part of the res gestae of the previous day's crimes. The First District Court of Appeal found there was no unusual similarity between the offenses and that there is no testimony otherwise linking the two instances.\textsuperscript{146} After finding admission of the other crimes evidence erroneous, the First District Court of Appeal addressed whether the admission could be considered harmless. Florida statutory law permits reversal only when "the error complained of has resulted in a miscarriage of justice."\textsuperscript{147} The First District Court of Appeal noted that erroneous admission of Williams Rule evidence is "presumed harmful because of the danger that a jury will take bad character or the propensity to commit the collateral crime as evidence of guilt of the crimes charged."\textsuperscript{148} The First District Court of Appeal felt that even with the improperly admitted evidence, the state had proven Lee's guilt by "clear and convincing, probably conclusive evidence."\textsuperscript{149} However, the district court still felt compelled to reverse Lee's convictions because of the Florida Supreme Court's recent statements concerning the harmless error rule. State v. Digulio\textsuperscript{150} had declared that "the test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. . . . The question is whether there is a reasonable possibility that the error affected the verdict."\textsuperscript{151} Under this standard, the First District Court of Appeal found reversal necessary, since it could not eliminate any reasonable possibility the Williams Rule evidence affected the verdict, especially since the state emphasized the bank robbery evidence in its closing arguments.\textsuperscript{152} However, the First District Court of Appeal felt there was a conflict between Florida stat-

\begin{itemize}
  \item 143. See Beasley v. State, 518 So. 2d 917 (Fla. 1988); Calloway v. State, 520 So. 2d 665 (Fla. 1st Dist. Ct. App. 1988), both allowing other crimes evidence for this purpose.
  \item 144. For a recent case rejecting other crimes evidence for this purpose due to a lack of similarity between the charged offense and the alleged other act, see Paquette v. State, 528 So. 2d 995 (Fla. 5th DCA 1988).
  \item 146. For recent cases approving such admission of other crimes evidence, see Jackson v. State, 522 So. 2d 802 (Fla. 1988); Bryan v. State, 533 So. 2d 744 (Fla. 1988); Harmon v. State, 532 So. 2d 182 (Fla. 1988).
  \item 147. FLA. STAT. § 59.041 (1987).
  \item 148. Lee, 508 So. 2d at 1302.
  \item 149. Id. at 1303.
  \item 150. 491 So. 2d 1129 (Fla. 1986).
  \item 151. Id. at 1138. Recently the Florida Supreme Court explicitly spelled out the proper procedure appellate courts must follow in deciding whether any error can be considered harmless. Cicarelli v. State, 531 So. 2d 129 (Fla. 1988), reiterated that the state must initially make a prima facie showing that erroneous admission of evidence in a criminal case may be harmless. Until the state does this, an appellate has no obligation to address the harmless error question. However, once the state meets its initial burden, an appellate court must thoroughly review the trial record to see if harmless error does in fact exist. The supreme court declared that "[t]his requires more than a mere looking at the evidence, and, in most instances, more than a mere reading of a portion of the record in the abstract. It entails an evaluation of the impact of the erroneously admitted evidence in light of the overall strength of the case and the defenses asserted." Id. at 132.
  \item 152. Cicarelli also declared that this task could not be delegated to the parties or to court personnel. Rather, each appellate judge must personally review "in most cases the entire trial transcript." Id.
  \item 153. The district court specifically found that "[t]he state's closing argument leads to the inescapable conclusion that the prosecutor was asking the jury to find [Lee] guilty, at least in part, because he was clearly a very bad man intent on committing crimes. . . ." Lee, 508 So. 2d at 1303.
\end{itemize}
sory law and the DiGuglio test, thus it certified the case to the Florida Supreme Court as one of altering a question of great public importance.

The Florida Supreme Court granted certiorari to decide whether "erroneous admission of evidence for collateral crimes require[s] reversal of a conviction where the error has not resulted in a miscarriage of justice but the state has failed to demonstrate beyond a reasonable doubt that there is no reasonable possibility that the error affected the jury verdict." Even before addressing the certified question in detail, the supreme court affirmed the First District Court of Appeal's determination that admission of the collateral crimes was error. The state offered testimony that Lee stole the rape victim's car to allegedly use it in the later bank robbery. However, the state made no showing that this car was ever used. Likewise, the mere fact that Lee used a gun in the later bank robbery was irrelevant to the other charges against him, since there was no showing the gun used in the earlier kidnapping and robbery was the same weapon. The supreme court thus found that "[b]ecause no connection was established between the bank robbery and the instant offenses, the evidence of the bank robbery was not relevant to establish the entire context out of which the criminal conduct arose." As to the certified question, the Florida Supreme Court held that DiGuglio established the proper standard for evaluating whether erroneously admitted evidence can be harmless error. Lee found no conflict between the existing statutory law and the DiGuglio decision. The supreme court "recognized the authority of the legislature to enact harmless error statutes is unquestioned" but declared that "[t]he court retains the authority, however, to determine when an error is harmless and the analysis to be used in making the determination." Thus DiGuglio was implicitly characterized as a decision implementing the legislatively enacted harmless error. Lee reaffirmed that the DiGuglio standard should be strictly followed. The court agreed there was sufficient evidence apart from the collateral crimes evidence to support a guilty verdict. However, this would not satisfy DiGuglio's test. Rather the "focus of harmless error analysis must be the effect of the error on the trier of fact." Since the supreme court agreed with the district court conclusion that the state had heavily directed the jury's attention to the other crimes evidence in closing argument, a reversal was mandated.

Lee is a noteworthy decision in several respects. First, it reaffirms Florida's recognition of how unfairly prejudicial erroneous admission of other crimes can be to an accused. Second, by its focus on the state's use of the other crimes evidence in the closing arguments, Lee gives some practical guidance to counsel and to other appellate courts on how to see whether harmless error exists. Third, Lee reaffirms that the state has the burden to demonstrate harmless error exists once other crimes evidence is erroneously admitted. Thus the state must on appeal always consider making a harmless error argument every time a Williams Rule issue is raised. Finally, Lee should warn prosecutors of the long term detrimental effect of prosecutorial overkill. Indeed, with all the damaging evidence, one must seriously question the lack of judgment of the assistant state attorney who offered the other crimes evidence here.

V. Lay Opinion Testimony

Florida Statutes, section 90.701, states in pertinent part:

If a witness is not testifying as an expert, his testimony about what he perceived may be in the form of opinion when:

(1) the witness cannot readily, and with equal accuracy and adequacy, communicate what he has perceived to the trier of fact without testifying in terms of inferences and opinions and his use of inferences or opinions will not mislead the trier of fact to the prejudice of the opposing party; and

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153. Cicorelli, 531 So. 2d at 134.
154. Id. at 135.
155. Id. at 137 n.1.
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157. Id. (quoting Keen v. State, 504 So. 2d 396, 401 (Fla. 1987)).
158. This rule echoes that of Fed. R. Evid. 701. Prior to offering an opinion, the lay witness, just like the expert, must first provide a sufficient foundation for the testimony. The witness must establish personal knowledge of the subject matter about which he will testify. See, M. GRAHAM, HANDBOOK OF FLORIDA EVIDENCE § 701.1 (1987). Unless the testimony is rationally based on the witness's perception, only an expert will be permitted to offer the opinion. Id. The scope of a lay witness's testimony is generally left to the discretion of the court. See, e.g., South Venice Corp. v. O.W. Cape, 229 So. 2d 632, 656 (Fla. 2d Dist. Ct. App. 1968).

The rationales for permitting lay witnesses to testify based on opinion are several.
The Florida Supreme Court granted certiorari to decide whether "erroneous admission of evidence for collateral crimes require[s] reversal of a conviction where the error has not resulted in a miscarriage of justice but the state has failed to demonstrate beyond a reasonable doubt that there is no reasonable possibility that the error effected the jury verdict." Even before addressing the certified question in detail, the supreme court affirmed the First District Court of Appeal's determination that admission of the collateral crimes was error. The state offered testimony that Lee stole the rape victim's car to allegedly use it in the later bank robbery. However, the state made no showing that this car was ever so used. Likewise, the mere fact that Lee used a gun in the later bank robbery was irrelevant to the other charges against him, since there was no showing the gun used in the earlier kidnapping and robbery was the same weapon. The supreme court thus found that "[b]ecause no connection was established between the bank robbery and the instant offenses, the evidence of the bank robbery was not relevant to establish the entire context out of which the criminal conduct arose." As to the certified question, the Florida Supreme Court held that DiGilio established the proper standard for evaluating whether erroneously admitted evidence can be harmless error. Lee found no conflict between the existing statutory law and the DiGilio decision. The supreme court "recognized the authority of the legislature to enact harmless error statutes is unquestioned" but declared that "[t]he Court retains the authority, however, to determine when an error is harmless and the analysis to be used in making the determination." Thus DiGilio was implicitly characterized as a decision implementing the legislatively enacted harmless error. Lee reaffirmed that the DiGilio standard should be strictly followed. The court agreed there was sufficient evidence apart from the collateral crimes evidence to support a guilty verdict. However, this would not satisfy DiGilio's test. Rather the "focus of harmless error analysis must be the effect of the error on the trial of fact." Since the supreme court agreed with the district court conclusion that the state had heavily directed the jury's attention to the other crimes evidence in closing argument, a reversal was mandated. Lee is a noteworthy decision in several respects. First, it reafirms Florida's recognition of how unfairly prejudicial erroneous admission of other crimes can be to an accused. Second, by its focus on the state's use of the other crimes evidence in the closing arguments, Lee gives some practical guidance to counsel and to other appellate courts on how to see whether harmless error exists. Third, Lee reaffirms that the state has the burden to demonstrate harmless error exists once other crimes evidence is erroneously admitted. Thus the state must on appeal always consider making a harmless error argument every time a Williams Rule issue is raised. Finally, Lee should warn prosecutors of the long term detrimental effect of prosecutorial overkill. Indeed, with all the damaging evidence, one must seriously question the lack of judgment of the assistant state attorney who offered the other crimes evidence here.

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The rationale for permitting lay witnesses to testify based on opinion are several.
Pursuant to this standard, non-expert witnesses may testify about a wide variety of subjects, including physical appearance, the handwriting of another if the requisite familiarity is shown, the identity of a person or animal if previous acquaintance or knowledge is shown, and the value of real or personal property.

The most significant recent case on lay opinion testimony is *Garron v. State*, in which the Florida Supreme Court of Florida decided whether lay opinion testimony about the mental condition of another must be contemporaneous with the event in question. In *Garron*, the defendant was accused of shooting and killing his wife and stepdaughter. He was convicted of first-degree murder and sentenced to death. At trial, the defendant raised an insanity defense. In response, the prosecution offered the testimony of an assistant state attorney who was originally responsible for trying the case. The assistant state attorney was permitted to testify that at the first appearance hearing conducted on

Jurors may be assisted in deciding matters of fact by lay opinions. In some circumstances, lay witnesses truly are the functional equivalent of experts. These circumstances include those in which the lay witnesses have had experience, such as smelling dynamite, observing intoxicated individuals, or observing the speed of a passing car. Because the lay individuals are the functional equivalent of experts in areas within their common understanding, their testimony would be sufficiently reliable. In addition, to exclude testimony on these matters would deprive the jury of useful information. Finally, to distinguish between fact and opinion in a hyper-technical manner would be incongruent with actual experience. The dividing line between fact and opinion is a matter of degree, and untrained witnesses often do not tailor their testimony to this dividing line. Thus, a strict application of the opinion rule would be disruptive at the very least, and a hindrance to properly admitted factual testimony. For an insightful and brief analysis, see M. Grubbs, *A Handbook on Florida Evidence* § 701.1, at 512. See also Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 417 (1952).

*Ehret*, *Florida Evidence* § 701.1 (2d ed. 1984). 159 Sw. e.g. *Rivers v. State*, 458 So. 2d 762, 765 (Fla. 1984) (permitting a police detective to testify as to the value of the defendant's mental state); *Marine Division v. Boat Town U.S.A.*, Inc., 444 So. 2d 88 (Fla. 4th Dist. Ct. App. 1984) (stating that the owner of property is permitted to testify as to the value of his property). Cases decided this year involving lay opinions include *State v. Brown*, 28 Fla. Supp. 2d 46 (Volusia County Cir. Ct. 1998) (permitting an experienced police officer's testimony about his estimation of the speed of a motor vehicle); *Zwing v. Hettinger*, 530 So. 2d 218 (Fla. 2d Dist. Ct. App. 1988) (excluding an opinion by a non-expert as to the cause of an automobile accident); *Florida v. Van Horn*, 528 So. 2d 329 (Fla. 2d Dist. Ct. App. 1988) (analyzing the scope of permissible lay witness testimony on the mental condition of another); *Garron v. State*, 528 So. 2d 353 (Fla. 1988) (involving in part the admissibility of observations by a prosecutor about the mental condition of a defendant to rebut an insanity defense).

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the day following the shooting, the defendant did not appear psychotic or insane under the legal definition of insanity. 161

The Florida Supreme Court noted that the admission of lay opinion testimony about a person's mental condition is permissible provided that the witness has personal knowledge. 162 The more pressing question in *Garron*, however, was essentially one of first impression—how close in time must lay opinion testimony on a person's mental condition be to the relevant event? In answering this question, the court fashioned a bright-line test. It held that lay opinion testimony about another's sanity requires personal observations occurring simultaneously or in close time proximity to the event in question.163 The court found that if lay witness observations were removed from the event in question even by one day, such as the opinion advanced by the assistant state attorney, the subject matter of the testimony would more properly fall within the domain of expert witnesses. 164

Although this approach in *Garron* provides a smooth interface between expert and lay opinion testimony, the per se exclusion of "untimely" lay opinion testimony fails to consider the importance of the lay opinion to the particular case. An opinion such as the assistant state attorney's in *Garron* is still relevant, is likely irreducible in form, and may be the best available evidence on the issue of sanity. If so, it would be better to present the lay opinion to the jury directly rather than rely solely on an expert's more removed projection.

Despite such support for the value of "untimely" lay opinion testimony, there are ample reasons to support the conclusion reached in *Garron*. As a matter of policy, *Garron* deters considerable "after-the-fact" opinion testimony and promotes judicial economy. Its preference for expert testimony is consistent with the broad interpretation gener-

161. *Garron*, 528 So. 2d at 356. On appeal, the Florida Supreme Court held that "the testimony was both highly inflammatory and of dubious probative value. Hence the unfair prejudice resulting from this testimony renders it inadmissible." *Id.*

162. *Id.* (quoting *Rivers*, 458 So.2d at 765) The court quoted from one of its earlier decisions, *Rivers v. State*, 458 So. 2d 762 (Fla. 1984) in observing that "well-established principle of law in this state that an otherwise qualified witness who is not a medical expert can testify about a person's mental condition provided the testimony is based on personal knowledge or observation." See also *Seeley v. State*, 105 So. 2d 337 (Fla. 1953); *Hixson v. State*, 165 So. 2d 436 (Fla. 2d Dist. Ct. App. 1964).

163. *Garron*, 528 So. 2d at 357.

164. *Id.* The court added, however, that "witnesses who have known and observed a defendant over an extended period of time may also be competent to testify as to their nonexpert opinion on the defendant's sanity." *Id.* at 357, n.3.
Pursuant to this standard, non-expert witnesses may testify about a wide variety of subjects, including physical appearance, the handwriting of another if the requisite familiarity is shown, the identity of a person or animal if previous acquaintance or knowledge is shown, and the value of real or personal property.188

The most significant recent case on lay opinion testimony is *Garron v. State,*189 in which the Florida Supreme Court of Florida decided whether lay opinion testimony about the mental condition of another must be contemporaneous with the event in question. In *Garron,* the defendant was accused of shooting and killing his wife and step-daughter. He was convicted of first degree murder and sentenced to death. At trial, the defendant raised an insanity defense. In response, the prosecution offered the testimony of an assistant state attorney who was originally responsible for trying the case. The assistant state attorney was permitted to testify that at the first appearance hearing conducted on

Jurors may be assisted in deciding matters of fact by lay opinions. In some circumstances, lay witnesses are the functional equivalent of experts. These circumstances include those in which the lay witnesses have had experience such as smoking dynamite, observing intoxicated individuals, or observing the speed of a passing car. Because the lay individuals are the functional equivalent of experts in areas within their common understanding, their testimony would be sufficiently reliable. In addition, to exclude testimony on these matters would deprive the jury of useful information. Finally, to distinguish between fact and opinion in a hyper-technical manner would be incongruent with actual experience. The dividing line between fact and opinion is a matter of degree, and the trained witness need not tailor their testimony to this dividing line. Thus, a strict application of the opinion rule would be disruptive at the very least, and a hindrance to properly admitted factual testimony. For an insightful but brief analysis, see M. GRABAR, A HANDBOOK ON FLORIDA EVIDENCE § 701.1, at 512. See also Ladd, Expert Testimony, 5 VAND. L. REV. 414, 417 (1952).

*Ehrhardt, Florida Evidence § 701.1 (2d ed., 1984).*

159. See, e.g., *Rivers v. State,* 458 So. 2d 762, 765 (Fla. 1984) (permitting a police detective to testify as to his opinion about the defendant’s mental state); *Mercury Marine Division v. Bout Town U.S.A., Inc.*, 444 So. 2d 88 (Fla. 4th Dist. Ct. App. 1984) (holding that the owner of property is permitted to testify as to the value of his property). Cases decided this year involving lay opinions include State v. Brown, 28 Fl. Supp. 2d 46 (Volusia County Ct. 1998) (permitting an experienced police officer’s testimony about his estimation of the speed of a motor vehicle); *Zwing v. Hettenger,* 530 So. 2d 318 (Fla. 2d Dist. Ct. App. 1988) (excluding an opinion by a non-expert as to the cause of an automobile accident); *Florida v. Van Horn,* 528 So. 2d 529 (Fla. 2d Dist. Ct. App. 1988) (analyzing the scope of permissible lay witness testimony on the mental condition of another); *Garron v. State,* 528 So. 2d 553 (Fla. 1988) (involving in part the admissibility of observations by a prosecutor about the mental condition of a defendant to rebut an insanity defense).

160. 528 So. 2d 353 (Fla. 1988).

the day following the shooting, the defendant did not appear psychotic or insane under the legal definition of insanity.181

The Florida Supreme Court noted that the admission of lay opinion testimony about a person’s mental condition is permissible provided that the witness has personal knowledge.182 The more pressing question in *Garron,* however, was essentially one of first impression—how close in time must lay opinion testimony on a person’s mental condition be to the relevant event? In answering this question, the court fashioned a bright-line test. It held that lay opinion testimony about another’s sanity requires personal observations occurring contemporaneously or in close time proximity to the event in question.183 The court found that if lay witness observations were removed from the event in question even by one day, such as the opinion advanced by the assistant state attorney, the subject matter of the testimony would more properly fall within the domain of expert witnesses.184

Although this approach in *Garron* provides a smooth interface between expert and lay opinion testimony, the per se exclusion of “untimely” lay opinion testimony fails to consider the importance of the lay opinion to the particular case. An opinion such as the assistant state attorney’s in *Garron* is still relevant, is likely irreducible in form, and may be the best available evidence on the issue of sanity. If so, it would be better to present the lay opinion to the jury directly rather than rely solely on an expert’s more removed projection.

Despite such support for the value of “untimely” lay opinion testimony, there are ample reasons to support the conclusion reached in *Garron*. As a matter of policy, *Garron* deters considerable “after-the-fact” opinion testimony and promotes judicial economy. Its preference for expert testimony is consistent with the broad interpretation gener-

181. *Garron,* 528 So. 2d at 356. On appeal, the Florida Supreme Court held that “the testimony was both highly inflammatory and of dubious probative value. Hence the unfair prejudice resulting from this testimony renders it inadmissible.” *Id.*

182. *Id.* (quoting *Rivers,* 458 So. 2d at 765) The court quoted from one of its earlier decisions, *Rivers v. State,* 458 So. 2d 762 (Fla. 1984) in observing that “[i]t is a well established principle of law in this state that an otherwise qualified witness who is not a medical expert can testify about a person’s mental condition provided the testimony is based on personal knowledge or observation.” See also, *Sealey v. State,* 205 So. 2d 137 (Fla. 1968); *Hixson v. State,* 165 So. 2d 436 (Fla. 2d Dist. Ct. App. 1964).

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VI. Expert Witnesses

Florida Statutes, section 90.702, provides:

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

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166. Experts are permitted to testify about their opinion, based on either facts personally known to the expert, a hypothetical question, or facts observed or disclosed to the expert at or prior to trial. See Harris, The Admissibility of Expert Witness Testimony: Time To Take the Final Leap?, 42 U. Miami L. Rev. 831 (1988).

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167. Several recent opinions discussed well-established rules concerning expert testimony at trial. Sain v. Bucolo, 527 So. 2d 911 (Fla. 3d Dist. Cl. App. 1988) (per curiam) involved an action for medical malpractice and wrongful death stemming from the treatment of the decedent’s heart problem. The trial court restricted certain evidence concerning the decedent’s life expectancy and treated the expert’s opinion on the subject as binding. The Third District Court of Appeal found that the trial court erred in concluding that the expert’s opinion is conclusive. Id. at 912. Consequently, the court reversed and remanded for further proceedings.

In State v. Van Horn, 528 So. 2d 529 (2d Dist. Cl. App. 1988), the defendant was not guilty by reason of insanity on the charge of murder. On appeal, the Second District Court of Appeal reversed and remanded. The district court found that the trial court’s entry of a judgment of not guilty by reason of insanity after a mistrial was not warranted given the evidence presented. The court stated that the jury deadlocked should have been resolved by giving the evidence to a new jury to decide whether the state had proven its case beyond a reasonable doubt. The court also noted that expert testimony is not conclusive, even when uncontradicted, and in this case could have been rebutted by the observations of lay witnesses. Id. at 530. The court stated that “[e]xpert testimony, even when uncontradicted, is not conclusive on the issue of sanity and the trier of fact may find such testimony adequately rebutted by the observations of laymen.” Id. at 530 (emphasis added) (citing State ex rel. Bloodworth v. Kasper, 394 So. 2d 501, 503 (Fla. 4th Dist. Cl. App. 1981)).

In Bueno v. State, 527 So. 2d 194 (Fla. 1988), the court examined the level of certainty required for an opinion expressed by an expert. The court concluded that in a homicide prosecution, expert medical testimony need not express an opinion to a reasonable certainty to be admitted; expert testimony “is competent if the expert can show that, in his opinion, the occurrence could cause death or that the occurrence may have probably caused death.” Id. at 197-98. (citations omitted).

Florida courts also handed down several decisions concerning the qualifications required to become an expert witness. The qualifications for testifying under the Florida Rules as an expert are framed very broadly, similar to the parallel Federal Rule of Evidence, Fed R. Evid. 702. A witness will be qualified based on either education, experience, or other specialized knowledge. In Benson v. State, 526 So. 2d 948 (Fla. 2d Dist. Cl. App. 1988), the court reiterated the principle that the determination of whether a witness is properly qualified as an expert is subject to the “wide discretion” of the trial court. Id. at 957. In light of this principle, the Second District Court of Appeal affirmed the trial court’s decision to admit a bomb technician and metallurgist to testify as expert witnesses in a murder trial.


