TABLE OF CONTENTS
MISCELLANEOUS CASES

Contents

MISCELLANEOUS CASES

ATTEMPT

Fla. Department of Corrections v. Gould, 2022 WL 2092492 (Fla.App. 1 Dist., 2022) *request for certification denied*

> Defendants convicted for violations of 794.011 are not eligible for incentive gain-time. Defendants convicted for violations of attempted sexual battery are eligible for incentive gain-time. Violations for attempted crimes (777.04) are stand-alone offenses. So, when a defendant is convicted of attempted sexual battery, he is not actually convicted of 794.011, but only 777.04.
>
> If the legislature wants to include attempts in statutes such as incentive-gain time restrictions, they need to include attempts in the language of that statute. For example, the sexual offender registration statute says, "has been convicted of committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses proscribed in the following statutes in this state…"
>
> When you intend to change a charge to facilitate a plea, consider that changing it to an attempt will give the defendant an opportunity to reduce his sentence up to 10 days a month.

But see,

Wilcox v. State, 783 So.2d 1150 (Fla 1st DCA 2001): (*receded from by DOC v. Gould)*

> Attempted sexual battery is an offense under chapter 794 and therefore, there was no error in conditions of probation imposed pursuant to section 948.03.
>
> Discussion: The defendant objected to sex offender probation, arguing that since he was convicted of attempted sexual battery, his conviction fell under the 777 attempt statute and not the 794 sexual battery statute.

BOND ISSUES

Coffield v. State, 2021 WL 1657697 (Fla.App. 4 Dist., 2021)

Defendant was arrested for interference with custody and posted bond. The state filed the case after the 21st day. Several months later, the state filed a lewd battery charge arising from the same episode. The defendant moved for an adversarial preliminary hearing because the original case was not filed within 21 days. The court ruled a defendant can have an adversarial hearing even after formal charges are filed and the defendant posts bond. The hearing addresses all pending charges at the time of the hearing, even those added after his original arrest. In this case, an earlier Arthur hearing was denied based on proof evidence and presumption great. Even so, the defendant still had a right to do the hearing. Whereas the state was able to do the Arthur hearing based on hearsay, the adversarial hearing required direct testimony. The moral of the story is once you miss the 21-day deadline, the defense attorney has a right to take a shot at our witnesses at any time.

Hunt v. Gualtieri, 2020 WL 7625367 (Fla.App. 2 Dist., 2020)

The petition for writ of habeas corpus is granted. The unrefuted evidence established that the petitioner cannot afford the $150,000 bond imposed by the trial court, and the State presented no evidence to support a finding that "no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process." ... Because the charge of possession of child pornography is not designated as "dangerous" under section 907.041(4)(a), there is a statutory presumption in favor of release on nonmonetary conditions… Finally, the fact that the petitioner is a citizen of the United Kingdom is not dispositive of a risk of flight.

CAPITAL OFFENSE-UNIQUE ISSUES

Morales-Alaffita v. State, 2023 WL 8791610 (Fla.App. 2 Dist., 2023):

Defendant was not entitled to a 12-person jury on a capital battery case since death was not an option.

This ruling will not be applicable to offenses occurring after October 1, 2023, since death is not an option.

Guzman v. State, 2022 WL 14688085 (Fla.App. 4 Dist., 2022)

Court rejected defendant's argument that his 6th and 14th Amendment rights were violated by seating a 6-person jury on a capital sexual battery case.

Mendez v. State, 2022 WL 4587502 (Fla. 4th DCA 2022)

Since sexual battery of a child is not punishable by death, it can be filed by information.

Pretell v. State, 2022 WL 2062432 (Fla.App. 1 Dist., 2022)

Defendant tried for capital sexual battery was not entitled to a 12-person jury.

Pinder v. State, 2022 WL 1160965 (Fla.App. 3 Dist., 2022)

The following excerpt is the entire text of an opinion addressing the old capital sexual battery statute which called for life with a 25 year mandatory minimum.

Affirmed. See Laster v. State, 486 So. 2d 88, 88 (Fla. 5th DCA 1986) (holding: "Sexual battery on a child under twelve years of age is a capital felony punishable by life imprisonment with a minimum of twenty-five years imprisonment. It is not a life felony and is not subject to a guideline sentence; it is not scored within the guidelines.") See also Collins v. State, 823 So. 2d 299 (Fla. 3d DCA 2002) (affirming in reliance on Laster).

Phillips v. State, 2021 WL 1588662 (Fla.App. 1 Dist., 2021)

Capital Sexual Battery does not require a 12-person jury.

State v. Dagostino, 2020 WL 5580153 (Fla.App. 5 Dist., 2020)

Trial court erred in ruling defendant in capital sexual battery case could have a 12-person jury. Section 913.10 specifically says all non-capital

trials "shall" consist of six jurors. The term "capital" in this situation only applies to cases where death penalty is an option. *(See Lessard v. State below)*

State v. Kwitowski, 2018 WL 3040506,(Fla.App. 2 Dist., 2018)

Defendant who committed perjury in a capital sexual battery case committed a second degree felony. Capital sexual battery is considered a capital felony for perjury purposes.

Lessard v. State, 2017 WL 6347376, (Fla.App. 1 Dist., 2017):

This is an interesting concurring opinion where the judge acknowledges that six person juries are permitted in capital sexual battery trials, but argues that 12 person juries would be better. He goes deep into the history of the rules etc…

Pinder v. State, 35 Fla. L. Weekly D1882 (Fla. 3d DCA 2010)

Defendant was properly charged by information rather than indictment, in prosecution for sexual battery on a minor; although State Attorney was required to charge all criminal offenses punishable by death by indictment, it could elect whether to charge all other offenses by either filing an indictment or an information.

Pfoutz v. State, 910 So.2d 946 (Fla. 5th DCA 2005):

Life imprisonment without parole for sexual battery on a child does not violate the 8th Amendment.

Adaway v. State, 902 So.2d 746 (Fla. 2005):

Defendant's sentence of life imprisonment without parole was not grossly disproportionate to his crime of oral union with the vagina of a girl under the age of 12, and thus, sentence satisfied requirements of the Cruel and Unusual Punishments Clause; there was nothing passive or nonviolent about defendant's crime since approached 11-year-old victim in her bedroom while she was sleeping, ordered her to remove her clothing, and touched her genitals without her consent, and although legislature's elimination of parole eligibility increased overall harshness of punishment, difference was not severe enough to render sentence grossly disproportionate.

Duffy v. State, 874 So.2d 1242 (Fla. 2d DCA 2004):

Where defendant was sentenced for capital sexual battery occurring between October 1993 and October 1995, and sentencing statute was amended in 1995 to eliminate possibility of parole for capital crimes that do not result in punishment by death, under rule of lenity, defendant was entitled to be sentenced under 1993 version of statue which provided for twenty-five year mandatory minimum with eligibility for parole.

Glover v. State, 863 So.2d 236 (Fla. 2003):

Age of defendant is an element of capital sexual battery under 794.011(2).

Although trial court did not specifically instruct jury that age of defendant was element of offense that must be proven beyond a reasonable doubt, district court did not err in affirming conviction, because defendant's age of over eighteen years was not a disputed element.

Discussion: Read this case well before trying a capital sexual battery case. The court held that the judge must specifically instruct the jury that the defendant's age is an element of the offense. The court in this case, however, said failure to do so was not a problem because age was not an issue. The court noted that the jury viewed the 37-year-old defendant in the courtroom for several days. The defendant's booking admission that he was born in 1964 was admitted into evidence and there was no evidence to the contrary.

Shingleton v. State, 759 So.2d 713 (Fla. 2nd DCA 2000):

Error to summarily deny claim that counsel erroneously advised defendant that if he went to trial and was convicted he would be eligible for release after serving 25 years of life sentence for Capital Sexual Battery, and that he would probably serve more time if he answered a plea to Attempted Capital Sexual Battery and received 40 year sentence. Claim that counsel failed to advise defendant that he would be classified as sexual predator if convicted without merit because defendant would have been classified as sexual predator if he entered plea to Attempted Capital Sexual Battery.

Discussion: This case points out that in 1995, Section 775.082(1) the Florida Statute was amended to eliminate the possibility of any sort of early release on a conviction for capital sexual battery. Prior to that time there was a 25 year mandatory minimum with discretionary release at the end of twenty five years.

Palaczolo v. State, 754 So.2d 731 (Fla. 2nd DCA 2000):

Defendant in capital sexual battery trial not entitled to twelve (12) person jury and not entitled to jury instruction concerning penalty.

Discussion: The issue in this case was whether the defendant in the capital sexual battery trial was entitled to a jury of 12 and to an instruction concerning the penalty. The Defendant made the argument that since capital sexual battery now carries mandatory life with no possibility of early release, it is more akin to capital murder. The Appellate Court rejected that contention and left the issue up to the Florida Supreme Court to decide whether we needed any rule changes.

D'Ambrosio v. State, 736 So.2d 44 (Fla. 5th DCA 1999):

Age of defendant is one of the elements to be proved to establish capital sexual battery, and thus it must be included within the instructions, along with the proof.

Stallings v. State, 736 So.2d 17 (Fla. 2d DCA 1999):

State was permitted to bring rape charges by information, rather than indictment, where offense for which defendant was charged and convicted was not subject to death penalty.

Generazio v. State, 727 So.2d 333 (Fla. 4th DCA 1999): Carney

Because death penalty may not be imposed for capital sexual battery, failure to instruct jury on battery as lesser included offense of capital sexual battery is not fundamental error.

Since death penalty is not applicable to capital sexual battery, a twelve person jury is not required.

Since death penalty is not applicable to capital sexual battery the trial court is not required to inform the jury of the possible sentence to be imposed.

Webb v. State, 724 So.2d 646 (Fla. 5th DCA 1999):

No error in refusal to give instructions on lesser included offenses to capital sexual battery for which statute of limitations had run where defendant did not waive statute of limitations.

Discussion: When we file capital sexual battery charges which occurred several years ago, the suspect cannot plea to or be sentenced to lesser offenses which occurred outside the statute of limitations unless he

affirmatively states on the record that he is knowingly and intelligently waiving the statute of limitations. Since the defendant never did this in this case, he had no right to request lessers. In fact, if the judge had instructed the jury on lessers without a proper waiver, the convictions for those lessers would have been reversed with jeopardy attached.

Biles v. State, 700 So.2d 166 (Fla. 4th DCA 1997): Lazarus

Error to sentence defendant as habitual offender for capital sexual battery upon a child.

Hare v. State, 687 So.2d 1371(Fla. 2d DCA 1997):

Error to impose fines without statutory authority. Trial court's imposition of fines totaling $45,000 for three capital sexual battery convictions, apparently in reliance on statute allowing up to $15,000 fine on conviction of life felony, is stricken.

Fisk v. State, 681 So.2d 307 (Fla. 5th DCA 1996):

Death penalty cannot be imposed for capital sexual battery, and therefore it was not error to omit reference to specific penalties in jury instructions..

Discussion: The opinion cites Florida Rule of Criminal Procedure 3.390(a) which prohibits a judge in a non-capital case from informing a jury of potential penalties, but requires that a judge do so in a capital case for which a death penalty can be imposed.

Rusaw v. State, 451 So.2d 469 (Fla. 1984):

The supreme court "held "that although a sexual battery could no longer be punished by the death penalty it was nevertheless to be considered a 'capital' crime for purposes of the sentencing provisions of section 775.082(1), Florida Statutes. 484 So.2d at 628.

State v. Hogan, 451 So.2d 844 (Fla. 1984):

The court held,[A]lthough the crime of sexual battery remained a "capital" offense for purposes of allowing a sentence of life imprisonment without parole for twenty-five years, it did not remain a "capital" offense for purposes of the requirement that the jury be constituted by twelve persons. The requirement of a twelve-person jury was held to be applicable only in those cases where death was a possible penalty.

CLERGY PRIVILEGE

State v. Gonzalez, 2024 WL 349322 (Fla.App. 2 Dist., 2024)

The 57-year-old defendant kissed and fondled the breast of a 12-year-old girl in his church congregation. The victim reported the incident to family members and the pastor (M.S.) of the church. The pastor arranged a meeting with about 20 church elders to address the situation. He instructed the defendant to appear at the meeting so he could explain and confess to his actions and seek the church's forgiveness. The trial court said the suspect's subsequent statements were a violation of the clergy privilege.

The appellate court did a thorough and methodical analysis of how the clergy privilege applied to this situation and ruled the statements were not protected and should be admissible. Although multiple elements of the privilege were discussed, the most significant one was whether the defendant's statements were made "for the purpose of seeking spiritual counsel and advice." In addressing that issue, the court stated,

> *When viewed as a whole, we do not construe the video and the suppression hearing testimony as reflecting that the communication was made "for the purpose of seeking spiritual counsel and advice." Significantly, Gonzalez did not initiate the meeting or seek out M.S. for spiritual advice. Rather, it was M.S. who sought out Gonzalez to address the matter, ultimately instructing him to attend the meeting to explain what had happened and to apologize.*
>
> *A person seeking to enforce the privilege must be seeking spiritual counsel and advice from a member of the clergy, but while M.S. met that definition, the "whole church" did not.*

McDermott v. State, 2023 WL 3394954, at *4 (Fla.App. 5 Dist., 2023)

The defendant was convicted for sexual battery/familial or custodial authority. After he committed the offense, he admitted to it to his wife. He and his wife then went to a lay person in a position of leadership at their church for support and counseling. The defendant admitted to the offense in their presence as well. After conviction, the defendant argued the trial court erroneously allowed his admissions in the trial in violation of clergy privilege and spousal privilege.

As to the clergy privilege, the court noted the witness "was not a member of the clergy, and no reasonable basis existed to believe he was a minister." The defendant's claim that he thought his communications would be protected did not matter. The statement was admissible.

As to the spousal privilege, the court relied on section 90.504(3)(b), which states, "In a criminal proceeding in which one spouse is charged with a crime committed at any time against the person or property of the other spouse, or the person or property of a child of either." The clear language of the statute excludes spousal privilege from applying.

The court made an important observation. The only privileges that exist are the ones in the evidence code. Common law privileges do not apply. Therefore, rulings should be made based on strict adherence to the language in the code.

It should be noted that there were other arguments that could have been considered, but the court said since the privileges did not exist based on the clear language of the evidence code, they need not be considered.

Cuevas v. State, 2021 WL 49868 (Fla.App. 4 Dist., 2021):

The defendant molested his stepdaughter. Once it was disclosed, he called his pastor to discuss what he had done. The mother was present in the room when he made the call. After the call he advised her he told the pastor everything. The appellate court ruled the clergy communication privilege did not apply because he was in the mother's presence when he made the phone call and also because he told her what the two of them discussed.

The defendant and the mother also met with a church volunteer to discuss the issue. The appellate court ruled that the volunteer did not qualify as "clergy" for the purpose of the privilege. Secondly, the conversation was in the presence of the mother and occurred in Dunkin Donuts.

The court notes that section 90.505 includes 4 steps that must be analyzed to determine if the clergy privilege exists.

1. The communication must be made to a "member of the clergy."
2. The statement must be made for the purpose of seeking spiritual counseling or advice.
3. The information must be received in the usual course of the clergyman's practice or discipline.
4. The communication must be made privately and not intended for further disclosure.

Ronchi v. State, 2018 WL 2988975 (Fla.App. 5 Dist., 2018)

State sought to introduce child hearsay statements from victim who confessed her victimization of sexual abuse when she was 15 years of age. The victim waived the clergy privilege, but the priest objected to the subpoena, claiming it would violate his religious doctrine. The appellate court chose to analyze the situation pursuant to F.S. 761.03(1), and explained,

> *FRFRA expressly provides that the government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless the government demonstrates that the application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. § 761.03(1), Fla. Stat. (2017).*

Applying this standard, the court ruled that the State had a compelling interest in prosecuting child molesters, but the second prong of the test was not met considering various facts of this particular case.

CLOSING ARGUMENT

McDonald v. State, 2023 WL 4479575 (Fla.App. 4 Dist., 2023)

Prosecutor's comment during closing argument at child pornography trial that websites used by defendant were primarily for trading illegal child pornography was improper, where evidence that most people using these websites did so for such purpose was never developed during trial.

McDonald v. State, 2023 WL 4479575 (Fla.App. 4 Dist., 2023)

Prosecutor's comment during closing argument at child pornography trial that websites used by defendant were primarily for trading illegal child pornography was improper, where evidence that most people using these websites did so for such purpose was never developed during trial.

McDonald v. State, 2023 WL 3486698, at *3 (Fla.App. 4 Dist., 2023)

> *At trial, the state produced evidence that the defendant used internet websites including Kik, Omegle, and Mega to obtain pornographic materials. The prosecutor stated in closing arguments that "[t]he majority of the time [these websites] are used for trading illegal child pornography." The trial court overruled an objection to this statement.*
>
> *As the state concedes, any evidence that most people using these websites did so to exchange child pornography was never developed during trial and thus did not support the prosecutor's inflammatory argument. Improper closing argument has no rightful place in the repertoire of criminal trials and with the barest of trial preparation is easy to avoid. The statement was improper, and we caution against its re-use on remand.*

Smith v. State, 2022 WL 109116 (Fla.App. 1 Dist., 2022)

The following comments in the state's rebuttal closing were improper burden shifting,

> *This defendant does not have to prove his innocence. I am not asserting that to you at all. But when you have this kind of evidence put against you, two children saying these sort of things, swearing to these things the way they have, then, yes, if you believe them, that shifts to him. If you believe these children, then you find him guilty. He has not proven that he did not do this, if you believe them.*

Almarales v. State, 2021 WL 2559643 (Fla.App. 4 Dist., 2021)

> Eighty-one-year-old defendant was charged with lewd molestation of an eight-year-old child. In closing argument, defense counsel argued the victim was fabricating her story and that she used age inappropriate language in describing the acts. In her rebuttal closing, the prosecutor argued,
>
> > *In opening statement, defense counsel told you that she imagined these allegations, that kids at school are talking about sex, that she's learning about sex at school. Ladies and gentlemen, an eight-year-old is not going to imagine allegations like this in the detail and in the manner that she explained it, an*

> *eight-year-old as smart as this child is… An eight-year-old is not going to be able to lay out two years of constant normalizing of sexual behavior that culminates in this experience at this house. This is not from the imagination of an eight-year-old.*

The appellate court ruled these statements were improper bolstering of the victim's credibility. The court ruled there was no evidence presented that eight-year-olds were incapable of making up such allegations. Interestingly, the court also noted that defendant's comment that eight-year-olds do not use certain words was within the common understanding of jurors. The court also ruled the Sate was in error when they argued the victim described grooming behavior. There was no evidence to that fact and the State did not call an expert to discuss grooming or the ability of eight-year-olds to fabricate.

Note: It is interesting to note that the court noted, "The detective then interviewed the defendant, who was 81 years old and walked with a cane." One must ask why this fact was relevant. Usually, when a court points out such a detail, it means there is a level of sympathy for the defendant and they are not going to give the Sate any breaks. The court also points out this is a one-on-one case with no corroborating evidence.

Gilbert v. State, 2021 WL 2385832, (Fla.App. 2 Dist., 2021)

In closing argument, the State argued that the victim's dysfunctional life made her a vulnerable victim. The State detailed the difficult aspects of the victim's life to make this point. The court ruled this was not an improper appeal to sympathy.

The court ruled the State improperly vouched for the credibility of the victim in closing when he/she argued:

> *A year and a half [after the abuse occurred], does anyone think that [testifying to the abuse] was fun for [the victim]? Does anyone think that this is where she wants to be? What motivation is there for her to say these allegations happened in 2017, then continue on, continue on, continue on and have to come and talk about it again in front of a bunch of strangers. The reality is, because she's telling you what happened to her. She's credible. Her testimony, the video, the journal that you're going to see, it's consistent.*

Lynch v. State, 2020 WL 6252833 (Fla.App. 1 Dist., 2020)

> *Appellant argues that the prosecutor's comments—that it was difficult for a twelve-year-old girl to keep this dark secret, that the victim remembered Appellant as the first person who kissed and touched her, and that Appellant was an authority figure who broke the victim and the victim's trust—evoked sympathy for the victim and encouraged hostile emotions toward Appellant.* The appellate court ruled that these valid comments on the evidence presented.
>
> Additional objections to the closing were addressed as well.

Jackson v. State, 2020 WL 4814178, at *3 (Fla.App. 1 Dist., 2020)

> Court held the following statement by prosecutor in closing argument was improper:
>
> > *But we know from our existence, from our experience, from reading the news, we know that pedophiles exist, we know child molesters exist. And we hope we never come into contact with one, we hope we never see one, we hope we never have to call somebody one. But take a good look because one sits right there.*
>
> In so ruling, the court stated,
>
> > *We agree that this statement was objectionable and improper. "It is improper for a prosecutor to refer to the accused in derogatory terms, in such a manner as to place the character of the accused in issue."* Kelly v. State, *842 So. 2d 223, 227 (Fla. 1st DCA 2003)* (*quoting* Pacifico v. State, *642 So. 2d 1178, 1183 (Fla. 1st DCA 1994)*). *The other district courts have specifically held that it is improper argument to call the defendant a pedophile.* See Rodriguez v. State, *210 So. 3d 750, 754 (Fla. 5th DCA 2017)*; Petruschke v. State, *125 So. 3d 274, 279–80 (Fla. 4th DCA 2013)*. *Such "[i]nflammatory labels used by a prosecutor to describe the defendant are improper invitations for the jury to return its verdict based on something other than the evidence and applicable law."* Rodriguez, *210 So. 3d at 754*. *In* Rodriguez, *the prosecutor repeatedly referred to the defendant as a pedophile and made numerous other improper remarks.* See id. *at 754–55*. *Based on the totality of the argument the court found that the closing argument constituted fundamental error.* Id. *at 756*. *While improper, however, the prosecutor here only referred to Appellant as a pedophile one time. Based on the totality of the arguments made by*

the prosecutor and invited by the defense, we do not find that it rises to the level of fundamental error.

Roderick v. State, 2019 WL 6139395 (Fla.App. 1 Dist., 2019)

Prosecutor's comments during closing arguments invoking the story of King Solomon and stating that jurors should use their "God given common sense" did not improperly invoke religion and, thus, defense counsel's failure to object to such comments did not constitute ineffective assistance of counsel in defendant's trial for sexual battery upon a child and other crimes; prosecutor's comments were a direct response to defendant's theory that the absence of DNA proved victim fabricated attack and were not so egregious as to vitiate defendant's entire trial.

Prosecutor's statement that it was unusual for victim to run through the halls of a hotel screaming that she had been raped was not improper prosecutorial vouching of victim's credibility and, thus, defense counsel's failure to object to such statement did not constitute ineffective assistance of counsel in defendant's trial for sexual battery upon a child and other crimes; prosecutor's statement was based on testimony from the victim, the hotel clerk, and the responding law enforcement officers.

Berouty v. State, 2019 WL 5939281, (Fla.App. 2 Dist., 2019)

The State made the following comments in the rebuttal section of the closing statement. The court ruled it was error, but not fundamental error:

Now, a mentor of mine once told me that if you can't win an argument with facts, argue the law. If you can't win the argument with law, argue the facts. If you can't win with either, just argue everything you want. Attack everybody, the victim, the police, the investigation, whatever you can get your hands on, argue that, and I feel that that's what is happening here. I feel like we're in a room and spaghetti is getting thrown over our heads in every which direction hoping something will stick.

There have been so many deflection tactics that have been thrown out here and so many things that were addressed that just don't matter....

....

Now, maybe if the defendant had still been under the defense that he was going with initially, which is, you got the wrong guy,1 then

> *all of those things would have been valid.... Then it would have been completely appropriate to bring all of that out, but that's not his defense. So the fact that all of that is being brought out here, duck, that's spaghetti flying right at you. And it's trying to distract you from the fact that here you've got someone whose story just doesn't add up with the allegations.*
>
> *Now, are we supposed to think that all of those things together are to create reasonable doubt here regarding the defendant's guilt, that you should feel reasonable doubt because of the absence of [finger]prints or a photograph may not have been introduced the right way, I don't know how you get there. I just don't know how you get there, based on all of those things. It's all just been to me smoke and mirrors....*
>
> ....
>
> *This is starting to feel a little bit like an abusive relationship where the abuser is always shifting the focus and trying to put the blame on the victim and everything around, right, instead of putting the focus on what matters.*

Grimsley v. State, 2019 WL 1466863 (Fla.App. 1 Dist., 2019)

> Although prosecutor's statements suggesting that 34-year old defendant's failure to proclaim his innocence of charged offense of unlawful sexual activity with a minor, specifically by denying that he was father of 16-year old victim's child, constituted improper burden shifting, mistrial was not necessary to ensure fair trial; State presented DNA evidence that defendant was child's father to a 99.9% certainty, victim testified that defendant had sex with her, and State developed a timeline matching defendant's sexual interaction with victim's pregnancy and delivery.
>
> An argument emphasizing a defendant's failure to proclaim his or her innocence is improper; it is the equivalent of a burden-shifting argument.

Lenz v. State, 2018 WL 1956322, at *3 (Fla.App. 4 Dist., 2018)

> In his closing argument, prosecutor commented on a jail call between the defendant and his wife:

> *And sometimes silence can be deafening. And in this case in this jail call, I think his silence not to comfort her and say, hey, this is a misunderstanding, I didn't do it on purpose, I didn't have a lewd intent, something to that effect, he's silent. I can't help but wonder what has changed. Think about this. This is early on in the case, this is the first jail call. What has changed over the three years, what has changed? I'll tell you what's changed. He's had three years to think about this. He's had three years to think of his story and to explain everything away…*
>
> *Really? And he was innocent. Why couldn't he talk about the case? Why couldn't he get on the phone and say this is a misunderstanding, why couldn't he say I was tricked by the police, why couldn't he say PTSD kicked in, why couldn't he say all that? That wouldn't put him in jeopardy, not one bit. Not at all. He knows he's guilty, that's why he doesn't want to talk about this case.*

In addressing this closing argument, the appellate court stated,

> *We find that the prosecutor's argument was both an impermissible comment on silence and a burden-shifting comment, with either one being egregious and obviously improper.*[1]

Bettey v. State, 2018 WL 1833401, (Fla.App. 1 Dist., 2018):

The defense objected to the following statements in closing argument:

> *In ground three, Appellant argued that counsel was ineffective for failing to object to the following statements made by the prosecutor during closing argument, which he contends (1) bolstered the credibility of the witnesses and (2) demeaned his defense:*
> *(a) "It's not reasonable to believe that they weren't doing anything other than telling you the truth."*
> *(b) the CPT interviewer "has no interest in the outcome of this case";*
> *(c) "the truth is what [the victims] told you happened";*
> *(d) "there's no reasonable reason for these girls to lie";*
> *(e) it was painful for both victims to tell the truth;*
> *(f) the victims' mother was "telling you the truth";*
> *(g) "the truth is what [the victims] told you";*

(h) the victims' disclosures could not be "anything other than the truth"; and
(i) the Child Protective Team interviewer "didn't have an interest in this case."

The Appellate court noted that the comments were not inappropriate because,

> *Here, nothing in the challenged arguments indicates that the prosecutor was relying on information outside of the record or that he had reasons to believe the victims or the victims' mother that were not presented to the jury. The context of the statements indicate that the prosecutor was arguing why the jury should find the victims credible.*

See the opinion for additional related issues.

Thompson v. State, 2018 WL 794682 (Fla.App. 1 Dist., 2018):

Prosecutors opening statement calling the suspect the boogeyman was objectionable, but not fundamental error.

Simbert v. State, 2017 WL 3616394 (Fla.App. 4 Dist., 2017)

The prosecutor made two comments in closing that were deemed improper by the court:

1. *The judge is going to read you the law. One of the things that he's going to tell you is that it's not the number of witnesses or the number of exhibits that the state attorney, that's me, puts into evidence, it is the quality. I can prove a case with just one witness just on their testimony. If you believe [the victim] he sits here guilty.*

2. *But let's give yo u that and say she is a pathological liar, she lied on the stand, she lied to the nurse, she lied to everybody, and she lied about the injury to her, and then she deleted all of the messages and she tried to somehow railroad him into this because she is a criminal mastermind and not a teenage girl who was sitting up here crying while she tried to recount to you one of the worse things that ever happened. If you believe all of that you should walk him. If you believe all of that, if all of that is true [appellant] is either the unluckiest man alive or he is guilty.*

The court noted that both comments constituted burden shifting, but since defense counsel did not make the proper objection, it was waived.

Scott v. State, 2017 WL 1718804, (Fla.App. 3 Dist., 2017)

At the beginning of the closing argument, the prosecutor said, "Members of the jury, today is the day that you all get to do justice. Each and every one of you gets to do justice today for C.S." Additionally, at the end of the State's rebuttal argument, the prosecutor made the following argument:

> *And today you get to do justice for her. You get to be her voice. You get to be the voice that she couldn't have, that she couldn't tell her mom, that she couldn't tell a teacher. You get to be her voice. You get to say you don't do whatever you want. You don't take whatever you don't—whatever you want. You don't take the innocence of this child because you want to. You are her voice today, and you get to say you are guilty of all three counts because you violated this child repeatedly and she is still suffering. You get to be her voice.*

The appellate court strongly condemned this "Justice for victim" argument and cautioned prosecutors to refrain from such arguments.

Rodriguez v. State, 2017 WL 548649 (Fla. 5th DCA 2017):

Calling Appellant a pedophile was "clearly designed to inflame the prejudices of the jury and constituted an impermissible general attack on [his] character.

A prosecutor's request that the jury show sympathy for the victim ... is clearly improper.

[M]isquoting a defendant or implying a defendant said something [that he did not] is a misrepresentation of the evidence.

The following comments invited the jury to return a verdict for any number of reasons other than proof of guilt beyond a reasonable doubt:

> (i) repeatedly calling Appellant a liar; (see qualifying footnote in opinion)
>
> (ii) making nationalistic appeals to what sexual information the people of the United States do not want five year olds to have;

(iii) ridiculing Appellant's position with sarcastic remarks and comments;

(iv) and stating that Appellant violated one of the most sacred duties of our society by his conduct.

Discussion: The 5th really went after this ASA for his closing remarks. They concluded the opinion by ordering the Clerk to forward the transcripts to the Florida Bar. An example of one of the scathing comments is: "The flood of improper prosecutorial comments in closing argument in this case was deep, wide, and unrelenting; it made a mockery of the constitutional guarantee of a fair trial for Appellant."

It is always helpful when the appellate court includes specific arguments made by counsel. In this case, the court highlighted the following portion of the ASA's closing argument:

> *[T]he criminal justice system does not exist only to protect the rights of defendants. ... [T]here's another person in this equation, and that's the victim. The victim has a right to justice, just like he [Rodriguez] does. Equal justice under the law applies not just to defendants, but to victims, as well. He's had his day in court. It's time to give the victim her due. It's time to give her justice.*

The court referred to this comment as the "well-known and completely inappropriate "justice for the victim" argument." As a human being, the argument seems completely justified, but from a legal perspective it is considered improperly asking the jury to show sympathy for the victim.

Robinson v. State, 2017 WL 33709 (Fla. Dist. Ct. App. Jan. 4, 2017):

In trial where suspect engaged in sexual relationship with girlfriend's 17-year-old daughter, the following comments in closing were ruled inappropriate:

1. "First of all, it is not consensual sex. That is bad enough. It is rape .... It is torture. He tortured her. He tortured her for weeks, and he had her keep his secrets… we put on a lot of evidence that indicated this was not consensual in any way, shape or form. This was torture. This was rape. That is what makes it worse. That is what makes it a lot worse, a lot worse."
    - *Prosecutor inflamed the minds and passions of the jurors, attempting to play to their emotions.*
2. "Find [Appellant] guilty so [G.W.] can move on, try to repair her relationship with her mother, try to repair the rest of her life .... That is what she needs."

- *Besides again playing to the jurors' emotions, the prosecutor was asking the jury to convict Appellant based on a reason other than a determination of guilt.*

3. "Can you imagine what really must have happened? ... Can you imagine how bad it must have really been[?]"
    - *Improper bolstering occurs when the State ... indicates that information not presented to the jury supports the witness's testimony.*

Panchoo v. State, 185 So.3d 562, (Fla. 5th DCA 2016)

Prosecutor's comment during closing argument in child abuse trial, "Think how bad a broken elbow would hurt by itself. Imagine getting bashed in the head like this. Bashed on the back of the head.... I submit to you that's torture," violated the Golden Rule.

Court express concerned about repeated improper comments by prosecutors.

Haspel v. State, 164 So.3d 6 (Fla. 4th DCA 2014)

Prosecutor's multiple references to victim as "damaged" during closing argument at trial on charges of sexual battery of a child under the age of 12, to which defendant did not object, were not an improper appeal to the jury for sympathy for the victim, so as to constitute fundamental error; much of the damage referred to by prosecutor was a description of victim's psychological state caused by other harmful events in her life, such as abuse by defendant and by her prior step-father, and being disbelieved by her grandmother when she tried to report defendant's abuse, and prosecutor used these events to explain why victim did not seek help when she was young and the abuse started.

Bell v. State, 108 So.3d 639 (Fla. 2013):

The State may not comment on a defendant's failure to mount a defense because doing so could lead the jury to erroneously conclude that the defendant has the burden of doing so; such comments run afoul of due process, which requires the state to prove every element of a crime beyond a reasonable doubt and establishes that a defendant has no obligation to present witnesses.

Prosecutor's comment during closing argument in prosecution for lewd and lascivious battery, that the victim and her mother had testified that the victim was under the age of 12 at the time of the offense "without any

evidence contradicting that" was not an impermissible comment on the defendant's right to remain silent; defendant's testimony was not the exclusive means by which the defense could have challenged the State's evidence regarding the victim's age.

Where the evidence is uncontradicted on a point that witnesses other than the defendant can contradict, a comment on the failure to contradict the evidence is not an impermissible comment on the failure of the defendant to testify;

Prosecutor's comment during closing argument in prosecution for lewd and lascivious battery, that the victim and her mother had testified that the victim was under the age of 12 at the time of the offense "without any evidence contradicting that" was not improper burden shifting; prosecutor specifically stated that the State carried the burden of proving the victim's age beyond a reasonable doubt, and in context, the prosecutor's comment was a statement on the jury's duty to analyze the evidence presented at trial followed by the prosecutor's argument regarding what conclusion the jury should reach from the evidence.

Prosecutor's comment during closing argument in prosecution for lewd and lascivious battery, that "[i]n this particular case it is the word of [the victim] against the plea of not guilty that [defendant] entered," thereby asserting that defendant's not guilty plea constituted the sum of the evidence in support of his innocence, impermissibly highlighted the fact that defendant did not testify on his own behalf and constituted an improper comment on defendant's right to remain silent.

Prosecutor's comment during closing argument in prosecution for lewd and lascivious battery, "[i]n cases like this, it is always a one-person's word against another," improperly commented on defendant's failure to testify; comment highlighted the fact that while the victim testified, defendant did not.

Prosecutor's comment during closing argument in prosecution for lewd and lascivious battery, that "if you are looking for a reason to not believe [the victim] there isn't one. Because there is no evidence that she would have made this up at this particular time under these particular circumstances," improperly shifted the burden of proof; comment highlighted defendant's failure to present any evidence impeaching the State's witness, comment could have led the jury to erroneously believe that defendant had the burden of presenting such evidence, and prosecutor did not correct any false impression by reminding jury that the State at all times retained the burden of proof.

Prosecutor's voir dire questions, asking prospective jurors whether the testimony of a child alone would be insufficient for them to return a guilty verdict, did not improperly precondition the jurors to convict defendant in prosecution for lewd and lascivious battery; prosecutor sought to ascertain whether any prospective juror carried an underlying distrust of child witnesses, and such questions were within the State's right to ascertain latent or concealed prejudgments by prospective jurors.

Although a prosecutor may not interrogate a prospective juror as to his attitude toward a particular witness who is expected to testify in the case, especially when the juror knows in advance that the prosecution has only the one primary witness to prove its case, this prohibition extends only to questions of prospective jurors as to the kind of verdict they would render under any given state of facts or circumstances.

Keum San Yi v. State, 128 So.3d 186 (Fla.App. 5 Dist.)

Prosecutor's argument, during closing argument at trial on charges including lewd and lascivious molestation, that victim was the only witness to testify who was present at the time of the alleged events, was improper; argument was susceptible of being viewed as a comment on defendant's exercise of his right to remain silent.

Petruschke v. State, 125 So.3d 274 (Fla. 4th DCA 2013):

Prosecutor's statement, during closing argument in prosecution for lewd and lascivious molestation, that three-year-olds such as alleged victim lacked mental ability to fabricate allegations of sexual abuse, was unsupported by evidence, was not fair inference from evidence, and amounted to misconduct, especially given that allegations of sexual abuse were not spontaneous, but rather were in response to questioning by adult, and there was no evidence presented at trial that a three-year-old child lacks mental ability to fabricate allegations of sexual abuse in such circumstances.

Prosecutor's repeated references to defendant as “pedophile,” during closing argument in prosecution for lewd and lascivious molestation, were clearly designed to inflame prejudices of the jury and constituted impermissible general attack on defendant's character; such references improperly suggested that defendant might have committed prior illegal sexual acts involving children and further suggested improper “pedophile profile” argument, and trial court immediately overruled defense counsel's

objection to first such reference, making it clear that such line of argument was permissible.

Charriez v. State, 96 So.3d 1127 (Fla.App. 5 Dist.)

Prosecutor misstated the law as it related to reasonable doubt when, during closing argument, she suggested that, if the jurors believed the victim, they would have to convict defendant of lewd or lascivious battery.

Prosecutor made an improper appeal to the jurors' community conscience by suggesting, during closing argument that they had a communal duty to convict defendant of lewd or lascivious battery in order to protect the community.

McPhee v. State, 117 So.3d 1137 (Fla. 3rd DCA 2012):

Prosecutor's unobjected-to reference to defendant as a pedophile during closing argument at trial on charges of sexual activity with a child by a person in custodial authority and unlawful sexual activity with a minor, was not fundamental error; comment was made following a review of the facts, which set forth defendant's sexual encounter with young mentally-handicapped girl while he was serving as a teachers' aide at her school, and defendant did not show that prosecutor's one, isolated comment resulted in prejudice sufficient to undermine the outcome of the case.

Roberts v. State, 66 So.3d 401 (Fla. 4th DCA 2011):

Prosecutor's closing argument was improper because it was replete with comments which offered prosecutor's opinion as to defendant's guilt, shifted the burden of proof, appealed to sympathy for the accuser, vouched for the accuser's credibility, and invited the jury to base its verdict on which witness the jury thought was most credible.

Perea v. State, 35 So.3d 58 (5th DCA 2010):

The prosecutor's closing argument comments, which asked the jury to consider why the victim would make accusations against defendant, did not impermissibly shift the burden of proof, in prosecution for sexual battery and other offenses; the comments did not imply to the jury that the defendant had to prove anything in order to establish his innocence, and the prosecutor's statements were a permissible comment that the evidence at trial did not indicate that the victim had any reason to lie.

Defendant was entitled to be sentenced for lewd molestation as a first-degree felony, rather than as a life felony; the sentencing statute that increased the punishment for lewd molestation became effective during the dates defendant was alleged to have committed his crime, and thus he was entitled to be sentenced under the more lenient of the two sentencing statutes.

Barnett v. State, 45 So.3d 963 (Fla. 3d DCA 2010):

Molestation defendant was not entitled to mistrial based on prosecution's closing argument that child victim's story "never changed," even though State had successfully objected to admission of evidence that the victim had recanted her allegations against defendant, where the gist of the State's argument was that each time the victim gave a statement, her description of how the touching took place was the same.

Elisha v. State, 949 So.2d 271 (Fla. 4th DCA 2007):

Defendant was entitled to his requested mistrial at trial for sexual battery upon a child based on prosecutor's repeated references to him during closing argument as "a condom-carrying masturbator" and "a masturbator," even though defendant admitted to police that he masturbated in bathroom stall at a store; prosecutor's many repeated references were designed to inflame prejudices of jury and constituted an impermissible general attack on defendant's character, and concern that prosecutor's references might have influenced jury was heightened by fact that evidence against defendant was far from overwhelming.

