2011

FLORIDA SEXUAL VIOLENCE BENCHBOOK

Florida Criminal Sexual Battery and Civil Sexual Violence
Injunction Benchbook Advisory Committee

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Introduction

Florida's Sexual Violence Benchbook is designed to serve as a resource for new and experienced judges who handle cases involving sexual violence. While this benchbook was as current as possible at the time it was released, laws related to sexual violence change frequently so be certain to verify references and citations. Citations herein are to the 2010 Florida Statutes and Rules unless otherwise noted.

Acknowledgements

A grant from the Violence Against Women Grants Office, Office of Justice Programs, U.S. Department of Justice allowed the Florida Criminal Sexual Battery and Civil Sexual Violence Injunction Benchbook Advisory Committee to develop this benchbook. We would like to thank the following contributors and members of the advisory committee for their subject-matter expertise and their diligent efforts in developing Florida's Sexual Violence Benchbook: Judge Wayne Durden; Judge Janet Ferris (retired); Assoc. Administrative Judge George Sarduy; Hon. Bob Dillinger, Public Defender; Hon. Larry Eger, Public Defender; Hon. R.J. Larizza, State Attorney; Hon. Bernie McCabe, State Attorney; Laura Adams, Asst. State Attorney; Thomas Bakkedahl, Chief Asst. State Attorney; Michelle Barki, Asst. Public Defender; Clint Davis, Asst. Public Defender; Richard DeMaria, Asst. Public Defender; Francine Donnorummo, Asst. State Attorney, SVU Director; Rick Johnson, Esq.; Julia Lynch, Asst State Attorney; Terrence Martin, Division Chief Special Assault; Nathan Moon, Esq.; Blaise Trettis, Executive Asst. Public Defender; Ebony Tucker, Esq., Florida Council Against Sexual Violence; Florida State University College of Law. We extend our sincere thanks to all contributors for the time and effort they dedicated to this important project.

I. Introduction to Sexual Violence Issues

The stakes in sexual violence cases are incredibly high for both defendants and victims. Defendants face lengthy prison sentences and potentially a lifetime of supervision and the label of being a sexual offender which can make it very difficult to obtain work and housing. Victims of sexual violence face injuries and disease, emotional and psychological issues, fear, embarrassment, confusion, and fear of not being believed. Moreover, sexual violence cases often attract significant attention from the media and the community. As a result, the decisions judges make in sexual violence cases are among the most difficult and scrutinized decisions they will make throughout their time on the bench. Procedurally, sexual violence cases are very similar to other criminal cases, however, it is the differences and the uniquely personal aspects of these cases that make them difficult for the parties, attorneys, and judges. This benchbook will explore the various types of sexual violence crimes in Florida as well as related issues such as, stalking, victim safety, when children are victims or witnesses, confidentiality, public and media involvement, and sentencing. The goals of this benchbook are to help judges understand the issues pertinent to presiding over sexual violence cases in Florida, and to help judges ensure their courtrooms are neutral territories for the presentation of evidence and the administration of justice.

Crimes of a sexual nature call out for justice. It is precisely in situations like these that the protections and procedures of the justice system must work their best. In recent years, with the advent and improvement of DNA evidence, we have seen several instances of people being exonerated after serving lengthy sentences for rape and other crimes of sexual violence. On December 17, 2009, James Bain was released from a Florida prison after he had served 35 years for the kidnap and rape of a child that DNA evidence proved he did not commit. Even more recently, on May 5, 2010 Raymond Towler was released from an Ohio prison after he served nearly 30 years for a rape that DNA evidence showed he did not commit. It is terrible to think of an innocent person spending years of his life in prison for a crime he truly did not commit. The heinousness of these types of crimes cries out for justice for the victims, but there is no justice if innocent people are convicted and the actual perpetrators remain free. That is why the roll of the judge in establishing a neutral playing field is so important in all criminal cases and in sexual violence cases particularly.

What about the victims? Another factor that weighs heavily in sexual violence cases is a host of commonly held beliefs and ideas about rape and sexual violence that are often based

more on myths than facts. You may ask, why is this kind of information relevant to judges who are neutral arbiters? The answer is one of fundamental fairness in court proceedings. We take for granted that it is improper to believe a defendant is guilty simply because he or she has been accused of a crime. Proper procedures must be followed, competent evidence must be presented, and credibility of witnesses must be weighed before a verdict can be justly rendered. These are the basic due process requirements that lead to overall fairness for defendants in criminal cases. Similarly, if participants in court cases are operating under false beliefs or misinformation on issues such as victim behaviors and who can and "cannot" commit rape, despite the evidence that is presented, then how could such cases be considered fair toward the victim? This benchbook will address the common preconceived notions that parties, law enforcement, attorneys, jurors, and even judges themselves bring into the courtroom, and reveal how those notions compare with reality.

How Big is the Problem

You will find a variety of statistics on the prevalence of sexual violence cases, and often these numbers differ. The reasons for differing figures on the incidence of sexual violence are due to differing methodologies, differing definitions of sexual violence, differing populations included in the study, and different time spans for each study. Despite differing statistics, we know that there is a significant prevalence of sexual violence crimes in America including the cases that are reported to authorities and those that are never reported.

Rape in America: A Report to the Nation is one of the landmark studies of rape cases.[1] Through its definitions, methodology, and survey sample, the *Rape in America* study estimated that there are 683,000 "forcible rapes" in America each year.[2] In this study, "rape was defined as 'an event that occurred without the woman's consent, involved the use of force or threat of force, and involved sexual penetration of the victim's vagina, mouth, or rectum.' Women were asked whether such experiences had occurred anytime during their lifetimes, whether or not they reported it to police, and whether the attacker was a stranger, family member, boyfriend, or friend."[3]

One of the most recent statistical guides is *Criminal Victimization in the United States*.[4] The estimates from this long-term study are based on interviews of between 67,000 and 85,000 people per year since 1996 and the results listed here are for the year 2007. The study estimates

1 *Rape in America: A Report to the Nation*, National Victim Center (1992)

2 *Id*. at 2

3 *Id*.

4 *Criminal Victimization in the United States, 2007 Statistical Tables*, National Crime Victimization Survey, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, www.ojp.usdoj.gov/bjs/ .

that there were 248,280 rapes/sexual assaults in the United States in 2007.[5] Women are far more likely to be the victims of rape or sexual assault with 236,980 female victims compared with 11,300 male victims.[6] Further details from this study will be presented in later sections of the benchbook.

In Florida, it has been estimated that **one out of every nine** adult women has been the victim of a forcible rape sometime in her lifetime.[7] In the specific realm of criminal law, however, *Florida's Trial Court Statistical Reference Guide* shows that there were 3,369 charges filed for sexual offenses in fiscal year 2008-2009.[8] The guide defines sexual offenses as:

- Sexual misconduct by certain persons with a person with a disability, Section 393.135(2), Florida Statutes;
- Sexual misconduct by certain persons with a patient, Section 394.4593(2), Florida Statutes;
- Sexual misconduct by a psychotherapist with a client, Chapter 491, Florida Statutes;
- Sexual battery, Chapter 794, Florida Statutes (excluding sections 794.0235(5)(a) and (5)(b));
- Lewd or lascivious offenses, Chapter 800, Florida Statutes;
- Lewd or lascivious battery, molestation, or exhibition with elderly or disabled adults, Sections 825.1025(2), (3), and(4), Florida Statutes;
- Incest, Chapter 826, Florida Statutes;
- Sexual misconduct with a forensic client, Section 916.1075(2), Florida Statutes;
- Sexual misconduct by corrections staff with an inmate or supervised offender, Section 944.35(3)(b), Florida Statutes; and
- Sexual misconduct by juvenile justice staff and a juvenile offender, Section 985.701, Florida Statutes.[9]

For the 2000-2001 fiscal year, Florida courts reported 4,196 sexual violence charges and the

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5 *Id*. at 14.

6 *Id*. at 15.

7 *Rape in Florida: A Report to the State.* Ruggiero, K. J., & Kilpatrick, D.G. National Violence Against Women Prevention Research Center, Medical University of South Carolina. (May 15, 2003), www.doh.state.fl.us/Family/svpp/planning/Rape_in_Florida.pdf .

8 *Florida's Trial Court Statistical Reference Guide*, Florida Office of the State Courts Administrator § 4-2 (FY 2008-09) www.flcourts.org/gen_public/stats/reference_guide08_09.shtml

9 *Id*. at § 11-13.

number of charges for crimes of sexual violence in Florida has generally been gradually falling since then.[10] The statistics from the Office of the State Courts Administrator are specifically for cases in which charges have been filed, so these statistics obviously do not include any acts of sexual violence that were not reported to law enforcement or that did not result in the filing of formal charges.

Instances of sexual violence are notoriously under reported. It is estimated that as many as 84 percent of rape cases are never reported to police.[11] The *Criminal Victimization in the United States* study puts the number of cases not reported to police at 58.4 percent.[12] Whether the difference in these two numbers is due to study methodology, better public information on sexual violence, or more training for law enforcement officers on sexual violence issues, there is clearly a significant under reporting of sexual violence offenses.

Types of Offenses

There are many types of crimes that can be considered sexual offenses. While there are some offenses of a sexual nature that are misdemeanors such as unnatural or lascivious acts,[13] exposure of sexual organs,[14] and some offenses of prostitution,[15] the primary focus of this benchbook is on the various felony offenses that pertain to non-consensual sexual activity. The following crimes and statutory sections, pursuant to Florida Statutes (2010), will be addressed:

- Sexual Battery, **chapter 794**;
- Lewdness; Indecent Exposure, **chapter 800**;
- Incest, **chapter 826**;
- Abuse of Children, **chapter 827**;
- Obscenity, Child Pornography, Computer Facilitated Offenses, **chapter 847**;
- Abuse, Neglect, and Exploitation of Elderly Persons and Disabled Adults, **chapter 825**;
- Stalking, **chapter 784**;

10 *Florida's Trial Court Statistical Reference Guide*, Florida Office of the State Courts Administrator § 2-2 (FY 2000-01) www.flcourts.org/gen_public/stats/bin/reference_guide/2000_01circuitcriminal.pdf.
11 *Rape in America, supra* at 6.
12 *Criminal Victimization in the United States, supra* at 96.
13 Section 800.02, Florida Statutes (2010).
14 Section 800.03, Florida Statutes (2010).
15 Sections 796.07(4)(a) and (b), Florida Statutes (2010).

- Kidnapping, False Imprisonment, Luring or Enticing a Child, and Human Trafficking, **chapter 787**; and
- Prostitution, **chapter 796**.

There are additional sections of the Florida statutes that deal with sexual violence offenses, however, those sections primarily deal with an additional "status" element such as: someone providing care to persons with disabilities or mental illness, a psychotherapist and a client, an employee of the Agency for Persons with Disabilities or the Department of Children and Families and a forensic client, a Department of Corrections employee and an inmate, or a Department of Juvenile Justice employee and a detained or committed juvenile. In practice, you will be alerted to these additional types of cases by the charges included in the charging documents. A point to consider when handling these cases is the likely increase in public and media attention due to the fact that someone in an official capacity or position of responsibility has been accused of the offense. The focus of this benchbook, however, is on the more typical types of sexual violence cases outlined above. Understanding the typical kinds of sexual violence cases you will encounter will give you the necessary tools to handle any sexual violence case that comes before you.

Definitions

Each section of the Florida Statues specifically defines the terminology necessary to understand the statute and should be consulted as necessary. The following list of terms and definitions includes those that will be used frequently throughout this benchbook.

Child Pornography - means any image depicting a minor engaged in sexual conduct. § 847.001(3), Fla. Stat. (2010).

Coercion - means the use of exploitation, bribes, threats of force, or intimidation to gain cooperation or compliance. § 800.04(1)(c), Fla. Stat. (2010).

Consent - means intelligent, knowing, and voluntary consent and does not include coerced submission. "Consent" shall not be deemed or construed to mean the failure by the alleged victim to offer physical resistance to the offender. § 794.011(1)(a), Fla. Stat. (2010).

Human Trafficking - means transporting, soliciting, recruiting, harboring, providing, or obtaining another person for transport. § 787.06(2)(c), Fla. Stat. (2010).

Incest - means knowingly marrying or having sexual intercourse with a person related by lineal consanguinity, or a brother, sister, uncle, aunt, nephew, or niece. § 826.04, Fla. Stat. (2010).

Lewd or Lascivious Battery - means engaging in sexual activity with a person 12 years of age or older but less than 16 years of age; or encouraging, forcing, or enticing any person less than 16 years of age to engage in sadomasochistic abuse, sexual bestiality, prostitution, or any other act involving sexual activity. § 800.04 (4), Fla. Stat. (2010).

Lewd or Lascivious Conduct - means intentionally touching a person under 16 years of age in a lewd or lascivious manner; or soliciting a person under 16 years of age to commit a lewd or lascivious act. § 800.04 (6), Fla. Stat. (2010).

Lewd or Lascivious Exhibition - means intentionally masturbating; intentionally exposing the genitals in a lewd or lascivious manner; or intentionally committing any other sexual act that does not involve actual physical or sexual contact with the victim, including, but not limited to, sadomasochistic abuse, sexual bestiality, or the simulation of any act involving sexual activity in the presence of a victim who is less than 16 years of age. § 800.04 (7), Fla. Stat. (2010).

Lewd or Lascivious Molestation - means intentionally touching in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person less than 16 years of age, or forcing or enticing a person under 16 years of age to so touch the perpetrator. § 800.04 (5), Fla. Stat. (2010).

Mentally Defective - means a mental disease or defect which renders a person temporarily or permanently incapable of appraising the nature of his or her conduct. § 794.011(1)(b), Fla. Stat. (2010).

Mentally Incapacitated - means temporarily incapable of appraising or controlling a person's own conduct due to the influence of a narcotic, anesthetic, or intoxicating substance administered without his or her consent or due to any other act committed upon that person without his or her consent. § 794.011(1)(c), Fla. Stat. (2010).

Mental Retardation - While the term "developmental disability" is the more appropriate term to use today, Florida Statutes still utilize the term mental retardation in several places. Retardation means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior that manifests before the age of 18 and can reasonably be expected to continue indefinitely. § 393.063(31), Fla. Stat. (2010).

Nonstranger - refers to a victim's relationship to the offender. An offender who is either related to, married to, well known to, friends with, a colleague of, or casually acquainted with the victim is a nonstranger.

Offender - means a person accused of a sexual offense in violation of a provision of Chapter 794 F.S. § 794.011(1)(d), Fla. Stat. (2010).

Penetration - means some entry into the relevant part, however slight. Emission is not required. *See, Richards v. State*, 738 So. 2d 415, 418 (Fla. 2d DCA 1999), and *Barker v. State*, 24 So. 69 (Fla. 1898).

Physically Helpless - means unconscious, asleep, or for any other reason physically unable to communicate unwillingness to an act. § 794.011(1)(e), Fla. Stat. (2010).

Physically Incapacitated - means bodily impaired or handicapped and substantially limited in ability to resist or flee. § 794.011(1)(j), Fla. Stat. (2010).

Retaliation - includes, but is not limited to, threats of future physical punishment, kidnapping, false imprisonment or forcible confinement, or extortion. § 794.011(1)(f), Fla. Stat. (2010).

Serious Personal Injury - means great bodily harm or pain, permanent disability, or permanent disfigurement. § 794.011(1)(g), Fla. Stat. (2010).

Sexual Activity Sexual activity is actually defined in two different ways in the Florida Statutes. For lewd or lascivious offenses under Chapter 800, sexual activity means the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual activity does not include an act done for a bona fide medical purpose. § 800.04(1)(a), Fla. Stat. (2010). For unlawful sexual activity with certain minors under Chapter 794, sexual activity means oral, anal, or vaginal penetration by, or union with, the sexual organ of another; however, sexual activity does not include an act done for a bona fide medical purpose. § 794.05(1), Fla. Stat. (2010). Note that section 794.05(1) does *not* include "the anal or vaginal penetration of another by any other object" in its definition of sexual activity.

Sexual Battery - means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose. § 794.011(1)(h), Fla. Stat. (2010).

Sexual Conduct - means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. §§ 827.071(g) and 847.001(16), Fla. Stat. (2010).

Sexual Intercourse - means the penetration of the female sex organ by the male sex organ, however slight; emission of semen is not required. § 826.04, Fla. Stat. (2010).

Sexual Violence - is a general term meaning any of the various types of sexual offenses such as: sexual battery or rape, sexual assault, lewd and lascivious acts, incest, etc.

Stalking - means willfully, maliciously, and repeatedly following, harassing, or cyberstalking another person. § 784.048(2), Fla. Stat. (2010).

Stranger - refers to a victim's relationship to the offender. An offender who is not known to the victim is a stranger.

Union - means contact. *See, Standard Jury Instructions for Criminal Cases*, and *Richards v. State*, 738 So. 2d 415, 418 (Fla. 2d DCA 1999).

Victim - means a person who has been the object of a sexual offense, a person upon whom a sexual offense was committed or attempted, or a person who has reported a sexual offense to a law enforcement officer. *See*, §§ 794.011(1)(i), and 800.04(1)(d) Fla. Stat. (2010).

> Note: The term "victim" as opposed to "alleged victim" will be used generally throughout this benchbook to refer to someone who has suffered an act of sexual violence regardless of charges being filed or the rendering of a guilty verdict.

Stranger vs. Nonstranger Rape

Some of the most commonly held ideas about sexual violence cases surround the issue of whether or not the accused/offender is someone the victim knows, so this issue deserves some attention from the outset. The image of a man jumping from the bushes to attack a random woman and rape her at gun point is a fairly common idea about what constitutes rape. The understanding or belief that a friend, relative, boyfriend, or husband can commit rape without employing physical violence is far less common. In fact, as few as 22 percent of all rapes are committed by someone who is a stranger to the victim.[16] The other 78 percent of rapes were committed by: 9 percent husbands or ex-husbands; 11 percent fathers or step-fathers; 10 percent boyfriends or ex-boyfriends; 16 percent other relatives; 29 percent other non-relatives such as friends and neighbors; and 3 percent did not know or refused to answer.[17]

The *Criminal Victimization in the United States* study used a broader definition of "stranger" and estimated that 42.2 percent of rapes/sexual assaults involved a stranger.[18] This result includes

16 *Rape in America, supra* at 4.
17 *Id*.
18 *Criminal Victimization in the United States*, supra at 40.

cases where the victim did not know the relationship, if any, to the offender which made up 5.6 percent of all cases, and cases where the victim did not know the number of offenders which made up 5.4 percent of all cases.[19]

Breaking down the 57.8 percent of all rapes/sexual assaults by nonstrangers shows a similarly wide spectrum of relationships between the victim and the offender. A spouse was listed as the offender in 8.5 percent of these cases, 2.5 percent were ex-spouses, 0.8 percent were committed by a parent, and 1.8 percent of offenders were another type of relative, a full 31.2 percent of the known offenders were someone well known to the victim, and 15.5 percent of known offenders were considered casual acquaintances of the victim.[20]

The data from both studies show that most rapes are in fact committed by someone known to the victim. Rapes committed by strangers are a clear minority of cases. One factor that may have led to the myth that rapes are frequently committed by strangers is that these types of attacks are far more likely to be reported to police. While rape cases are significantly underreported to law enforcement as noted above, more than half of the rapes/sexual assaults committed by strangers are reported to police while only 34.4 percent of those committed by nonstrangers are reported to police.[21]

Beyond the statistics, what is the impact on the victim of being raped by a stranger versus a nonstranger? It is commonly believed that someone raped by a stranger will suffer greater psychological and emotional trauma than someone raped by a nonstranger. This is a very common myth about rape. In fact, victims of rape by a nonstranger are often the ones who suffer greater psychological and emotional trauma precisely because the offender was someone they knew. When a person is victimized by someone she trusted she often comes to doubt her own judgment, is unable to trust others, and becomes fearful. The violation of trust is often harder for victims to cope with than dealing with being the victim of a random act of violence. Consider also that when the offender is a coworker, a family member, or in the victim's circle of friends, then the victim is likely to have to continue to see and interact with the offender or his associates. Additionally, when the victim and the offender know each other they are likely to have mutual friends or family members who are likely to take sides with either the offender or the victim which creates stress in the victim's familiar relationships.[22] This complex array of factors reveals just some of the issues and difficulties facing victims of nonstranger rape.

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19 *Id*. at 46.

20 *Id*. at 46.

21 *Id*. at 99.

22 *See*, Lynn Hecht Schafran et al., *Understanding Sexual Violence: The Judicial Response to Stranger and Nonstranger Rape and Sexual Assault*, National Judicial Education Program to Promote Equality for Women and Men in the Courts (2005).

Psychological Effects of Rape

Besides the physical effects of sexual violence, victims frequently suffer a host of psychological effects as well. Sexual and/or physical assaults have been repeatedly associated with increased anxiety, depression, cognitive disturbance such as hopelessness and low self-esteem, post-traumatic stress, dissociation, somatization, sexual problems, substance abuse, and suicidality.[23] (internal citations omitted.)