168. 293 F. 1013 (D.C. Cir. 1923).
169. Id. at 1014 (emphasis added).
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A. The Reliability of Expert Testimony Based on Novel Scientific Evidence

For expert testimony to be admissible at trial, the scientific methodology upon which the evidence is based must be reliable. The traditional test of reliability was enunciated in the seminal case of Frye v. United States.168 In Frye, the court stated:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential forces of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.169

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Although Frye concerned the admissibility of polygraph evidence, its rationale was extended to cover all forms of scientific evidence. The wide-spread reliance on the Frye test served to exclude a considerable quantity of novel scientific evidence. In response to growing criticism about the test's inflexibility, several courts abandoned the test in favor of a more flexible approach. In United States v. Downing, the United States Court of Appeals for the Third Circuit held that "a particular degree of acceptance of a scientific technique within a scientific community is neither a necessary nor a sufficient condition for admissibility; it is, however, one factor that a district court normally should consider in deciding whether to admit evidence based upon the technique." The court added that:

The reliability inquiry that we envision is flexible and may turn on a number of considerations, in contrast to the process of scientific 'nose-counting' that would appear to be compelled by a careful reading of Frye. Unlike the Frye standard, the reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community. A district court in assessing reliability may examine a variety of factors in addition to scientific acceptance. In many cases, however, the acceptance factor may well be decisive, or nearly so.

1. Reliability and DNA Print Identification Evidence

In Andrews v. Florida, the Fifth District Court of Appeal considered the propriety of the Frye test in what has been called the first appellate ruling on the admissibility of DNA print identification evidence. This relatively new scientific technique involves comparing the DNA of fluids found at the scene of a crime with the fluids found in the defendant. The examiner analyzes the sequences within a DNA molecule, which produce a pattern unique to the individual with the exception of identical twins. By comparing different DNA codes, it can be determined whether the fluids came from the same person or the identical twin.

The court in Andrews rejected the Frye test as a basis for deciding whether the DNA print evidence is sufficiently reliable to admit at trial. Instead, the district court endorsed the "more flexible totality of circumstances" approach of the United States Court of Appeals for the Third Circuit. The court in Andrews reasoned that the reliability of the novel scientific evidence should depend on a variety of factors, including whether the technique is related to more established forms of analysis, whether specialized literature on the novel method exists, whether there are non-judicial uses for the technique, and whether the expert witness testifying in favor of the technique is properly qualified. Utilizing this quasi-balancing test, the court concluded that the DNA typing technique was sufficiently reliable to be admitted at trial.

The district court then determined whether the DNA evidence was properly admitted by the trial court. In Andrews, the defendant was accused of rape. The DNA typing evidence showed that the DNA structure in the defendant's blood was identical to the DNA structure of semen taken from the rape victim. The State called several experts to discuss the testing procedure in general and the tests performed in this particular case. The district court noted that control groups were run using known DNA samples, and that if a particular sample was tested improperly, there would be no result at all and not an erroneous result. The court further found that other indicia of reliability were present, such as the existence of specialized literature on the subject.

Identification evidence may properly be admitted at a criminal trial to tie a defendant to bodily fluids associated with the crime.

The technique has been used for approximately ten years. Andrews, 533 So. 2d at 847.

See discussion of United States v. Downing, 753 F.2d 1224 (3d Cir. 1985) regarding the Frye test accompanying notes 170-73.

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Andrews is in accord with a growing minority of courts that find the Frye test to be antiquated because it is inflexible and excludes helpful evidence. The true problem in Andrews, however, lies elsewhere. While the use of DNA testing may be accepted in the scientific community and considered sufficiently reliable to admit at trial, Andrews should have paid more attention to the likely impact of DNA typing evidence on the outcome of a trial. The all-or-nothing conclusion associated with DNA print identification is particularly dangerous in a criminal trial setting where much is at stake. The use of such evidence offers an incentive for those responsible for prosecuting a case, from police officers to the prosecuting attorneys, to overly rely on the conclusions drawn from such evidence. These individuals will have less motivation to gather additional evidence, and a greater motivation to highlight the DNA evidence for the trial of the fact. More importantly, the same incentive to take a short-cut would be present for the jury in its duty to find that the prosecutor has proven each and every element of its case beyond a reasonable doubt. If DNA print identification is permitted, and it offers an all-or-nothing conclusion, it would be all too easy for juries to use that evidence as a substitute for a rigorous analysis and review of the totality of the evidence. Once admitted, it is noted that a sizable body of literature about DNA testing exists. Id. at 850.

Evidence

2. Modifying the Frye Test

The Frye test has not been abandoned completely in Florida, although modifications have been advanced. The Florida Supreme Court, in Correll v. State, recently held that scientific evidence possesses a presumption of reliability if it has been received in a substantial number of previous Florida cases. In Correll, a case involving multiple first degree murder, the Florida Supreme Court considered whether expert testimony on blood analysis by a forensic serologist was properly admitted at trial. The analysis involved an electrophoresis process which permits blood samples to be characterized more precisely.

184. In another recent case, Mitchell v. State, 527 So. 2d 179 (Fla. 1988), the supreme court held that expert testimony on teeth bite marks was sufficiently reliable to have been properly admitted at trial. In Mitchell, the defendant was convicted of 1st degree felony murder and sentenced to death. At trial, a dentist who was also a forensic odontologist and consultant to the Dade County Medical Examiner testified that the defendant's teeth matched the pattern of the bite mark on the evidence. Another forensic dentist testified for the defense about the same bite mark. The Florida Supreme Court noted that it had previously held in 1984 that such bite mark testimony was sufficiently reliable to be admitted at trial. See also Bundy v. State, 455 So. 2d 330 (Fla. 1984).

185. Interestingly, the Frye test has not been expressly adopted in Florida either. In Bundy, 529 So. 2d at 341, the court stated that under the circumstances of the present case, we are not called upon to decide whether the enhancement of a subject's memory by hypnosis is a species of evidence that must meet the Frye test of general scientific acceptance in order to be admissible. Nor is it necessary for us to decide whether the admissibility of hypnotically refreshed recall testimony should be governed by the relevancy approach.

186. See, Dobson, Survey of Florida Law, Evidence, 11 Nova L. Rev. 1291 (1981). Yet, the Florida Supreme Court has effectively embraced the "general acceptance" standard advanced in Frye. See Delap v. State, 440 So. 2d 1242, 1247 (Fla. 1983) ("Where evidence is based solely upon scientific tests and experiments, it is essential that the reliability of the test be recognized and accepted by scientists or that the demonstration pass in the stage of experimentation to that of reasonable demonstration").
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The primary rationale for this alternative to Frye's "general acceptance in the scientific community" test seems to be its efficiency. It would be a waste of time for courts to reiterate the reliability of a scientific technique in the scientific community every time the technique is challenged. The "prior judicial approval" test also offers consistency in the courts.

Despite its appeal, the new approach does not appear to improve upon Frye. General acceptance by the courts does not ensure sensitivity to changes in the scientific literature or technology regarding the technique in question. Nor does the new test take into account the circumstances upon which the other courts admitted the testimony, or whether the other courts properly ensured the accuracy of the admitted testimony. The transformation of the "general acceptance in the scientific community" standard to a "general acceptance by the courts" standard may save time, but poses significant questions of relevance and prejudice instead.

B. Expert Testimony on Polygraph Evidence

The use of experts on the subject of polygraphs, also known as lie detector evidence, is not a new issue before the courts. Its controversial nature, however, has made it a continuing subject of litigation. 189

188. Id. at 567.

189. See, e.g., Sullivan v. State, 303 So. 2d 632 (Fla. 1974); Brown v. State, 452 So. 2d 122-24 (Fla. 1st Dist. Ct. App. 1984); Codie v. State, 313 So. 2d 754 (Fla. 1975); and Cumbie v. State, 327 So. 2d 67 (Fla. 1st Dist. Ct. App. 1976) (rev'd on other grounds, 345 So. 2d 1061 (Fla. 1977)). The exclusion of posthypnotically refreshed testimony is based on the firmly rooted belief that it is unreliable and likely to mislead the jury.

190. See, e.g., DeLapa v. State, 440 So. 2d 1242, 1247 (Fla. 1983), cert. denied, 467 U.S. 1204 (1984). ("The evidence fails to show that the polygraph examination has gained such reliability and scientific recognition in Florida as to warrant its admissibility. The Florida rule of inadmissibility reflects state judgment that polygraph evidence is too unreliable or too capable of misinterpretation to be admitted at trial.")

191. Davis v. State, 529 So. 2d 572, 573-574 (Fla. 1988). The admission of polygraph evidence upon stipulation has been endorsed by many states. See Brown v. State, 452 So. 2d 122, 124 (Fla. 1st Dist. Ct. App. 1984) ("In the absence of a proper stipulation and upon objection, polygraph test results and testimony concerning those results are inadmissible.")

192. Id. at 567.

193. 516 So.2d 933 (Fla. 4th Dist. Ct. App. 1987).

194. The question certified asked: "When polygraph evidence is admitted by stipulation, and a party request a proper instruction on the scientific unreliability of polygraph results, is it reversible error for the trial court to fail to so instruct the jury?" Id.

195. The defendant requested a special jury instruction relating to the reliability of the polygraph testimony. The trial court rejected the proposed instruction and instead gave a standard jury instruction on expert witnesses.

The majority of the initial panel of Fourth District judges held that a special instruction on the weight to be accorded such evidence was warranted due to the "singular importance" of the evidence in a case such as this one. The panel reasoned that the standard instruction on expert witnesses failed to adequately address the specific implications associated with this type of evidence.
than the general groupings of types A, B, and O. The court held that there was no need to question the reliability of scientific evidence admitted previously in a "substantial number of other Florida cases" unless the party opposing the evidence makes a timely request for an inquiry supported by authority indicating a lack of general acceptance of the technique employed. 188

The primary rationale for this alternative to Frye's "general acceptance in the scientific community" test seems to be its efficiency. It would be a waste of time for courts to reigate the reliability of a scientific technique in the scientific community every time the technique is challenged. The "prior judicial approval" test also offers consistency in the courts.

Despite its appeal, the new approach does not appear to improve upon Frye. General acceptance by the courts does not ensure sensitivity to changes in the scientific literature or technology regarding the technique in question. Nor does the new test take into account the circumstances upon which the other courts admitted the testimony, or whether the other courts properly ensured the accuracy of the admitted testimony. The transformation of the "general acceptance in the scientific community" standard to a "general acceptance by the courts" standard may save time, but poses significant questions of relevance and prejudice instead.

B. Expert Testimony on Polygraph Evidence

The use of experts on the subject of polygraphs, also known as lie detector evidence, is not a new issue before the courts. Its controversial nature, however, has made it a continuing subject of litigation. 189

188. Id. at 567.
189. "[A]ny inquiry into its reliability for purposes of admissibility is only necessary when the opposing party makes a timely request for such an inquiry supported by authorities indicating that there may not be general scientific acceptance of the technique employed." Id.

190. The subject of hypnotically refreshed testimony also retains a high-profile status. In Florida, recent case law has reaffirmed the well-established rule that hypnotically refreshed testimony remains per se inadmissible in a criminal case. See Bundy v. State, 471 So. 2d 9, 118 (Fla. 1983) ("For these reasons, we likewise hold that hypnotically refreshed testimony is per se inadmissible in a criminal trial in this state, but hypnosis did not render a witness incompetent to testify to those facts demonstrably recalled prior to hypnosis"). See also Pale v. State, 529 So. 2d 328 (Fla. 2d Dist. Ct. App. 1988); Codie v. State, 313 So. 2d 754 (Fla. 1975).

In Florida, polygraph evidence is generally inadmissible. 190 Polygraph evidence may be admitted, however, if both parties stipulate to its admissibility at trial. 191 Much of the polygraph litigation in recent years has shifted from contentions relating to the general admissibility of polygraph evidence to disputes surrounding the stipulation of admissibility reached by the parties.

In Davis v. State, 192 the Fourth District Court of Appeal certified to the Florida Supreme Court the question of whether the jury must be specially instructed upon a proper request about polygraph evidence admitted by stipulation. 193 The defendant in Davis was charged with mishandling funds entrusted to him pursuant to his employment. The parties stipulated to the admissibility of the results of the defendant's polygraph test. The defendant failed the test, and the results were the subject of expert testimony at trial. 194

To resolve the question of whether a special jury instruction is required upon a proper request, the Florida Supreme Court first analyzed

190. See, e.g., Sullivan v. State, 303 So. 2d 632 (Fla. 1974); Brown v. State, 452 So. 2d 122-24 (Fla. 1st Dist. Ct. App. 1984); Codie v. State, 313 So. 2d 754 (Fla. 1975); and Cumbie v. State, 327 So. 2d 67 (Fla. 1st Dist. Ct. App. 1976), rev'd on other grounds, 345 So. 2d 1061 (Fla. 1977). The exclusion of hypnotically refreshed testimony is based on the firmly rooted belief that it is unreliable and likely to mislead the jury.

See, e.g., DeLap v. State, 440 So. 2d 1242, 1247 (Fla. 1983), cert. denied, 467 U.S. 1264 (1984).("The evidence fails to show that the polygraph examination has gained such reliability and scientific recognition in Florida as to warrant its admissibility. The Florida rule of inadmissibility reflects state judgment that polygraph evidence is too unreliable or too capable of misinterpretation to be admitted at trial.")

192. Davis v. State, 520 So. 2d 572, 573-574 (Fla. 1988). The admission of polygraph evidence upon stipulation has been endorsed by many states. See Brown v. State, 452 So. 2d 122, 124 (Fla. 1st Dist. Ct. App. 1984) ("In the absence of a proper stipulation and upon objection, polygraph test results and testimony concerning those results are inadmissible").

193. 516 So.2d 953 (Fla. 4th Dist. Ct. App. 1986).

194. The question certified asked, "When polygraph evidence is admitted by stipulation, and a party request a proper instruction on the scientific unreliability of polygraph results, is it reversible error for the trial court to fail to so instruct the jury?" Id.

195. The defendant requested a special jury instruction relating to the reliability of the polygraph testimony. The trial court rejected the proposed instruction and instead gave a standard jury instruction on expert witnesses.

The majority of the initial panel of Fourth District judges held that a special instruction on the weight to be accorded such evidence was warranted due to the "singular importance of the evidence in a case such as this one. The panel reasoned that the standard instruction on expert witnesses failed to adequately address the specific implications associated with this type of evidence.

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the scope of the waiver created by the stipulation. The supreme court had two options to choose from. The stipulation could be interpreted to waive any and all objections about the scientific reliability of the polygraph evidence. Alternatively, the stipulation could be construed to waive only objections to the admissibility of the evidence and not to its weight. The Florida Supreme Court adopted the latter interpretation, concluding that unless the parties agree otherwise, the right to comment on the question of the evidence's reliability to the jury is not waived.

On the question of whether a special jury instruction would be required upon a proper request, the Florida Supreme Court reached almost a cursory resolution, even though this issue was given careful scrutiny below by the Fourth District Court of Appeal. The district court concluded that a special instruction must be given if properly requested. The district court reasoned that the jury should be informed about the "strengths and weaknesses of such evidence, what the results are calculated to determine, and that it is for them to determine [the] weight and effect." In essence, especially because of the evidence's "inherent unreliability." The district court compared polygraph evidence to other forms of "suspect or questionable evidence," inferring that similar treatment was warranted. In light of the "mythical aura" surrounding the polygraph testimony, the district court found that a special instruction should be given upon a proper request.

The Florida Supreme Court spent little time in rejecting the district court's approach and rationale. The supreme court held that the standard jury instruction on expert witnesses would suffice, particularly in light of the instruction's last sentence, which reads: "[I]f any other witnesses, you may believe or disbelieve all or any part of an expert's testimony." The court found that this would adequately warn juries that polygraph evidence is not conclusive.

The Florida Supreme Court's approach misses the mark completely. The court either failed to or chose not to observe that admitted polygraph evidence still poses unavoidable reliability problems. A special instruction concerning the fallibility of the "human" factors involved in interpreting the raw polygraph data would, at a minimum, be necessary to dispel the "mythical aura" of polygraph results. The standard instruction on expert witnesses does not illuminate the special nature of this evidence or communicate to the jury the degree of caution with which such evidence should be received.

Interestingly, both the Florida Supreme Court and the Fourth District Court of Appeal in Davis admonished the parties' lack of foresight in handling the stipulation. To minimize the uncertainty associated

196. This approach was adopted by the dissent in the en banc opinion of the Fourth District Court of Appeal. Id. at 957.
197. Davis, 552 So. 2d at 574.
198. Davis, 552 So. 2d at 955.
199. Id. The district court cited with approval the decisions of several other states in which special instructions were given when stipulated polygraph evidence was admitted at trial. See State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962); and State v. Greagor, 33 Wash. App. 496, 656 P.2d 529 (Ct. App. 1982). In Valdez, the court concluded that polygraph evidence is admissible on stipulation for the purpose of corroborating other evidence regarding either the defendant's participation in the crime charged or the defendant's credibility as a witness if he opts to take the witness stand.
200. Davis, 516 So. 2d at 955.
201. The court found other suspect evidence to include circumstantial evidence and confessions. Id. Ironically, many commentators and participants in the criminal justice system believe circumstantial evidence, when compared to some forms of direct evidence such as eyewitness testimony, is not only equal to but preferable to the direct evidence.
202. Id. at 953, 955 (quoting Farmer v. City of Ft. Lauderdale, 427 So. 2d 182. 1058
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203. Id. at 955. The court reversed an earlier position by holding that "if an improper instruction is requested, the trial court is not required to fashion a proper one." Id. at 956. The court's conclusion endorses that of Carron v. State, 414 So. 2d at 288 (Fla. 2d Dist. Ct. App. 1982), aff'd, 427 So. 2d 192 (Fla. 1983). In that case, the Second District Court of Appeal held that a trial court must not simply read a statement to the jury, but must instead instruct the jury on each of the essential elements of the crime as interpreted by case law. The court of appeal noted, however, that a trial court may properly refuse to give a legally inaccurate instruction. The court stated that "we are reluctant to endorse the principle that where a party requested a legally erroneous instruction on subject matter which the appellate courts have not previously suggested as appropriate for a jury instruction, the court must not only perceive the need for instruction but must also straighten out what we present a correct legal principle." Carron, 414 So. 2d at 291. In affirming this holding, the Florida Supreme Court added that "when a timely request for a proper instruction, its omission is not a reversible error. In this case, the requested instruction was improper, and there was no error in refusing it." Carron, 427 So. 2d at 194.

204. See Florida Standard Jury Instructions in Criminal Cases § 2.04(a), The Fourth District Court of Appeal, in its en banc decision, had considered the question at length.

206. Davis, 520 So. 2d at 574.
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205. See Florida Standard Jury Instructions In Criminal Cases § 204(d). Davis v. State, 520 So. 2d 572, 574 (Fla. 1988).

206. Davis, 520 So. 2d at 574.

with polygraph evidence stipulations, the Florida Supreme Court announced in Davis that henceforth, polygraph stipulations must be set forth in writing and signed by the parties.208

This signed writing requirement is eminently proper. At the very least, it forces the parties to treat the admissibility of such evidence more seriously. The requirement also provides an incentive to deal with all reasonably foreseeable problems that may arise from the admission of the polygraph evidence, much in the same way two parties to a contract might include potential problems or contingencies in their agreement. Moreover, the new writing requirement can further underscore to the parties the importance of careful preparation regarding all aspects of a case.

Despite the welcome manner with which the Florida Supreme Court dealt with the polygraph issue before it, Davis serves as a reminder of how troublesome polygraph evidence can be. It raises once again the recurrent question of whether polygraph evidence should be permitted at all, even upon stipulation. Although the stipulation exception furthers the interests of the litigants, the unreliability of the test is significant enough to justify a per se exclusion. Spin-off problems, such as those present in Davis, create further difficulties. Unless the jury is made to fully understand why the evidence is permitted upon stipulation, the court system is simply assisting the gambling tendencies of the state and of some defendants who agree to admit polygraph evidence.

C. Expert Testimony on Witness Credibility

In recent years, courts around the nation, as well as in Florida, have been faced with significant questions involving the admissibility of expert psychological testimony on the credibility of witnesses. The courts generally have excluded the expert psychological testimony, particularly when the testimony offers opinions about the veracity of specific witnesses at trial and not just general psychological profiles, witness characteristics, or clinical syndromes. The overall rejection of the testimony - and of special jury instructions on the same subject matter - is not surprising given that the psychological premises of the expert testimony conflict with the traditional conception of jurors using only their common sense to assess witness credibility.

The increasing number of questions about the ability of the jury to reach accurate conclusions on credibility issues can be attributed to various sources. The Supreme Court of the United States has acknowledged the dangers of eyewitness identification testimony which may mislead the jury. In a series of well-known cases, the court shaped legal rules concerning identifications in line-ups and photo arrays to minimize potential prejudice.209

Furthermore, some highly publicized cases have involved witnesses who recanted their testimony subsequent to the trial and conviction of the defendant.210 Finally, and perhaps most importantly, mounting psychological data suggests that lay jurors inadequately evaluate the testimony of others due to prejudices and biases in their common sense that make their evaluations neither "common" nor " sensible."

While expert assistance has been offered in a wide variety of cases, it appears most often in cases involving sexual child abuse, eyewitness identification, and retarded or emotionally disturbed witnesses.211 Several recent Florida decisions concerning sexual battery on children212 have further defined the position of Florida courts on the scope of admissible expert testimony bearing on witness credibility.

In Brown v. State,213 the defendant was convicted of attempted sexual battery upon a child of less than twelve years of age and of the commission of a lewd act upon a child. The prosecution offered the testimony of a counselor with the Child Protection Team. She was to E:\ she her opinion, based on an examination of the victim, about whether

208. Davis, 520 So. 2d at 574. This requirement was intended to minimize similar controversies in the future. As the Fourth District Court of Appeal noted, "contrary can be minimized by the preparation of a studied, carefully drawn, written stipulation, so that there will be no doubt as to the agreement of the participants therein."


211. The psychological testimony may be far-reaching, extending to any case involving witness reactions which may be considered counter-intuitive.

212. See, e.g. Ward v. State, 519 So. 2d 1082 (Fla. 1st Dist. Ct. App. 1988), in which the First District Court of Appeal considered whether the testimony of a clinical psychologist on the common symptoms displayed by victims of sexual abuse was in error. The court held that such testimony was admissible in a case involving a lewd assault on a child.

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213. 523 So. 2d 729 (Fla. 1st Dist Ct. App. 1988).
the victim exhibited the typical signs of sexual abuse, and whether the victim was in fact sexually abused. The expert's opinion that the child had been abused was admitted by the trial court over the defendant's objection.

On appeal, the defendant-appellant claimed that the expert should have been barred from testifying that the victim's symptoms were "consistent with" those of a person who had been sexually battered. The form of the admitted testimony, defendant argued, impropriely served to bolster the alleged victim's credibility.

The First District Court of Appeal rejected the appellant's contentions. The court first noted that the testimony consisted of an opinion that the victim had been sexually abused, which is not an offense in Florida. Therefore, the testimony did not assert that a crime had been committed or that the defendant had committed it. After perhaps realizing that this fine-line distinction is not entirely persuasive, the district court also noted that there was corroborative evidence admitted at trial in the form of a medical doctor's testimony about his examination of the victim for sexual abuse. The court added that even if the admissibility of the expert's testimony was in error, it was harmless in light of the overwhelming evidence of guilt.