Dial v. State, 922 So.2d 1018 (Fla. 4th DCA 2006):

Prosecutor's improper closing argument at trial on charges including murder, child abuse, and aggravated manslaughter of a child, which told the story of the case from the perspective of eight-year-old victim and appealed to the jury for sympathy for the victim and hostility toward the defendant, was harmless error; State demonstrated beyond a reasonable doubt that the error did not affect jury's verdict finding defendant guilty of aggravated manslaughter of a child.

"The objectionable portion of the argument began, 'Hi, I'm Joey and I'm eight,' and continued in the first person for ten pages of transcript. Although creative and well-phrased, the argument was an improper appeal to the jury for sympathy for the victim."

Gonzalez v. State, 829 So.2d 323 (Fla. 2d DCA 2002):

> The state successfully argued that the victims' previous molestation by another defendant was inadmissible. The state's subsequent argument in closing that the young victims had no way of knowing all of the sexual details they described unless they were actually molested was improper.

Hudson v. State, 820 So.2d 1070 (Fla. 5th DCA 2002):

> Prosecutor's reference to pedophiles in closing argument was prejudicial because it suggested defendant had committed prior illegal sexual acts involving children and also improperly suggested a profile-type argument that, if defendant had certain traits which fit the offender profile, he must have abused the victim.
>
> Error harmless given overwhelming evidence of guilt and fact that prosecutor made only single reference to word pedophile.

Shriver v. State, 750 So.2d 117 (Fla. 2nd DCA 1999):

> Claim that counsel failed to object to prosecutor's repeated emphasis during closing argument of a statement from a witness that defendant "raped" alleged victim, although judgment of acquittal had been entered on sexual battery charge, stated a claim which was sufficiently prejudicial to state a visual claim for relief, but the case was remanded for further evidentiary hearing.

Pendarvis v. State, 752 So.2d 75 (Fla. 2nd DCA 2000):

> New trial required where prosecutor during closing argument used large note pad which, which when prosecutor displayed it to defense counsel and judge for approval contained word "introvert" but when displayed to jury had been altered to read "pervert".

Cook v. State, 736 So.2d 739 (Fla. 5th DCA 1999):

> Prosecutor's reference during closing argument to numerous uncharged incidents of sexual abuse which defendant allegedly perpetrated upon child victim did not prejudice defendant, so as to warrant granting of motion for mistrial in prosecution for committing lewd, lascivious, or indecent act upon a child under the age of 16 years, and committing lewd or lascivious act in the presence of child under age of 16 years, where such incidents were testified to by victim during trial.

Jones v. State, 730 So.2d 346 (Fla. 4th DCA 1999): Dimitrouleas

New trial required where it was undisputed that defendant was extremely angry and acting in a very bizarre fashion at time of incident, defendant raised defense of involuntary intoxication and presented evidence that his angry, bizarre behavior began shortly after he consumed ad non-alcoholic drink that he had left unattended as a party for a brief period of time, and prosecutor, in closing argument suggested that there was no controlled substance or prescription medication that, if slipped into defendant's drink, could have caused defendant's behavior despite lack of evidence to support that suggestion.

Discussion: This case does not involve a sex crime, but it is relevant to set out parameters on what we can properly argue in our Rohypnol/GHB cases. Be careful not to make arguments which are not supported by the evidence. The appellate court noted that the prosecutor violated rule 4-3.4 (e) of the Rules Regulating The Florida Bar. This case reflects a recent trend of the appellate courts to label improper comments by prosecutors as ethics violations.

Ford v. State, 702 So.2d 279 (Fla. 4th DCA 1997):

Prosecutor's remark that defendant, convicted of sexual battery, had been accused of rape by several other women was improper, highly prejudicial and inflammatory, where no reasonable construction of the evidence supported statement. Unsubstantiated statements referring to other crimes committed by defendant are particularly condemned, and presumptively prejudicial.

> *Really, this man is 26 years old, 26 years old, now 25 last year okay. I mean what is the law of average here, how many times would a man get himself in a situation where four or five girls are going to call rape.*

Reference to defendant's statement to a friend that he had "a little fun" with complainant as "rapist talk," made without any basis in evidence was improper argument, and trial court erred in overruling objection.

Prosecutor's reference to movie "9 ½ Weeks" which defendant had testified was the model for consensual sexual activities between him and complainant and implication that movie had sinister ending went beyond bounds of permissible argument, where there was no evidence of movie's ending, so that argument was not fair comment on evidence. Argument suggesting to jury that there is evidence harmful to accused that jury did not hear highly improper.

> *Well, he told you about the little acts that were done and that it was part of the movie. But, what did he leave out, he left out the humiliating words and demands that were given in this movie to the woman. What did he leave out, he left out the ending of the movie. A movie admittedly he liked, very much liked it so much that he fantasized about it and when he had girlfriends over or a woman over, she didn't have to be a girlfriend, he lives this fantasy, he left the ending out because the ending shows*-[objection sustained]…*Doesn't tell you the movie's ending, okay. Ask yourself, why, why wouldn't he tell us the way the movie ends.*

Bauta v. State, 698 So.2d 860 (Fla. 3rd DCA 1997):

> No error in sustaining state's objection to defense counsel's closing argument suggesting that state failed to call lead detective because detective had no favorable evidence to present for the state, where detective's testimony no longer served useful purpose after defendant successfully excluded from evidence child hearsay statement made to detective.
>
> Taken in isolation, prosecutor's statement in closing argument "Don't you think that as a prosecutor in Dade County I have better things to do than to persecute this defendant?" was improper, because the statement can be interpreted by the jury as an assertion by the prosecutor of her personal view of the guilt of the defendant. When read in context, however, the prosecutor was responding to the defense theme that the state, including the prosecutor personally, had coached or led the child victim into making statements about the defendant which were untrue. If objectionable at all in this context, the statement does not constitute fundamental error.

COMPETENCY:

Note: For case dealing directly with competency issues where expert witnesses are involved, please see the chapter on *Expert Witnesses/Independent Evaluations.*

Section 90.605 (2):

> In the court's discretion, a child may testify without taking the oath if the court determines the child understands the duty to tell the truth or the duty not to lie.

Kennedy v. State, 2011 WL 1660937 (Fla.App. 4 Dist.)

> Decision upon the competency of a child to testify is one peculiarly within the discretion of the trial judge because the evidence of intelligence, ability to recall, relate and to appreciate the nature and obligations of an oath are not fully portrayed by a bare record.
>
> Trial court did not abuse its discretion in finding that nine year old developmentally disabled child, who was present in bathroom when her younger sibling received scalding burns in bathtub, was competent to testify against her mother in child abuse prosecution; however, because the issue was so close, and the passage of time might have impaired child's ability to testify, should child's testimony again be required in any retrial, trial court must make a renewed finding of competency, and appellate court's finding that the trial court did not abuse its discretion in the original trial should not be considered as establishing child's competency in further proceedings.

State v. Karelas, 28 So.3d 913 (5th DCA 2010):

> Thirteen-year-old victim's ability to accurately recollect alleged molestation incident was an issue of credibility, not competence, that should have been reserved for determination by the jury; that suggestive questions by police might have been posited was only one factor that went to the reliability of the testimony, yet trial court precluded victim from testifying on that basis alone.
>
> Testimonial competency relates to the capacity of a witness to recollect and communicate facts and appreciate the obligation to tell the truth; it is a test of intellectual capacity, not veracity.
>
> Competency should be determined at the time a witness testifies based on the witness's capacity at the time the testimony is offered.

J.B.J. v. State, 17 So.3d 312 (1st DCA 2009):

> Trial court was in error for ruling that 4-year-old victim was competent to testify.
>
> "[W]hen a child's competency is at issue, the trial court should consider (1) whether the child is capable of observing and recollecting facts, (2) whether the child is capable of narrating those facts to a court or to a jury, and (3) whether the child has a moral sense of the obligation to tell the truth."

Opinion contains a transcript of the competency hearing and points out why it was deficient on the third prong of the test.

Court erred in allowing detective to testify regarding a prior consistent statement of the child. In so ruling, the Court stated as follows:

> Prior consistent statements are generally inadmissible to corroborate or bolster a witness's trial testimony because such statements are usually hearsay.. Section 90.801(2), Florida Statutes (2008), provides an exception to this general rule where "the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and that statement is: .... (b) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication." Additionally, to be admissible under section 90.801(2)(b), the prior consistent statement must have been made "before the existence of a fact said to indicate bias, interest, corruption, or other motive to falsify…In order to introduce a prior consistent statement, "[t]here must be an initial attempt on cross-examination to demonstrate the improper influence, motive or recent fabrication and, once such an attempt has successfully occurred, then prior consistent statements are admissible on the redirect examination or through subsequent witnesses to show the consistency of the witness'[s] trial testimony." A prior consistent statement is not admissible under section 90.801(2)(b) "merely because the opposing lawyer has attacked the credibility of the witness or challenged the truthfulness of the statement given by the witness at trial."

Lugo v. State, 971 So.2d 183 (Fla. 5th DCA 2007):

> Child molestation victim's out-of-court statements indicating that she understood what it meant to be truthful and could accurately relate matters, such as color of an object, that she had personally observed was not hearsay as the statements were not being offered to prove the truth of the matters asserted in the child's responses to the questions posed by child protection team interviewer.

Bennett v. State, 971 So.2d 196 (Fla. 1st DCA 2007):

> The competence of a child witness is based on intelligence, not age, and

whether the child possesses a sense of the obligation to tell the truth.

When ruling on a child's competency to testify, the trial court should consider (1) whether the child is capable of observing and recollecting facts, (2) whether the child is capable of narrating those facts to the court or to a jury, and (3) whether the child has a moral sense of the obligation to tell the truth.

Factors to consider in reviewing a trial court's decision on a child's competency to testify include the entire context of her testimony and whether her testimony is corroborated by other evidence.

Trial court did not abuse its discretion when it found 12-year old victim competent to testify in trial for attempted sexual battery, sexual battery, and lewd and lascivious molestation, although expert testified that victim had expressive and receptive language impairment; victim accurately recounted facts about her life, there was corroborating evidence from defendant, who admitted to touching victim's vagina, from family friend, and from defendant's cousin, and victim possessed a moral sense of the obligation to tell the truth.

S.C. v. State, 837 So.2d 1159 (Fla. 1st DCA 2003):

Error to determine that four year old alleged victim was competent to testify without conducting adequate inquiry into whether child possessed moral sense of duty to tell the truth.

Discussion: The court noted that the trial court must, “determine whether the child is capable of observing, recollecting, and narrating facts, and whether the child has a moral sense of the duty to tell the truth.”

Acevedo v. State, 787 So.2d 127 (Fla. 3d DCA 2001):

No error in excluding discovery deposition in which defendant’s 3 1/2 year old granddaughter admitted starting fire which gave rise to instant prosecution by striking match and which defense counsel sought to introduce as evidence after granddaughter was found not competent to testify because she did not have sufficient memory to the events in question.

Discussion: The defendant was convicted for second degree murder because his granddaughter burned to death in a fire in his one bedroom apartment. The defendant sought to introduce statements from his other 3 1/2 year daughter that she started the fire. Since the child was not competent the court did not allow the statements.

Bowman v. State, 760 So.2d 1053 (Fla. 4th DCA 2000):

Person may be found competent to testify and still be mentally defective under statutory definition.

Testimony by school psychologist who worked with victim for three years that victim had IQ of 36 and psychologist's description of people scoring in that range were sufficient to permit jury to determine issue of whether the defendant was mentally defective.

Discussion: The victim, who was in his early twenties, was assaulted by the driver of the bus for handicapped people. His grandmother testified that he behaves like a four or five year old in some respects and a nine or ten year old in others. He is unable to read or write, but can sign his name. The school psychologist testified that the individuals with in the victim's intelligence range "may have very weak skills and are not completely independent in terms of being able to go running an errand on their own or maybe even cross the street on their own in terms of socialization with others." The appellate court distinguished this case from Mathis v. State, 682 So.2d 175 (Fla. 1st DCA 1996) and took a more favorable position towards victims. Even though the psychologist could not define "mentally defective," her testimony was sufficient to send the case to the jury. It appears there may be a difference in opinion between the 1st DCA and the 4th DCA. The court also gives us good language regarding the competency of children and how it is not unusual for young children to understand the moral obligation to tell the truth.

Toussaint v. State, 755 So.2d 170 (Fla. 4th DCA 2000):

No error in failing to sua sponte hold hearing to determine victim's competency to testify where victim's competency was never placed in issue.

Palaczolo v. State, 754 So.2d 731 (Fla. 2nd DCA):

The issue in this case was whether the trial court erred in refusing to allow voir dire of the child victim on the issue of competency. When the prosecutor asked the child whether she knew the difference between a truth and a lie, she replied, "I forgot that one." When given concrete examples of truths and lies, the seven (7) year old witness responded appropriately. When the State finished asking its competency questions the defense requested the opportunity to voir dire the witness on the issue of competency. The State argued that defense counsel could ask these questions on cross-examination and the court agreed. The appellate court

ruled that when a party challenges the competency of a witness, the trial court should permit voir dire on the issue and make a case specific determination of the witness' competency to testify. This should occur before the witness is allowed to testify.

Munguia v. State, 743 So.2d 154 (FL 3rd DCA October 20, 1999):

Trial court acted within its discretion when it found victim competent to testify after questioning victim extensively and reviewing psychological report.

Delacruz v. State, 734 So.2d 1116 (Fla. 1st DCA 1999):

Child's testimony was insufficient to establish that she was competent to testify in sexual abuse case; of 78 questions posed to her, she responded verbally to only 17, her responses to remaining questions consisted of either head-shaking or shrugs, there was nothing in child's testimony that established that she understood what it meant to tell the truth, the difference between telling the truth and telling a lie, or what would happen if she did not tell the truth, and there was nothing in child's testimony from which one might conclude that she was capable of observing and recollecting facts, or of narrating those facts to a jury.

Discussion: This opinion gives a lengthy discussion on this area of the law and is a good reference case for a general understanding of the child hearsay exception. The opinion also cites relevant portions of the transcript where the judge tries to make a determination of the victim's competency.

Seccia v. State, 720 So.2d 580 (Fla. 1st DCA October 12, 1998):

No abuse of discretion in trial court's finding that child had moral sense of duty to tell truth when the 8-year-old child testified he knew the difference between the truth and a lie; that it was wrong tell a lie, particularly in court, because "something bad" could happen; that one is punished when one lies; that one has an obligation to tell the truth, particularly in court; and that the judge would punish him if he did not tell the truth in court; and he promised to tell the truth.

Bloodworth v. State, 719 So.2d 383 (Fla. 1st DCA October 23, 1998):

No abuse of discretion in determining that nine-year-old victim was competent to testify.

Discussion: A short opinion with little research value.

Barton v. State, 704 So.2d 569 (Fla. 1st DCA 1997)

Trial court abused discretion in apparent determination that victim was competent to testify where judge before whom victim's testimony was videotaped questioned victim, but made no finding that victim was competent to testify, and trial judge accepted this without making any further inquiry or findings.

Seccia v. State, 687 So.2d 1371 (Fla. 1st DCA 1997):

Trial court examination on competency issue was insufficient to establish whether the child was capable of observing and recollecting facts, narrating those facts to the court or jury, and had a moral sense of the obligation to tell the truth.

Discussion: The victim in this sexual battery/indecent assault case was six years old when he testified at the trial. This decision is very helpful in that it gives us the colloquy right from the transcript. There is also an interesting dissent. One important point made in this case is "knowing the difference between the truth and a lie does not impute a moral obligation or sense of duty to be truthful." That is why we must always make a child promise to tell the truth. The detectives frequently fail to satisfy that aspect of the competency determination.

Simmons v. State, 683 So.2d 1101 (Fla. 1st DCA 1996)

Mentally retarded person who witnessed sexual battery and kidnapping was ruled competent to testify when court made proper findings that witness was capable of observing facts as evidenced by his ability to be employed, to obtain a driver's license, and to operate a truck; witness demonstrated capacity to relate facts and explanations; and witness demonstrated capacity to differentiate between truth and lie and capacity to relate events in an understandable fashion.

Mere fact that witness is retarded or may have history of mental problems is not enough to compel witness to submit to psychological evaluation.

Trial court did not abuse its discretion in denying defendant's request for psychiatric evaluation of state's mentally retarded witness, where witness' trial testimony was generally complete, responsive, and consistent with deposition testimony and physical evidence.

Fuller v. State, 669 So.2d 273 (Fla. 2d DCA 1996):

Reversible error to permit child victim to testify without establishing whether child had moral sense of obligation to tell truth and without conduction full examination as to child's ability to observe and recollect facts.

Discussion: The court spells out the test to be used when determining the witnesses competency to testify. "The trial court should consider (1) whether the child is capable of observing and recollecting facts, (2) whether the child is capable of narrating those facts to the court or to a jury, and (3) whether the child has a moral sense of obligation to tell the truth." Be careful to read the very interesting dissent on this decision. It appears that a rather thorough attempt was made to determine the child's competency, but the majority did not feel it was strong enough.

Baker v. State, 674 So.2d 199 (Fla. 4th DCA 1996):

No abuse of discretion in judge's determination that six year old daughter of defendant was competent to testify. The child proved her intelligence by knowing her age, where she went to school, where she went to church and could identify the colors of people's clothing. She also testified that she knew it was wrong to lie, and that people get into trouble for lying.

Discussion: As noted in the opinion, the standard for competency of an infant witness was set by the Supreme Court in Lloyd v. State,524 So.2d 396 (Fla. 1988). The *Lloyd* court held that the competence for an infant witness is measured by his or her intelligence rather than age, and whether the child possesses a sense of the obligation to tell the truth. In making this determination, the court should consider: (1) Whether the infant witness has sufficient intelligence to receive a just impression of the events observed; (2) sufficient capacity to relate them correctly; and (3) appreciates the need to tell the truth.

Kertell v. State, 649 So.2d 892 (Fla. 2d DCA 1995):Kertell v. State, 649 So.2d 892 (Fla. 2d DCA 1995)Kertell v. State, 649 So.2d 892 (Fla. 2d DCA 1995)

Trial court failed to make sufficient findings of fact to support its finding that four year old victim of alleged capital sexual battery was competent to testify. Court's summary findings were inadequate to permit admission of child's hearsay statements.

Griffin v. State, 526 So.2d 752 (Fla. 1st DCA 1988):

When child's competency is at issue, trial court should consider whether child is capable of observing and recollecting facts, whether child is

capable of narrating those facts to court or to jury, and whether child has moral sense of obligation to tell truth.

Trial court improperly determined competency of four-year-old sexual abuse victim to testify where, after de minimis competency examination conducted at beginning of child's videotaped deposition, trial court found only that child was competent to testify "within the confines of what is reasonable for a four-year-old"; although child was relatively articulate and intelligent, she was not unequivocally capable of separating fact from fantasy.

The primary test of testimonial competence of an infant witness is his or her intelligence, rather than his or her age, and, in addition, whether the child possesses a sense of obligation to tell the truth.

When a child's competency is at issue, the trial court should consider (1) whether the child is capable of observing and recollecting facts, (2) whether the child is capable of narrating those facts to the court or to a jury, and (3) whether the child has a moral sense of the obligation to tell the truth.

When the competency of a child witness is raised as an issue in the case, it is then the duty of the trial court to examine the witness to determine whether he or she has sufficient intelligence to observe, recollect, and narrate the facts and has a sense of the obligation to tell the truth.

In fulfilling that duty, the trial court may examine the child personally, or may determine the child's competency on the basis of the examination conducted by the attorneys. In addition, in applicable circumstances, the trial court may rely on the testimony and reports prepared by experts regarding the child's ability to testify.

Lloyd v. State, 524 So.2d 396 (Fla. 1988):

Due process was not violated by trial court's refusal to allow defense expert more than one hour to examine murder victim's five-year-old child in order to afford defense opportunity to challenge child's competency to testify, where trial judge noted that he would reconsider time limitation if expert found anything to indicate there were problems with child and all of records of child's previous examinations including tests administered by state expert, were made available to defense expert.

Prime test of testimonial competence of infant witness is intelligence, rather than age, and, in addition, whether child possesses sense of obligation to tell the truth.

It is within discretion of trial judge to decide whether infant of tender years has sufficient mental capacity and sense of moral obligation to be competent as witness, and except when there is abuse of that discretion, trial court's decision will not be disturbed.

Trial court could allow murder victim's son, who was five years old at time of killing, to testify at trial several months later notwithstanding defense expert's testimony that in his view child was not capable of recalling events and testifying accurately and notwithstanding multiple inconsistencies in child's stories.

It is the established law of this state that if an infant witness 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, the infant should be permitted to testify.

Discussion: It should be noted that the opinion emphasized the fact that "the critical facts in this case are not totally dependent on the child's observations." The inference here is that the competency issue is not as much a concern when the critical facts are corroborated through other sources. Unfortunately, this is not always the case in sexual battery cases. When a capital felony depends exclusively on the word of a young child, the court will likely scrutinize the issue more vigorously.

In the Interest of M.A, 477 So.2d 47 (Fla. 4th DCA 1985):

In ruling whether the trial court abused its discretion in finding the 3-year old victim competent to testify as a witness against the appellant, the appellate court noted:

> [a] reading of the transcript of the hearing wherein the state attempted to qualify the victim as a competent witness, together with the testimony finally extracted from the victim after much coaxing and cajoling, demonstrates that the victim's testimony was too unreliable to use as a basis for adjudicating appellant guilty of the charges.

Hudson v. State, 368 So.2d 437 (Fla. 3rd DCA 1977):

Where judge conducted personal examination of victim and was satisfied as to victim's competency, it was not abuse of discretion to deny defendant's motion for psychological examination of victim prior to

permitting victim to testify in prosecution for sexual battery, even though the victim had a history of a psychological disorder.

Davis v. State, 348 So.2d 1228 (Fla. 3rd DCA 1977):

After a careful examination of the record, the district court determined that the trial court abused its discretion in allowing the 5-year old child to testify at trial, finding the record permeated with evidence that the parents had "refreshed" the child's memory of the alleged incident a number of times.

CONTROLLED TELEPHONE CALLS AND SURREPTITIOUS RECORDINGS

State v. Trinidad, 2022 WL 15525608 (Fla.App. 5 Dist., 2022)

The victim, who was between 11 and 17 during the sex offenses, secretly recorded the suspect on her iPhone as they discussed the allegations. The trial court suppressed the recording because it was partially inaudible, and the suspect did not make an overt admission. The trial court ruled the prejudice outweighed the probative value. A transcript of the call is in the opinion. The appellate court reversed this ruling and noted:

> *Here, the trial court found that the probative value of the recording would be outweighed by "some prejudice" and that it would "confuse a jury." Nowhere, though, did the trial court conclude or suggest that the audio recording is the type of evidence that would improperly inflame the jury or improperly appeal to the jury's emotions. Instead, the trial court appeared to conclude that because the audio recording contained neither a definitive confession nor an overt reference to molestation or intercourse it may confuse the jury. But the lack of these explicit references would neither improperly inflame the jury, nor would it distract the jury from the issues in the case merely because the evidence requires inference. To the contrary, the statements are evidence from which guilt as to the charged crimes may be inferred. As a result, we conclude the trial court abused its discretion in concluding the audio recording was inadmissible pursuant to section 90.403.*

The appellate court also rejected the defense argument that the recording was illegally recorded pursuant to section 934.03 The

court pointed out that the following section of the statute made the recording legal.

> *The statute was amended in 2015 and now provides that it is lawful for a child under 18 years of age to intercept and record an oral communication if:*
>
> > *the child is a party to the communication and has reasonable grounds to believe that recording the communication will capture a statement by another party to the communication that the other party intends to commit, is committing, or has committed an unlawful* ***sexual*** *act or an unlawful act of physical force or violence against the child.§ 934.03(2)(k), Fla. Stat. (2021).*

Smiley v. State, 279 So.3d 262 (Fla.App. 1 Dist., 2019)

Defendant did not have a subjective expectation that statements made in victim's home were not subject to interception, and thus statements recorded on victim's cell phone were not protected by wiretap statute from admission in prosecution for aggravated assault by threat with deadly weapon and domestic violence battery, where cell phone video showed defendant saw cell phone in victim's hand and knew he was being recorded, defendant tried to snatch phone from victim's hand, and defendant made statements suggesting he knew he was being recorded.

Smith v. State, 261 So.3d 714 (Fla.App. 5 Dist., 2018)

Recording of a phone conversation, which was recorded using an app on mother's cell phone, between defendant and child's mother that occurred on the day of child's death was prohibited by wiretap statute, and thus inadmissible in first-degree murder prosecution, even though defendant admitted to officer that he knew mother recorded phone conversations, where there was no evidence that defendant gave mother permission to record the conversation or that he had reason to know that she would record the call.

State v. Caraballo, 198 So.3d 819 (Fla.App. 2 Dist.,2016)

Defendant did not have a reasonable expectation of privacy in recorded statements made to employer, and thus recording was admissible at trial

for grand theft based on defendant's alleged act in taking money from employer, where statements occurred at a sales counter in an area that was open to the public, not in a private office, and the business was open to the public at the time the recording was made, there was a sign at the front of the store notifying everyone who entered that the business had constant video and audio surveillance, cameras inside the store were in visible locations, and defendant admitted she was aware of the cameras.

Belle v. State, 177 So.3d 285 (Fla.App. 2 Dist.,2015)

Defendant, who took cell phone from his girlfriend after she informed him she was going to record conversation, and then inadvertently recorded himself trying to molest girlfriend's 12-year old daughter, failed to demonstrate an expectation of privacy in the recording sufficient to justify its exclusion under statute the prohibited use as evidence of intercepted wire or oral communications, in prosecution for attempted lewd or lascivious molestation of a child under the age of twelve; the cell phone was in defendant's custody at the time of the recording, and there was no evidence girlfriend intentionally intercepted the portion of the recording that took place when she was gone.

McDade v. State, 154 So.3d 292 (Fla. 2014):

Defendant's conversations with his stepdaughter in his bedroom, that were recorded surreptitiously, and during which he confirmed child sexual abuse and solicited sex with her, were "oral communications," and were "uttered by a person exhibiting an expectation that his communication was not subject to interception," and thus recordings fell within statute prohibiting interception of oral communications without consent of all parties to the communication, and were inadmissible as evidence in prosecution for sexual battery on a child less than 12 years of age and other offenses.

Testimony of victim's boyfriend that victim told him she was being raped by defendant when she was younger was hearsay, and thus was inadmissible in prosecution for sexual battery on a child less than 12 years of age and other offenses.

Nunn v. State, 2013 WL 2494161 (Fla. 4th DCA 2013):

Generally, municipal law enforcement officers can exercise their law enforcement powers only within the territorial limits of the municipality.

Just as an arrest, made in good faith reliance upon the law, is not deemed unlawful when a law is subsequently determined to be unconstitutional, the investigatory acts of an officer outside of his or her jurisdiction should not be deemed unlawful if during the investigation the officer has a good faith belief that the crime occurred within his or her jurisdiction.

Officer's recording of controlled telephone call was not rendered unlawful under Florida Security of Communications Act when it was discovered by defendant's admissions that all defendant's crimes occurred in another county beyond officer's jurisdiction, where officer had a good faith belief, based on victim's statements, that she was investigating a crime which may have been committed within her jurisdiction when the controlled call was made.

Mead v. State, 31 So.3d 881 (Fla.App. 4 Dist.,2010)

Law enforcement officer's verbal authorization to arson victim to record conversation with defendant, who was the primary suspect for the crime, that occurred after officer's authorization, outside officer's presence, was sufficient to render the victim's interception of telephone conversation between her and defendant lawful under statute declaring it lawful for law enforcement officer or person acting under the direction of law enforcement officer to intercept communication when such person is a party to the communication or a party has given prior consent to interception and purpose of interception is to obtain evidence of criminal act, and, thus, recording was admissible in arson prosecution; language of statute did not require police involvement or presence during recording process.

Gutierrez v. State, 967 So.2d 322 (3rd DCA 2007):

Defendant who was convicted of three counts of lewd and lascivious battery on a child less than 16 years of age was not prejudiced by trial court's error in allowing jury to use, in the jury room during deliberations, a transcript of a recording of a controlled telephone call between defendant and victim's friend, and thus such error was harmless; defendant did not object to use of the transcript on the basis of its accuracy, transcript was an accurate reflection of the recording jury heard at trial, including the labeling of inaudible portions of the recording, and transcript

was relevant to help jury in listening to the recording, in which defendant incriminated himself three times.

Transcript of recording of controlled telephone call between defendant and friend of victim was properly authenticated so as to permit its use at trial on charges of lewd and lascivious battery on a child less than 16 years of age; friend who participated in the call testified that she reviewed the original recording, an enhanced recording, and the transcript and that they were an accurate depiction of the conversation she had with defendant, and friend assisted in preparation of the transcript.

Trial court's factual finding, at trial on charges of lewd and lascivious battery on a child less than 16 years of age, that victim's friend was not coerced into making controlled telephone call to defendant was not clearly erroneous, and thus recording of call was admissible at trial, even though friend testified that she felt a bit of pressure to make the call; friend also testified that she was not forced to make the call.

Atkins v. State, 930 So.2d 678 (Fla. 4th DCA 2006):

Conversation was not taped for purpose of obtaining evidence of criminal act, and thus, was inadmissible under wiretap statute; person recorded on phone was not even witness to alleged sexual battery but instead encountered alleged victim after incident, recording conversation was not for purpose of obtaining evidence of criminal act, and even if officer's direction to alleged victim was to record calls of suspects or anyone else who was trying to influence or threaten or coerce her, that did not include conversations from concerned friends who happened to be at party.

A conversation surreptitiously recorded with a mere witness is not the type of conversation allowed under wiretapping statute.

Good faith exception did not apply to permit introduction of illegally intercepted wiretap communications, thus tape recording was inadmissible to impeach person recorded; prohibition of wiretapping statute was absolute.

Discussion: The victim was sexually battered at a party. After the party her friend called her to discuss the event and apparently told her she believed it happened. At trial, the friend testified she did not believe the victim. The State introduced a tape the victim made of the conversation to impeach the friend. When the officer directed the victim to tape any phone calls from the defendant or of those trying to intimidate her, that

directive did not apply to the current situation. The court notes that violations of F.S. 934 require suppression without exception.

State v. Sobel, 743 So.2d 38 (Fla. 5th DCA 1999):

Purpose of deputy's telephone conversation with defendant's friend was to obtain evidence of abuse of defendant's daughter, and thus consent of only one party to conversation was required for conversation to be admissible at trial for failing to protect daughter and for tampering with a witness; conversation was part of deputy's efforts to locate child, whose testimony was critical in the case

Discussion: This case presents a unique perspective in this area. F.S. 934.03(2)(c) allows a police officer to tape a phone call when one party consents as long as it's purpose is to obtain evidence of a criminal act. In this case, a child abuse victim recanted her allegations and the detective was unable to locate her to follow up on the investigation. Since the family was of no help, he enlisted one the victim's friends to call the victim's mother and attempt to obtain information as to the victim's whereabouts. During the conversation, the mother made incriminating statements which led to charges against her, such as tampering with a witness and failure to protect. The defense moved to suppress the statement, arguing that the purpose of the call was not to obtain evidence of a criminal act. The appellate court said that finding the victim was essential to the criminal investigation and therefore fell within the language of the statute.

Thompson v. State, 731 So.2d 819 (Fla. 5th DCA 1999):

Recording of telephone conversation between defendant and child victim, which recording was obtained under statute governing interception and disclosure of wire, oral, or electronic communications, was admissible in sex offense prosecution, even though police department failed to give notice to State Attorney in Illinois county where defendant lived that telephone conversation between defendant and victim was going to be recorded, where victim and victim's mother consented to recording of communication.

Commerford v. State, 728 So.2d 796 (Fla. 4th DCA 1999):

Police officers' actions in failing to obtain warrant and having victim surreptitiously record conversation with defendant prosecuted for lewd assault on minor under 16 did not violate defendant's Fourth Amendment rights, in light of victim's testimony that she agreed with police to record

her conversation with defendant for the purpose of obtaining evidence of his lewd assault upon her.

Trial court did not abuse its discretion in admitting partially inaudible tape recording in prosecution for committing lewd assault on minor under the age of 16, as tape clearly revealed sufficient relevant portions that were audible to justify its admission, including portion where defendant asked if victim would like to have sex "again," and victim herself testified that tape was a fair and accurate representation of the conversations she had with defendant.

Discussion: The court ruled that such recordings are admissible unless the inaudible and unintelligible portions are so substantial as to deprive the remainder of relevance. The court ruled that a "jury may view an accurate transcript of an admitted tape recording as an aid in understanding the tape so long as the transcript does not go back to the jury room or become a focal point of the trial."

State v. Stout, 693 So.2d 657 (Fla. 4th DCA 1997):

Trial court erred in suppressing taped telephone conversation between defendant and victim of alleged sexual batteries. Interception made at direction of law enforcement officer, and with consent of one of the parties to telephone conversation, complied with statutory requirements. Defendant had no reasonable expectation of privacy in telephone conversation with victim.

Discussion: Since this procedure is frequently utilized in sex offenses, you should be familiar with this opinion. Detective Don Scarbrough from the Broward County Sheriff's Office investigated this case which alleged that the victim was sexually assaulted by her mother's boyfriend more than ten years previously. The victim now lives in Georgia. Detective Scarbrough contacted Georgia authorities and had them monitor a telephone call between the victim and Mr. Stout. During this call, Mr. Stout made some incriminating statements. Judge Sheldon Schapiro suppressed the tape of the telephone call, concluding that article I, section 23 of the Florida Constitution required the police to obtain an order of authorization pursuant to F.S. 934.07 prior to the interception of the telephone conversation.

CORPUS DELICTI REQUIREMENT

State v. Tumlinson, 2016 WL 6810975 (Fla. 2d DCA Nov. 18, 2016)

In prosecution for lewd or lascivious molestation of child, State did not present independent evidence corroborating trustworthiness of statements in defendant's handwritten journal regarding his alleged sexual abuse of minor child and his subsequent oral and written statements to law enforcement, and, thus, statements were not admissible under statute governing admissibility of confessions, where only evidence offered by State were statements themselves and defendant's admission that he authored statements.

Even though the statute governing admissibility of confessions in sexual abuse cases replaces the corpus delicti rule with the trustworthiness doctrine and does not require independent proof of each element of the crime in order for a confession to be admitted, there must be some evidence that tends to establish the type of harm for which the defendant is being criminally charged.

Ramirez v. State, 2014 WL 996524 (Fla.App. 1 Dist.)

In proving corpus delicti, in regard to the second part of the required proof, the criminal agency of another, the proof need not show the specific identity of the person who committed the crime; that is, it is not necessary to prove that the crime was committed by the defendant.

Child victim's testimony and statements during interview with child protection team interviewer, to effect that a man had inserted his fingers in her vagina when she was four years old, adequately established corpus delicti of charged offenses of sexual battery and lewd or lascivious molestation, as predicate for admission of defendant's confession without determination of trustworthiness thereof.

Defendant's conviction for lewd or lascivious molestation violated prohibition against double jeopardy, where conviction was based upon single act of digital penetration which also formed basis of sexual battery conviction.

Allen v. State, 2011 WL 3903163 (Fla.App. 4 Dist.)

Since the state could not prove the corpus delicti of the crime concerning sexual battery victim, the state had to prove by a preponderance of evidence that there was sufficient corroborating evidence that tended to establish the trustworthiness of the defendant's confession.

Statute making confessions in sexual abuse cases admissible without the need for the State to prove the existence of all the elements of the crime if

the confession is determined to be trustworthy eliminates the state's burden of establishing the corpus delicti of the crime as a predicate to admitting the defendant's confession into evidence.

Despite fact that the state was unable to establish the corpus delicti for the crime of sexual battery of a child, sufficient evidence established that defendant's confession was trustworthy, for purposes of admissibility of confession at trial on charge of sexual battery under statute making confessions in sexual abuse cases admissible without need for the State to prove existence of all elements of the crime; defendant gave statement in which he confessed to sexual relations with victims, defendant subsequently wrote letter of apology to victims, defendant's oral statement included several indicia of trustworthiness that would have been unknown to anyone other than the criminal, and victim corroborated defendant's confession.

Hobbs v. State, 999 So.2d 1025 (Fla. 2008):

A trial court may consider a victim's recantation when determining whether the state is unable to prove the existence of the elements of the crime for purposes of admitting a statement under the statute governing the admissibility of confessions in sexual-abuse cases; disapproving Kelly v. State, 946 So.2d 591. F.S. 92.565.

Tanzi v. State, 964 So.2d 106 (Fla. 2007):

State submitted sufficient proof of corpus delicti of sexual battery charge to admit evidence of defendant's confession to such offense during penalty phase of capital murder trial for purposes of establishing murder in the course of felony aggravator; defendant confessed to forcing victim to perform oral sex under a threat to cut her throat with a razor and that he ordered her to stop when her loose teeth had lessened his pleasure, medical examiner determined that victim's teeth were in fact loose, a towel containing defendant's semen was found in victim's van, the location defendant indicated the oral sexual battery took place, and razors were discovered in victim's van.

Discussion: The defendant argued that the trial court did not make the requisite findings required by F.S. 92.565, but the appellate court noted that the trial judge admitted the evidence under traditional corpus delicti law and thus, the section 92.565 were not required.

Hernandez v. State, 946 So.2d 1270 (Fla. 2d DCA 2007):

Questions that nurse, who performed sexual assault examination on child, directed to child and her parents, were functional equivalent of police interrogation, thus statements by child and her parents to nurse were testimonial in nature, such that child and parents absence at trial violated defendant's right to confrontation; nurse was member of child protection team (CPT), which by statute, was arm of law enforcement, CPT worked in concert with police in connection with investigation of alleged sexual assault on child, primary purpose of sexual assault examination was to gather facts for use in potential criminal prosecution, and there was no ongoing emergency when nurse conducted her examination of child.

Statements made to a law enforcement officer or other government official are testimonial if the primary purpose for which the statements are made is to provide information about past events for later use in a criminal prosecution; in short, statements made in response to official interrogation have a testimonial aspect when the purpose of the exercise is to nail down the truth about past criminal events.

Trial court's finding that defendant's confession in sexual abuse cases was trustworthy without first making specific findings of fact required by statute governing admissibility of confession in sexual abuse cases was error; trial court did not specify what it had heard at suppression hearing that led it to conclusion that defendant's statements were trustworthy, trial court merely recited language of statute instead of making case-specific findings on critical issue of trustworthiness, and trial court's repetition of boilerplate language of statute was insufficient. Section 92.565.

Discussion: Child victim made sexual abuse allegations and then disappeared to Mexico with his family. The defendant confessed to offense. The State tried to go forward using the defendant’s confession pursuant to 92.565 and the testimony of the CPT worker who interviewed the child. The appellate court ruled that the child hearsay statement was barred under Crawford v. Washington because it was testimonial in nature and that the judge did not make a sufficient finding of reliability to introduce the defendant’s confession. It should be noted that the appellate court ruled that the court could have considered the CPT worker’s testimony for purposes of the 92.565 hearing, but not at trial.

Kelly v. State, 946 So.2d 591 (Fla. 1st DCA 2006):

Error to admit defendant’s confession where state did not independently establish corpus delicti.

Statutory exception to corpus delicti rule in sexual abuse cases was not applicable where state was unable to establish elements of offense because victim refused to cooperate with prosecution.

Prerequisite to application of statutory exception is prosecution's inability to independently prove the crime due to some disability of part of victim.

Bradley v. State, 918 So.2d 337 (Fla. 1st DCA 2005):

A defendant's confession is admissible in evidence under statute making confessions in sexual abuse cases admissible without the need for the State to prove the existence of all the elements of the crime if the confession is determined to be trustworthy only if: (1) the offense qualifies as a sexual abuse case; (2) the state is unable as a result of some disability on the part of the victim to prove an element of the crime; (3) the state has proven that the defendant's confession is trustworthy; and (4) the trial court has made specific findings of fact on the issue of trustworthiness.