Nearly one third of rape victims will develop post traumatic stress disorder (PTSD) in their lifetimes.[24] Compared to the population of women who are not victims of a crime, women who are raped are 6.2 times more likely to develop PTSD in their lifetimes.[25] Thirty percent of rape victims will suffer at least one major depressive episode in their lifetimes which is three times more likely than women who are not victims of a crime.[26] One third of rape victims report that they have seriously considered suicide in their lifetimes which is more than 4 times the incidence among non-victims.[27] Lastly, rape victims are 13 times more likely to actually attempt suicide than non-victims.[28]

The psychological effects of sexual violence are important in the context of criminal cases because they lead to certain common responses from victims that may appear odd or counterintuitive to someone who has not been so victimized and who is unaware or unsympathetic to these impacts. These are the kinds of behaviors and responses similar to those of victims of domestic violence that are hard to grasp for people who have not been in such situations. For example, many people will ask why a victim of domestic violence doesn't simply leave the abuser. We have learned that while this question is irrelevant in that it focuses on a victim's legal choice as opposed to an abuser's criminal behavior, victims in fact have a variety of reasons for staying in abusive relationships including: fear of greater violence if they leave, desire to protect children from violence, financial and social inability to leave, and even hope that things will change. Similarly, many victims of sexual violence do not promptly make a complaint to law enforcement or even seek medical attention. Many people see this as a strange response to a traumatic event and may question a victim's veracity as a result, yet when we look at some of the reasoning involved it becomes clear why this happens. Some of the reasons victims have for these counterintuitive actions include:

- Not knowing the assault was legally a rape,
- Denial and suppression of emotions related to the rape sometimes used as a coping mechanism,

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23 John Briere and Carol E. Jordan, *Violence Against Women Outcome Complexity and Implications for Assessment and Treatment*, Journal of Interpersonal Violence, Vol. 19 No. 11 (November 2004).

24 *Rape in America, supra* at 7.

25 *Id*.

26 *Id*.

27 *Id*.

28 *Id*.

- Actual psychogenic amnesia which is an inability to remember some or all details of the assault,
- Fear of retaliation,
- Fear of being blamed or of not being believed,
- Fear of further loss of privacy,
- Fear of the criminal justice system, and
- Embarrassment and shame when recounting the details of the rape.[29]

Of course all victims are different and may experience a range of symptoms and responses that include many or none of these and each victim will experience a range in duration and severity of .[30]

Another question often asked about victim behavior is, "Why didn't she fight back or get away?" Everyone is familiar with the so called "fight or flight response" to a perceived threat wherein someone in danger has an automatic psychological and physiological response to either flee the danger or prepare to fight it. These are the responses we expect to see and we wonder why a victim may not have fought or fled in a given case. There is actually a third possible response and that is to "freeze." This response is one we've all likely experienced or at least observed at some time. The phrase "like a deer in the headlights" exemplifies this response. In terms of sexual violence, some victims will experience frozen fright or even dissociation.[31]

Frozen fright is when fear causes a person to feel immobilized or paralyzed to the point that they cannot offer any resistance. Dr. Judith Herman of Harvard Medical School writes:

> When a person is completely powerless, and any form of resistance is futile, she may go into a state of surrender. The system of self-defense shuts down entirely. The helpless person escapes from her situation not by action in the real world but rather by altering her state of consciousness. Analogous states are observed in animals who sometimes 'freeze' when they are attacked. These are the responses of captured prey to predator or of a defeated contestant in battle.[32]

Dissociation can happen to a victim of a traumatic event when they believe they are

29 *See*, Lynn Hecht Schafran et al., *Understanding Sexual Violence: The Judicial Response to Stranger and Nonstranger Rape and Sexual Assault*, National Judicial Education Program to Promote Equality for Women and Men in the Courts, Unit II (2005).

30 *Id*.

31 *Id*.

32 *Id*., citing Dr. Judith Herman, *Trauma and Recovery* 42-43 (1992).

in inescapable danger. Dissociation can appear as detached calm because the victim may feel or perceive that the event is not happening to her, as though she is observing it from outside her body, or as though the whole experience is a bad dream.[33] Dissociation can produce a "profound passivity in which the person relinquishes all initiative and struggle."[34]

Finally, some victims will make the strategic decision to *not* resist or fight back. This response is in no way consent. A person may calculate the situation before her and decide that resisting could result in greater physical injury than the rape itself or may even lead to death.[35]

One last question that often arises about victims of sexual violence is, "Why doesn't she have a better recollection of events?" This gets directly into how the human brain works. David Lisak, Ph.D., explains how traumatic events are both encoded into our brains and recalled differently than regular events:

> The memory of a traumatic experience is not encoded in the same way as is a normal experience. The powerful neurochemicals that trigger the fight or flight response have far-reaching effects, including dramatic effects on the manner in which memories are encoded. Often, a traumatized person cannot generate the kind of narrative memory that we can normally muster for an important experience. Their memories are often fragmented, out of sequence, and filled with gaps. They may recall very specific details for particular aspects of the experience, and recall little or nothing for others. It is for this reason – the neurobiology of traumatic recovery – that great care must be taken in interviewing trauma survivors. The fact that a traumatized person recalls a detail which they earlier had not is not prima facie evidence of fabrication; it is the characteristic way in which these types of memories are stored and recalled. The fact that they can recall the texture of a rapist's shirt, but cannot recall whether he was wearing a hat, is not evidence that something is being hidden; it is a product of how the brain encodes information during a trauma.[36]

These issues are presented here to give you some background and a frame of reference regarding some of the very common questions and misconceptions that many people have about how and why victims may react and behave in the ways they do. You may see issues related to these behaviors raised in pretrial motions, as a part of voir dire, and as an expert's opinion testimony during trial.

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33 *Id*.

34 *Id*.

35 *See*, Lynn Hecht Schafran et al., *Understanding Sexual Violence: The Judicial Response to Stranger and Nonstranger Rape and Sexual Assault*, National Judicial Education Program to Promote Equality for Women and Men in the Courts, Unit II (2005).

36 David Lisak, Ph.D., *The Neurobiology of Trauma*, National Judicial Education Program, Understanding Sexual Violence: Prosecuting Adult Rape and Sexual Assault Cases (2000).

II. Sexual Violence Statutes

A. Sexual Battery, Section 794.011, Florida Statutes (2010)

Rape, or more accurately, the offense of sexual battery is what most people think of when discussing sexual violence. In Florida, the general definition of sexual battery is the nonconsensual "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose."[37] Ironically, most of the terms used in the statutory definition of sexual battery are not specifically defined in the statute and have, as a result, been the subject of litigation.

What is meant by the terms "union" and "penetration"? *Richards v. State* indicates that "union permits a conviction based on contact with the relevant portion of anatomy, whereas penetration requires some entry into the relevant part, however slight."[38] Regarding offenses based on penetration, emission is not required and penetration alone is sufficient to sustain a charge of rape.[39]

The *Richards v. State* case cited above dealt primarily with the definitions of "vaginal," "sexual organ," and "vaginal area." Since the focus of the case was on definitions and parsing the statute, it is instructive on many of the other undefined terms used in the statutory definition of sexual battery.

> Because it is often difficult to understand exactly what types of conduct this statute proscribes, it is useful to divide this offense into four parts, and to translate its terms into more active language. (citation omitted). The statute prohibits:
>
> (1) "Oral, anal, or vaginal penetration by the sexual organ of another." Translation: It is illegal for a man to place his penis inside the mouth, anus, or vagina of a victim.

37 Section 794.011(1)(h), Florida Statutes (2010).

38 *Richards v. State*, 738 So. 2d 415, 418 (Fla. 2d DCA 1999).

39 *Barker v. State*, 24 So. 69 (Fla. 1898).

(2) "Oral, anal, or vaginal union with the sexual organ of [the defendant]." Translation: It is illegal for a man to touch the mouth, anus or vagina of the victim with his penis, and it is illegal for a woman to touch the mouth, anus or vagina of the victim with her "sexual organ."

(3) "Oral, anal, or vaginal union with the sexual organ of [the victim]." Translation: It is illegal for a man to touch the sexual organ of the victim with his mouth or anus, and it is illegal for a woman to touch the sexual organ of the victim with her mouth, anus, or vagina.

(4) "The anal or vaginal penetration of another by any other object." Translation: It is illegal for a man or a woman to place any object inside the anus or vagina of the victim.[40]

1. Specific Sexual Battery Offenses

With sexual battery defined, we can look at the distinct criminal offenses. The basic offense of sexual battery is found in **section 794.011(5), Florida Statutes (2009)** which says that "a person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof does not use physical force and violence likely to cause serious personal injury commits **a felony of the second degree**...." (emphasis added) This basic offense "is included in any sexual battery offense charged under subsection (3) or subsection (4)."[41] This is the standard offense of sexual battery.

The basic charge for an offense of sexual battery may be modified based upon the ages of the victim and the offender, whether a weapon or injurious force was used, whether the victim suffered additional injury, and whether the offender was in a position of familial or custodial authority. Because the degrees of these offenses range from a capital or life felony to a third degree felony, the degree of each offense is highlighted for each offense type.

Section 794.011 (2), Florida Statutes (2010):

(a) A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a **capital felony, punishable as provided in ss. 775.082 and 921.141**.

(b) A person less than 18 years of age who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a **life felony**.

40 *Richards*, *supra* at 417-18.

41 Section 794.011(6), Florida Statutes (2010).

Section 794.011 (3), Florida Statutes (2010):
A person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury commits a **life felony**.

Section 794.011 (4), Florida Statutes (2010):
A person who commits sexual battery upon a person 12 years of age or older without that person's consent, under any of the following circumstances:

- When the victim is physically helpless to resist.[42]
- When the offender coerces the victim to submit by threatening to use force or violence likely to cause serious personal injury on the victim, or to retaliate against the victim or any other person, and the victim reasonably believes that the offender has the present ability to execute the threat.[43]
- When the offender, without the prior knowledge or consent of the victim, administers or has knowledge of someone else administering to the victim any narcotic, anesthetic, or other intoxicating substance which mentally or physically incapacitates the victim.[44]
- When the victim is mentally defective and the offender has reason to believe this or has actual knowledge of this fact.[45]
- When the victim is physically incapacitated.[46]
- When the offender is a certified law enforcement officer, correctional officer, or correctional probation officer, or is an elected official exempt from certification, or any other person in a position of control or authority in a probation, community control, controlled release, detention, custodial, or similar setting, and such officer, official, or person is acting in such a manner as to lead the victim to reasonably believe that the offender is in a position of control or authority as an agent or employee of government.[47] commits a **first degree felony**.

Section 794.011 (8), Florida Statutes (2010):
Without regard to the willingness or consent of the victim, which is not a defense to prosecution under this subsection, a person who is in a position of familial or custodial authority to a person less than 18 years of age and who:

42 Section 794.011 (4)(a), Florida Statutes (2010).
43 Section 794.011 (4)(b) and (c), Florida Statutes (2010).
44 Section 794.011 (4)(d), Florida Statutes (2010).
45 Section 794.011 (4)(e), Florida Statutes (2010).
46 Section 794.011 (4)(f), Florida Statutes (2010).
47 Section 794.011 (4)(g), Florida Statutes (2010).

- Solicits that person to engage in any act which would constitute sexual battery commits a **third degree felony.**[48]

- Engages in any act with that person while the person is 12 years of age or older but less than 18 years of age which constitutes sexual battery commits a **first degree felony**.[49]

- Engages in any act with that person while the person is less than 12 years of age which constitutes sexual battery, or in an attempt to commit sexual battery injures the sexual organs of such person commits a **capital or life felony, punishable as provided in ss. 775.082 and 921.141**.[50]

Unlawful sexual activity with certain minors is prohibited pursuant to **Section 794.05, Florida Statutes (2010):**

A person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age commits a **second degree felony**.[51]

As used in this section, "sexual activity" means oral, anal, or vaginal penetration by, or union with, the sexual organ of another; however, sexual activity does not include an act done for a bona fide medical purpose.[52]

- The provisions of this section do not apply to a person 16 or 17 years of age who has had the disabilities of nonage removed under chapter 743.[53]

- The victim's prior sexual conduct is not a relevant issue in a prosecution under this section.[54]

Though it is not an offense of sexual violence, any person who falsely accuses a person listed in section 794.011(4)(g) or other person in a position of control or authority as an agent or employee of the government of violating paragraph (4)(g) is guilty of a **third degree felony**.[55]

2. Consent

"Consent" means intelligent, knowing, and voluntary consent and does not include coerced submission. "Consent" shall not be deemed or construed to mean the failure by the alleged

48 Section 794.011(8)(a), Florida Statutes (2010).
49 Section 794.011(8)(b), Florida Statutes (2010).
50 Section 794.011(8)(c), Florida Statutes (2010).
51 Section 794.05(1), Florida Statutes (2010).
52 *Id*.
53 Section 794.05(2), Florida Statutes (2010).
54 Section 794.05(3), Florida Statutes (2010).
55 Section 794.011 (10), Florida Statutes (2010).

victim to offer physical resistance to the offender.[56] While many factors are likely to be raised on the issue of consent, the proposition that "no means no" is clearly supported by law. A defense of "her lips said 'no', but her eyes said 'yes'" will not be condoned, nor will it be accepted as a legal defense to a charge of sexual battery.[57] To allow such a defense "would, in effect, virtually eliminate sexual battery prosecutions, since every defendant charged with that crime would merely have to assert that he believed that when the victim said 'no', she really meant 'yes'."[58]

3. Use of Force

The issues of the type and amount of force used by the perpetrator and the amount of resistance offered by the victim are frequent elements of defenses and are issues that interest jurors. As to force, the Florida Legislature has specifically indicated that "it was never intended that the sexual battery offense described in s. 794.011(5) require any force or violence beyond the force and violence that is inherent in the accomplishment of 'penetration' or 'union.'"[59] As to a victim's choice to resist, the legislature chose to include in the definition of "consent" that the failure by the alleged victim to offer physical resistance to the offender shall not be deemed or construed to mean "consent."[60]

State v. Sedia dealt with a physical therapist who, without warning, put his penis in the vagina of a patient who was facing away from him.[61] The court considered "the victim as being essentially "physically helpless to resist" due to the fact that the victim had no opportunity to communicate her unwillingness to have sexual intercourse with the defendant before the alleged penetration occurred."[62] "The state need not prove that the defendant used more physical force than merely the physical force necessary to accomplish sexual penetration in order to convict a defendant under section 749.011(5)."[63]

4. Intent

Any authority on sexual violence will explain that the crime of rape has little to do with sexual gratification and is instead committed out of anger or a desire to humiliate the victim. Nothing in Chapter 794, Florida Statutes requires a finding of the defendant's intent to obtain "sexual gratification" from his actions. Sexual battery and attempted sexual battery are general

56 Section 794.011(1)(a), Florida Statutes (2010).
57 *Fletcher v. State*, 698 So. 2d 579 (Fla. 3rd DCA 1997).
58 *Id*. at 580.
59 Section 794.005, Florida Statutes (2009).
60 Section 794.011(1)(a), Florida Statutes (2010).
61 *State v. Sedia*, 614 So. 2d 533 (Fla. 4th DCA 1993)
62 *Id*. at 535.
63 *Id*.

intent crimes.[64] In cases of sexual battery alleged to have been committed by males upon females with the male's sexual organ "Chapter 794 proscribing sexual battery says nothing whatsoever about a desire for sexual gratification and ... [w]e hold that such a desire is not an element of the offenses charged here…."[65]

Why is this explanation relevant and necessary? The common law of rape included an element of "carnal knowledge" which led to the inclusion of sexual gratification as an element of the offense. The current statutory language, however, does not support such a contention. Where this issue was further drawn into question was in cases where an object other than the defendant's sexual organ was used to commit the sexual battery. Dicta in *Hendricks v. State*, indicated that court's belief that "when an object other than the actor's sexual organ is brought into union with the victim a question of intent to derive sexual gratification comes into play and becomes a necessary element of the crime."[66] This comment in *Hendricks* is based in part upon a similar decision in *State v. Alonso*[67] which was overruled by *Aiken v. State*.[68] In *Aiken*, the Florida Supreme Court affirmed the Fourth District Court of Appeal's decision in *State v. Aiken*,[69] and cited "a desire for sexual gratification is not a necessary element to a sexual battery as charged here. Chapter 794 of the Florida Statutes shows a clear intent to protect an individual's sexual privacy from violence."[70] In Justice McDonald's special concurrence, he writes, "I concur with the majority opinion but also agree with the specially concurring opinion of Judge Dauksch in this cause and the specially concurring opinion of Judge Schwartz in *Surace v. State*, 378 So.2d 895 (Fla. 3rd DCA 1980). Like Judge Schwartz, I would go further and hold that the attainment of sexual gratification is not an element of the crime in question, and that a violation of the sexual battery statute occurs whenever, as in this case, there is an intentional, non-consensual intrusion into the sexual privacy of another. Id. at 899."[71]

Clearly, while some older cases relied upon common law notions of carnal knowledge and sexual gratification, the current statutes and case law do not include any requirement for a showing of intent to receive sexual gratification.

5. Physically Helpless to Resist

Section 794.011(4), Florida Statutes (2010) provides, "A person who commits sexual battery upon a person 12 years of age or older without that person's consent, under any of the following circumstances, commits a felony of the first degree…." The relevant circumstance

64 *Holland v. State*, 773 So. 2d 1065, 1071 (Fla. 2000).
65 *State v. Aiken*, 370 So. 2d 1184, 1185-1186 (Fla. 4th DCA 1979).
66 *Hendricks v. State*, 360 So. 2d 1119, 1123 (Fla. 3rd DCA 1978).
67 *State v. Alonso*, 345 So. 2d 740 (Fla.3d DCA 1977).
68 *Aiken v. State*, 390 So. 2d 1186 (Fla. 1980).
69 *State v. Aiken*, 370 So. 2d 1184 (Fla. 4th DCA 1979).
70 *Aiken v. State*, 390 So. 2d 1186 at 1187 (Fla. 1980).
71 *Aiken v. State*, 390 So. 2d 1186 at 1188 (Fla. 1980).

that leads to a charge under this section obviously becomes an element of the crime and must be proven beyond a reasonable doubt to sustain a conviction. Of all the listed circumstances under this section, "when the victim is physically helpless to resist"[72] tends to raise the most questions and lead to the most appeals.

The statute defines "physically helpless" as being "unconscious, asleep, or for any other reason physically unable to communicate unwillingness to an act."[73] By defining physically helpless in this way the legislature chose to focus on a victim's ability to communicate as opposed to her ability to physically resist an attack. This approach is logical because the crimes of sexual battery essentially deal with the victim's consent, and there is no legal requirement for a victim to attempt to physically resist an attack.

In *Coley v. State* the court discussed the unique issues raised in having to prove the element of physical helplessness. "In order to prove this element, the State must show beyond a reasonable doubt that the victim was physically unable to communicate unwillingness, by reason of sleep, unconsciousness, or otherwise. It is the settled interpretation of the statute that being tied up does not meet this element of the offense; if the victim, although physically restrained, can communicate unwillingness, then this element is not satisfied."[74] In this case, the evidence showed that the alleged victim communicated her initial willingness to engage in certain sexual acts and that she had the ability to communicate at all relevant times which led the court to find that there was no evidence which would support a finding, beyond a reasonable doubt, of a physical inability to communicate unwillingness.[75]

In *State v. Sedia*, noted above, a physical therapist, without warning, put his penis in the vagina of a patient who was facing away from him.[76] The victim in this case was fully physically functioning, however, the court considered the victim physically helpless to resist due to the fact that "the victim had no opportunity to communicate her unwillingness to have sexual intercourse with the defendant before the alleged penetration occurred."[77] This case shows that the statutory definition of "physically helpless" is quite limiting and focuses primarily on a victim's ability to communicate her consent or lack of consent.

It is for the State to prove all elements of the charged offense(s) beyond a reasonable doubt. When a victim was "able to communicate her unwillingness, and did so both before and during the commission of the sexual battery" then she was not physically helpless to resist and a conviction under section 794.011(4)(a) must be reversed.[78]

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72 Section 794.011(4)(a), Florida Statutes (2010).
73 Section 794.011(1)(e), Florida Statutes (2010).
74 *Coley v. State*, 616 So. 2d 1017 at 1020 (Fla. 3rd DCA 1993).
75 *Id*. at 1021.
76 *State v. Sedia*, 614 So. 2d 533 (Fla. 4th DCA 1993).
77 *Sedia, supra* at 535.
78 *Norman v. State*, 555 So. 2d 1316 (Fla. 5th DCA 1990).

6. Person in Familial or Custodial Authority

Section 794.011(8)(a)-(c), Florida Statutes (2010) prohibits acts that would constitute sexual battery by a person who is in a position of familial or custodial authority. As with all of the "status" variations on the standard charge of sexual battery, the State must prove the status element of familial or custodial authority beyond a reasonable doubt. These cases tend to be very fact specific as the following examples will illustrate.