The district court's opinion contained the following warning:

We limit our decision in this case strictly to the facts at hand, and caution that the decision is not to be construed as condoning either the use of an expert's opinion as to the guilty or innocence of the accused or the use of expert testimony to bolster the credibility of a witness.

The necessity for this disclaimer suggests the unease with which expert psychological testimony is received by the courts. Although the court in Brown essentially upheld the admission of the expert testimony, it failed to directly address the major issues raised by credibility testimony.

For expert testimony to be properly received at trial, it must assist the jury and not be unfairly prejudicial. The assistance prong of this test requires that the subject of the expert testimony lie outside of the jury's common knowledge. If the subject matter of the testimony is within the common sense or common experience of the jurors, expert testimony would be redundant and invade the province of the jury.

Several courts have held that credibility testimony is duplicative of the jury's common sense and therefore falls the assistance prong of the test. Other courts have determined that traditional safeguards such as cross examination, argument by counsel, or the observation of witness demeanor would adequately assist the jury in evaluating credibility without an opinion by an expert such as the Child Protection Team expert in Brown. The court in Brown did not consider either of these rationales for exclusion.

The court in Brown did engage in a limited discussion of the potential for prejudice that may result from the form of the expert testimony. Yet prejudice may arise in many other ways as well. The jury may misuse evidence by misinterpreting or substituting the expert's 219. See Fla. STAT. § 90.702 (1987).
220. See id. § 90.403.
221. M. GRAHAM, HANDBOOK OF FLORIDA EVIDENCE § 702.2 (1987). See also Buhman v. Seaboard Coastline R.R. Co., 381 So. 2d 229, 230 (Fla. 1980). ("[T]he subject must be beyond the common understanding of the average layman").
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The true test of the admissibility of such testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any particular knowledge or experience, not, common to the world, which rendered their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue.

WIGMORE EVIDENCE § 1923, at 31-32 (Chadbourn rev. 1978) (quoting from Taylor v. Monroe, 412 CONN. 36, 44 (1873)). See also Johnson v. State, 393 So. 2d 1069 (Fla. 1980); Red Carpet Corp. v. Calvert Fire Ins. Co., 393 So. 2d 1160 (Fla. 1st Dist. Ct. App. 1981); In Re Estate of Coleman, 511 So. 2d 365, 370 (Fla. 1st Dist. Ct. App. 1987).
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opinion for its own or when conflicting expert engage in a “battle of the experts.” The harmless error analysis utilized in Brown omitted discussion of these potentially prejudicial conclusions of the expert’s testimony.228

In light of Brown’s somewhat cursory treatment of expert testimony on credibility, it is noteworthy that less than four months after Brown was decided the First District Court of Appeal appeared to signal a retreat from its hypertechnical stance on the permissible form of expert opinions. In Snodderly v. State,229 which also involved the sexual battery of a child, the district court stated that testimony by an expert as to whether the victim had been sexually abused is excludable upon a proper objection. There was no such objection in Snodderly and the district court held without explanation that the admission of expert testimony under the circumstances did not constitute fundamental error without the proper objection. In Ward v. State,230 the First District Court of Appeal considered another issue involving expert psychological testimony: whether testimony about a clinical syndrome was admissible in a case involving the sexual battery of a child.230 At trial, a clinical psychologist was permitted to testify about the consistency of the symptoms observed in the child victim with those symptoms displayed by other child victims of sexual abuse.230 The expert discussed three general types of symptoms displayed by such victims.230 The expert conceded that her opinion was

228. The court could have examined whether the expert’s testimony about the victim’s “sexual abuse” was functionally equivalent to a direct statement about the credibility of the victim. Both statements achieve the same end. The more generalized or oblique the reference to a specific witness’s credibility, moreover, the less relevant the expert testimony. Testimony based on comparisons with other victims may be prejudicial as well, because of dissimilar circumstances.

229. 528 So.2d 982 (Fla. 1st Dist. Ct. App. 1988) (holding that testimony of an expert about the inconsistency of the statements by the victims was properly excluded under the circumstances).


230. The psychologist was prohibited from directly testifying about the credibility of the child victim.

231. These symptoms were: “sexual behavior (suggestions of sexual activities, e.g., sexual play with toys); behavioral reactions (extreme passiveness or aggressiveness, changes in eating, sleeping, etc.); and emotional reactions (sleep disturbances, physical and depressive reactions).” Ward v. State, 519 So. 2d 1082, 1083 n.4 (Fla. 1st Dist. Ct. App. 1988).

232. Id. at 1083.

233. Id. at 1084.

234. Id. (citing Hawkhorne v. State, 408 So. 2d 801, 805 (Fla. 1st Dist. Ct. App. 1982), rev. denied, 415 So. 2d 1361 (Fla. 1982) (concerning the battered woman’s syndrome)).

235. Id.

236. Id. In further support of its conclusion that the expert testimony was proper, the district court cited the admission of expert testimony on post-traumatic stress syndrome in child sexual assault cases when relevant so long as it was not offered to “directly vouch for the credibility of a witness.” Id. While the court conceded that the credibility of a witness is indeed bolstered by even indirect testimony about general characteristics, the court found that to be “a necessary incident of the expert testimony and permissible, as it was subject to the jury’s scrutiny.” Id.
opinion for its own or when conflicting expert engage in a "battle of the experts." The harmless error analysis utilized in Brown omitted discussion of these potentially prejudicial consequences of the expert's testimony.226

In light of Brown's somewhat cursory treatment of expert testimony on credibility, it is noteworthy that less than four months after Brown was decided the First District Court of Appeal appeared to signal a retreat from its hypertechnical stance on the permissible form of expert opinions. In Snoddy v. State,227 which also involved the sexual battery of a child, the district court stated that testimony by an expert as to whether the victim had been sexually abused is excludable upon a proper objection. There was no such objection in Snoddy and the district court held without explanation that the admission of expert testimony under the circumstances did not constitute fundamental error without the proper objection.

In Ward v. State,228 the First District Court of Appeal considered another issue involving expert psychological testimony: whether testimony about a clinical syndrome was admissible in a case involving the sexual battery of a child.229 At trial, a clinical psychologist was permitted to testify about the consistency of the symptoms observed in the child victim with those symptoms displayed by other child victims of sexual abuse.230 The expert discussed three general types of symptoms displayed by such victims.231 The expert conceded that her opinion was

226. The court could have examined whether the expert's testimony about the victim's "sexual abuse" was functionally equivalent to a direct statement about the credibility of the victim. Both statements achieve the same end. The more generalized or oblique the reference to a specific witness's credibility, moreover, the less relevant the expert testimony. Testimony based on comparisons with other victims may be prejudicial as well, because of dissimilar circumstances.

227. 528 So.2d 982 (Fla. 1st Dist. Ct. App. 1988) (holding that testimony of an expert about the inconsistency of the statements by the victim was properly excluded under the circumstances).

228. 519 So. 2d 1082 (Fla. 1st Dist. Ct. App. 1988).


230. The psychologist was prohibited from directly testifying about the credibility of the child victim.

231. These symptoms were: "sexual behavior (suggestions of sexual activities, e.g., sexual play with toys); behavioral reactions (extreme passiveness or aggressiveness, changes in eating, underachievement); and emotional reactions (sleep disturbances, behavioral problems)."

busted partly on her belief that the child was indeed telling the truth, and that the child's versatic suggested that the trauma was caused by sexual abuse.232

Despite how close the expert came to giving an opinion on the credibility of the child, the First District Court of Appeal affirmed the trial court's decision to permit the expert testimony. The district court held that the trial judge did not abuse his discretion in admitting the testimony finding that the child abuse syndrome is an area "sufficiently developed" to serve as a basis for expert testimony.233 The court emphasized that this type of expert testimony met the three criteria for admissibility, which it described as:

(1) the expert is qualified to give an opinion on the subject matter; (2) the state of the art or scientific knowledge permits a reasonable opinion to be given by the expert; (3) the subject matter of the expert opinion is so related to some science, profession, business or occupation as to be beyond the understanding of the average layman...234

The district court, after observing that prong number three was "of critical importance,"235 concluded that jurors could use the help. The district court stated that while child abuse is becoming more widely publicized, it is not so understandable by lay persons that they know as much as a qualified expert with specialized knowledge and skills in the field.236

This analysis of the relative knowledge of experts and lay jurors, while accurate, opens the door wide to expert psychological testimony.


233. Id. at 1083.

234. Id. at 1084.

235. Id. (quoting Hawthorne v. State, 408 So. 2d 801, 805 (Fla. 1st Dist. Ct. App. 1982), rev. denied, 415 So. 2d 1361 (Fla. 1982) (concerning the battered woman's syndromes)).

236. Id. in further support of its conclusion that the expert testimony was proper, the district court cited the admission of expert testimony on post-traumatic stress syndrome in child sexual assault cases when relevant so long as it was not offered to "directly vouch for the credibility of a witness." Id. While the court conceded that the credibility of a witness is indeed bolstered by even indirect testimony about general characteristics, the court found that to be "a necessary incident of the expert testimony and permissible, as it was subject to the jury's scrutiny." Id.
In almost every instance, a psychologist who has made systematic studies and has drawn empirical conclusions from experiments will be more knowledgeable than a lay observer such as a juror. The result is that a "common sense" analysis by jurors would almost always benefit from expert psychological assistance.

This "slippery slope" is filled with irony. If the jury purportedly lacking the ability of the expert to evaluate the symptoms of the child witness, it is equally likely that the jury lacks the ability to understand what the expert is saying, how to analyze the expert's testimony, and how to discard some or all of the expert's contentions. In a sense, the expert testimony can be used against itself by claiming that the jury is not capable of assessing the expert psychological testimony properly because such an assessment must be based on the jury's common sense.

Despite questions about its relevance and its potential for unfair prejudice, expert psychological testimony has been justified in certain circumstances in a criminal case on alternative policy grounds. As the California Supreme Court noted in People v. McDonald.\[237\]

When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony.\[238\]

This "centrality" analysis was indirectly addressed by the First District Court of Appeal in Calloway v. State.\[239\] The case involved the sexual battery of a young girl by her step-father. The "centrality" approach to admitting evidence did not arise in the context of expert psychological testimony, but instead with "similar acts" character evidence.\[240\]

The court noted that familial sexual battery cases such as Calloway present special problems because; "[t]he victim is typically the sole eyewitness and corroboration evidence is scant. Credibility becomes the focal issue."\[241\]

The district court noted in response to the special problems posed by familial sexual abuse cases, some courts relax the applicable evidentiary rules regarding "similar acts" evidence.\[242\] The majority of the courts, on the other hand, still require compliance with the rules of evidence.\[243\] In Calloway, the court found that the "other act" evidence was properly admitted under the rules of evidence, stating:

In the instant case the victim was the sole eyewitness to the alleged offenses and corroboration evidence was scant. Credibility of the victim was the focal issue in the case, the defense being predicated upon the defendant's claim that the victim concocted her story because of reaction on her part to his exercise of parental discipline over her and because she preferred living with her real father.\[244\]

The "centrality" analysis touched on in Calloway may be utilized successfully in the area of expert psychological testimony as well. Under certain circumstances, an exception should exist from strict application of the traditional evidentiary rules. In particular, when the credibility question is central to the outcome of a criminal case and little if any corroborative evidence exists, outcome-determinative credibility evaluations should be considered so sensitive that the potential stigma and moral condemnation of the defendant associated with a criminal conviction warrants the admissibility of such expert testimony. In other less crucial situations, the use of such expert testimony is not similarly justified when measured against its potential prejudice and whether it assists the jury. In most of the less justifiable situations, testimony on credibility would invade the domain of the jury and cause further damage by highlighting the defects in the jury's common sense.

238. Id. at 377, 690 P.2d at 727.
239. 520 So. 2d 654 (Fla. 1st Dist. Ct. App. 1988).
The "Williams Rule" concerns the admissibility of other acts evidence pursuant to FLA. STAT. § 90.404 (1977).
241. Calloway, 520 So. 2d at 667 (quoting Herring v. State, 513 So. 2d 122 (Fla. 1987) (involving the use of "other acts" character evidence under the "Williams Rule" in family sexual abuse cases)).
242. Id.
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244. Id. The court did affirm the admission of an expert psychologist who testified that the victim, Ben Calloway, had "demonstrated symptoms indicative of child sexual syndrome." Id. at 668. The court cited Ward v. State, 519 So. 2d 1083 (Fla. 1st Dist. Ct. App. 1988), as authority for admitting the testimony. The court noted several parallels to Ward, including that the expert was the same in both cases and that his opinion and the basis for that opinion were also "remarkably similar." Calloway, 520 So. 2d at 668, n.6.
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This would in turn diminish the representation role of the jury, which is to decide cases as representative of the cross-section of the community. The net effect of freely permitted expert psychological testimony might be to increase the accuracy of the outcome of a trial, but at the cost of the public's confidence in the jury's ability to reach a just result on its own.**

VIII. Hearsay

Florida Statutes, section 90.801, defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Florida courts are busy with cases involving hearsay, one of the least understood and most visible areas of the law of evidence.** In this survey year, for example, the courts dealt with cases involving the applicability of the hearsay rule, the definition of hearsay, and the pertinence to civil action in the particular case.

245. The reliance on psychological and empirical data would also change the complexity of the jury system, reworking legal rules in the image of psychological studies that may differ in purpose and effect from their counterpart legal policies and considerations.

246. F.S.A. § 90.801 (1987). Several myths have arisen about hearsay in Florida. One is that a statement by a declarant who is going to testify at trial is exempted from the hearsay provision. This is not true, the Florida rule echoes the federal rule which makes all statements made out of court and offered for the truth of the matter asserted hearsay, whether or not the declarant testifies. The Florida hearsay rule used to state that hearsay includes statements "other than one made by the declarant while testifying at the trial or hearing." This wording could have been construed to mean that any statement made by the declarant even those out of court, would be exempted from the hearsay rule. Under the current wording, this ambiguity no longer exists. In 1981, the Florida legislature amended the rule, adopting the language and meaning of the equivalent Fed. R. Eviv 801(c). See S. GARD, FLORIDA EVIDENCE RULES 7.01 (2d ed. Supp. Feb. 1988).

Florida hearsay law differs from federal law in minor respects. For example, admissions are statutorily defined as non-hearsay under the Federal Rules of Evidence.

F.S.A. § 90.801 (d). In Florida, admissions constitute an exception to the hearsay rule. See F.S.A. § 90.801(18) (1987).

247. Hearsay is generally excluded from evidence because it lacks sufficient indicia of reliability. If the hearsay declarant is not testifying on the witness stand as to what she saw or heard, the trier of fact is unable to observe the witness's demeanor or receive the benefit of cross-examination. Even if the hearsay declarant is testifying at trial, the better evidence is the defendant's testimony based on her present memory and perception. Unless a hearsay statement possesses adequate assurances of reliability, it will be excluded pursuant to the hearsay rule. In the admission of hearsay, only a small portion of out-of-court statements are eventually excluded as hearsay. Those statements that are admitted fall into one of three categories: (1) not hearsay; (2) statutory not hearsay; or (3) exceptions to the hearsay rule. The first category, not hearsay, lacks one of the required elements of the hearsay definition. That is, the evidence in question is either not a statement, not made by a declarant, not out of court, or not offered for the truth of the matter asserted. Statutory non-hearsay, on the other hand, meets all the requirements for hearsay but is deemed by statute to be admissible as non-hearsay. One example is a prior identification of a person made by the declarant while the declarant was perceiving him. Id. § 90.801(23)(c).

248. The hearsay rule does not apply to all types of proceedings or hearings. For example, in unemployment compensation hearings, hearsay evidence may be used for the purpose of supplementing or explaining other evidence. Florida Mining & Mate-

ral Corp. v. Florida Unemployment Appeals Commission, 13 Fla. L. Weekly 2072, 2073 (Fla. 1st Dist. Ct. App. 1988). The First District Court of Appeal held that "[a]ll hearsay evidence is not sufficient itself to support a finding unless it would be admissible over objection in civil actions, hearsay evidence may be used for the purpose of supplementing or explaining other evidence").

The pertinent statute relating to unemployment hearings, Fla. Stat. § 320.56(1)(d) (1987), states in part that: "hearsay evidence may be used for the purpose of supplementing or explaining other evidence but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

Another area in which the hearsay rule has limited applicability is the sentencing phase of trial. This past year, several appellate decisions focused on that area. Id. § 921.141(1), essentially provides that hearsay, as well as any other legally obtained probative evidence, is admissible at sentencing so long as the defendant has a fair opportunity to rebut any hearsay statements offered. Id. § 921.141(3), 921.141(5), 921.141(10), Bueno v. State, 527 So. 2d 194 (Fla. 1988).

In Bueno v. State, an attorney who prosecuted the defendant in a prior first degree murder trial testified about the presentence investigation. See Viscomi, State v. Bueno, 525 So. 2d 844 (Fla. 2d Dist. Ct. App. 1988) (invoking a motion to correct the defendant's sentence, which departed from the guideline recommendations. The court held that the defendant's due process rights were violated by the failure of the appellate court to make a contemporaneous objection). See also Vandeven v. State, 475 So. 2d 29 (Fla. 5th Dist. Ct. App. 1988); Lomonte v. State, 506 So. 2d 114 (Fla. 2d Dist. Ct. App. 1987).

In Laflin v. State, 518 So. 2d 408 (Fla. 1st Dist. Ct. App. 1988), the defendant contended the accuracy of his prior record. The state offered the corroboration of the probation and parole officers to meet its burden of proof. The court held that this testimony was insufficient corroboration, finding that the testimony was "nothing more..."
This would in turn diminish the representation role of the jury, which is to decide cases as representative of the cross-section of the community. The net effect of freely permitted expert psychological testimony might be to increase the accuracy of the outcome of a trial, but at the cost of the public’s confidence in the jury’s ability to reach a just result on its own.\textsuperscript{55}

\section*{VIII. Hearsay}

Florida Statutes, section 90.801, defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”\textsuperscript{54} Florida courts again were busy with cases involving hearsay, one of the least understood and most visible areas of the law of evidence.\textsuperscript{56} In this survey year, for example, the courts dealt with cases involving the applicability of the hearsay rule,\textsuperscript{46} the definition of hearsay, and the rules of admissibility of hearsay statements.

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Florida hearsay law differs from federal law in minor respects. For example, admissions are statutorily defined as non-hearsay under the Federal Rules of Evidence.


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Despite the general prohibition of hearsay, only a small portion of out of court statements are eventually excluded as hearsay. Those statements that are admitted fall into one of three categories: (1) not hearsay; (2) statutory not hearsay; or (3) exception to the hearsay rule. The first category, not hearsay, lacks one of the required elements of the hearsay definition. That is, the evidence in question is either not a statement, not made by a declarant, not out of court, or not offered for the truth of the matter asserted. Statutory non-hearsay, on the other hand, means all the requirements for hearsay but is deemed by statute to be admissible as non-hearsay. One example is a prior identification of a person made by the declarant while the declarant was perceiving the defendant. Id. § 90.801 (2)(c).

248. The hearsay rule does not apply to all types of proceedings or hearings. For example, in unemployment compensation hearings, hearsay evidence may be used for the purpose of supplementing or explaining other evidence. Florida Mining & Materials Corp. v. Florida Unemployment Appeals Commission, 13 F.L. Weekly 2072, 2073 (Fla. 1st Dist. Ct. App. 1988). (The First District Court of Appeal held that “while hearsay evidence is not sufficient itself to support a finding unless it would be admissible over objection in civil actions, hearsay evidence may be used for the purpose of supplementing or explaining other evidence.”). The pertinent statute relating to unemployment hearings, F.L.A. STAT. § 120.53(1)(b) (1987), states in part that: “hearsay evidence may be used for the purpose of supplementing or explaining other evidence but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.”

Another area in which the hearsay rule has limited applicability is the sentencing phase of trial. This past year, several appellate decisions focused on that area. Id. § 921.141(1), essentially provides that hearsay, as well as any other legally obtained probative evidence, is admissible at sentencing so long as the defendant has a fair opportunity to rebut any hearsay statements offered. Id. § 921.141(4); Buenano v. State, 527 So. 2d 194 (Fla. 1988).

In Buenano, an attorney who prosecuted the defendant in a prior first degree murder case testified during the sentencing phase of a subsequent murder trial. Id. at 198. The court concluded that the sentencing testimony was “admissible and susceptible to fair rebuttal, especially since defense counsel also represented Buenano in the prior felony case.” Id.

While hearsay is admissible during the sentencing phase, the Second District Court of Appeal reaffirmed the rule that if a defendant disputes hearsay pertaining to the extent of the defendant’s prior record, the state is then required to corroborate the hearsay during the pre-sentence investigation. See Viscioa v. State, 522 So. 2d 84 (Fla. 2d Dist. Ct. App. 1988) (invoking a motion to correct the defendant’s sentence, which departs from the guideline recommendations. The court held that the defendant’s claim concerning the use of disputed uncorroborated hearsay was waived by his failure to make a contemporaneous objection). See also Vandeven v. State, 478 So. 2d 29 (Fla. 5th Dist. Ct. App. 1985); Lomonte v. State, 506 So. 2d 1141 (Fla. 2d Dist. Ct. App. 1987).

In Lahomme v. State, 518 So. 2d 408 (Fla. 1st Dist. Ct. App. 1988), the defendant contested the accuracy of his prior record. The state offered the corroboration of the probation and parole officers to meet its burden of proof. The court held that this testimony was insufficient corroboration, finding that the testimony was “nothing more
say, the admission of prior consistent statements, as excited utterances,

than repeating a challenge to hearsay. . . . Id. at 410. The court consequently reversed and
remanded to provide the state with another opportunity to corroborate the disputed
record. Id.

The admission of hearsay regarding the defendant's record sacrifices the defend-
and's interest for the purposes of judicial economy. While a defendant may stipulate to
his or her criminal record, the importance of the prior record to the defendant during
the sentencing phase, coupled with the difficulty a defendant may have in assembling
his or her convictions, should require the state to secure certified copies of all crimes
the prosecution intends to use during the sentencing phase. This requirement may
prove to be cumbersome and uneconomical, and on efficiency grounds could be
restricted to cases involving first degree murder charges or the equivalent. The use of
hearsay, moreover, generally is not warranted when such great interests are at stake.

249. The most significant of these cases concerned FLA. STAT. § 90.801 (2)(b)
(1987), which pertains to prior consistent statements. As a general rule, prior consis-
tent statements, which merely corroborate a witness's testimony, are inadmissible. One
recent case focused on the requirement that to be admitted, the prior statement must
occur during a "proceeding." The case reaffirmed the principle that statements made to
a police officer are not part of a "proceeding" that could allow for admissibility. Kirk-
land v. State, 509 So. 2d 1105 (Fla. 1987) (invoking an assault victim who provided a
police officer with a sworn statement for the purpose of securing a warrant and initiat-
ing prosecution; the statement was held to be erroneously admitted).