Statute making confessions in sexual abuse cases admissible without the need for the State to prove the existence of all elements of the crime if the confession is determined to be trustworthy applied to capital sexual battery case involving 11-year-old victim, regardless of whether victim's age was the reason state could not prove all elements of crime; statute created bright-line exception to the requirement that State prove an inability to show all the elements of the crime for victims under 12, and fact that statute stated that victim's age "may" be relevant simply signified that other factors could also justify application of statute, not that victim's age did not suffice. http://web2.westlaw.com/find/default.wl?DB=1000006&DocName=FLSTS92%2E565&FindType=L&AP=&mt=Florida&fn=_top&sv=Split&vr=2.0&rs=WLW6.03 *See 92.565*http://web2.westlaw.com/find/default.wl?DB=1000006&DocName=FLSTS92%2E565&FindType=L&AP=&mt=Florida&fn=_top&sv=Split&vr=2.0&rs=WLW6.03

Sufficient evidence established that defendant's confession that he placed his hand and mouth on 11-year-old victim's penis was trustworthy, for purposes of admissibility of confession at trial on charge of capital sexual battery under statute making confessions in sexual abuse cases admissible without the need for the State to prove the existence of all elements of the crime; police detective who heard confession testified that it was made freely and voluntarily, nothing in record suggested that confession was not free and voluntary, and victim's testimony was entirely consistent with confession, except that confession added a detail that victim might not have been able to perceive.

Geiger v. State, 907 So.2d 668 (Fla. 2d DCA 2005):

> Evidence was insufficient to establish that sexual battery on a mentally defective person had occurred, and thus, defendant's confessions would have been inadmissible at trial; although defendant had opportunity to engage in criminal conduct, no independent evidence established that crime occurred or that defendant's admissions to criminal conduct were trustworthy, only defendant's statements confessing to sexual battery suggested that any crime occurred, and clinical psychologist stated that defendant's confessions were suspect.
>
> Discussion: This case discusses the application of F.S. 92.565. The case has a very good discussion of the history of corpus delecti and is a good resource for researching the topic.

State v. Lena, 819 So.2d 919 (Fla. 3rd DCA 2002):

> Florida Statute 92.565 is only applicable to the charged offense, not previous offenses, therefore, defendant's written statement that he had molested the victim several years earlier should not have fallen under statute.

B.P. v. State, 815 So.2d 728 (Fla. 5th DCA 2002):

> Although trial court recognized that it is no longer necessary under section 92.565 to establish corpus delicti in sex offenses, trial court failed to comply with requirements of statute where court failed to conduct hearing in which it considered whether state could otherwise show the existence of each element of offense and whether purported admission was trustworthy.
>
> "The court found no corroborating evidence tending to establish the trustworthiness of the admission. Since the victims were able to testify effectively about the alleged oral sex, their failure to even mention the event "admitted" by appellant case doubt that such even occurred."

Peterson v. State, 810 So.2d 1095 (Fla. 5th DCA 2002):

> State established trustworthiness of confession by preponderance of evidence, as required by section 92.565, which permits admission of confession under certain circumstances in absence of independent establishment of corpus delicti. Defendant's confession was remarkably consistent with the victim's allegations and statements to her mother and the Child Protection Team which she made very shortly after the alleged

crime took place, and the results of her physical examination were consistent with her allegations of sexual contact.

Claim that statute should not be retroactively applied to crime which occurred prior to effective date of statute not reached by appellate court because it was not raised at trial.

State v. Dionne, 814 So.2d 1087 (Fla. 5th DCA 2002):

F.S. 92.565, which authorizes the admission of a defendant's confession when there is no corpus delicti, does not violate ex post facto laws because it is a rule of evidence that addresses the question of admissibility rather than the quantum of evidence required for a conviction.

CREDIBILITY OF VICTIM:

Alvarado-Contreras v. State, 2020 WL 7062658 (Fla.App. 2 Dist., 2020)

In trial for sexual battery, testimony of defendant's girlfriend, who was also victim's sister, that defendant's girlfriend's daughter had caused victim's former husband to be jailed and deported after accusing him of sexual battery, was admissible to impeach the victim with evidence of victim's bias, and thus, trial court erred in excluding the testimony on grounds that defendant was seeking to admit evidence of victim's prior bad acts to suggest victim lacked credibility; defendant was not seeking to admit bad acts evidence to attack victim's credibility, instead, the testimony was offered to prove the victim had a reason to be biased against her sister and, by proxy, against defendant.

In trial for sexual battery, probative value of testimony of defendant's girlfriend that her sister, the victim, had reason to be biased against her and, by proxy, defendant because girlfriend's daughter had caused victim's former husband to be jailed and deported after accusing him of sexual battery, was not outweighed by any danger of confusion or unfair prejudice; reasonable jurors could have readily understood defense theory that victim was attempting to visit upon her sister what she had suffered as result of perceived fabrication against her husband by her niece, and the testimony would not have cast victim in such bad light as to cause prejudice that outweighed defendant's right to admit relevant evidence.

LaMore v. State, 2020 WL 5265589 (Fla.App. 2 Dist., 2020)

Defendant was convicted of a sexual act upon a child. His defense was that the mother of the child used to threaten to have him thrown in prison for the rest of his life just like she did her previous husband. She said her daughter would testify to whatever she told her to say. The jury did not buy the defense and convicted him. Subsequent to his conviction he filed a motion for a new trial based on newly discovered evidence. The new evidence consisted of another man who said the woman made a similar threat to him years earlier. The trial court said this was hearsay, but the appellate court said that since it was being used solely to establish a motive to fabricate, it was admissible. "An out-of-court statement not offered to prove the truth of the facts contained therein but to indicate the motive or bias of a witness does not constitute hearsay when offered for impeachment purposes."

Hawn v. State, 2020 WL 4198178 (Fla.App. 4 Dist., 2020):

Ten-year-old victim testified her mother's boyfriend touched her legs, butt and private area. When she first reported it to her grandmother, she said he only touched her legs and butt. Trial court refused to allow defense counsel to cross examine the victim regarding her failure to tell her grandmother that the defendant touched her private. The appellate court ruled that this was a significant detail that would have naturally been revealed to the grandmother and it was error for the trial court to disallow the cross examination. This negative impeachment went beyond nit-picking and was material to the case.

Note: This is an especially important case to understand. Victims rarely reveal all the facts when they are first interviewed and often reveal more details with time. These issues should be anticipated before trial and the victim should be prepared to adequately respond to such a cross-examination. Simply objecting to negative impeachment may result in reversal.

Smith v. State, 2020 WL 1429597, at *1 (Fla. Dist. Ct. App. Mar. 24, 2020)

Trial court improperly admitted taped statement of defendant in which detectives repeatedly vouched for the credibility of the child victim. Such comments should have been redacted. The following remarks were listed as improper comments vouching for the victim's credibility:

- *"I can tell you once again from experience it's in her brain because it happened."*
- *"But I'm going to tell you right now, I believe that your [ ] licked someone's pee-pee. I wholeheartedly believe that ..."*
- *"It's not within the realm of what a [ ] year old would come up with."*
- *"And I can tell you she's not lying. She's not lying about this. She did not make this story up."*
- *"Once again, a [ ] doesn't make this stuff up."*

- *"Very descriptive. Very detailed, not something that comes out of a [ ] year-old's mouth."*

Washington v. State, 2019 WL 5302591 (Fla.App. 1 Dist., 2019)

Trial court did not abuse its discretion at trial for sexual battery on a person less than 12 years of age by a person over 18 years of age by excluding testimony of witness who had interviewed victim three to four years prior to trial, during investigation by Department of Children and Families, regarding victim's advanced familiarity with sexual activity; evidence was remote and not related to the criminal charge, and jury was informed by other means that victim possessed knowledge of sexual activity not normally known by a person her age.

Teachman v. State, 2019 WL 73515 (Fla.App. 1 Dist., 2019)

The rape shield law does not exclude evidence that would otherwise be admissible under the Florida Evidence Code; instead, the rape shield law is a codification of Florida's relevance rules as applied to the sexual behavior of victims of sexual crimes.

A defendant's right to full and fair cross-examination, guaranteed by the Sixth Amendment, may limit rape shield law's application when evidence of the victim's prior sexual conduct is relevant to show bias or motive to lie.

Probative value of evidence of minor victim's sexual relationship with boyfriend was substantially outweighed by risk of unfair prejudice and was precluded from admission under rape shield law in defendant's trial for sexual battery and lewd and lascivious molestation of a child; although defense counsel mentioned that family member believed victim "made the allegations up because [she] and her boyfriend got caught doing what they weren't supposed to be doing," there was no evidence that sexual nature of victim's relationship with her boyfriend was critical to theory of defense.

Macomber v. State, 2018 WL 4139254, (Fla.App. 1 Dist., 2018)

Appellant was convicted of capital sexual battery and lewd molestation based on evidence that he sexually abused his girlfriend's seven-year-old daughter, K.M. The evidence admitted at trial included K.M.'s trial testimony and her partially redacted pre-trial interview. The State successfully filed a motion in limine prohibiting the jury from hearing portions of K.M.'s testimony where she said every time the defendant

molested her, he molested his own daughter at the same time. The defendant's daughter had given statements saying she never witnessed the molestations and was never molested herself. The appellate court reversed the conviction and ruled the jury should have heard this portion of the victim's testimony and the daughter's denial of it. The court said this information was inextricably intertwined with the victim's testimony and should have been admitted. The court distinguished this situation from other appellate decisions where the victim's false allegations about third parties were successfully excluded.

Stevenson v. State, 2017 WL 6598636 (Fla.App. 1 Dist., 2017):

Trial court did not err in allowing child victim of sexual abuse to sit in a chair in front of jury box during his testimony.

Scott v. State, 2017 WL 1718804, (Fla.App. 3 Dist., 2017)

The victim briefly testified that, as a result of the defendant's abuse, she tried to commit suicide. The court ruled that this information was relevant and did not require reversal.

The case law has consistently held that the behavioral changes of a victim following the alleged sexual abuse is probative of whether the sexual abuse occurred.

CPT counselor testified she recommended the victim "go to the Kristi House for therapeutic services for help—help with her victimization and for DCF to look into the safety of the other children in the home, their concern for the mother's ability to protect the other children." The court ruled that this statement did not improperly vouch for victim's credibility.

Pineda v. State, 2017 WL 697728 (Fla.App. 3 Dist., 2017):

Both the lead detective and the prosecutor commented that the victim did not have a motive to lie. The court ruled that this was not vouching for the credibility of the victim under the circumstances of this case and any error was invited.

The court pointed out that defense attorney is guilty of the same conduct he arguing in his appeal:

> *In fact, the only improper bolstering was by defense counsel who expressed his own opinion about the credibility of the witnesses and the innocence of the defendant.*
>
> *Defense Counsel: You heard from Jesemy [a defense witness]. You can make a determination of whether she is credible. I don't think that Jesemy Placeres would come in here and say anything but the truth in a case of this magnitude about children. She will not—you make a credibility call. I don't think she is capable of doing that.*
> ....
> *Defense Counsel: My client is completely innocent. My client is the victim in this case and you know what really bothers me, throughout the litigation, which makes the hairs of the back of my head stand up, when they say to you or anybody else, why would she make this up with a serious face?*

Granados v. State, 2016 WL 4379036 (Fla.App. 4 Dist.,2016)

> Prosecutor's cross-examination of defendant as to why child victim would make such "outrageous lies" about sexual abuse by defendant did not impermissibly shift burden of proof to defendant, in trial for sexual battery by person 18 of age upon person less than twelve years of age, where defendant had attacked victim's credibility based on her delay in reporting abuse and discrepancies in her various statements.

Sandoval v. State, 2016 WL 4132011 (Fla.App. 4 Dist.,2016)

> Probative value of evidence on cross-examination that complainant had undertaken unsuccessful self-induced abortion that resulted in birth of child with disabilities was substantially outweighed by danger of unfair prejudice, in trial for sexual battery while in familial or custodial authority and lewd and lascivious molestation; probative value of such evidence to show complainant's motive to fabricate accusation of sexual abuse by defendant while she lived with mother and defendant and that she resented him for encouraging her not to get abortion was marginal at most, given that child was not defendant's, pregnancy occurred several years after sexual abuse, complainant accused defendant of sexual abuse several years after she had child, and defendant had no authority to prevent her from getting abortion.

Lenz v. State, 2016 WL 231496, (Fla.App. 4 Dist.,2016):

It was improper for State to ask defendant on cross-examination in lewd molestation trial if the victim had a motive to lie when the defendant never attacked the credibility of the victim.

Court erred in allowing State to play jail calls where defendant told his wife that he wanted a private attorney who "knew all the loopholes."

Gutierrez v. State, 2015 WL 3887354 (Fla. 2015)

Special jury instruction providing that testimony of alleged sexual battery victim needs "no corroboration" is improper, as misleading to jury and bolstering the victim's testimony by according it special status, regardless of whether defense counsel has pointed out to the jury that no other witness has corroborated the victim's account.

Cavaliere v. State, 2014 WL 4671450 (Fla.App. 2 Dist.)

Police detective and 11-year-old victim's teacher improperly vouched for victim's credibility at trial on charge of lewd and lascivious molestation of a person less than sixteen years of age, thereby usurping the jury's role; detective testified that based on victim's age, and "looking at her and kind of getting a feel for her" he could tell that she was acting appropriately and that her accusations against defendant were not a joke to her, and teacher testified that victim was happier and "seemed like a ton of bricks" had been "lifted off her shoulder" after she told teacher what defendant had done.

Haspel v. State, 2014 WL 3605610 (Fla.App. 4 Dist.)

Investigating detective did not give an improper opinion as to defendant's guilt at trial on charges of sexual battery of a child under the age of 12 by giving an affirmative answer when asked whether he had determined, during the course of his investigation, "that the alleged incidents occurred as early as" particular year; question and answer could not be construed as detective giving his opinion on defendant's guilt, but rather question merely sought to establish the earliest date the alleged incidents occurred, since time was relevant to the issue of the victim's age.

Prosecutor's multiple references to victim as "damaged" during closing argument at trial on charges of sexual battery of a child under the age of 12, to which defendant did not object, were not an improper appeal to the jury for sympathy for the victim, so as to constitute fundamental error; much of the damage referred to by prosecutor was a description of victim's

psychological state caused by other harmful events in her life, such as abuse by defendant and by her prior step-father, and being disbelieved by her grandmother when she tried to report defendant's abuse, and prosecutor used these events to explain why victim did not seek help when she was young and the abuse started.

Pierce v. State, 2014 WL 1696141 (Fla.App. 2 Dist.)

Victim's interview with detective during which she initially stated that she did not observe any scars on defendant's body after he undressed and then later stated that he may have scar on his chest but that she was not sure because it had been long time ago constituted prior inconsistent statement admissible as negative impeachment evidence to attack victim's credibility, in order to support defendant's claim that victim fabricated allegations, after victim testified that she saw scars on defendant's abdomen and shoulder that were visible only when he removed shirt, in trial for lewd and lascivious battery and lewd and lascivious molestation.

Anderson v. State, 2014 WL 996486 (Fla.App. 1 Dist.):

Proposed impeachment of victim as to type of clothing she was wearing at time of sexual battery was impermissible impeachment on a collateral issue; evidence was not relevant to any issue in the case as it did not reflect on defendant's guilt or innocence, and victim's alleged false characterization of her clothing did not show bias, corruption, or lack of competency as a witness.

Two types of evidence pass the test for impeaching a witness's credibility with proof by other witnesses that material facts are not as testified to by the witness being impeached: (1) facts relevant to a particular issue, and (2) facts which discredit a witness by pointing out the witness's bias, corruption, or lack of competency.

Ramayo v. State, 2014 WL 768862 (Fla.App. 3 Dist.):

Admission of pediatrician's testimony and written examination report of child, who was alleged victim of molestation, regarding pediatrician's diagnosis of sexual abuse based on history provided by child was not harmless error, where physical examination of child disclosed no physical findings supporting allegations that sexual abuse had occurred; physician was not allowed to opine directly on child's credibility or otherwise vouch for her truthfulness, and state failed for meet burden of showing that pediatrician's improper bolstering of child's testimony did not contribute to jury's guilty verdict.

Carlisle v. State, 2014 WL 1225200 (Fla.App. 4 Dist.)

Defendant charged with sexual battery on a child while in a position of familial or custodial authority could cross examine alleged victim as to recantation of previous sexual abuse allegations against defendant under statute permitting impeachment by showing that the witness is biased; allowing cross-examination would conceivably support defendant's allegations that victim had a motive to lie to gain attention or avoid punishment, since the victim's prior allegations of abuse were against defendant, the manner of abuse was similar, and police had acted on victim's past allegations of abuse.

Evidence of victim's prior recantation of allegations of sexual abuse against defendant was relevant in prosecution of defendant for sexual battery on a child while in a position of familial or custodial authority under rule permitting evidence of similar crimes, wrongs, or acts to show specific reasons why victim may have fabricated allegations of sexual abuse.

Probative value of evidence of victim's recantation of prior allegations of sexual abuse against defendant in prosecution of defendant for sexual battery on a child while in a position of familial or custodial authority was not substantially outweighed by danger of unfair prejudice.

Keum San Yi v. State, 2013 WL 6331660 (Fla.App. 5 Dist.)

Trial court should not have allowed law enforcement officer to testify as to his opinion of victim's credibility at trial on charges including lewd and lascivious molestation; victim's credibility was critical to the case, and officer's testimony invaded the province of the jury to determine witness credibility.

Prosecutor's argument, during closing argument at trial on charges including lewd and lascivious molestation, that victim was the only witness to testify who was present at the time of the alleged events, was improper; argument was susceptible of being viewed as a comment on defendant's exercise of his right to remain silent.

Harrell v. State, 2013 WL 1007283 (Fla.App. 5 Dist.):

Evidence that the victim was a prostitute may be admissible if it is offered to show the victim consented to sex with the defendant.

Remand was required for post-conviction court to consider petitioner's claim that trial counsel was ineffective in failing to call witness, who would have testified that victim was a known prostitute who routinely traded sex for drugs or money with defendant and other men, and admitted to witness that she had falsely accused defendant of rape because he refused to give her more drugs and money when she asked for it; evidence that victim was a prostitute was admissible to show that victim consented to sex with defendant, and witness's statements were non-hearsay and admissible to show bias.

McPhee v. State, 37 Fla. L. Weekly D2765 (Fla. 3rd DCA 2012):

Evidence of victim's prior false accusations of sexual abuse, which defense sought to introduce to show victim's prior sexual knowledge, was inadmissible in prosecution for sexual activity with a child by a person in custodial authority and unlawful sexual activity with a minor; victim's character was not an essential element of the defense or charge.

Louis v. State, 2012 WL 5870078 (Fla.App. 4 Dist.)

Defendant could not attempt to impeach the victims' testimony through a deputy who interviewed the victims, in prosecution for sexual battery upon a person younger than 12 and lewd or lascivious molestation upon a person younger than 12; if defendant wanted to impeach the victims' testimony and cast doubt on their credibility, then he needed to be done while each victim was on the stand, pursuant to statute governing prior statements of witnesses.

Elmer v. State, 37 Fla. L. Weekly D2393 (Fla. 2d DCA 2012):

Initial police investigation report that included statements from complainant that suggested the sex abuse commenced after she had turned 12 years old was admissible as a prior inconsistent statement that could be used to discredit or impeach complainant's testimony, in prosecution for capital sexual battery on a child less than twelve years old.

Evidence of a defendant's continued sexual abuse of the same victim after the victim turned twelve years old may be admitted as similar fact evidence in prosecution for capital sexual battery on a child less than twelve years old.

Charriez v. State, 2012 WL 3870369 (Fla.App. 5 Dist.)

Prosecutor misstated the law as it related to reasonable doubt when, during closing argument, she suggested that, if the jurors believed the victim, they would have to convict defendant of lewd or lascivious battery.

Prosecutor made an improper appeal to the jurors' community conscience by suggesting, during closing argument that they had a communal duty to convict defendant of lewd or lascivious battery in order to protect the community.

Woods v. State, 2012 WL 2913176 (Fla.App. 4 Dist.)

Statement of alleged minor victim, who was defendant's granddaughter, that "Grandpa didn't do nothing" was admissible as prior inconsistent statement for purposes of attacking alleged victim's credibility in prosecution for sexual battery on a person less than 12 years of age; statement was, on its face, inconsistent with extensive details of molestation to which she testified at trial.

Under statute providing that a witness's credibility may be attacked by introducing prior inconsistent statement of the witness, the inconsistent statement is not hearsay, because it is not offered to prove its truth, only to show the inconsistency for impeachment purposes.

Powell v. State, 37 Fla. L. Weekly D428 (Fla. 5th DCA 2012)

Trial court erred when it denied defendant the opportunity to cross-examine her son regarding the details of his juvenile probation, which defendant contended to be the motive for her son's fabrication of facts that served as a basis for the charge of felony child abuse.

Manetta v. State, 2012 WL 555418 (Fla.App. 3 Dist.)

In the absence of an adverse adjudication on prior claims of abuse, mere accusations of similar abuse against others by a State witness are inadmissible in prosecution for child sexual abuse.

Pantoja v. State, 36 Fla. L. Weekly S91 (Fla. 2011):

Statute governing use of criminal convictions for impeachment of witnesses does not permit impeachment of a witness with evidence of a prior accusation that did not result in a criminal conviction.

In prosecution for sexual battery and lewd or lascivious molestation, minor victim's prior false accusation of molestation against her uncle was not admissible under statute allowing impeachment of a witness by showing that witness was biased; evidence did not establish motive for victim to lie about abuse, but rather merely showed that victim previously accused uncle of inappropriately touching her and that no one believed her or acted on her allegation.

In prosecution for sexual battery and lewd or lascivious molestation, minor victim's prior false accusation of molestation against her uncle was not admissible under statute governing use of specific instances of witness's conduct to prove character, where victim's character was not essential element of defense or charge; disapproving *Jaggers v. State*, 536 So.2d 321.

Trial court's exclusion of evidence of minor victim's prior false accusation of molestation against her uncle did not violate defendant's constitutional right to confront witnesses in prosecution for sexual battery and lewd or lascivious molestation; prior accusation was not against defendant, victim testified that she did not recant prior accusation against uncle, and victim's accusation against uncle involved one-time incident involving "over-the-clothes" groping, whereas her accusation against defendant involved "under-the-clothes" sexual acts that occurred on multiple occasions.

Ortuno v. State, 36 Fla. L. Weekly D471 (Fla. 1st DCA 2011):

Admission of victim's prior consistent statements, made during Child Protection Team (CPT) interview, was erroneous because the motive to falsify did not arise after that interview; victim had been removed from her mother's home and was living with another family when CPT interviewer conducted interview with victim, victim liked living with this family, victim believed that perhaps she could avoid return to her mother's home by claiming she had been molested by defendant, victim had same motivation, or bias, at time she spoke with interviewer as when she testified at trial, and because victim's prior consistent statements were not made, as required by law, prior to time that motive to fabricate existed, they should not have been admitted.

Green v. State, 36 Fla. L. Weekly D533 (Fla 5th DCA 2011):

Evidence that alleged victim of sexual battery posted photographs of herself posing with dancers at a male strip club was inadmissible at defendant's trial, despite contention that the evidence impeached victim's testimony as to the impact on her life of her encounter with defendant, where defendant did not proffer evidence establishing that the photographs were taken and posted after the alleged offense.

During the cross-examination of A.M. by Green's counsel, A.M. began to cry. Defense counsel asked her why she was crying, and she responded:

> *Because it hurts me. Every single morning, when I have to wake up in the morning I don't be around men no more. I don't talk to nobody no more. It just screwed me up so bad and emotionally. I can't sleep in the bedroom without my door being locked and no one being home.*

Defense counsel subsequently tried to admit images gathered from victim's MySpace page showing her getting groped by male strippers. The court ruled that if the defense had been able to prove that the pictures were taken after the assault, they would have been admissible, but the defense failed to do so.

Cupas v. State, --- So.3d ----, 2011 WL 611815 (Fla. 4th DCA 2011):

"We find no abuse of discretion in the trial court's ruling that any probative value in evidence concerning the victim's prior suspension from school and the incremental punishment of the school's disciplinary system was substantially outweighed by the danger of unfair prejudice and thus affirm as to this ground as well."

Barnett v. State, 35 Fla. L. Weekly D2269 (Fla. 3d DCA 2010):

Molestation defendant was not entitled to ask victim's mother in the defense case regarding child's alleged recantation of allegations against defendant, as the question called for hearsay and when the child victim was on the stand, the defense did not ask the victim about the alleged recantation, and thus failed to lay the proper foundation for impeachment by inconsistent statements.

Molestation defendant was not entitled to mistrial based on prosecution's closing argument that child victim's story "never changed," even though State had successfully objected to admission of evidence that the victim had recanted her allegations against defendant, where the gist of the State's

argument was that each time the victim gave a statement, her description of how the touching took place was the same.

Harvey v. State, 35 Fla. L. Weekly D2124 (Fla. 4th DCA 2010):

Defendant charged with unlawful sexual activity by a person 24 years of age or older with a person 16 or 17 years of age was not entitled to impeach victim with his allegedly false claim that, on a separate occasion, he had had sexual intercourse with an adult woman other than defendant.

Note: There is a conflict among the various DCAs on this issue, so the case has been certified to the Florida Supreme Court.

Espinoza v. State, 35 Fla. L. Weekly D1280 (Fla. 4th DCA 2010):

Defendant accused of sexual battery on a child under 12 years of age was not entitled to attack victim's credibility with previous statements made by victim at pretrial deposition, where victim had recounted four incidents involving defendant, while at trial, she recounted only three and acknowledged that she had earlier described a fourth incident but could not recall the details; victim's inability to remember was not inconsistent with her prior statement.

Pantoja v. State, 990 So.2d 626 (Fla. 1st DCA 2008):

Trial court properly excluded evidence that victim recanted a prior accusation against another person.

Evidence was properly excluded under rule that a witness' credibility may not be attacked by proof that she committed specific acts of misconduct that did not end in a criminal conviction.

Discussion: The victim in a sexual battery/lewd molestation case testified at her deposition that, "I told my aunt [C.M.D.] once about Juan touching me, but I guess she might have gotten mad at my uncle and said that he did it to Nanna because my nanna will believe anything." She later recanted this statement. Defense counsel tried to have this evidence introduced to impeach the victim. The court ruled that you cannot impeach a witness with specific acts, but indicated that if the circumstances surrounding the false allegation had been substantially similar to the present case, they may have reached a different result. The court certified conflict on this issue with *Jaggers v. State*, 536 So.2d 321 (Fla. 2d DCA 1988).

Fehringer v. State, 976 So.2d 1218 (Fla. 4th DCA 2008):

> Defense counsel should have been allowed to proffer minor victim's testimony regarding prior accusation of sexual assault she made against another man, even where victim did not previously recant allegation, in prosecution for lewd or lascivious conduct committed on victim less than 16 years old by offender 18 years old or older; prior accusations could have cast doubt on current one by, for example, being remarkably similar in content, or made against person similar to defendant, and state's argument that defense counsel should not have been permitted to go on "fishing expedition," was not recognized ground for denying proffer if proposed fishing expedition was reasonably related to issues at trial.
>
> No error in denying defendant's motion in limine regarding defendant's conduct in text messaging, tickling, and telling victim to "take it out in trade," because these acts were not evidence of collateral crimes, but were relevant evidence admissible as part of, or inextricably intertwined with, the crime charged.

Parker v. State, 32 Fla. L. Weekly D2417 (2d DCA 2007):

> A defendant facing sexual abuse allegations is entitled to impeach a child witness with evidence that he or she had previously made accusations of sexual abuse and later admitted that they were false.

Roebuck v. State, 953 So.2d 40 (Fla. 1st DCA 2007):

> Evidence that child victim had previously falsely accused her brother of physical abuse was not admissible in prosecution for lewd and lascivious battery; plain language of statute authorized impeachment of witness with only prior convictions and there was no "false reporting" exception written into or considered by statute, previous false accusation did not involve defendant, false report concerned dissimilar crime, proffered evidence did not establish a motive on victim's part to lie about charged offense, and evidence could not be admitted based on witness's character since victim's character was not essential element of defense or charge.

Felton v. State, 949 So.2d 342 (Fla. 4th DCA 2007):

> Defendant was entitled at trial for false imprisonment, attempted sexual battery, and other offenses to cross examine victim, for impeachment purposes, about fact that victim was on methadone at time of incident, even though expert testimony was lacking on effects of methadone on a person's ability to perceive; victim's drug use at time of incident might have impacted her capacity or ability to observe incident.

State opened door, in prosecution for false imprisonment, attempted sexual battery and other offenses, to defendant's proposed cross examination of victim, for impeachment purposes, about victim's use of methadone at time of incident; the state portrayed victim in a misleading way on direct examination, in that the state painted a picture of victim and her boyfriend, as innocent lovebirds, who traveled to Florida for a family vacation, but in reality, victim and her boyfriend were heroin addicts who moved to Florida to receive treatment at a methadone clinic.

Emelien v. State, 952 So.2d 1261 (Fla. 4th DCA 2007):

Defendant opened door to officer's testimony that officer believed the truthfulness of statements made by victim in response to police questioning, and thus officer's testimony was not fundamental error in prosecution for improper exhibition of a deadly weapon; defense counsel had been critical of officer during opening statements because officer did not contact defendant before concluding that charges should be filed, and officer's testimony was made in response to state's question as to whether he believed the victim, as such belief would explain why officer failed to contact defendant before filing charges.

Discussion: This is not a sex crimes case, but the issue could easily be presented in one.

Tarner v. State, 938 So.2d 635 (5th DCA 2006):

Testimony of defendant's mother and alleged victim's friend that alleged victim was aware of pornographic pictures of herself and defendant, thus contradicting victim's assertion that victim never had consensual sex with defendant, was not hearsay; testimony was offered to impeach testimony of victim and show why victim was not trustworthy, not to prove truth of matter asserted.

Date on which alleged victim learned of existence of pornographic photos of herself and defendant was material fact, and thus, testimony of defendant's mother and alleged victim's friend that alleged victim was aware of photos was admissible to impeach testimony of victim; defendant argued that victim falsely accused him of nonconsensual sex to placate boyfriend, so defendant's argument would be more plausible if victim was aware of photos prior to date on which her boyfriend saw photos, if jury believed victim was aware of photos prior to when she claimed, her claim of nonconsensual sex would be undermined by fact that she voluntarily chose to move back in with defendant, and prosecutor specifically argued

that victim did not contact police prior to date, because date was first learned of photos.

State v. Taylor, 928 So.2d 473 (Fla. 1st DCA 2006):

Certiorari review of order allowing admission of minor victim's pretrial testimony, indicating that she might have told someone that her biological father had not sexually abused her, was not warranted, even if trial court, when denying state's in limine motion, erred in finding that such testimony constituted recantation of her prior abuse allegations; evidence was arguably admissible in any event as relevant to victim's credibility, bias, motive, or interest.

Minus v. State, 901 So.2d 344 (Fla. 4th DCA 2005):

Evidence of note written by complainant, who had dated defendant for seven years, to defendant was admissible to impeach complainant's testimony that her relationship with defendant had ended in kidnapping and sexual battery prosecution; on note complainant had written, from "my 1st love" to "your 1st love."

Evidence of letters written by sexual battery complainant, who had dated defendant for seven years, to defendant and trial judge was relevant to issue of complainant's credibility in kidnapping and sexual battery prosecution; letters were inconsistent with complainant's allegations and could have been used to impeach her testimony, letter intimated that complainant may have accused defendant of rape for him to get help for his problems in jail and that relationship with complainant was not completely over as she claimed, and letter to judge stated that complainant was pressured to continue prosecution by her family, which was consistent with defense theory of her motive for making allegations.

Evidence of complainant's allegations that defendant raped her on two prior occasions after which complainant, who had dated defendant for seven years, continued to spend time with defendant and buy him gifts and celebrated her birthday with defendant was relevant to issue of bias and credibility of complainant as well as to issue of consent in kidnapping and sexual battery prosecution.

Evidence of complainant's mother's refusal to permit complainant to live in home while her relationship with defendant continued was relevant to show bias or motive for complainant's allegations of sexual battery against defendant, who dated complainant for seven years.

Evidence of prior sexual relationship between complainant and defendant who had dated for seven years was relevant to issue of consent in kidnapping and sexual battery prosecution.

The defendant's right to full and fair cross-examination, guaranteed by the Sixth Amendment, may limit rape victim shield statute's application when evidence of the victim's prior sexual conduct is relevant to show bias or motive to lie.

Evidence of prior sexual relationship between complainant and defendant who had dated for seven years was admissible under rape-shield law in kidnapping and sexual battery prosecution as it involved claims of prior sexual conduct between complainant and defendant, not third person.

Reeves v. State, 862 So.2d 60 (Fla. 1st DCA 2003):

Trial court did not err in prohibiting cross-examination of child victim of sexual offense regarding prior false accusations of sexual misconduct that victim had made against her father where victim had not recanted her statements.

Court did not err in prohibiting attack of victim's credibility by cross-examining her with regard to her statement that she saw Jesus in order to show that victim did not have the ability to perceive the difference between fantasy and reality.

Section 90.611 does not permit evidence to be admitted that discloses witness's practice of unconventional or unusual religion.

Discussion: The court distinguished other decisions that allowed cross-examination concerning prior false allegations because those cases involved recantations of the accusations by the victim. In this case, the victim never recanted her other allegations. In reference to the religion issue, the girl testified in her deposition that when she told her mother what happened to her, she saw Jesus standing in the room, demons were cast out of her, and she rolled on the floor and "spit out the evil that Uncle Dan Put in me."

State v. Lalor, 842 So.2d 217 (Fla. 5th DCA 2003):

Victim's testimony that she went to sleep and woke up to find defendant having nonconsensual intercourse with her was legally sufficient to defeat motion for judgment of acquittal.

Error to grant motion for judgment of acquittal based on defendant's apparent candor or victim's inability to remember large portions of the evening in question.

In moving for a judgment of acquittal, a defendant admits all facts and evidence adduced at trial, and all reasonable inferences that maybe drawn from such evidence must be viewed in light most favorable to the state.

Kelso v. State, 840 So.2d 1111 (Fla. 1st DCA 2003):

Fact that another man was later arrested charged, convicted, and sentenced for committing similar acts on the same victim and admitted having an ongoing relationship with the victim could not have been known at time of trial.

Evidence was material to verdict where jury essentially had to decide whether it believed victim or defendant, and state argued the jury should believe victim because there was no way she could have known about the things described unless defendant had actually done them to her and victim had no incentive to lie.

Discussion: The defendant made a motion for new trial based upon newly discovered evidence. In ruling that the court should have had an evidentiary hearing on the matter, the appellate court noted that the State portrayed the child as a naïve, innocent victim who could not possibly describe the terrible things the defendant did to her if they had not actually happened.

Alvarez v. State, 817 So.2d 1037 (Fla. 3rd DCA 2002):

Testimony from victim's friend that victim told her that her father paid her to say the defendant molested her was not hearsay because it was not offered to prove the truth of its contents.

Discussion: The court did not indicate the relevance of the statement. I can't imagine the defense attorney did not want the jury to believe the truth of the matter asserted.

Baker v. State, 804 So.2d 564 (Fla. 1st DCA 2002):

Any error in excluding defendant's proffered evidence that victim had falsely accused others of sexual crimes against her in the past would be harmless beyond reasonable doubt given undisputed evidence in record establishing that defendant admitted having sex with victim.

Discussion: This case presents a rather interesting discussion about appropriate methods of impeachment. The court notes that the general rule is that a witness can only be impeached with reputation evidence or specific types of crimes. There is an exception, however, when a victim has a history of making false allegations. This evidence evidently goes toward bias and motive. The court indicated that if the defendant had denied the sexual acts took place, it would have been reversible error to exclude the evidence. Since the defendant admitted to the sexual act, any potential error was harmless.

Paul v. State, 790 So.2d 508 (Fla. 5th DCA 2001):

Investigator for child protection team, who was not an expert, improperly vouched for minor victim in sexual battery case by stating that victim was honest and that victim had no motive to lie.

Even if the defense implied through argument or cross-examination that the victim had a motive to lie, the prosecution cannot ask a witness to vouch for the credibility of the victim.

Discussion: The court noted that the victim's character relating to truthfulness may be supported by reputation evidence when appropriate, and his or her prior consistent statements may be admitted to rebut a charge of fabrication, but the testimony of a witness cannot be bolstered by another witness vouching for his or her credibility based solely on personal observation. The main point to gather from this case is that you cannot introduce such testimony simply because the defendant "opened the door."

Trainor v. State, 768 So.2d 1123 (Fla. 2d DCA 2000):

No error in failure to admit sexual battery victim's hospital records and other mental health records supposedly bearing on his credibility when defense counsel failed to offer sufficient proffer of relevance.

Discussion: Prior to trial, the State agreed that the jury was entitled to know that the victim was diagnosed as severely emotionally disturbed, that he had a prior diagnosis of attention deficit disorder, and that he was currently on Prozac. Defense counsel, however, tried to admit the victim's Charter Hospital records, where he was treated pursuant to the Baker Act, and the victim's other mental health records associated with the hospitalization which had occurred two years before the date of the offense. Defense counsel did not present evidence of the relevance of the records, but proffered their relevance to the court. The court noted the primary deficiencies in the defense proffer:

1. Counsel did not argue that the victim's records showed that his mental capacity would in any way affect the truth or falsity of his testimony. Psychiatric testimony suggesting the victim's propensity to tell the truth was affected by his or her mental and emotional condition is relevant and admissible to impeach his or her credibility.

2. Counsel did not argue that the victim's records would show that he suffered from a mental condition at the time of the incident or at the time of trial and that such condition affected his ability to observe, remember, and accurately recount the matter about which he testified.

Washington v. State, 766 So.2d 325 (Fla 4th DCA 2000):

No abuse of discretion in denial of motion for new trial on ground that police officer vouched for truth of victim's testimony during his testimony on redirect examination, where defense opened door to line of testimony on cross examination, and officer did not testify that he in fact believed victim's statements.

Fella v. State, 754 So.2d 165 (Fla. 5th DCA 2000):

Error in giving nonstandard jury instruction on credibility of witnesses, which stated that jury should attempt to resolve any conflicts in testimony without attributing untruthfulness to any witness, was harmless.

Scott v. State: 730 So.2d 732 (Fla. 2d DCA 1999):

Evidence about juvenile probationary status of juvenile who is key prosecution witness has probative value to show that witness has motive to testify so as to please authorities who have discretion over juvenile's status.

Defense should have been allowed to question alleged victim about her juvenile probationary status in trial for committing a lewd and lascivious act in the presence of a child younger than 16 years of age; alleged victim's credibility was crucial given that there were no other witnesses to alleged crime and no physical evidence connecting defendant to alleged crime, and alleged victim had been adjudicated delinquent of a felony and was on probation at time of trial.

Scurry v. State, 701 So.2d 587 (Fla. 2d DCA 1997):

Trial court should have conducted *in camera* review of victim's HRS records where records may have contained information relevant to victim's credibility and ability to remember.

Discussion: According to this case, you should not let a judge simply refuse to allow the defense an opportunity to review the child's HRS records, but should insist that he conduct an *in camera* review. In this case, the attorney for HRS offered to allow the judge to inspect the records, but he did not. The appellate court noted that the defense request was probably just a fishing expedition, the review should have been done nonetheless.

Moise v. State, 700 So.2d 438 (Fla. 4th DCA 1997):

No error in denying motion requesting appointment of expert to review victim's deposition and statement to police, where defendant made no showing as to why issue of victim's credibility would warrant appointment of an expert.

Credibility of witnesses is matter normally within ordinary expertise of defense counsel in criminal case.

Appointment of expert not warranted where it was undisputed that victim had been abused, and defendant admitted to police he had abused victim.

State v. McLellan, 696 So.2d 928 (Fla. 2d DCA 1997):

Improper for prosecutor to comment on victim's credibility by stating in closing argument "I would think common sense should also tell you, that when somebody goes to a doctor they're honest."