Properly deciding whether familial authority or custodial authority exist to support a charge under section 794.011(8) depends on a very fact specific review of the relationship between the parties. In *Rawls*, the court simply wrote, "The existence of a familial relationship depends on the particular facts of a case."[79] "There is no single definition or description of what constitutes a "familial relationship" in the context of child sexual battery. The … determination of whether a familial relationship exists must be done on a case-by-case basis. Consanguinity and affinity are strong indicia of a familial relationship but are not necessary. Also, the defendant and victim need not reside in the same home. The relationship must be one in which there is a recognizable bond of trust with the defendant, similar to the bond that develops between a child and her grandfather, uncle, or guardian."[80]

Crocker dealt with a case of familial authority as opposed to custodial authority even though the defendant was not related by blood or marriage to the victim. The 12-year old victim lived with her aunt whom the defendant dated. The defendant lived with the victim and her aunt in what appeared to be a family unit. These facts were sufficient "to allow the jury to determine from the evidence whether the relationship between Crocker and the child was of the familial nature contemplated by the statute. The trial court did not err by denying the motion for judgment of acquittal."[81] In the *Hull* case, however, the defendant's conviction for sexual battery by a person in a position of familial or custodial authority pursuant to section 794.011(8) against his 17-year-old niece by marriage was reversed. The victim lived in her own private room in the defendant's home while she was attending college. The defendant had no close personal relationship with the victim and no authority over her. Based on these facts, the court wrote, "It is clear that the facts demonstrate the total absence of the 'recognizable bond of trust,' or the 'duty or obligation to care for the other,' which are indispensable to a finding of the 'familial or custodial authority' required for a violation of the statute."[82]

Hallberg, dealt with the issue of custodial authority where a school teacher showed up uninvited at a student's home during the summer break from school and committed lewd acts upon the child and had sexual activity with the child while her parents were away. The victim's parents did not give the defendant any custodial control or authority over the victim. Based on

79 *State v. Rawls*, 649 So. 2d 1350 at 1352. (Fla. 1994) (superseded on other grounds).

80 *Id*. at 1353.

81 *Crocker v. State*, 752 So. 2d 615 at 617 (Fla. 2d DCA 1999).

82 *Hull v. State*, 686 So .2d 676 – 677 (Fla. 3rd DCA 1996) (citing *State v. Rawls*, 649 So. 2d 1350, 1353 (Fla. 1994) and *Hallberg v. State*, 649 So. 2d 1355, 1357 (Fla. 1994)).

the facts of this case, the defendant could not be found to be in custodial control of the child.[83] Compare the *Hallberg* decision to that of *Collins* wherein the defendant was held to have had custodial authority over the victim. "The evidence presented showed that the victim had many contacts with the defendant, she had ridden in his truck many times, the defendant had daily contact with the victim's mother, and, in fact, the mother of the child knew, and approved, that the child was in the care of the defendant on the day the crime was committed."[84]

B. Kidnapping, False Imprisonment, Luring or Enticing a Child,

Chapter 787, Florida Statutes (2010)

Kidnapping is clearly a crime in and of itself with no inherent requirement of sexual violence, however, some cases of sexual violence will also include a separate act of kidnapping. Kidnapping means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against her or his will and without lawful authority, with intent to:

1. Hold for ransom or reward or as a shield or hostage,
2. Commit or facilitate commission of any felony,
3. Inflict bodily harm upon or to terrorize the victim or another person, or
4. Interfere with the performance of any governmental or political function.[85]

A person who kidnaps a person commits a **first degree felony**.[86]

"When … the victim is under the age of thirteen, the 'against her or his will' element is met if the confinement is without the consent of the child's parent or legal guardian."[87]

A person who kidnaps a child under the age of 13 and who, in the course of committing the offense, commits one or more of the following:

1. Aggravated child abuse;
2. Sexual battery against the child;
3. Lewd or lascivious battery, lewd or lascivious molestation, lewd or lascivious conduct, or lewd or lascivious exhibition;
4. A violation of s. 796.03 or s. 796.04, relating to prostitution, upon the child; or

83 *See*, *Hallberg v. State*, 649 So. 2d 1355 (Fla. 1994).
84 *Collins v. State*, 496 So. 2d 997 at 999 (Fla. 5th DCA 1986) (internal citations omitted).
85 Section 787.01(1)(a), Florida Statutes (2010).
86 Section 787.01(2), Florida Statutes (2010).
87 *Bishop v. State*, 46 So. 3d 75 (Fla. 5th DCA 2010).

5. Exploitation of the child or allowing the child to be exploited, commits **a life felony**.[88] Similar to kidnapping are the crimes of false imprisonment and false imprisonment of a child under age 13 which are found in section 787.02, Florida Statutes.

An issue to be mindful of is whether the kidnapping is shown to be a crime on its own or whether it is merely incidental to another crime such as a sexual battery. In *Gore*[89] and *Wike*,[90] for example, the victims were clearly taken and held against their will, were physically bound, were then sexually battered, and, in these cases, murdered. Each criminal offense in *Gore* and *Wike* was provable on its own and upheld on appeal.

For a kidnapping conviction to stand, the resulting movement or confinement:

1) must not be slight, inconsequential, and merely incidental to the other offense;
2) must not be of the kind inherent in the nature of the other offense; and
3) must have some significance independent of the other offense in that it makes the other offense substantially easier to commit or substantially lessens the risk of detection.[91]

In *Bishop*, the defendant's act of leading the child to a secluded location, out of the view of the people in or near the hotel's pool, so as to isolate her from meaningful contact with the public was sufficient movement of the victim to meet the standard set out in *Faison*.[92]

C. Lewdness; Indecent Exposure, Chapter 800, Florida Statutes (2010)

Lewd or lascivious acts account for a significant number of sexual violence cases. There are a variety of offenses that fall under the general category of "lewd or lascivious." Lewd or lascivious offenses include: lewd or lascivious battery,[93] lewd or lascivious molestation,[94] lewd or lascivious conduct,[95] and lewd or lascivious exhibition.[96] Lewd or lascivious cases have some distinct elements from sexual battery cases. An element of all the lewd or lascivious offenses under section 800.04, Florida Statutes is that the victim is less than 16 years of age at the time of the offense. If the victim is less than 12 years of age, the degree of the offense is increased

88 Section 787.01(3)(a), Florida Statutes (2010).
89 *See*, *Gore v. State*, 706 So. 2d 1328 (Fla. 1997).
90 *See*, *Wike v. State*, 698 So. 2d 817 (Fla. 1997).
91 *Bishop v. State*, 46 So. 3d 75 (Fla. 5th DCA 2010), *citing Faison v. State*, 426 So. 2d 964 (Fla. 1983).
92 *Id*.
93 Section 800.04(4), Florida Statutes (2010).
94 Section 800.04(5), Florida Statutes (2010).
95 Section 800.04(6), Florida Statutes (2010).
96 Section 800.04(7), Florida Statutes (2010).

as it is in sexual battery cases. Additionally, consent is not a factor in lewd or lascivious cases because consent is statutorily prohibited as a defense in these cases.

The Legislature has prohibited several possible defenses to lewd or lascivious conduct by statute. Consent is not a defense to any of the lewd or lascivious offenses.[97] Whether or not the victim was chaste at the time of the offense is also prohibited as a defense.[98] Lastly, "the perpetrator's ignorance of the victim's age, the victim's misrepresentation of his or her age, or the perpetrator's bona fide belief of the victim's age cannot be raised as a defense…."[99]

Lewd or lascivious cases define "sexual activity" with the same terminology used to define sexual battery. "'Sexual activity' means the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual activity does not include an act done for a bona fide medical purpose."[100]

Lewd or lascivious battery occurs when a person engages in sexual activity with a person 12 years of age or older but less than 16 years of age; or encourages, forces, or entices any person less than 16 years of age to engage in sadomasochistic abuse, sexual bestiality, prostitution, or any other act involving sexual activity and is a **second degree felony**.[101]

Lewd or lascivious molestation occurs when a person intentionally touches in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person less than 16 years of age, or forces or entices a person under 16 years of age to so touch the perpetrator.[102] The felony degrees of this offense vary depending upon the age of the victim and the age of the offender. An offender 18 years of age or older who commits lewd or lascivious molestation against a victim less than 12 years of age commits **a life felony**[103] punishable as provided in section 775.082(3)(a)4.[104] An offender less than 18 years of age who commits lewd or lascivious molestation against a victim less than 12 years of age; or an offender 18 years of age or older who commits lewd or lascivious molestation against a victim 12 years of age or older but less than 16 years of age commits a **second degree felony**.[105] Lastly, an offender less than 18 years of age who commits lewd or lascivious molestation against a victim 12 years of age or older but less than 16 years of age commits a **third degree felony**.[106]

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97 Section 800.04(2), Florida Statutes (2010).

98 *Id*.

99 Section 800.04(3), Florida Statutes (2010).

100 Section 800.04(1)(a), Florida Statutes (2010).

101 Section 800.04(4), Florida Statutes (2010).

102 Section 800.04(5)(a), Florida Statutes (2010).

103 Section 800.04(5)(b), Florida Statutes (2010).

104 Section 775.082(3)(a)4, Florida Statutes (2010) provides that, a life felony committed on or after September 1, 2005, which is a violation of s. 800.04(5)(b), is punishable by a term of imprisonment for life; **or** a split sentence that is a term of not less than 25 years' imprisonment and not exceeding life imprisonment, followed by probation or community control for the remainder of the person's natural life. Also, a life felony committed on or after July 1, 2008, which is a person's second or subsequent violation of s. 800.04(5)(b), is punishable by a term of imprisonment for life.

105 Section 800.04(5)(c), Florida Statutes (2010).

106 Section 800.04(5)(d), Florida Statutes (2010).

Lewd or lascivious conduct occurs when a person intentionally touches a person under 16 years of age in a lewd or lascivious manner; or solicits a person under 16 years of age to commit a lewd or lascivious act.[107] An offender 18 years of age or older who commits lewd or lascivious conduct commits a **second degree felony**.[108] An offender less than 18 years of age who commits lewd or lascivious conduct commits a **third degree felony**.[109]

Lewd or lascivious exhibition occurs when a person intentionally masturbates; intentionally exposes the genitals in a lewd or lascivious manner; or intentionally commits any other sexual act that does not involve actual physical or sexual contact with the victim, including, but not limited to, sadomasochistic abuse, sexual bestiality, or the simulation of any act involving sexual activity in the presence of a victim who is less than 16 years of age.[110] An offender 18 years of age or older who commits a lewd or lascivious exhibition commits a **second degree felony**.[111] An offender less than 18 years of age who commits a lewd or lascivious exhibition commits a **third degree felony**.[112]

While it should go without saying, a mother's breastfeeding of her baby does not under any circumstance constitute a violation of this section.[113]

In 2010, the Florida Legislature created the offense of lewd or lascivious exhibition in the presence of an employee.[114] A violation of this section is a **third degree felony**. This offense is intended to protect employees of state or private correctional facilities from being exposed to lewd or lascivious behavior from the detainees in those facilities. An offense under this section also differs from the other types of lewd or lascivious offenses in that the age of the victim is not a factor.

1. Double Jeopardy in Lewd or Lascivious Cases

When cases have elements of both a sexual battery and lewd or lascivious conduct, prosecutors may draft the information to charge the defendant with each possible offense. It is appropriate for an information to charge a defendant with all offenses supported by the evidence, however, double jeopardy issues can arise if the charges are based on the same act or occurrence or are in the course of the same activity. In *Hightower*, the Florida Supreme Court stated in a footnote that, "If uncertain of the proof, the cautious prosecutor will probably charge sexual battery and lewd and lascivious conduct in separate counts, recognizing, however, that only one conviction can be obtained for the same conduct."[115] Charging a defendant with both sexual

107 Section 800.04(6)(a), Florida Statutes (2010).
108 Section 800.04(6)(b), Florida Statutes (2010).
109 Section 800.04(6)(c), Florida Statutes (2010).
110 Section 800.04(7)(a), Florida Statutes (2010).
111 Section 800.04(7)(b), Florida Statutes (2010).
112 Section 800.04(7)(c), Florida Statutes (2010).
113 Section 800.04(8), Florida Statutes (2010).
114 Section 800.09, Florida Statutes (2010).
115 *State v. Hightower*, 509 So. 2d 1078 at 1079 (Fla. 1987), (superseded on other grounds).

battery and commission of a lewd act upon a child is proper, however, dual convictions based on the same act violate the prohibition against double jeopardy.[116] When charges arise as part of a single episode, involve the same victim, take place in one location, and have no meaningful temporal break between acts, the prohibition against double jeopardy permits conviction on only one count.[117]

Convictions for sexual battery *and* lewd or lascivious acts are proper when there are sufficient facts to establish both offenses as separate and distinct offenses. When the evidence presented supports both attempted sexual battery and lewd and lascivious assault that involve separate acts occurring on different days, then convictions on both counts is proper.[118] In *Romage*, defendant's three-minute criminal episode in which he pushed the victim onto a bed, rolled up her shirt to touch her breasts, digitally penetrated her vagina and then unsuccessfully attempted penile penetration was sufficient to affirm convictions of both sexual battery and lewd or lascivious molestation.[119] As for the lewd and lascivious molestation charges, the State charged Romage with three *separate* counts, one each for: (1) touching the breasts, (2) digital penetration, and (3) penile touching of the vagina. Conviction on only one count of lewd and lascivious molestation was proper where the acts arose from a single episode in one location without a meaningful temporal break between acts.

In *Meshell*, three of the five counts of lewd or lascivious battery charged against the defendant occurred at approximately the same time. The information charged that on one day the defendant, (1) "did with his penis penetrate or have union with the vagina of [the victim];" (2) "did with his mouth have union with the vagina of [the victim];" and (3) "did with his penis have union with the mouth of [the victim]."[120] The Court held that, "the sex acts proscribed in section 800.04(4) (oral, anal, or vaginal penetration) are of a separate character and type requiring different elements of proof and are, therefore, distinct criminal acts. Thus, punishments for these distinct criminal acts do not violate double jeopardy."[121] Additionally, the Court noted that such an outcome is warranted by the Florida Legislature pursuant to section 775.021(4)(a), Florida Statutes (2006).[122] "Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial."[123]

116 *Hausen v. State*, 730 So. 2d 327 at 329 (Fla. 5th DCA 1999).
117 *King v. State*, 834 So. 2d 311 at 312 (Fla. 5th DCA 2003).
118 *State v. Stone*, 677 So. 2d 982 at 984 (Fla. 5th DCA 1996).
119 *See*, *Romage v. State*, 890 So. 2d 550 (Fla. 5th DCA 2005).
120 *State v. Meshell*, 2 So. 3d 132 at 134 (Fla. 2009).
121 *Id*. at 136.
122 *Id*.
123 Section 775.021(4)(a), Florida Statutes (2006).

D. Incest, Section 826.04, Florida Statutes (2010)

Incest occurs when a person knowingly marries or has sexual intercourse with a person to whom he or she is related by lineal consanguinity, or a brother, sister, uncle, aunt, nephew, or niece, which is a **third degree felony**.[124] This section goes on to define "sexual intercourse" as the penetration of the female sex organ by the male sex organ, however slight; emission of semen is not required.[125] It is important to note that the statute specifically prohibits *only* marrying or having "sexual intercourse" with specifically defined relatives as incest. The criminal activity prohibited as incest is, therefore, much narrower than the definitions of sexual battery, sexual activity, sexual conduct, and lewd or lascivious acts. Other acts of a sexual nature may be chargeable under different statutes depending on the facts of a given case, but it is incorrect to charge such acts under the incest statute.

A key element of the crime of incest is the relationship between the offender and the victim. The statute specifically prohibits "sexual intercourse with a person to whom he or she is related by lineal consanguinity, *or* a brother, sister, uncle, aunt, nephew, or niece" (emphasis added). Courts have interpreted the "or" relationships as those of collateral consanguinity as opposed to people related only by marriage. In *Beam*, the defendant's conviction for incest was vacated because even though he was both an uncle by marriage and the adoptive father to the 18-year-old victim, section 826.04 requires that both parties to the intercourse be related by consanguinity, whether lineal or collateral.[126] The court went on to say that the defendant "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."[127] Though Hull dealt with a case of sexual battery by a person in a position of familial or custodial authority, the court noted that "[t]he relationship of uncle-in-law and niece-in-law is clearly not alone sufficient to demonstrate either a section 794.011(8), Florida Statutes (1995) "authority" or to implicate the incest statute, section 826.04, Florida Statutes (1995)."[128]

Since incest cases frequently deal with children and minors who are often dependent upon the offender, these crimes have a special statute of limitations. When the victim of incest is under the age of 18, the applicable three year period of limitation for a third degree felony does not begin to run until the victim has reached the age of 18 or the incest is reported to a law enforcement agency or other governmental agency, whichever occurs earlier.[129] Similarly, a civil action based on incest may be commenced at any time within 7 years after the age of majority,

124 Section 826.04, Florida Statutes (2010).

125 *Id*.

126 *See*, *Beam v. State*, 1 So. 3d 331at 333 (Fla. 5th DCA 2009).

127 *Id*. at 335.

128 *Hull v. State*, 686 So. 2d 676 at 677 (Fla. 3rd DCA 1996).

129 Section 775.15(13)(a), Florida Statutes (2010).

or within 4 years after the injured person leaves the dependency of the abuser, or within 4 years from the time of discovery by the injured party of both the injury and the causal relationship between the injury and the abuse, whichever occurs later.[130]

E. Sexual Performance by a Child, Section 827.071, Florida Statutes (2010)

Sexual crimes against children can violate several different statutes such as sexual battery, lewd or lascivious offenses, incest, dependency under Chapter 39 Florida Statutes, child pornography, etc. Additionally, section 827.071, Florida Statutes (2010) prohibits using a child less than 18 years of age in a sexual performance, promoting a sexual performance of a child, or possessing images of a sexual performance by a child. The elements of the sexual performance by a child offenses lend themselves to being charged along with child pornography and computer facilitated crimes, so these offenses are often seen together. Of note for offenses under this section is the fact that sexual performance by a child offenses pertain to victims less than 18 years of age, whereas the lewd or lascivious offenses pertain to victims less than 16 years of age.

While "sexual battery" has the same definition in this section as it does in the sexual battery statue,[131] there are three unique definitions that are relevant here to the discussion of sexual performance by a child. "Sexual performance" means any performance or part thereof which includes sexual conduct by a child of less than 18 years of age.[132] "Sexual conduct" means actual *or simulated* sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.[133] Lastly, "simulated" means the explicit depiction of sexual conduct which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.[134] See section 827.071(1), Florida Statutes for a complete listing of other relevant definitions.

A person is guilty of the use of a child in a sexual performance if, knowing the character and content thereof, he or she employs, authorizes, or induces a child less than 18 years of age to engage in a sexual performance or, being a parent, legal guardian, or custodian of such child, consents to the participation by such child in a sexual performance, and commits a **second degree felony**.[135]

A person is guilty of promoting a sexual performance by a child when, knowing the

130 Section 95.11(7), Florida Statutes (2010).

131 Section 827.071(1)(e), Florida Statutes (2010).

132 Section 827.071(1)(h), Florida Statutes (2010).

133 Section 827.071(1)(g), Florida Statutes (2010). *See also Schmitt v. State*, 590 So. 2d 404, 415 (Fla. 1991) for a discus sion of interpreting "sexual conduct" as defined by this statute.

134 Section 827.071(1)(i), Florida Statutes (2010).

135 Section 827.071(2), Florida Statutes (2010).

character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a child less than 18 years of age, and commits a **second degree felony**.[136]

It is a **second degree felony** for any person to possess with the intent to promote any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, includes any sexual conduct by a child. The possession of three or more copies of such photograph, motion picture, representation, or presentation is prima facie evidence of an intent to promote.[137]

It is a **third degree felony** for any person to knowingly possess a photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, he or she knows to include any sexual conduct by a child. *The possession of each such photograph, motion picture, exhibition, show, representation, or presentation is a separate offense*.[138]

Finally, the Legislature provides that prosecution of any person for an offense under this section shall not prohibit prosecution of that person in this state for a violation of any law of this state, including a law providing for greater penalties than prescribed in this section or any other crime punishing the sexual performance or the sexual exploitation of children.[139]

"Florida courts have uniformly construed section 827.071 to permit a conviction even where the video tape of the child's engagement in sexual conduct is not shown to third persons."[140] "The statute … does not require that the sexual performance be exhibited to third persons. An 'audience' can consist of a single individual and that individual can be the defendant."[141]

F. Obscenity, Child Pornography, Computer Facilitated Offenses, Chapter 847, Florida Statutes (2010)

Chapter 847, Florida Statutes deals with a variety of offenses under the general label of obscenity. This chapter covers offenses including child pornography, computer pornography, traveling to meet minors, exposing minors to harmful representations, and selling or buying of minors among other offenses. Some definitions to be aware of, include:

"Child pornography" means any image depicting a minor engaged in sexual conduct.[142]

"Minor" means any person under the age of 18 years.[143]

"Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual

136 Section 827.071(3), Florida Statutes (2010).
137 Section 827.071(4), Florida Statutes (2010).
138 Section 827.071(5), Florida Statutes (2010).
139 Section 827.071(6), Florida Statutes (2010).
140 *Bishop v. State*, 46 So. 3d 75 (Fla. 5th DCA 2010).
141 *Id*.
142 Section 847.001(3), Florida Statutes (2010).
143 Section 847.001(8), Florida Statutes (2010).

bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. A mother's breastfeeding of her baby does not under any circumstance constitute "sexual conduct."[144]

"Sexually oriented material" means any book, article, magazine, publication, or written matter of any kind or any drawing, etching, painting, photograph, motion picture film, or sound recording that depicts sexual activity, actual or simulated, involving human beings or human beings and animals, that exhibits uncovered human genitals or the pubic region in a lewd or lascivious manner, or that exhibits human male genitals in a discernibly turgid state, even if completely and opaquely covered.[145]

"Harmful to minors" means any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:

a) Predominantly appeals to a prurient, shameful, or morbid interest;
b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors; and
c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.[146]

"Obscene" means the status of material which:

a) The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
b) Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and
c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.[147]

G. Abuse, Neglect, and Exploitation of Elderly Persons and Disabled Adults, Section 825.1025, Florida Statutes (2010)

Similar to the lewd or lascivious offenses against minors less than 16 years of age, Florida statutes also prohibit lewd or lascivious acts on adults who are elderly or disabled.