The rationale underlying the exclusion of prior consistent statements is essentially
one of judicial economy. The benefits of such statements are most likely outweighed by
the time devoted to addressing the corollary issues raised by such statements. In cer-
tain circumstances, however, such as those involving charges of recent fabrication, improper
influence or motive, such statements are needed to present unfairness and will be ad-
mitted if they possess sufficient indicia of reliability.

The three exceptions are significant not only for increasing the scope of admissible
hearsay, but for making the prior consistent statements admissible as substantive
evidence. Thus, for prior consistent statements, and the other two exceptions as well, the
jury may consider the statements for their independent truth value, and not merely as
reflections on the witness's credibility.

Although the theory underlying the prior consistent statement exception is valid,
its implementation is not. Considerable confusion arises over the definitions of influ-
ence, motive, and recent fabrication, and when sufficient evidence of influence, motive
or recent fabrication has been offered to trigger the admission of prior consistent state-
ments. Reliability is judged by the opportunity and motive of the witness to falsify

statements bearing on state of mind, the business and public record
exceptions, co-conspirator statements, the child sexual abuse statements
exception, and dying declarations. Not all of these cases were impor-
at the time the statement was made there was a reason to falsify. The statements were
made after the incident had been concluded, during the police investigation. The court
noted that the crime had "long since occurred and . . . terminated, giving (the victim) no
time to reflect." Quiles, 523 So. 2d at 1263 (quoting Lamb v. State, 357 So. 2d 427,
438 (Fla. 2d Dist. Ct. App. 1978)).

The Second District Court of Appeal reaffirmed and elaborated on the holding in
Quiles in Bianchi v. State, 528 So. 2d 1309 (Fla. 2d Dist. Ct. App. 1988). In Bianchi,
the defendant was convicted of arson. Before trial, statements were made by witnesses
to the arson investigator about the arson. The investigator was permitted to testify to
such statements at trial. As in Quiles, the court found that the statements were errone-
ously admitted because the witnesses had the time and motive to falsify their state-
ments made to the investigator. The court further noted that the accident investigator
was permitted to testify to the consistent statements in anticipation of and prior to the
hearing of any charges at trial of improper influence, motive, or recent fabrication.
The court concluded that the concept of "anticipatory rehabilitation" does not exist in
the area of prior consistent statements, and that at least the State should have waited
until redirect examination to offer the prior consistent statements.

Limiting prior consistent statements to those which occur prior to any opportuni-
ty to falsify arises sense. Prior consistent statements are considered to be of
limited value, and a narrow construction of the exception is consistent with this view.
Furthermore, the use of an objective rule, that does not ask whether in the particular
case at hand the witness subjectively reflected or falsified, permits these statements to
be evaluated efficiently and without the creation of a mini-trial.

260. The Florida Evidence Code provides for a hearsay exception for statements
made under the belief of impending death, often referred to as "dying declarations." 

The statement must be made by the declarant "who reasonably believed that his
death was imminent, concerning the physical cause or instrumentalities of what he be-
lieved to be his impending death or the circumstances surrounding his impending
death." FLA. STAT. § 90.804 (1987). The Florida exception applies in all civil or crimi-
nal actions, unlike the parallel federal rule which applies in criminal cases only to
homicide prosecutions.

This past year, the Florida Supreme Court had the opportunity to consider a claim
raised under the dying declaration exception. In Torres-Arboledo v. State, 524 So. 2d
403 (Fla. 1988), the defendant was convicted of attempted armed robbery and first
degree murder. At trial, the doctor who treated the victim in the emergency room was
allowed to testify about a statement made to him by the victim about the cause of the
victim's injuries.

Part of this statement was found to be admissible under section 90.803(4), as a
statement made for the purpose of medical treatment or diagnosis. The court found,
however, that, despite the state's contention, the entire statement did not constitute a
dying declaration. The court reasoned that to be a dying declaration, evidence must be
destroyed that the declarant, at the time of the utterance of the statement, knew that
death was imminent and inevitable. In evaluating whether an adequate predicate was
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its implementation is not. Considerable confusion arises over the definitions of influ-
ence, motive, and recent fabrication, and when sufficient evidence of influence, motive
or recent fabrication has been offered to trigger the admission of the prior consistent state-
ments. Reliability is judged by the opportunity and motive of the witness to falsify
statements.

In Quiles v. State, 523 So. 2d 1261 (Fla. 2d Dist. Ct. App. 1988), the defendant
was convicted of aggravated assault with a firearm and criminal mischief. At trial, the
state was permitted to offer the testimony of a police officer who recounted the victim's
version of the altercation with the defendant. The State contended that this testimony
was admissible as non-hearsay because it was a prior consistent statement pursuant to
the statement failed to possess the requisite indicia of reliability. The court found that

at the time the statement was made there was a reason to falsify. The statements were
made after the incident had been concluded, during the police investigation. The court
found that the crime had "long since occurred and... terminated, giving [the victim] time
to reflect." Quiles, 523 So. 2d at 1263 (quoting Lamb v. State, 357 So. 2d 427,
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ments made to the investigator. The court further noted that the accident investigator
was permitted to testify to the consistent statements in anticipation of and prior to the
leving of any charge at trial of improper influence, motive, or recent fabrication. The
court concluded that the concept of "anticipatory rehabilitation" does not exist in the
area of prior consistent statements, and that at least the State should have waited
until direct examination to offer the prior consistent statements.

Limiting prior consistent statements to those which occur prior to any opportuni-
ties to falsify arises makes sense. Prior consistent statements are considered to be of
limited value, and a narrow construction of the exception is consistent with this view.
Furthermore, the use of an objective rule, that does not ask whether in the particular
case at hand the witness subjectively reflected or falsified, permits these statements to
be evaluated efficiently and without the creation of a mini-trial.

The Florida Evidence Code provides for a hearsay exception for statements rule
under the belief of impending death, often referred to as "dying declarations." The
statement must be made by the declarant "while reasonably believing that his
death was imminent, concerning the physical cause or instrumentalities of what he be-
lieved to be his impending death or the circumstances surrounding his impending
deth." Fla. Stat. § 90.804 (1987). The Florida exception applies in all civil or crimi-
nal actions, unlike the parallel federal rule which applies in criminal cases only to
homicide prosecutions.

This past year, the Florida Supreme Court had the opportunity to consider a claim
under the dying declaration exception. In Torres-Arribalo v. State, 524 So. 2d
403 (Fla. 1988), the defendant was convicted of attempted armed robbery and first
degree murder. At trial, the doctor who treated the victim in the emergency room was
shown to testify about a statement made to him by the victim about the cause of the
victim's injuries.

Part of this statement was found to be admissible under section 90.803(4), as a
statement made for the purpose of medical treatment or diagnosis. The court found,
however, that despite the state's contention, the entire statement did not constitute a
dying declaration. The court reasoned that to be a dying declaration, evidence must be
shown that the declarant, at the time of the utterance of the statement, knew that
death was imminent and inevitable. In evaluating whether an adequate predicate was

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tant or advanced the state of the law. A discussion of the more significant cases follows.

A. The Scope of the Hearsay Rule

In Bauer v. State, the defendant was charged with and convicted of multiple counts of dealing in stolen property. At trial, the defense attempted to establish entrapment through the cross-examination of the prosecution’s key witness, a special agent with the Florida Department of Law Enforcement. On re-direct examination, the special agent testified about the defendant’s predisposition to commit the stolen property offenses. The agent’s testimony included hearsay statements made by a confidential informant.

On appeal, the defendant challenged the use of hearsay during the re-direct examination of the special agent. The Second District Court of Appeal first concluded that the contents of the statements made by the confidential informant would be hearsay under the “any reasonable interpretation” exception, even though testimony about the actions taken by the special agent in response to information received would not.

laid for admissibility, the supreme court found that the trial judge’s specific ruling excluding the statement from the dying declaration category was not clearly erroneous.

This case illustrates the significant assumptions upon which the dying declaration rule is based. The preliminary findings of knowledge of impending death by the victim at the time the statement was made is intended to ensure that the victim has lost all hope of recovery. This lack of hope of recovery is believed to provide the indicia of trustworthiness to ensure the reliability of the evidence. It is unclear, however, how that belief by the declarant would ensure the reliability of the statement. First, the declarant at that time may indeed be suffering from the effects of the moral wounds, distorting his perception, memory, or narration. Furthermore, and more significantly, the motive to falsify — or at least to be influenced by suggestive bias or prejudices — may be greater when there is no hope of recovery, rather than less. The assurance of accuracy thus appears to be unrelated to the knowledge of impending death.

251. 528 So. 2d 6 (Fla. 2d Dist. Ct. App. 1988).
252. The defendant was found guilty of seven counts of dealing in stolen property under Fla. Stat. § 812.019 (1983).
253. Bauer, 528 So. 2d at 7.
254. The court stated that “although it has long been the law of the state that a law enforcement officer may testify as to what action he took pursuant to information received from a confidential informant, his testimony regarding the content of such information constitutes hearsay.” Id. (citing Collins v. State, 65 So. 2d 61 (Fla. 1953); Haynes v. State, 502 So. 2d 501 (Fla. 1st Dist. Ct. App. 1987); Davis v. State, 419 So. 2d 11 (Fla. 3d Dist. Ct. App. 1983); Pastell v. State, 398 So. 2d 851 (Fla. 3d Dist. Ct. App. 1981); and Hutto v. State, 566 So. 2d 438 (Fla. 1989)).
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The more pressing question confronting the district court was whether the hearsay rule applies when an entrapment defense is raised. The court cited with approval and quoted the United States Court of Appeals for the Fifth Circuit in United States v. Webster, which had held that the district court may exclude hearsay under "any reasonable interpretation," even though testimony about the actions taken by the special agent in response to information received would not be. Laid for admissibility, the supreme court found that the trial judge's specific ruling excluding the statement from the dying declaration category was not clearly erroneous.

Our creation of a rule that allows gross hearsay evidence to be used to prove predisposition has resulted in the very evils that the rule against hearsay was designed to prevent. The jury is free to believe the unsworn, unverified statement of government informants, sometimes unidentified, whose credibility is not subject to the effective testing before the jury and whose motivations may be less than honorable. We are hard pressed to envision a situation where the disparity between the probative value and prejudicial effect of evidence is greater.

This decision to apply the hearsay rule to proof of predisposition in rebuttal to an entrapment defense is consistent with the spirit and letter of the hearsay rule. While hearsay is sometimes justified primarily on the basis of need, such as with dying declarations, there appears to be no special need in rebutting the entrapment defense to permit otherwise unreliable evidence in the form of hearsay. Hearsay statements by informants who may have an interest in their statements should be considered even less reliable than other forms of hearsay. Consequently, if the state is to take advantage of the position of the defendant to commit a crime, it should be required to do so in the same manner as any other element of the crime charged.

B. Co-Conspirators' Statements

The Florida Evidence Code treats statements made by co-conspirators of a defendant as a form of admission by a party opponent. Such statements are admissible as a hearsay exception. Section 90.803(18)(e) states are pertinent part that co-conspirator statements

255. 649 F.2d 346 (5th Cir. 1981) (en banc).
256. Id. at 350.
are admissible when they are made:

by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy. Upon request of counsel, the court shall instruct the jury that the conspiracy itself and each member's participation in it must be established by indepen-
dent evidence, either before the introduction of any evidence or
before evidence is admitted under this paragraph.**

Section 90.803 (18)(e) does not state what quantum of evidence is
required to prove these independent facts, or how the court should
decide the question of admissibility. These issues were squarely addressed
by the Third District Court of Appeal in Romanzi v. State.***

In Romanzi, the defendant physician was convicted of conspiracy to
commit first degree murder as well as first degree murder. At trial, the
jury was presented with co-conspirator statements. On appeal, the
defendant contested the admissibility of those statements and the way
in which they were admitted.**** The district court rejected the various
contentions of the defendant and affirmed her convictions.

The district court first considered the quantum of proof the state
must offer to establish the existence of a conspiracy. The court ob-
erved that initially there was no consensus in either federal or state
courts as to whether the proof required was slight evidence, substantial
evidence, or a preponderance of the evidence.**** It was also unclear
as to whether it was the responsibility of the judge or the jury to decide
if the standard of proof had been met.****

This confusion was clarified considerably in the United States Court of
Appeals for the Fifth Circuit in United States v. James.***** James dealt with the parallel co-conspirators' excep-
tion in the Federal Rules of Evidence.****** The court in James

adopted a two-step procedure applied solely by the judge.***** Under this
procedure, the government must meet an initial burden of proof by
substantial evidence in the preliminary determination of admissibility.
Upon the close of all the evidence, the judge must review admissibility
again, but this time by determining whether the government has shown
the foundational elements by the more stringent preponderance of the
evidence standard.******

The two-tiered James test was adopted fully or in part by many
state courts, including several in Florida. The Fourth District Court of
Appeal, for example, embraced part of the James approach in Saavedra
t v. State in 1982.***** The court in Saavedra utilized only the second
prong of the test, requiring the state to meet its burden of a preponder-
ance of the evidence at the close of all the evidence. In 1984, the
Second District Court of Appeal in State v. Morales adopted the
James approach in its entirety.

In 1987, the law concerning co-conspirator statements took yet an-
other turn when the United States Supreme Court addressed the re-
quirements of admissibility in Bourjaily v. United States.****** Bourjaily
differed with the approach and conclusions of James.******* The Supreme
Court first reasoned that the admissibility of a co-conspirator's state-
ment was a preliminary question of fact governed by Federal Rule of
Evidence 104(a).******* The Supreme Court then analogized co-conspirator
statements to other preliminary questions of fact such as the voluntari-
est consent to search and the voluntariness of a confession.********

In those situations, the Court noted that preliminary facts must be shown

266. Under James, there is no participation by the jury in determining admissi-

ability. The court stated that “[t]he jury is to play no role in determining the admissibil-

ity of statements.” James, 590 F.2d at 580.

267. Id. at 582.

268. 421 So. 2d 725 (Fla. 4th Dist. Ct. App. 1983). The court in Saavedra found

that Fla. Stat. § 90.105(1) (1987), providing that “the court shall determine preliminary

questions concerning . . . the admissibility of evidence,” paralleled that of the

Fed. R. Evin. 104(a).

269. The court was silent on the question of the quantum of proof required for

the initial assessment of admissibility.

270. 104 So. 2d 410 (Fla. 2nd Dist. Ct. App. 1984).


272. Similar reasoning was applied in Saavedra v. Morales.

273. As noted supra note 268, the parallel Florida rule is Fla. Stat. § 90.105(1)

(1987), which differs in form but not in substance from the federal rule.


to exist by a preponderance of the evidence to be admissible. The Supreme Court then completed its analogy by concluding that the same standard should apply to co-conspirator statements, effectively abandoning the threshold "substantial evidence" test adopted in James. The use of a preponderance standard for the initial analysis, moreover, had the further effect of making the second part of the James test — a preponderance of the evidence analysis at the close of the evidence — superfluous.

The Third District Court of Appeal in Romani considered this history and opted to conform its approach to the new direction charted in Bourjaily. The district court concurred with and quoted Bourjaily in holding that "where the preliminary facts relevant to section 90.803(18)(e) are disputed, the offering party must prove them by a preponderance of the evidence." 276

The court in Romani also found Bourjaily instructive on the question of whether independent evidence is required to establish the existence of a conspiracy and the participation by the declarant and the defendant in that conspiracy. Interpretations of the independent evidence requirement prior to Bourjaily prohibited "bootstrapping," the use of the co-conspirator's hearsay statements to establish the conspiracy. 277 Bourjaily overturned that general rule, however, finding that just as the Federal Rules of Evidence permit inadmissible evidence to be considered by a judge in making preliminary determinations of fact, a judge can consider the hearsay statements in part to determine whether a conspiracy existed and whether the defendant and declarant participated in that conspiracy. 278 The United States Supreme Court instead required only that some independent evidence of the conspiracy be presented for consideration by the court. 279 The Court did not reach the question of what proportion of independent evidence was necessary, or whether in certain situations hearsay evidence alone could support a finding that a conspiracy existed.

In light of this analysis about the "independent evidence" requirement in Bourjaily, the court in Romani considered whether under the Florida Evidence Code hearsay statements could be used to establish the existence of a conspiracy and the defendant and declarant's participation in that conspiracy. 280 The court in Romani noted that the Florida Evidence Code does not contain any parallel provision to the federal rule that frees judges from the rules of evidence when making preliminary determinations of fact for admissibility purposes. 281 The district court also observed that there was no precedent in Florida which evaluated the difference between the Florida and Federal rules on this issue. 282 In what was basically a case of first impression, the district court again concluded that the Florida rules should be interpreted in accordance with Bourjaily and the Federal co-conspirator rule. 283 The court in Romani similarly adopted and quoted the Bourjaily holding, stating that judges, "... in making a preliminary factual determination under section 90.803(2)(e), may examine hearsay statements sought to be admitted ... . " 284 The hearsay statements were to be accorded the appropriate weight based on the judge's "judgment and experience." 285

The district court relied on several factors in reaching this conclusion. These factors included statements by commentators who asserted that limiting judges to the rules of evidence was impractical, and the policy that the Florida Rules of Evidence were patterned after the Federal Rules of Evidence and consequently should be construed in the same manner.

Based on these newly adopted standards of admissibility for co-conspirators' statements, the court in Romani found that the out-of-court statements of Dr. Romani's co-conspirators were admissible because some independent evidence was offered as to the defendant's and declarants' participation in the conspiracy and as to the existence of the conspiracy as well. The district court consequently rejected the defendant's claims and affirmed her convictions.

The decision by the court in Romani to follow Bourjaily in adopting a one-shot test of admissibility for co-conspirator statements is readily justifiable. It promotes judicial economy, sets a workable standard, and protects the defendant's rights by requiring a preponderance of evidence in that conspiracy. 286

276. 528 So. 2d at 20 (quoting Bourjaily, 107 S. Ct. at 2779).
279. 528 So. 2d at 20 (providing a quotation from Bourjaily).
280. Romani, 528 So. 2d at 22.
281. Id.
282. Id.
283. See W. Hicks \& J. Matthews, Evidence, 31 U. Miami L. Rev. 951, 954 (1977) ("Can a practical matter, it would be impossible for a judge to follow all the rules of evidence in making preliminary determinations.").
284. Romani, 528 So. 2d at 21-22 (quoting Bourjaily, 107 S. Ct. at 2782).
285. Id. at 22, (quoting United States v. Matlock, 415 U.S. 164, 175 (1974)).
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280. Id. at 22, (quoting United States v. Matlock, 415 U.S. 164, 175 (1974)).
of the evidence. The district court's decision to follow Bourjaily in permitting the use of hearsay to establish the existence of a conspiracy and the participation of the defendant and declarant in that conspiracy, on the other hand, is not similarly supportable. The policy of construing Florida law in a manner similar to the federal law upon which it is based is inapplicable when a parallel provision does not exist under state law. If anything, the omission of a similar provision in the Florida Evidence Code regarding the use of inadmissible evidence indicates that a similar result was not intended by the Florida Legislature. The other justifications advanced by the Romani court for following Bourjaily lack persuasiveness as well. The court concluded that the lack of precedent on the issue meant that there was no precedent opposing a construction consistent with the Federal law. The lack of precedent, however, has no bearing on whether the courts should or should not adopt a construction consistent with the Federal law. The silence of other Florida courts can be interpreted just as strongly to mean that these courts have not decided to follow the Federal lead, even though the opportunity was present.

The Third District Court of Appeal's reliance on the opinion of several commentators also was not warranted. The commentators stated that: "As a practical matter, it would be impossible for a judge to follow all the rules of evidence in making preliminary determinations." Deciding such an important question because judges allegedly would not follow the rules of evidence is not a sound basis for decision and is inconsistent with other Federal and Florida Rules of Evidence. Just because judges may be tempted not to follow the rules of evidence is not a sufficient reason to abandon them. Rules are meant to serve as an incentive or deterrence, and a rule limiting admissibility determinations to only admissible evidence sends a message to judges to try to conform their conduct to that standard. Such is the rationale for the applicability of both the Federal and Florida Rules of Evidence to non-jury trials, in which the judge plays the roles of both judge and jury. While the rules of evidence may not be as closely followed in such trials as compared to a jury case, that is not to say that judges do or should not at least make efforts to follow the rules in deciding questions in a proper manner.

As a practical matter, permitting a court to consider hearsay may very well result in the previously anathema "bootsraping," in which the hearsay statements dominate the court's determination about the existence of a conspiracy and the participation by the defendant and declarant in that conspiracy. The temptation to rely upon and use the hearsay statements will be great, and may only be matched by the temptation of the prosecutor to use the hearsay statements to establish the conspiracy and participation by the defendant and declarant. The result may be that the word "independent" is effectively read out of the foundational requirements for admitting co-conspirator statements. This is a bad policy that has great potential for backfiring.

C. Excited Utterances

An excited utterance is defined under Florida Statutes, section 90.803 as "a statement or excited utterance relating to a startling event or condition made while the declarant is under the stress of excitement caused by the event or condition." Florida law requires three elements for a statement to fall within the excited utterance exception: (1) There must be an event startling enough to cause nervous excitement; (2) the statement must have been made before there was time to contrive or misrepresent; and 3) the statement must be made while the person is under the stress of excitement caused by the event. In Jano v. State, the Florida Supreme Court evaluated the use of the excited utterance exception in a child sexual battery case. The court's decision was particularly important to child sexual battery prosecutions, since many out-of-court statements by allegedly abused children occur well after the alleged abuse. If these statements are viewed as admissible hearsay, child victims could be kept off the witness stand or could have their credibility bolstered.

In Jano, the defendant was convicted of sexual battery of his two and one-half year old daughter. The child did not testify at trial, and the incriminating statements by the child against the defendant were ad-

of the evidence. The district court’s decision to follow Bourjaily in per-
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While the rules of evidence may not be as closely followed in such tri-

\textsuperscript{286} The fact that the ruling allows Florida law to be consistent with federal law is
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\textsuperscript{287} Romani, 528 So. 2d at 21.

\textsuperscript{288} Id. at 21, n.13 (citing W. Hicks and J. Mathews, Evidence, 31 U. Miami
L. Rev. 951 (1977)); See also M. GRAHAM, HANDBOOK OF FLORIDA EVIDENCE §§

\textsuperscript{289} Romani 528 So. 2d at 21, (quoting W. Hicks & J. Mathews, Evidence, 31
U. Miami L. Rev. 951, 954 (1977)).
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mited either as a spontaneous statement or excited utterance. The issue confronting the Florida Supreme Court, as certified by the Fourth District Court of Appeal, was: "Whether out-of-court statements of a child are admissible under Section 90.803(1) or (2), Florida Statutes, where they refer to a series of prior events which the testimony does not establish as having occurred simultaneously or within a reasonably preceding the hearsay statement of the victim."

The Florida Supreme Court considered whether the excited utterance exception requirements should be relaxed for statements made by children in child sexual battery cases. The court recognized that other jurisdictions have adopted such a liberal construction in the child abuse context based on the belief that the victim's young age minimizes the likelihood of deception or falsification by the declarant. The supreme court rejected a more relaxed construction, however, and instead sided with the majority of courts in treating statements by youthful declarants in the same manner as statements made by any other person.