Discussion: This case was a one on one indecent assault case in which the victim claimed she was digitally penetrated. There was no corroborating physical evidence. The prosecutor tried to use the statement the child gave to the examining physician to bolster her credibility. The physician did not testify. The appellate court jumped all over the prosecutor in this case for giving his inappropriate opinion that people who go to the doctor tend to tell them the truth. It is interesting to note that the grievous sin committed by the prosecutor has been codified in the evidence code in section 90.803(4), which is entitled "Statements for purposes of medical diagnosis or treatment." This exception to the hearsay rule was created because people usually tell their doctor the truth. Obviously, there are some flaws in this observation, but it is interesting nonetheless.

Correia v. State, 695 So.2d 461 (Fla. 4th DCA 1997):

Expert witness was not testifying beyond her area of expertise when she opined that child victim's statement was congruent with statements of children who had actually been abused. Such testimony is admissible even though, by its very nature, it tends to bolster credibility of victim.

Contention that expert crossed the line during course of her testimony and improperly vouched for victim's credibility not preserved for appeal by specific objection.

Claim that methodology used by expert in validating victim's accusations was not generally accepted in relevant scientific community not preserved for appeal by objection.

Discussion: The primary value of this case is to teach defense attorneys how to make appropriate objections to expert testimony. The expert in this case was Rachel Carroll, a counselor for the Coral Springs Police Department. She was declared as an expert "in the field of interviewing children who have made allegations of sexual abuse." It was her opinion that the victim's statement was consistent with the statement of an abused child. Her interviewing technique and validation methodology follow the teachings of Dr. Suzanne Sgroi, who wrote a book in which she describes a "conceptual framework for child sexual abuse." This framework can be used in validating claims of sexual abuse.

The appellate court indicated that objections to either improperly vouching for a victim's credibility or failure to pass the *Frye* standard may have been appropriate, but since they were not made at trial they will not be considered on appeal. In conclusion, this form of testimony may or may not be admissible depending on the form of objection.

Rhue v. State, 693 So.2d 567 (Fla. 2d DCA 1996)

Counsel was ineffective in failing to object to testimony and comments vouching for credibility of child sexual battery victim.

A line of questioning that results in a clear impression that a counselor believes the victim was telling the truth constitutes an impermissible vouching for the victim's credibility.

Discussion: Although no objection was made by defense counsel, the appellate court chose to reverse the defendant's conviction based on ineffective assistance of counsel. Several examples of the prosecution's improper comments on the victim's credibility were cited by the court. These examples should give you a good feel for where the problems lie in

this area. A psychologist who examined the child testified that he has previously assessed children whom he has found to be not credible. He testified that in such cases he has advised the State Attorney's Office the child was not credible, but not in this case. The State compounded this error by stressing the point in closing argument.

The child's mother inappropriately testified that, after the child related the incident to her, she asked him if it really happened and she looked him right in the face "because when you look him in the face, you can tell." She also testified that the child does not make up stories and then stick with them. The child's grandmother inappropriately testified that the child may tell lies about small things, such as whether he has eaten all his food, "but never would he lie. We try to stress to him to tell the truth." The child's great-grandmother, when asked if the child had been injured in the incident, state, "[The child] injured? Why, he wouldn't lie."

The court also found error in the prosecutor's cross-examination of the appellant. The prosecutor asked the appellant if state witnesses had been lying during their testimony. The prosecutor also elicited testimony from the appellant that, from the victim's voice, it sounded as if he was telling the truth on his tape-recorded statement to police.

Kearney v. State, 689 So.2d 1310 (Fla. 5th DCA 1997):

Trial court erred in failing to admit evidence tending to prove bias or motive on part of victim's father. Statement by victim's brother who would have testified that father said once defendant, the live-in boyfriend of victim's mother, was out of the way, the family would be back together again, was not hearsay, since it was not offered to prove that the family would be reunited if defendant were out of the way.

Mills v. State, 681 So.2d 878 (Fla. 3rd DCA 1996):

No error in refusing to allow defense to elicit from detective statements made by victim which were allegedly inconsistent with statements made by victim on cross-examination where defense counsel had not laid proper foundation for introduction of such statements by asking victim whether she had made a specific oral statement to police which was allegedly inconsistent with her trial testimony.

Discussion: This is a very valuable case to have with you in trial. The opinion provides a very good discussion on the issue of when it is proper to impeach a witnesses with extrinsic evidence on a collateral matter. This rule of law rarely seems to surface after law school, but it is still applicable and you should educate your judge as to its meaning. Several

authorities are cited in the opinion which should be read to fully understand this issue.

Skyles v. State, 670 So.2d 1084 (Fla. 4th DCA 1996):

Error to refuse to permit defendant to recall child victim of sexual assault for further cross-examination where, after victim had testified, defense counsel learned that victim had recently told a playmate that sexual battery claim against defendant was a fabrication.

Stinfil v. State, 668 So.2d 671 (Fla. 4th DCA 1996):

Investigating deputy's testimony that he felt child victim was telling the truth did not amount to fundamental error and may not be considered on appeal in absence of objection at trial.

CRIMINAL TRANSMISSION OF HIV

Debaun v. State, 2017 WL 1024526 (Fla., 2017) *disapproved L.A.P.*

Term "sexual intercourse," as used in statute making it felony for someone infected with human immunodeficiency virus (HIV) to have sexual intercourse with person without informing them of infection, was not limited to penile-vaginal intercourse and, instead, encompassed oral and anal intercourse; term was not defined in statute, dictionary definitions of term encompassed acts beyond penile-vaginal intercourse, purpose of statute was to prohibit HIV-positive individuals from engaging in sexual acts most likely to transmit infection, which included oral and anal sex acts, without informing partner of presence of infection, and incest statute was aimed at preventing certain pregnancies, such that its definition of term was inapplicable.

L.A.P. v. State, 2011 WL 2279018 (Fla. 2d DCA 2011) *overruled*

Evidence was insufficient to establish that defendant, who was HIV-positive, engaged in sexual intercourse with her partner, and thus evidence was insufficient to support conviction for engaging in sexual intercourse without informing her partner of her HIV status; defendant engaged in oral sex and digital penetration of the vagina, and sexual intercourse was defined as an act where the male's sexual organ was placed inside the female's sexual organ.

DANGEROUS SEXUAL FELONY OFFENDER

Acevedo v. State, 2015 WL 4549626 (Fla. Dist. Ct. App. July 29, 2015)

Evidence supported finding that sex offense defendant qualified as a dangerous sexual felony offender (DSFO), as his predicate conviction contained elements similar to the offense of lewd or lascivious battery, lewd or lascivious molestation; the DSFO statute required similar elements, not identical elements, both statutes proscribed the lewd or lascivious touching of a child, they both required the victim to be under a certain similar age, both statutes were second degree felonies, and in 1981, the defendant was charged with coercing an 11–year–old boy to allow the defendant to perform oral sex on him, which conduct was proscribed by the current lewd or lascivious battery statute.

Felder v. State, 2013 WL 3238157 (Fla. 5th DCA 2013)

Prior conviction for attempted sexual battery was not a qualifying felony conviction supporting sentencing under Dangerous Sexual Felony Offender Act; statute clearly intended to exclude consideration of a prior conviction for an "attempted" offense.

Abrams v. State, 971 So.2d 1033 (Fla. 4th DCA 2008):

Dangerous Sexual Felony Offender (DSFO) statute was not facially unconstitutional as violative of procedural due process; defendant was on notice of increased penalty attached to his criminal conduct, he had notice and opportunity to be heard on his sentence, and statute did not contain provision placing burden on state to prove prior qualifying conviction required by act, nor did it state degree of proof.

Committing lewd or lascivious conduct did not qualify defendant for sentencing pursuant to Dangerous Sexual Felony Offender (DSFO) statute.

DEFENDANT'S COMMENTS

Bearce v. State, 731 So.2d 157 (Fla. 5th DCA 1999):

Error in admitting evidence of sexual acts engaged in by third parties which was contained in transcribed interview with defendant, was not preserved for appeal where no objection was made until after transcript of statement had been given to the jury.

Admission of Defendant's confession that he had engaged in other lewd acts with victim was harmless error in view of confession to sexual activity offense.

Garner v. State, 729 So.2d 90 (Fla. 5th DCA 1999):

State employee interviewing defendant regarding civil child protection matter was not required to advise defendant of his right to attorney, or to warn defendant that his statements could be used against him in proceedings brought by Department of Children and Family Services to protect abused children, where there were no such proceedings in place.

Marchina v. State, 702 So.2d 1369 (Fla. 1st DCA 1997):

Error to permit state to elicit testimony from defendant concerning nature of unrelated charges pending against him where any legitimate probative value was clearly and substantially outweighed by danger of unfair prejudice.

Discussion: The state offered evidence that the defendant left town the evening of the sexual assault. The defendant testified on direct that he left town because he heard that two girls in the trailer park had been raped and when he saw police car in front of his residence he "thought it was going to be the same stuff" because he "had trouble with them about two months before this…." The defendant indicated that the prior trouble was an arrest and pending case on unrelated charges. On cross-examination, the court ruled that the defendant opened the door and the state was allowed to elicit the fact that the charges involved little girls. The appellate court ruled that the nature of the charges may have been relevant, but the probative value was clearly outweighed by the prejudice.

Carter v. State, 687 So.2d 327 (Fla. 1st DCA 1997):

Error to admit testimony, in prosecution for lewd and lascivious assault upon a child less than sixteen years of age, that defendant had commented, "If you're old enough to bleed, you're old enough to breed," where statement was offered solely to show that defendant was sort of person who would molest a 13-year-old girl.

Discussion: The defendant had made this statement to the victim's aunt shortly before the incident. The defendant and the aunt had been discussing the issue of sex and young girls, but were not speaking about this specific victim. The prosecutor argued at a suppression hearing that the statement showed the defendant "was willing to commit this kind of crime, and that's exactly what he did just a short time after he made the

statement." The court ruled that this statement shows that the State offered the statement solely to show that appellant is the sort of person who would molest a 13-year-old girl. It was thus, inadmissible character evidence. In a footnote, the court noted that this is not *Williams Rule* evidence, because "The statement here is one of belief, and does not involve past behavior, in the form of other crimes, wrongs or acts."

DEFENSE TACTICS

Roman v. State, 2015 WL 2393275 (Fla.App. 4 Dist.):

Court improperly excluded evidence that suggested wife had motive to coach child victim to make allegations of sexual abuse against father.

Here, the proffered testimony may not have gone to a material fact, but the defendant wanted to use the proffered testimony to develop reasonable doubt. His theory was that the mother coaxed the child to make up the molestation charges so that the mother could be free to date other men. The proffered testimony would have been used to prove that upon the defendant's arrest, the mother immediately began dating, used the defendant's money for plastic surgery, and married as soon as her divorce was final, within months of the defendant's arrest. Thus, there was a "possibility of a tendency of evidence to create a reasonable doubt."

Lee v. State, 899 So.2d 348 (Fla. 2d DCA 2005):

Trial counsel's failure to investigate medical evidence presented at trial and its relationship to victim's prior allegations of abuse was ineffective assistance of counsel, in prosecution for capital sexual battery prosecution; there were no eyewitnesses or direct physical evidence of abuse, testimony from physician added weight to victim's story, counsel made insufficient efforts to discover if there were other explanations for victim's condition, and if counsel had made reasonable investigation, he could have been in better position to advise his client on whether to proceed to trial immediately, seek continuance, or agree to plea bargain.

Discussion: The pediatrician testified that the victim had a nodule indicating that h hymen had bee torn and formed a scar as it healed. He testified that hymen was abnormal and showed signs of repeated

penetration consistent with the victim's story. At the post conviction hearing, physicians testified that the doctor's evaluation was no longer acceptable.

Adams v. State, 783 So.2d 1226 (Fla. 5th DCA 2001):

Where the only defense offered by defendant was that he did not intend to cause injuries to child, not that some other person caused or contributed to child's injuries, trial court properly denied defendant the opportunity to cross-examine child's mother as to her potential bias or improper motive for testifying on behalf of state, including mother's involvement in dependency proceeding regarding parties' son.

Reed v. State, 783 So.2d 1192 (Fla. 1st DCA 2001):

No abuse of discretion to refuse to allow a current viewing or current photographic evidence of victim's wounds where evidence was not relevant to question of whether wounds had occurred and not necessary to impeach.

Even if evidence were relevant, there was no basis for trial court to require viewing in absence of a showing that strong compelling reasons existed for jury to be permitted to view current wounds where refusal to allow viewing did not impinge on defendant's constitutional right to due process and viewing would have merely corroborated pediatrician's testimony that wounds had almost completely faded.

Where defendant did not object to standard jury instruction which did not adequately define "maliciously," but did not totally fail to address the element of malice, defendant failed to preserve issue for appeal. Question Certified regarding whether fundamental error occurred.

Discussion: The defendant was charged with aggravated child abuse: "did commit an aggravated battery upon and/or willfully torture or maliciously punish" the victim, a child under the age of 18 by repeatedly hitting her with a stick and/or an electrical cord. The trial took place approximately 2 years after the offense. The defense attorney wanted the victim to pose before the jury to show that the marks had substantially healed. The court ruled that this was irrelevant, and even if it was relevant, the defendant did not show the required "strong or compelling reasons" to require the victim to do so.

Alvelo v. State, 769 So.2d 476 (Fla. 5th DCA 2000):

No error in refusal to permit defendant to fully inquire into violent nature of victim's father in order to establish that victim fabricated charge against defendant out of fear of his father.

No error in refusal to allow defendant to put on character evidence that defendant had reputation for not committing lewd acts on children.

Cook v. State, 736 So.2d 739 (Fla. 5th DCA 1999):

Trial court, in prosecution for committing a lewd or lascivious act in the presence of a child under the age of 16 years, properly excluded evidence concerning statements made to defendant by victim's mother, prior to the filing of the instant charges, threatening to file criminal charges against the defendant if he sought to obtain custody of victim's half-sister in a pending paternity action, as such evidence was hearsay, and defendant failed to submit any evidence indicating that the victim had been influenced in any way by her mother to testify about defendant's repeated criminal conduct.

Mackey v. State, 703 So.2d 1183 (Fla. 3rd DCA, 1997):

No error in excluding evidence about child victim's mother to support defense that mother was responsible for injuries resulting in child's death where defendant's main defense was that defendant inadvertently fatally injured child while administering cardiopulmonary resuscitation to child after child had suffered accidental injuries.

Bauta v. State, 698 So.2d 860 (Fla. 3rd DCA 1997):

Trial court properly sustained state's objection to defense counsel's questions seeking to insinuate that victim's brother could be source of digital penetration where there was no reasonable basis for defendant to suggest that police should have investigated brother. The questions were irrelevant and potentially seriously misleading.

DEPOSITIONS:

Davis v. State, 2011 WL 4809847 (Fla.App. 1 Dist.)

Defendant pled guilty to sexually abusing 13-year-old victim and then tried to take her deposition in preparation of sentencing. The State filed a protective order, claiming that the defendant did not have a right to take depositions once he had pled. The court ruled with the State. The Appellate court ruled that defendants have a right to take depositions at any critical stage.

Trial court erred by failing to exercise its discretion, through conducting a balancing test, when evaluating whether to allow defendant to depose victim in preparation for sentencing on charge of sexual conduct, but this error was harmless, given that issue of consent was fully addressed in victim's police statement and defendant's testimony at sentencing hearing; court should have evaluated State's motion for a protective order by weighing possibility that deposition would uncover evidence pertinent to sentencing against such factors as victim's young age and emotional state, and court should have considered defendant's ability to obtain evidence regarding consent from other sources, and it was difficult to see how deposing victim would have revealed new information concerning issue of consent.

Defendants have a right to conduct discovery at any critical stage of a criminal proceeding, and court should treat discovery disputes at any such stage in the same manner as those brought at trial.

J.S. v. State, 35 Fla. L. Weekly D2158 (Fla. 4th DCA 2010):

Trial court did not abuse its discretion in delinquency proceeding by denying juvenile's motion to conduct a second deposition of the victim after State amended the charges against juvenile from lewd and lascivious conduct to lewd and lascivious molestation; victim was asked, and answered, questions at her first deposition concerning whether juvenile touched her breasts, buttocks, genitals, or the clothing covering them, and defense counsel's failure to ask about certain other matters that he should have covered was not good cause for subjecting victim to a second deposition.

Rein v. State, 711 So.2d 615 (Fla. 3rd DCA 1998):

No merit to defendant’s contentions in relation to improper denial by court of use of videotaped depositions during cross-examination of youthful prosecution witnesses.

Olson v. State, 705 So.2d 687 (Fla. 5th DCA 1998):

Error to exclude evidence as to victim’s previous hospitalization for mental problems, and his mother’s long-standing involvement in victim rights organization for victims of sexual abuse. The evidence was relevant on the issue of credibility.

Oral and unrecorded statements of witnesses to a state attorney are privileged as work product and not subject to discovery.

Investigations by state attorneys to determine whether or not to file a sworn information are not subject to discovery by oral deposition; such discovery would require disclosure of work product and seriously impede criminal prosecutions. If not subject to discovery, such statements surely cannot be sought by a fishing expedition at trial.

The Rules of Discovery provide for discovery of written or recorded witness statements, thus, if not written or recorded, they are not discoverable.

Discussion: This case makes very entertaining reading. Defense counsel called the prosecutor who initially filed the case and the prosecutor who later amended the information as defenses witnesses. He was attempting show that the victim gave inconsistent stories, but ended up with two prosecutors telling the jury how credible the victim was and how they believed in the defendant's guilt. This was ruled reversible error even though the defense counsel started the whole mess. The appellate court did provide us some good language, however, when they ruled that the trial court never should have let the defense counsel call the prosecutors as witnesses.

Marin v. State, 684 So.2d 859 (Fla. 5th DCA 1996):

Any error in permitting state to impeach with deposition of witness under age sixteen was harmless where audio tape of deposition clearly demonstrated that witness, whose mother was present throughout the deposition, was not intimidated or mistreated in any fashion.

DISCOVERY:

McDonald v. State, 2023 WL 4479575 (Fla.App. 4 Dist., 2023)

There was reasonable probability that defense's trial preparation or strategy in child pornography prosecution would have been materially different had not trial court permitted state to produce previously undisclosed records from email service provider, which linked email account to defendant by name and phone number, as rebuttal evidence to defendant's testimony that email account was not his, and thus defendant was procedurally prejudiced, warranting reversal; undisclosed records directly impeached defendant's testimony that he never had an account

with provider and damaged his credibility, and, had such records been disclosed, defense counsel would have discussed them with defendant, who might have chosen to pursue a different defense theory or chosen not to not testify.

Prosecutor's comment during closing argument at child pornography trial that websites used by defendant were primarily for trading illegal child pornography was improper, where evidence that most people using these websites did so for such purpose was never developed during trial.

State v. Juarbe, No. F21-7195, 2021 WL 4847013 (Fla.Cir.Ct., Miami-Dade County Oct. 12, 2021)

In a capital sexual battery case, the state requested the trial court to order defense counsel to return his/her copy of the child forensic interview at the conclusion of the case. The state argued that inadvertent disclosure of the video would cause great harm to the victim. Defense counsel objected and said the video interview should remain part of the client's file. After analyzing the pros and cons, the trial court ruled although risk of inadvertent disclosure was small, potential harm to the victim was great. The court ordered defense counsel to return the video at the conclusion of the case.

Horn v. State, 2020 WL 6156056, (Fla.App. 1 Dist., 2020)

Defendant argued the Sate committed Brady violations by failing to turn over certain documents in a child sexual abuse case. In one incident, it was learned that DCF investigators had made notations that the child was not particularly credible. The court ruled that since this evidence would not have been admissible at trial, it was not a Brady violation. The defense also argued that DCF had unfounded prior allegations by this child. Once again, the court ruled this was inadmissible evidence. Prior unfounded allegations in police reports were likewise inadmissible.

Bess v. State, 2017 WL 127646 (Fla.App. 5 Dist., 2017)

Nurse practitioner in lewd battery case offered expert opinion testimony establishing that the lack of vaginal injury is not unusual in rape cases. Since State did not list her as an expert, court committed reversible error by not doing a Richardson hearing.

Moore v. State, 2014 WL 1094549 (Fla.App. 5 Dist.)

Trial court erred in prosecutions for capital sexual battery by requiring defendant to propound written interrogatories to two Child Protection Team members who had been designated by the State as Category A witnesses as a condition to trial court's consideration of defendant's motion to depose the witnesses; rules of criminal procedure did not contemplate such a discovery device, and requiring use of the device placed an undue burden on the defense.

Elghomari v. State, --- So.3d ----, 2011 WL 408833 (Fla. 4th DCA 2011)

State committed no discovery violation when it described during its opening statement two incidents of molestation that, although charged in the information, were not previously referenced or identified in the victim's statements provided as part of the discovery process; statements were oral, defendant was charged with the incidents, information was filed well before the victim's deposition, and defense counsel had the opportunity to ask specific questions about those two counts.

Discovery rules do not require state to disclose unrecorded oral statements.

State's failure during victim's deposition to indicate that defense counsel had overlooked the molestation in two counts did not amount to a discovery violation, although they were not previously referenced or identified in the victim's statements provided as part of the discovery process.

Trial court abused its discretion in admitting irrelevant testimony by the victim's mother regarding the weakening of mother's sexual relationship with defendant around the time he abused the victim in prosecution for sexual battery and lewd molestation.

Error in admission of testimony by the victim's mother regarding the weakening of mother's sexual relationship with defendant around the time he abused the victim was harmless, where testimony was an insignificant part of the trial, and State made only brief, isolated references to the testimony during closing argument.

Landry v. State, 931 So.2d 1063 (4th DCA 2006):

Trial court was required to hold a *Richardson* hearing on whether the state committed a discovery violation by failing to disclose a statement that defendant allegedly made to victim, even though trial court, after victim testified to disputed statement, asked whether defense counsel had taken victim's deposition; trial court could not know by its limited inquiry whether a discovery violation had occurred, and only through Richardson hearing could determinations be made on whether the state intended to elicit victim's testimony on disputed statement or whether the state knew of disputed statement before victim testified.

Discussion: At the defendant's child abuse trial, the following exchange took place between the prosecutor and the victim, the defendant's daughter:

> State: Have I or anyone-has anyone asked you to tell a lie about this, [victim]?
> [Victim]: Yes.
> State: Who?
> [Victim]: My dad.

When the defendant objected that this was a discovery violation, the judge simply asked if the victim had been deposed. The court ruled that this was an inadequate *Richardson* hearing.

Bell v. State, 930 So.2d 779 (Fla. 4th DCA 2006):

State had obligation under discovery rule to disclose to defendant prior to trial that child victim's trial testimony would differ from that which she gave at her deposition, to extent that she would effectively admit to perjury at deposition, in prosecution for sexual battery on a child and other offenses, as state learned of victim's planned change in testimony during week before trial began.

Flores v. State, 872 So.2d 441 (Fla. 4th DCA 2004):

Inquiry into state's failure to provide defendant with report of earlier physical examination of child victim in which nurse practitioner discovered healed tear on child's hymen was inadequate where the only factor that was adequately addressed was whether violation was willful or inadvertent, but did not address whether violation was trivial or substantial or whether noncompliance had prejudiced defendant's ability to properly prepare for trial.

State could not avoid consequences of its failure to provide nurse practitioner's report by simply asserting that it advised defense counsel

two weeks prior to trial that state was going to use nurse practitioner as witness and offered to make her available for deposition.

Although report prepared as a consequence of a later examination which revealed no signs of trauma or injury, mentioned that there was an earlier exam, it did not mention nurse practioner's name, existence of earlier report, or findings from the earlier exam, and there was nothing in the record indicating that defense counsel either was or should have been aware that witness listed by state two weeks prior to trial was the individual who had performed the earlier examination and that there were physical signs of penetration.

Olson v. State, 705 So.2d 687 (Fla. 5th DCA 1998):

Oral and unrecorded statements of witnesses to a state attorney are privileged as work product and not subject to discovery.

Investigations by state attorneys to determine whether or not to file a sworn information are not subject to discovery by oral deposition; such discovery would require disclosure of work product and seriously impede criminal prosecutions. If not subject to discovery, such statements surely cannot be sought by a fishing expedition at trial.

The Rules of Discovery provide for discovery of written or recorded witness statements, thus, if not written or recorded, they are not discoverable.

Discussion: This case makes very entertaining reading. Defense counsel called the prosecutor who initially filed the case and the prosecutor who later amended the information as defenses witnesses. He was attempting show that the victim gave inconsistent stories, but ended up with two prosecutors telling the jury how credible the victim was and how they believed in the defendant's guilt. This was ruled reversible error even though the defense counsel started the whole mess. The appellate court did provide us some good language, however, when they ruled that the trial court never should have let the defense counsel call the prosecutors as witnesses.

Pender v. State, 682 So.2d 1161 (Fla. 5th DCA 1996):

Failure to provide copy of colposcopic photograph to the defendant was harmless beyond a reasonable doubt where evidence showed that child victim had venereal disease which could only be caused by sexual intercourse.

Failure to conduct a Richardson hearing is subject to harmless error analysis.

McArthur v. State, 671 So.2d 867 (Fla. 4th DCA 1996):

Where state affirmatively led defendant to believe that it had victim's shorts in its custody and that the shorts were not torn, when in fact the state mistakenly had defendant's shorts, trial court erred in concluding that discovery violation did not occur simply because defendant knew that the evidence existed.

Discussion: When the police placed a pair of shorts into evidence in this sexual battery case, they assumed they were the victim's shorts. The victim apparently mentioned to the prosecutor in the middle of trial that she still had the shorts she had been wearing and they were torn. Defense counsel had already argued in opening statement that none of the victim's clothing was torn. The appellate court ruled that the discovery violation was not intentional, but it was material. The fact that defense counsel never bothered to actually look at the shorts in evidence did not seem to matter, because the information provided by the state was inaccurate.

FALSE IMPRISONMENT OF CHILD

Andre v. State, 13 So.3d 103 (4th DCA 2009):

Victim's godmother who had raised the child since she was 2 years old asked the defendant to take the child to elementary school. The defendant fondled the child in the car and then took her to a motel room and molested here there. Defendant argued that his conviction for false imprisonment was in error because there was no evidence offered that the godmother was the "parent or legal guardian" of the child. The appellate court held that since F.S. 787.02(b) states that if the confinement is of a child under age thirteen, then it is against her or his will if it is "without the consent of her or his parent or legal guardian" the state failed to prove every element of the case and the conviction was reversed.

FIRST COMPLAINT EXCEPTION TO HEARSAY RULE

Browne v. State, --- So.3d ----, 2014 WL 223094 (Fla.App. 4 Dist.)

Under the first complaint exception to the hearsay rule, the fact that a victim of a sexual battery sought the first opportunity to complain is admissible to rebut any inference of consent that might be drawn from the silence of the victim.

Testimony from the victim's friend as to the victim's statements to her describing the assault by defendant were not admissible under the first complaint exception to the hearsay rule, during prosecution for attempted sexual battery; the friend's testimony went far beyond a single statement and amounted to a narration of the criminal assault.

Testimony from the victim's friend as to the victim's statements to her describing the assault by defendant were not admissible under the excited utterance exception to the hearsay rule, during prosecution for attempted sexual battery; it was unclear from the record how much time passed between the incident and the time when the victim told her friend about the incident.

Testimony from the victim's friend regarding the victim's statements to her describing the assault by defendant were not admissible under the prior consistent statement rule, during prosecution for attempted sexual battery; the defense accused the victim of having a motive to fabricate that the incident was non-consensual once she discovered the hickey on her neck, and the victim's conversation occurred after she was aware of the hickey on her neck.

Seagrave v. State, 768 So.2d 1121 (Fla. 1st DCA 2000):

Error to admit witness’s testimony repeating victim’s account of offense under “first complaint” exception to hearsay rule, where victim did not report event to witness until ten hours later although she had opportunities to relay information earlier to others.

Burgess v. State, 644 So.2d 589 (Fla. 4th DCA 1994):

Trial court erred in admitting hearsay testimony from school vice-principal, teacher, and police officer on details of what victim recounted when she first reported sexual battery after arriving at school under first complaint exception.

Where there has been no lapse of time between event and victim's report of incident, first complaint exception to hearsay rule in sexual battery cases does not apply, because there is no inference of consent to rebut.

First complaint exception to hearsay rule allows admission of only fact of report of sexual battery, but none of detailed statements of complaining witness.

Statements of victim's vice-principal, teacher, and police officer about details of what victim recounted when she first reported sexual battery

after arriving at school were not admissible as spontaneous statements or as excited utterances, where 45 to 60 minutes had lapsed between cessation of event and victim's statements to three witnesses, she was interrogated by police officer, and she had opportunity for reflection.

Discussion: This a very helpful case and the appellate court cites numerous other opinions on the same subject: "Pacifico v. State, 642 So.2d 1178 (Fla. 1st DCA 1994) (statements to roommates upon arrival home were first opportunity to complain to anyone other than defendant and were thus admissible under first complaint exception); Turtle v. State, 600 So.2d 1214 (Fla. 1st DCA 1992) (state conceded error as to admission under first complaint exception of entire statements made by child victim of sexual battery to mother and police officer); McDonald v. State, 578 So.2d 371, 373 (Fla. 1st DCA) (victim's statement to friend immediately after event admissible under first complaint exception to hearsay rule in sexual battery cases) rev. denied, 587 So.2d 1328 (Fla.1991); Preston v. State, 470 So.2d 836, 837 (Fla. 2d DCA 1985) (statement by victim shortly after her escape from motor vehicle admissible under first complaint theory); Lyles v. State, 412 So.2d 458, 459 (Fla. 2d DCA 1982) (fact that victim complained at first opportunity admissible to rebut inference of consent); Monarca v. State, 412 So.2d 443, 445 (Fla. 5th DCA 1982) (victim's statement to nurse at hospital admissible under first complaint theory); Charles W. Ehrhardt, Florida Evidence, Sec. 803.1, n. 5 (1993 ed.). Where there has been no lapse of time between the event and the victim's report of the incident, the first complaint exception does not apply because there is no inference of consent to rebut. Conley v. State, 592 So.2d 723, 728 (Fla. 1st DCA 1992)." Two ancient Florida Supreme Court cases are also cited: Ellis v. State, 25 Fla. 702, 6 So. 768 (1889) and Custer v. State, 159 Fla. 574, 34 So. 2d 106 (1948).

Pacifico v. State, 642 So.2d 1178 (Fla. 1st DCA 1994):

Statements by alleged sexual battery victim to her roommates immediately after she was taken home by defendant were admissible under "first complaint" exception to hearsay rule; victim made statements to her roommates at her first opportunity to complain to anyone other than defendant after the sexual encounter.

Duration of time between event and out-of-court statement is important consideration in determining admissibility of statement under excited utterance exception to hearsay rule; utterance must have been made before there has been time to contrive and misrepresent.

Out-of-court statements made after declarant has had time for reflective thought are not admissible either as spontaneous statements or as excited utterances.

In prosecution for sexual battery, defendant was entitled, under "then existing state of mind" exception to hearsay rule, to present evidence as to victim's statements at time of the incident in order to prove that victim consented to sexual intercourse; victim's state of mind was at issue, as lack of consent was element of crime of sexual battery.

GAIN-TIME

Fla. Department of Corrections v. Gould, 2022 WL 2092492 (Fla.App. 1 Dist., 2022) *request for certification denied*

Defendants convicted for violations of 794.011 are not eligible for incentive gain-time. Defendants convicted for violations of attempted sexual battery are eligible for incentive gain-time. Violations for attempted crimes (777.04) are stand-alone offenses. So, when a defendant is convicted of attempted sexual battery, he is not actually convicted of 794.011, but only 777.04.

If the legislature wants to include attempts in statutes such as incentive-gain time restrictions, they need to include attempts in the language of that statute. For example, the sexual offender registration statute says, "has been convicted of committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses proscribed in the following statutes in this state…"

When you intend to change a charge to facilitate a plea, consider that changing it to an attempt will give the defendant an opportunity to reduce his sentence up to 10 days a month.

But see,

Wilcox v. State, 783 So.2d 1150 (Fla 1st DCA 2001):

Attempted sexual battery is an offense under chapter 794 and therefore, there was no error in conditions of probation imposed pursuant to section 948.03.

Discussion: The defendant objected to sex offender probation, arguing that since he was convicted of attempted sexual battery, his conviction fell under the 777 attempt statute and not the 794 sexual battery statute.

HUMAN TRAFFICKING

Matos v. State, 2023 WL 2903995 (Fla. 4th DCA 2023):

> A john can be charged with human trafficking for paying a minor for sex. He doesn't have to know the girl is being pimped and ignorance of age is not a defense. Upon conviction, it is a mandatory life sentence.

Poole v. State, 2019 WL 5485561 (Fla.App. 5 Dist., 2019)

> Expert opinion on human trafficking and the sex worker subculture may assist the trier of fact on subjects not within an ordinary juror's understanding or experience and, thus, may be admissible in a criminal case involving commercial sexual activity, even though such testimony may not assist the jury in every case involving commercial sexual activity; not only are jurors generally unfamiliar with the realities of human trafficking, but a juror's only exposure to this subject may be confined to brief references gleaned from popular media outlets or fictionalized accounts.
>
> Special agent's expert opinion on human trafficking and the sex worker subculture could assist the trier of fact and, thus, was properly admitted in trial of defendant charged with human trafficking for commercial sexual activity and branding; expert testified to use of technology in the human trafficking industry, provided examples of specific terms that are used within the relationships of pimps and sex workers, and offered insight as to why victims of human trafficking remain in abusive relationships with traffickers and why such victims hesitate to report crimes to family, friends, or police, and this testimony could help jury better assess victim's credibility and better understand critical issues that might have confused jurors unfamiliar with patterns and penchants of sex workers.

INCEST:

Beam v. State, (5th DCA January 23, 2009)

> "We conclude that Beam cannot be convicted of incest with the victim by virtue of his being her "uncle-in-law" because relations by affinity are not included within the purview of incest as proscribed in section 826.04. The

fact that Beam adopted the victim does not alter the biological fact that she was not related to him by consanguinity."

Carnes v. State, 725 So.2d 417 (Fla. 2d DCA 1999):

Incest statute applies to half-siblings, i.e. those persons who have in common only one parent.

Judiciary should avoid interpreting a statute in a manner which ascribes to the legislature an intent to create an absurd result.

INTERFERENCE WITH CUSTODY:

Vanegas v. State, 360 So.3d 1195 (Fla.App. 3 Dist., 2023)

Any person, including a parent, falls within the ambit of statute prohibiting interference with child custody; statute targets "whoever" interferes with custody, and this word necessarily has a comprehensive meaning and does not lend itself to any restrictive interpretation, and there is no explicit parental exemption.

Statute prohibiting interference with child custody was applicable to defendant, and thus, defendant was not entitled to writ of habeas corpus, ordering her immediate release from the county jail, where she was being held without bond on the basis that she violated her probation by committing the offense of interference with child custody; defendant was child's parent, she was only authorized by court order to access the child at visitation appointments supervised by family court services, and she retrieved child from therapy and took him on an outing in derogation of these conditions.

Award of shared parental responsibility and supervised timesharing does not render the State incapable of proving that parent acted without lawful authority within the meaning of statute providing that whoever, without lawful authority, knowingly or recklessly takes or entices any minor from the custody of the minor's parent, his guardian, a public agency having the lawful charge of the minor, or any other lawful custodian commits the offense of interference with custody.

Lindemuth v. State, 247 So.3d 635, (Fla. 3rd DCA 2018)

Defendant who asked 14-year-old boy to get into his car could be convicted of interference with custody because he "enticed" the minor

from the custody of his parents. Trial court properly defined the term "enticed" in the jury instruction.

> *The trial court here instructed the jury that entice meant "to lure, induce, tempt, incite, or persuade a person to do a thing." The trial court wanted it to be clear there was no sexual component to the definition of entice in the jury instruction, as subsection (1) of section 787.03, under which Lindemuth was charged, has no sexual component to it. No sexual intent finding on Lindemuth's part was required by the jury in order to find him guilty of interference with custody, as the jury found here.*

Parents have a legal right to the custody of their minor children, and custody is more than just being in physical custody of a minor child at a given moment in time; instead, child is in his or her parent's custody at all times because the meaning of "custody" encompasses other responsibilities relating to the protection, supervision, welfare, and care of a child.

Statute, which prohibits interference with parental custody by a person who is not a parent or lawful custodian of the minor child, has no sexual component to it.

Flynn v. State, 2017 WL 1718841(Fla. 4th DCA 2017)

Concealing a minor contrary to court order (787.04(1)) did not require a court order compelling defendant to reveal the location of the minor. "Concealment" means concealing a child from a person entitled to its custody. This case specifically rejects the case of Merkle v. State, 88 So.3d 375, 377 (Fla. 2d DCA 2012) which ruled that the court must first order the defendant to reveal the location of the minor.

Diez v. State, 970 So.2d 931 (4th DCA 2008):

The use of force, by breaking in, threatening with a gun, and forced movement and restraint, could not be viewed as naturally accompanying the interference with custody, and thus, all three kidnapping prongs under the *Faison* test, for determining whether the movement or confinement of a victim during the commission of another felony is sufficient to support an additional conviction for kidnapping, were proved; defendant committed the offenses in effort to forcefully remove five year old child from her mother's care, defendant arrived at mother's apartment, showed her fake badge, search warrant, and gun, and as mother opened door, defendant pushed her against wall and took mother from room to room through apartment in search of child's passport and other documents.

Wright v. State, 947 So.2d 1240 (Fla. 1st DCA 2007):

> A final judgment is not "any action or proceeding pending in this state" as required by statute prohibiting the failure to produce or deliver a minor whose custody is involved in "any action or proceeding pending in this state" (F.S. 787.04(4)) after removing minor from state with the permission of the court in such a proceeding; thus, defendant's conviction for failing to timely return her children to their father, the custodial parent, following an out-of-state summer vacation had to be reversed where defendant's visitation with children was pursuant to a modified final judgment respecting custody.

Muniz v. State, 764 So.2d 729 (Fla. 2d DCA 2000):

> Kidnapping statute does not criminalize confinement of child under age of thirteen by "a parent or legal guardian."
>
> Defendant was parent of five-week-old child at time of incident giving rise to kidnapping charge where his name appeared as father upon child's birth certificate and defendant had acknowledged paternity pursuant to "Determination of Parentage" statute.
>
> Discussion: The court implied that the result *might* have been different if a court had issued a ruling depriving him of authority over the child. *see* Lafleur v. State, 661 So.2d 346 (Fla. 3d DCA 1995).

State v. Kashani, 738 So.2d 1004 (Fla. 2d DCA 1999):

> Error to dismiss information charging defendant with interference with custody and concealing a child on ground that defendant's visitation rights with children had been suspended by civil order in family involved matter. Trial court improperly interpreted civil order to be a contempt order.

Ladd v. State, 714 So.2d 533 (Fla. 1st DCA 1998):

> Attempted interference with custody is not a lesser included offense of interference with custody because both offenses carry the same penalty.
>
> Discussion: Both crimes are third degree penalties and therefore one cannot be a lesser included offense of the other. If there is an issue as to whether it is a completed crime, both counts should be filed in the alternative.

Arroyo v. State, 705 So.2d 54 (Fla. 4th DCA 1997): Judge Cohn

Evidence that mother was in vehicle when father picked up children from foster parents and drove with them to Mexico insufficient, standing alone, to support conviction for interference with custody.

State cannot rely on mother's later efforts to conceal children in foreign state to support conviction of interference with custody in Florida.

The crime of interference with the custody of a minor occurred when the children were seized and transported to Mexico, the prohibited act being the *taking or enticing* from the custody of the parent or lawful custodian.

Discussion: The defendant in this case was the mother of the children, but the father took the active role in the abduction. The state's only evidence showed that the mother was along for the ride. The court ruled that the mother's intent could not be inferred by her mere presence. The efforts she took to conceal the children while they were out of the state were irrelevant to her state of mind at the time of the taking. Note that the rationale of this decision only applies to F.S. 787.03(1). F.S. 787.03(2) includes the words "detain" and "conceal" which would make the defendant's subsequent behavior relevant. F.S. 787.04 contains similar language.