144 Section 847.001(16), Florida Statutes (2010).
145 Section 847.001(18), Florida Statutes (2010).
146 Section 847.001(6), Florida Statutes (2010).
147 Section 847.001(10), Florida Statutes (2010).

Lewd or lascivious battery upon an elderly person or disabled person occurs when a person encourages, forces, or entices an elderly person or disabled person to engage in sadomasochistic abuse, sexual bestiality, prostitution, or any other act involving sexual activity, when the person knows or reasonably should know that the elderly person or disabled person either lacks the capacity to consent or fails to give consent, and commits a **second degree felony**.[148]

Lewd or lascivious molestation of an elderly person or disabled person occurs when a person intentionally touches in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of an elderly person or disabled person when the person knows or reasonably should know that the elderly person or disabled person either lacks the capacity to consent or fails to give consent, and commits a third degree felony.[149]

Lewd or lascivious exhibition in the presence of an elderly person or disabled person occurs when a person, in the presence of an elderly person or disabled person:

1. Intentionally masturbates;
2. Intentionally exposes his or her genitals in a lewd or lascivious manner; or
3. Intentionally commits any other lewd or lascivious act that does not involve actual physical or sexual contact with the elderly person or disabled person, including but not limited to, sadomasochistic abuse, sexual bestiality, or the simulation of any act involving sexual activity, when the person knows or reasonably should know that the elderly person or disabled person either lacks the capacity to consent or fails to give consent to having such act committed in his or her presence, and commits a **third degree felony**.[150]

H. Stalking, Section 784.048, Florida Statutes (2010)

Stalking is not inherently a sexual violence offense, however, stalking offenses are sometimes related to other offenses of physical violence, domestic violence, and/or sexual violence. The basic offense of stalking is a first degree misdemeanor, however, there are several criteria which raise the offense to aggravated stalking which is a third degree felony. Lastly, similar to domestic violence cases, a law enforcement officer may arrest, without a warrant, any person he or she has probable cause to believe has committed stalking.[151]

Stalking occurs when a person willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person, which is punishable as a **first degree misdemeanor**.[152] The section defines "harasses" as engaging in a course of conduct directed at a specific person that causes

148 Section 825.1025(2)(a) and (b), Florida Statutes (2010).
149 Section 825.1025(3)(a) and (b), Florida Statutes (2010).
150 Section 825.1025(4)(a) and (b), Florida Statutes (2010).
151 Section 784.048(6), Florida Statutes (2010).
152 Section 784.048(2), Florida Statutes (2010).

substantial emotional distress in such person and serves no legitimate purpose.[153] "Cyberstalk" is defined as engaging in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose.[154] If the stalker is already under an injunction for protection against sexual violence, domestic violence, repeat violence, dating violence, or other court-imposed protective order, then he commits **aggravated stalking** which is a **third degree felony**.[155]

Aggravated stalking occurs when a person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person, and makes a credible threat with the intent to place that person in reasonable fear of death or bodily injury of the person, or the person's child, sibling, spouse, parent, or dependent, commits the offense of aggravated stalking which is a **third degree felony**.[156]

A person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks a minor under 16 years of age commits the offense of **aggravated stalking**, a **third degree felony**.[157]

Any person who, after having been sentenced for a violation of section 794.011, section 800.04, or section 847.0135(5) and prohibited from contacting the victim of the offense pursuant to section 921.244, willfully, maliciously, and repeatedly follows, harasses, or cyberstalks the victim commits the offense of **aggravated stalking**, a third degree felony.[158]

Sentences imposed under this section *shall* run consecutive to any former sentence imposed for a conviction for any offense under section 794.011, section 800.04, or section 847.0135(5).[159]

I. Human Trafficking, Chapter 787, Florida Statutes (2010)

Human trafficking simply means transporting, soliciting, recruiting, harboring, providing, or obtaining another person for transport.[160] Any person who knowingly engages, or attempts to engage, in human trafficking with the intent or knowledge that the trafficked person will be subjected to forced labor or services; or benefits financially by receiving anything of value from participation in a venture that has subjected a person to forced labor or services, commits a **second degree felony**.[161]

Frequently, these cases involve transporting people from developing countries with the promise of jobs and a better life. Once the person is moved far from his or her familiar environ-

153 Section 784.048(1)(a), Florida Statutes (2010).
154 Section 784.048(1)(d), Florida Statutes (2010).
155 Section 784.048(4), Florida Statutes (2010).
156 Section 784.048(3), Florida Statutes (2010).
157 Section 784.048(5), Florida Statutes (2010).
158 Section 784.048(7), Florida Statutes (2010).
159 Section 784.048(8), Florida Statutes (2010).
160 Section 787.06(2)(c), Florida Statutes (2010).
161 Section 787.06(3), Florida Statutes (2010).

ment, family, and resources, he or she is bound to some sort of service against his or her will. Women and children who fall into these schemes often find themselves forced into prostitution and pornography. The Florida Legislature has clearly laid out its intent with respect to human trafficking in section 787.06(1), Florida Statutes:

> (a) The Legislature finds that human trafficking is a form of modern-day slavery. Victims of human trafficking are young children, teenagers, and adults. Thousands of victims are trafficked annually across international borders worldwide. Many of these victims are trafficked into this state. The Legislature finds that victims of human trafficking are subjected to force, fraud, or coercion for the purpose of sexual exploitation or forced labor.
>
> (b) The Legislature finds that while many victims of human trafficking are forced to work in prostitution or the sexual entertainment industry, trafficking also occurs in forms of labor exploitation, such as domestic servitude, restaurant work, janitorial work, sweatshop factory work, and migrant agricultural work.
>
> (c) The Legislature finds that traffickers use various techniques to instill fear in victims and to keep them enslaved. Some traffickers keep their victims under lock and key. However, the most frequently used practices are less obvious techniques that include isolating victims from the public and family members; confiscating passports, visas, or other identification documents; using or threatening to use violence toward victims or their families; telling victims that they will be imprisoned or deported for immigration violations if they contact authorities; and controlling the victims' funds by holding the money ostensibly for safekeeping.
>
> (d) It is the intent of the Legislature that the perpetrators of human trafficking be penalized for their illegal conduct and that the victims of trafficking be protected and assisted by this state and its agencies. In furtherance of this policy, it is the intent of the Legislature that the state Supreme Court, The Florida Bar, and relevant state agencies prepare and implement training programs in order that judges, attorneys, law enforcement personnel, investigators, and others are able to identify traffickers and victims of human trafficking and direct victims to appropriate agencies for assistance. It is the intent of the Legislature that the Department of Children and Family Services and other state agencies cooperate with other state and federal agencies to ensure that victims of human trafficking can access social services and benefits to alleviate their plight.

These cases can present difficult issues for judges due to the fear that victims are placed under. Those who traffic in people often use isolation, financial dependency, children, and

physical intimidation on their victims to prevent them from testifying or to recant. In many respects, these cases share the same types of dynamics as domestic violence cases.

What should judges consider in these cases? Obviously, victim safety is a concern. Victims should be made aware of the types of services available to them in your circuit. While it is not the role of a judge to direct a victim to available services, he or she can and should inquire if victims have been informed of their rights and the availability of local services that they may wish to utilize.

III. Procedures & Trial

A. Pretrial

1. Bond

a. First Appearance and Setting Bond

At first appearance the judge ***must*** advise the accused of the following:

- the charges against him, and provide him with a copy of the complaint;
- the right to remain silent, and that anything he says may be used against him;
- the right to counsel including the right to appointed counsel if indigent; and
- the right to communicate with counsel, family, or friends, and reasonable means to do so.[162]

The judge must determine whether probable cause exists, set a bond and determine the conditions of pretrial release, or hold the defendant on no bond if the charge is for a "non-bondable" offense. Pursuant to rule 3.131(a), defendants are entitled to pretrial release on reasonable conditions ***except*** those charged with a capital offense or an offense punishable by life imprisonment where the proof of guilt is evident or the presumption of guilt is great; this is what is meant by a "non-bondable" offense. Of the offenses covered by this bench book, those that are either "capital" or punishable by life are:

- **Sexual Batteries** under sections 794.011(2)(a) and (b), 794.011(3), 794.011(8)(c), and an offense with an enhanced penalty under section 794.023(2)(b);
- **Kidnapping or False Imprisonment** under sections 787.01(2), 787.01(3), and 787.02(3)(a); and

162 Fla. R. Crim. P. 3.130 (b) Advice to Defendant.

Lewd or Lascivious Molestation under section 800.04(5)(b).

No person charged with a dangerous crime shall be granted nonmonetary pretrial release at a first appearance hearing; however, the court shall retain the discretion to release an accused on electronic monitoring or on recognizance bond if the findings on the record of facts and circumstances warrant such a release.[163] Many of the offenses listed in this benchbook are considered "dangerous crimes" which are defined to include:

1. Arson;
2. Aggravated assault;
3. Aggravated battery;
4. Illegal use of explosives;
5. Child abuse or aggravated child abuse;
6. Abuse of an elderly person or disabled adult, or aggravated abuse of an elderly person or disabled adult;
7. Aircraft piracy;
8. Kidnapping;
9. Homicide;
10. Manslaughter;
11. Sexual battery;
12. Robbery;
13. Carjacking;
14. Lewd, lascivious, or indecent assault or act upon or in presence of a child under the age of 16 years;
15. Sexual activity with a child, who is 12 years of age or older but less than 18 years of age, by or at solicitation of person in familial or custodial authority;
16. Burglary of a dwelling;
17. Stalking and aggravated stalking;
18. Act of domestic violence as defined in s. 741.28;

163 Section 907.041(4)(b), Florida Statutes (2010).

19. Home invasion robbery;

20. Act of terrorism as defined in s. 775.30;

21. Manufacturing any substances in violation of chapter 893; and

22. Attempting or conspiring to commit any such crime.[164]

b. Factors to Consider and Conditions of Release

In cases where a defendant may be released on bond there is a presumption in favor of non-monetary conditions of release, however, this presumption ***does not apply*** to violent offenses. Additional conditions of release should be included in the bond determination as appropriate. As a condition of any pretrial release, the defendant ***shall***:

- Refrain from criminal activity of any kind,
- Refrain from any contact of any type with the victim, except for proper pretrial discovery, and
- Comply with all other conditions of pretrial release.[165]

The above list details all of the mandatory release conditions.

The court may impose other conditions of release to 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. Additional conditions of release may include:

- Placing restrictions on defendant's travel, associations, and residence;
- Placing defendant in the custody of a person or organization (a drug rehab facility, for example) that agrees to supervise him or her; and
- Any other condition deemed reasonably necessary to assure appearance as required, including requiring defendant to return to custody after specified hours.[166]

Though not spelled out in law or rule, some of the other ordinary conditions of release that would fall under the "any other conditions" authorization noted above include: surrendering weapons, firearms, and ammunition; electronic monitoring of defendant, requiring defendant to contact pretrial services on a regular basis; and requiring defendant to submit to random drug testing.

164 Section 907.041(4)(a), Florida Statutes (2010).
165 Section 903.047, Florida Statutes (2010).
166 Fla. R. Crim. P. 3.131(b)(1) Hearing at First Appearance Conditions of Release.

"If 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, the accused may be detained."[167]

Factors to consider when determining bond and conditions of release are found in rule 3.131(b)(3) and in section 903.046, Florida Statutes (2010) and include:

- The nature and circumstances of the offense charged and the legal penalty facing defendant;
- The nature and probability of intimidation and danger to victims;
- The weight of evidence against the defendant;
- Whether the crime charged is a violation of chapter 874 or alleged to be subject to enhanced punishment under chapter 874;
- Defendant's family ties in the community and elsewhere;
- Length of residence in the community;
- Employment history;
- Financial resources, and the source of funds used to post bail;
- Need for substance abuse evaluation and/or treatment;
- Defendant's mental condition;
- Defendant's past and present conduct including criminal record, any history of flight to avoid prosecution, and any failures to appear;
- Nature and probability of danger to the community posed by defendant's release;
- Whether the defendant is already on release pending resolution of another criminal proceeding or is on probation, parole, or other release pending completion of sentence;
- Whether there is probable cause to believe that the defendant committed a new crime while on pretrial release; and
- Any other facts the court considers relevant.

c. Pretrial Detention and Arthur Hearings

The Florida Legislature has stated that it is the policy of this state that persons committing

167 Fla. R. Crim. P. 3.131(a) Right to Pretrial Release.

serious criminal offenses, posing a threat to the safety of the community or the integrity of the judicial process, or failing to appear at trial be detained upon arrest.[168]

The relevant portion of section 907.041(4)(c), Florida Statutes reads:

> The court may order pretrial detention if it finds a substantial probability, based on a defendant's past and present patterns of behavior, the criteria in s. 903.046, and any other relevant facts, that any of the following circumstances exists:
>
> **1**. The defendant has previously violated conditions of release and that no further conditions of release are reasonably likely to assure the defendant's appearance at subsequent proceedings;
>
> **2**. The defendant, with the intent to obstruct the judicial process, has threatened, intimidated, or injured any victim, potential witness, juror, or judicial officer, or has attempted or conspired to do so, and that no condition of release will reasonably prevent the obstruction of the judicial process; 907.041(4)(c)
>
> …
>
> **5**. The defendant poses the threat of harm to the community. The court may so conclude, if it finds that the defendant is presently charged with a dangerous crime, that there is a substantial probability that the defendant committed such crime, that the factual circumstances of the crime indicate a disregard for the safety of the community, and that there are no conditions of release reasonably sufficient to protect the community from the risk of physical harm to persons.
>
> **6**. The defendant was on probation, parole, or other release pending completion of sentence or on pretrial release for a dangerous crime at the time the current offense was committed; or
>
> **7**. The defendant has violated one or more conditions of pretrial release or bond for the offense currently before the court and the violation, in the discretion of the court, supports a finding that no conditions of release can reasonably protect the community from risk of physical harm to persons or assure the presence of the accused at trial.

The state attorney has the burden of showing the need for pretrial detention.[169] The defendant is entitled to be represented by counsel, to present witnesses and evidence, and to cross-examine witnesses. The court may admit relevant evidence without complying with the rules of evidence, but evidence secured in violation of the United States Constitution or the

168 Section 907.041(1), Florida Statutes (2010).
169 Section 907.041(4)(g), Florida Statutes (2010).

Constitution of the State of Florida shall not be admissible. In other words, hearsay that would otherwise be inadmissible is admissible for a pretrial detention hearing, however, it final order of pretrial detention shall not be based exclusively on hearsay evidence.[170] No testimony by the defendant shall be admissible to prove guilt at any other judicial proceeding, but such testimony may be admitted in an action for perjury, based upon the defendant's statements made at the pretrial detention hearing, or for impeachment.[171] The pretrial detention order of the court shall be based solely upon evidence produced at the hearing and shall contain findings of fact and conclusions of law to support it. The order shall be made either in writing or orally on the record. The court shall render its findings within 24 hours of the pretrial detention hearing.[172] The defendant shall be entitled to dissolution of the pretrial detention order whenever the court finds that a subsequent event has eliminated the basis for detention.[173]

The rule on pretrial detention was amended to change the process for filing a motion for pretrial detention. The following text of the revised rule became effective on January 1, 2010:

> A person arrested for an offense for which detention may be ordered under section 907.041, Florida Statutes, shall be taken before a judicial officer for a first appearance within 24 hours of arrest. The state may file with the judicial officer at first appearance a motion seeking pretrial detention, signed by the state attorney or an assistant, setting forth with particularity the grounds and the essential facts on which pretrial detention is sought and certifying that the state attorney has received testimony under oath supporting the grounds and the essential facts alleged in the motion. If no such motion is filed, the judicial officer may inquire whether the state intends to file a motion for pretrial detention, and if so, grant the state no more than three days to file a motion under this subdivision. Upon a showing by the state of probable cause that the defendant committed the offense and exigent circumstances, the defendant shall be detained in custody pending the filing of the motion. If, after inquiry, the State indicates it does not intend to file a motion for pretrial detention, or fails to establish exigent circumstances for holding defendant in custody pending the filing of the motion, or files a motion that is facially insufficient, the judicial officer shall proceed to determine the conditions of release pursuant to the provisions of rule 3.131(b). If the motion for pretrial detention is facially sufficient, the judicial officer shall proceed to determine whether there is probable cause that the person committed the offense. If probable cause is found, the person may be detained in custody pending a final hearing on pretrial detention. If probable cause is established after first appearance pursuant to the provisions of rule

170 Fla. R. Crim. P. 3.132(c)(1) Hearing Required.
171 Section 907.041(4)(h), Florida Statutes (2010).
172 Section 907.041(4)(i), Florida Statutes (2010).
173 Section 907.041(4)(k), Florida Statutes (2010).

3.133 and the person has been released from custody, the person may be recommitted to custody pending a final hearing on pretrial detention.[174]

Arthur Hearings

An "Arthur hearing" is similar to the pretrial detention process, however, it is relevant to any capital or life felony involving proof evident and presumption great. Though a defendant is not "entitled" to a bond if charged with a non-bondable offense, the defendant ***is entitled*** to an Arthur hearing to demand that the state prove the additional element necessary for pretrial detention pursuant to the rule, namely that the proof is evident or the presumption of guilt is great. The State cannot simply present the information to the court but must present further evidence which, when viewed in the light most favorable to the State, would legally sustain a jury verdict of guilty.[175] Additionally, the state's burden of proof at an Arthur hearing for showing proof evident or presumption great is greater than beyond a reasonable doubt.[176]

It should go without saying but the court must allow argument at an Arthur hearing. Even if the judge finds that the evidence presented by the State satisfies the requirement for proof evident or presumption great, the judge must at least allow defense counsel to make minimal argument. In *Bleiweiss*, the court did not allow defense counsel to make any argument after the State presented its case which "amounted to a basic denial of petitioner's right to be heard at an adversarial judicial proceeding that could deprive him of his liberty--the most fundamental of all due process rights."[177] While a judge must allow some argument, a judge may place reasonable restrictions on the length and manner of argument, and may even require counsel to submit its argument in writing.[178]

d. Notice to Victims

"Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused."[179] It is the responsibility of the State to keep victims advised of court dates by providing sufficient notice. While it may not be feasible to inform the victim of a defendant's first appearance, the victim must receive sufficient notice of all subsequent court appearances including any bond modification hearings. Judges may

174 Fla. R. Crim. P. 3.132(a) Pretrial Detention.
175 *State v. Arthur*, 390 So. 2d 717 (Fla. 1980).
176 *See, State v. Perry*, 605 So. 2d 94 (Fla. 3rd DCA 1992), and *Russell v. State*, 71 So. 27 (Fla. 1916).
177 *Bleiweiss v. State*, 24 So. 3d 1215 at 1216 (Fla. 4th DCA 2009).
178 *Id.* at 1217.
179 Art. I, § 16(b), Fla. Const.

want to ask the State if the victim is present and/or if the victim was given notice of the court appearance and the outset.

2. Statute of Limitations

There are several exceptions to the standard statute of limitations for commencing prosecutions for many of the sexual violence offenses described in this book. As this is also a frequently changing area of law, it is important to remember that the statutes of limitation applicable in a given case "are those which were in effect at the time of the incidents giving rise to the criminal charges."[180]

a. Criminal Cases

A prosecution for a capital felony, a life felony, or a felony that resulted in a death may be commenced **at any time**.[181] Several types of sexual battery fall into this category:

- Sexual battery of a child less than 12,[182]
- Sexual battery with the use of force or the use or threat to use a deadly weapon,[183] and
- Sexual battery of a child less than 12 by a person in familial of custodial authority.[184]
- The kidnap of a child under 13 with an accompanying, enumerated offense is a life felony that may be commenced at any time.[185] When a person 18 or older who commits a lewd or lascivious molestation against a child under 12 commits a life felony that may be commenced at any time.[186]

There are also situations in which offenses other than capital or life felonies may also be commenced **at any time**. When a sexual battery that would be a first or second degree felony under section 794.011 is reported to a law enforcement agency within 72 hours after its commission, the prosecution for such offenses may be commenced at any time.[187] Similarly, when a

180 *State v. Mack*, 637 So. 2d 18 (Fla. 4th DCA 1994). *See also*, *Torgerson v. State*, 964 So. 2d 178 (Fla. 4th DCA 2007).
181 Section 775.15(1), Florida Statutes (2010).
182 Section 794.011(2)(a) and (b), Florida Statutes (2010).
183 Section 794.011(3), Florida Statutes (2010).
184 Section 794.011(8)(c), Florida Statutes (2010).
185 Section 787.01(3)(a), Florida Statutes (2010).
186 Section 800.04(5)(b), Florida Statutes (2010).
187 Section 775.15(14), Florida Statutes (2010).

sexual battery that would be a first or second degree felony under section 794.011 is committed upon a victim under the age of 18 is reported to a law enforcement or other governmental agency within 72 hours after its commission, the prosecution for such offenses may be commenced at any time.[188] The prosecution for a first degree felony sexual battery of a victim under 18 years of age may be commenced at any time.[189] If the offense is a violation of section 794.011, sexual battery, and the victim was under 16 years of age at the time the offense was committed, a prosecution of the offense may be commenced at any time.[190]

In many cases involving victims under the age of 18 the computation of time is tolled until the victim turns 18 years old. When the victim of a sexual battery, a lewd or lascivious offense under section 800.04, incest, or a computer facilitated lewd or lascivious exhibition under section 847.0135(5) is under the age of 18, the applicable period of limitation, if any, does not begin to run until the victim has reached the age of 18 or the violation is reported to a law enforcement agency or other governmental agency, whichever occurs earlier.[191]

b. Civil Actions

While this book deals with the criminal aspects of sexual violence cases, civil suits are also sometimes filed in these cases. In 2010, the Florida Legislature made a major change to the statute of limitations for civil actions based on sexual battery. Sexual battery offenses on victims under age 16 may now be commenced **at any time**.[192] The new section reads:

95.11(9) SEXUAL BATTERY OFFENSES ON VICTIMS UNDER AGE 16.—An action related to an act constituting a violation of s. 794.011 involving a victim who was under the age of 16 at the time of the act may be commenced at any time. This subsection applies to any such action other than one which would have been time barred on or before July 1, 2010.[193]

3. Charging Issues

a. Informations

In practice, sexual violence cases will almost always be initiated by information. After the Florida Supreme Court ruled that the death penalty was no longer applicable to sex offenses,[194] indictment by grand jury was no longer required to initiate a case of "capital" sexual battery and such cases could be initiated by filing an information.[195] Since crimes must be charged based

188 Section 775.15(13)(a), Florida Statutes (2010).
189 Section 775.15(13)(b), Florida Statutes (2010).
190 Section 775.15(13)(c), Florida Statutes (2010).
191 Section 775.15(13)(a), Florida Statutes (2010).
192 Section 95.11(9), Florida Statutes (2010).
193 *Id*.
194 *See*, *Buford v. State*, 403 So. 2d 943 (Fla. July 23, 1981).
195 *See, Cooper v. State*, 453 So. 2d 67 (Fla 1st DCA 1984).

upon the law that existed at the time they occurred, any offense of capital sexual battery that is alleged to have occurred prior to July 23, 1981 must still be initiated by a grand jury indictment and a defendant will also be entitled to a 12-person jury in such cases.