The supreme court cited two Florida decisions by the First and Fourth District Courts of Appeal to illustrate the importance of the contemporaneity of the statements and the event. In light of the

293. The spontaneous statement exception exempts from the hearsay rule "a spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness." FLSA STAT. § 90.803(1). The main difference between the spontaneous statement and excited utterance exceptions is the amount of time that may permissibly lapse between the incident in question and the hearsay statement.

294. See Jano, 524 So. 2d at 660. On appeal the state suggested that the statements were excited utterances because they were made under the stress of excitement.

295. See JANO v. STATE, 510 So. 2d 615 (FLA. 4TH DIST. CT. APPL. 1987).

296. Id. at 620, quoted in JANO, 524 So. 2d at 660.

297. The court in JANO cited Lanier v. People, 200 Colo. 448, 615 P.2d 720 (1980), in Re Marriage of Thiss, 121 Ill. App. 3d 1092, 460 N.E.2d 912, 77 Ill. Dec. 608 (CT. APP. 1984); see Annotation: Time Element As Affecting Admissibility of Statements or Complaints Made By Victim Of Sex Crime At Re Gosain: Spontaneous Exclamation, Or Excited Utterance, 89 A.L.R. 3d 102 (1979), concerning the significance of contemporaneity to the admissibility of a statement or complaint made by a victim of a sex crime as a gesture, a spontaneous exclamation, or an excited utterance.

298. Saltier v. State, 500 So. 2d 184 (FLA. 1ST DIST. CT. APPL. 1986).


300. In Saltier, hearsay statements by a child about the abuse of that child several hours after it allegedly occurred without a showing of excitement was found by the court to be inadmissible. In Bagley, the hearsay statement of abuse made subsequent to the alleged incidents did not meet the criteria for the excited utterance exception.

Florida precedent and historical parameters of the hearsay exception, the court agreed with the conclusion reached by the Fourth District Court of Appeal, which decided that "However, it is clear that the intent of the [evidence] code, which we are obliged to enforce, is that the state prove that the time was sufficiently short under the facts to fall within the limits of the exception." The supreme court added that only in exceptional cases would statements made several hours after an event qualify as an excited utterance due to the probable termination of the stress of excitement caused by the event.

The supreme court's refusal to adopt a special hearsay exception for children within the excited utterance exception in JANO is amply justifiable in light of accepted methods of judicial construction. While physical child abuse cases, and particularly child sexual battery cases, are appropriate subjects for an exception if one is to exist, such sentiment does not legitimize the rewriting of a legislative code by the courts. The general focus of the hearsay rule is reliability, and the decreased age of the declarant simply is not correlated with increased reliability. Under the rule, reliability is putatively assured by the stress of excitement caused by the event, and this key element cannot be read out of the rule without changing its entire meaning. While the age of the declarant may in some cases justify the admission of such statements because the excitement suffered by children may differ from that of adults, this result is still consistent with the requirements of the hearsay exception. As the court aptly noted in JANO, the legislature has tackled this problem by creating a new exception to the hearsay rule, section 90.803(23), regarding hearsay statements by children who are victims of sexual abuse.

D. Statements of Child Victims of Sexual Abuse

Section 90.803(23)** exempts from the hearsay rule statements

301. JANO v. STATE, 524 So. 2d 660, 663 (quoting JANO v. STATE, 510 So. 2d 615, 619 (FLA. 4TH DIST. CT. APPL. 1987)).

302. Id.

303. See, for example, the trial of Joel Steinberg, who was charged with and convicted of killing his adoptive daughter Lisa. This sad story of child abuse was publicized nationwide.


305. The constitutionality of this section has recently been upheld by the Supreme Court. See Perez v. State, 57 U.S.W. 2391 (FLA. 1988). The right to a fair trial is not violated if the statute did not violate the confrontation clauses of the state or federal constitution.
mitted either as a spontaneous statement or excited utterance. The issue confronting the Florida Supreme Court, as certified by the Fourth District Court of Appeal, was: "Whether out-of-court statements of a child are admissible under Section 90.803(1) or (2), Florida Statutes, where they refer to a series of prior events which the testimony does not establish as having occurred simultaneously with or immediately preceding the hearsay statement of the victim?"

The Florida Supreme Court considered whether the excited utterance exception requirements should be relaxed for statements made by children in child sexual battery cases. The court recognized that other jurisdictions have adopted such a liberal construction in the child abuse context based on the belief that the victim's young age minimizes the likelihood of deception or falsification by the declarant. The supreme court rejected a special relaxed construction, however, and instead sided with the majority of courts in treating statements by youthful declarants in the same manner as statements made by any other witness. The supreme court cited two Florida decisions by the First and Fourth District Courts of Appeal to illustrate the importance of the contemporaneity of the statements and the event.

293. The spontaneous statement exception exempts from the hearsay rule "a spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness." Fla. Stat. § 90.803(1). The main difference between the spontaneous statement and excited utterance exceptions is the amount of time that may permitably lapse between the incident in question and the hearsay statement.

294. See Jano, 524 So. 2d at 660. On appeal the state suggested that the statements were excited utterances because they were made under the stress of excitement.


296. Id. at 620, quoted in Jano, 524 So. 2d at 660.

297. The court in Jano cited Lancaster v. People, 200 Colo. 448, 615 P.2d 720 (1980), In Re Marriage of Theis, 121 Ill. App. 3d 1092, 460 N.E.2d 912, 77 Ill. Dec. 608 (Ct. App. 1984); see Annotation, Time Element As Affecting Admissibility of Statement or Complaint Made By Victim Of Sex Crime At Res Gestae, Spontaneous Exclamation, Or Excited Utterance, 89 A.L.R. 3d 102 (1979), concerning the significance of contemporaneity to the admissibility of a statement or complaint made by a victim of a sex crime as res gestae, a spontaneous exclamation, or an excited utterance.


300. In Saltor, hearsay statements by a child about the abuse of that child several hours after it allegedly occurred without a showing of excitement was found by the court to be inadmissible. In Bagley, the hearsay statements of abuse made subsequent to the alleged incidents did not meet the criteria for the excited utterance exception.

D. Statements of Child Victims of Sexual Abuse

Section 90.803(23) exempts from the hearsay rule statements


302. Id.

303. See, for example, the trial of Joel Steinberg, who was charged with and convicted of killing his adoptive daughter Lisa. This sad story of child abuse was publicized nationwide.


305. The constitutionality of this section has recently been upheld by the Supreme Court. See Perez v. State, 577 U.S.L.W. 2391 (Fla. 1988). The eight to zero decision found that the statute did not violate the confrontation clauses of the state or federal constitutions.
made by child victims of sexual abuse. The rule states in pertinent part:

Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse or any other offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. . . . and

2. The child either:
   a. Testifies, or
   b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child’s participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm. . . . 308

This provision, to which no parallel federal rule exists, has spawned considerable litigation and has received much attention in the courts of Florida." Recently, in Griffin v. State, 309 the First District federal constitutions. In Perez, the defendant pleaded no content to lend small charges on a three and one-half year old child. On appeal, the Fifth District Court of Appeal upheld the constitutionality of the statute. Perez v. State, 500 So. 2d 725 (Fla. 5th Dist. Ct. App. 1987). The court noted that under the confrontation clause, out-of-court statements are not barred when a declarant is found to be unreliable for cross-examination. Ohio v. Roberts, 440 U.S. 56, 63 (1980). The court further pointed out that the Florida statute requires additional safeguards, particularly corroboration of the abuse of offense. The court rejected a vague challenge to the factors that may be considered in determining the reliability of the statement, reasoning that the list of factors provided by the legislature “is not exhaustive.” 306, 307.


307. For example, in State v. Allen, 519 So. 2d 1076 (1988), the court held that failure to comply with the record requirements of Fla. Stat. § 803(23) (1987) constituted reversible error when the evidence admitted was a videotape of the child victim’s testimony.

308. 526 So. 2d 752 (Fla. 1st Dist. Ct. App. 1988). The court in Griffin noted that, “in determining the competency of a child of tender years to testify as a witness, the trial court must focus on two elements: (1) the child’s intelligence, and (2) the child’s understanding of the obligation to tell the truth. Before finding the child competent to testify as a witness, the trial court should determine whether the child understands the nature of his or her role, whether the child understands that what he or she says can be used against him in court, and whether the child understands that he or she has the right to counsel.”

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Court of Appeal reversed the defendant’s conviction in a child sexual abuse case due to the failure of the trial court to make specific findings of fact on the record indicating the basis for determining the admissibility of the child’s out-of-court statements.309 The true import of Griffin, however, involves its examination of the tension between the hearsay statements of a child, which may provide the only evidence in an abuse case, and the right of the accused to a fair trial. The specific issue raised in Griffin was whether a child hearsay declarant must be competent at the time the hearsay statement is made.

The desire to protect the child from cross-examination or from testifying at trial conflicts with the constitutional right of a criminal defendant to confront the witnesses against him.310 As a general rule, when hearsay statements are admitted there is no opportunity to cross-examine the declarant or assess his or her demeanor. Thus, unless guarantees of trustworthiness are present, the statements will violate the confrontation clause of the United States Constitution. Some courts, such as the Washington Supreme Court, have adopted a requirement of competency of the declarant-child-victim as a predicate to admitting the child’s hearsay statements.311 Most jurisdictions, however, do not require a showing of competency as a precondition to admissibility.312

The court in Griffin, after raising and discussing this difficult issue,
made by child victims of sexual abuse. The rule states in pertinent part:

Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse or any other offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible is admissible in evidence in any civil or criminal proceeding if:

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   a. Testifies; or

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This provision, to which no parallel federal rule exists, has spawned considerable litigation and has received much attention in the courts of Florida. Recently, in Griffin v. State, the First District federal constitutions. In Perez, the defendant pleaded no contest to lewd sexual charges on a three and one-half year old child. On appeal, the Fifth District Court of Appeal upheld the constitutionality of the statute. Perez v. State, 500 So. 2d 725 (Fla. 5th Dist. Ct. App. 1988). The court noted that under the confrontation clause, out-of-court statements are not barred when a declarant is found to be unavailable for cross examination. Ohio v. Roberts, 440 U.S. 56, 63 (1980). The court further pointed out that the Florida statute requires additional safeguards, particularly corroboration of the abuse of evidence. The court rejected a vagueness challenge to the statute which may be considered in determining the reliability of the statement, reasoning that the facts of factors provided by the legislature “is not exhaustive.”

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resolved the question by declining to reach it, stating that while it did not "reject the possibility that, in appropriate circumstances, hearsay would be admissible though the declarant was found incompetent," the hearsay as issue was already "clearly inadmissible." Thus, despite its comments about the importance of safeguarding the defendant's confrontational rights in such cases, the district court left the door open for the admissibility of hearsay statements by incompetent child declarants. Furthermore, the court failed to say what those circumstances of admissibility would be. If the confrontational rights of the defendant outweigh the necessity of admitting statements by incompetent child victims, it is unclear as to what circumstances would justify admission. If the court in Griffin permits a case by case analysis, it is inviting other courts to compromise the right to confrontation based on ad hoc balancing. This would yield inconsistent results and a lack of guidance for future cases.

E. Public Records and Reports Under the Federal Rules of Evidence

Both the Florida and the Federal Rules of Evidence contain a hearsay exception for public records and reports. Federal Rule of Evidence 803(8)(c) states in pertinent part that "records, reports, statements or data compilations, in any form, of public offices or agencies, setting forth . . . in civil actions . . . factual findings resulting from an investigation made pursuant to authority granted by law that are admissible under the sources of information or other circumstances indicate lack of trustworthiness." 315

314. Griffin, 526 So. 2d at 759.
315. Id. The hearsay was already "clearly inadmissible" because of the trial court's failure to comply with procedural safeguards.
316. Id.
317. If the court is to create a more specific standard for this exception, it may well rely on the test applied to other fundamental constitutional rights, that of secure scrutiny. The state would be required to show a compelling need for the incompetent hearsay statements and no other reasonable alternative to admissibility. While this standard is certainly subject to criticism, it at least indicates the relative weight of such interest consistent with the court's holding in Griffin.
318. Fla. Stat. § 90.803(8) (1987); Fed. R. Evid. 803(8). This public records exception is parallel to the business records exception, see Fla. Stat. § 90.803(6) (1987), which permits the introduction of private records of a regularly conducted business activity.
319. Fed. R. Evid. 803(8)(c). The parallel Florida rule has no similar provision regarding the admissibility of factual findings. Fla. Stat. § 90.803(8) (1987) states: Records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matters which there was a duty to report, excluding in criminal cases matters observed by a police officer or other law enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness.
322. A report by Lieutenant Commander William C. Morgan, Jr. authorized from the Manual of the Judge Advocate General included Morgan's opinion that pilot error was "the most probable cause of the accident." Rainey v. Beech Aircraft Corp., 784 F.2d 1232, 1252 (11th Cir. 1986).
323. Statements on cross-examination by the decedent's husband, himself a Navy pilot, however are not allowed, raising a second evidentiary issue. The United States Court of Appeals for the Eleventh Circuit, in its original panel decision, reversed the decision below in favor of the Plaintiff John Rainey. Upon rehearing, en banc, the court optics finally on the question of admissibility under Rule 803(8), and consequently reinstated that the panel decision remains as controlling authority. Id.
324. This rule codifies the pre-existing common law exemplifying public records from the hearsay rules. See Fed. R. Evid. 803, Advisory committee's note.
resolved the question by declining to reach it, stating that while it did not "reject the possibility that, in appropriate circumstances, hearsay would be admissible though the declarant was found incompetent," the hearsay at issue was already "clearly inadmissible." Thus, despite its comments about the importance of safeguarding the defendant's confrontational rights in such cases, the district court left the door open for the admissibility of hearsay statements by incompetent child declarants. Furthermore, the court failed to say what those circumstances of admissibility would be. If the confrontational rights of the defendant outweigh the necessity of admitting statements by incompetent child victims, it is unclear as to what circumstances would justify admission. If the court in Griffin permits a case by case analysis, it is inviting other courts to compromise the right to confrontation based on ad hoc balancing. This would yield inconsistent results and a lack of guidance for future cases.  

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324. This rule codifies the pre-existing common law exemplifying public records from the hearsay rules. See Fed. R. Evid. 803, Advisory committee's notes.
culty to apply in practice. The Court further noted that a broad interpretation of admissibility under Rule 803(8)(c) would be consistent with the Federal Rules' general approach toward liberalized admission of "opinion" testimony. Since the Court characterized a factual finding as a form of opinion, the statement by the author of the Navy investigative report was of the type that could be admitted under Rule 803(c). The Court further found that sufficient safeguards against abuse existed, such as limiting opinions to those based on a factual investigation, as well as the built-in trustworthiness inquiry that the rule itself requires. In so finding, the Court laid to rest the conflict between those jurisdictions that narrowly interpreted "factual findings" to exclude opinions or conclusions and those that adopted a broader, more inclusive, interpretation.

The Court's decision to permit factual findings is not surprising in light of the current trend toward admitting opinion testimony. The Court was not at all troubled by the potential for prejudice, given the several safeguards that exist to counter that potential. The Court's assertion that there should be no line between fact and opinion because one would be too difficult to draw, however, is unpersuasive. Courts draw difficult lines all the time, and in the law of evidence a significant historical divider has been the partition between fact and opinion.

326. The court stated, "our conclusion that neither the language of the Rule nor the intent of its framers calls for a distinction between 'fact' and 'opinion' is strengthened by the analytical difficulty of drawing such a line. It has frequently been remarked that the distinction between statements of fact and opinion is, at best, one of degree..." Id. at 449.
327. Id. at 450.
328. Id.
329. Id. at 349.
330. The United States Court of Appeals for the Eleventh Circuit decision excluding factual findings from the form of opinions from admissibility under Fed. R. Evid. 803(8)(c) was consequently overruled, although its conclusion that the district court had abused its discretion on another evidentiary question was affirmed. The court of appeals and the Supreme Court found that the district court had abused its discretion in limiting the scope of cross examination of Commandeer Rainey by his own counsel after Rainey had been called as an adverse witness by Defendant Beech Aircraft Corp. Counsel had attempted to elicit from the latter written by Rainey to the investigator also said that the most probable primary cause of the crash was due to equipment malfunction. Before Rainey could answer the question, however, the defense objected on the basis that the question called for the witness's opinion. The objection was sustained. The Supreme Court held that this evidentiary ruling was in error because the rule of completeness require that Rainey be allowed in fairness to show that he believed in the equipment malfunction theory. See Rainey, 109 S. Ct. 439, 450.
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331. The Court also noted that the leading scholars who have dealt with this question almost unanimously favor the broader, more inclusive approach. The Court cites, for example, E. CLEARY, MCCORMICK ON EVIDENCE 890 n.7 (3d ed.1984); M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 886 (2d ed. 1984); R. LEMPERT AND S. SALZBERG, A MODERN APPROACH TO EVIDENCE 449-50 (2d ed 1982); G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 275-76 (2d ed. 1987); D. LOUBETTE & C. MEULLER, FEDERAL EVIDENCE § 455, at 740-41 (1980); & J. WENGER & M. BURR, WEINER'S FEDERAL EVIDENCE § 803(8)(D).
APPENDIX

CONTEMPORANEOUS OBJECTION RULE:

See Fla. Stat. § 90.104 (1987) providing in part that: "(1) A court may predicate error... on the basis of admission... evidence when a substantial right of the party is adversely affected and... (a) When the ruling is one admitting evidence, a timely objection or motion to strike appears on the record, stating the specific ground of objection."

The contemporaneous objection rule really has two separate components, both of which must be satisfied by counsel who wish to preserve their record for appeal.

The first requirement is one of timeliness. When allegedly objectionable matters are offered or someone does something objectionable, counsel must promptly object to it or else find his later complaint waived. For recent cases on this requirement, see Harmon v. State, 527 So. 2d 182 (Fla. 1988) (Trial counsel’s failure to object to allegedly improper judicial comment waived issue, since the comment was not fundamental error); Correll v. State, 523 So. 2d 562, 566 (Fla. 1988) (Defendant’s pre-trial objection to state’s proffer of other crimes evidence did not preserve the issue for appeal in the absence of an objection at trial). "Even when a prior motion in limine has been denied, the failure to object at the time collateral crime evidence is introduced waives the issue for appellate review." Torres-Arbelo v. State, 524 So. 2d 403 (Fla. 1988) (Defendant’s failure to promptly object to being tried in clothes which could be identified as jail garb waived alleged error); Snoddy v. State, 523 So. 2d 982 (Fla. 1st Dist. Ct. App. 1988) (Trial counsel’s failure to object to child sexual abuse expert’s conclusion that victim had been abused waived issue for appeal)." Cruse v. State, 522 So. 2d 90 (Fla. 1st Dist. Ct. App. 1988) (Prosecutor’s comments in closing argument that jury should not sympathize with defendant since defendant could have been charged with other offenses besides the ones on trial was improper. However, defense counsel’s failure to object waived the error); DiSavio v. State, 522 So. 2d 84 (Fla. Dist. Ct. App. 1988) (Defendant’s failure to promptly dispute information about defendant’s criminal conviction record that state relied on at sentencing waived issue); Paza v. Winn-Dixie Supermarkets, 526 So. 2d 696, 697 (Fla. 4th Dist. Ct. App. 1988) (Trial court erred in declaring mistrial after verdict in plaintiff’s favor because the plaintiff allegedly used improper leading question on direct examination. Although there were numerous leading questions asked, many were not objected to. Winn-Dixie’s argument that it refrained from making repeated leading questions out of fear of antagonizing the jury is not a sufficient excuse, since “it is well settled that allegedly improper comments or questions at trial to support a mistrial must be accompanied by a spontaneous objection and motion for mistrial.”)

When a defendant has received an illegal sentence, Florida courts have consistently excused the failure to promptly object. For recent cases on this see Gianetti v. State, 516 So. 2d 277 (Fla. 5th Dist. Ct. App. 1987) (Trial court’s sentence requiring defendant to pay costs was illegal as ex post facto punishment, since defendant’s crime occurred before statute authorizing imposition of these costs was passed. Gianetti’s lack of a contemporaneous objection was irrelevant, since the sentence was illegal per se); Sharp v. State, 522 So. 2d 51 (Fla. 5th Dist. Ct. App. 1988) (A sentencing guideline miscalculation can be corrected without a contemporaneous objection having been made at sentencing). The contemporaneous objection rule’s second requirement is specificity. Unless objection stating the correct grounds for the objection, any alleged error is not preserved. For recent cases on this aspect of the rule, see Harmon v. State, 527 So. 2d 182 (Fla. 1988) (Counsel’s objection to admission of other crimes evidence at trial on basis that it was beyond the scope of cross-examination waived any claim that the admission violated the Williams rule); Holley v. State, 523 So. 2d 668 (Fla. 1st Dist. Ct. App. 1988) (Appellate court refused to consider defendant’s argument that a laboratory report was inadmissible hearsay, since this was not the grounds on which counsel objected to the document’s admission at trial)."

OFFERS OF PROOF:

See Fla. Stat. § 90.104(1)(b) (1987) requiring that before an appellate court may find error in a trial court’s evidentiary ruling, "[w]hen the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which the questions were asked." The United States Supreme Court in construing Fed. R. Evid. 103, relating to offers of proof, has recently indicated that the adequacy of an offer must be judged on appeal by the total context in which it took place. Thus when an attorney is interrupted in making his offer of proof, the appellate court should consider this in ruling on the proffer’s specificity. See Beech Aircraft Corp. v. Rainey, 109 S. Ct. 452, 53 n.2 (1988). PRELIMINARY QUESTIONS:

See Fla. Stat. § 90.105 (1987); Leonard Bros. Indus. Contractors v. Burke Co., 529 So. 2d 779 (Fla. 3rd Dist. Ct. App. 1988) (Court summarily found that in a product liability action plaintiff had made a sufficient preliminary showing that equipment tested by experts was the same as that which injured plaintiff). See also Brock v. G.D. Searle & Co., 530 So. 2d 428, 430 (Fla. 1st Dist. Ct. App. 1988), which merely cited Fla. STAT. § 90.152(2) (1987) during a discussion of other issues.

PROHIBITION ON JUDICIAL COMMENT:

See Fla. Stat. § 90.106 (1987); Harmon v. State, 527 So. 2d 182, 186 (Fla. 1988) (A Florida court’s sentence containing words such as "the defendant was taken to the hospital", "the defense counsel argued that his client had told him that he was not guilty", or "the defense counsel had asked the court to find the defendant not guilty" is not an objection to the total context in which it took place. Thus when an attorney is interrupted in making his offer of proof, the appellate court should consider this in ruling on the proffer’s specificity. See Beech Aircraft Corp. v. Rainey, 109 S. Ct. 452, 53 n.2 (1988)."

LIMITED ADMISSIBILITY OF EVIDENCE:

See Fla. Stat. § 90.107 (1987); Kingery v. State, 523 So. 2d 1199, 1204 (Fla. 1st Dist. Ct. App. 1988) (Trial court erred when it allowed the state to impeach a prosecution witness with the witness’s deposition testimony and denied defense counsel’s request that the jury be instructed the evidence could only be used for impeachment and..."
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tion or motion to strike appears on the record, stating the specific ground of objec-
tion . . . Florida appellate courts have been traditionally strict in enforcing this rule.

The contemporaneous objection rule really has two separate components, both of which
must be satisfied by counsel who wish to preserve their record for appeal.