Costlow v. State, 543 So.2d 1259 (Fla. 5th DCA 1989):

Even though father did not use false name and often showed off child to strangers and told them she was his daughter, father's six-week odyssey across state created prima facie violation of child concealment, where mother had been awarded legal custody of child, and father made minimal or no efforts to inform mother of child's whereabouts. West's F.S.A. § 787.04(1).

"Concealment" within meaning of child concealment statute means concealing child from person entitled to its custody--not concealing it from motel guests, friends and relatives.

Intent to conceal need not be proven directly by defendant's own admission or statements to establish violation of child concealment statute.

Discussion: This case lays out a detailed factual scenarios that we see frequently. The father had limited visitation with the child. Instead of returning the child at the designated time, he chose to go on an extended road trip with the child without notifying the other parent. The father obtained the child legally, but failed to return it illegally. The court gives

some good language concerning the intent of the statute and how it was created to address the escalating problem of parents behaving this way.

JURISDICTION

Batiz v. State, 2019 WL 5485560, (Fla.App. 5 Dist., 2019)

Defendant committed sexual battery on a cruise ship in international waters. The State charged in the Information that the crime occurred in Brevard County, FL. At the close of the trial, the defendant moved for judgment of acquittal, *asserting for the first time that the State failed to invoke the maritime criminal jurisdiction of the trial court because the information alleged that the events occurred in Brevard County, which was indisputably incorrect.* Ruling against the defendant, the court found:

We find that no requirement existed for the State to allege maritime criminal jurisdiction pursuant to section 910.006 within the body of the information in order to invoke the trial court's jurisdiction.

The court noted, however, the maritime jurisdictional requirements of 910.006 must be proven beyond a reasonable doubt at trial.

Paul v. State, 2017 WL 5616904 (Fla.App. 3 Dist., 2017)

Florida had jurisdiction to prosecute cruise line crew member for attempted sexual battery on a ship that embarked and disembarked in Miami.

Pursuant to section 910.006(3)(d), Florida has criminal jurisdiction over acts taking place on board a ship outside of Florida's territory where "[t]he act or omission occurs during a voyage on which over half of the revenue passengers on board the ship originally embarked and plan to finally disembark in this state, without regard to intermediate stopovers."

Accordingly, because Florida has the sovereign authority to exercise criminal jurisdiction based on section 910.006(3)(d) and the effects doctrine, we conclude that the trial court properly denied the defendant's motion to dismiss.

KIDNAPPING

Richardson v. State, 2021 WL 3506761 (Fla.App. 1 Dist., 2021)

The defendant offered a 14-year-old girl a ride home in his van. He locked the doors of the van and then took the child to two different parking lots to sexually molest her. The defendant argued that the Kidnapping charge was incidental to the commission of the sexual battery and should be dismissed. The appellate court ruled the confinement was not incidental to the underlying crimes, was not inherent in the nature of the other crimes, and it made the other crimes substantially easier to commit and lessened the risk of detection.

Watkins v. State, 2019 WL 4122629, (Fla.App. 5 Dist., 2019)

After engaging in a consensual sexual relationship with a prostitute, the defendant became angry and kidnapped the victim. He drove her to multiple locations and committed sexual acts against her at these locations. He was convicted of sexual battery and kidnapping in the first county and then tried again in a second county where he drove the victim. The appellate court ruled this was a double jeopardy violation because the victim was continually confined and the odyssey was a single episode. The court also ruled that the kidnapping was not based on distinct acts.

Gloston v. State, 2019 WL 1986131, at *2 (Fla.App. 1 Dist., 2019)

Defendant was convicted for attempted sexual battery and kidnapping for dragging a woman off an elliptical machine at a hotel and pulling her kicking and screaming toward the pool deck. The court rejected the Defendant's claim that the movement was incidental to the sexual battery by saying,

> *As to the first Faison factor, the record indicates that Gloston not only forcefully moved J.W. off the elliptical machine, but also proceeded to struggle with J.W. in an attempt to drag her out of the hotel gym, into the hallway, and toward the pool deck. These efforts resulted in J.W. resisting, with Gloston resorting to kicking and striking J.W. in order to subdue her. These acts are neither slight, inconsequential, nor incidental to Gloston's intent of sexually battering J.W.*
>
> *As to the second factor, Gloston's asportation of J.W. was not inherent to an attempted sexual battery. Gloston chose not to sexually batter J.W. in the hotel gym. Instead, Gloston forced J.W. out of the gym and dragged her across the hallway toward the pool*

> *deck. Thus, Gloston's actions were not inherent to his attempted sexual battery, but rather part of his intent to forcibly move J.W. in order to facilitate a sexual battery.*
>
> *Lastly, Gloston's actions were significant and independent of an attempted sexual battery and were done to lower the risk of detection.*

Glover v. State, 2017 WL 5474439, at *2 (Fla.App. 4 Dist., 2017)

The court affirmed a kidnapping conviction where defendant robbed victims at gunpoint and then directed women to a more secluded area of park so he could sexually batter them. The courted stated,

> *Although Glover did not use great force to move the women to the area behind a "fairly large tree," he deliberately directed the women to disrobe completely before ordering them to move behind the tree which Glover was attempting to hide behind while committing the sexual battery. These actions, taken together, were not inconsequential nor were they inherent in the act of sexual battery, and taken in the light most favorable to the state they establish that Glover intended to make it easier to commit sexual batteries and to reduce the danger of detection.*

Williams v. State, 2016 WL 2750429 (Fla. Dist. Ct. App. May 12, 2016)

In ruling that victim's confinement was sufficiently distinct from the sexual battery and murder to support kidnapping, the court noted,

> *He menacingly approached and entered the victim's bedroom carrying a knife, moving her inside as he locked the door, thereby confining the victim at that point; this was a separate, divisible, actionable offense. The State wasn't required to prove that the kidnapping was independent of the other crimes; instead, a kidnapping charge is actionable if the kidnapping is "not merely incidental to the killing, but was sufficiently separate from" the other crimes.*

Wilson v. State, 2015 WL 968685 (Fla.App. 2 Dist.):

Movement and confinement of victim was inconsequential or inherent in sexual battery offense, and thus was insufficient to support kidnapping

conviction; movement occurred during a struggle to restrain victim by getting her to the ground, defendant could not have committed battery without restraining victim, there was no reason for movement aside from testimony that it was part of struggle that occurred when defendant attempted to restrain victim, victim did not testify that defendant moved her in any particular direction or that he deliberately moved her at all, and attack occurred at a time and place where crime was unlikely to have been detected.

Stanley v. State, 38 Fla. L. Weekly D1006 (Fla. 2d DCA 2013):

Defendant's minor confinement of victim during commission of lewd and lascivious crimes did not constitute a kidnapping, but did support conviction for lesser included offense of false imprisonment; the confinement was inherent in the nature of the crime as defendant could not commit the unwanted sexual acts without restraining the unwilling victim, and although defendant taped the victim's mouth and hands, he bit through the tape and released her from confinement as soon as the sexual assault was over, and she was able to leave the scene shortly after the sexual acts took place and to quickly report the crime to law enforcement.

Bishop v. State, 35 Fla. L. Weekly D2039 (Fla. 5th DCA 2010):

Evidence was sufficient to support conviction for kidnapping; defendant secretly abducted or confined eight-year-old victim when he led her to a secluded location, out of the view of the persons at the hotel's pool, and defendant did not have permission from the victim's parents to take the victim.

The term "secretly," as used in the kidnapping statute, means that the abduction or confinement is intended by the defendant to isolate or insulate the intended victim from meaningful contact or meaningful communication with the public.

LURING OR ENTICING A CHILD

State v. Brake, 796 So.2d 522 (Fla. 2001):

Statute which makes it a third degree felony for an adult who has previously been convicted of a sexual offense to intentionally lure or entice, or attempt to lure or entice, a child under age twelve into a

structure, dwelling or conveyance for other than a lawful purpose is not unconstitutionally vague or overbroad.

Term ``for other than a lawful purpose" interpreted as requiring state to prove that a defendant lured or enticed child into structure, dwelling, or conveyance for an ``illegal" purpose, i.e., with the intent to violate Florida law by committing a crime.

Under court's interpretation, statute provides adequate notice of conduct it prohibits and is not susceptible of application to conduct protected by First Amendment.

Section of statute which permits state to prove mens rea element of offense by proving lack of parental consent for child to enter structure, dwelling, or conveyance with defendant must be deleted as an unconstitutional statutory presumption.

Discussion: In ruling section 787.025(2)(b) unconstitutional, the court noted "For example, a neighbor who invites a child into their house for a perfectly innocent reason is not likely to seek parental permission." Thus, the court is concerned that the statute may punish innocent activity.

MEDICAL RECORD SUBPOENAS

Rodriguez v. State, 2020 WL 7050452 (Fla.App. 4 Dist., 2020)

The Fourth DCA explained the State's burden to justify issuing a subpoena for a suspect's medical records.

> *Similarly, in the present case, we conclude that the State has not met its burden of demonstrating a reasonable founded suspicion that the medical records have any information relevant to the pending charges or any ongoing criminal investigation. Defendant was charged with vehicular homicide and reckless driving, not DUI. Neither the accident report, the search of defendant's vehicle, nor the statements of any witness proved any reasonable suspicion that defendant was under the influence of alcohol or drugs… There must be some reasonable founded suspicion that alcohol or drugs were involved, such as someone smelling alcohol, drug or alcohol containers in the vehicle, or statements or evidence which might suggest drug use or alcohol intoxication. Here, there is nothing to suggest any alcohol or drug involvement. There is merely a bare suspicion, not a reasonable founded suspicion.*

State v. Carter, 2015 WL 6554472 (Fla.App. 5 Dist.,2015)

Defendant's medical records, including her oral statements about her medical condition to hospital personnel, fell within the medical professional-patient privilege and were protected from disclosure in attempted first-degree murder prosecution in connection with alleged attempted murder-suicide, where State failed to give notice and obtain a subpoena for records, and State did not attempt to secure records by obtaining a search warrant.

Defendant's statement to a nurse that she "had failed" in an apparent reference to her attempt to take her adult son's life was not a "medical record," and thus was not protected from disclosure by the medical professional-patient privilege in attempted first-degree murder prosecution in connection with alleged attempted murder-suicide involving son.

Medical records of defendant's adult son, who suffered from cerebral palsy and was severely developmentally disabled, were not subject to suppression for police's violation of the medical professional-patient privilege under the exclusionary rule, in attempted first-degree murder prosecution in connection with alleged attempted murder-suicide involving son; defendant could not use mandatory reporting requirements applicable to vulnerable adults to shield her conduct, and privilege was intended to protect the privacy of the patient, not his guardian.

Barahona v. State, 2015 WL 3609071 (Fla. 3rd DCA 2015):

Defendant's medical records did not have clear connection to codefendant's alleged illegal activity, and thus, did not overcome defendant's constitutional right to privacy for those records in prosecution for first-degree murder of their child, multiple counts of aggravated battery of their children, child abuse and neglect, and mutilating or grossly abusing body after death, even though codefendant argued that defendant believed that children were trying to poison him; codefendant failed to demonstrate relevancy of defendant's medical records, codefendant did not allege how any of those records would relate to separate case against her and her prospective defenses, and disclosure of records would cause irreparable harm for which defendant would have no adequate remedy on appeal.

There is a strong protection afforded to personal medical records by the constitutional right to privacy.

There is a strong protection afforded to personal medical records by the statutory physician-patient privilege.

McAlevy v. State, 947 So.2d 525 (Fla. 4th DCA 2006):

In challenge to medical records subpoena, state did not have to present evidence via testimony concerning the relevance of medical records to criminal investigation.

State v. Kutik, 914 So.2d 484 (Fla. 5th DCA 2005):

Police officer who investigated fatal automobile accident involving defendant's passenger failed to make good faith effort to comply with statutes governing blood draws and acquisition of medical records, and thus records reflecting defendant's blood alcohol level were inadmissible in prosecution for driving under the influence (DUI) manslaughter and other charges; officer visited hospital where defendant was treated but did not request a blood draw or obtain permission to review records, officer later obtained records using improper police form, and officer did not contact state attorney to subpoena records after proper notice, but rather records were subpoenaed 14 months later.

Frank v. State, 912 So.2d 329 (Fla. 5th DCA 2005):

Fact that officer who obtained blood test results was not acting in bad faith does not excuse failure to comply with statutory notice requirements for obtaining medical records.

State v. Rattray, 903 So.2d 1015 (Fla. 4th DCA 2005):

Subpoena was not the only mechanism for members of sheriff's office investigating physician to obtain medical records of physician's patients, and thus investigators could seize such records pursuant to a search warrant, even though statutes governing confidentiality of patient records only provided for disclosure of such records by permission of patient or subpoena from court of competent jurisdiction; patients' privacy rights needed to be balanced against state's need to conduct criminal investigation, and privacy rights were protected by sealing records in court pending notice to patients and a hearing as to records' relevancy to investigation.

Farrall v. State, 902 So.2d 820 (Fla. 4th DCA 2004):

> Court did not err in denying motion to suppress blood samples where state gave notice of its intent to seek subpoena of defendant's hospital records and blood samples, but then disregarded the ten-day waiting period and seized the evidence by way of a search warrant.
>
> State may seize medical records under a valid search warrant without prior notice or hearing.

Sneed v. State, 876 So.2d 1235 (Fla. 3rd DCA 2004):

> Error to admit defendant's medical records which were obtained from hospital without giving notice to defendant or his attorney, in violation of section 395.3025(4)(d). State did not establish that police had acted in good faith by affidavit of police officer who initially obtained the records stating that he was unaware of the law protecting patients' records at the time he procured them. Ignorance of the law is not good faith.

State v. Cashner, 819 So.2d 227 (Fla. 4th DCA 2002):

> Although state provided notice, it prevented defendant from objecting to proposed subpoena by failing to include essential contact information its notice. Omission was further compounded by conduct of state's investigator, who served the notices on defendant but who willfully refused to disclose contact information.
>
> Assistant State Attorney failed to included his name, Florida Bar number, room number, or telephone number, thus preventing defendant from lodging an objection to the subpoena.
>
> Discussion: This is a very important case to understand. In essence, it is saying that providing the defendant notice is useless if he is not afforded a reasonable opportunity to respond to it. The court's same rationale could be used to suppress evidence if you don't give the defendant sufficient time to respond.

State v. McCord, 828 So.2d 458 (Fla. 4th DCA 2002):

> Where state obtains patient records by causing subpoena duces tecum to issue without giving either defendant or his attorney notice of subpoena and without judicial approval, state should be permitted to have second subpoena issued once procedural and substantive requirements of statue are met.

State v. Johnson, 814 So.2d 390 (Fla. 2002):

> District court erred in finding that exclusionary rule foreclosed state from subpoenaing defendant's medical records, prospectively, even in a constitutional and statutorily permissible manner, because of state's prior noncompliance with statute where state made goof faith effort to meet statutory requirements.
>
> The exclusionary rule can serve its historic purpose when state does not make good faith effort to comply with procedural requirements of statute, but it does not automatically apply any time state fails to comply without regard to whether state made good faith effort to comply.
>
> Discussion: This case seems to draw the line on F.S 395.3025(4)(d) violations based upon whether the State made a good faith effort to comply. In this case the State Attorney investigator made an incomplete effort to locate the defendant to serve her, but was not successful. The fact that the effort was made allowed the State to cure the problem with a subsequent subpoena with proper notice.

State v. McCord, 807 So.2d 815 (Fla. 4th DCA 2002):

> Where state obtains patient records by causing subpoena duces tecum to issue without giving either defendant or his attorney notice of subpoena and without judicial approval, exclusion of evidence is appropriate remedy.
>
> Question certified based upon conflict with State v. Fahner, 794 So.2d 712 (Fla. 3rd DCA 2001, and State v. Manney, 723 So.2d 928 (Fla. 5th DCA 1999).

Sneed v. State, 802 So.2d 458 (Fla. 3d DCA 2002):

> Conflict certified on issue of whether state should be permitted to issue second investigative subpoena for defendant's hospital records upon proper notice after trial court had granted motion to suppress hospital records because defendant was not given notice of initial subpoena.

State v. Fahner, 794 So.2d 712 (Fla. 3d DCA 2001):

> Where state issued investigative subpoena for defendant's hospital records, but defendant did not receive notice of subpoena, county court properly granted motion to suppress hospital records, and properly ruled that state could re-subpoena hospital records upon giving proper notice to defendant.

Proper procedure where defendant did not receive notice of subpoena for medical records is to quash first subpoena, allow state to issue new subpoena while giving defendant proper notice, and allow defendant opportunity to make any legally sufficient argument for quashing of second subpoena.

Discussion: The 3rd DCA certified this issue to the Florida Supreme Court based upon a conflict with the 4th DCA. The 5th DCA issued a ruling consistent with this opinion in State v. Manney, 723 So.2d 928 (Fla. 5th DCA 1999), but the 4th DCA issued a ruling inconsistent with this opinion in State v. Rutherford, 707 So.2d 1129 (Fla. 7th DCA 2001).

State v. Manney, 723 So.2d 928 (Fla. 5th DCA 1999):

In prosecution for driving under the influence (DUI) manslaughter and vehicular homicide, state's failure to follow proper statutory requirements for compelling disclosure of defendant's medical records was not fatal to issuance of records, where those records were later sought through proper means.

Klossett v. State, 763 So.2d 1159 (Fla. 4th DCA 2000):

Error to deny defendant's motion to suppress his medical records, because State failed to give defendant notice prior to subpoena of his medial records. The fact that notice failed to reach defendant because of clerical error was not relevant.

Discussion: This case involves a unique issue in this area. A prosecutor attempted to mail notice to the defendant, but placed the wrong address on the envelope. The trial court ruled that the prosecutor made a good faith effort to comply with the notice statute, but the appellate court disagreed and suppressed the evidence.

Rutherford v. State, 707 So.2d 1129 (Fla. 4th DCA 1997): Eade

Where state obtained defendant's hospital records by causing subpoena duces tecum to issue without giving either defendant or his attorney notice of subpoena and without judicial approval, exclusion of evidence is appropriate remedy. States proposal that it be given and after-the-fact opportunity to make requisite showing that records are relevant to criminal investigation is rejected. Where private matters have been released under overbroad subpoena along with discoverable information, damage statute seeks to prevent has already occurred.

Discussion: We should all be very familiar with this very strongly worded opinion. The court goes so far as to imply that prosecutors are violating their oath to uphold the Florida Constitution when they fail to follow these "simple" procedures. The privacy rights of the patient are stressed by the court and there is also language to the effect that we should only seek what we feel is relevant and not just blindly demand everything. Of course, when victim records are at stake, we can usually get patient consent.

"In sum, under *Hunter*, notice to the patient that the prosecution seeks his hospital records and, if the patient objects, a court's finding that the records are relevant to a criminal investigation, are the two procedural gateways through which the state must pass in order to obtain a patient's hospital records."

State v. Rutherford, 701 So.2d 1129 (Fla. 4th DCA 1998): *on motion for rehearing and/or certification of conflict and/or question of great public importance.*

Where state obtained defendant's hospital records by causing subpoena duces tecum to issue without giving either defendant or his attorney notice and without judicial approval, exclusion of evidence is appropriate remedy.

Discussion: Although strictly collateral, this case gives us some ammunition against the defense argument that using "and/or" language is inappropriate in any form or as one counselor phrased it "an abomination of the English language." The 4th DCA used "and/or" twice in one sentence at the beginning of the opinion.

Clark v. State, 705 So.2d 1057 (Fla. 4th DCA 1997):

Where state's first subpoena of hospital records containing results of blood tests of defendant for use in pending DUI prosecution was quashed because of state's failure to give notice to defendant and obtain court order as required by F.S. 395.3025(4)(d), issuance of second subpoena is prohibited.

Discussion: This case is included as a reminder to always send out a patient notification letter when you subpoena medical records. As this case points out, you cannot *undo* your mistake by simply doing it right the second time.

State v. Edwards, 650 So.2d 630 (Fla. 2d DCA 1994):

Trial court in prosecution for driving while intoxicated (DWI) erred in suppressing medical records which indicated defendant's blood alcohol level where hospital voluntarily forwarded records to state attorney's office and any violation of law was committed by hospital records custodian who disclosed confidential records without defendant's consent.

State v. Buchanon, 610 So.2d 467 (Fla. 2d DCA 1992):

Diagnostic information furnished by manslaughter defendant's treating physician violated defendant's doctor/patient privilege and therefore could not be utilized by law enforcement officer as the sole source of probable cause to believe that alcohol was factor in accident in which defendant had been involved.

Big Sun Healthcare System's, Inc. v. Prescott, 582 So.2d 756 (Fla. 5th DCA 1991):

See this case for various miscellaneous issues involving the obtaining of privileged medical records.

OBSCENITY, SHOWING TO A MINOR

Austin v. State, 2011 WL 3452939 (Fla.App. 1 Dist.):

Defendant charged with showing obscene material to a minor was not entitled to modify jury instruction on obscenity to include a "reasonable person" standard; trial court correctly instructed jurors to apply contemporary community standards only to the prurient interest and patent offensiveness prongs of obscenity test, and instruction did not refer to community standards in explaining what to consider in determining whether the material had literary, artistic, political scientific value.

Valdes v. State, 930 So.2d 682 (Fla. 3rd DCA 2006):

Evidence was sufficient to establish that defendant showed obscene material to two minor victims; both victims gave sufficiently detailed descriptions of pornographic content of materials defendant had shown them, both testified that they learned how to perform various sex acts they were forced to perform on defendant by watching these videos, and although none of the videotapes that victims were forced to watch were introduced into evidence at trial, testimony was sufficiently descriptive and detailed for to find that material was obscene.

Discussion: Although the opinion on the obscenity charge is helpful, I disagree with the court's reasoning and conclusion. Hopefully, the issue is appealed further and the Supreme Court rules supports the Third DCA's opinion instead of mine.

Beber v. State, 853 So.2d 576 (Fla. 5th DCA 2003): *reversed on other grounds*

Evidence insufficient to support conviction for providing obscene material to a minor because the magazine and photography admitted in evidence at trial were not identified by child as the ones he had been shown. It was error to admit them in evidence and to permit jury to infer that these were the materials defendant had shown to the child.

Discussion: In reference to the obscenity charge, the court stated that in most cases, the jury will need to see the picture to convict of this charge, not simply a child's vague description.

Williams v. State, 846 So.2d 1244 (Fla. 1st DCA 2003):

Error to deny motion for judgment of acquittal where only evidence presented to show that material was obscene was the victim's testimony.

Discussion: This very brief opinion does not enlighten us much on the issue. The court did not say that the state *could not* prove the image was obscene based solely on the testimony of the victim, but only that the victim's testimony was insufficient as a matter of law to prove obscenity. The description given by the child was not included in the opinion, nor was an explanation as to how if failed to meet the legal requirement. As a practical matter, it would typically be extremely difficult to prove an image is obscene without having the image available for court.

Foburg v. State, 807 So.2d 774 (Fla. 2d DCA 2002):

Testimony by victim named in information and testimony of another teenage girl not sufficient to make prima facie showing that material at issue was obscene.

Discussion: The opinion does not detail the description given by the girls, so it is hard to determine the extent of the problem. This case basically shows that proving obscenity without being able to show the picture is extremely difficult.

PAST RECOLLECTION RECORDED

McClusky v. State, 2021 WL 507666 (Fla.App. 1 Dist., 2021)

A sexual assault nurse who has no independent recollection of a particular exam is allowed to read from her report as past recollection recorded as long as she can say it was generated contemporaneously with the event and that it was accurate. The court noted that she was not refreshing her memory from the report and provided a distinction between the two:

> *There is a clear and obvious distinction between the use of a memorandum for the purpose of stimulating the memory and its use as a basis for testimony regarding transactions as to which there is no independent recollection. In the former case it is immaterial what constitutes the spur to memory, as the testimony, when given, rests solely upon the independent recollection of the witness. In the latter case the memorandum furnishes no mental stimulus, and the testimony of a witness by reference thereto derives whatever force it possesses from the fact that the memorandum is the record of a past recollection, reduced to writing while there was an existing independent recollection.*

PRETRIAL DETENTION

Johnson v. Guevara, 2015 WL 249322 (Fla.App. 3 Dist.):

Pretrial detention was not impermissible even if the pretrial detention order was based in part in hearsay evidence in the form of a videotaped interview of the child victim by a forensic examiner; the pretrial detention order also relied on numerous pieces of non-hearsay evidence related to defendant's convictions and court appearances, none of which were the subject of objection or dispute by the defendant, and the child victim testimony may have constituted admissible evidence rather mere, excludible hearsay.

PRIOR CONSISTENT STATEMENTS

Gilbert v. State, 2021 WL 2385832, (Fla.App. 2 Dist., 2021)

After the abuse was reported, the victim began to write a journal about the abusive acts. The trial court allowed introduction of the journal as a consistent statement to rebut recent fabrication. The appellate court said it did not qualify as this hearsay exception because the motive to fabricate predated the writing of the journal.

Rios v. State, 2016 WL 3002176 (Fla. Dist. Ct. App. May 25, 2016)

A few days after being victimized in lewd conduct case, victim tearfully told her sister about the assault. Defendant objected to sister's testimony as hearsay.

Court ruled that sister's general testimony that her sister told her about the assault was not hearsay.

Sister's testimony about the victim's demeanor was relevant to rebut defendant's claim that she was making up the story to divert scrutiny for her sexual relationship with her adult boyfriend. Court noted that is some cases the prejudice may outweigh the probative value.

Goldtrap v. State, 2013 WL 2249290 (Fla.App. 1 Dist.)

Child victim's text messages to her boyfriend and church counselor that defendant had molested her were not admissible as prior consistent statements, in prosecution for lewd and lascivious molestation on a child between the ages of 12 and 16, as the circumstances supporting defendant's assertion that victim had a motive to fabricate arose when victim moved in with defendant and his family, but the text messages were sent by victim after she moved in with defendant and his family.

Monday v. State, 792 So.2d 1278 (Fla. 1st DCA 2001):

Admissibility of prior consistent statement to rehabilitate a witness who has been impeached by a prior inconsistent statement is a matter within sound discretion of trial court.

Trial court should not allow a prior consistent statement if it would merely repeat what witness has said at trial, but may exercise its discretion to allow prior consistent statement as rehabilitation if it has some value in rebutting prior inconsistent statement used for impeachment.

No abuse of discretion in admission of prior inconsistent statement of child victim of lewd and lascivious act concerning date of offense to rehabilitate witness after she was impeached on this issue by a prior inconsistent statement.

Discussion: The victim testified in her deposition that she was sexually abused on April 10, 1999. At trial, she testified that it occurred on April 2, 1999. Defense counsel impeached the victim on the discrepancy and argued that it affected her credibility. The State was then allowed to introduce a segment of the victim's diary and a prior affidavit she gave in which she stated the date was April 2. The court ruled that since it was not being offered to prove an element of the offense, but only to rehabilitate the victim's credibility, it was admissible. This is an interesting opinion that should be read carefully so as not to be misused.

Keffer v. State, 687 So.2d 256 (Fla. 2d DCA 1996):

Error to permit investigating officers to testify concerning victim's prior consistent statements that defendant penetrated her vagina with his finger. Testimony not admissible to rebut express or implied charge of improper influence, motive, or recent fabrication where defense counsel did not elicit any evidence that victim had motive to falsify and only vaguely implied that she may have changed her story because she did not want her homosexual lover to know she had some sexual interest in men.

PRISONERS' RIGHTS TO VISITATION OF THEIR CHILDREN

Moore v. Perez, 756 So.2d 1086 (Fla. 5th DCA 2000):

Criminal court lacks jurisdiction to enter orders compelling Department of Corrections to allow visitation privileges to an inmate in DOC custody because the regulation of prison visitation lies within authority of DOC.

Where defendant was conviction of Attempted Lewd and Lascivious act in the presence of a child, statute prohibits visitation by anyone under age 18 years unless special visitation is approved by Superintendent.

Order ruling that defendant' sentence be corrected or clarified to allow him visitation with children and prohibiting DOC from taking action that might frustrate intent of court's order is quashed.

Cassady v. Moore, 737 So.2d 1174 (Fla. 1st DCA 1999):

Statute restricting prison inmate's right to visitation with his children, due to inmate's conviction for attempted sexual battery by a person over 18 years of age upon a person less than 12 years of age, did not violate defendant's due process rights; statute served important state interests of protecting minor children from convicted sex offenders and helping to ensure proper rehabilitation of sex offenders, and was narrowly tailored to serve that purpose, in that statute did not deny visitation completely but

instead left determination within discretion of superintendent, who had to assess interests of children involved.

Singletary v. Storey, 711 So.2d 221 (Fla. 5th DCA 1998):

Trial court erred in ordering that inmate incarcerated for committing lewd and lascivious acts upon a child be allowed visitation with her infant daughter while she is incarcerated. Department of Corrections rather than court is authorized to determine if visitation with minors is appropriate in the case of prisoners serving time for committing a sex act on or in the presence of children.

Singletary v. Alvarado, 725 So.2d 1152 (Fla. 2d DCA 1998):

Regulation of prison visitation lies within the authority of Department of Corrections. Order directing that prisoner be allowed visitation privileges with his children quashed.

PROCURING A MINOR FOR PROSTITUTION: *Statute repealed 10-1-2014*

McCann v. Moore, 763 So.2d 556 (Fla. 4th DCA 2000):

Based on a writ of habeas corpus, the Fourth DCA reversed itself on its previous decision of McCann v. State, 711 So.2d 1290 (Fla. 4th DCA 1998), which ruled that the defendant was properly convicted of attempted procurement of prostitution. The Fourth DCA accepted the reasoning of recent opinions that hold procurement for prostitution does not apply to a defendant who solicits a minor to have sex with himself. The defendant was ordered to be resentenced for the offense of solicitation to commit prostitution.

Petty v. State, 761 So.2d 474 (Fla. 3rd DCA 2000):

Defendant was erroneously convicted of procurement of a minor for prostitution where defendant paid victim money to engage in sexual acts with himself rather than a third party. On remand, court to enter conviction for solicitation.

Kobel v. State, 745 So.2d 979 (Fla. 4th DCA August 25, 1999):

Defendant's act of offering minor money to have sex with defendant constituted lesser crime of solicitation rather than attempted procurement.

Defendant's conduct in driving into alley as directed by minors, after specific request to engage in sexual activity, can be viewed as an overt act towards perpetration of attempted indecent assault.

Discussion: The fourth DCA receded from its previous holding in McCann v. State, 711 So. 2d 1290 (Fla. 4th DCA 1998), on the issue of procuring a minor for prostitution. In McCann, the Court ruled that one could procure a minor for prostitution by attempting to engage that person in prostitution with himself. This ruling conflicted with an earlier opinion from a different DCA. The Fourth DCA now agrees with other districts in that procuring a minor for prostitution involves obtaining the minor's sexual services for a third party. This statute is meant to address the evils of the commercialization of prostitution. On the other hand the Court did give us good language for attempted indecent assault charges. According to the 4th DCA, simply driving into the alley for the purpose of having sex with these children was an overt act, necessary for an attempt.

Register v. State, 715 So.2d 274 (Fla. 1st DCA 1998):

Evidence that defendant offered money to 12-year-old girl to have sex with him and that girl refused offer insufficient to establish prima facie case. Mere offer of money to person under 18 to have sex with the person making the offer is solicitation rather than procurement for prostitution.

Discussion: The defendant offered a child money to have sex with him. The child refused and told her mother. The defendant was subsequently charged with procuring person under age of 18 for prostitution, a second degree felony. The appellate court went to great pains in an attempt to define "procure," including citing dictionary definitions and the Washington State Supreme Court. The court determined that the legislative intent of the statute was to "proscribe the commercial exploitation of children induced to engage in sexual activity with others for the financial benefit of the procurer pimp." Therefore, when an old man offers a child money for sex, he is only committing the crime of solicitation for prostitution, a second degree misdemeanor. This case has a contrary holding to McCann v. State, 711 So.2d 1290 (Fla. 4th DCA 1998)

McCann v. State, 711 So.2d 1290 (Fla. 4th DCA 1998):Zeidwig

While it is true that "procure" may mean to act as a "pimp" and not necessarily procure the person for oneself, it is also clear that "procure" may mean persuading, inducing, or prevailing upon the person to do something sexual for oneself.

Discussion: In this particular case, the defendant drove up to some young girls and offered them $50 "to be my sex toy." The girls refused and no sex was to be had. This case has the opposite holding of Register v. State, 715 So.2d 274 (Fla. 1st DCA 1998). The 4th DCA subsequently reversed itself on this issue.

RAPE SHIELD LAW:

Blow v. State, 2023 WL 6321920 (Fla.App. 5 Dist., 2023):

The defendant broke into the victim's home in the middle of the night and had sex with her while she was sleeping. The defendant wanted to testify that he had traded her drugs for sex on two other occasions. The trial court applied the rape shield law to exclude such testimony. The appellate court ruled the judge was in error for excluding the testimony because the rape shield law does not apply to previous sexual acts with the defendant. The language in the statute says, "Specific instances of prior *consensual* sexual activity between the victim and *any person other than the offender* may not be admitted into evidence in a prosecution under s. 787.06, s. 794.011, or s. 800.04. Ultimately, the trail court's error was considered harmless.

Vincent v. State, 2023 WL 4919546 (Fla.App. 4 Dist., 2023)

Thus, the defendant correctly argues the circuit court erred in relying on the rape shield statute as its basis for precluding the defendant from eliciting testimony from the victim, or arguing to the jury, that someone other than the defendant had raped the victim.

The court pointed out that the rape shield statute only applies to consensual sexual activity.

Murphy v. State, 2021 WL 1773840 (Fla.App. 3 Dist., 2021)

Defendant was charged with sexual battery for forcing the victim to have sex with him while they watched television in his bedroom. During her deposition, the victim testified that when she was 13 she had a sexual relationship with a school cafeteria worker. When her father found out he beat her. She ran from the house and met up with a man who molested her in a public restroom. The defense argued that she made up the incident in the restroom to deflect from the incident with the cafeteria worker. The defense argued that this act supported his theory that the victim had consensual sex with the defendant and then said it was rape so that her

boyfriend would not be mad at her. The trial court ruled the previous incident was inadmissible under the Rape Shield law.

The appellate court ruled on whether the Rape Shield law conflicted with the Confrontation Clause. The court gave a good summary of the history of the law and explained that the procedure must give way to constitution when the facts warrant. In this case, however, the appellate court ruled the trial judge made the right call. The probative value of the evidence was outweighed by the unfair prejudice. The defendant could still present his theory of defense without bringing up the victim's prior sexual encounters with the cafeteria worker and guy in the public restroom.

This is a good case to review for a better understanding of the nuances of when the Rape Shield law applies and when it does not.

Moore v. State, 2021 WL 752784 (Fla.App. 1 Dist., 2021)

The victim's teacher called the victim's mother to school to discuss a romantic relationship the victim was having with another student. During the meeting, the victim disclosed that her father had been having sex with her. The defendant wanted to cross-examine the victim concerning her consensual sexual activity with the boy. He argued that she was lying about her allegations in order to get out of trouble on the issue with the boy. The trial court excluded this evidence based on the rape shield law, F.S. 794.022. The appellate court said the rape shield law typically excludes such evidence, but "[a] defendant's 'right to full and fair cross-examination, guaranteed by the Sixth Amendment, may limit [section 794.022]'s application when evidence of the victim's prior sexual conduct is relevant to show bias or motive to lie.' In this case, however, the court ruled that the defendant "was able to adequately develop his theory of defense without delving into the victim's prior sexual relations." There was no need to describe the precise issue addressed in the teacher's meeting.

Thorne v. State, 2019 WL 2078366 (Fla.App. 1 Dist., 2019)

Rape shield law did not apply to evidence of victim's allegations of nonconsensual conduct by men other than defendant when victim was a minor in prosecution for lewd and lascivious battery and sexual battery; rape shield law only related to consensual sexual activity.

The rape shield law does not exclude evidence that would otherwise be admissible under the evidence code; instead, the rape shield law is a codification of relevance rules as applied to the sexual behavior of victims of sexual crimes

Exclusion of evidence that minor victim, during interview, accused three men of sexually battering her but did not accuse defendant prevented defendant from presenting full and fair defense in prosecution for lewd and lascivious battery and sexual battery; defendant's theory of defense was that victim fabricated her allegations against him after he stopped giving her gifts, and evidence tended to prove victim's motivation to fabricate her allegations against defendant, if jury believed victim did not accuse defendant during interview because sexual activity did not occur.

Teachman v. State, 2019 WL 73515 (Fla.App. 1 Dist., 2019)

The rape shield law does not exclude evidence that would otherwise be admissible under the Florida Evidence Code; instead, the rape shield law is a codification of Florida's relevance rules as applied to the sexual behavior of victims of sexual crimes.

A defendant's right to full and fair cross-examination, guaranteed by the Sixth Amendment, may limit rape shield law's application when evidence of the victim's prior sexual conduct is relevant to show bias or motive to lie.

Probative value of evidence of minor victim's sexual relationship with boyfriend was substantially outweighed by risk of unfair prejudice and was precluded from admission under rape shield law in defendant's trial for sexual battery and lewd and lascivious molestation of a child; although defense counsel mentioned that family member believed victim "made the allegations up because [she] and her boyfriend got caught doing what they weren't supposed to be doing," there was no evidence that sexual nature of victim's relationship with her boyfriend was critical to theory of defense.

Arroyo v. State, 2018 WL 3636833, (Fla.App. 3 Dist., 2018)

Defense counsel sought to show sexual battery victim had consensual sex with the defendant and lied about it to appease her ex-boyfriend with whom she wanted to reconcile. He sought to introduce the fact that she had sex with her ex-boyfriend shortly before the sexual battery to support his contention. The appellate court ruled that the Rape Shield law prohibited the introduction of testimony concerning the sex with the ex-boyfriend. The defendant could prove the existence of a close relationship without discussing the sexual encounter.

Gomez v. State, 2018 WL 1956309 (Fla.App. 4 Dist., 2018):

During trial for defendant sexually battering his wife, defense sought to introduce evidence that wife accused an employer of raping her several years earlier and also accused defendant of trying to rape her year earlier. The trial court ruled that both incidents violated the Rape Shield law and were irrelevant. Appellate court ruled Rape Shield law did not apply in either circumstance because that statute is limited to prior "consensual" activity and also does not apply to prior sex with defendant. The court upheld the ruling however, because they agreed that the acts were irrelevant. When objecting under Rape Shield, make sure you argue relevance in addition to the act.

Bentley v. State, 2017 WL 6346690, (Fla.App. 3 Dist., 2017):

Defendant picked up 13-year-old victim on the streets, took her back to his room and had sex with her. He tried to use the fact she was a previous human trafficking victim to support his defense that she was a prostitute and initiated the sexual encounter. The court ruled that since consent is not a defense for a lewd battery charge, the trial court properly precluded the defense from mentioning the child's past sexual history or initiation of the sexual act.

Portillo v. State, 2017 WL 697729 (Fla.App. 3 Dist., 2017)

Florida's Rape Shield Law cannot be invoked by an accused rapist to limit a victim's direct testimony because the Legislature's intent in enacting the law was to shield the victim from abusive conduct by the defense.

Discussion: In this rather unusual fact pattern, the State asked the victim if she had ever been digitally penetrated by a boyfriend before. The defendant was charged with attempted sexual battery and the State was trying to establish that the victim knows when a guy is trying to penetrate her instead of simply fondling her. The defense tried to keep it out based on the rape shield statute.

Cooper v. State, 2014 WL 1301510 (Fla.App. 4 Dist.)

Rape shield law only applies to violations of chapter 794, not 800.04.

Defendant's argument, at trial in prosecution for lewd or lascivious battery and molestation, that Rape Shield Statute should not be interpreted to exclude the testimony he sought to elicit from victim regarding her prior sexual experiences and her denial of any prior sexual experience to police officer investigating the case was insufficient to preserve, for purposes of

appeal, his argument that the Rape Shield Statute did not apply to prosecutions for lewd or lascivious battery and molestation.

Erroneous exclusion, pursuant to the Rape Shield Statute, of testimony that defendant sought to elicit from victim regarding her prior sexual experiences and her denial of any prior sexual experience to police officer investigating the case was not fundamental error at trial on charges of lewd or lascivious battery and molestation.