"The indictment or information on which the defendant is to be tried shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged."[196] Essentially, informations must be clear enough for defendants to be able to prepare a defense. "Each count of an indictment or information on which the defendant is to be tried shall allege the essential facts constituting the offense charged. In addition, each count shall recite the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. Error in or omission of the citation shall not be ground for dismissing the count or for a reversal of a conviction based thereon if the error or omission did not mislead the defendant to the defendant's prejudice."[197]

When an information is not clear or includes an error, case law and rules tends to favor allowing amendments to cure such defects as opposed to simply dismissing a case outright, unless a defendant has actually been prejudiced by the information.[198] "An information on which the defendant is to be tried that charges an offense may be amended on the motion of the prosecuting attorney or defendant at any time prior to trial because of formal defects."[199]

In *DuBois*, an arrest of judgment on a sexual battery charge was reversed because the indictment gave the defendant sufficient notice of the charge he was facing and was, therefore, not defective.[200] "In this case DuBoise did not move to quash the indictment before trial, but instead waited until after the trial before filing a motion for arrest of judgment pursuant to *Florida Rule of Criminal Procedure 3.610*. That rule provides that a motion for arrest of judgment shall not be granted unless the indictment is so defective that it will not support a judgment of conviction. The reason for this provision is to discourage defendants from waiting until after a trial is over before contesting deficiencies in charging documents which could have easily been corrected if they had been pointed out before trial. Hence a charging document which is subject to pre-trial dismissal can nevertheless withstand a post-trial motion for arrest of judgment. For example, the failure to include an essential element of a crime does not necessarily render an indictment so defective that it will not support a judgment of conviction when the indictment references a specific section of the criminal code which sufficiently details all the elements of the offense. In this case the indictment specifically referenced *section 794.011(3), Florida Statutes*. By referencing *section 794.011(3)*, which specifically defines all the elements of the offense, the indictment placed DuBoise on adequate notice of the crime being charged."[201]

Some of the other issues that can arise out of informations include: vague timeframes for

196 Fla. R. Crim. P. 3.140 (b) Nature of Indictment or Information.
197 Fla. R. Crim. P. 3.140 (d)(1) Allegations of Fact; Citation of Law Violated.
198 *See*, *State v. Haubrick*, 997 So. 2d 1228 (Fla. 1st DCA 2008).
199 Fla. R. Crim. P. 3.140 (j) Amendment of Information.
200 *See*, *DuBois v. State*, 520 So. 2d 260 (Fla. 1988).
201 *Id*. at 264-265 (internal citations and spacing omitted).

the charged offense(s), charging multiple specific offenses or offenses occurring on one or more occasion, double jeopardy violations when multiple counts are alleged, joinder and severance of offenses and defendants, and consolidating related offenses. As these issues are not uncommon and can arise in other types of criminal cases, only some specific problems common to sexual violence cases will be addressed here.

b. Statement of Particulars

A statement of particulars is often requested in sexual violence cases to narrow a broadly charged timeframe. Very broad timeframes are sometimes charged when victims are children and/or when an offense or multiple offenses have been alleged to have taken place over many months or years. By rule, "Each count of an indictment or information on which the defendant is to be tried shall contain allegations stating as definitely as possible the time and place of the commission of the offense charged in the act or transaction or on 2 or more acts or transactions connected together, provided the court in which the indictment or information is filed has jurisdiction to try all of the offenses charged."[202] Clearly, generalized or vague information in charging documents can prejudice defendants by making it difficult to prepare a defense or assert an alibi.

Pursuant to rule, "The court, on motion, shall order the prosecuting attorney to furnish a statement of particulars when the indictment or information on which the defendant is to be tried fails to inform the defendant of the particulars of the offense sufficiently to enable the defendant to prepare a defense. The statement of particulars shall specify as definitely as possible the place, date, and all other material facts of the crime charged that are specifically requested and are known to the prosecuting attorney, including the names of persons intended to be defrauded. Reasonable doubts concerning the construction of this rule shall be resolved in favor of the defendant."[203]

Dell'Orfano v. State does not create a bright line rule for when an alleged timeframe for an offense is too broad, however, the court said, "a trial court on a proper motion is required to dismiss an information or indictment involving lengthy periods of time if the State in a hearing cannot show clearly and convincingly that it has exhausted all reasonable means of narrowing the time frames further. Where such showing is made, the burden then shifts to the defendant to show that the defense more likely than not will be prejudiced by the lengthy time frame."[204]

Dell'Orfino was remanded for further proceedings. The trial court again granted a motion to dismiss because the time period alleged for the offenses, which had been narrowed from 35 months to 27 months, was still too broad and the information as written could lead a

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202 Fla. R. Crim. P. 3.140 (d)(3) Time and Place.
203 Fla. R. Crim. P. 3.140 (n) Statement of Particulars.
204 *Dell'Orfano v. State*, 616 So. 2d 33, 35 (Fla. 1993).

jury to non-unanimous verdicts.[205] The Fourth District wrote, "It is well settled that separate and distinct offenses may not generally be alleged in a single count of an indictment or information. To be legally sufficient, an information can neither be so vague or indefinite as to mislead or embarrass the accused, or subject him or her to multiple prosecution."[206] "In the instant case, the information lists four counts. Each count includes only one specific criminal act, but charges that such act occurred on one or more occasions over a two and one-half year time period. It may be true, as the state contends, that the individual count removes the potential hazard of non-unanimous verdicts. To find appellee guilty on an individual count, the jurors would have to all agree that appellee performed the specific criminal act alleged in that count at least one time."[207] The court held, "Where it is reasonable and possible to distinguish between specific incidents or occurrences, as it is in this case, then each should be contained in a separate count of the accusatory document. Thus, while we agree with the reasoning of the trial court on this issue, we reverse and remand to give the state an opportunity to amend."[208]

It is important to distinguish the timeframes alleged in an information and any clarification of timeframes by a statement of particulars. "When a bill of particulars narrows the time within which the crime occurred, and the prosecution fails to show the defendant committed the offense within that time frame, a conviction on the charge must be reversed."[209]

c. Double Jeopardy

There have been some recent changes in Florida to the analysis that goes into determining whether or not a double jeopardy violation exists. Section 775.021, Florida Statutes (2010) will be addressed as well as the Florida Supreme Court's former "primary evil" standard and the court's recent decision in *Valdes v. State*.

The Legislature provides that, whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.[210]

The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of

205 *State v. Dell'Orfano*, 651 So. 2d 1213 (Fla. 4th DCA 1995).
206 *Id*. at 1214 (internal citations omitted).
207 *Id*. at 1215.
208 *Id*. at 1216.
209 *Audano v. State*, 674 So. 2d 882 (Fla. 2nd DCA 1996).
210 Section 775.021(4)(a), Florida Statutes (2010).

lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:

1. Offenses which require identical elements of proof.
2. Offenses which are degrees of the same offense as provided by statute.
3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.[211]

The Florida Supreme Court concluded that its "prior double jeopardy jurisprudence announcing the 'primary evil' standard has proven difficult to apply and has strayed from the plain language of the governing statute, we now adopt the approach set forth in Justice Cantero's special concurrence in *State v. Paul*, 934 So. 2d 1167 (Fla. 2006). Thus, we hold that section 775.021(4)(b)(2), Florida Statutes (2008), prohibits 'separate punishments for crimes arising from the same criminal transaction only when the statute itself provides for an offense with multiple degrees.'"[212]

The offenses of sexual battery and lewd or lascivious battery share the same elements except that lack of consent is not an element of lewd and lascivious battery. If both sexual battery and lewd or lascivious battery are charged for the *same* act or occurrence, then it is likely that a defendant will be improperly placed in double jeopardy.[213]

The statutory definitions of the proscribed sex acts under the sexual battery and lewd or lascivious battery statues are identical ("oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object"[214]), so the same double jeopardy analysis applies. The acts proscribed in section 800.04(4) were of a separate character and type requiring different elements of proof and were, therefore, distinct criminal acts. Thus, punishments for these distinct acts did not violate double jeopardy.[215] "Of course, if two convictions occurred based on two distinct criminal acts, double jeopardy is not a concern."[216]

The crimes of sexual battery and lewd and lascivious assault are mutually exclusive and a defendant cannot be convicted of both crimes if the charges arise out of the same act. Evidence was sufficient to support separate acts supporting separate offenses.[217]

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211 Section 775.021(4)(b), Florida Statutes (2010).

212 *Valdes v. State*, 3 So. 3d 1067, 1068 (Fla. 2009) (citing *State v. Paul*, 934 So. 2d 1167 at 1176 (Fla. 2006) (Cantero, J., specially concurring)).

213 *See, Tannihill v. State*, 848 So. 2d 442 (Fla. 4th DCA 2003), and *Ornis v. State*, 932 So. 2d 648 (Fla. 4th DCA 2006).

214 See, sections 794.011(1)(h) and 800.04(1)(a), Florida Statutes (2010).

215 *State v. Meshell*, 2 So. 3d 132, (Fla. 2009).

216 *Hayes v. State,* 803 So. 2d 695, 700 (Fla. 2001).

217 *State v. Stone*, 677 So. 2d 982 (Fla. 5th DCA 1996).

4. Discovery

a. Proper handling of sensitive witnesses and evidence

Some unique discovery issues arise in sexual violence cases, particularly in cases where children are victims and where child pornography is involved. There are also exceptions to public records laws with some of the information common in sexual violence cases.

Discovery depositions of children under the age of 16 ***must*** be videotaped unless the court orders otherwise.[218] If a witness of any age is emotionally fragile, then the court may order the deposition to be videotaped or even conducted be in the presence of the trial judge or a special magistrate.[219] A defendant may not be physically present at a deposition except on stipulation of the parties or court order on a showing of good cause.[220] To determine whether good cause exists, the court should consider:

- the need for the physical presence of the defendant to obtain effective discovery;
- the intimidating effect of the defendant's presence on the witness, if any;
- any cost or inconvenience which may result; and
- whether an alternative electronic or audio/visual means is available.[221]

Depositions must be conducted in good faith and not merely to unreasonably annoy, embarrass, or oppress the deponent or party.[222] At any time during the taking of a deposition, a party deponent may move to terminate or limit the examination upon a showing that the examination is being conducted in bad faith or in such manner as to unreasonably annoy, embarrass, or oppress the deponent or party, and the deposition shall be suspended for the time necessary to make a motion for an order.[223] Upon such a showing, the court may:

- terminate the deposition,
- limit the scope and manner of the taking of the deposition,
- limit the time of the deposition,
- continue the deposition to a later time,
- order the deposition to be taken in open court, and
- may additionally impose any sanction authorized by rule 3.220.[224]

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218 Fla. R. Crim. P. 3.220(h)(4) Depositions of Sensitive Witnesses.
219 *Id*.
220 Fla. R. Crim. P. 3.220(h)(7) Defendant's Physical Presence.
221 *Id*.
222 Fla. R. Crim. P. 3.220(l)(2) Motion to Terminate or Limit Examination.
223 *Id*.
224 *Id*.

If the court orders the deposition terminated, then it shall ***only*** be resumed upon the order of the court in which the action is pending.[225]

There are also discovery rules pertaining to the handling of sensitive information. On a showing of good cause, the court shall at any time order that:

- specified disclosures be restricted, deferred, or exempted from discovery;
- certain matters not be inquired into;
- the scope of a deposition be limited to certain matters;
- a deposition be sealed and after being sealed be opened only by order of the court; or
- make such other order as is appropriate to protect a witness from harassment, unnecessary inconvenience, or invasion of privacy, including prohibiting the taking of a deposition.[226]

All material and information to which a party is entitled, however, must be disclosed in time to permit the party to make beneficial use of it."[227]

Any person may move for, and the court may consider *in camera*, an order denying or regulating disclosure of sensitive matters.[228] Upon request, the court shall allow the defendant to make an ex parte showing of good cause for taking the deposition of a Category B witness.[229] A record ***shall*** be made of any proceedings conducted pursuant to rule 3.220(m), and if the court enters an order granting relief after an in camera inspection or ex parte showing, the entire record of the proceeding shall be sealed and preserved and be made available to the appellate court in the event of an appeal.[230]

b. Handling child pornography evidence

Child pornography is illegal contraband and may not be copied or distributed even to defense counsel pursuant to a demand for discovery.[231] Such evidence shall be held by the arresting agency.[232] The existence of any child pornography or similar evidence must be disclosed

225 *Id*.
226 Fla. R. Crim. P. 3.220(l)(1) Motion to Restrict Disclosure of Matters.
227 *Id*.
228 Fla. R. Crim. P. 3.220(m)(1) In Camera and Ex Parte Proceedings.
229 Fla. R. Crim. P. 3.220(m)(2) In Camera and Ex Parte Proceedings.
230 Fla. R. Crim. P. 3.220(m)(3) In Camera and Ex Parte Proceedings.
231 *See*, *State v. Ross*, 792 So. 2d 699, 702 (Fla. 5th DCA 2001), and *United States v. Kimbrough*, 69 F. 3d 723, 731 (5th Cir. 1995), *cert. denied*, 517 U.S. 1157, 134 L. Ed. 2d 650, 116 S. Ct. 1547 (1996).
232 *See*, Section 847.011(7), Florida Statutes (2009).

and the defense given a reasonable opportunity to inspect.[233] Note also that the court on its own initiative or pursuant to a motion shall deny or partially restrict disclosures authorized by rule 3.220 if it finds there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from the disclosure, that outweighs any usefulness of the disclosure to either party."[234]

Public records laws pursuant to section 119.07(1) and s. 24(a), Art. I of the State Constitution have many exemptions relevant to the types of information and evidence collected in sexual violence and child abuse cases. Pursuant to section 119.0714(h) the following criminal intelligence information or criminal investigative information is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution:

- Any information, including the photograph, name, address, or other fact, which reveals the identity of the victim of the crime of child abuse as defined by chapter 827.
- Any information which may reveal the identity of a person who is a victim of any sexual offense, including a sexual offense proscribed in chapter 794, chapter 796, chapter 800, chapter 827, or chapter 847.
- A photograph, videotape, or image of any part of the body of the victim of a sexual offense prohibited under chapter 794, chapter 796, chapter 800, chapter 827, or chapter 847, regardless of whether the photograph, videotape, or image identifies the victim.[235]

Similarly, "[a]ny information not otherwise held confidential or exempt from s. 119.07(1) which reveals the home or employment telephone number, home or employment address, or personal assets of a person who has been the victim of sexual battery, aggravated child abuse, aggravated stalking, harassment, aggravated battery, or domestic violence is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, upon written request by the victim, which must include official verification that an applicable crime has occurred. Such information shall cease to be exempt 5 years after the receipt of the written request. Any state or federal agency that is authorized to have access to such documents by any provision of law shall be granted such access in the furtherance of such agency's statutory duties, notwithstanding this section."[236]

"Any information in a videotaped statement of a minor who is alleged to be or who is a victim of sexual battery, lewd acts, or other sexual misconduct proscribed in chapter 800 or in s. 794.011, s. 827.071, s. 847.012, s. 847.0125, s. 847.013, s. 847.0133, or s. 847.0145,

233 *See, Ross* and *Kimbrough*, *supra*.
234 Fla. R. Crim. P. 3.220(e) Restricting Disclosure.
235 *See*, sections 119.0714(1)(h) and 119.071(2)(h)1, Florida Statutes (2010).
236 Section 119.071(2) (j)1., Florida Statutes (2010).

which reveals that minor's identity, including, but not limited to, the minor's face; the minor's home, school, church, or employment telephone number; the minor's home, school, church, or employment address; the name of the minor's school, church, or place of employment; or the personal assets of the minor; and which identifies that minor as the victim of a crime described in this subparagraph, held by a law enforcement agency, is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. Any governmental agency that is authorized to have access to such statements by any provision of law shall be granted such access in the furtherance of the agency's statutory duties, notwithstanding the provisions of this section."[237]

"A public employee or officer who has access to a videotaped statement of a minor who is alleged to be or who is a victim of sexual battery, lewd acts, or other sexual misconduct proscribed in chapter 800 or in s. 794.011, s. 827.071, s. 847.012, s. 847.0125, s. 847.013, s. 847.0133, or s. 847.0145 may not willfully and knowingly disclose videotaped information that reveals the minor's identity to a person who is not assisting in the investigation or prosecution of the alleged offense or to any person other than the defendant, the defendant's attorney, or a person specified in an order entered by the court having jurisdiction of the alleged offense."[238] A person who violates this provision commits a first degree misdemeanor.

c. Depositions

Depositions can be very difficult for both adult and minor sexual violence victims, however, these depositions are also essential for forming a defense. In the Florida Legislature's guidelines for fair treatment of victims and witnesses in the criminal justice and juvenile justice systems, victims are given the opportunity to have an advocate present during depositions and such advocates **shall** be permitted to attend and be present during any deposition of the victim.[239]

Florida Statutes direct the chief judges of each judicial circuit to develop a local order limiting the number of interviews of child abuse and sexual abuse of victims under age 16 or persons with mental retardation for both law enforcement and discover purposes.[240] "The order shall, to the extent possible, protect the victim from the psychological damage of repeated interrogations while preserving the rights of the public, the victim, and the person charged with the violation."[241]

As noted above, depositions of children under the age of 16 shall be videotaped unless otherwise ordered by the court.[242] Additionally, a defendant shall not be physically present at a

237 Section 119.071(2) (j)2.a., Florida Statutes (2010).
238 Section 119.071(2) (j)2.b., Florida Statutes (2010).
239 Section 960.001(1)(q), Florida Statutes (2010).
240 Section 914.16, Florida Statutes (2010).
241 *Id*.
242 Fla. R. Crim. P. 3.220(h)(4) Depositions of Sensitive Witnesses.

deposition except on stipulation of the parties or for good cause as provided by rule.[243] Lastly, the court may limit the scope of depositions under certain circumstances.[244]

5. Motions for Psychological Testing of Victims

A motion for psychological or psychiatric testing of a victim may be brought for the purpose of determining the victim's competency or credibility. While courts have the authority to order a victim to undergo a psychological evaluation, that authority should only be exercised if there is strong and compelling evidence to do so. In *Dinkins*, the trial court's denial of defendant's motion to compel a victim of sexual battery to submit to a psychiatric examination was upheld.[245] The court wrote "we do not expressly reject the concept of the court possessing inherent power to require such an examination under the most compelling of circumstances where it is necessary to insure a just and orderly disposition of the cause, we would discourage the practice in any but the most extreme instances."[246]

In *Coe*, the trial court's order requiring a victim of sexual battery to undergo a psychiatric examination was quashed.[247] The court held that "the defendant presented neither a strong nor compelling reason for requiring the victim to submit to a psychiatric examination for the purpose of determining her credibility. First, there was no evidence presented to suggest that the victim had a history of psychiatric or psychological problems that would have affected her credibility. The only 'evidence' was the unsworn motion, and its factual allegations, and defense counsel's representations to the trial judge. Even if we were to accept these allegations as true, there was still no strong or compelling evidence to suggest that such an examination was required to prevent a miscarriage of justice. Accordingly, we hold that the trial court departed from the essential requirements of law in ordering the victim to undergo a psychiatric examination."[248]

In *Camejo*, the court addressed the distinction between a judge's *authority* to order a psychological examination, and a judge's power to *compel* the victim to submit to the examination.[249] The court determined that Florida follows the majority of states in recognizing the a court has the discretionary power to order psychological examinations under certain circumstances.[250] "However, even in those jurisdictions which permit a trial judge to order a psychological examination, virtually all agree that a judge lacks the power to actually compel the victim to submit

243 Fla. R. Crim. P. 3.220(h)(4)(7) Defendant's Physical Presence.
244 Fla. R. Crim. P. 3.220(l) Protective Orders.
245 *Dinkins v. State*, 244 So. 2d 148 (Fla. 4th DCA 1971).
246 *Id.* at 150.
247 *State v. Coe*, 521 So. 2d 373 (Fla. 2nd DCA 1988).
248 *Id*. at 376.
249 *State v. Camejo*, 641 So. 2d 109, 110 (Fla. 5th DCA 1994).
250 *Id*.

to such an examination."[251] "In summary, Florida law accords with the majority rule in other jurisdictions that trial courts have the inherent power to order psychological examinations. These examinations have been historically ordered in other jurisdictions, where one of three situations exists: (a) uncorroborated, testimony of victim; (b) competency of victim is in question; and (c) the victim's credibility is at issue. Section 794.022 specifically provides that testimony of a sexual abuse victim need not be corroborated; therefore, this would be an invalid reason to order such an examination in Florida. Of course the mental competency of a victim/witness would always be a valid reason to order such an examination in a criminal prosecution. *See generally*, *Goldstein v. State*, 447 So. 2d 903 (Fla. 4th DCA 1984). And lastly, credibility may be a reason to order such an examination, but only if *there is strong and compelling evidence.* Coe; Dinkins."[252] (emphasis in original) The Florida Supreme Court cited this same holding from *Camejo* in its review and held "we approve and adopt as our own the well-reasoned opinion of the court below."[253]

The facts in *Gray*, led that court to conclude that an interview of the victim by an expert was appropriate and failure to allow such an interview of the victim denied the defendant due process.[254] In Gray, the defendant "requested an interview, not an intrusive examination, by his expert. The victim was no longer of tender years, and there was no testimony that the evaluation will result in any physical or emotional detriment to the victim. The probative value of the examination was heightened by appellant's inability to otherwise refute the state's expert's testimony regarding subjective observations. Given the seriousness of the allegations, the limited scope of appellant's request for an interview rather than a more intrusive examination, the state's use of expert's testimony which was based in part on subjective observations that would be difficult to refute absent an independent interview, and the showing that the victim may have made false allegations due to his emotional instability, the trial court abused its discretion in denying appellant's request for a personal interview of [the victim]. Our ruling is bottomed upon fundamental fairness notions inherent in due process and not on any independent right to conduct examinations of prosecution witnesses. Certainly we could not endorse a rule allowing a psychological examination whenever the victim's credibility is made an issue. On remand the trial court will have broad latitude to fashion a means to accommodate the defense request."[255]

251 *Id*.
252 *Id*. at 113.
253 *Camejo v. State*, 660 So. 2d 242 (Fla. 1995).
254 *See*, *Gray v. State*, 640 So. 2d 186 (Fla. 1st DCA 1994).
255 *Id*. at 193.