The first requirement is timeliness. When allegedly objectionable matters are
offered or someone does something objectionable, counsel must promptly object to
it or else find his later complaint waived. For recent cases on this requirement, see
Harmon v. State, 527 So. 2d 182 (Fla. 1988) (Trial counsel's failure to object to
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Paza v. Winn-Dixie Supermarkets, 526 So. 2d 696, 697 (Fla. 4th Dist. Ct. App. 1988)
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occurred before statute authorizing imposition of these costs was passed. Ghianali's lack
of a contemporaneous objection was irrelevant, since the sentence was illegal per se.); Sharp v. State, 522 So. 2d 51 (Fla. 5th Dist. Ct. App. 1988) (A sentencing guide-
line miscalculation can be corrected without a contemporaneous objection having been
made at sentencing.)

The contemporaneous objection rule's second requirement is specificity. Unless ob-
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preserved. For recent cases on this aspect of the rule, see Harmon v. State, 527 So. 2d
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admission violated the Williams Rule.); Holley v. State, 523 So. 2d 688 (Fla. 1st Dist.
Ct. App. 1988) (Appellate court refused to consider defendant's argument that a labora-
tory report was inadmissible hearsay, since this was not the grounds on which counsel
objected to the document's admission at trial.)

OFFERS OF PROOF:

See Fla. Stat. §90.104(4)(b) (1987) requiring that before an appellate court may find
error in a trial court's evidentiary ruling, "[T]hen the ruling is one excluding evidence, the
substance of the evidence was made known to the court by offer of proof or was
apparent from the context within which the questions were asked.

The United States Supreme Court in construing Fed. R. Evid. 103, relating to
offers of proof, has recently indicated that the adequacy of an offer must be judged on
applying the total context in which it took place. Thus when an attorney is interrupted
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PRELIMINARY QUESTIONS:

So. 2d 779 (Fla. 3rd Dist. Ct. App. 1988) (Court summarily found that in a product
liability action plaintiff had made a preliminary showing that equipment tested by experts was the same as that which injured plaintiff.);

See also Brock v. G. D. Searle & Co., 530 So. 2d 428, 430 (Fla. 1st Dist. Ct.
1988), which merely cites Fla. Stat. § 90.105(2) (1987) during a discussion of other
issues.

PROHIBITION ON JUDICIAL COMMENT:

See Fla. Stat. § 90.106 (1987); Harmon v. State, 527 So. 2d 182, 186 (Fla. 1988) (A
trial judge's comment, after the state objected that there had been no inconsistent testi-
mony during a defense attempt to impeach a crucial state witness through prior inconsis-
tent statements, that "the statements seemed consistent with him [the judge] also,
but that it was for the jury to decide" was not grounds for reversal. The defense coun-
sel failed to immediately object to the comment. However, a comment of a contemporane-
ous objection, a conviction will not be reversed because an improper comment is
made unless the comment is so prejudicial as to amount to fundamental error.";

LIMITED ADMISSIBILITY OF EVIDENCE:

See Fla. Stat. § 90.107 (1987); Kingery v. State, 523 So. 2d 1199, 1204 (Fla. 1st
Dist. Ct. App. 1988) (Trial court erred when it allowed the state to impeach a prosecut-
orn witness with the witness's deposition testimony and denied defense counsel's re-
quest for a continuance. The evidence could only be used for impeachment and
RULE OF COMPLETENESS AS TO A DOCUMENT’S CONTENTS:

See F.A.A. Stat. § 90.108 (1987). Although no Florida cases during this survey period construed this rule, the United States Supreme Court in Beech Aircraft Corp. v. Rainey, 109 S. Ct. 439 (1988), construed F.A.A. Rule 106 which F.A.A. Stat. § 90.108 is modeled after. The Court declared Rule 106 is essentially a rule of fairness which operates almost automatically once a trial court finds one party has made such selective use of statements in a writing that the jury could be misled. According to the Court; “when one party has made use of a portion of a document, such that misunderstanding or distortion can be avoided only through presentation of another portion, the material required for completeness is ipso facto relevant and therefore admissible under [Federal Rules of Evidence] 401 and 402.” Id. at 451.

In Rainey, surviving spouses of two Naval personnel killed in an airplane crash sued Beech Aircraft claiming that loss of engine power at a crucial time caused the accident. An official Air Nave investigation concluded that pilot error was the most likely cause. After the investigation’s report was finished, one surviving spouse sent a letter disputing the report’s findings. At trial, Beech Aircraft called this spouse as an adverse witness and questioned him about statements in his letter which admitted that pilot error could have been the cause. On cross-examination, plaintiff’s counsel was prevented by a successful defense objection from introducing other parts of the same letter asserting engine reliability. The Court found this reversible error, since these parts were necessary to prevent the jury from being misled about what the witness spouse actually thought was the crash’s cause. As the Court noted, based on the direct adverse examination, “[i]t is possible that a jury would have excluded this information from the document that the spouse did not believe in his theory of power failure and had developed it only later for purposes of litigation.” Rainey, 109 S. Ct. 450 (1988).

JUDICIAL NOTICE:

See F.A.A. Stat. §§ 90.201–207 (1987); England v. England, 520 So. 2d 699 (Fla. 4th Dist. Ct. App. 1987). In an appeal court, reversing a general master’s denial of a request for an increase of a permanent periodic alimony award, took judicial notice that an initial monthly award’s value had substantially decreased after fifteen years (that is, Put American Stone Co. v. Moeller, 527 So. 2d 275, 276 (Fla. 4th Dist. Ct. App. 1988) (Trial court erroneously noticed evidence in another case the same defendant was involved in, when the court did not bring into evidence the record of the second case. “Absent those judicially noticed records or documents, [adequate appellate review is impossible.”); Young v. State, 519 So. 2d 719 (Fla. 5th Dist. Ct. App. 1988) (Trial court in probate revocation hearing was entitled under F.A.A. Stat. § 90.202(a) to judicial notice of a court’s records to judicially notice defendant’s probation status.).

CIVIL PRESUMPTIONS:

See F.A.A. Stat. § 90.305–306 (1987); Fillings v. Boone, 835 F.2d 1289 (11th Cir. 1988) (County Adult Entertainment Ordinance declared constitutional despite challenge on multiple grounds. Ordinance language creating presumption anyone or anyone receiving an occupational license is a commercial establishment was not unconstitutional.

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not substantially. Fla. Stat. § 90.107 (1987) makes this instruction mandatory upon request. Failure to give such here was reversible error, since without the instruction the court "permitted the state to use what could fairly be termed affirmatively prejudicial testimony as substantive evidence in closing argument.").

RULE OF COMPLETENESS AS TO A DOCUMENT'S CONTENTS:
See Fla. Stat. § 90.108 (1987). Although no Florida cases during this period construed this rule, the United States Supreme Court in Beech Aircraft Corp. v. Rainey, 105 S. Ct. 439 (1988), construed Fed. R. Evid. 106 which Fla. Stat. § 90.108 is modeled after. The Court declared Rule 106 is essentially a rule of fairness which operates almost automatically once a trial court finds one party has made such selective use of statements in a writing that the jury could be misled. According to the Court; "when one party has made use of a portion of a document, such that missing information or distortion can be averted only through presentation of another portion, the material required for completeness is ipso facto relevant and therefore admissible under [Federal Rules of Evidence] 402 and 407." Id. at 451.

In Rainey, surviving spouses of two Naval personnel killed in an airplane crash sued Beech Aircraft claiming that loss of engine power at a crucial time caused the accident. An official Naval investigation into the crash concluded that failure to load the correct fuel was the most likely cause. After the investigation's report was finished, one surviving spouse sent a letter disputing the report's findings. At trial, Beech Aircraft called this spouse as an adverse witness and questioned him about statements in his letter which admitted that plane engine failure could have been the cause. On cross-examination, plaintiff's counsel was prevented by a successful defense objection from introducing other parts of the letter asserting engine rollback as the most likely cause. The Court found this reversible error, since these parts were necessary to prevent the jury from being misled about what the witness spouse actually thought was the crash's cause. As the Court noted, based on the direct adverse examination, "[i]t is possible that a jury would have concluded from this information that [the spouse] did not believe in his theory of power failure and had developed it only for purposes of litigation." Rainey, 105 S. Ct. at 450-51.

JUDICIAL NOTICE:
See Fla. Stat. §§ 90.201-207 (1987). England v. England, 530 So. 2d 699 (Fla. 4th Dist. Ct. App. 1988) (Appellate court, reversing a general master's denial of a request for an increase of a permanent periodic alimony award, took judicial notice that at initial monthly award's value had substantially decreased after fifteen years time). Pat American Stone Co. v. Meister, 527 So. 2d 275, 276 (Fla. 4th Dist. Ct. App. 1988) (Trial court erroneously notice evidence in another case the same defendant was involved in, when the court did not bring into evidence the record of the second case. "Absent those judicially noticed records or documents, [adjudge appellate review is impossible."). Young v. State, 519 So. 2d 719 (Fla. 5th Dist. Ct. App. 1988) (Trial court on probation revocation hearing was entitled under Fla. Stat. § 90.303(2) allowing judicial notice of a court's records to judicially notice defendant's probationary status.

CIVIL PRESCRIPTIONS:
See Fla. Stat. §§ 90.301-304 (1987); Fillingim v. Boone, 835 F 2d 1389 (11th Cir. 1988) (County Adult Entertainment Ordinance declared constitutional despite challenge on multiple grounds. Ordinance language created presumption that certain premises where nude dancing occurs knows of it and presumption that an establishment receiving an occupational license is a commercial establishment was not unconstitutional.

tional. Florida Evidence Code sections on presumptions relate only to civil presumptions. These sections were thus inapplicable to the present challenge which claimed the ordinance created a due process violation in a criminal case.); In re Marriage of Wilson, 27 Fla. Supp. 2d 108 (Fla. Cir. Ct. 1988) (Since an antenuptial agreement was no one-sided in the husband's favor, the court found the husband had the burden of persuasion under Fla. Stat. § 90.302(2) (1987) to show he had not concealed assets from the wife before the agreement's execution. However, the court found this burden satisfied.); In re Adoption of P.M. and J.M., 28 Fla. Supp. 2d 32 (Fla. Cir. Ct. 1998) (Trial court denied petitioner's motion to set aside an adoption on grounds of undue influence. Due to adopting parties fiduciary relationship with petitioner, the court found there could be a presumption of undue influence which is one affecting public policy. This Fla. Stat. §§ 90.303, 90.304 (1987) make this a presumption affecting the burden of proof under Fla. Stat. § 90.302(2) (1987). However, the adopting parties carried the burden of proof that there was no overhearing, since the petitioner was the one who initiated the action of having her children adopted.); GENERAL RELIABILITY CONCERN:
See Fla. Stat. §§ 90.401-403 (1987). General reliability questions can be subdivided into two major issues. The first issue is concerned with whether certain information is relevant at all. Florida Statutes, section 90.401 defines relevant evidence as "evidence tending to prove or disprove a material fact." Unless a piece of information is being offered as bearing on a witness's credibility, the underlying claim and defenses set the boundaries of materiality. After this, whether a piece of information tends to prove or disprove a material fact is a function of how strong or weak the logical connection is between the information and the matter it is offered on. For a recent short article discussing these aspects of general relevancy, as expressed in the Federal Rules of Evidence, see Schmitt, Reliability Under Rule 407-A Dual Concept, 14 Litigation 12 (Spring 1988).

The second general relevancy issue only exists after an item has been determined relevant under Fla. Stat. § 90.401 (1987). Logically relevant information can still be excluded for a variety of reasons, some of which are specifically mentioned in the Florida Evidence Code. However the code could not specifically mention every conceivable reason for excluding logically relevant information could be specifically mentioned in the Code. Florida Statutes, section 90.403 helps compensate for this. Section 90.403 envisions a weighing process which balances the code's "probative worth against various matters which may distract the fact finder from proper consideration of the evidence. This section requires exclusion only when information is "substantively outweighed", Fla. Stat. § 90.403 (1987), by its distracting qualities.

As past surveys have noted, cases discussing general relevancy are so "fact specific" that they have little precedential value. This situation continued to exist during the recent survey period.

For recent cases discussing logically relevant, see Jackson v. State, 322 So. 2d 802 (Fla. 1975) (Testimony that murder defendant possessed various weapons and bulletproof vest of irrelevant; however, its admission was harmless.); Holley v. State, 532 So. 2d 688, 690 (Detective's testimony in sexual assault case that many victims "give inconsistent accounts of the crime" was irrelevant but harmless in light of overwhelming scientific evidence showing the defendant was guilty.); State v. Porrey, 13 Fla. L. Weekly 2121 (Fla. 2d Dist. Ct. App. 1988) (Co-defendant's previous acquittal for involvement in the same robbery defendant was being tried for was not admissible.); DeSanctis v. Acedera, 528 So. 2d 461 (Fla. 3d Dist. Ct. App. 1988) (Spec.
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cific instances of alleged job misconduct were too collateral to bear on witnesses’ cedities.); Gardner v. State, 530 So. 2d 404 (Fla. 3d Dist. Ct. App. 1988) (Trial court erred in excluding testimony of Gardner’s first defense counsel who had interviewed robbery victim and who had the victim examine several photographs, none of which were Gardner’s, to see if the victim recognized one of them as the robber. The victim’s testimony about the victim’s photographic misidentification was relevant to his ability to correctly identify who robbed her.)

For several recent cases discussing general considerations why logically relevant might still be excluded, see State v. McLain, 525 So. 2d 420, 422 (Fla. 1988) (evidence in a vehicular manslaughter case that the intoxicated driver’s blood test showed a small trace of cocaine, and the state chemist could not say “whether it would have had any effect at all on the accused’s driving” was properly excluded. A jury might have been improperly prejudiced against the defendant by merely knowing he had taken even this small trace of cocaine); Herber v. State, 525 So. 2d 709, 713 (Fla. 4th Dist. Ct. App. 1988) (in charge of aggravated child abuse stemming from a beating occurring in one month, state should not have been allowed to introduce evidence that the defendant also beat the child several months earlier. “[T]he prejudicial effect of the evidence of the prior incident...clearly outweighed any probative is offered,” since the only use was whether the later beating was abusive); School Board v. Coffey, 524 So. 2d 1052 (Fla. 5th Dist. Ct. App. 1988) (Trial court in negligent retention and supervision case stemming from teacher’s sexual abuse of a student did not err in excluding evidence that the victim had an incestuous relationship with his brothers, when this was offered to show the source of the victim’s psychological injuries.).

Routine Practice:

See FLA. STAT. § 90.406 (1987); Progressive American Ins. Co. v. Kurtz, 518 So. 2d 1339, 1341 (Fla. 5th Dist. Ct. App. 1987) (Evidence that an insurance company had the standard practice of mailing a coverage option form in every envelope containing a premium renewal notice was sufficient to create a presumption the insured received this information even without evidence the practice was actually followed in a particular instance.

Subsequent Remedial Measures:

See FLA. STAT. § 90.407 (1987); Jordon v. School Board, 531 So. 2d 976 (Fla. 4th Dist. Ct. App. 1988) (Order granting a new trial in a personal injury action affirmed where appellate during trial had violated the trial court’s ruling on a motion in limine excluding evidence of school board’s subsequent remedial measures.).

Offers To Compromise:

See FLA. STAT. § 90.408 (1987); Equitable Life Assurance Society v. Digital Products Corp., 528 So. 2d 1375 (Fla. 4th Dist. Ct. App. 1988) (Summarily concluding that a trial court in an unjust enrichment action over defendant’s alleged retention of an automatic telephone dieter properly excluded a letter from one of defendant’s employees offering to return the device if Digital would pay for the return and would give the employee a written release from all liability.).

Offers To Plead Guilty:

See FLA. STAT. § 90.410 (1987); Ferrante v. State, 524 So. 2d 742, 744 (Fla. 4th Dist. Ct. App. 1988) (Conviction reversed and remanded for trial court’s determination whether jurors during their deliberations had improperly considered a newspaper article reporting unsuccessful plea discussions, since FLA. STAT. § 90.410 (1987) made this “information not available to the jury through the testimony at trial.”;}

ATTORNEY-CLIENT PRIVILEGE:

See FLA. STAT. §§ 90.502, 90.503 (1987); Tarver v. State, 530 So. 2d 245 (Fla. 1987) (Defendant claiming his convictions should be reversed because his absence from crucial trial stages was caused by his counsel’s failure to advise him of his right to participate waived any protection of the attorney-client privilege. Such a failure charged a breach of duty owed to the client. Florida Statutes, section 90.502(4)(c) (1987) specifies that “[t]here is no lawyer-client privilege...when...[a] communication is relevant to an issue of breach of duty by the lawyer to his client...arising from the lawyer-client relationship.”); Watkins v. State, 516 So. 2d 1043, 1046 (Fla. 1st Dist. Ct. App. 1987) (There was no error committed in a failure to appear for trial case by allowing defendant’s former attorney to testify that the attorney had informed defendant of the trial dates. The court held “that an attorney’s communication to his client of the trial date is not a communication ‘not intended to be disclosed to third persons’...” FLA. STAT. § 90.502(1), and thus that it is not confidential); Tall of the Pup, Inc. v. Webb, 528 So. 2d 506 (Fla. 2d Dist. Ct. App. 1988) (Minority shareholder suing a corporation for attempted wrongful removal as an officer and director was not entitled to correspondence between the corporation and its counsel since this was privileged. Only a corporation’s management, and not a single shareholder, can waive the privilege’s protection.); State Farm Mutual Automobile Ins. Co. v. Kelly, 533 So. 2d 787 (Fla. 4th Dist. Ct. App. 1988) (Attorney-client privilege protects an insurance company’s legal department file on a particular case when the company’s “is not in a fiduciary relationship to its insured.”) Id. at 788 (quoting Manhattan National Life Ins. Co. v. Kajawa, 522 So. 2d 1078, 1080 (Fla. 4th Dist. Ct. App. 1988)).

Psychotherapist-Patient Privilege:

See FLA. STAT. § 90.503 (1987); Burton v. Becker, 516 So. 2d 283, 284 (Fla. 2nd Dist. Ct. App. 1988) (Section 90.503 privilege makes confidential communications and records of a patient “made for the purpose of diagnosis or treatment of [the patient’s] mental or emotional condition, including alcoholism and other drug addiction.”... FLA. STAT. § 90.503(2) (1987). However section 90.503’s confidentiality protection is subject to FLA. STAT. § 397.053 (1987), Records of Drug Abusers, which allows disclosure of such records “without consent upon court order...after application showing good cause therefor.” FLA. STAT. § 397.053(2) (1987). The court found good cause when the records were “relevant to respondents’ cause of action.” Burton, 516 So. 2d at 284, and not cumulative.); L.T. v. Dept. of Health & Rehab. Serv., 532 So. 2d 1085 (Fla. 3d Dist. Ct. App. 1988) (Psychotherapist-patient privilege in section 90.503 was inapplicable to child abuse or neglect cases because of FLA. STAT. § 415.512 (1987). Abridgment of Privileged Communications Involving Child Abuse or Neglect. This parents’ psychiatric histories could be discovered in a disciplinary proceeding).
cific instances of alleged job misconduct were too collateral to bear on witnesses' credibility.

Gardner v. State, 530 So. 2d 404 (Fla. 3d Dist. Ct. App. 1988) (Trial court erred in excluding testimony of Gardner's defense counsel who had interviewed robbery victim and who had the victim examine several photographs, none of which were Gardner's, to see if the victim recognized one of them as the robber. The witness's testimony about the victim's photographic misidentification was relevant to her ability to correctly identify who robbed her.)

For several recent cases discussing general considerations why logically relevant might still be excluded, see State v. McClain, 525 So. 2d 420, 422 (Fla. 1988) (Evidence in a vehicular manslaughter case that the intoxicated driver's blood test showed a small trace of cocaine in his system and the state chemist could not tell "whether it would cause any effect at all upon McClain's driving" was properly excluded. A jury might have been improperly prejudiced against the defendant by merely knowing he had taken even this small trace; Herbert v. State, 526 So. 2d 709, 713 (Fla. 4th Dist. Ct. App. 1988) (In charge of aggravated child abuse stemming from a beating occurring in one month, state should not have been allowed to introduce evidence that the defendant also beat the child several months earlier: "The purpose of the evidence of the prior incident... clearly outweighed any probative it offered," since the only issue was whether the latter beating was abusive; School Board v. Coffey, 524 So. 2d 1052 (Fla. 5th Dist. Ct. App. 1988) (Trial court in negligent retention and supervision case stemming from teacher's sexual abuse of a student did not err in excluding information that the victim had an incestuous relationship with his brothers, when this was offered to show the source of the victim's psychological injuries.).

ROBTIUE PRACTICE:

See Fla. Stat. § 90.406 (1987); Progressive American Ins. Co. v. Kurtz, 518 So. 2d 1339, 1341 (Fla. 5th Dist. Ct. App. 1987) (Evidence that an insurance company had the standard practice of mailing a coverage option form in every envelope containing a premium renewal notice was sufficient to create a presumption the insured received this information even without evidence the practice was actually followed in a particular instance.).

SUBSEQUENT REMEDIAL MEASURES:


OFFERS TO COMPROMISE:

See Fla. Stat. § 90.408 (1987); Equitable Life Assurance Society v. Digital Products Corp., 528 So. 2d 1375 (Fla. 4th Dist. Ct. App. 1988) (Summary concluding that a trial court in an unjust enrichment action over defendant's attempt to have a automatic telephone dialer properly excluded a letter from one of defendant's employees offering to return the device if Digital paid the return and would give the employer a written release from all liability.).

OFFERS TO PLEAD GUILTY:

See Fla. Stat. § 90.410 (1987); Ferrante v. State, 524 So. 2d 742, 744 (Fla. 4th Dist. Ct. App. 1988) (Conviction reversed, any offer could prevail whether jurors during their deliberations had improperly considered a newspaper article reporting unsuccessful plea discussions, since Fla. Stat. § 90.410 (1987) made this "information not available to the jury through the testimony at trial.")

ATTORNEY-CLIENT PRIVILEGE:

See Fla. Stat. § 90.902 (1987); Turner v. State, 530 So. 2d 49 (Fla. 1987) (Defendant claiming his convictions should be reversed because his absence from crucial trial stage was caused by his counsel's failure to advise him of his right to participate waived any protection of the attorney-client privilege. Such a failure charged a breach of duty owed to the client. Florida Statutes, section 90.502(4)(c) (1987) specifies that "[t]here is no lawyer-client privilege... when... the communication is relevant to an issue of breach of duty by the lawyer to his client... arising from the lawyer-client relationship."); Watkins v. State, 516 So. 2d 1043, 1046 (Fla. 1st Dist. Ct. App. 1987) (There was no error committed in a failure to appear for trial case by allowing defendant's former attorney to testify that the attorney had informed defendant of the trial dates. The court held that "an attorney's communication to his client of the trial date is not a communication "not intended to be disclosed to third persons." -- Fla. Stat. § 90.902(1), and that it is not confidential."); Tail of the Pup, Inc. v. Webb, 528 So. 2d 596 (Fla. 2d Dist. Ct. App. 1988) (Minority shareholder suing a corporation for attempted wrongful removal as an officer and director was not entitled to correspondence between the corporation and its counsel since this was privileged. Only a corporation's management, and not a single shareholder, can waive the privilege's protection); State Farm Mutual Automobile Ins. Co. v. Kelly, 533 So. 2d 787 (Fla. 4th Dist. Ct. App. 1988) (Attorney-client privilege protects an insurance company's legal department file on a particular case when the company "is not in a fiduciary relationship to its insured.") Id. at 788 (quoting Manhattan National Life Ins. Co. v. Kujawa, 522 So. 2d 1076, 1080 (Fla. 4th Dist. Ct. App. 1988)).