Victory v. State, 33 Fla. L. Weekly D1321 (Fla. 5th DCA 2008):

Post-conviction movant was entitled to evidentiary hearing on his claim of ineffective assistance of counsel, based upon counsel's failure to seek in camera hearing on admissibility of evidence of prior consensual sexual activity between 8-year-old victim and victim's 6-year-old brother, where physical evidence indicated that victim's injuries had occurred some time before date on which she alleged penile penetration by defendant, evidence of prior consensual activity could have established that brother's digital penetration of victim, rather than any action by defendant, was source of victim's injuries, and record did not indicate whether defense counsel was aware of claim of digital penetration.

Discussion: The best part of this opinion is the dissent. The dissenting judge does his best to expose the defendant's claim for the sham that it is. Among his better quotes are, "I believe that Victory's allegations are absurd and ludicrous on their face and that confining the discussion to digital penetration in the majority opinion does not make them any less so." and "It is beyond belief that a pre-pubescent, six-year-old child could cause this type of injury as Victory alleges, especially injury that would produce scarring that far back into the victim's vagina. I find Victory's allegations-that the victim's six-year-old brother caused the victim's injury by engaging in consensual intercourse with her by inserting his penis and finger into her vagina-to be ridiculous and utterly devoid of any merit."

Esteban v. State, 967 So.2d 1095 (Fla. 4th DCA 2007):

For evidence that a victim of sexual battery was a prostitute to be admissible, the defendant must make a sufficient showing through an offer of proof on the record or by other appropriate means, that the evidence of prostitution bears materially on the issues and that without this evidence, the defendant's ability to present a defense will be critically hampered; if the defendant makes a sufficient showing, then the trial court should engage in a balancing test to weigh the probative value of the evidence

against the unfair prejudice to the victim and the state's case to determine if it should be admitted.

Reputation evidence that victim was a prostitute was irrelevant at trial for sexual battery, even though defendant sought to introduce evidence to suggest that someone else might have perpetrated charged crime; victim's reputation did not tend to prove that victim was acting as a prostitute and was attacked by one of her customers.

Carlyle v. State, 31 Fla. L. Weekly D2958 (Fla. 2d DCA 2006):

No abuse of discretion in exclusion of evidence of victims prior arrest for prostitution and her admission that she had acted as a prostitute in the past, where defendant did not establish a sufficient pattern between prior acts of victim and current charges.

Discussion: This case presents a good discussion of the Rape Shield Law and how it applies to prostitutes.

Minus v. State, 30 Fla. L. Weekly D1158 (Fla. 4th DCA 2005):

The defendant's right to full and fair cross-examination, guaranteed by the Sixth Amendment, may limit rape victim shield statute's application when evidence of the victim's prior sexual conduct is relevant to show bias or motive to lie.

Evidence of prior sexual relationship between complainant and defendant who had dated for seven years was admissible under rape-shield law in kidnapping and sexual battery prosecution as it involved claims of prior sexual conduct between complainant and defendant, not third person.

Strong v. State, 28 Fla. L. Weekly D1877 (Fla. 3rd DCA 2003):

Trial court did not abuse discretion in giving jury instruction quoting subsection of statute which provides that use of a prophylactic device is not, but itself, relevant to the issue of victim consent.

Gilliam v. State, 817 So.2d 768 (Fla. 2002):

Evidence that victim was prostitute would have been wholly irrelevant to defense theory that defendant murdered victim during seizure, and evidence would not have been admissible under Rape Shield Law.

Frederic v. State, 770 So.2d 719 (Fla. 4th DCA 2000):

No abuse of discretion in excluding testimony that victim had once accused her mother's live-in boyfriend of sexual abuse, which defendant argued would have established basis for victim's sexual knowledge and could have impacted jury's assessment of victim's credibility, where evidence showed explanations for victim's knowledge of sex other than previous instance of sexual abuse.

Discussion: This opinion makes a very helpful distinction in the law. The court implies that if the victim's prior sexual experience were the only way to explain her sexual knowledge, it would have been admissible. Since the victim's sexual knowledge was already established by testimony regarding her sex education class and her 13 years of age, the prior incident was irrelevant. The court also implied that if the defendant had argued a different relevance for the evidence, such as retaliation for an exercise of authority, it might have been admissible.

McLean v. State, 754 So.2d 176 (Fla. 2nd DCA April 5, 2000):

Where victim was kidnapped in car driven by co-defendant, and defendant was asleep in car when victim entered car, state's circumstantial evidence was not inconsistent with defendant's assertion that he was not aware of co-defendant's intent to kidnap the victim.

Discussion: The court noted that the supreme court has held that the rape shield statute must give way if it interferes with the defendant's constitutional right to confrontation or denies the defendant the opportunity to present a full and fair defense. The key issue in this case was whether the sexual contact was consensual. Since the doctor's opinion that the victim's vaginal trauma could have possibly been the result of a long absence of sexual activity, it was relevant to the issue of consent. The defense should have been allowed to prove into the matter.

Commerford v. State, 728 So.2d 796 (Fla. 4th DCA 1999):

In prosecution for lewd assault on minor under 16, defendant was not entitled to cross-examine victim regarding her prior sexual activity with another person, as defendant was allowed to fully inquire of the victim the names of other persons with whom she had had sexual relations, and line of questioning did not reveal that she indeed had sex with any person other than defendant.

Discussion: In reference to the rape shield law, the defendant argued that the victim was crying rape to cover up a sexual encounter she had with

another boy. The court held an in-camera hearing in which the defense was allowed to inquire as to how many boys the victim had sex with. The inquiry revealed that she had not had sex with anyone.

Bisbee v. State, 719 So.2d 993 (Fla. 1st DCA 1998):

Where sole evidence against defendant was testimony of victim, including pictures drawn by victim of "private parts" of victim and defendant, court erred in excluding evidence of prior molestation of victim which could explain how the 7-year-old would have knowledge of sexual molestation.

Discussion: This is not really a "rape shield case", but I felt this was the most logical place to insert it.

Mitchell v. State, 695 So.2d 810 (Fla. 3rd DCA 1997):

Lastly, we find that the trial court properly excluded evidence concerning the victim's prior sexual relationship with the defendant's brother where the defense failed to show that the testimony fell within an exception to the Rape Shield Law. More specifically, the defense's proffer was insufficient to establish a pattern of conduct or behavior on the part of the victim that was so similar to the conduct or behavior in the case that it was relevant to the issue of consent.

Hammond v. State, 660 So.2d 1152 (Fla. 2d DCA 1995):

When "classic credibility" concepts are involved, defendant's right to confront his accusers takes precedence over rape shield law.

Trial court's failure to allow defendant, who was charged with sexual battery, to elicit testimony in front of jury concerning victims' prior sexual knowledge, was reversible error, where charges against defendant were grounded entirely upon accusations of victims.

Because the charges against Hammond were grounded entirely upon the accusations of these mentally challenged youngsters, it cannot be said that the failure to allow the defendant to explore further the source of their sexual knowledge was harmless error.

Discussion: The appellate court noted that the jury was likely to believe that these naïve young boys could not make up the sexual acts described, so the defendant had the right to show the jury that they had been involved in sexual behavior previously.

Teemer v. State: 615 So.2d 234 (Fla. 3rd DCA 1993):

DNA test that revealed that semen swabbed from victim's vagina and cervix was not defendant's semen should have been admitted in prosecution for sexual battery and other offenses as relevant to defendant's claim of misidentification, rather than excluded under Rape Shield Statute, though victim testified that she had been anally penetrated, where physician who examined victim found no evidence of trauma to her anus and did not find any semen in her anal cavity, and defense proffered that physician would testify that sexual battery victims often think they have been anally penetrated, when in fact they have not been.

Dixon v. State, 605 So.2d 960 (Fla. 2d DCA 1992):

Evidence of child victim's alleged prior sexual knowledge was impermissibly excluded under rape shield statute where exclusion precluded defendant from presenting full and fair defense.

Discussion: The defendant claimed the 5 year old victim was fabricating her allegations of sexual abuse and to support his position, he wanted to offer testimony from someone who had seen the girl engage in sexual acts with another child. The appellate court ruled this information was necessary for a fair and complete defense.

State v. Pancoast, 596 So.2d 162 (Fla. 2d DCA 1992):

Evidence that victim had engaged in sexual activity with three men other than defendant who were younger than her did not establish pattern of similar sexual conduct under Rape Shield Law necessary for such evidence to be admissible in sexual battery prosecution; no evidence was proffered to show that any physical abuse occurred in prior consensual encounters or to show that victim consented to violence or physical abuse in encounter with defendant, and victim did not "cry rape" after prior consensual encounters.

Lewis v. State, 591 So.2d 922 (Fla. 1991):

Exclusion of testimony regarding alleged victim's prior sexual activity with her boyfriend under rape shield law was erroneous where it precluded the defendant, her stepfather, from presenting a full and fair defense on the theory that the victim accused him to prevent her mother from discovering that the victim had been sexually active with her boyfriend.

General rule requiring exclusion of testimony as to prior sexual conduct of sexual assault victim must give way to defendant's constitutional rights

where application of rule interferes with confrontation rights or otherwise precludes defendant from presenting a full and fair defense.

Castro v. State, 591 So.2d 1076 (Fla. 3rd DCA 1991):

Trial judge's exclusion, under rape shield statute, of extensive proffered evidence concerning victim's alleged motivation to fabricate accusation of sexual battery against her uncle constituted prejudicial error requiring reversal of conviction and new trial.

Robinson v. State, 575 So.2d 600 (Fla. 1st DCA 1991):

Evidence that victim engaged in prostitution may have bearing on issue of consent if defendant's defense is that sexual encounter with victim was in connection with act of prostitution.

Trial court engages in balancing test to weigh probative value of evidence against unfair prejudice to victim to determine if evidence of victim's prostitution should be admitted, if defendant makes sufficient showing that evidence of prostitution bears materially on issue of consent and that without opportunity to elicit that evidence defendant's ability to present defense will be critically hampered.

Trial court did not commit reversible error by prohibiting introduction of evidence of victim's prostitution absent any proffer from defense of evidence sought to be elicited; defendant did not seek to offer evidence of specific prior acts of prostitution and probative value of evidence sought to be elicited did not appear in record.

Evidence of violence directed against rape victim weighed heavily against defendant's contention that victim's reputation as prostitute would have had significant bearing on issue of consent.

DPR v. Wise, (Fla. 1st DCA 1991):

Rape shield statute was not applicable to disciplinary hearing brought against psychiatrist accused of influencing female patients to engage in sexual relations with him; statute was applicable only to criminal prosecutions.

Young v. State, 562 So.2d 370 (Fla. 3rd DCA 1990):

Victim's consensual intercourse with three members of defendant's group of friends, two of whom she allegedly knew already had girlfriends, did

not establish pattern of conduct on part of victim necessary for admission of testimony concerning such activity under exception in rape shield law.

Roberts v. State, 510 So.2d 885 (Fla. 1987):

Rape shield law precluded admission of evidence of victim's alleged activities as a prostitute.

Applying rape shield law to preclude reference to rape victim's alleged activities as a prostitute did not interfere with defendant's confrontation rights or otherwise operate to preclude defendant from presenting full and fair defense, where only limit on defendant's testimony as to conversation that he had with victim concerned specific type of employment in which victim was allegedly engaged.

Discussion: The Supreme Court noted that the reason the victim's profession was not admissible is because the defendant did not argue consent. Instead, the defendant argued that he never had sex with victim. Had the defense been one of consent, the court implies that her status of a prostitute may have been relevant.

Baeza v. State, 489 So.2d 36 (Fla. 4th DCA 1986):

Rape shield statute did not exclude mother's testimony in prosecution of stepfather for alleged sexual abuse of daughter that she had discovered son asleep in bed with daughter and that he had been nude, supporting reasonable inference that son, without stepfather's involvement, had caused physical trauma later identified by pediatrician, and thus was evidence from which jury could have concluded that defendant stepfather was not source of injury.

Marr v. State, 470 So.2d 703 (Fla. 1st DCA 1985):

Trial judge who allowed testimony relating to facts that prosecutrix and her friend were in love, as well as closeness of their relationship, struck proper balance between policies undergirding rape shield statute and those of confrontation clause, by allowing evidence as to bias of prosecutrix, without permitting specific references to sexual intimacies, and did not completely foreclose defendant's right to conduct effective cross-examination for purpose of exposing any lurking bias of key witness; thus, statute was constitutionally applied.

SCIENTIFIC EVIDENCE:

Eicheleberger v. State, 662 So.2d 1025 (Fla. 5th DCA 1995):

Discussion: This case only contains a concurring opinion which discusses a defense called "breath holding syndrome." The court indicates that no court has addressed the issue of whether the breath-holding syndrome is admissible as a defense in a criminal case. The court refused to consider the question in this case because the defense did not present medical or scientific evidence that such a syndrome exists. The basis essence of this defense is that some children have spells where they hold their breath until they pass out. This falling to the ground supposedly explains their bruises. If you ever get a case with this defense, this case will be your starting point for research.

VICTIM RIGHTS:

City of Tallahassee v. Fla. Police Benevolent Association, Inc., 2023 WL 8264181 (Fla., 2023)

Police officer who shot suspects in self defense argued Marcy's law prohibited their names from being published. The Florida Supreme Court ruled, "Our decision instead is limited to the determination that Marsy's Law does not guarantee to crime victims a generalized right of anonymity."

The Court ruled that the constitutional provision only applies to "information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information of the victim," The Court elaborated by noting,

> *Marsy's Law speaks only to the right of victims to "prevent the disclosure of information or records that could be used to locate or harass" them or their families. Art. I, § 16(b)(5), Fla. Const. One's name, standing alone, is not that kind of information or record; it communicates nothing about where the individual can be found and bothered.*

The court noted that there are other statutory restrictions on identifying certain individuals, such as confidential informants, but the constitution did not address such issues.

For sex offenses and child abuse cases, we still must comply with public records restrictions and the dictates of section 92.56. We should continue to use victim initials in documents and court pleadings pursuant to 92.56(3):

> *The state may use a pseudonym instead of the victim's name to designate the victim of a crime described in s. 787.06(3)(a)1., (c)1., or (e)1., in s. 787.06(3)(b), (d), (f), or (g), or in chapter 794 or chapter 800, or of child abuse,*

aggravated child abuse, or sexual performance by a child as described in chapter 827, or any crime involving the production, possession, or promotion of child pornography as described in chapter 847, in all court records and records of court proceedings, both civil and criminal.

Fla. Police Benevolent Association, Inc. v. City of Tallahassee, 2021 WL 1257869 (Fla.App. 1 Dist., 2021) *Overruled*

Two city police officers who fatally shot suspects threatening them with deadly force were entitled to confidentiality afforded to victims under the Florida Constitution, and therefore, officers were entitled to declaratory and injunctive relief precluding the city from releasing public records requested by media that would identify them; officers were "victims" under the confidentiality provision, such provision did not conflict with public records disclosure provision of the Florida Constitution, and neither provision suggested that public records related to government employees and ordinarily subject to disclosure were not entitled to confidential treatment when the employee was a crime victim. Fla. Const. art. 1, §§ 16, 24(a); Fla. Stat. Ann. § 86.011.

Commencement of a criminal proceeding is not required before victim protection provisions of the Florida Constitution, including protection of victim's confidentiality, apply; protection begins at the time of victimization.

Names and identities of two city police officers, who fatally shot suspects threatening them with deadly force, were protected from disclosure to the media by the victim confidentiality provision of the Florida Constitution; in light of multiple online search resources available to seek out information about individuals when the person's name is known, the officers' names were information that could be used to locate or harass them or their families.

Note: This is not a sex crimes case, but it is important to understand if you ever have a police officer as a victim. Marsy's law protects cops too.

Stevenson v. State, 2017 WL 6598636 (Fla.App. 1 Dist., 2017):

Trial court did not err in allowing child victim of sexual abuse to sit in a chair in front of jury box during his testimony.

Graham v. State, 2015 WL 4111657, (Fla. Dist. Ct. App. July 8, 2015)

> *"Graham also asserts that the trial court erred when it prohibited defense counsel from cross-examining the victim and her mother about a prior incident of sexual abuse against the victim that occurred in Mississippi and from cross-examining the victim's mother about whether she was a victim of sexual abuse. Graham argues that these lines of questioning would have demonstrated that his innocent touches were misinterpreted by the victim. However, even if the prior incidents of sexual abuse of the victim and the mother were marginally relevant, the probative value of the testimony would be substantially outweighed by the prejudice it would likely cause.* Ware v. State, *124 So.3d 388, 391 (Fla. 1st DCA 2013). Thus, the trial court did not abuse its discretion by restricting the cross-examination of these witnesses about the prior incidents of sexual abuse."*

Kovaleski v. State, 37 Fla. L. Weekly S661 (Fla. 2012):

> Partial closure of courtroom at alleged child victim's request during his testimony in prosecution for lewd and lascivious acts on a minor did not violate defendant's right under Federal and State Constitutions to a public trial; closure occurred only at victim's request, protecting victim upon his request was a compelling interest of the state, the partial closure was narrowly tailored to state's interest of protecting the victim, and allowing parties statutorily enumerated to remain in courtroom during victim's testimony and only providing partial closure during victim's testimony provided for the most reasonable alternative to closing courtroom during a trial; disapproving, *Alonso v. State*, 821 So.2d 423.

Kovaleski v. State, 34 Fla. L. Weekly D79 (Fla. 4th DCA 2009):

> Proffer was required to cross-examine sexual abuse victim about prior false accusation of sexual misconduct against another person, where record was silent as to whether victim had ever made such an accusation or withdrawn it.
>
> Failure of defendant to object to closing of courtroom when sexual abuse victim testified constituted waiver of his right to public trial.

Miller v. State, 33 Fla. L. Weekly D2112 (Fla. 1st DCA 2008):

> Defendant who was convicted of two counts of lewd or lascivious battery on a person twelve years of age or older, but less than sixteen years old

waived, for purposes of appeal, his objection to trial court's clearing of the courtroom, including the removal of defendant's immediate family, prior to the victim's testimony, even though defense counsel suggested that immediate family was exempt from removal, where defense counsel never obtained a ruling on his objection, did not draw court's attention to statute containing the exemption, and did not make sure the record reflected exactly who was excluded from the courtroom.

M.D. v. State, 33 Fla. L. Weekly D1572 (Fla. 1st DCA 2008):

Juvenile victim was entitled to have trial court order HIV testing of juvenile defendant under statute requiring court to order testing when requested by victim's legal guardian or parent after lewd or lascivious battery had been committed on a person less than 16 years of age, even though legislature renumbered subsections of battery statute and HIV testing statute referred to subsections no longer dealing with the offenses; a literal interpretation of HIV statute would have rendered an absurd result contrary to legislature's clear intent that those charged with sexual offenses under battery statute be subject to HIV testing.

Discussion: The enumerated statutes that qualify for the provisions of 960.003 included the statute numbers of the Lewd and Lascivious statute that existed prior to October 1, 1999. So even though the technical numbers do not match up, the appellate court ruled that the legislative intent was clear.

Hogan v. State, 30 Fla. L. Weekly D1453 (Fla. 5th DCA 2005):

Defendant was prohibited from cross-examining victim regarding whether she had been the victim of prior sexual violence, during trial for sexual battery and battery; the alleged prior attacks were not the subject of discovery by either the State or the defense, and there was no testimony, expert or otherwise, that made the victim's history relevant. http://web2.westlaw.com/find/default.wl?rs=WLW5.06&tf=-1&docname=FLSTS794.022&db=1000006&tc=-1&fn=_top&mt=Florida&vr=2.0&sv=Split&rp=%2ffind%2fdefault.wl&findtype=L

Lena v. State, 29 Fla. L. Weekly D2748 (Fla. 3rd DCA 2004):

Where trial court granted state's motion for partial closure of courtroom, but ordered that television monitor be set up outside courtroom so that those who were required to leave courtroom during minor victim's testimony were able to see and hear it by television link, the proper legal

standard for the partial closure was the "substantial reason" test rather that the four-part Waller test.

Under circumstances where a television link was available for excluded persons, trial court had only to make appropriate findings setting forth substantial reason why pretrial closure was necessary.

Court properly rejected defendant's argument that expert testimony was needed from a physician or psychologist before courtroom could be partially closed.

Court erred in allowing state to qualify state attorney's forensic interviewer as an expert in forensic interviewing where record does to demonstrate the existence of a recognized field of expertise in forensic interviewing.

Jones v. State, 29 Fla. L. Weekly D2171 (Fla. 3rd DCA 2004):

Court's partial closure of courtroom during testimony of victim of sex crime without making findings required by *Waller v. Georgia* did not amount to fundamental error and a contemporaneous objection was required to preserve the issue for appellate review.

Springer v. State, 29 Fla. L. Weekly D1366 (Fla. 5th DCA 2004):

Partial closure of courtroom in accordance with section 918.16 during testimony of victim did not deny defendant right to fair and open public trial.

Discussion: This case provides very little discussion, but simply indicates that the issues were resolved by previous opinions.

Kovaleski v. State, 28 Fla. L. Weekly D2180 (Fla. 4th DCA 2003): *on rehearing*

Where courtroom was partially closed under section 918.16, which allows for a partial closure during period when victim of sex offense under 16 years of age is set to testify, but when victim took the stand it became clear that the victim was no longer under age 16 as the statute required, and defense counsel timely objected to continued closure of courtroom, trial court erred in failing to conduct *Waller* hearing to determine whether prerequisites for closure had been met.

Ford v. State, 27 Fla. L. Weekly D1740 (Fla. 4th DCA 2002):

Constitutional rights of victim of jewelry thefts were violated when victim received insufficient notice of hearing in which court accepted guilty pleas of two defendant and dismissed charges as to third defendant.

Pleas quashed and case remanded for further proceedings with adequate notice to victims.

Discussion: The State mailed the victims notice of the plea hearing five days prior to the hearing. The victims objected that they did not have sufficient notice to be at the hearing, but the court took the pleas anyhow. Although restitution was an issue in this matter, the same principle applies to sex offenses. If the case is resolved without giving the victim notice and opportunity to be heard, the victim can appeal and get the plea overturned by the appellate courts. If the state is at fault in providing insufficient notice, I imagine the appellate courts would come down quite hard on us in subsequent opinions, much as they did in the line of cases where we did not provide proper notice prior to issuing subpoenas for medical records.

Alvarez v. State, 27 Fla. L. Weekly D1743 (Fla.. 4th DCA 2002):

Issue of trial court' closure of courtroom during testimony of minor victim of sexual offense in community control revocation proceeding was not preserved for appellate review where defendant failed to object to closure.

Probationer has a constitutional due process right to a public trial in a VOP hearing.

Williams v. State, 736 So.2d 699 (Fla. 4th DCA 1999), receded from to the extent it holds that failure to object to closure of courtroom does not constitute a waiver of the right to public trial.

Alonso v State, 821 So.2d 423 (Fla. 3d DCA 2002):

Error to close courtroom during testimony of two teenaged witnesses where no overriding interest was served by closure during testimony.

Evidence that victim was forced onto bed face down, causing her to be unable to breathe, and that there was anal penetration causing victim great pain was sufficient to support charge of sexual battery with great force.

In deciding whether there has been actual physical force likely to cause serious personal injury, court is not required to ignore injury occasioned by penetration itself.

Roberts v. State, 27 Fla. L. Weekly D1068 (Fla. 2d DCA 2002):

> Error to order courtroom cleared of spectators, including members of defendant's immediate family during testimony of child victim without making appropriate findings to justify the closure.
>
> In order for court to clear courtroom during such testimony, the party seeking to close the hearing must advance an overriding interest that is likely to protect that interest, and the trial court must consider reasonable alternatives to closing the proceedings.

Hobbs v. State, 820 So.2d 347 (Fla. 1st DCA 2002):

> Where state was seeking to close trial in a constitutionally valid matter pursuant to F.S. 918.16, to the extent there was any error during state's attempt to comply with the statute, it was an error in the trial process itself rather than a structural defect.
>
> Discussion: The court provides a nice summary of the standard used in clearing a courtroom. In a total closure of the courtroom, a compelling reason standard is used. In a partial closing such as that provided by F.S. 918.16, a substantial reason standard is used. In this case, the prosecutor requested closure pursuant to statute. The appellate court ruled that this generic request was obviously referring to F.S. 918.16 and therefore valid.

Whitson v. State, 791 So.2d 544 (Fla. 2d DCA 2001):

> Error to totally close courtroom without making findings that meet the prerequisites for closure set forth in *Waller v. Georgia*, 467 U.S. 39 (1984).
>
> Total closure of courtroom is statutory error since section 918.16 does not authorize total closure of the courtroom when certain victims of a sex offense testify, but identifies member of the public who cannot be removed.
>
> *Waller* requires the performance of a judicial duty that cannot be obviated by relying on state statue.

Rider v. State, 724 So.2d 617 (Fla. 5th DCA 1998):

> Trial court did not abuse its discretion in refusing defendant's request to require mother of child victim of alleged sexual abuse to testify before child, absent demonstration of any prejudice.

Rule of sequestration of witnesses is not to be applied as a strict or absolute rule of law, and the trial court has discretion to determine whether a particular witness should be excluded from the courtroom during the trial.

Discussion: The defense acknowledged that the victim's mother was exempt from sequestration pursuant to F.S. 90.616(2)(d), but demanded that she testify prior to the child so that she could not hear the child's testimony. The appellate court ruled that the matter was within the sound discretion of the trial judge and no prejudice was shown.

Fitzgibbons v. State, 745 So.2d 452 (Fla. 3rd DCA 1999):

Abuse of discretion to refuse to allow defense to recall victim as part of its case in chief, contrary to court's earlier ruling, where defense, in reliance upon court's earlier ruling, had refrained from inquiring about certain matters which were critical to defense during cross-examination of victim during state's case in chief.

Clements v. State, 742 So.2d 338 (Fla. 5th DCA 1999):

Trial court did not err in ordering that persons not permitted by section 918.16 F.S.1997, leave courtroom during victim's testimony without considering other alternatives or necessity of closure. Partial closure under statute does not require showing of same factors necessary for total closure of hearing.

Discussion: The trial court in this case excluded everyone not specifically mentioned in F.S.918.16 from the courtroom during the 14 year old victim's testimony. The defense counsel objected on the grounds that his client was being deprived of a right to a public trial. The defense argued several federal cases involving total closure of judicial proceedings. The Appellate Court ruled that these various federal cases were not applicable because F.S.918.16 is specifically tailored to meet the important goal of protecting a child's welfare during testimony. In essence, if this issue ever arises in one of your trials, do not allow defense counsel to confuse the judge with case law that relates to complete closure of courtrooms. It is not applicable under these circumstances.

Martinez v. State, 664 So.2d 1034 (Fla. 4th DCA 1995):

Where facts were hotly disputed, defendant's right to fair trial outweighed victim's right to be present in courtroom during crucial stages of criminal proceedings.

Discussion: The witness was the victim of attempted manslaughter. The court allowed the victim to stay in the courtroom during opening statements. The defendant objected. The appellate court ruled that when there is a conflict between the victim's constitutional right to be present at all crucial stages and the defendant's right to a fair trial, any doubts should be resolved in favor of the defendant receiving a fair trial. The court later implied that the victim could have sat through remainder of trial after her testimony.

Duncan v. State, 583 So.2d 439 (Fla. 4th DCA 1991)

There was no error in allowing the child's guardian ad litem to sit with her during her testimony. The trial court took adequate precautions to ensure that the guardian would not influence the child's responses.

Video Voyeurism

Allen v. State, 2020 WL 20662 (Fla.App. 1 Dist., 2020)

Defendant pushed his pants into the next stall where a 14-year-old girl was undressing. She noticed his phone was in the pocket facing up toward her. Defendant was properly convicted of video voyeurism even though the recording was never recovered from the phone.

VIDEOTAPED INTERVIEW ISSUES

State v. Mackendrick, 2022 WL 1164057 (Fla.App. 1 Dist., 2022)

The Florida Supreme Court has held that videotaped out-of-court interviews with child victims are not allowed into the jury room during deliberations because of the "real danger that the child's statements will be unfairly given more emphasis than other testimony." Young v. State, 645 So. 2d 965, 967 (Fla. 1994)... However, any error in allowing a videotape to go to the jury room is not fundamental and must be preserved by objection.

Martin-Godinez v. State, 2020 WL 502396, (Fla.App. 1 Dist., 2020)

Defendant argued counsel was ineffective because he did not object to the CPT Interview going to the jury during deliberations. Although the court denied his claim because he did not allege it properly, they did note that the trial court erred:

"[V]ideotaped out-of-court interviews with child victims introduced into evidence under section 90.803(23)[, Florida Statutes,] shall not be allowed into the jury room during deliberations." Young v. State, 645 So. 2d 965, 967 (Fla. 1994).

Otero v. State, 2015 WL 3986161 (Fla. Dist. Ct. App. July 1, 2015)

Otero alleged ineffective assistance when defense counsel failed to object, and in fact agreed, to the jury's viewing of the victims' videotaped interviews in the jury room during its deliberations. In Young v. State, 645 So.2d 965, 967 (Fla.1994), the Supreme Court held that such videotaped interviews should not be allowed into the jury room because of the "real danger that the child's statements will be unfairly given more emphasis than other testimony." The proper response to a jury's request to view a taped interview is to replay it in open court.

Nunez v. State, 2013 WL 1222940 (Fla.App. 3 Dist.)

Jury should not have been allowed to view entire unredacted recording of interview of victim, including evidence of additional uncharged incidents involving the defendant and victim, in prosecution for sexual battery on a person less than 12 years old and one count of lewd and lascivious molestation on a person less than 12 years old; unredacted recording constituted evidence of collateral crimes neither charged in the information nor properly noticed and determined to be admissible pursuant to rule governing admission of other crimes, wrongs or acts.

Sending a videotaped interview of a child victim to the jury room is error.

Ruiz v. State, 2013 WL 614294 (Fla.App. 2 Dist.)

Defendant was not barred from raising postconviction ineffective assistance of counsel claim, that defense counsel at trial on sexual battery charges had been ineffective for failing to preserve error arising when jury was allowed during deliberations to view videotaped interview with child victim, since issue had not been resolved against him on direct appeal; defendant's claim of error relating to jury consideration of the videotape had been disposed on in direct appeal on grounds of lack of preservation.

Discussion: The main lesson from this case is that you never agree to send the child's videotaped statement to the jury room. It must be played in open court.

McLevy v. State, 28 Fla. L. Weekly D1657 (Fla. 1st DCA 2003):

It was error to allow videotape of out-of-court interview with child victim of sexual abuse to go back to the jury room during deliberations, but error is not necessarily fundamental.

Jassan v. State, 749 So.2d 511 (Fla. 2d DCA 1999):

Videotaped interviews with child victims, when introduced to prove allegations of sexual abuse are not permitted in jury rooms during deliberations.

Although delivery of victim's videotaped statement to the jury may be harmful and prejudicial, it is not fundamental error.

Tullis v. State, 716 So.2d 819 (Fla. 5th DCA 1998):

Videotaped, out of court interviews of alleged child sexual abuse victims are not permitted into the jury room during jury deliberations. Playing a videotape during jury deliberations, even on one occasion, is prohibited because it places undue emphasis on the videotape over other oral testimony and denies the accused the opportunity to cross examine the witness.

VOIR DIRE:

Cassaday v. State, 2020 WL 218307, (Fla.App. 4 Dist., 2020)

Trial court gave each side 45 minutes to do their voire dire during sexual battery child. Defense kept asking for extensions and ultimately got a total of 75 minutes. Appellate court said the time limitations are taken on a case-by-case basis, but 75 minutes was reasonable in this case, especially since defense counsel wasted all of his time pre-trying his case. Examples of his inappropriate "pre-trying" tactics are discussed.

Weddington v. State, 2019 WL 1523174, (Fla.App. 1 Dist., 2019)

The following comment by the judge during jury selection in a sexual battery trial was not fundamental error.

> *And for those of you who demand more than what the State requires, that is that testimony of a witness is insufficient to convict someone, imagine yourself alone with me in this courtroom and I walk over and pick up my gavel, which is a hefty little thing, and I knock you on the head. I'm innocent, because your only case is your own testimony, and for many, many, many of you who responded today, that is insufficient for the State to bring its case against the defendant.*

Sonneman v. State, 2018 WL 6816804 (Fla.App. 5 Dist., 2018)

> Jury foreperson's alleged non-disclosure of her own personal experience with sexual assault was not basis for juror interview following conviction of lewd or lascivious battery of child and interfering with custody of child, where foreperson did not conceal information related to direct question asked during voir dire examination, since neither prosecutor nor defense counsel asked panel if any of them had personally been sexually assaulted or if any among them was victim of any crime at all, prosecutor only inquired as to friends or family members affected by sexual assault, and defense counsel limited his voir dire inquiry on subject to two prospective jurors who responded to prosecutor's question.

Gonzalez v. State, 2014 WL 3930137 (Fla.App. 3 Dist.):

> Prospective juror was not excusable for cause based on her responses to voir dire questions in trial for lewd and lascivious molestation; although juror initially raised her hand in response to the court's inquiry whether any jurors felt they might be prejudiced or biased based on the nature of the case, juror candidly informed court she had been a victim of molestation as a child, juror consistently and unequivocally maintained that she could be fair and impartial, and juror never affirmatively expressed bias or prejudice against defendant.

Bell v. State, 38 Fla. L. Weekly S87 (Fla. 2013):

> Prosecutor's voir dire questions, asking prospective jurors whether the testimony of a child alone would be insufficient for them to return a guilty verdict, did not improperly precondition the jurors to convict defendant in prosecution for lewd and lascivious battery; prosecutor sought to ascertain whether any prospective juror carried an underlying distrust of child witnesses, and such questions were within the State's right to ascertain latent or concealed prejudgments by prospective jurors.

> Although a prosecutor may not interrogate a prospective juror as to his attitude toward a particular witness who is expected to testify in the case, especially when the juror knows in advance that the prosecution has only the one primary witness to prove its case, this prohibition extends only to questions of prospective jurors as to the kind of verdict they would render under any given state of facts or circumstances.

McPhee v. State, 37 Fla. L. Weekly D2765 (Fla. 3rd DCA 2012):

> Potential juror's statement, during voir dire in prosecution for sexual activity with a child by a person in custodial authority and unlawful sexual activity with a minor, that defendant looked like someone who had molested her younger sibling years earlier did not require that entire jury panel be struck; defendant was not implicated as the perpetrator of the earlier offense, defense counsel dispelled any notion that potential juror thought defendant was the perpetrator through follow-up questioning, potential juror did not end up serving on the jury, and defense never objected at the time potential juror made her comment or moved to strike the panel once jury selection was complete.

Moore v. State, 31 Fla. L. Weekly D2483 (Fla. 3rd DCA 2006):

> Hypothetical questions of whether prospective jurors would be satisfied with hypothetical purse-snatching victim's testimony and physical evidence and with testimony alone were permissible during voir dire of trial for burglary of scrap-metal business and petit theft of metal radiators; questions did not relate to facts of defendant's case or ask prospective jurors to commit to a verdict but, rather, tested jurors' abilities to accept both testimonial and physical evidence.
>
> Hypothetical questions designed to determine whether prospective jurors could correctly apply the law are permissible.
>
> Discussion: The State was able to challenge jurors for cause because they said they could not convict based upon testimony alone. This is not a sexual battery case, but the argument can be used on many of our sex crimes cases.

Ferreiro v. State, 31 Fla. L. Weekly D2166 (Fla. 3rd DCA 2006):

> In prosecution of defendant for sexual battery on a minor under twelve, defense counsel could not ask potential jurors during voir dire whether "a girl could come to court and lie" and whether "a girl could come to court

and lie about rape charge;" court prohibited references to "a girl" and "rape charge" because they seemed to refer to the facts of the case, these limitations on voir dire were reasonable, and defense counsel's ability to determine the fairness of jurors was not restricted by these limitations.

McCray v. State, 31 Fla. L. Weekly D314 (Fla. 1st DCA 2006):

Trial court abused its discretion in stalking trial in refusing to allow defendant to use police report to refresh minor witness's recollection, even though police report contained a description given by witness to her mother and then relayed from mother to officer preparing the report and, thus, apparently contained inadmissible hearsay.

Even if a statement is inadmissible as hearsay, it may still be used to refresh recollection, as long as a party is not unduly prejudiced by the process.

Police officer's testimony in stalking trial regarding witness's previous description of defendant, which was provided to officer and included in his report, was not hearsay; testimony was to be used to impeach witness's testimony rather than to prove truth of matter asserted.

Discussion: This is not a sex crimes case, but the issue may present itself frequently in your cases.

Miles v. State, 27 Fla. L. Weekly D2104 (Fla. 3rd DCA 2002):

Where defendant was charged with capital sexual battery, trial court reversibly erred in refusing to strike medical social worker whose job entailed working in emergency room with children who had been sexually abused, and who gave equivocal response to question on voir dire as to whether her experience would make it difficult for her to be fair and impartial.

Valderrama v. State, 816 So.2d 1143 (Fla. 4th DCA 2002):

No abuse of discretion in denying motion to strike venire after many of members revealed that they had been victims of sexual abuse as children.

Barnette v. State, 756 So.2d 1069 (Fla. 5th DCA 2000):

Prosecutor's questions during voir dire examination whether prospective jurors "couldn't find the Defendant guilty of anything unless there was an eye witness, other than the victim testifying?" and questioned whether jurors would be willing to use their common sense to judge credibility of

witnesses because it might "come down to which witness is more credible, which one is more believable" did not amount to impermissible comment on Defendant's right to remain silent.

Metaxotos v. State, 756 So.2d 199 (Fla. 4th DCA 2000):

Error to deny defendant's request to permit members of his family to be in courtroom during voir dire. New trial required.

Discussion: The defendant in this case was charged with attempted first degree murder, burglary while armed, and sexual battery with a deadly weapon. The trial court in the case refused to consider any accommodation to permit family members or the public at large to be present during any portion of the voir dire. The presumption of openness of the courtroom was not overcome and the total closure of the courtroom during voir dire was a violation of the defendant's 6th Amendment Right to a public trial.

Bryant v. State, 765 So.2d 68 (Fla. 4th DCA 2000): *On Motion For Rehearing*.

Error to deny defense challenge for cause of juror who had expressed bias, who gave emotionally charged responses to charges, and who remarked that "right off the bat I've got him guilty."

Responses given in response to questions by judge insufficient to do away with doubt cast on juror's partiality.

Discussion: The juror in this sexual battery familial/custodial authority trial expressed his predisposition of the defendant's guilt in voir dire. He had family members molested and said numerous times he was inclined to find the defendant guilty. The judge eventually got him to agree that he would base his verdict on the evidence presented. The appellate court said that the judge's efforts to rehabilitate him were not sufficient and that someone with this much inherent bias should have been stricken for cause. The lesson here is that when a juror seems too good to be true, he probable is. Some jurors are simply beyond rehabilitation and there is no need to work on rehabilitation.

Hall v. State, 24 Fla. L. Weekly D1870 (Fla. 5th DCA August 6, 1999):

No abuse of discretion in denial of challenges for cause directed at jurors who either knew someone who was involved in a sex crime or had themselves been victim of sex crime, where underlying events were in a sense remote, and all jurors unequivocally indicated that they would be

able to render a verdict based on evidence and not on personal beliefs, feelings or experiences.

Chester v. State, 737 So.2d 557 (Fla. 3rd DCA 1999):

Juror's unintentional failure to disclose during voir dire that she was sexually abused as child, in trial for robbery and commission of lewd and lascivious act upon minor child, deprived defendant of his right to fair and impartial jury, though jury failed to reach verdict on lewd and lascivious assault charge, where juror admitted that she believed victim in instant case because juror's mother did not believe her own report of sexual assault.

Young v. State, 720 So.2d 1101 (Fla. 1st DCA 1998):

Once a party shows that a juror concealed information during questioning that is relevant and material to serving on the jury and that the non-disclosure was not caused by the party's own lack of diligence, inherent prejudice to the party is presumed, and the party is entitled to a new trial. In this case, a juror concealed the fact that she had been molested as a child.