6. Managing the Courtroom

a. Maintaining safety and decorum

Judges have the authority and responsibility to control the conduct of proceedings before the court, ensure decorum, prevent distractions, and ensure the fair administration of justice.[256] It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings.[257] While public trials are essential to the judicial system's credibility, "this proposition is counterbalanced by the proposition that courts have the inherent power to preserve order and decorum in the courtroom, as well as the responsibility to protect the rights of the parties and witnesses and to further the administration of justice."[258]

In *Johnston*, the Florida Supreme Court held that shackling the defendant during his trial was not a violation of his due process rights. "The trial court conducted a case-specific analysis, made its decision based on information regarding Johnston's behavior, used a reasonable method of restraint under the circumstances, and ensured that the jury would not be able to see the leg shackles that Johnston was required to wear."[259] While the court recognized that shackling is inherently prejudicial, it also stated that shackles may be appropriate to preserve courtroom security which is an essential state interest.[260]

b. When and how to close a courtroom

Defendants, victims, or witnesses may wish to close part or all of a court proceeding or trial due to privacy concerns, fear of prejudicial press coverage, or the sensitive nature of the evidence to be presented, however, there is a strong presumption of public access to civil and criminal proceedings and their records.[261] Moreover, defendants have a right to a public trial,[262] so closing or clearing a courtroom is only proper if it serves a compelling government interest and is narrowly tailored to serve that interest.

Lewis dealt with the right of the press to be present at a pretrial motion to suppress. The Florida Supreme Court determined that the proper balance between the need for open government and public access to the judicial process, through the media, and the paramount right of a defendant in a criminal proceeding to a fair trial before an impartial jury could be struck by applying the following three-pronged test:

256 See, Fla. R. Jud. Admin. 2.450(a), and Code of Judicial Conduct, Canon 3B (2008).
257 *Johnston v. State*, 27 So. 3d 11, 28 (Fla. 2010) (citing *Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970)).
258 *Simpson v. State*, 3 So. 3d 1135 (Fla. 2009) (citing *Miami Herald Publishing Co. v. Lewis*, 426 So. 2d 1 (Fla. 1982)).
259 *Johnston* at 29.
260 *Id*. at 28.
261 *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113, 114 (Fla. 1988).
262 U.S. Const. amend. VI, and Fla. Const. art. I, s. 16.

1) Closure is necessary to prevent a serious and imminent threat to the administration of justice;

2) No alternatives are available, other than change of venue, which would protect a defendant's right to a fair trial; and

3) Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.[263]

Closing a courtroom, even when authorized by section 918.16, Florida Statutes, also requires sufficient inquiry and findings by the court in order to avoid reversal. The section reads:

> **918.16 Sex offenses; testimony of person under age 16 or person with mental retardation; testimony of victim; courtroom cleared; exceptions.--**
>
> (1) Except as provided in subsection (2), in the trial of any case, civil or criminal, when any person under the age of 16 or any person with mental retardation as defined in s. 393.063 is testifying concerning any sex offense, the court shall clear the courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, court reporters, and, at the request of the victim, victim or witness advocates designated by the state attorney's office.
>
> (2) When the victim of a sex offense is testifying concerning that offense in any civil or criminal trial, the court shall clear the courtroom of all persons upon the request of the victim, regardless of the victim's age or mental capacity, except that parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, court reporters, and, at the request of the victim, victim or witness advocates designated by the state attorney may remain in the courtroom.

Pritchett[264] and *Alonso*[265] were both reversed and remanded when judges closed their courtrooms pursuant to section 918.16 without making additional findings

In *Pritchett*, the State requested that the courtroom be cleared during the minor victim's testimony and the trial court ordered the courtroom cleared of all spectators over defendant's objection.[266] The appellate court held that "[t]here are four prerequisites that must be satisfied

263 *Miami Herald Publ. Co. v. Lewis*, 426 So. 2d 1, 15-18 (Fla. 1982).
264 *Pritchett v. State*, 566 So. 2d 6 (Fla. 2nd DCA 1990).
265 *Alonso v. State*, 821 So. 2d 423 (Fla. 3rd DCA 2002).
266 *Pritchett*, supra at 7.

… [first,] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; second, the closure must be no broader than necessary to protect that interest; third, the trial court must consider reasonable alternatives to closing the proceedings; and fourth, the court must make findings adequate to support the closure.[267] This test is clearly very similar to the three-pronged test the Florida Supreme Court set out in *Lewis*, supra.

Similarly, in *Alonso*, the State moved to close the courtroom during the testimony of the victim and two teenaged witnesses based upon the authority of section 918.16, Florida Statutes.[268] Because of the language of the statute, the judge believed he was required to clear the courtroom for these witnesses and did so over the defendant's objection. The appellate court wrote, "It has been held that the automatic application of a statute of this general type violates the United States Constitution."[269] In this case the court held that, the judge must make the necessary findings that the party seeking closure has an overriding interest, that there is no reasonable alternative to closure, and that the closure is no broader than necessary.[270]

B. Pleas

1. Voluntary and Knowing

Before accepting a plea of guilty or nolo contendere, the trial judge shall determine that the plea is voluntarily entered and that a factual basis for the plea exists.[271] No plea of guilty or nolo contendere shall be accepted by a court without the court first determining, in open court, that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness and that there is a factual basis for the plea of guilty.[272]

"The voluntariness of a plea depends on whether the defendant is aware of the direct consequences of the plea and those consequences listed in Florida Rule of Criminal Procedure 3.172(c)."[273] "[T]he trial court must inform a defendant of the direct, but *not* the collateral, consequences of a plea."[274]

267 *Id*. citing *Waller v. Georgia*, 467 U.S. 39, 47 (1984).

268 *Alonso v. State*, 821 So. 2d 423 (Fla. 3rd DCA 2002).

269 *Alonso* at 426 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 73 L. Ed. 2d 248, 102 S. Ct. 2613 (1982)).

270 *See*, *Alonso* at 426. *See also*, *Waller v. Georgia*, 467 U.S. 39 (1984) and *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984) and its predecessors.

271 Fla. R. Crim. P. 3.172(a) Voluntariness; Factual Basis.

272 Fla. R. Crim. P. 3.170(k) Responsibility of Court on Pleas.

273 *State v. Partlow*, 840 So. 2d. 1040, 1042 (Fla. 2003) (citing *State v. Ginebra*, 511 So. 2d 960, 962 (Fla. 1987)).

274 *Bolware v. State*, 995 So. 2d 268 (Fla. 2008), (citing *Major v. State,* 814 So. 2d 424, 426-27 (Fla. 2002); and *State v. Ginebra,* 511 So. 2d 960, 961 (Fla. 1987)).

To determine voluntariness the judge should place the defendant under oath and determine that he or she understands:

1) the nature of the charge to which the plea is offered, the maximum possible penalty, and any mandatory minimum penalty provided by law;
2) if not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, an attorney will be appointed to represent him or her;
3) the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury, and at that trial a defendant has the right to the assistance of counsel, the right to compel attendance of witnesses on his or her behalf, the right to confront and cross-examine witnesses against him or her, and the right not to testify or be compelled to incriminate himself or herself;
4) that upon a plea of guilty, or nolo contendere without express reservation of the right to appeal, he or she gives up the right to appeal all matters relating to the judgment, including the issue of guilt or innocence, but does not impair the right to review by appropriate collateral attack;
5) that if the defendant pleads guilty or is adjudged guilty after a plea of nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he or she waives the right to a trial;
6) that if the defendant pleads guilty or nolo contendere, the trial judge may ask the defendant questions about the offense to which he or she has pleaded, and if the defendant answers these questions under oath, on the record, and in the presence of counsel, the answers may later be used against him or her in a prosecution for perjury;
7) the complete terms of any plea agreement, including specifically all obligations the defendant will incur as a result;
8) that if he or she pleads guilty or nolo contendere, if he or she is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service. It shall not be necessary for the trial judge to inquire as to whether the defendant is a United States citizen, as this admonition shall be given to all defendants in all cases; and
9) that if the defendant pleads guilty or nolo contendere, and the offense to which the defendant is pleading is a sexually violent offense or a sexually motivated offense, or if the defendant has been previously convicted of such an offense, the plea may subject the defendant to involuntary civil commitment as a sexually violent predator upon comple-

tion of his or her sentence. It shall not be necessary for the trial judge to determine whether the present or prior offenses were sexually motivated, as **this admonition shall be given to all defendants in all cases**.[275] (emphasis added).

Failure to inform a defendant of collateral consequences, i.e., those that do not have "definite, immediate, and largely automatic effect on the range of the defendant's punishment" cannot render the plea involuntary.[276] Statutory sexual offender and sexual predator reporting, registration, and public notification requirements are collateral consequences of a plea.[277]

The Sexually Violent Predator Act also known as the Jimmy Ryce Act provides for the involuntary civil commitment of those who are convicted of sexual offenses and found to be sexually violent predators.[278] To meet the requirements of the Act, the State must prove, by clear and convincing evidence, "that the person has been convicted of a sexually violent offense and suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment."[279] The doctrine of equitable estoppel does not prohibit the state from initiating civil commitment proceedings.[280]

In *Watrous*, the appellate court held that a plea to a qualifying offense under the Sexually Violent Predator Act automatically puts a person at risk for involuntary civil commitment, however, it does not automatically result in that person's commitment, therefore, commitment under the Act is a collateral consequence of a plea.[281] Compare *Watrous* to the decision in *Luedtke*, in which affirmative misadvice by counsel regarding the Jimmy Ryce involuntary civil commitment consequences of a plea was a proper basis for allowing a defendant to withdraw the plea even though the judge in Luedtke properly warned the defendant of the consequence as required by rule 3.172(c)(9).[282]

Despite the holdings in *Harris* and *Watrous* that potential involuntary civil commitment under the Sexually Violent Predator Act is a collateral consequence of a plea, rule 3.172(c)(9) requires judges to advise ***all*** defendants entering a plea of guilty or nolo contendere of potential involuntary civil commitment if their current or previous offense qualifies them for such. Clearly, the best course of action to prevent error in accepting a plea that may have Sexually Violent Predator Act/Jimmy Ryce Act consequences is to follow rule 3.172(c)(9) and warn all defendants in all cases.

Before accepting a defendant's plea of guilty or nolo contendere to a **felony**, the judge

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275 Fla. R. Crim. P. 3.172(c)(1)-(9) Determination of Voluntariness.
276 *State v. Partlow*, 840 So. 2d. 1040, 1043 (Fla. 2003).
277 *Id*.
278 *State v. Harris*, 881 So. 2d 1079, 1082 (Fla. 2004)
279 *Id*. at 1083.
280 *Id.* at 1085.
281 *Watrous v. State*, 793 So. 2d 6, 10 (Fla. 2d DCA 2001).
282 *See*, *Luedtke v. State*, 6 So. 3d 653(Fla. 2d DCA 2009).

must inquire whether counsel for the defense has reviewed the discovery disclosed by the state, whether such discovery included a listing or description of physical items of evidence, and whether counsel has reviewed the nature of the evidence with the defendant. The judge must then inquire of the defendant and counsel for the defendant and the state whether physical evidence containing DNA is known to exist that could exonerate the defendant. If no such physical evidence is known to exist, the court may accept the defendant's plea and impose sentence. If such physical evidence is known to exist, upon defendant's motion specifying the physical evidence to be tested, the court may postpone the proceeding and order DNA testing.[283]

Before the trial judge accepts a guilty or nolo contendere plea, the judge must determine that the defendant either

1) acknowledges his or her guilt or
2) acknowledges that he or she feels the plea to be in his or her best interest, while maintaining his or her innocence.[284]

If the trial judge does not concur in a tendered plea of guilty or nolo contendere arising from negotiations, the defendant may withdraw the plea.[285]

Failure to follow any of the procedures in rule 3.172 shall not render a plea void absent a showing of prejudice.[286]

2. Withdrawing Pleas

The court may in its discretion, and shall on good cause, at any time **before** a sentence, permit a plea of guilty or no contest to be withdrawn and, if judgment of conviction has been entered thereon, set aside the judgment and allow a plea of not guilty, or, with the consent of the prosecuting attorney, allow a plea of guilty or no contest of a lesser included offense, or of a lesser degree of the offense charged, to be substituted for the plea of guilty or no contest. The fact that a defendant may have entered a plea of guilty or no contest and later withdrawn the plea may not be used against the defendant in a trial of that cause.[287] "The defendant has the burden to show good and sufficient cause to support withdrawal of a guilty plea."[288]

283 Fla. R. Crim. P. 3.172(d) DNA Evidence Inquiry.
284 Fla. R. Crim. P. 3.127(e) Acknowledgement by Defendant.
285 Fla. R. Crim. P. 3.127(h) Withdrawal of Plea When Judge Does Not Concur.
286 Fla. R. Crim. P. 3.127(j) Prejudice.
287 Fla. R. Crim. P. 3.170(f) Withdrawal of Plea of Guilty or No Contest.
288 *Caddo v. State*, 806 So. 2d 520, 521 (Fla. 2nd DCA 2001) (citing *Ostermann v. State*, 183 So. 2d 873, 875 (Fla. 2d DCA 1966)).

Once a sentence has been imposed, however, a defendant must demonstrate a manifest injustice requiring correction to withdraw a plea.[289] A defendant who pleads guilty or nolo contendere without expressly reserving the right to appeal a legally dispositive issue may file a motion to withdraw the plea within thirty days after rendition of the sentence, but only upon the grounds specified in Florida Rule of Appellate Procedure 9.140(b)(2)(A)(ii)(a)–(e) except as provided by law.[290] The appellate rule provides that a defendant may not appeal from a guilty or nolo contendere plea with the exception that a defendant may directly appeal only:

a. the lower tribunal's lack of subject matter jurisdiction;

b. a violation of the plea agreement, if preserved by a motion to withdraw plea;

c. an involuntary plea, if preserved by a motion to withdraw plea;

d. a sentencing error, if preserved; or

e. as otherwise provided by law.[291]

Note the decision in *Luedtke*, where even though the court warned the defendant of potential involuntary civil commitment as a result of his plea, counsel's affirmative misadvice regarding the applicability of the Jimmy Ryce Act provided good cause to support defendant's motion to withdraw his plea, and the trial court erred in denying defendant's motion to withdraw plea.[292]

3. Victim Input

Before making any plea agreement the State should discuss the proposed plea and its ramifications with the victim. Victims have a right to be heard at sentencing regardless of whether defendant was convicted at trial or entered a plea of guilty or no contest. The court must allow the victim a meaningful opportunity to address the court prior to the defendant's sentencing.[293] More information on victim input and involvement with sentencing can be found in the "Sentencing" section, however, this note is included here as a reminder that these victim rights also apply to sentencing as a result of a plea.

289 *State v. Partlow*, 840 So. 2d 1040, 1042 (Fla. 2003).
290 Fla. R. Crim. P. 3.170(l) Motion to Withdraw the Plea After Sentencing.
291 Fla. R. App. P. 9.140(b)(2)(a)(ii)a-e Guilty or Nolo Contendere Pleas.
292 *Luedtke*, supra at 656.
293 Section 921.143(1), Florida Statutes (2010).

C. Trial

1. Jury Selection

Since sexual violence cases range from "capital" or life felonies to third degree felonies a few questions immediately arise. How many jurors are necessary and how many peremptory challenges are available? While twelve persons shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases,[294] the offense of "capitol sexual battery" is no longer subject to the death penalty so six jurors are all that are necessary to try any sexual battery case. "Sexual battery of a child, therefore, while still defined as a 'capital' crime by the legislature, is not capital in the sense that a defendant might be put to death. Because the death penalty is no longer possible for crimes charged under subsection 794.011(2), a twelve-person jury is not required when a person is tried under that statute."[295]

As for peremptory challenges, the state and the defense are each allowed 10 peremptory challenges when the offense charged is punishable by death or imprisonment for life.[296] For all other felonies each side gets six peremptory challenges.[297] Trial judges may also exercise their discretion and allow additional peremptory challenges as appropriate.[298]

Challenges for cause, obviously, are unlimited so long as there is cause. The bases for challenges for cause are the same in sexual violence cases as in other criminal cases. A challenge for cause to an individual juror may be made only on the following grounds:[299]

1) The juror does not have the qualifications required by law;

2) The juror is of unsound mind or has a bodily defect that renders him or her incapable of performing the duties of a juror, except that, in a civil action, deafness or hearing impairment shall not be the sole basis of a challenge for cause of an individual juror;

3) The juror has conscientious beliefs that would preclude him or her from finding the defendant guilty;

4) The juror served on the grand jury that found the indictment or on a coroner's jury that inquired into the death of a person whose death is the subject of the indictment or information;

5) The juror served on a jury formerly sworn to try the defendant for the same offense;

294 Section 913.10, Florida Statutes (2010), and Fla R. Crim. P. 3.270 Number of Jurors.

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

296 Section 913.08(1)(a), Florida Statutes (2010), and Fla. R. Crim. P. 3.350(a)(1) Felonies Punishable by Death or Im prisonment for Life.

297 Section 913.08(1)(b), Florida Statutes (2010), and Fla. R. Crim. P. 3.350(a)(2) All Other Felonies.

298 Fla. R. Crim. P. 3.350(e) Additional Challenges.

299 Section 913.03, Florida Statutes (2010).

6) The juror served on a jury that tried another person for the offense charged in the indictment, information, or affidavit;

7) The juror served as a juror in a civil action brought against the defendant for the act charged as an offense;

8) The juror is an adverse party to the defendant in a civil action, or has complained against or been accused by the defendant in a criminal prosecution;

9) The juror is related by blood or marriage within the third degree to the defendant, the attorneys of either party, the person alleged to be injured by the offense charged, or the person on whose complaint the prosecution was instituted;

10) The juror has a state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent the juror from acting with impartiality, but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not be a sufficient ground for challenge to a juror if he or she declares and the court determines that he or she can render an impartial verdict according to the evidence;

11) The juror was a witness for the state or the defendant at the preliminary hearing or before the grand jury or is to be a witness for either party at the trial;

12) The juror is a surety on defendant's bail bond in the case.

The Florida Supreme Court has held, "The state, no less than a defendant, is entitled to an impartial jury."[300] As such, jury selection is an incredibly important part of a trial for both sides and problems with jury selection are a frequent basis for appeal. Judges **must** swear in the prospective jurors **before** beginning voir dire.[301] Judges may examine each prospective juror individually or may examine the prospective jurors collectively.[302] Having a standard slate of questions at the ready for jury selection in sexual violence cases can be a good way to identify prejudice or bias that may exist as a result of preexisting misconceptions about victims, defendants, and sexual violence cases in general. Whether done by the judge or by counsel, it is essential to assure that an impartial jury is selected so both sides get the fair trial that they deserve.