PSYCHOTHERAPIST-PATIENT PRIVILEGE:

See Fla. Stat. § 90.503 (1987); Burton v. Becker, 516 So. 2d 283, 284 (Fla. 2d Dist. Ct. App. 1987) (Section 90.503 privilege makes confidential communications and records of a patient "made for purposes of diagnosis or treatment of [the patient's] mental or emotional condition, including alcoholism and other drug addiction.")

See Fla. Stat. § 90.503(2) (1987). However section 90.503's confidentiality protection is subject to Fla. Stat. § 379.053 (1987), Records of Drug Abusers, which allows disclosure of such records "without consent upon court order... after application showing good cause therefor.") Fla. Stat. § 379.053(2) (1987). The court found good cause when the records were "relevant to respondents' cause of action." Burton, 516 So. 2d at 284, and not cumulative.); T.T. v. Dept. of Children & Rehab., 512 So. 2d 1085 (Fla. 3d Dist. Ct. App. 1988) (Psychotherapist-patient privilege in section 90.503 was inapplicable to child abuse or neglect cases because of Fla. Stat. § 415.512 (1987), Aberration of Privileged Communications (Involving Child Abuse or Neglect. Thus parents' psychiatric histories could be discovered in a dependency proceeding).
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App. 1988) (The court found that a doctor could not invoke the privilege against self-incrimination to refuse to subpoena records. The keeping of the records was statutorily required, thus the privilege does not apply to them.) Madel v. State, 528 So. 2d 1384 (Fla. 4th Dist. Ct. App. 1988) (Conviction per curiam affirmed.

Judge Glickstein concurring specially noted that the trial court did not err in refusing to allow the defense to call a witness whom the defense knew would invoke the fifth amendment to questions about a hit and run accident the defendant was charged with.) re: Forfeiture of $13,000.00 U.S. Currency, 522 So. 2d 408 (Fla. 5th Dist. Ct. App. 1988) (Civil defendant's invocation of privilege against self-incrimination cannot be defeated by a default in the opponent's favor.)

The past two surveys have noted the approach of recent Florida cases have taken to issues involving the privilege against self-incrimination and subpoenaed documentary evidence. See Dobson, Evidence: 1986 Survey of Florida Law, 11 Nova L. Rev. 1291, 1324-36 (1987) and Dobson & Friedland, Evidence: 1987 Survey of Florida Law, 12 Nova L. Rev. 443, 510-13 (1988). The Florida Supreme Court in State v. Wellington Precious Metals, Inc., 510 So. 2d 902 (1987), recently upheld the issue of an investigative subpoena addressed to a solely owned corporation, as opposed to the sole shareholder and corporate custodian. The shareholder challenged the subpoena claiming that production of the records would personally incriminate him. However, the Florida Supreme Court distinguished this situation from a previous United States Supreme Court Case, United States v. Doe, 465 U.S. 605 (1984), which found that compelled production of a sole proprietorship's records "compels the holder of the documents to perform an act that may have testimonial aspects and an incriminating effect." Id. at 612. Wellington noted that Florida law treats sole proprietorships differently from corporations. The sole shareholder by incorporating had waived his own personal privilege against self-incrimination by assuming corporate office and responsibilities. The court held that "the subpoena does not place the burdens on the corporation and its officers to timely produce and authenticate the corporate records, and . . . [the sole shareholder], as an individual, had no standing to challenge the subpoena." Wellington Precious Metals, Inc., 510 So. 2d at 903. Last term, the United States Supreme Court in Bravwell v. United States, 108 S. Ct. 2284 (1988), decided that a corporate custodian who was also the corporation's sole shareholder could not invoke the fifth amendment to avoid producing corporate records that may be personally incriminating. Braavwell's reasoning is extremely analogous to that in Wellington. The Court noted that Doe protected sole proprietors from acts of compelled production that would be personally incriminating. However, sole shareholders were different. "But [Braavwell] has operated his business through the corporate form, and we have long recognized that for purposes of the Fifth Amendment, corporations and other collective entities are treated differently than individuals." Id. at 2288. Since a custodian's act of production is attributable only to the corporate entity, to allow Braavwell to successfully assert the privilege against self-incrimination would have been to confine that protection on the corporation itself. Thus his privilege claim failed.

For a recent article criticizing the Braavwell decision, see Cominsky & Bailie, Standing the Fifth Amendment on its Head — Supreme Court in Braavwell Creates Fifth Amendment Exception for Corporate Entities, 62 Fla. B.J. 53 (Dec. 1988).

INFORMER PRIVILEGE

FLA. STAT. § 90.501 (1987) recognizes that privileges other than those enumerated in the Florida Evidence Code can exist. One non-statutory privilege long accepted in Florida concerns the identity of confidential informers in criminal cases. Like most privileges, this one is not absolute. Florida Rule of Criminal Procedure Rule 3.220(c)(2) specifically provides for disclosure if an informant will testify or if disclosure is needed for the defendant to have a fair trial. However, the defense must make a preliminary showing disclosing is needed. Since protecting an informer's identity is often essential to future state evidence gathering, this showing is a strict one as recently demonstrated in Garcia v. State, 521 So. 2d 191 (Fla. 1st Dist. Ct. App. 1988). There the state obtained a residential search warrant based on information from an informer about drug sales. The informer was not present when the warrant was executed, and the charges pertained to a drug transaction occurring on a different date than the informer's tip. The defense claimed this would rely on an entrapment defense but failed to specify exactly how the informer's testimony was essential to this. The First District Court of Appeal found that a general defense allegation was not sufficient to require disclosure. Furthermore, since the state did not mention the informer in its case and proved the charges through other witnesses, there had been no deprivation of a fair trial. Garcia should serve as a reminder of how strict a showing Florida courts will require before allowing the confidential informant privilege to be breached in the name of justice.

Even after an informer's identity has been disclosed, there may still be reason to keep other information about the informer confidential, especially the informer's address. Thus in State v. Martin, 522 So. 2d 872 (Fla. 3rd Dist. Ct. App. 1988), the district court acknowledged that even after the state had mentioned the informer's name in the information, the state's failure to produce the informer for a deposition did not merit an automatic dismissal. One charge was witness tampering stemming from the defendant's assault on the informer; thus serious questions about the informer's safety, if produced for deposition, needed to be explored before determining if dismissal was appropriate.

For another recent case dealing with procedural matters concerning this privilege, see Burns v. State, 523 So. 2d 604, 606 (Fla. 4th Dist. Ct. App. 1988) (Defendant's plea of solo concensore mooted any questions about disclosure of an informer's identity).

JOURNALIST PRIVILEGE:

Although Florida statutory law does not contain a specific reporter or journalist privilege, Florida case law recognizes such a privilege. However Waterman Broadcasting v. Reese, 523 So. 2d 1161, 1162 (Fla. 2nd Dist. Ct. App. 1988) recently reaffirmed that the privilege is only a qualified one and can be overcome "in those situations in which the demands of justice compel a need for such disclosure." The state subpoenaed a television reporter after her broadcast interview in which the interviewee claimed to have killed his wife with a lethal drug dosage. Waterman found that the state had made the three-part showing of (1) relevancy of the evidence, (2) failure to secure the information by alternative means, and (3) compelling need for the information. See Gable Land Company v. Horne, 426 So. 2d 1234 (Fla. 1st Dist. Ct. App. 1983). The information was both relevant and otherwise unobtainable, since this was the interviewee's only admission concerning the act. Finally, there was a compelling need, since the state was attempting to determine the truth must investigate all potential sources of information in a criminal case.

Although this author agrees with Waterman's conclusion on the text's first two parts, the Second District Court of Appeal's brief discussion on part three is troubling. Since there is always a need to find the truth in any litigation, part three would always be satisfied under the Waterman approach. The Second District Court of Appeal's
App. 1988) (The court found that a doctor could not invoke the privilege against self-incrimination to refuse producing subpoenaed patient records. The keeping of the records was statutorily required, thus the privilege does not apply to them.); Maal v. State, 328 So. 2d 1384 (Fla. 4th Dist. Ct. App. 1980) (Conviction per curiam affirmed; Judge Glickstein concurring specially noted that the trial court did not err in refusing to allow the defense to call a witness whom the defense knew would invoke the fifth amendment to questions about a hit and run accident the defendant was charged with.); In re Forfeiture of $13,000.00 U.S. Currency, 522 So. 2d 408 (Fla. 5th Dist. Ct. App. 1988) (Civil defendant's invocation of privilege against self-incrimination cannot be punished by a default in the opponent's favor.).

The past seven years surveys of recent Florida cases have taken into issues involving the privilege against self-incrimination and subpoenaed documentary evidence. See Dobson, Evidence: 1986 Survey of Florida Law, 11 NOVA L. REV. 129; 1334-36 (1987) and Dobson, Evidence: 1987 Survey of Florida Law, 12 NOVA L. REV. 463, 510-13 (1988). The Florida Supreme Court in State v. Wellington Precious Metals, Inc., 510 So. 2d 902 (1987), recently upheld the issue of an investigative subpoena addressed to a solely owned corporation, as opposed to the sole shareholder and/or corporate custodian. The shareholder challenged the subpoena claiming that production of the records would personally incriminate him. However, the Florida Supreme Court distinguished this situation from a previous United States Supreme Court Case, United States v. Dor, 465 U.S. 605 (1984), which found that compelled production of a sole proprietorship's records "compels the holder of the documents to perform an act that may have testimonial aspects and an incriminating effect." Id. at 612. Wellington noted that Florida law treats sole proprietorships differently from corporations. The sole shareholder by incorporating had waived his own personal privilege against self-incrimination by assuming corporate office and responsibilities. The court held that "the subpoena duces tecum placed the burden on the corporation and its officers to timely produce and authenticate the corporate records, and . . . (the sole shareholder), as an individual, has no standing to challenge the subpoena." Wellington Precious Metals, Inc., 510 So. 2d at 905. Last term, the United States Supreme Court in Braswell v. United States, 108 S. Ct. 2284 (1988), decided that a corporate custodian was also the corporation's sole shareholder could not invoke the fifth amendments to avoid producing corporate records that may be personally incriminating. Braswell's reasoning is correct, and we have long recognized that for purposes of the Fifth Amendment, corporations and other collective entities are treated differently than individual."

For a recent article analyzing the Braswell decision, see Comisky & Bailey, Standing the Fifth Amendment on Its Head — Supreme Court in Braswell Creates Fifth Amendment Exception for Corporate Entities, 62 FLA. B. J. 53 (Dec. 1988).

INFORMER PRIVILEGE: FLA. STAT. § 90.501 (1987) recognizes that privileges other than those enumerated in the Florida Evidence Code exist. One non-statutory privilege long accepted in Florida concerns the identity of confidential informers in criminal cases. Like most privileges, this one is not absolute. Florida Rule of Criminal Procedure Rule 3.220(c)(2) specifically provides for disclosure if an informant will testify or if disclosure is needed for the defendant to have a fair trial. However, the defense must make a preliminary showing disclosure is needed. Since protecting an informant's identity is often essential to future state evidence gathering, this showing is a strict one as recently demonstrated in Garcia v. State, 521 So. 2d 191 (Fla. 1st Dist. Ct. App. 1988). There the state obtained a residential search warrant based on information from an informant about drug sales. The informant was not present when the warrant was executed, and the charges pertained to a drug transaction occurring on a different date than the informant's tip. The defense claim it would rely on an entrapment defense but failed to specify exactly how the informant's testimony was essential to this. The First District Court of Appeal found that a general defense allegation was not sufficient to require disclosure. Furthermore, since the state did not mention the informant in its case and presented the charges through other witnesses, there, there had been no deprivation of a fair trial. Garcia should serve as a reminder of how strict a showing Florida courts will require before allowing the confidential informant privilege to be breached in the name of necessity.

Even after an informant's identity has been disclosed, there may still be reason to keep other information about the informant confidential, especially the informant's address. Thus in State v. Martin, 522 So. 2d 872 (Fla. 3d Dist. Ct. App. 1988), the district court acknowledged that even after the state had mentioned the informant's name in the information, the state's failure to produce the informant for a deposition did not merit an automatic dismissal. One charge was witness tampering stemming from the defendant's assault on the informant; thus serious questions about the informant's safety, if produced for deposition, needed to be explored before determining if dismissal was appropriate.

For another recent case dealing with procedural matters concerning this privilege, see Burns v. State, 523 So. 2d 604, 606 (Fla. 4th Dist. Ct. App. 1988) (Defendant's plea of no contest controverts most any questions about disclosure of an informant's identity.).

INFORMANT PRIVILEGE: Although Florida statute law does not contain a specific reporter or journalist privilege, Florida case law recognizes such. However Waterman Broadcasting v. Reese, 523 So. 2d 1161, 1162 (Fla. 2d Dist. Ct. App. 1988) recently reaffirmed that the privilege is protected to protect the confidentiality of information. The Court noted that the privilege is only a qualified one and can be overcome "in those situations where the demands of justice compel a need for such disclosure." There the state subpoenaed a television newscaster for his notes in which the interviewee claimed to have killed his wife by a lethal drug dosage. Waterman found that the state had made the three-part showing of (1) relevancy of the information, (2) failure to secure the information by alternative means, and (3) compelling need for the information. See Gadsden County Times, Inc. v. Horne, 426 So. 2d 1234 (Fla. 1st Dist. Ct. App. 1983). The information was both relevant and otherwise unobtainable, since this was the interviewee's only admission concerning the act. Finally, there was a compelling need, since the state in attempting to determine the truth must investigate all potential sources of information in a criminal case.

Although this author agrees with Waterman's conclusion on the tense's first two parts, the Second District Court of Appeal's brief discussion on part three is troubling. Since there is always a need to find the truth in any litigation, part three would always
opinion apparently forgets that privileges exist to protect and to encourage confidential communications within certain relationships despite the collateral consequences that recognition of a privilege may sometimes be counter-productive to discovering the truth. What Waterman actually discloses is a potentially anti-privilege attitude in general by the Second District Court of Appeal.

For other recent cases applying the Garden County Times test see Miami Herald Publishing Co. v. Morejon, 529 So. 2d 1204, 1205 (Fla. 3d Dist. Ct. App. 1988) (Court found that a journalist witnessing an event in a criminal case no has no “qualified privilege to refuse to testify about what the journalist saw and heard” and must therefore testify concerning his or her knowledge of such an event after being duly served with a witness subpoena in the case.”); Carroll Contracting, Inc. v. Edwards, 529 So. 2d 1291 (Fla. 5th Dist. Ct. App. 1988) (Civil defendant allowed to subpoena unpublished photographs of an accident scene which had since changed and which had not been otherwise photographed at the time of the accident.

For one recent view of the privilege presented by a lawyer-journalist, see Bainbridge, Subpoenaing the Press, 74 A.B.A. J. 68 (November 1988).

PUBLIC RECORDS:
See Fla. Stat. § 19.01-14 (1987), Public Records; Florida Freedom Newspapers, Inc. v. McTay, 520 So. 2d 32 (Fla. 1988) (the court found that “[C]riminal investigative information” as defined in Fla. Stat. § 119.011(3)(b) (1987) becomes a public record subject to disclosure once it is given to the accused in discovery. However, any disclosure may be temporarily delayed pursuant to a court order after a finding that there is cause to believe that immediate disclosure would deprive the accused of a fair trial.

Coleman v. Austin, 521 So. 2d 247, 248 (Fla. 1st Dist. Ct. App. 1988) (Public records subject to copying include “inter-office and inter-office memorandums which formalize knowledge and communicate information between public employees,” even when contained in a state attorney’s case file. However, the court found this standard does not encompass preliminary drafts of documents or an attorney’s personal notes.

Downs v. Austin, 522 So. 2d 931 (Fla. 1st Dist. Ct. App. 1988) (Polygraph test results taken in a complete investigative work not a conclusively exceptive (exemption) from disclosure under the Public Records Act; even if such test results were initially exempt, a state attorney’s reference to them in a Clumsy Board hearing waived the exemption.

J. Sparling v. Scheinert, 531 So. 2d 988 (Fla. 2d Dist. Ct. App. 1988) (Court found that accident reports are public records subject to public inspection and copying under Chapter 119, Florida Statutes. However, any portions of accident reports which are privileged under the Accident Report Privilege, Fla. Stat. § 316.066(4) (1987), are made exempt from disclosure by Fla. Stat. § 119.07(3A) (1987)); Jordan v. School Bd., 531 So. 2d 976, 977 (Fla. 4th Dist. Ct. App. 1988) (Court found that a public record normally subject to inspection may become privileged when there is present litigation, even though there is present litigation when the record contains information “prepared at the attorney’s expense, direction, which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney’s making of the statement or the theory or the effect of the statement.”)

Fla. Stat. § 27.514 (1987) (Court held that a witness was not qualified to testify before the court on a pre-trial statement because he was not a party to the action and because he was a non-party witness).

DEAD MAN’S ACT protection against admission of uncorroborated conversations between
opinion apparently forgets that privileges exist to protect and to encourage confidential communications within certain relationships despite the collateral consequence that recognition of a privilege may sometimes be counter-productive to discovering the truth. What Waterman actually discloses is a potentially anti-privilege attitude in general by the Second District Court of Appeal.

For other recent cases applying the Gaither County Times test see Miami Herald Publishing Co. v. Morgan, 529 So. 2d 1204, 1205 (Fla. 3d Dist. Ct. App. 1988) (Court found that a journalist witnessing an event in a criminal case has no "qualified privilege [to refuse to testify about what the journalist saw and heard]" and must therefore testify concerning his knowledge of such an event having been engaged to serve as a witness subpoena in the case."); Carroll Contracting, Inc. v. Edwards, 528 So. 2d 95 (Fla. 5th Dist. Ct. App. 1988) (Civil defendant allowed to serve subpoenas printed on the typographical of an ancient scene which had since changed and which had not been otherwise photographed at the time of the accident.)

For one recent view of the journalist privilege presented by a lawyer-journalist, see Bainbridge, Subpoenaing the Press, 74 A.B.A.J. 68 (November 1988).

PUBLIC RECORDS:
See Fla. Stat. §§ 119.01-14 (1987); Public Records; Florida Freedom Newspapers, Inc. v. Mc Carty, 520 So. 2d 32 (Fla. 1988) (The court found that "[C]riminal investigative information as defined in art. § 119.011(3)(b) (1987) becomes a public record subject to disclosure only if it is given to the accused in discovery. However, any disclosure may be temporarily delayed pursuant to a court order after a finding that there is cause to believe that immediate disclosure would deprive an accused of a fair trial."); Coleman v. Austin, 521 So. 2d 247, 248 (Fla. 1st Dist. Ct. App. 1988) (Public records subject to copying include "inter-office and intra-office memoranda which formative knowledge and communicate information between public employees," even when contained in a state attorney's case file. However, the court found this standard does not encompass preliminary drafts of documents or an attorney's personal notes."); Dowes v. Austin, 522 So. 2d 931 (Fla. 1st Dist. Ct. App. 1988) (Polygraph test results taken in a concealed investigation were not statutorily exempt from disclosure under the Public Records Act; even if such test results were initially exempt, a state attorney's referral to them in a Clemency Board hearing waived the exemption."); Sauer v. Scheiner, 531 So. 2d 988 (Fla. 3d Dist. Ct. App. 1988) (Court found that "accident reports are public records subject to public inspection and copying" under Chapter 119, Florida Statutes. However, any portions of accident reports which are privileged under the Accident Report Privilege, Fla. Stat. § 316.644(3) (1983), are made exempt from discovery by Fla. Stat. § 119.07(3)(a) (1987.); Jordan v. School Bd., 531 So. 2d 976, 977 (Fla. 4th Dist. Ct. App. 1988) (Court found that a public record normally subject to inspection may be exempt from disclosure when there is present litigation and when the record contains information "prepared at the attorney's direct expense, which reflects a matter of litigation, impression, conclusion, litigation strategy, or legal theory of the attorney or the agency." (citing Fla. Stat. § 119.07(3)(e) (1987)). However unless the parties seeking to keep information privileged requests, "the trial court is not required to initiate an in-camera hearing sua sponte", Jordan, 531 So. 2d at 977, on this issue.

DEAD MAN'S ACT:
See Fla. Stat. §90.02(2) (1987); Krevatias v. Wright, 518 So. 2d 435 (Fla. 1st Dist. Ct. App. 1988) (Personal representative by filing action for accounting from defendant who allegedly abused power of attorney that defendant had granted him did not waive Dead Man's Act protection against admission of uncorroborated conversations between
prosecutor...[was] not affirmatively harmful as required by the rule." ); Moser v.
State, 522 So. 2d 540 (Fla. 3d Dist. Ct. App. 1988) (Court summarily concluding
that a witness was not adverse so admission of his prior testimony was erroneous.).
Failure of the state to have an appropriate witness declared adverse, and thus subject
to impeachment by the state itself, can have dire consequences. Recently in D.J.G.
v. State, 524 So. 2d 1024, 1025 (Fla. 1st Dist. Ct. App. 1987), the court held in
part that "where a state witness at trial gives testimony of his version of the event that
occurs with the defendant's version, and the state does not assert at any point that
the witness is adverse,...the state is bound by the testimony adduced, entitling
the defendant to a directed verdict of acquittal" unless there is other evidence supporting
the charged crime. However, the only post-Capiz cases of D.J.G. cites for support also
come from the First District Court of Appeal, thus not all district courts may take
the same position. In a strong dissent, Judge Joanes argued that preventing the party
who calls a witness from being "able to overcome the witness's testimony" is the rule
and is the rationale behind section 90.608. According to the dissent, "this does not mean
that when the state calls a witness, it should be totally bound by everything the witness
says;" id. at 1030, especially where the witness and accused are obviously friends.

GENERAL LIMITATIONS ON CROSS-EXAMINATION SUBJECT MATTER:
See Fla. Stat. § 90.612(2) (1987) which restricts cross-examination "to the subject
matter of the direct examination and matters affecting the credibility of the witness."
In recent decisions involving this limitation see Jackson v. State, 530 So. 2d 269, 271
(Fla. 1988) (Court affirms without any explanation, other than "the trial court was
within its discretion," trial court's ruling which prohibited defense from cross-examining
defendant's girlfriend about whether she had been seeing another man while Jack-
son was imprisoned before he allegedly committed a murder and robbery.); Young v.
State, 522 So. 2d 540 (Fla. 3d Dist. Ct. App. 1988) (Defendant's conviction reversed
because the trial court prohibited cross-examination on matters related to a state wit-
ness's credibility. Unfortunately, the Third District Court of Appeal's brief opinion
does specify the erroneously excluded information); King v. State, 523 So. 2d 924
(Fla. 3d Dist. Ct. App. 1988) (After an alleged burglary victim invoked his privilege
against self-incrimination at a deposition when questioned about whether he dealt
drugs, the trial court properly prevented defense counsel at trial from cross-examining
the witness with questions designed to show the witness's dealing activity. Al-
though the defense theory was that the witness lied to conceal this activity, the Third
District Court of Appeal deemed such questioning "clearly a defensive matter well
beyond the scope of the direct examination." ); id. at 926 (quoting Steinborth v. State,
412 So. 2d 332, 339 (Fla. 1982)). However King would allow a defendant to develop
this theory through his/her own witnesses' direct examination during the direct
case.); Weinstein v. State, 28 Fla. Supp. 132 (Fla. Cir. Ct. 1988) (Defendant's convic-
tions for driving under the influence and driving with an unlawful blood alcohol level
reversed, since the trial court erred in restricting Weinstein from cross-examining a
state witness about the accuracy of a breathalyzer after the state had introduced evi-
dence of the defendant's breathalyzer test results.).