Bauta v. State, 698 So.2d 860 (Fla. 3rd DCA 1997):

Where prospective juror broke down crying in response to questions regarding sexual abuse, trial court did not abuse its discretion by conducting voir dire of jury panel on issue of possible taint and denying motion to discharge panel.

Washington v. State, 687 So.2d 279 (Fla. 2d DCA 1997):

Trial did not abuse its discretion in denying motion to strike the entire venire when a prospective juror explained that she was predisposed to defendant's guilt because she had been the victim of child abuse herself. Curative instruction was adequate.

OTHER:

Carnright v. State, 2024 WL 357988 (Fla.App. 3 Dist., 2024)

The defendant met the victim at a bar and offered her cocaine. They then went to his car and had sex. She said he took advantage of her inebriated state to force her to have sex. The defendant said she was extorting him for drugs and money.

At trial, the defendant sought to introduce data from the victim's cell phone to impeach her testimony. He also sought to introduce her search history to impeach her. The trial court did not allow the defendant to introduce this extrinsic evidence but allowed him to paraphrase it during his cross examination. The appellate court said most of the data was properly excluded and it was harmless error nonetheless.

Rivas v. State, 2023 WL 8442850 (Fla.App. 1 Dist., 2023)

The victim testified she was sexually abused by the defendant three years earlier. She eventually told a friend, who convinced her to tell her mother. The defendant claimed two pieces of testimony in trial were error and merit reversal.

The first testimonial evidence subject to objection is quoted in the opinion:

> *The first statement that Rivas challenges is the friend's, who testified for the State:*
>
> > *[The State]: Do you know if [the victim] had told her mom at that point?*
> > *[Friend]: She had told me that she never told anyone.*
> > *[The State]: How did you feel about that?*
> > *[Friend]: It honestly hurt me, because I know that, through my experiences that I've had with multiple men in my youth, it's hard to open up to someone, especially in Hispanic communities, it's very normalized behavior upon men.*

The defendant argued this testimony characterized people like him as pedophiles. The appellate court disagreed and said it was not reversible.

The second testimonial evidence subject to objection is the nurse practitioner's testimony that, "the seven-year-old's vagina was penetrated with such force that her hymen was torn." The defendant argued that the testimony was unduly prejudicial because any reasonable juror would develop an affinity for the victim after hearing it. The appellate court responded that the fact the statement was emotionally charged was not a problem. "That is true of nearly any evidence pointing to a child sex crime."

Swearingen v. State, 2023 WL 7177791 (Fla.App. 1 Dist., 2023)

Victim's emotional testimony, in which she recounted being molested when she was about six years old and during which she cried and referred to having her innocence robbed by defendant, did not warrant mistrial in prosecution for lewd and lascivious molestation of a person under 12 years of age; there was no indication that victim's emotional testimony compromised validity of trial, or that trial court should have taken different, alternative action due to reactions by jurors to the victim's emotional testimony, and there was no basis for finding error by the trial court which was in the best position to assess the intensity of the victim's emotional testimony and its potential effect on jurors.

Deloatch v. State, 2023 WL 3606546, at *1 (Fla.App. 4 Dist., 2023)

The victim voluntarily checked herself into a DCF treatment facility for detox treatment. An employee traded sex for cigarettes in the short time she was there. The defendant was subsequently convicted of sexual misconduct contrary to F.S. 394.4593(2). The appellate court reversed the conviction because the victim did not meet the definition of a "patient" as defined in earlier parts of the statute. The statute defines a patient as someone receiving mental health treatment. The victim was there to receive detox treatment, not mental health treatment.

Floyd v. State, 2022 WL 12071204, (Fla.App. 5 Dist., 2022)

Defendant made an ineffective assistance of counsel claim because his attorney did not object to a statement introduced in evidence where the detectives expressed their opinions regarding the victim's credibility and the suspect's guilt. The defendant never admitted his guilt in the statement. The case was remanded for a hearing on the issue considering the prejudice issue. The following section of the opinion is a helpful resource when deciding whether to redact portions of a statement.

> *Furthermore, although interrogating detectives' statements can be understood by a jury to be "techniques" used to secure confessions, see, e.g., McWatters v. State, 36 So. 3d 613, 638 (Fla. 2010), "[a] witness's opinion as to the credibility, guilt, or innocence of the accused is generally inadmissible, [and] it is especially troublesome when a jury is repeatedly exposed to an interrogating officer's opinion regarding the guilt or innocence of the*

> *accused." Roundtree v. State, 145 So. 3d 963, 965 (Fla. 4th DCA 2014) (quoting Jackson v. State, 107 So. 3d 328, 339-40 (Fla. 2012)); see also Page v. State, 733 So. 2d 1079, 1081 (Fla. 4th DCA 1999) ("It is especially harmful for a police witness to give his opinion of a [witness's] credibility because of the greater weight afforded an officer's testimony.").*
>
> It is interesting to note that the State argued that the detective's comments were techniques used to secure a confession. Since the defendant never confessed, what is their relevance?

Bresile v. State, 2022 WL 3050084 (Fla. 3rd DCA 2022)

Defendant violated his probation by committing sexual battery on a child. The victim recanted and said he made up the story because she was mad at him. At the revocation hearing, the state introduced the victim's statement, her mother's statement and the 911 call. A DNA analyst also testified that the penile swab from the defendant had saliva DNA on it. This was consistent with the victim's allegation that the defendant put his penis in her mouth.

The court ruled that hearsay is admissible at a VOP as long as there is other corroborating evidence. It concluded by saying,

> *L.K.'s hearsay statements presented to the court during the violation of probation hearing, coupled with the corroborating non-hearsay testimony provided by the analyst regarding the presumptive positive findings of saliva on Bresile's penile swab, are sufficient to sustain the trial court's finding that the State established by a preponderance of the evidence that Bresile violated his probation. Accordingly, we affirm the order of revocation of probation and the sentencing order entered by the trial court.*

Thach v. State, 2022 WL 2349471 (Fla., 2022)

Defendant was charged with multiple counts of sexual battery and lewd or lascivious molestation. The three victims did not testify as

to all of the elements of sexual battery, so the defense moved for a judgment of acquittal. The state responded by amending the sexual battery charges to lewd or lascivious molestation. The defense argued there were substantive changes that were per se reversible.

The Florida Supreme Court ruled that making substantive changes are not per se reversible. Instead, the Court ruled, "we reaffirm that the proper standard is an individualized showing of prejudice to the substantial rights[4] of the defendant. Prejudice, in this context, depends not on any one factor, but on the totality of the circumstances at the time of the amendment." The Court then noted that the defendant was not prejudiced by the amendments. The conviction was affirmed. The Court disapproved of two previous 4th DCA opinions that used the per se reversible rule.

Bankston v. State, 2021 WL 5915068 (Fla.App. 4 Dist., 2021)

The defendant was charged with causing his mouth to penetrate or unite with the vagina of the victim. During jury selection, the State amended the information to state the defendant's penis penetrated or united with the victim's anus. The court gave the defendant the option to continue the trial based the amended information, but the defendant said he would like to proceed. The appellate court ruled the defendant waived any objection to the amended information. The court noted, "[I]t is well settled that the state may substantively amend an information during trial, even over the objection of the defendant *unless there is a showing of prejudice to the substantial rights of the defendant*."

Schluck v. State, WL 5103745 (Fla.App. 1 Dist., 2021):

Defendant sexually battered the victim sometime at night. He left her dorm room at 7:14 am. She had a discussion with her roommate about the crime and then called 911 at 7:41 am. The victim did not testify at trial and the State introduced the 911 recording as an excited utterance. The victim sounded very distraught on the call. The appellate court ruled it did not qualify for an excited utterance because the victim had time to engage in reflective thought process before making the call.

Dillard v. State, 2021 WL 4805280 (Fla.App. 2 Dist., 2021)

This homicide case is a good resource for us when the charging document allows for alternative means of committing the crime. The state charged the defendant with premeditated murder or felony murder. The court ruled that the jury did not have to be unanimous as to which one applied as long

as they were unanimous on the ultimate issue of guilt. The court cited to *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991), where the Court observed,

> *"[o]ur cases reflect a long-established rule of the criminal law that an indictment need not specify which overt act, among several named, was the means by which a crime was committed.... We have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone. In these cases, as in litigation generally, "different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict."*

Shimon v. R. B., 2021 WL 357956 (Fla.App. 3 Dist., 2021)

Possibility that criminal investigation into alleged sexual battery offense could be re-opened was not so remote as to eliminate defendant's reasonable fear of prosecution, and thus, portion of order issued in purported victim's civil action compelling defendant to produce allegedly self-incriminating documents in discovery violated the Fifth Amendment, even though county prosecutor had declined to bring criminal charges, where future prosecution was not barred by statute of limitations, defendant had not been granted immunity, and the protection against double jeopardy had not been established.

Discussion: Although this is a civil case, it provides another example as to why it is important to do good memos. The victim was sexually battered on a boat, and the case was reviewed and declined by the Broward State Attorney's Office. The victim sued the offender and demanded certain incriminating documents. The court noted the case was declined "due to "the time delay and the victim's indecisiveness to come forward in the beginning, as well as jurisdictional issues." As you can see, the ASAs memo was likely scrutinized by both attorneys, the trial court and the appellate court. Hopefully, all were impressed with the quality of the work of the ASA who resolved the case!

Botto v. State, 2020 WL 7082527 (Fla.App. 5 Dist., 2020):

Eight-year-old victim told forensic interviewer that defendant fondled his penis and "he thinks" the defendant performed oral sex on him. The state

only filed on the fondling charges. At trial, the child's CPT interview was played testified about the oral sex and defense counsel did not object. Appellate court ruled defense counsel was deficient in her responsibilities for not objecting to the evidence and the case was reversed for ineffective assistance of counsel.

Holloway v. State, 2020 WL 7252803 (Fla.App. 1 Dist., 2020)

Defendant was convicted for sexual battery of a mentally impaired victim. At trial, he proffered evidence from a witness who testified he saw a video call between the defendant and the victim where they discussed having sex and she took off her shirt. The defendant argued this evidence should be admitted under the state of mind exception to the hearsay rule to show the victim consented. The appellate court ruled the state of mind exception only applies to statements made just before or contemporaneously with the event. Since the proffer did not include the time or date the statement was made, it did not qualify.

Thach v. State, 2020 WL 5668525 (Fla.App. 1 Dist., 2020)

During trial, the State amended several counts of sexual battery upon a child to lewd or lascivious molestation of a child. Appellate court said amending an information in trial is appropriate as long as there is no prejudice to defendant. Since the amended charges addressed the same sexual acts, there was no prejudice to the defendant.

State v. Patterson, 2020 WL 4915345, at *2 (Fla.App. 5 Dist., 2020)

Defendant was on probation for failing to register as a sex offender. The judge issued a warrant for violating his probation and issued a $2500 bond. The appellate court ruled the judge's failure to comply with section 948.06(4) constituted a clear departure from the essential requirements of the law. Section 948.06(4) mandates that the court hold a hearing and make a finding that the defendant is not a danger to the public prior to releasing him on bail or his own recognizance. The court also referred to Fla. R. Crim P. 3.790(b)(2).

J.F. v. State, 2019 WL 6720430 (Fla.App. 2 Dist., 2019)

Juvenile charged with delinquent act of attempted sexual battery on child less than 12 years of age was not entitled to jury instruction on lewd and lascivious molestation as permissive lesser included offense, in juvenile delinquency proceeding, where statutory elements of lewd or lascivious

molestation were not alleged in information, specifically, information did not allege that defendant touched victim in lewd or lascivious manner.

Goodman v. State, 2019 WL 6139529 (Fla.App. 1 Dist., 2019)

Trial court's standard instruction, which defined sexual battery as the sexual organ of the defendant penetrating or having union with the vagina of the victim, constituted fundamental error, where information charged defendant with only attempted sexual battery via penetration, and State relied on instruction by presenting evidence and arguing that jury could convict defendant of uncharged crime.

Nebergall v. State, 2019 WL 5778045 (Fla.App. 4 Dist., 2019) *revised on motion for clarification at* 2020 WL 88797

Alleged victim's improper comment during her cross-examination referencing DNA found on her buttocks may have materially contributed to defendant's convictions on charges of attempted sexual battery while in possession of a weapon and simple battery; although forensic scientists from sheriff's office described results from testing of DNA evidence on victim's buttocks as inconclusive, victim's comment strongly implied that DNA belonged to defendant and that there was evidence to that effect which jury was not being permitted to see, and jury convicted defendant on both charges for which DNA evidence was present, albeit inconclusive, and acquitted defendant on one charge for which no DNA evidence was taken.

Logue v. Book, 2019 WL 3807987 (Fla.App. 4 Dist., 2019)

Peaceful protest against advocacy of sex offender registration laws, made at a children's march by opponent of sex offender laws, served legitimate purpose, and thus did not constitute harassment that would support issuance of injunction protecting advocate for sex offender laws from stalking by opponent, even if protest was unpleasant and objectionable; each party was vocal proponent of opposite positions on sex offender laws, the issue was being debated within the free trade in ideas, the fact that the advocate had far greater public support in the debate than the opponent did not make the opponent's conduct illegitimate, and opponent had First Amendment right to express his views, even if distasteful and vulgar.

Social media posts made by opponent of sex offender laws, including address of advocate of sex offender laws, photographs of advocate's home, song containing obscene lyrics directed at advocate, and cartoon depicting tombstone with obscene reference to advocate, were not directed at a specific person and, thus, did not support issuance of injunction protecting advocate from stalking by opponent; while the posts were aimed at the advocate and caused her concern, they were not sent directly to her, and threats made via social media had to be directed to the victim by delivery rather than by content in order to support stalking injunction.

Where comments are made on an electronic medium to be read by others, they cannot be said to be directed to a particular person, as required to support the grant of a stalking injunction.

Maldonado v. State, 2019 WL 3938788, (Fla.App. 4 Dist., 2019)

When defendant got out of prison after serving a sentence of sexual battery, the DOC personnel erroneously told him he had to wear an electronic monitor. The victim was not a child and the court never ordered it. Not long after his release, there was a sexual battery in Palm Beach County. The detective called the DOC and asked them if any sexual offenders had recently been released to the area of the crime. He was advised that the defendant had been release to that area about 30 days earlier. DOC also gave the detective his GPS coordinates at the time of the crime.

The Defendant argued that unlawfully making him wear the monitor violated his Fourth Amendment rights and all evidence resulting from this violation should be suppressed. The court disagreed and said the erroneous requirement for the defendant to wear a GPS monitor was based on simple negligence and therefore, there was no deterrent effect in suppressing the evidence. The case gives a good discussion on why evidence should not be suppressed when such a remedy does nothing to defer future misconduct.

Viladoine v. State, 2019 WL 1466879 (Fla.App. 4 Dist., 2019)

The state was precluded during jury trial from amending the information to charge defendant with sexual battery upon a child less than 12 years of age by object penetration of victim's vagina, instead of sexual battery upon a child less than 12 years of age by sexual organ penetration of or union with victim's vagina, even though defendant's defense theory was alibi, and even though the amendment did not change the crime charged; the amendment changed the essential elements of the charged offense and

altered the way the defense might have prepared the case as, if the charge was object penetration with a pink toy gun, careful preparation would have focused on whether the pink toy gun was ever present.

Five-year-old victim's statement to detective on the day of the incident was inadmissible in evidentiary hearing in prosecution for sexual battery upon a child less than 12 years of age, where victim's statement raised serious concerns about victim's competence at the time the statement was given, and nothing in the reconstructed evidence of the hearing overcame those concerns.

Johnson v. State, 2019 WL 1371917, (Fla.App. 4 Dist., 2019)

Trial court read the wrong jury instructions for the wrong counts. The case discusses why this was not fundamental error.

Madison v. State, 2018 WL 6271782 (Fla.App. 1 Dist., 2018)

Evidence that defendant refused to provide a DNA sample at an interview before his arrest was admissible in defendant's trial for capital sexual battery, lewd or lascivious molestation, attempted capital sexual battery, and false imprisonment; defendant opened door to admission of such evidence by repeatedly questioning investigator on cross-examination as to whether there was any evidence, including DNA evidence, that victim was sexually assaulted other than victim's allegations, as well as by suggesting that investigation was less than thorough and that defendant's arrest relied solely upon victim's allegations, and defendant's refusal to submit a DNA sample could be considered suspicious and tending to corroborate victim's allegations and identification of defendant as perpetrator.

Frazier v. State, 2018 WL 3151314, (Fla.App. 1 Dist., 2018)

Court was not required to analyze whether or not the child was in need of the protection offered by section 90.803(23) prior allowing the introduction of child hearsay statement.

At the appellant's trial, the State submitted evidence that the appellant told the victim "not to tell nobody or he'll come back and he'll hurt [her]." The State's evidence was legally sufficient to show that the appellant knowingly intimidated the child victim to prevent her from reporting the sexual battery to law enforcement. Based on the record, we find that the State presented sufficient evidence to sustain a conviction for tampering with a victim.

Evans v. State, 2018 WL 2716714, (Fla.App. 4 Dist., 2018)

Defendant was charged with burglarizing a 77-year-old woman's home and sexually battering her. The defendant argued that it was a consensual encounter. The court ruled that the victim's 911 call was admissible as an excited utterance under the following circumstances:

> *Similarly, in this case, the victim was an elderly woman. Although she called her son first, and waited until he arrived in order to call the police, the 911 call was made only about twenty minutes after the appellant left her apartment. During the call, she was crying and in shock. Further, an officer who came to the scene also described the victim as in shock. The victim sounded stunned and extremely concerned that she was still in danger. The court acted within its discretion in admitting the tape.*

During cross-examination of the victim, the defense attorney pursued his theory of consent. The victim responded to by saying, "Oh no. I swear on my son's soul that everything you are saying is a lie. ... Unbelievable. Oh, my God." Defense counsel asked for a mistrial because of the emotional outburst. The court provided a good discussion concerning when emotional outbursts require a mistrial and then distinguished those cases in ruling this victim's behavior did not require a mistrial.

Bubb v. State, 2017 WL 3442745 (Fla.App. 5 Dist., 2017)

Any error resulting from admission of child protection team (CPT) interview video was not fundamental in prosecution for sexual battery on a person less than 12 years of age and lewd or lascivious molestation; defendant admitted he penetrated victim, similar out-of-court statements from victim were admitted without objection through testimony of nurse examiner, forensic evidence established existence of semen in victim's underwear, and witness observed defendant red, sweaty, and very nervous after victim told witness she had been touched.

Brugal v. State, 2017 WL 1076893 (Fla.App. 3 Dist., 2017)

The court properly allowed the victim to testify there was a gun on the night stand. It was relevant to explain why she was afraid to report the incident.

Mathis v. State, 1D14-2695, 2016 WL 6673395 (Fla. 1st DCA Nov. 14, 2016)

Defense counsel's decision not to move to dismiss two counts of unlawful sexual activity with child, based on statute of limitations, had conceivable tactical explanation, and, thus, defendant could not raise ineffective assistance of counsel claim on direct appeal; defendant also faced count of capital sexual battery on child, capital battery count carried mandatory life sentence, and it was conceivable that counsel strategically chose to risk convictions on unlawful sexual activity counts to increase chances of acquittal on capital battery count.

S.D. v. Dep't of Children & Families, 2016 WL 6992649 (Fla. 3d DCA Nov. 30, 2016)

Witness's testimony via computer (Skype), in termination of parental rights action, fully satisfied the protections of the confrontation clause, as she was visible for the trier of fact to assess her credibility and father had opportunity to cross-examine the witness.

Although there was no notary present in Connecticut to swear in witness prior to her computer testimony in termination of parental rights action, any error was cured, when the court granted Department of Children and Families' (DCF) motion to reopen the case and subsequently had a notary swear in witness by telephone from Connecticut.

Colon v. State, 2016 WL 2772192, (Fla. Dist. Ct. App. May 13, 2016)

In this priceless case the State introduced photos of the 4-year-old victim's vaginal injuries through the child's mother. Defense counsel objected because the photos had invoked an outburst from the mother at another hearing. Additionally, the mother had been crying throughout her entire testimony. The following excerpt describes the event:

> *The State then presented the photographs to the victim's mother and asked her to identify what was depicted therein. She replied, "It's my daughter's vagina." While the State was publishing the photograph to the jury, the victim's mother stated twice that she needed to throw up and then vomited into a trash can, which was provided by a prescient bailiff. The record reflects that this occurred in front of the jury box and within clear view of the jury. The defense moved for a mistrial. After a brief bench conference, the court announced a recess and the mother*

> *was escorted to the restroom. Although the trial court agreed with the defense and expressed its doubts that there was a curative instruction that could adequately address this incident, it ultimately denied the defense's motion for mistrial. This was error.*

The appellate court ruled that the prejudicial effect of the tactic outweighed the probative value. Since the State had the option to introduce the photos through the physician that did the exam, the court felt that the only reason the State had to do this was to evoke the emotional response.

Ferguson v. State, 2015 WL 9491865 (Fla.App. 5 Dist.,2015):

Witness's comment, "I always thought he was a child molester, I had that opinion, but I didn't have any proof or facts**,** but there wasn't much I could do about it" was improper.

State's follow-up question, "What about Mr. Ferguson made you think that he was a pedophile?" was "highly improper" and would have been: grounds for mistrial.

Lopiano v. State, 2015 WL 2089039 (Fla.App. 4 Dist.)

During a lewd molestation investigation, detective repeatedly asked defendant if he penetrated child. Defendant admitted to fondling child, but not penetrating child. Detective said during interview that he did not believe defendant on this issue. Appellate court ruled it was reversible error not to redact this portion of the interview. Since the children never said they were penetrated and the element is not necessary for a molestation charge, it was unduly prejudicial. The court also should have redacted the part of the tape where the detective said he did not believe the defendant.

Eichhorn v. State, 2015 WL 2258185 (Table) (Fla.App. 5 Dist.) *unpublished*

Life sentence for conviction of sexual battery on a child was reversed for ineffective assistance of counsel. In this entertaining opinion, defense counsel told his client to turn down plea of 5 years prison. He told his client that there was no way a jury would convict. He also advised his client that the victim would not be ruled competent to testify and that the

Williams Rule evidence would not be admissible. Based on this advice, the defendant chose to take his chances with the jury.

Parkerson v. State, 2015 WL 1930312 (Fla.App. 4 Dist.)

Video Voyeurism statute is not unconstitutionally overbroad.

State v. Pereira, 2015 WL 1609909 (Fla.App. 5 Dist.)

State's filing of amended information, charging a single count of child abuse, rather than two counts of lewd and lascivious behavior charged in the original information, acted as a nolle prosequi of the original information.

State was not barred from refiling original charges in second amended information, which reinstated charges of two counts of lewd and lascivious behavior and did not include any new charges, under speedy trial rule; concern that State would be allowed to universally toll running of speedy trial period by entering a nolle pros did not apply, because defendant was able to file notice of expiration pursuant to speedy trial rule, have a timely hearing upon notice pursuant to rule, and have trial date set within recapture period provided by rule, and since amended information, which charged single count of child abuse, was filed based on plea agreement between State and defendant, State did not unilaterally abandon original charges.

When an amended information is filed by bilateral agreement to effectuate a plea, and that plea ends up not resolving the case through no fault of the State, State is not barred from refiling the original charges within the recapture period under the speedy trial rule.

Where the defendant has not waived the procedural rights created by State's speedy trial rule, and the State files an amended information after expiration of the speedy trial period, upon proper motion, the court must dismiss any new charge arising from the same criminal episode as the one charged in the original information.

Pearlman v. State, 2015 WL 548134 (Fla.App. 4 Dist.)

Defendant failed to preserve appellate review of argument that trial court abused its discretion in limiting defense counsel's cross-examination of victim regarding anatomical terminology critical to elements of crime of lewd or lascivious battery on a person 12 or older but less than 16; defendant never proffered testimony he sought to elicit, substance of testimony was not apparent from record, and victim's testimony suggested

that she sufficiently understood the difference between outside and inside of her genitalia.

Wunsch v. State, 2014 WL 5783805 (Fla.App. 2 Dist.):

Erroneous instruction that allowed jury to convict defendant of child neglect with great bodily harm based upon uncharged theory that defendant failed to provide for child's needs was fundamental error; jury could not have found defendant guilty under theory charged in information unless it disregarded instruction on uncharged theory, and State argued that evidence supported a conviction under uncharged theory.

Long v. State, 2014 WL 5462459 (Fla.App. 1 Dist.)

Presence of numerous "burly" men wearing leather jackets emblazoned with the phrase "Bikers Against Child Abuse," created an inherently prejudicial atmosphere at trial in prosecution for child molestation, and deprived defendant of his due process right to trial by a panel of impartial jurors, even though trial court ultimately instructed the group not to wear their "insignia" in the courtroom, and jurors denied that the group's presence in support of victim would have any effect on their verdict; jurors' disavowals of impartiality did not ensure that they was not intimidated and improperly influenced, and the danger posed by jurors' pretrial exposure to the group's insignia could have been easily remedied by the empaneling of a new jury.

New Jury Instruction 2014 WL 4251210 (Fla.)

Sexual Misconduct by a Psychotherapist, F.S. 491.0112, came out with a new jury instruction.

Mehaffie v. Rutherford, 2014 WL 3465686 (Fla.App. 1 Dist.)

Defendant charged with offenses including using a computer to seduce, solicit, lure, or entice a child failed to demonstrate reversible error in trial court's setting of bond at $250,003 for each of the three charges, for a total of $750,009; trial court properly considered that defendant was a flight risk given his lack of ties to the community, trial court considered the serious nature of the charges and determined that requiring defendant to live with his parents would not be sufficient to reduce the risk to the community, and defendant presented no evidence of ties to the community, or evidence regarding his financial circumstances.

Cavaliere v. State, 2014 WL 4671450 (Fla.App. 2 Dist.)

Police detective and 11-year-old victim's teacher improperly vouched for victim's credibility at trial on charge of lewd and lascivious molestation of a person less than sixteen years of age, thereby usurping the jury's role; detective testified that based on victim's age, and "looking at her and kind of getting a feel for her" he could tell that she was acting appropriately and that her accusations against defendant were not a joke to her, and teacher testified that victim was happier and "seemed like a ton of bricks" had been "lifted off her shoulder" after she told teacher what defendant had done.

Video clip from film depicting an intimate interaction between a teenage girl and an older man was inadmissible in prosecution for lewd and lascivious molestation of a person less than 16 years of age, even if victim was prompted to report defendant's alleged actions by watching film with her mother and a friend; probative value of clip was substantially outweighed by the danger of unfair prejudice and risk of confusion from showing jury a video depicting a dissimilar predatory sexual battery, and victim's testimony that she watched film and film gave her the idea to come forward would have sufficed to describe the circumstances as victim saw them and rebut defense's assertions.

Criner v. State, 2014 WL 1715155 (Fla.App. 5 Dist.):

State's criminal prosecution of defendant for lewd or lascivious molestation of a child under 12 years of age, arising from defendant's alleged molestation of his daughter, was not barred by a trial court's finding in an earlier proceeding to terminate parental rights (TPR) that Department of Children and Families (DCF) failed to prove by clear and convincing evidence that defendant sexually abused daughter; issue litigated in TPR proceeding was whether daughter continued to be at risk of harm from defendant, while issue litigated in criminal proceeding was whether defendant was criminally culpable for alleged molestation of daughter, and State's purpose in TPR proceeding was protection of daughter, while State's purpose in criminal proceeding was to determine whether defendant molested daughter and, if so, to punish him for doing so.

State v. Roberts, 2014 WL 1696279 (Fla.App. 3 Dist.)

Trial court departed from the essential requirements of law by focusing on whether murder eyewitness was able to testify, rather than on her persistent refusal to testify, for purposes of determining whether

unavailability exception to hearsay rule applied for admission of witness's sworn former trial testimony during resentencing hearing for defendant.

Evidence was sufficient to find that based on witness's refusal to testify, witness, who was raped by defendant and saw him commit murder, was unavailable to testify for purposes of determining whether unavailability exception to hearsay rule applied for admission of witness's sworn former trial testimony during resentencing hearing for defendant; witness testified that requiring her to testify again would essentially re-victimize her, and, regardless of penalties imposed, she would not testify, and secretary employed by state attorney's office testified that despite speaking with witness about possibility of testifying via video or positioning her in courtroom so that she would not have to look at defendant, witness said she still would not testify.

Gutierrez v. State, 2014 WL 560914 (Fla.App. 5 Dist.):

While there is no hard and fast rule that it is always error to give a special "no corroboration" instruction in sexual battery cases, such an instruction should rarely be given, and only in very limited circumstances where the defendant's argument suggests the jury must require corroboration.

Defense counsel's statement, in opening argument in prosecution for sexual battery, that jury would hear from no eyewitnesses, and that it would not hear from anyone "to say that [victim's] story was corroborated from seeing it [,]" did not entitle state to its requested special instruction to effect that testimony of a sexual battery victim required no corroboration, as such statement was correct and did not constitute improper argument that eyewitness testimony was required.

Erroneous giving of state's requested special instruction, in prosecution for sexual battery, to effect that testimony of a sexual battery victim required no corroboration, did not prejudice defendant and was harmless, where victim's testimony was not completely uncorroborated; DNA evidence obtained from vaginal swab matched defendant, and testimony of sexual assault nurse and photographs of victim's injuries were consistent with described attack.

Ingram v. State, 2014 WL 656734 (Fla.App. 5 Dist.):

State, as custodian of public records related to records requester's prosecution for sexual battery of a child, was statutorily required to redact record and produce portions remaining after such redaction, rather than requiring requester to arrange for such redaction by third party.

Inmate serving life sentence for sexual battery of a child was a "defendant" within meaning of section of Public Records Act prohibiting disclosure of videotaped information that revealed a minor's identity to any person "other than the defendant" and other specified individuals, and thus inmate or his counsel was to be provided, pursuant to inmate's records request, with unredacted copy of any videotaped interview of the minor victim.

Section of Public Records Act prohibiting disclosure of videotaped information that reveals a minor's identity to a person who is not assisting in the investigation or prosecution of offense, or to any person "other than the defendant" and other specified individuals, affirmatively authorizes the disclosure of identity information to the listed categories of persons; the exclusion for the "defendant" and others is an exclusion from the prohibition of disclosure, rather than just an exclusion from criminal penalties for disclosure.

Records request brought under Public Records Act by inmate serving life sentence for sexual battery of a child, in which inmate sought disclosure of recorded interviews of victim and her mother as well as other information, was not barred by virtue of the fact that it was against prison rules for inmate to receive videotapes or CDs in prison; inmate indicated he would employ counsel to take possession of the records, and trial court could work out details of how record exchange could be accomplished.

Murdock v. State, --- So.3d ----, 2014 WL 51681 (Fla.App. 4 Dist.)

State's cross-examination of probationer in revocation proceedings based upon new charge of lewd or lascivious battery on a victim between the ages of 12 and 16, in which prosecutor referenced DNA database and testimony of state's expert witnesses, indicating that probationer's sperm was found inside victim, and asked probationer if each was wrong or lying, did not impermissibly seek to have probationer testify as to credibility of state's witnesses, but rather sought to highlight inconsistency between probationer's testimony that he never met victim and overwhelming scientific evidence that probationer's DNA was found inside victim.

Farmer v. State, 2013 WL 6478857 (Fla.App. 4 Dist.)

Practice of using a witness screen is inherently prejudicial and can be reversible where a defendant objects and elects for the statutory closed

circuit video procedure; however, where a defendant acquiesces to the use of a screen, the issue is waived.

Morgan v. State, 2013 WL 6122270 (Fla.App. 5 Dist.)

Variance between indictment, charging defendant with sexual battery by contact between defendant's penis and victim's vagina, and proof at trial, establishing contact between defendant's mouth and victim's vagina, resulted in defendant's conviction of uncharged crimes in violation of due process and was not harmless, despite state's citation to correct statute in indictment.

Defendant charged with sexual battery by contact between defendant's penis and victim's vagina invited error in giving of jury instructions containing uncharged offense of sexual battery by contact between defendant's mouth and victim's vagina, waiving any claim of fundamental error; trial court thoroughly reviewed jury instructions with prosecutor and defense counsel after all evidence was presented, specifically referencing instruction as to oral contact, defense counsel indicated that she had no objection to such instruction, trial court inquired again after instructions were revised and again after instructions were read to jury, and defense counsel assented each time.

Swafford v. State, 2013 WL 5942382 (Fla.)

Newly discovered evidence that there was no seminal fluid found inside of the victim weakened the case against the defendant so as to give rise to a reasonable doubt as to his culpability, and therefore warranted grant of new trial in postconviction relief proceeding following sexual battery conviction, where alleged presence of seminal fluid was the linchpin of the sexual battery conviction, as victim's clothing did not provide any support for a sexual battery, as deceased victim was found fully clothed and, other than bullet holes, her clothing was undamaged, defendant had been involved in a three-hour adult sexual relationship with a different woman that ended approximately 20 minutes before victim was kidnapped, and defendant would have had a window of less than one hour to kidnap, sexually assault, and kill the victim.

Johnson v. State, 38 Fla. L. Weekly D1511 (Fla. 3rd DCA 2013):

Testimony, in sexual battery prosecution, by nurse who assisted nontestifying doctor in examination and collection of DNA samples from victim at rape treatment center authenticated the evidence and supported introduction of doctor's report as business record under exception to hearsay rule; nurse verified doctor's signature on report and explained that her own initials on report evidenced that she had been present, she described standard procedures at center, and any chain of custody issues were eliminated by detective's testimony that he accompanied victim to center, waited during examination, received sealed evidence directly from doctor, and submitted it to police department for testing.

Merritt v. State, 38 Fla. L. Weekly D551 (Fla. 4th DCA 2013):

Six or seven year old rape victim's response to a proffered question by defense counsel as to whether victim's vagina had ever been penetrated by someone other than the defendant, in which the victim answered that "her cousin said that this boy did when we was little" constituted inadmissible hearsay evidence.

Bell v. State, 38 Fla. L. Weekly S87 (Fla. 2013):

The State may not comment on a defendant's failure to mount a defense because doing so could lead the jury to erroneously conclude that the defendant has the burden of doing so; such comments run afoul of due process, which requires the state to prove every element of a crime beyond a reasonable doubt and establishes that a defendant has no obligation to present witnesses.

Prosecutor's comment during closing argument in prosecution for lewd and lascivious battery, that the victim and her mother had testified that the victim was under the age of 12 at the time of the offense "without any evidence contradicting that" was not an impermissible comment on the defendant's right to remain silent; defendant's testimony was not the exclusive means by which the defense could have challenged the State's evidence regarding the victim's age.

Where the evidence is uncontradicted on a point that witnesses other than the defendant can contradict, a comment on the failure to contradict the evidence is not an impermissible comment on the failure of the defendant to testify;

Prosecutor's comment during closing argument in prosecution for lewd and lascivious battery, that the victim and her mother had testified that the victim was under the age of 12 at the time of the offense "without any evidence contradicting that" was not improper burden shifting; prosecutor

specifically stated that the State carried the burden of proving the victim's age beyond a reasonable doubt, and in context, the prosecutor's comment was a statement on the jury's duty to analyze the evidence presented at trial followed by the prosecutor's argument regarding what conclusion the jury should reach from the evidence.

Prosecutor's comment during closing argument in prosecution for lewd and lascivious battery, that "[i]n this particular case it is the word of [the victim] against the plea of not guilty that [defendant] entered," thereby asserting that defendant's not guilty plea constituted the sum of the evidence in support of his innocence, impermissibly highlighted the fact that defendant did not testify on his own behalf and constituted an improper comment on defendant's right to remain silent.

Prosecutor's comment during closing argument in prosecution for lewd and lascivious battery, "[i]n cases like this, it is always a one-person's word against another," improperly commented on defendant's failure to testify; comment highlighted the fact that while the victim testified, defendant did not.

Prosecutor's comment during closing argument in prosecution for lewd and lascivious battery, that "if you are looking for a reason to not believe [the victim] there isn't one. Because there is no evidence that she would have made this up at this particular time under these particular circumstances," improperly shifted the burden of proof; comment highlighted defendant's failure to present any evidence impeaching the State's witness, comment could have led the jury to erroneously believe that defendant had the burden of presenting such evidence, and prosecutor did not correct any false impression by reminding jury that the State at all times retained the burden of proof.

Prosecutor's voir dire questions, asking prospective jurors whether the testimony of a child alone would be insufficient for them to return a guilty verdict, did not improperly precondition the jurors to convict defendant in prosecution for lewd and lascivious battery; prosecutor sought to ascertain whether any prospective juror carried an underlying distrust of child witnesses, and such questions were within the State's right to ascertain latent or concealed prejudgments by prospective jurors.

Although a prosecutor may not interrogate a prospective juror as to his attitude toward a particular witness who is expected to testify in the case, especially when the juror knows in advance that the prosecution has only the one primary witness to prove its case, this prohibition extends only to questions of prospective jurors as to the kind of verdict they would render under any given state of facts or circumstances.

Sloan v. State, 38 Fla. L. Weekly D111 (Fla. 4th DCA 2013):

> There was a sufficient nexus between sex offense defendant's suicide attempt and the crime to render it admissible as evidence of consciousness of guilt; although attempt occurred before the issuance of the arrest warrant, it occurred after he was aware that law enforcement had been notified of the alleged molestation by the victim's mother.

Powell v. State, 37 Fla. L. Weekly D2406 (Fla. 1st DCA 2012):

> For purposes of the excited utterance exception to the rule against hearsay, the stress that justifies the admission of the statement can exist for a significant period of time after the startling event is over; however, the period of time the courts would consider to be significant in this context is most often measured in hours.
>
> Out-of-court statements of victim and her sister to their mother that defendant had sexually abused them years earlier when they were minors were inadmissible under excited utterance exception to rule against hearsay, in prosecution for capital sexual battery, as victim and her sister had ample time for reflection before they made the statements.

Hall v. Ryan, 2012 WL 3822154 (Fla.App. 3 Dist.)

> Probable cause existed to believe that defendant committed a new law violation, in violation of the terms of his probation, by sending a "friend request" on an online social networking website to the daughter of his ex-wife/girlfriend; defendant was the subject of a permanent injunction for domestic violence that prevented him from contacting ex-wife/girlfriend "directly or indirectly," and the friend request to daughter, who lived with ex-wife/girlfriend, resulted in the contact prohibited by the injunction because daughter told ex-wife/girlfriend about it.

Smith v. State, 2012 WL 3822115 (Fla.App. 4 Dist.)

> Minor victim called ASA and recanted sexual abuse allegations against his adoptive mother, but then changed his story again and added a few acts. Defendant sought to call ASA as a witness to impeach the child and also to show that she pressured him back to his original story. It was reversible error to prohibit the defendant from calling her as a witness.

While we acknowledge that it is far from the norm to call a prosecutor to testify in a case, this is a very unusual case with very unusual facts and prosecutorial conduct.

Court erred in failing to read special jury instruction concerning the defense that the victim was the aggressor who sexually assaulted the defendant.

It was reversible error to allow the State to charge multiple counts of lewd conduct in one count of the information over the defendant's objection.

Discussion: This is a tricky area that should be read carefully. The courts have historically allowed the State to charge multiple acts "on one or more occasions" when the victim cannot be more specific. This court seems to say that we can only do it that way if the defendant fails to object. Otherwise, the jury verdict is not unanimous.

Mendoza v. State, 37 Fla. L. Weekly D1670 (Fla. 1st DCA 2012)

Prosecutor could question defendant on cross-examination about the possibility of tailoring his testimony based on his presence in the courtroom during the testimony of other witnesses in prosecution for kidnapping and sexual battery; such questions were designed to challenge the credibility of the defendant as a witness, which was a proper purpose of cross-examination.

State v. Kotecki, 37 Fla. L. Weekly D588 (Fla. 2d DCA 2012)

Defendant, who was charged with unlawful sexual activity with minor, was entitled to have case transferred from Manatee County to Sarasota County; while, other than the geographical proximity between Manatee and Sarasota counties, there was no specific evidence in the record pointing to Sarasota County as the place where defendant and victim had sex, the victim was vague and evasive regarding where she and defendant had intercourse, and victim's ambivalent testimony allowed State to file an information that included more than one county, namely Manatee County and Sarasota County, and the State was only required to prove that the crime was committed in the general area alleged, and this alternative allegation then allowed defendant to elect to have the case transferred.