Often the question of whether a potential juror or a family member has been the victim of a rape (whether or not it was ever reported) or been accused of a rape will be asked during voir dire. To get clear and honest answers to these difficult questions it is important to at least offer the potential jurors the opportunity to answer sensitive questions in chambers or better still through a questionnaire that all potential jurors fill out before voir dire begins. If a question-

300 *State v. Neil*, 457 So.2d 481, 487 (Fla. 1984).

301 Fla. R. Crim. P 3.300(a) Oath.

302 Fla. R. Crim. P 3.300(b) Examination.

naire is used, it will be helpful to include a question as to whether or not the juror would like further discussion of the issue to take place in chambers or if they are comfortable potentially discussing the matter in open court.

Also of note regarding jury selection is the fact that speedy trial is complied with when the prospective jurors are sworn at the beginning of the jury selection process, however, jeopardy does not attach until the jury is sworn prior to trial.

2. Evidence

Taking evidence in sexual violence cases is generally the same as other criminal cases. The areas where there are differences will be in the type and amount of scientific evidence, hearsay exceptions such as child hearsay, the frequency of recantations, issues of victim protection, and privileged communications.

a. Rape Shield Law

The legislature has determined that certain types of evidence are not relevant to sexual battery prosecutions and may not be a part of a trial for sexual battery. These types of laws limiting what is generally "character evidence" are commonly known as rape shield laws. These laws are primarily designed to protect victims from various trial tactics that are essentially without any relevant merit to the charge the defendant is facing.

The testimony of the victim need not be corroborated in a prosecution for sexual battery.[303] A victim's testimony is theirs alone and does not need corroboration from another witness, a psychologist, or an expert witness. While a victim's testimony need not be corroborated, a judge should **not** comment on this fact or instruct the jury on section 794.022(1). A comment or instruction on this issue by a judge constitutes an impermissible comment on the evidence and may result in reversal.[304]

Specific instances of prior consensual sexual activity between the victim and any person other than the offender shall not be admitted into evidence in a prosecution under section 794.011.[305] Such evidence may be admitted if it is first established to the court in a proceeding **in camera and outside the presence of the jury** that such evidence may prove that the defendant was not the source of the semen, pregnancy, injury, or disease; or, when consent by the victim is at issue, such evidence may be admitted if it is first established to the court in a proceeding **in camera and outside the presence of the jury** that such evidence tends to establish a pattern

303 Section 794.022(1), Florida Statutes (2010).
304 *Brown v. State*, 11 So.2d 428 (Fla. 2nd DCA 2009).
305 Section 794.022(2), Florida Statutes (2010).

of conduct or behavior on the part of the victim which is so similar to the conduct or behavior in the case that it is relevant to the issue of consent.[306]

Similarly, reputation evidence relating to a victim's prior sexual conduct or evidence presented for the purpose of showing that manner of dress of the victim at the time of the offense incited the sexual battery shall not be admitted into evidence in a prosecution under section 794.011.[307]

When consent of the victim is a defense to prosecution under section 794.011, evidence of the victim's mental incapacity or defect is admissible to prove that the consent ***was not*** intelligent, knowing, or voluntary; and the court shall instruct the jury accordingly.[308]

An offender's use of a prophylactic device, or a victim's request that an offender use a prophylactic device, is not, by itself, relevant to either the issue of whether or not the offense was committed or the issue of whether or not the victim consented.[309]

Additionally, the identity of a victim of sexual violence may not be disclosed by a public employee or officer. A public employee or officer who has access to the photograph, name, or address of a person who is alleged to be the victim of sexual battery, lewd or lascivious acts under chapter 800, child abuse under section 827.03, contributing to the delinquency or dependency of a child under section 827.04, or sexual performance by a child under section 827.071may not willfully and knowingly disclose it to a person who is not assisting in the investigation or prosecution of the alleged offense or to any person other than the defendant, the defendant's attorney, a person specified in an order entered by the court having jurisdiction of the alleged offense, or organizations authorized to receive such information made exempt by s. 119.071(2)(h), or to a rape crisis center or sexual assault counselor, as defined in s. 90.5035(1)(b), who will be offering services to the victim.[310] Similar laws that have been enacted to affirmatively prevent the media from disclosing information about the victims of such crimes have generally been held to be unconstitutional.[311]

b. Privileged Communications

Privileged communications arise in all sorts of cases; however, in sexual violence cases there are certain unique privileges that exist. Alternatively, in child abuse cases all privileges with respect to the defendant's communications are abrogated except for attorney/client and clergy privileges.

306 *Id*.
307 Section 794.022(3), Florida Statutes (2010).
308 Section 794.022(4), Florida Statutes (2010).
309 Section 794.022(5), Florida Statutes (2010).
310 Section 794.024(1), Florida Statutes (2010).
311 *See*, *Fla. Star v. B. J. F.*, 491 U.S. 524 (1989), and *State v. Globe Communs. Corp.*, 648 So. 2d 110 (Fla. 1994).

i. Spousal Privilege of Marital Communication

Communications between a husband and wife are privileged pursuant to Florida law. In sexual violence cases, this privilege is most likely to arise if one spouse admits committing an offense or provides details of an offense to the other spouse. "A spouse has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, communications which were intended to be made in confidence between the spouses while they were husband and wife."[312] "The privilege may be claimed by either spouse or by the guardian or conservator of a spouse. The authority of a spouse, or guardian or conservator of a spouse, to claim the privilege is presumed in the absence of contrary evidence."[313] This privilege is specifically for *communications*, so observations of things or actions by a spouse are not subject to this privilege. If a privileged marital communication is improperly admitted, it is subject to a harmless error analysis.[314]

There is **no** spousal privilege under section 90.504:

1) In a proceeding brought by or on behalf of one spouse against the other spouse;
2) 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; or
3) In a criminal proceeding in which the communication is offered in evidence by a defendant-spouse who is one of the spouses between whom the communication was made.[315]

As with other privileges, the marital communication privilege can be lost or waived. If the marital communication was recorded or overheard by a third party, then the privilege is lost as there would not be an expectation of privacy. The privilege can also be waived affirmatively or by voluntary disclosure. "A person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if the person, or the person's predecessor while holder of the privilege, voluntarily discloses or makes the communication when he or she does not have a reasonable expectation of privacy, or consents to disclosure of, any significant part of the matter or communication. This section is not applicable when the disclosure is itself a privileged communication."[316]

For a lengthy and thorough look at the spousal privilege and the difficulties that can arise therefrom, see *Bolin v. State*, 793 So.2d 894 (Fla. 2001).

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312 Section 90.504(1), Florida Statutes (2010).
313 Section 90.504(2), Florida Statutes (2010).
314 *Taylor v. State*, 855 So. 2d 1, 28 (Fla. 2003).
315 Section 90.504(3), Florida Statutes (2010).
316 Section 90.507, Florida Statutes (2010).

ii. Communications with Care Providers

As sexual violence cases can encompass medical issues, psychological issues, and counselors the following privileges are frequently encountered:

1. Psychotherapist – Patient Privilege

A communication between psychotherapist and patient is "confidential" if it is not intended to be disclosed to third persons other than:

1. Those persons present to further the interest of the patient in the consultation, examination, or interview.
2. Those persons necessary for the transmission of the communication.
3. Those persons who are participating in the diagnosis and treatment under the direction of the psychotherapist.[317]

Additionally, communications between a patient and a *psychiatrist* shall be held confidential and shall not be disclosed except upon the request of the patient or the patient's legal representative.[318]

A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcoholism and other drug addiction, between the patient and the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.[319]

The psychotherapist-patient privilege may be claimed by:

a) The patient or the patient's attorney on the patient's behalf.

b) A guardian or conservator of the patient.

c) The personal representative of a deceased patient.

d) The psychotherapist, but only on behalf of the patient. The authority of a psychotherapist to claim the privilege is presumed in the absence of evidence to the contrary.[320]

317 Section 90.503(1)(c), Florida Statutes (2010).
318 Section 456.059, Florida Statutes (2010).
319 Section 90.503(2), Florida Statutes (2010).
320 Section 90.503(3), Florida Statutes (2010).

There is no privilege under section 90.503:

a) For communications relevant to an issue in proceedings to compel hospitalization of a patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has reasonable cause to believe the patient is in need of hospitalization.

b) For communications made in the course of a court-ordered examination of the mental or emotional condition of the patient.

c) For communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of his or her claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.[321]

2. Sexual Assault Counselor – Victim Privilege

A communication between a sexual assault counselor or trained volunteer and a victim is "confidential" if it is not intended to be disclosed to third persons other than:

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

2. Those persons necessary for the transmission of the communication.

3. Those persons to whom disclosure is reasonably necessary to accomplish the purposes for which the sexual assault counselor or the trained volunteer is consulted.[322]

A victim has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made by the victim to a sexual assault counselor or trained volunteer or any record made in the course of advising, counseling, or assisting the victim. Such confidential communication or record may be disclosed only with the prior written consent of the victim. This privilege includes any advice given by the sexual assault counselor or trained volunteer in the course of that relationship.[323]

The privilege may be claimed by:

a) The victim or the victim's attorney on his or her behalf.

321 Section 90.503(4), Florida Statutes (2010).
322 Section 90.5035(1)(e), Florida Statutes (2010).
323 Section 90.5035(2), Florida Statutes (2010).

b) A guardian or conservator of the victim.

c) The personal representative of a deceased victim.

d) The sexual assault counselor or trained volunteer, but only on behalf of the victim. The authority of a sexual assault counselor or trained volunteer to claim the privilege is presumed in the absence of evidence to the contrary.[324]

If the sexual assault counselor is subpoenaed by the defense for a deposition, the State may seek a motion to quash on the basis that without prior written consent from the victim, the counselor cannot divulge any confidential information to a third party. At a hearing on such a motion the court should determine the purpose for the subpoena and whether any information sought would ***not*** be confidential. If the court determines that the purpose of the subpoena is to elicit non-confidential information, then the motion to quash should be denied; however, an order limiting the inquiry to non-confidential matters may be issued. Additionally, there is some conflict with regard to the sexual assault counselor privilege and potentially other privileges. *Pinder* contemplates the possibility of an in camera review of information made confidential under section 90.5035, Florida Statutes if the defendant establishes a reasonable probability that the privileged matters contain material information necessary to his defense.[325] The Third District, however, concluded that *Pinder* was wrongly decided and certified conflict.[326] With respect to the psychotherapist-patient privilege at issue in *Famiglietti*, the court concluded "that there is neither an Evidence Code provision, nor an applicable constitutional principle, which allows the invasion of the victim's privileged communications with her psychotherapist."[327] "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."[328]

3. Doctor – Patient Confidentiality

Concerning information that may exist between a doctor and a patient, it is important to consider whether the information sought is testimonial in nature or is contained in a medical record. Unlike the privileges listed above, Chapter 90 of the Florida Statues does not provide for a doctor - patient privilege. Other statutory references and case law indicate that both testimonial and documentary evidence between a doctor and a patient is still *confidential* with limitations on disclosure. Medical records may **not** be furnished to, and the medical condition of a patient

324 Section 90.5035(3), Florida Statutes (2010).
325 *State v. Pinder*, 678 So. 2d 410, 417 (Fla. 4th DCA 1996).
326 *See*, *State v. Famiglietti*, 817 So. 2d 901 (Fla. 3rd DCA 2002).
327 *Id*. at 908.
328 *Jaffee v. Redmond*, 518 U.S. 1, 17 (1996).

may **not** be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, **except** upon written authorization of the patient.[329] Medical *records* may, however, be furnished without written authorization in any civil or criminal action, unless otherwise prohibited by law, upon the issuance of a subpoena from a court of competent jurisdiction and proper notice to the patient or the patient's legal representative by the party seeking such records.[330] The Florida Supreme Court has held that Florida Statutes do create a physician-patient privilege of confidentiality for the patient's personal medical information.[331]

When dealing with medical records specifically, patient records are confidential and must not be disclosed without the consent of the patient or his or her legal representative, but appropriate disclosure may be made without such consent in any civil or criminal action, unless otherwise prohibited by law, upon the issuance of a **subpoena** from a court of competent jurisdiction and **proper notice** by the party seeking such records to the patient or his or her legal representative.[332] Note that federal HIPAA regulations must also be complied with when subpoenaing medical records.

iii. Certain Privileges Abrogated in Child Abuse Cases

In child abuse cases under Chapter 39, all privileges with respect to the defendant's communications are abrogated except for attorney/client and clergy privileges. The privileged quality of communication between husband and wife; and between any professional person and his or her patient or client; and any other privileged communication (except that between attorney and client or the privilege provided in s. 90.505, as such communication relates both to the competency of the witness and to the exclusion of confidential communications) shall not apply to any communication involving the perpetrator or alleged perpetrator in any situation involving known or suspected child abuse, abandonment, or neglect and shall not constitute grounds for failure to report as required by s. 39.201, regardless of the source of the information requiring the report, failure to cooperate with law enforcement or the department in its activities pursuant to this chapter, or failure to give evidence in any judicial proceeding relating to child abuse, abandonment, or neglect.[333]

A similar abrogation of privileges exists with respect to situations involving known or suspected abuse, neglect, or exploitation of a vulnerable adult.[334]

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329 Section 456.057(7)(a), Florida Statutes (2010).

330 Section 456.057(7)(a)(3), Florida Statutes (2010).

331 *See*, *Acosta v. Richter*, 671 So. 2d 149 (Fla. 1996). (*Acosta* dealt with the confidentiality requirements of section 455.241(2), Florida Statutes (1993) which has been modified over the years and now exists as section 456.057(7)(a), Florida Statutes (2010). The substantive changes to this statute do not alter the Court's holding in *Acosta*.)

332 Section 395.3025(4)(d), Florida Statutes (2010).

333 Section 39.204, Florida Statutes (2010).

334 Section 415.1045(3), Florida Statutes (2010).

c. Witnesses

i. Competency

Competency can relate to a defendant's mental competency to proceed with trial or sentencing, a child's competence to be a witness, or whether a person with a mental disability is competent to testify. The general rule is that every person is competent to be a witness, except as otherwise provided by statute.[335] A person is disqualified to testify as a witness when the court determines that the person is:

1) Incapable of expressing himself or herself concerning the matter in such a manner as to be understood, either directly or through interpretation by one who can understand him or her.

2) Incapable of understanding the duty of a witness to tell the truth.[336]

The trial judge has broad discretion in determining whether or not a witness is competent to testify.[337]

In *Bennett*, the First District wrote, 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.[338]

"Factors to consider in reviewing the 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."[339]

Failure of the trial court to conduct an adequate competency evaluation on a child victim can lead to reversal. In addressing the testimonial competence of a child sex abuse victim, the test to be applied by the trial court includes whether the child: (1) is capable of receiving a just impression of the facts about which he or she is to testify; (2) is capable of relating them correctly; and, (3) possesses a sense of obligation to tell the truth. "Possessing a sense of obligation to tell the truth" means that the child should possess the spiritual

335 Section 90.601, Florida Statutes (2010).
336 Section 90.603, Florida Statutes (2010).
337 *See*, *State v. Green*, 733 So. 2d 583 (Fla. 1st DCA 1999), and *Simmons v. State*, 683 So. 2d 1101 (Fla. 1st DCA 1999).
338 *Bennett v. State*, 971 196, 201 (Fla. 1st DCA 2007) (internal citations omitted).
339 *Id*.

and moral consciousness that should be the basic inducement to all witnesses to speak the truth.[340]

ii. Refusal to Testify

No one may refuse to testify in a legal proceeding except as otherwise provided by Chapter 90, Florida Statutes, any other statute, or the Constitution of the United States or of the State of Florida. No person in a legal proceeding has a privilege to:

1) Refuse to be a witness.
2) Refuse to disclose any matter.
3) Refuse to produce any object or writing.
4) Prevent another from being a witness, from disclosing any matter, or from producing any object or writing.[341]

A refusal to testify can make the witness "unavailable" to testify for purposes of hearsay exception. A declarant who persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so, is unavailable as a witness.[342]

iii. Recantation and Prior Inconsistent Statements

Recanted statements and prior inconsistent statements are among the most difficult elements that can enter into a trial because no one has an opportunity to prepare for them or their consequences. Children who are or may be victims of a crime may recall and explain events quite differently while giving a statement versus testifying during a trial before a jury, spectators, and the defendant several months after an assault. Some children may also not understand the importance and gravity of a trial. How should a child's changed or recanted statement be treated? If there is little or no corroborating evidence, then is a judgment of acquittal warranted? There is a growing line of cases that deal directly with these issues.

In *Beber*, the defendant was charged by information with capital sexual battery by "placing his mouth, tongue on or in union with the [child's] penis."[343] The alleged victim was 6 years old at the time of the incident and he gave a videotaped statement during a forensic interview with a Child Protection Team worker trained in giving such interviews. The video was admitted

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340 *See*, *Black v. State*, 864 So. 2d 464 (Fla. 1st DCA 2003).

341 Section 90.501, Florida Statutes (2010).

342 Section 90.804(1)(b), Florida Statutes (2010). *See also*, *Happ v. Moore*, 784 So. 2d 1091 (Fla. 2001).

343 *Beber v. State*, 887 So. 2d 1248, 1252-53 (Fla. 2004).

into evidence during the trial under the child hearsay exception provided in section 90.803(23)(a), Florida Statutes (2002). In the video, the child said that the defendant twice put the child's penis in the defendant's mouth, however, at trial the then 8-year-old child testified that the defendant touched the child's penis with his hand only and otherwise answered questions by saying he did not know or could not remember. The Court relied upon it decision in *State v. Green*, and held that the child's hearsay statements, standing alone, were insufficient to sustain a conviction of capital sexual battery.[344]

Baugh v. State is similar to *Beber* in that it involves a defendant charged with a capital sexual battery and a child's out-of-court hearsay statement.[345] In *Baugh*, while testifying at trial, the alleged victim completely recanted her earlier statements and indicated that she only made her earlier statements to get the defendant in trouble. "The only direct evidence presented in this case was the child's out-of-court hearsay statements, which she completely recanted during her in-court testimony. The evidence which was offered as 'corroborating' these out-of-court statements, as required by *Green* and *Moore*, was circumstantial evidence from which the jury had to infer that Baugh had perpetrated a sexual battery on the child."[346] "The rule is well established that the prosecution, in order to present a prima facie case, is required to prove each and every element of the offense charged beyond a reasonable doubt, and when the prosecution fails to meet this burden, the case should not be submitted to the jury, and a judgment of acquittal should be granted."[347] Recanted statements can sustain a sexual battery conviction when other proper corroborating evidence is admitted; however, in this particular case there was not sufficient corroborating evidence and the trial court should have granted the motion for a judgment of acquittal.

The analyses in *Beber* and *Baugh* were utilized recently in *Johnson v. State* which again dealt with a charge of sexual battery on a child under the age of 12 years (this case also had charges of lewd and lascivious molestation) and out-of-court hearsay statements by children that were recanted during trial.[348] The court wrote, "The state must still prove the elements of the crime through the testimony of the child at trial or by other substantive evidence. If the only evidence of guilt is a child victim's out-of-court statement admitted under *section 90.803(23)*, and if the child has recanted the accusation in court, the trial court must grant a motion for judgment of acquittal."[349]

iv. Expert Witnesses

Sexual violence cases can contain a great deal of evidence of a medical, psychological, or scientific nature which will often involve expert witness testimony. "If scientific, technical, or

344 Id. at 1253. *See also, State v. Green,* 667 So. 2d 756, 760-61 (Fla. 1995).
345 *Baugh v. State*, 961 So. 2d 198 (Fla. 2007).
346 *Id*. at 203. *See also, State v. Green*, 667 So. 2d 756 (Fla. 1995), and *State v. Moore*, 485 So. 2d 1279 (Fla. 1986).
347 *Id*. at 203-204, citing *Williams v. State*, 560 So. 2d 1304, 1306 (Fla. 1st DCA 1990).
348 *Johnson v. State*, 1 So. 3d 1164 (Fla. 1st DCA 2009).
349 *Id*. at 1166.

other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial."[350] "The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence."[351] "Unless otherwise required by the court, an expert may testify in terms of opinion or inferences and give reasons without prior disclosure of the underlying facts or data. On cross-examination the expert shall be required to specify the facts or data. Prior to the witness giving the opinion, a party against whom the opinion or inference is offered may conduct a voir dire examination of the witness directed to the underlying facts or data for the witness's opinion. If the party establishes prima facie evidence that the expert does not have a sufficient basis for the opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data."[352] The opinion testimony of a qualified expert witnesses that is otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact.[353]

Opinions from expert witnesses can be helpful for explaining uncommon or complicated matters to the jury, however, they can also be improper or prejudicial. "An expert may not directly vouch for the truthfulness or credibility of a witness."[354] "[I]t was error for the state's witnesses to directly testify as to the truthfulness of the victim."[355] An expert may, however, properly aid a jury in assessing the veracity of a victim of child sexual abuse by summarizing the medical evidence and expressing his opinion as to whether it was consistent with the victim's story.[356] An expert may also offer observations from his experience regarding behaviors of child sex abuse victims in general to aid a jury in assessing the veracity of a victim of child sexual abuse and to rebut defense attacks on the victim's credibility.[357]

Expert opinion that an accused person does or does not fit the profile of a pedophile or a sexual offender is not admissible.[358] Profile testimony necessarily relies on some scientific principle or test which implies an infallibility not found in pure opinion testimony, therefore, it must meet the *Frye* test to be admissible. Sex offender profile evidence is not generally accepted in the scientific community, so it is not admissible as expert opinion testimony.[359]

350 Section 90.702, Florida Statutes (2010).
351 Section 90.704, Florida Statutes (2010).
352 Section 90.705, Florida Statutes (2010).
353 Section 90.703, Florida Statutes (2010).
354 *Feller v. State*, 637 So. 2d 911 (Fla. 1994).
355 *Tingle v. State*, 536 So. 2d 202 (Fla. 1988).
356 *Id*. at 205, citing *U.S. v. Azure*, 801 F.2d 336 (8th Cir. 1986).
357 *Oliver v. State*, 977 So. 2d 673 (Fla. 5th DCA 2008).
358 *Flanagan v. State*, 625 So. 2d 827 (Fla. 1993).
359 *Id*. at 828.