The general purpose of any rational evidence code must be to promote procedural
and substantive fairness in the trial process. Thus despite both section 90.612's pro-
dural prohibition and other Florida Evidence Code provisions substantially limiting
cross-examination, a witness's direct examination testimony may open the door for
cross-examination on what would otherwise be an impermissible topic. For recent cases
providing illustrations of this principle, see Lusk v. State, 531 So. 2d 1377 (Fla. 2d
Dist. Ct. App. 1988) (Once an alleged battery victim claimed on direct examination
that he did not fight back when the defendant supposedly attacked him because "he
was not that type of person, and it was not in his nature to fight with anyone", id. at 1379,
the defense should have been allowed to cross-examine the victim about prior
acts of violence against his wife.); Cabrera v. State, 517 So. 2d 51, 52 (Fla. 3d Dist.
Ct. App. 1987) (Murder and armed robbery defendant's assertion on direct examina-
tion that police took all his jewelry when they arrested him opened the door for state to
cross-examine him about "the stolen nature of a ring seized from him by the police at
the time of his arrest.").

Just as a direct examination can open the door for admission of normally imper-
mmissible matters on cross-examination, so can cross-examination do the same for re-
direct examination. For a recent case illustrating this, see Morgan v. State, 520 So. 2d
105 (Fla. 2d Dist. Ct. App. 1988) (Defense cross-examination of an arresting police
officer about his source of information about Morgan's involvement in a robbery opened
the door for the state to elicit from the officer what the officer's confidential informant
had said that prompted the officer's actions.).

IMPEACHMENT BY CHARACTER EVIDENCE:
See Fla. Stat. § 90.609 (1987) (Kingsley v. State, 523 So. 2d 1199, 1207 (Fla. 1st
Dist. Ct. App. 1988) (Police officer's comment during testimony "contrasting appel-
last's neat courtroom appearance with his appearance at the time of his arrest" could
be an improper attack on defendant's character.); Alvarado v. State, 521 So. 2d 180,
181 (Trial court correctly limited defense attack on state witness's character for truth-
fulness to reputation evidence only and not another witness's personal opinion or belief.).

IMPEACHMENT BY PRIOR CONVICTIONS:
(Trial court did not err in refusing to allow defense counsel to cross-examine a witness
about his arrests since Fla. Stat. § 90.610 (1987) only allows convictions for felonies
and false statements to be used for impeachment. While pending charges against a
state witness are admissible to show bias, defense counsel failed to argue this to the
trial court.); Martin v. State, 517 So. 2d 737 (Fla. 4th Dist. Ct. App. 1987) (Trial
court erroneously allowed the state to impeach a defendant with prior convictions
when the state attorney refused defense counsel's discovery request to disclose the de-
fendant's record.).

For a recent article discussing the proper method of impeachment by prior convic-
tions see Keele, A TRIAL LAWYER'S GUIDE TO IM-
peachment of a Witness, 58 FLA. B.J. 17 (March 1989).

Federal Rule of Evidence 609, which deals with the admissibility of prior convictions
for impeachment, is similar to Florida Statutes, section 90.610. One recent major issue
has been the extent to which Rule 609's provisions on witness impeachment apply in
a civil case. On January 18, 1989 the United States Supreme Court in Green v. Bock
Launderette Machine Co., 845 F.2d 1011 (3d Cir. 1988), cert. granted, 56 U.S.W.L. 3864
(June 20, 1988), heard arguments on whether Federal Rule of Evidence 609 translated
admission in a civil case against a plaintiff of any felony conviction less than ten years
old.

IMPEACHMENT BY SPECIFIC ACTS:
Unlike the Federal Rules of Evidence, the Florida Evidence Code does not usually
permit impeachment of a witness by specific instances of conduct. Florida evidence law-

certain kind of crime and if so, how many times.

Failure to observe this limitation frequently results in reversals when the offending party obtains a favorable verdict. For recent cases concerning this limitation, see State v. Pettis, 520 So. 2d 250, 254 (Fla. 1988) (Trial court erroneously denied state's motion in limine to prohibit impeachment of a police officer by showing the officer had received departmental reprimands for matters not connected with the defendant. However, such a ruling could not be made for a witness on collateral matters, since the "ruling was (not) a departure from the essential requirements of law" that would cause a miscarriage of justice.); Quiles v. State, 523 So. 2d 1261 (Fla. 2d Dist. Ct. App. 1988) (Defendant's firearm and criminal mischief convictions reversed, because trial court erroneously permitted the impeachment of a defense witness by questions showing the witness had struck a police officer on previous occasions. Even if the witness had been convicted for such acts, the state was limited to bringing out the fact and number of convictions and not the particulars of each instance.); Pate v. State, 529 So. 2d 328 (Fla. 2d Dist. Ct. App. 1988) (Defendant's sexual battery and kidnapping convictions reversed for a new trial, because the state improperly questioned defendant about his giving of false information after a driving under the influence arrest and his failing to appear for that charge and about a separate pending sexual battery charge against Pate.); De Sanctis v. Acevedo, 528 So. 2d 461 (Fla. 2d Dist. Ct. App. 1988) (Defense verdict of zero damages in a personal injury action reversed, because defense counsel improperly asked plaintiff police officer about an incident which insinuated De Sanctis was dishonest, and defense counsel also had improperly cross-examined another key witness about whether the witness had once been disciplined for insubordination and other instances of alleged job misconduct.); Rohrbacher v. Dusky, 528 So. 2d 1362 (Fla. 3d Dist. Ct. App. 1988) (Trial court's comments referring to evidence about a witness's alleged alcohol and drug abuse problems were general). 

IMPEACHMENT BY PRIOR INCONSISTENT STATEMENTS:

FLA. STAT. § 90.614(1) (1987) specifically addresses the foundation necessary for impeachment with a prior written inconsistent statement. However, witnesses may also be impeached with their prior oral inconsistent statements. When this occurs, the witness must be confronted with the statement and given the opportunity to admit or to deny making it before opposing counsel can call another witness to prove the statement was made. Failure to follow this procedure recently proved damaging to the defense in Snoddy v. State, 528 So. 2d 982, 983 (Fla. 1st Dist. Ct. App. 1988). There the First District Court of Appeal affirmed a trial court ruling excluding a defense witness's testimony about a sex abuse victim's alleged oral inconsistent statement, since on cross-examination the victim had never been asked if she had made such statements.

Except when a witness's prior inconsistent statement was "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition," see FLa. STAT. § 90.601(2)(b) (1987), the statement can only be used for impeachment and not for substantive purposes. Recently, Everett v. State, 530 So. 2d 415 (Fla. 4th Dist. Ct. App. 1988), found reversible error in a trial court's ruling over a defense objection permitting the state to subpoena a witness's prior inconsistent statement in closing argument. On a related issue, Kingery v. State, 523 So. 2d 1199, 1204 (Fla. 1st Dist. Ct. App. 1988) recently held that when a witness is impeached with a prior inconsistent statement the trial court must give limiting instruction that the statement is being admitted only for impeachment.

ANTICIPATORY REHABILITATION:

Although the Florida Evidence Code prohibits a party from impeaching its own witness. Published by NSUWorks, 1999

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except when the witness has proved adverse, Florida courts have allowed parties to engage in the "anticipatory rehabilitation" of their own witnesses. The difference between the two seems to depend on the examiner's purpose when bringing out a witness's prior convictions or prior inconsistent statements. If the examiner is doing so to attack his/her witness's credibility, then the statutory ban on impeaching one's own witness is involved. However, if the examiner is doing so to "take the wind out of the sails of [s] one's attack on the witness's credibility," Bell v. State, 491 So. 2d 1321 (Fla. 1986), then anticipatory impeachment is being done. For recent cases briefly discussing anticipatory impeachment, see Dowell v. State, 516 So. 2d 271 (Fla. 4th Dist. Ct. App. 1987) (summaries concluding without an explanation that the state was limited in its number of convictions and the reasons for them.); Quintano v. State, 528 So. 2d 46 (Fla. 3d Dist. Ct. App. 1988) (Anticipatory rehabilitation of a witness which revealed the nature of and alleged reasons for his prior conviction did not go further questioning on cross-examination about the crime and its circumstances.).


AUTHENTICATION:

See FLA. STAT. §§ 90.901-958 (1987); Loren v. State, 518 So. 2d 342 (Fla. 1st Dist. Ct. App. 1987) (State properly authenticated audio and video tapes and typed transcriptions of arranged meeting between defendant and state witness through testimony of witness who consented to the taping and testimony of state special agents who set up and operated the taping equipment.); Holland v. State, 528 So. 2d 496 (Fla. 4th Dist. Ct. App. 1988) (Trial court's ruling that before defendant could introduce his alleged tape recording of a meeting between himself and an undercover agent the tape must be authenticated by showing "the identity of the speakers . . . [and] the operator of the recording equipment was competent, the equipment functioned accurately, and the tape had not been materially altered" was correct.); Hargrove v. State, 530 So. 2d 441 (Fla. 4th Dist. Ct. App. 1988) (State did not properly prove that alleged statement to witness over the telephone qualified under the personal admission hearsay exception, FLA. STAT. § 90.801(1)(b)(1987), since there was insufficient proof defendant was the caller. The witness admitted he had never spoken to defendant and had only spoken to him a few times ever. The witness also could not describe how defendant's voice sounded and would not swear the voice was defendant's.);

THE RULE ON WITNESSES:

See Hardwick v. State, 521 So. 2d 1071 (Fla. 1988) (Court found that some witnesses violated trial court's sequestration order by talking among themselves while waiting to testify. However defendant's murder conviction was still affirmed, because the trial court had conducted an inquiry into this and found the violation did not merit a mistrial.);

REAL EVIDENCE:

See Wolfe v. GenCorp, Inc., 529 So. 2d 1154, 1156 (Fla. 1st Dist. Ct. App. 1988) (Plaintiffs in personal injury action stemming from a tire blowout offered sufficient evidence to lay predicate that the tire they were offering as an exhibit was the actual tire.)
Error
tire involved and also was "in substantially the same condition at trial as at the time of the accident." The trial court thus erred in excluding the tire and expert testimony about it. Readers should note that although the First District Court of Appeal’s opinion talked about "demonstrative evidence," this terminology was wrong: since the tire involved purported to be the actual tire which blew out and not some demonstrative substitute, Edwards v. State, 529 So. 2d 1213, 1214 (Fla. 4th Dist. Ct. App. 1988) (Court rejected defendant's arguments that his audio taped confession should have been excluded, because the tape was tampered with and was also partially inaudible. The tape was only altered to improve its audibility and to delete portions which mentioned defendant’s incriminating other crimes. The tape was partially inaudible, but "[t]he tape played only a supporting role in the state's case" since the victim positively identified Edwards as the man who robbed her. Therefore, Edwards suffered no possible prejudice from the tape's introduction.), State v. Denedos, 24 Fla. Supp. 2d 190 (Fla. Cir. Ct. 1987) (Trial court erred in suppressing video tape based on mere fact that portions of it were untrustworthy); State v. Buder, 25 Fla. Supp. 2d 84, 85 (Fla. Cir. Ct. 1987) (Trial court erred in allowing dismissal of defendant's driving under the influence charge was mandated by the state's destruction of a videotape showing Buder's condition shortly after arrest. The arresting officer conceded Buder had no problems performing certain functions and very little problems performing others. Since the breathalyzer test results registered only slightly above the legal limit, "the videotape would have been material and favorable to the defendant."); State v. Phillips, 28 Fla. Supp. 2d 29 (Fla. Cir. Ct. 1983) (Defendant's conviction for use or possession of drug paraphernalia was not erroneously entered when the state did not introduce the paraphernalia at trial. Although defense counsel objected to the lack of introduction on best evidence grounds, no violation was made that defendant was deprived of a fair trial. The best evidence rule only requires the original to prove the contents of a writing and thus was inapplicable.

As Buder noted, in a criminal case the state's loss of or failure to preserve evidence can have constitutional ramifications. Last term in Arizona v. Youngblood, 109 S. Ct. 1333 (1989), to furnish the defense with the &dquo;entire body of evidence against a boy. After the boy reported the sexual attack and was taken to a hospital for treatment, the treating hospital obtained various blood samples through use of a sexual assault kit. The police also took some clothing - the boy when he was attacked, but the police failed to refrigerate the clothing. The fluid samples in the sexual assault were not examined until ten days after the attack, and semen stains on the clothing were not examined until almost fifteen days afterwards. In both sets of tests, attempts to identify the blood grouping of the boy's assailant failed. At trial, experts for both sides testified about what the tests might have found if done promptly or if the clothing had been refrigerated. The Arizona Court of Appeals reversed Youngblood's convictions stating that ""when identity is an issue and the police permit the destruction of evidence that could eliminate the defendant as the perpetrator, loss is material...and is a denial of due process." 153 Ariz. 50, 54, 734 P.2d 592, 596 (1986).

The Supreme Court, in an important opinion, reversed. The Court distinguished between the state's suppression of favorable evidence after a defense request and "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." Parker v. Texas, 118 S. Ct. 644, 654 (1988). The first instance would be a due process violation where the state's good or bad faith was irrelevant. However, the Court

found that was not the scenario. When only potentially exculpatory evidence is involved, the Court required the defendant to show bad faith before there would be a due process violation. The Court justified this bad faith requirement by claiming that it "both limits the extent of the police's obligation to preserve evidence reasonable bounds and confines it to that class of cases where the interests of justice more clearly require it, i.e.,... [where] the police themselves, by their conduct, indicate that the evidence could form a basis for exonerating the defendant." Since the Arizona courts had previously found the police did not act in bad faith, the Court concluded no due process violation arose.

**DEMONSTRATIVE EVIDENCE:** Usually the issue revolves around the admissibility of demonstrative evidence are whether the proponents of the evidence can (1) demonstrate its logical relevance, (2) demonstrate the evidence sufficiently depicts the object or thing in issue to be offered to illustrate, and (3) demonstrate that the scientific or technical value is not substantially outweighed by any potentially unfair prejudice it may generate. Florida appellate courts have been extremely reluctant to find that crime scene photographs should have been excluded. Trial lawyers, especially criminal defense counsel, should note that the First District Court of Appeal in Kingery v. State, 523 So. 2d 1199 (Fla. 1st Dist. Ct. App. 1988), recently indicated that it might begin taking a tougher position on the admissibility of inflammatory photographs. There the court decided the state should not have been allowed to enter a photograph showing how the clothed body of a stabbing victim looked at the homicide scene. After declaring that "[t]he test for admissibility of photographic evidence is whether the photograph is relevant to any issue required to be proven in a given case," id. at 1207, (quoting Adams v. State, 412 So. 2d 850, 853 (Fla. 1982), cert. denied, 459 U.S. 882 (1983)), the First District Court of Appeal found that since the victim's dress was not an issue, the photographs was marginally relevant and best should have not been admitted.

For another recent case dealing with demonstrative evidence, see State v. Williams, 28 Fla. Supp. 2d 126 (Fla. Cir. Ct. 1988) (Once the state gave the defense a &dquo;pepper spray&dquo; one day after the shooting and before the inquest, the state satisfied any requirements it had to furnish the defense with the &dquo;entire body of evidence against a boy. After the boy reported the sexual attack and was taken to a hospital for treatment, the treating hospital obtained various blood samples through use of a sexual assault kit. The police also took some clothing - the boy when he was attacked, but the police failed to refrigerate the clothing. The fluid samples in the sexual assault were not examined until ten days after the attack, and semen stains on the clothing were not examined until almost fifteen days afterards. In both sets of tests, attempts to identify the blood grouping of the boy's assailant failed. At trial, experts for both sides testified about what the tests might have found if done promptly or if the clothing had been refrigerated. The Arizona Court of Appeals reversed Youngblood's convictions stating that ""when identity is an issue and the police permit the destruction of evidence that could eliminate the defendant as the perpetrator, loss is material...and is a denial of due process." 153 Ariz. 50, 54, 734 P.2d 592, 596 (1986).

The Supreme Court, in an important opinion, reversed. The Court distinguished between the state's suppression of favorable evidence after a defense request and "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." Parker v. Texas, 118 S. Ct. 644, 654 (1988). The first instance would be a due process violation where the state's good or bad faith was irrelevant. However, the Court

For discussion of potential constitutional conflicts between the rape shield law and an accused's right to introduce bias evidence, see supra text accompanying note 98-113.
tire involved and also was "in substantially the same condition at trial as at the time of the accident." The trial court thus erred in excluding the tire and expert testimony about it. Readers should note that although the First District Court of Appeal's opinion talked about "demonstrative evidence," this terminology was wrong; since the tire involved purported to be the actual tire which blew out and not some demonstrative substitute.); Edwards v. State, 529 So. 2d 1213, 1214 (Fla. 4th Dist. Ct. App. 1988) (Court rejected defendant's arguments that his audio taped confession should have been excluded, because the tape was tampered with and was also partially inaudible. The tape was only altered to improve its audibility and to delete portions which mentioned defendant's inadmissible other crimes. The tape was partially inaudible, but "[i]t appeared only as a supporting role in the state's case" since the victim positively identified Edwards as the man who robbed her. Therefore, Edwards suffered no possible prejudice from the tape's introduction.); State v. Denedo, 24 Fla. Supp. 2d 190 (Fla. Cir. Ct. 1987) (Trial court erred in suppressing video tape based on mere fact that portions of it were unintelligible.); State v. Bader, 25 Fla. Supp. 2d 84, 85 (Fla. Cir. Ct. 1987) (Trial court erred in dismissing defendant's charge under the instant statute because the absence of an evidentiary hearing was mandated by the state's introduction of a videotape showing Bader's condition shortly after arrest. The arresting officer conceded Bader had no problems performing certain functions and very little problems performing others. There the breathalyzer test results registered only slightly above the legal limit, "the videotape would have been material and favorable to the defendant."); State v. Phillips, 28 Fla. Supp. 2d 29 (Fla. Cir. Ct. 1988) (Defendant's conviction for use or possession of drug paraphernalia was not erroneously entered when the state did not introduce the paraphernalia at trial. Although defense counsel objected to the lack of introduction on best evidence grounds, no allegation was made that defendant was deprived of a fair trial. The best evidence rule only requires the original to prove the contents of a writing and was inapplicable.).

As Bader noted, in a criminal case the state's loss of or failure to preserve evidence can have constitutional ramifications. Last term in Arizona v. Youngblood, 109 S. Ct. 333 (1988), the United States Supreme Court revisited this area. Youngblood was accused of various sexual offenses against a young boy. After the boy reported the sexual assault and was taken to a hospital for treatment, the hospital obtained various fluid samples through use of a sexual assault kit. The police also took some clothes the boy wore when he was attacked, but the police failed to refrigerate the clothing. The fluid samples in the sexual assault kit were not examined until ten days after the attack, and semen stains on the clothing were not examined until almost fifteen days after wards. In both sets of tests, attempts to identify the blood grouping of the boy's assault failed. At trial, experts for both sides, testified about what the tests might have found if done promptly or if the clothing had been refrigerated. The Arizona Court of Appeals reversed convictions on the ground that the failure to preserve the evidence was "so fundamentally unfair that it violates the defendant's right to due process." 1 Arizona v. Youngblood, 333 U.S. 81 (1942). The Supreme Court, in an important opinion, reversed. The Court distinguished between the state's suppression of favorable evidence after a defense request and ""the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, of results which might have exonerated the defendant." 109 S. Ct. at 337. The first instance would be a due process violation where the state's good or bad faith was irrelevant. However, the Court

found that that was not the scenario. When only potentially exculpatory evidence is involved, the Court required the defendant to show bad faith before there would be a due process violation. The Court justified this bad faith requirement by claiming that it ""limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., [where] the police themselves, by their conduct, indicate that the evidence could form a basis for examining the defendant." Id. Since the Arizona courts had previously found the police did not act in bad faith, the Court concluded no due process violation arose.

DEMONSTRATIVE EVIDENCE:

Usually the only issues pertaining to the admissibility of demonstrative evidence are whether the proponent of the evidence can (1) demonstrate its logical relevance, (2) demonstrate the evidence sufficiently depicts the object or thing it is being offered to illustrate, and (3) demonstrate that the proponent is not substantially outweighed by any potentially unfair prejudice it may generate. Florida appellate courts have been extremely reluctant to find that crime scene photographs should have been excluded. Trial lawyers, especially on urgent eyewitness cases, continue to argue for admission on the admissibility of inflammatory photographs. There the court decided the state should not have been allowed to enter a photograph showing how the clothed body of a stabbing victim looked at the homicide scene. After declaring that ""[t]he test for admissibility of photographic evidence in court whether the photograph is "relevant to any issue required to be proven in a given case,"" 1 id. at 1207, quoting Adams v. State, 412 So. 2d 850, 853 (Fla. 1982), cert. denied, 459 U.S. 882 (1982), the First District Court of Appeal found that since the victim's body was not an issue, the photograph was marginally relevant at best and should not have been admitted.

For another recent case dealing with demonstrative evidence, see State v. Williams, 28 Fla. Supp. 2d 126 (Fla. Cir. Ct. 1988) (Once the state gave the defense a copy of the videotape taken of the defendant shortly after his driving under the influence arrest, the state satisfied any requirement to furnish the defense with potentially exculpatory evidence. Although both the state and defense subsequently lost their tapes exculpatory value. As the court stated, ""[i]t will be tried.").

THE RAPE SHIELD LAW:

See Fla. Stat. § 794.022 (1987); State v. Stewart, 25 Fla. Supp. 2d 1 (Fla. Cir. Ct. 1987) (Trial court partially granted defendant's pre-trial motion to admit testimony of other persons who allegedly had sexual relations with the victim. The court found that just because a consent defense was raised is not alone enough to allow other instances of the victim's sexual conduct. Rather such instances are only admissible when they ""establish a pattern of conduct or behavior on the part of the victim which is so similar to the conduct or behavior . . . . . that it is relevant to the issue of consent", Fla. Stat. § 794.022(2)(b) (1987). The trial court, in a thoughtful opinion, reached its decision by examining the ""totality of the circumstances", including the ""identity of the actors", ""the uniqueness of the acts", and ""the temporal proximity"" of the alleged incidents. The court concluded that the evidence was only relevant for admission of ""other crimes"" evidence, applying a test similar to the one required for admission of ""other acts"" evidence, only four of the seventeen alleged incidents showed the requisite degree of similarity). For discussion of potential constitutional conflicts between the rape shield law and rules of evidence, see supra text accompanying note 98-