Maharaj v. State, 37 Fla. L. Weekly D162 (Fla. 4th DCA 2012):

State opened the door to allowing defendant to cross-examine minor victim's mother about contents of victim's notebook; during the State's case-in-chief, State played for jury an audiotape containing series of controlled calls between victim's mother and defendant involving victim's notebook, mother's comments during the calls would have left reasonable juror with impression that the notebook referred to defendant, and this impression likely would not have been alleviated by mother's testimony that notebook did not refer to defendant by name, and mother's comment on the call about "some of the stuff she was reading" might have left reasonable juror with impression that victim wrote more statements in notebook other than those which mother mentioned in the calls.

Trial court's error in not finding that the State opened the door to allowing the defendant to cross-examine minor victim's mother about the contents of victim's notebook was not harmless; once the State mentioned the notebook's existence through the introduction of the controlled calls between victim's mother and defendant regarding notebook, a reasonable juror would have found the notebook's contents to be very significant, defendant was not given an opportunity to clarify or impeach the mother's characterization of notebook's contents or to present to the jury the manner in which victim wrote the statements, and reasonable possibility existed that allowing the jury to speculate as to the notebook's contents contributed to defendant's conviction.

Trial court erred in not allowing defendant to impeach minor victim's testimony, stating that she had told her aunt that defendant had touched her, by asking victim's aunt whether victim had ever said anything to her about being abused; although victim's alleged act of speaking to her aunt was not material, the content of that alleged speech was material, victim testified that she told her aunt that the defendant had touched her, and that statement summed up two of the three charges for which the defendant was on trial, and thus, allowing the defendant to ask the aunt whether victim ever said anything to her about being abused would not have constituted impeachment on a collateral matter.

Wilson v. State, 2011 WL 5061349 (Fla.App. 4 Dist.)

The state violated the collateral-matter rule by impeaching testimony of defendant on cross examination that she was not angry at a witness by recalling the witness to testify that defendant yelled obscenities at her during a recess at a trial for child abuse; whether defendant yelled obscenities at the witness was not evidence tending to prove or disprove a material fact in the case and, thus, was not relevant to the crime charged and did not serve to discredit defendant by establishing bias, corruption, or

lack of competency, and defendant did not open the door to the line of questioning, given that the first question posed to defendant about the incident with the witness was asked by the state on cross examination.

If a party cross examines a witness concerning a collateral matter, the cross examiner must take the answer and is bound by it and may not subsequently impeach the witness by introducing extrinsic evidence to contradict the witness on that point; an exception exists, however, where the collateral extrinsic evidence sought to be introduced concerns matters testified to by the witness on direct examination, as the witness is said to have opened the door.

Roberts v. State, 2011 WL 3300163 (Fla.App. 4 Dist.):

During deliberations in prosecution of defendant for lewd molestation of his daughter, juror's note, disclosing that she had child who would be attending the same school as victim and she felt the matter was too close to home, raised suggestion of bias which demanded an adequate inquiry from the trial court, and trial court erred by refusing to conduct inquiry to determine whether juror could remain fair and impartial or might have tainted the remaining jury panel; fact that juror brought it upon herself to send the note to trial judge suggested that she might have felt that she could no longer be fair and impartial juror, and judge's only reason for refusing to question juror during trial was that the judge had already excused the alternate juror.

Prosecutor's closing argument was improper because it was replete with comments which offered prosecutor's opinion as to defendant's guilt, shifted the burden of proof, appealed to sympathy for the accuser, vouched for the accuser's credibility, and invited the jury to base its verdict on which witness the jury thought was most credible.

Keith v. State, 35 Fla. L. Weekly D2142 (Fla. 5th DCA 2010):

Defendant who alleged that trial counsel was ineffective at his trial on charges of sexual battery on a child less than 12 years of age, for failing to anticipate, challenge, and rebut nurse practitioner's testimony that victim could be sexually penetrated without damage to her hymen, failed to establish that he was prejudiced by any such deficiency in counsel's performance; defendant offered no evidence casting doubt on nurse practitioner's testimony.

Akien v. State, 35 Fla. L. Weekly D1836 (4th DCA 2010):

Victim's telephone call to police to report assault was admissible under excited utterance exception to hearsay rule in prosecution for sexual battery and sexual activity with a minor; victim, a 17-year-old girl who was raped for 30 to 45 minutes, spoke to her mother roughly five minutes after assailant left, mother convinced victim to then call 911, and although victim may have had opportunity to engage in reflective thought, record did not clearly refute contention that victim spoke to 911 operator under stress of excitement caused by her rape.

Pulcini v. State, 35 Fla. L. Weekly D1620 (Fla. 4th DCA 2010):

Witness's stated reluctance to testify against defendant, his uncle, and apparent fabrication of testimony rendered him eligible to be treated as a hostile witness, such that State was permitted to examine witness using leading questions and impeach his testimony with prior inconsistent statements, in prosecution for unlawful sexual activity with a minor; once on the stand, witness admitted he did not want to be there, became upset upon identifying defendant as his uncle and began to cry, and, after recess in which witness spoke to his mother, who was defendant's sister, witness testified that he did not remember many of the statements he had made to police. https://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.08&fn=_top&sv=Split&docname=FLSTS90.608&tc=-1&pbc=B7012715&ordoc=2022600495&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31

The rule of completeness is not absolute and a trial court may exercise its discretion to exclude irrelevant portions of a recorded statement.

There was no violation of rule of completeness in trial court's refusal to admit entirety of defendant's statement to police, in prosecution for unlawful sexual activity with a minor; trial court merely excluded irrelevant portions of defendant's statement, which contained self-serving, non-exculpatory hearsay and statements concerning the victim's prior sexual conduct.

Johnson v. State, 35 Fla. L. Weekly D1628 (Fla. 4th DCA 2010):

Error in admitting evidence describing how victim had twice attempted to commit suicide after her relationship with defendant was revealed and defendant was arrested was not harmless, in prosecution for lewd and lascivious battery; testimony had substantial likelihood of inflaming jury and appealing to their emotions, State elicited evidence from three witnesses and a recorded phone conversation, State further commented on evidence during closing argument, and inculpatory evidence was not

overwhelming since State did not dispel reasonable possibility that error contributed to defendant's convictions.

Ross v. State, 35 Fla. L. Weekly D520 (Fla. 1st DCA 2010):

Trial court's instructing the jury that it could convict defendant of lewd or lascivious battery by finding sexual penetration or union when the information alleged only sexual penetration was not fundamental error, where it could be determined that jury did not convict defendant based on the uncharged theory of sexual union.

Hendricks v. State, 35 Fla. L. Weekly D (Fla. 1st DCA 2010):

Trial court in child molestation case properly precluded defendant from calling witnesses to testify that he had a reputation in the community for sexual morality.

"Because a person's tendency, or lack thereof, to commit acts of child molestation is not something that a community tends to have knowledge of, testimony concerning a person's reputation for having such a trait is inherently unreliable."

"To the extent Appellant attempted to introduce evidence only of his reputation for having appropriate sexual relationships with adults, it was within the trial court's discretion to exclude it as either irrelevant or substantially more likely to confuse the issues than to offer probative value."

Farias v. State, 35 Fla. L. Weekly D (Fla. 4th DCA 2010):

Photograph of seven-year-old victim undergoing sexual assault examination was not relevant to show whether defendant molested victim, although it illustrated physician's testimony concerning the physical examination he performed on the victim, as photograph, which showed no injuries, did not tend to prove or disprove a material fact that was in dispute.

Photograph of seven-year-old victim undergoing sexual assault examination was not relevant to refute defendant's theory that victim was untruthful about alleged molestation incident, despite state's suggestion that child would not have lied about the incident and thus subjected herself to such an invasive examination, as it was unlikely that child would have known about this consequence of reporting the incident.

> Error in admitting irrelevant photograph of seven-year-old victim undergoing sexual assault examination was not harmless error at trial for lewd or lascivious molestation of a child under the age of 12, as photograph had minimal probative value and its potential for offending the jury's sensibilities and evoking sympathy for the victim was substantial.

Straway v. State, 34 Fla. L. Weekly D1423 (Fla. 4th DCA 2009):

> State presented sufficient evidence that was inconsistent with defendant's hypotheses of innocence to permit submission of circumstantial evidence case to jury in felony murder prosecution in which defendant claimed that child victim's fatal injuries might have occurred while victim was in the custody of other individuals.
>
> State is not required to refute every possible variation of the events which could be inferred from the evidence to avoid a judgment of acquittal in a case in which the evidence is circumstantial. "For example, the State was not required to contradict Straway's theory that his young children might have caused J.A.'s fatal injuries because this theory is unreasonable in light of the children's young ages and the severity of J.A.'s injuries."

Perry v. State, 34 Fla. L. Weekly D (1st DCA 2009):

> Defendant was charged with sexual battery upon a child "by placing his penis upon the vagina of [victim] and/or placing his mouth in or upon the vagina of [victim], and/or placing his finger in or upon the vagina of [victim], contrary to the provisions of section 794.011(2)(a), Florida Statutes." The defendant requested a special verdict form for the jury to indicate which of the listed acts they were relying upon, arguing that a non-unanimous verdict would otherwise result. The trial court refused defendant's request. Appellate court ruled that the jury did not have to specify which of the listed acts they were agreeing upon and the judge was not in error for refusing to do so.

Brown v. State, 34 Fla. L. Weekly D (2d DCA 2009):

> Court improperly read a jury instruction patterned after F.S. 794.022(1) stating that the testimony of the victim need not be corroborated in a prosecution for sexual battery. Although the language properly tracked the statute, the instruction amounted to a comment on the evidence an was likely to confuse and mislead the jury. The section was written to guide the courts, not the juries.

State v. Haubrick, 34 Fla. L. Weekly D40 (Fla. 1st DCA 2009):

Trial court should not have dismissed amended information charging defendants with sexual battery by multiple perpetrators, even though information cited the wrong statutory subsection and omitted statutory language stating that the defendants did not "use physical force and violence likely to cause serious personal injury"; omitted language was not an essential element of the offense, and there was no evidence that defendants were confused and prejudiced by the amended information other than their bare assertions to that effect.

N.C. v. State, 33 Fla. L. Weekly D2432 (Fla. 5th DCA 2008):

Trial court was required to personally address issue of possible future applicability of Jimmy Ryce Act and determine that defendant understood potential consequence of Act before court could accept defendant's nolo contendere plea to charge of sexual battery, even though defendant signed printed form containing notification of possible applicability of Act as part of plea agreement.

Loftin v. State, 33 Fla. L. Weekly D2227 (Fla. 5th DCA 2008):

Evidence of male defendant's sexual orientation was irrelevant at trial for lewd and lascivious molestation of 15-year-old male victim; no evidence was presented or proffered demonstrating any connection between homosexuality or bisexuality and pedophilia.

Grace v. Florida Parole Commission, 33 Fla. L. Weekly D1764 (Fla. 1st DCA 2008)

Florida Parole Commission (FPC) had authority to impose special sexual offender conditions on defendant's conditional release supervision, even though defendant's sexual battery convictions preceded effective date of statute requiring imposition of special sexual offender conditions on sexual offenders; such statute did not affect FPC's discretionary authority to "impose any special conditions it considers warranted" from its review of the record. See F.S. 947.1405.

Fowler v. State, 33 Fla. L. Weekly D1679 (Fla. 1st DCA 2008):

Circumstantial evidence was sufficient to support conviction for sexual battery on a child under 12 years of age despite child's inability to point

out defendant in court; child continually, both in court and out, referred to man who put his "doughnut" in her mouth as "Earl," which was defendant's name, her mother and stepfather testified that they never referred to genitalia as "doughnut," and Earl was source of term, child's interview with child protection contained same allegations against Earl, she also described encounter with "Earl" at trial, Earl, was living with child and had sole access to her for period of time, and no other "Earl" would have had this access.

The identity of the perpetrator can be inferred from circumstantial evidence, and the lack of direct, in-court identification, goes to the strength of the case.

Tyrrell v. State, 33 Fla. L. Weekly D667 (Fla. 4th DCA 2008):

Any error resulting from trial court's orders requiring victim to produce sex toy was harmless, in prosecution for sexual battery on a person 12 years of age or older, in which jury found defendant guilty of lesser offense of misdemeanor battery, as jury did not need to see the actual toy to understand the testimony about it or nature of the defense that the victim's injuries were due to victim's use of the toy.

No error occurred as result of victim's failure to produce medical records pertaining to her panic attacks, though trial court had ordered her to do so, in prosecution for sexual battery on a person 12 years of age or older, in which jury found defendant guilty of lesser offense of misdemeanor battery, as victim's panic attacks prior to her encounter with defendant were irrelevant, in that her earlier panic attacks were too tenuous and remote to be admitted.

Trial court did not abuse its discretion in refusing to allow defendant to show victim a sex toy lineup, in prosecution for sexual battery on a person 12 years of age or older, in which jury found defendant guilty of lesser offense of misdemeanor battery, after victim failed to produce sex toy defendant alleged she used and that caused her injuries, as this use of visual aids was not directly related to the charges.

Ramkhalawan v. State, 33 Fla. L. Weekly D292 (Fla. 4th DCA 2008):

Child victim's testimony which was inconsistent with pre-trial recantation, but consistent with initial statements to police, supported convictions for capital sexual battery.

Letter from child victim's father stating that he was going to kill himself if victim did not recant accusations against relative was not hearsay in prosecution for capital sexual battery; the letter was admitted to show its effect on victim who recanted accusations before trial, but then testified for prosecution.

Letter from child victim's father stating that he was going to kill himself if victim did not recant molestation accusations against relative was not testimonial, and, thus, admitting it did not violate confrontation clause.

Pressley v. State, 968 So.2d 1039 (Fla. 5th DCA 2007):

13 year old victim's statements to her mother were not admissible under the excited utterance exception to the hearsay rule, in prosecution for lewd or lascivious molestation; approximately 45-60 minutes passed between the alleged molestation and when victim told her mother about the incident, and thus victim had time to reflect before making the statements.

Meredith v. State, 964 So.2d 247 (Fla. 4th DCA 2007):

Defendant was not prejudiced when trial court allowed the state, on day of trial, to filed an amended information that added a second count in prosecution for lewd or lascivious molestation of a child; amendment essentially divided allegations of original information, that defendant touched victim or induced victim to touch him, into two separate offenses.

Defendant was not in custody for *Miranda* purposes when he made statements to detective at sheriff's office, even though defendant was confronted with child victim's accusation of molestation; defendant drove himself to sheriff's office and entered building of his own volition, detective explained that his purpose in inviting defendant to sheriff's office was to give him an opportunity to respond to a child's report of inappropriate touching, interview was conducted in a casual and conversational tone, detective had a friendly demeanor, employed low-key interrogation tactics, and used a consolatory tone, and detective twice told defendant that he was not under arrest.

Wood v. State, 31 Fla. L. Weekly D3146 (Fla. 5th DCA 2006):

Denial of defendant's motion for continuance after State disclosed, on eve of trial, added victim's mother as witness, was not abuse of discretion, in trial for sexual battery of person less than 12 years of age by person 18 years or older; although late disclosure was inconvenient, defendant was

allowed opportunity to depose mother, and transcript of deposition testimony was prepared before she testified.

State v. Hosty, 31 Fla. L. Weekly S783 (Fla. 2006):

Mentally disabled adult's statements to law enforcement officer, regarding the alleged sexual battery against her, were testimonial in nature, for purposes of *Crawford* rule that under the Confrontation Clause, testimonial hearsay statements may not be admitted against a defendant unless the defendant has a prior opportunity for cross-examination of the declarant.

Statutory exception to hearsay rule for statements of disabled adults violates the Confrontation Clause, as applied to testimonial hearsay statements of a mentally disabled adult.

Statutory exception to hearsay rule for statements made by disabled adults was not a firmly rooted exception to hearsay rule, for purposes of reliability element of analysis of whether admission of nontestimonial hearsay statement of mentally disabled adult violated Confrontation Clause; statute had been in effect for only 11 years, and enactments, in other states, of hearsay exceptions for statements by disabled or dependent adults were not numerous or longstanding.

Factors for trial court to consider when determining whether mentally disabled adult's hearsay statements are reliable, as element of Confrontation Clause analysis for admission of nontestimonial hearsay statements, include: (1) spontaneity of statement; (2) how statement was elicited; (3) mental state of declarant when abuse of declarant was reported; (4) how declarant described the act; (5) whether declarant used terminology unexpected of similarly situated mentally disabled adult; (6) motive or lack thereof to fabricate the statement; (7) ability of declarant to distinguish between reality and fantasy; (8) vagueness of declarant's accusations; (9) possibility of any improper influence on declarant; and (10) any contradictions in the accusation.

Statutory exception to hearsay rule for statements of disabled adults does not violate the Confrontation Clause, as applied to a mentally disabled adult whose nontestimonial hearsay statement the trial court determines meets certain qualifications of reliability.

Vanslyke v. State, 31 Fla. L. Weekly D2351 (Fla. 2d DCA 2006):

For a child abuse report to justify a warrantless entry, the report, considered in the context of the totality of relevant circumstances, must provide "an objectively reasonable basis" for the police to believe that there is an immediate need for police assistance to render emergency assistance to an injured child or to protect a child from a threat of imminent injury.

State failed to establish exigent circumstances justifying a warrantless entry into defendant's dwelling, and thus, search without warrant was conducted in violation of the Fourth Amendment; record was devoid of any details that would provide support for conclusion that report of abuse was reliable, report provided no basis for concluding that children had suffered any injury or that they were at risk of imminent injury, and vague statements concerning "substances exposed," "conditions hazardous," and "drugs and guns" were insufficient to establish that it was necessary for police to enter dwelling to protect the occupants from imminent injury.

Discussion: This is a good case to read to determine when the police are justified in entering a person's home based on exigent circumstances based a child abuse call to the DCF hotline. Had the caller provided detailed, credible information and made allegations that would cause a reasonable person to feel the children were at risk of harm, then the entry would have been good.

Sanders v. State, 30 Fla. L. Weekly D1637 (Fla. 2d DCA 2005):

Defendant's confinement of victim in her apartment during commission of sexual battery was not kidnapping, although confinement was not slight or inconsequential due to its three-hour duration, and victim was briefly confined in bathroom; victim's confinement was the sort likely to naturally accompany sexual battery and thus was incidental to the sexual battery, and victim's confinement did not make it substantially easier for defendant to commit sexual battery, and thus did not have any significance independent of that crime.

Fencher v. State, 31 Fla. L. Weekly D1592 (Fla. 5th DCA 2006):

Rape kit was admissible in prosecution for sexual battery under business record exception to hearsay rule; although nurse who collected samples did not testify at trial, certified nurse midwife and advanced registered nurse practitioner, who routinely took samples and had testified as to sexual assault treatment center's records, testified that records from rape kit examinations were routinely generated and that she had seen hundreds of reports generated by nurse, certified nurse midwife knew nurse and

recognized her handwriting on kit, and certified nurse midwife identified kit and testified that it did not appear to have been tampered with. http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW6.06&fn=_top&sv=Split&tc=-1&findtype=L&docname=FLSTS90.803&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=Florida

Admission of rape kit in prosecution for sexual battery, without testimony of nurse who collected samples, did not violate defendant's right to confrontation; Florida Department of Law Enforcement (FDLE) forensic scientist who performed serological exams and DNA analysis on rape kit testified at length concerning tests he performed on both rape kit and saliva sample from defendant, and scientist was subject to cross-examination about his qualifications, chain of custody, procedures, serological results, and statistical analysis of the DNA samples. http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW6.06&fn=_top&sv=Split&tc=-1&findtype=L&docname=USCOAMENDVI&db=1000546&vr=2.0&rp=%2ffind%2fdefault.wl&mt=Florida

Dial v. State, 31 Fla. L. Weekly D501 (Fla. 4th DCA 2006):

Prosecutor's improper closing argument at trial on charges including murder, child abuse, and aggravated manslaughter of a child, which told the story of the case from the perspective of eight-year-old victim and appealed to the jury for sympathy for the victim and hostility toward the defendant, was harmless error; State demonstrated beyond a reasonable doubt that the error did not affect jury's verdict finding defendant guilty of aggravated manslaughter of a child.

"The objectionable portion of the argument began, 'Hi, I'm Joey and I'm eight,' and continued in the first person for ten pages of transcript. Although creative and well-phrased, the argument was an improper appeal to the jury for sympathy for the victim."

Corner v. State, 30 Fla. L. Weekly D92 (Fla. 3d DCA 2005)

Appellate counsel was noeficient for failing to raise on appeal the introduction of a rape treatment examination report during the testimony of a substitute medical expert who was testifying from the report, where report admitted was admissible as a business record, defense counsel did not object to its admission at trial, and petitioner benefited from its admission.

Jennings v. State, 30 Fla. L. Weekly D2628 (Fla. 2d DCA 2005):

> Failure of instructions to require jurors to decide whether victim was disabled adult was fundamental error in lewd and lascivious molestation of a disabled person prosecution; although defendant defense acknowledged that victim was mildly retarded, this fact, in and of itself, did not establish requisite status of victim, evidence reflected that she functioned well in wide range of activities, attended school, had friends, knew about sex, had volunteer job, bathed herself, ran errands, and assisted with chores, and defendant did not concede that his alleged victim was incapacitated or that her limitations restricted her ability to perform normal activities of daily living.

Elysee v. State, 31 Fla. L. Weekly D505 (Fla. 4th DCA 2006):

> Testimony by mother of 17-year-old alleged victim as to victim's morose behavior in days following incident in which defendant allegedly kissed victim, put victim's hand on his penis, and touched victim's breasts and vagina while driving her home from work was relevant to refute defense theory that victim fabricated story because defendant had rejected victim's advances, in prosecution for attempted sexual battery of a person over the age of 12.
>
> Seventeen-year-old alleged victim's statements to police officer approximately 15 to 20 minutes into stop of vehicle in which alleged incident occurred were not admissible under excited utterance exception to hearsay rule, in prosecution for attempted sexual battery of a person over the age of 12; victim did not make statements before there was time to engage in reflective thought.

Trahan v. State, 30 Fla. L. Weekly D2485 (5th DCA 2005):

> In prosecution for lewd or lascivious molestation of a child under sixteen years of age, state's decision to narrow its factual theory in its information to touching or rubbing victim's vaginal area precluded state from proving charged offense under alternative factual theory that defendant touched victim's buttocks, and thus instructing jury on alternative factual theory constituted fundamental error.
>
> The information read: *In the County of Brevard, ... [Appellant] ... did intentionally touch in a lewd or lascivious manner the breasts, genitals, genital area or buttocks, or clothing covering them ...* ***by*** *TOUCHING, RUBBING [the victim's] VAGINAL AREA....*
>
> The victim only testified that the defendant touched her buttocks.

Hubbard v. State, 30 Fla. L. Weekly D2095 (Fla. 1st DCA 2005):

> Any possible error in admission of birth certificate of victim's child showing defendant was child's father was harmless, in trial for sexual battery upon child 12 or older without child's consent and child abuse by impregnating child younger than 16, in view of DNA evidence showing that likelihood of anyone else being child's father was one in 780 million, and population genetics evidence that probability that defendant was not father was .000006 percent.
>
> Defendant was entitled to new trial for sexual battery upon child 12 or older without child's consent based on child victim's recantation of trial testimony that sexual relations had not been consensual, which recantation ultimate resulted in perjury conviction against victim, where victim's consent was essential element of offense, and there was no other evidence at trial to show that sexual relations were not consensual.
>
> Recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial; the trial court should consider all of the circumstances of the case, including the recantation, and it should deny the motion if it is not satisfied that the recantation is true.
>
> Discussion: This case demonstrates the danger of charging lewd battery and sexual battery in the alternative. In this case, the jury convicted of both and the judge dismissed the lewd battery charge based on double jeopardy grounds. After trial, the victim recanted on the consent issue. The State asked the appellate court to reinstate the lewd battery count when the sexual battery count was reversed based on the recantation, but the appellate court said it was without authority to do so. The court did state, however, that the trial court could address the issue on remand.

State v. Muro, 30 Fla. L. Weekly D1991 (Fla. 4th DCA 2005):

> Whether, in the absence of bad faith, the unpreserved or improperly preserved portions of eighty hours of hidden camera footage of defendant, a nanny, constituted exculpatory evidence that was more than potentially useful to defendant and constitutionally material to her defense against child abuse charges, was the appropriate legal standard by which to consider defendant's motion to suppress videotape recording of only two hours of footage from an eighty-hour recording.

Defendant, a nanny charged with child abuse, failed to establish, in support of her motion to suppress a videotape taken of two hours of footage from an eighty-hour hidden camera recording of herself with the child, that remaining seventy-eight hours constituted exculpatory evidence more than potentially useful in her defense, and therefore, State's failure to preserve remaining footage did not violate defendant's due process rights, though full recording allegedly showed defendant playing gently with child and child's parents engaging in questionable conduct toward child; such evidence was irrelevant to defendant's guilt, and law enforcement was not aware of omitting any footage with exculpatory value.

Finding that full, original recording may have revealed frame rate of the recording and possibly established that the footage could have been "jerky" due to being played back at a lower frame rate than that at which it was recorded not basis for suppression because defense counsel would still have opportunity to present expert testimony to present expert testimony to call into question the accuracy of the videotape, and jury would be free to consider al possible technological explanations for shaking scene in its deliberations.

Gresham v. State, 30 Fla. L. Weekly D1722 (Fla. 1st DCA 2005):

Indictment charging defendant only with sexual battery by "causing his tongue and/or finger to unite with or penetrate vagina of [victim]" was not fatally defective based on claim that allegations in effect also charged defendant with lewd and lascivious molestation.

Discussion: The language of the information was sustained based on an objection that it charged two separate offenses, but the court did not address the obvious problem in the language of the information that technically allowed the defendant to be convicted of sexual battery for causing his finger to unite with the vagina of the victim.

State v. Clements, 30 Fla. L. Weekly S379 (Fla. 2005):

Once trial commences, the state cannot amend information without leave of court, and court cannot grant leave to amend the information during trial if doing so would "prejudice…the substantial rights of defendant."

Because trial court in case at issue concluded that mid-trial filing of second amended information to add a capital felony charge would prejudice defendant, the second amended information never took effect, and the first amended information charging sexual activity, on which trial commenced and on which defendant was convicted, remained in effect.

Festa v. State, 30 Fla. L. WeeklyD1333 (Fla. 4th DCA 2005):

> Error to prohibit defendant from obtaining victim's medical and mental health records, which contained evidence highly relevant to defense.
>
> Discussion: This case has very little discussion and marginal research value.

Molter v. State, 29 Fla. L. Weekly D2590 (Fla. 2d DCA 2004):

> "Reference to the SAVE exam as being one for sexual assault victims was not harmful given the fact that such an exam is routine for women who report having been sexually abused. This is a matter of common knowledge that the jurors, as members of society, may be deemed to understand."

Wilson v. State, 29 Fla. L. Weekly D2288 (Fla. 4th DCA 2004):

> No merit to contention that trial court should have granted motion for judgment of acquittal on lewd molestation charge because state failed to exclude reasonable hypothesis of innocence, as case did not involve only circumstantial evidence, but included direct evidence in form of victim's testimony concerning defendant's actions.

Slater v. State, 29 Fla. L. Weekly D1855 (Fla. 5th DCA 2004):

> Trial court did not err in denying claim that defendant's pleas of no contest to aggravated manslaughter of child and aggravated child abuse should be set aside because court and counsel failed to advise defendant that his parental rights would be terminated as result of plea.
>
> Termination of parental rights is collateral consequence of plea, and court is under no duty to inform defendant of collateral consequences of plea.

Cano v. State, 29 Fla. L. Weekly D1619 (Fla. 2d DCA 2004):

> Court was not required to conduct *Frye* hearing prior to signing a search warrant where affiant officer provided profile evidence regarding people who are sex offenders and collectors of child pornography. Search warrants have a different standard than trial.

Perera v. State, 29 Fla. L. Weekly D912 (Fla. 3rd DCA 2004):

> No abuse of discretion in allowing victims' brother to testify concerning statement in which defendant apologized and said he had been abused by

his uncle. This did not constitute profile testimony, statements constituted statements from which guilt may be inferred.

Fleitas v. State, 28 Fla. L. Weekly D468 (Fla. 3rd DCA 2004):

Error to permit assistant state attorney to be called as witness and to allow her to testify about her opinion concerning the defendant's guilt, her assessment of the victim's credibility, and the defendant has committed many other uncharged crimes against the victim.

Where victim was over eleven years of age so that child hearsay could not be admitted, trial court erred in permitting investigating officer to testify as to prior accusations made by victim against defendant.

Discussion: The 3rd DCA was rather harsh in its opinion. The text of the ASA's testimony is included in a foot note. The first sentence of the opinion states, "First, for what we think and hope is the first and the last time in legal history, an assistant state attorney was permitted to be called as a witness in the case and to testify, allegedly as "background," to her investigation of the case itself, her opinion concerning the defendant's guilt, her assessment of the victim's credibility, and the defendant had committed many other uncharged crimes against the victim."

Toro v. State, 28 Fla. L. Weekly D2549 (Fla. 5th DCA 2003):

Defendant not entitled to post conviction relief based on newly discovered evidence based upon sworn statement by individual who described an active sexual relationship with the victim during relevant time periods.

Houston v. State, 28 Fla. L. Weekly D1972 (Fla. 5th DCA 2003):

Court erred in ordering that defendant receive MPA if ever released from prison pursuant to section 794.0235 without appointing a medical expert to determine whether defendant is an appropriate candidate for the treatment and without specifying the duration of the treatment.

Foss v. State, 28 Fla. L. Weekly D255 (Fla. 5th DCA 2003):

Erroneous reference to wrong section of F.S. 800.04 was not fatal to conviction where information properly pled necessary elements of offense.

Wise v. State, 28 Fla. L. Weekly D206 (Fla. 2d DCA 2003):

In lewd and lascivious act trial, trial court's instruction of jury on subsection of statute other than subsection under which defendant was charged was reversible error where jury's verdict was general verdict that did not specify the theory by which it found defendant guilty.

State v. Brockman, 27 Fla. L. Weekly D2000 (Fla. 1st DCA 2002):

State appealed from order entered by trial judge some days after guilty verdict was returned, in which trial court granted judgment of acquittal based upon its determination that jury should not have been allowed to hear either trial testimony or video testimony of 5-year-old child victim of lewd molestation because testimony was not reliable.

Trial court erred in retroactively excluding evidence to which no objection was made at trial, and then granting judgment of acquittal based on remainder of the evidence.

In determining whether evidence is sufficient to withstand motion for judgment of acquittal, trial court and reviewing court both must consider all evidence adduced, including evidence that may have come in erroneously. Further, absent fundamental error, trial court could not have granted even a timely motion for new trial based solely on inadmissibility of prejudicial evidence to which defense counsel did not adequately object.

Foy v. State, 818 So.2d 704 (Fla. 5th DCA 2002):

Judge's comments that ``there is no cure for pedophilia" and ``treatment doesn't do a bit of good" were comments on the nature of pedophilia and the treatment thereof and did not tend to show personal bias or prejudice on part of judge.

No error in denying motion to disqualify.

Fosman v. State, 664 So.2d 1163 (Fla. 4th DCA 1995):

Defendant charged with armed sexual battery could be required, at victim's request, to submit to blood test for human immunodeficiency virus (HIV); statute authorizing such orders met "special needs" test justifying relaxation of normal Fourth Amendment requirement for searches, and, given existence of probable cause to believe that defendant had committed armed sexual battery, defendant had no reasonable expectation of privacy in regard to having blood test for HIV, results of which would be disclosed only to victim and to public health authorities.

Blood test is "search" to which Fourth Amendment applies.

Statute requiring human immunodeficiency virus (HIV) testing of defendants charged with offense involving transmission of body fluids from one person to another served "special need," within meaning of Skinner and Von Raab, to slow the spread of acquired immunodeficiency syndrome (AIDS), and therefore, relaxation of Fourth Amendment requirements of warrant and probable cause was justified.

Statute requiring, upon victim's request, defendant charged with crime involving transmission of body fluids from one person to another to submit to testing for human immunodeficiency virus (HIV) does not violate defendant's right to privacy under State Constitution inasmuch as defendant charged with an offense has no reasonable expectation of privacy in regard to having blood test for HIV, results of which are disclosed only to victim and to public health authorities.

Discussion: This case provides a good discussion of various "special needs" cases.

Berkuta v. State, 788 So.2d 1081 (Fla. 4th DCA 2001):

Where trial court announced that courtroom would be closed during minor victim's testimony and defendant's mother was not entitled to stay, and defense counsel stated that he was not requesting that she be allowed to stay, defendant waived right to public trial. There is no requirement that public trial right be waived expressly and personally by defendant on record.

Discussion: The *Berkuta* court distinguishes this situation from the facts in Williams v. State, 736 So.2d 699 (Fla. 4th DCA 1999) where the defendant's family members were forced to vacate the courtroom to make room for more jurors. In *Williams*, the defendant requested that his family be allowed to remain, but in *Berkuta*, defense counsel advised the court that he was not requesting that the mother be allowed to stay.

Cardali v. State, 794 So.2d 719 (Fla. 3d DCA 2001):

Sexual battery is not an essential element of kidnapping, and to convict for one and not the other does not result in an inconsistent verdict.

Turner v. State, 788 So.2d 320 (Fla. 2d DCA 2001):

State has a right to charge adult defendant by indictment for life felony that allegedly occurred when defendant was a minor.

Discussion: The defendant was a teenager when he had sex with a girl under 12 years of age. 7 years later, the State charged him by information as an adult for sexual battery on a child. The appellate court reversed his conviction, holding that proceedings against him could not be initiated by information because he was a juvenile at the time of the offense. On remand, the State initiated a juvenile proceeding against the defendant and took the case to a grand jury. The appellate court said this procedure was proper. The court did not say whether the grand jury was necessary or not. The important thing was that proceedings were initiated in juvenile court.

Perry v. State, 776 So.2d 1102 (Fla. 5th DCA 2001):

Under circumstances, trial judge did not depart from neutrality and express bias against defendant when he questioned minor victim about the identity of her assailant.

Turner v. State, 769 So.2d 1108 (Fla. 2d DCA 2000):

Error to charge and convict defendant as an adult with committing a sexual battery when he was fourteen years of age (1992) without commencing proceedings under chapter 39.

Millien v. State, 766 So.2d 475 (Fla. 4th DCA 2000):

No error in excluding testimony from witnesses that they had been asked to falsely accuse defendant of sexual misconduct, offered to prove that declarants had planned to discredit defendant and carried out their plan by forcing victim and *Williams* rule witnesses to lie in furtherance of the conspiracy.

Statement is not within exception to hearsay rule for statements of declarant's then-existing state of mind offered to prove subsequent conduct where record does not support finding that the hearsay statements at issue were made prior to the time that the declarants allegedly would have encouraged victims of sexual misconduct to falsely implicate defendant.

Even if proffered testimony were admissible, trial court could properly find that evidence was "collateral in view of other testimony concerning conspiracy defense theory.

Discussion: The appellate court noted that the defendant was allowed to present ample evidence of this conspiracy defense and therefore did not have much standing to complain because some cumulative hearsay was

excluded. It would have been a more interesting issue if the defendant had been denied his defense altogether because of the hearsay problem.

Knarich v. State, 766 So.2d 404 (Fla. 2d DCA 2000):

The detective testified that during his interview of the defendant, he told the defendant that based upon his experience working with people who have a sexual interest in children, he found it hard to believe that the defendant was massaging the buttocks of the child and not getting sexually aroused. The defendant simply grinned and said he couldn't admit to that while the investigation was pending. The court held that this arguably impermissible opinion as the defendant's guilt was harmless under the facts of the case.

Mathis v. State, 25 760 So.2d 1121 (Fla. 4th DCA 2000):

Abuse of discretion to deny motion for mistrial, made after prosecution witness made comment indicating that defendant had previously been incarcerated.

Given dearth of physical evidence and victim's statement that her mother and guardian ad litem helped her remember some of the things to which she testified, comment which implied criminal propensity was not harmless beyond reasonable doubt.

Discussion: The witness was asked if the defendant had lived at that particular address for the last five years and the witness responded yes, since he got out of prison.

Hebel v. State, 765 So.2d 143 (Fla. 2d DCA 2000):

Where victim testified that she bled vaginally for one or two weeks following incident, court erred in refusing to permit examination of medical records of physician who had examined victim after incident without articulating basis.

Nichols v. State, 760 So.2d 223 (Fla. 5th DCA 2000):

New trial required where state was permitted to introduce into evidence over defendant's objection a journal entry and a letter contained on a legal pad the officer took from the defendant when he transported defendant to his bond hearing. Journal entry allegedly written by defendant, although it reflected on incident in question and defendant's doubts about victim's virginity, contained no admission of guilt, and its prejudicial nature far outweighed any probative value it might have.

Letter which was addressed to victim and dated after the incident giving rise to defendant's prosecution and which contained graphic sexual statements of what defendant would do with victim if he visited her in prison, where he somehow imagined victim would end up, and which explained in detail how defendant was going to slowly kill victim when she was released from prison, was improperly admitted into evidence. Letter did not indicate a consciousness of guilt, and there was no evidence that letter was ever to be mailed to the victim.

State v. Arrington, 741 So.2d 1152 (Fla. 2d DCA 1999):

County court improperly declared Section 798.02, cohabitation statute, facially unconstitutional.

Zwick v. State, 730 So.2d 759 (Fla. 5th DCA 1999):

Defendant entitled to new trial on counts of indecent assault on child where jury instructions with regard to acts which would support finding of guilt were more expansive than the acts alleged in the information, and the jury returned a general verdict of guilt, making it impossible to determine whether jury found defendant guilty of uncharged acts.

Where an offense may be committed in various ways, the evidence must establish it to have been committed in the manner charged in the indictment; the indictment or information may have alleged them in the conjunctive and proof of one would have sufficed, but, if one of the state of facts is alleged, it cannot be established by proof of another.

Discussion: The counts were filed under F.S. 800.04(2), the section that lists several ways to violate the statute, eg. "deviate sexual intercourse, sadomasochistic abuse…" The State only listed a couple of the various acts in the statute, but the court included all of them in the instruction. Be sure to advise your judge not to include certain acts in the jury instruction unless they are charged in the information.

McCoy v. State, 23 Fla. Law. Weekly D2673 (Fla. 1st DCA December 4, 1998):

Trial court should have granted defendant's motion for judgment of acquittal where burglary suspect had consent to enter victim's residence for business purposes and remained in home with consent to use the restroom and thereafter exposed himself to victim.

There must be some evidence the jury can rationally rely on to infer that consent was withdrawn besides the fact that a crime occurred.

Singletary v. Alvarado, 23 Fla. L. Weekly D2483 (Fla. 2d DCA November 6, 1998):

> Regulation of prison visitation lies within the authority of Department of Corrections. Order directing that prisoner be allowed visitation privileges with his children quashed.

Banks v. State, 702 So.2d 1381 (Fla. 3rd DCA 1997):

> Claim that physician to whom rape was reported was improperly allowed to testify that victim identified defendant as perpetrator does not justify reversal of conviction where point was not properly preserved by specific and timely objection.

Freels v. State, 701 So.2d 1207 (Fla. 1st DCA 1997):

> Defendant charged with sexual battery has right to be advised that basic gain time will not be available with sentence on that charge.

State v. Ludwig, 700 So.2d 18 (Fla. 4th DCA 1997): Schapiro

> Error to enter order of dismissal based on unconstitutionality of sexual misconduct by psychotherapist statute. (F.S. 491.0112)

State v. Augustine, 23 Fla. L. Weekly D2257 (Fla. 2d DCA October 2, 1998):

> Error to suppress photograph taken during post-arrest strip search of defendant which depicted prominent mark near defendant's groin area that was consistent with mark that had been described by capital sexual battery victim.
>
> Fact that detective involved in case had probable cause to obtain search warrant to verify the mark, but failed to do so, is of no moment where valid arrest was effected and routine strip search was conducted upon booking county jail.