In one prosecution for sexual battery upon a mentally defective person, a psychologist's opinion that the victim was incapable of appraising the nature of her conduct, or of giving knowing and voluntary consent to intercourse was admissible even though it included an opinion as to the ultimate issue to be decided by the trier of fact.[360]

v. Impeachment

While there are several forms of impeachment, sexual violence cases can raise questions regarding impeachment by reputation. In particular, attempts to impeach a victim's reputation by raising issues of her prior sexual conduct are expressly forbidden by statute.

A party may attack or support the credibility of a witness, a victim, or the accused, by evidence in the form of reputation, except that:

1) The evidence may refer **only** to character relating to truthfulness.
2) Evidence of a truthful character is admissible **only** after the character of the witness for truthfulness has been attacked by reputation evidence.[361]

It is important to remember that impeachment evidence may only refer to the witnesses character for **truthfulness**. Reputation evidence relating to a victim's prior sexual conduct or evidence presented for the purpose of showing that manner of dress of the victim at the time of the offense incited the sexual battery shall **not** be admitted into evidence in a sexual battery case.[362] Likewise, specific instances of prior consensual sexual activity between the victim and any person other than the offender shall **not** be admitted into evidence in a sexual battery case, except for specific enumerated reasons **after** an in camera proceeding.[363]

Any party may attempt to impeach the credibility of a witness by:

1) Introducing statements of the witness which are inconsistent with the witness's present testimony.
2) Showing that the witness is biased.
3) Attacking the character of the witness in accordance with the provisions of sections 90.609 or 90.610, Florida Statutes.
4) Showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which the witness testified.
5) Proof by other witnesses that material facts are not as testified to by the witness being impeached.[364]

360 *Dinkens v. State*, 976 So. 2d 660 (Fla. 1st DCA 2008).
361 Section 90.609, Florida Statutes (2010).
362 Section 794.022(3), Florida Statutes (2010).
363 Section 794.022(2), Florida Statutes (2010).
364 Section 90.608, Florida Statutes (2010).

Finally, any witness may have their truthfulness impeached for being convicted of a felony or of a crime involved dishonesty or a false statement.[365]

vi. Testimony via Closed Circuit Television, Child Victims

Upon motion and hearing in camera and upon a finding that there is a substantial likelihood that the child or person with mental retardation will suffer at least moderate emotional or mental harm due to the presence of the defendant if the child or person with mental retardation is required to testify in open court, or that such victim or witness is unavailable, the trial court may order that the testimony of a child under the age of 16 or person with mental retardation who is a victim or witness be taken outside of the courtroom and shown by means of closed circuit television.[366] The judge must make specific findings of fact, on the record, as to the basis for the ruling for testimony via closed circuit television.[367]

If testimony will be taken via closed circuit television, the only people who may be in the room during the recording of the testimony are:

- the judge,
- the prosecutor,
- the defendant,
- the attorney for the defendant,
- the operators of the videotape equipment,
- an interpreter, and
- some other person who, in the opinion of the court, contributes to the well-being of the child or person with mental retardation and who will not be a witness in the case.[368]

During the closed circuit television testimony of the child or the person with mental retardation, the court may require the defendant to view the testimony from the courtroom. In such a case, the court shall permit the defendant to observe and hear the testimony of the child or person with mental retardation, but shall ensure that the child or person with mental

365 Section 90.610, Florida Statutes (2010).
366 Section 92.54(1), Florida Statutes (2010).
367 Section 92.54(5), Florida Statutes (2010).
368 Section 92.54(3), Florida Statutes (2010).

retardation cannot hear or see the defendant. The defendant's right to assistance of counsel, which includes the right to immediate and direct communication with counsel conducting cross-examination, must be protected and, upon the defendant's request, such communication shall be provided by any appropriate electronic method.[369]

d. Hearsay Issues and Exceptions

Some of the exception to hearsay are more likely to arise in sexual violence cases than in other criminal cases. Hearsay issues and exceptions are particularly common in cases where children are victims.

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

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

2. The child **either**:
   a. Testifies; **or**
   b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).[370]

In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's state-

369 Section 92.54(4), Florida Statutes (2010).
370 Section 90.803 (23)(a), Florida Statutes (2010).

ment, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.[371]

The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.[372]

In *Townsend*, the Florida Supreme Court explained, "For a hearsay statement to be admitted under this section, the statement must meet two specific reliability requirements: (1) the *source* of the information through which the statement was reported *must indicate trustworthiness*; and (2) the *time, content, and circumstances* of the statement must reflect that the statement *provides sufficient safeguards of reliability*."[373]

Crawford v. Washington did not specifically deal with child hearsay, but with out-of-court hearsay statements in general.[374] The Court made a distinction between "testimonial" hearsay and "non-testimonial" hearsay for Sixth Amendment confrontation clause purposes. The Supreme Court held, "Where testimonial evidence is at issue, … the *Sixth Amendment* demands what the common law required: unavailability and a prior opportunity for cross-examination."[375] While Crawford does not specifically define all types of "testimonial hearsay" it is generally understood to include statements made to officials such as law enforcement officers, agency officials, and child protection team members for the purposes of investigation and prosecution. Under *Crawford*, it is only **non-testimonial** hearsay statements, such as statements to a parent, friend, or teacher, which may be admissible if they meet state-defined standards of reliability such as those set out in section 90.803 (23)(a), Florida Statutes and *Townsend*, above.

Obviously, these issues are irrelevant if the victim testifies, as the victim would then be available for cross examination. If the victim testifies, then the victim's prior hearsay statements, both testimonial and non-testimonial, may be admitted so long as they qualify for admission under one of the hearsay exceptions. So, *Crawford* only bars testimonial hearsay if the victim does not testify and was not subject to prior cross examination concerning the statements.

The Florida Supreme Court has addressed *Crawford* many times. *Contreras* dealt with a videotaped child protection team interview, defense counsel depositions of the victim, the unavailability of the victim to testify at trial based on a psychologist's opinion that this would cause her emotional harm, and whether or not any error was harmless error.[376] Based on the facts in Contreras, the court held that the statements to the child protection team interviewer were testimonial; a child victim could be "unavailable" under *Crawford* if testifying would cause emotional harm; and that the depositions taken in this case did not afford defendant sufficient

371 Section 90.803 (23)(b), Florida Statutes (2010).
372 Section 90.803 (23)(c), Florida Statutes (2010).
373 *State v. Townsend*, 635 So. 2d 949, 954 (Fla. 1994).
374 *See*, *Crawford v. Washington*, 541 U.S. 36 (2004).
375 *Id*. at 68.
376 *See*, *State v. Contreras*, 979 So. 2d 896, (Fla. 2008).

opportunity for cross-examination under *Crawford*.[377] In Contreras, the video was the only evidence of penetration, its admission was not harmless as to the sexual battery charge, which required proof of penetration, but was harmless as to the molestation charge, which did not.[378]

When a defendant thoroughly cross-examines a child during deposition, the trial court may allow testimony under child hearsay exceptions pursuant to sections 90.803(23) and 90.804, Florida Statutes, where appropriate, without violating defendant's right to confront witnesses.[379]

e. Similar Fact Evidence – "Williams Rule"

"Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity."[380]

Evidence of any facts relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused is admissible unless precluded by some specific exception or rule of exclusion. This rule applies to relevant similar fact evidence even though it points to the commission of another crime. The matter of relevancy should be carefully and cautiously considered by the trial judge. However, when found relevant within the limits of the stated rule, such evidence should be permitted to go to the jury.[381]

Before admitting similar fact evidence, the trial court must make two determinations:

1) whether the evidence is relevant or material to some aspect of the offense being tried, and

2) whether the probative value is substantially outweighed by any prejudice.[382]

In a criminal case in which the defendant is charged with a crime involving child molestation (conduct proscribed by sections 794.011, 800.04, or 847.0135(5) when committed against a person 16 years of age or younger), evidence of the defendant's commission of other crimes, wrongs, or acts of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.[383] The Florida Supreme Court has held that, "evidence of a collateral act of child molestation is relevant under the *Williams* rule to corroborate the

377 *Id*.
378 *Id*.
379 *Corona v. State*, 929 So. 2d 588 (Fla. 5th DCA 2006).
380 Section 90.404(2)(a), Florida Statutes (2010).
381 *See*, *Williams v. State*, 110 So. 2d 654 (Fla. 1959) (rehearing denied).
382 *See*, *Alsfield v. State*, 34 Fla. L. Weekly D 1980 (Fla. 4th DCA 2009).
383 Section 90.404(2)(b), Florida Statutes (2010).

victim's testimony in both familial and nonfamilial child molestation cases. We have relaxed the requirement for strict similarity between the charged and collateral offenses in the familial context, but there must be some similarity other than the fact that both offenses occurred in the family. We have not extended the relaxed standard of admissibility to nonfamilial cases. However, in both familial and nonfamilial cases, the required showing of similarity must be made on a case-by-case basis, and the collateral act evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice."[384]

When the state intends to offer evidence of other criminal offenses, the state shall furnish to the defendant or to the defendant's counsel a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information no fewer than 10 days before trial.[385] No notice is required for evidence of offenses used for impeachment or on rebuttal.[386]

"When the evidence is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information."[387]

f. Scientific Evidence

Expert testimony and evidence based on scientific testing is often part of sexual violence litigation. Today, we are familiar with DNA evidence being introduced in a variety of cases, but as with all scientific evidence, the testing methods must be reliable, generally accepted, and the evidence must be properly admitted. The *Frye* standard is the applicable law in Florida and it holds that scientific evidence is only admissible when its methods are sufficiently established to have gained general acceptance in their field.[388] The *Daubert* decision held that *Frye's* "general acceptance" test is not required by the Federal Rules of Evidence as a precondition to the admissibility of scientific evidence in *federal court* cases.[389] *Daubert* notes that Federal Rule of Evidence 702 is concerned with the scientific validity and the evidentiary relevance and reliability of the principles that underlie the scientific evidence submitted for consideration.[390] As noted above, "Florida does not follow *Daubert*. Florida courts follow the test set out in *Frye*. This test requires

384 *McLean v. State*, 934 So. 2d 1248, 1258 (Fla. 2006).
385 Section 90.404(2)(c)(1), Florida Statutes (2010).
386 *Id*.
387 Section 90.404(2)(c)(2), Florida Statutes (2010).
388 *See, Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); and *Ibar v. State*, 938 So. 2d 451, 467 (Fla. 2006) (rehearing denied, US cert. denied).
389 *See, Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).
390 *Id*, at 595.

that the scientific principles undergirding this evidence be found by the trial court to be generally accepted by the relevant members of its particular field. Courts will only utilize the *Frye* test in cases of **new and novel** scientific evidence. By definition, the *Frye* standard only applies when an expert attempts to render an opinion that is based upon new or novel scientific techniques. In the vast majority of cases, no *Frye* inquiry will be required because no innovative scientific theories will be at issue."[391]

"If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial."[392] "The determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge, whose decision will not be reversed absent a clear showing of error."[393]

i. DNA

When it comes to the right and wrong ways to deal with DNA evidence, the cases of *Gerald D. Murray v. State* are very instructive.[394] While the general reliability of DNA typing is accepted in the scientific community, the reliability of DNA evidence is predicated upon proper procedures being followed.[395] In *Hayes* (cited in *Murray*), the Florida Supreme Court took judicial notice that "DNA test results are generally accepted as reliable in the scientific community, provided that the laboratory has followed accepted testing procedures that meet the *Frye* test to protect against false readings and contamination."[396] Whether the testers followed proper procedures is always at issue and must be resolved on a case-by-case basis.[397] DNA evidence should not be admitted if proper procedures were not followed.[398]

"In admitting the results of scientific tests and experiments, the reliability of the testing methods is at issue, and the proper predicate to establish that reliability must be laid. If the reliability of a test's results is recognized and accepted among scientists, admitting those results is within a trial court's discretion. When such reliable evidence is offered, any inquiry into its reliability for purposes of admissibility is only necessary when the opposing party makes a timely request for such an inquiry supported by authorities indicating that there may not be general scientific acceptance of the technique employed."[399]

391 Spann v. State, 857 So. 2d 845, 852 (Fla. 2003).
392 Section 90.702, Florida Statutes (2010).
393 *See, Ramirez v. State*, 542 So. 2d 352 (Fla. 1989).
394 *See*, *Murray v. State*, 838 So. 2d 1073 (Fla. 2002), and *Murray v. State*, 3 So. 3d 1108 (Fla. 2009).
395 *Murray v. State*, 838 So. 2d 1073, 1078 (Fla. 2002).
396 Hayes v. State, 660 So. 2d 257, 264 (Fla. 1995).
397 *Murray v. State*, 838 So. 2d 1073, 1078 (Fla. 2002).
398 *Id*.
399 *Robinson v. State*, 610 So. 2d 1288, 1291 (Fla. 1992)(internal citations, quotations, and emphasis removed).

DNA testing, like other types of scientific testing, relies on obtaining results from lab testing, having experts interpret those results, and having a qualified expert testify about the test results at trial. Ideally, the person who conducted the testing would be the person who testifies as to the results at trial. "The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence."[400] When laboratory testing tasks are divided, who is the proper person to discuss the tests and give an expert opinion? Even though the expert who testified at trial was not the person who actually performed the testing to extract DNA samples, her testimony did not implicate the Confrontation Clause because she formulated her own conclusions from the raw data produced by the biologists under her supervision and control on her team, and she was subject to cross-examination with regard to those conclusions.[401] In *Smith*, the court also cites to two federal court cases for the proposition that the Sixth Amendment Confrontation Clause does not require an expert to have performed the actual laboratory work to permissibly testify with regard to conclusions that he or she has drawn from those results."[402] "[T]he Confrontation Clause does not forbid the use of raw data produced by scientific instruments, though the interpretation of those data may be testimonial."[403] " Similarly, the Fourth Circuit Court of Appeals held that a Confrontation Clause violation did not occur where the chief toxicologist of a lab reviewed the data from tests conducted by technicians at the lab and issued a report based upon that data where the toxicologist testified at trial with regard to his conclusions."[404]

The PCR/STR triplexing method is generally accepted by the scientific community, the particular test kit used does not have to be *Frye* tested, the evidence obtained from that kit was reliable, and that the failure to follow TWGDAM recommendations as to developmental validation does *not* render DNA test results inadmissible. Accordingly, the trial court properly admitted the DNA test results. See, Lemour v. State, 802 So.2d 402 (Fla. 3rd DCA 2001).

See Barnes v. State for a discussion on the improvements to DNA testing over time. Barnes v. State, 29 So.3d 1010 (Fla. 2010).

ii. Bite Marks, Hair Samples, Fluids, etc.

Bite-mark evidence is admissible when relevant to prove identification, state of mind, the act itself or any other material fact. Questions as to the weight to be given to such evidence,

400 Section 90.704, Florida Statutes (2010).
401 *See*, *Smith v. State*, 28 So. 3d 838 (Fla. 2009).
402 *Id*. at 854.
403 *Id*. at 855 (citing *United States v. Moon*, 512 F. 3d 359, 362 (7th. Cir. 2008).
404 *Id*. (citing *United States v. Washington*, 498 F. 3d 225, 228 (4th Cir. 2007).

including the degree of its probative force and effect and the inferences to be drawn from it, are for the trier of fact.[405]

"Visual and microscopic hair comparison is not based on new or novel scientific principles and, therefore, does not require a *Frye* analysis."[406]

After a fourth trial and third conviction, Murray appealed again and raised several issues related to hair evidence including an allegation of tampering.[407] "Generally, relevant physical evidence can be admitted unless there is evidence of probable tampering. Once the objecting party produces evidence of probable tampering, the burden shifts to the proponent of the evidence to establish a proper chain of custody or submit other evidence that tampering did not occur."[408]

iii. SANE, Sexual Assault Nurse Examiner

Forensic evidence in sexual violence cases may be collected by police, doctors, or a Sexual Assault Nurse Examiner, or SANE. SANEs are registered nurses who have been specially trained to provide comprehensive care to sexual assault patients, have demonstrated competency in conducting forensic exams, and are certified by a national body. These forensic nurses commonly perform physical exams on sexual assault victims, provide treatment, and collect evidence. As a result of these duties, SANE nurses are likely to be called upon to testify as to their observations and the evidence they collected. When a proper foundation is established, a SANE nurse can testify as an expert witness.

3. Defenses

a. Affirmative Defenses

i. Insanity

In cases where the sanity of a defendant may be at issue, the defense of insanity must be raised affirmatively. When in any criminal case it shall be the intention of the defendant to rely on the defense of insanity either at trial or probation or community control violation hear-

405 *Maynard v. State*, 455 So. 2d 632 (Cowart, J., specially concurring).

406 *McDonald v. State*, 952 So. 2d 484, 498 (Fla. 2006).

407 *Murray v. State*, 3 So. 3d 1108 (Fla. 2009)(rehearing denied, post-conviction relief denied, request denied, and US cert. denied).

408 *Murray v. State*, 3 So. 3d 1108, 1115 (Fla. 2009)(internal citations and quotations omitted).

ing, no evidence offered by the defendant for the purpose of establishing that defense shall be admitted in the case unless advance notice in writing of the defense shall have been given by the defendant.[409]

The defendant shall give notice of intent to rely on the defense of insanity no later than 15 days after the arraignment or the filing of a written plea of not guilty in the case when the defense of insanity is to be relied on at trial or no later than 15 days after being brought before the appropriate court to answer to the allegations in a violation of probation or community control proceeding. If counsel for the defendant shall have reasonable grounds to believe that the defendant may be incompetent to proceed, the notice shall be given at the same time that the motion for examination into the defendant's competence is filed. The notice shall contain a statement of particulars showing the nature of the insanity the defendant expects to prove and the names and addresses of the witnesses by whom the defendant expects to show insanity, insofar as is possible.[410]

ii. Involuntary vs. Voluntary Intoxication

"Involuntary intoxication has been recognized as a defense to negate intent under other circumstances. *Brancaccio v. State*, 698 So. 2d 597 (Fla. 4th DCA); *rev. denied*, 705 So. 2d 10 (Fla. 1997) (instruction should have been given in first degree murder case where there was evidence that defendant's conduct resulted from a side effect of prescribed Zoloft); and *Boswell v. State*, 610 So. 2d 670 (Fla. 4th DCA 1992) (instruction should have been given in shooting case where evidence showed defendant's conduct resulted from a reaction to prescribed Xanax and Prozac combined with cirrhosis of the liver)."[411] While the Fourth DCA has specifically recognized the defense of involuntary intoxication, the Florida Supreme Court has not had to address it specifically. "Assuming, without deciding, that the defense of involuntary intoxication does exist in Florida," the Florida Supreme Court held that a defendant is not entitled to an involuntary intoxication jury instruction when such a defense is not supported by the evidence.[412]

Voluntary intoxication resulting from the consumption, injection, or other use of alcohol or other controlled substances is **not** a defense to any offense proscribed by law. Evidence of a defendant's voluntary intoxication is not admissible to show that the defendant lacked the specific intent to commit an offense and is not admissible to show that the defendant was insane at the time of the offense, except when the consumption, injection, or use of a controlled substance was pursuant to a lawful prescription issued to the defendant by a licensed medical practitioner.[413]

409 Fla. R. Crim. P. 3.216(b) Notice of Intent to Rely on Insanity Defense.
410 Fla. R. Crim. P. 3.216(c) Time for Filing Notice.
411 *Carter v. State*, 710 So. 2d 110 (Fla. 4th DCA 1998).
412 *Mora v. State*, 814 So. 2d 322 (Fla. 2002).
413 Section 775.051, Florida Statutes (2010).

iii. Mistake of Fact

The perpetrator's ignorance of the victim's age, the victim's misrepresentation of his or her age, or the perpetrator's bona fide belief of the victim's age cannot be raised as a defense in a prosecution under section 800.04, Florida Statutes.[414]

iv. Consent

In sexual violence cases, whether or not the victim consented to the act or acts at issue is often the main fact in question. While a lack of consent is indeed an element to a charge of sexual battery, consent is irrelevant in many cases involving victims who are children.

Evidence of the victim's mental incapacity or defect, if any, may be considered in determining whether there was an intelligent, knowing, and voluntary consent.

Neither the victim's lack of chastity nor the victim's consent is a defense to the crimes proscribed by section 800.04, Florida Statutes.[415]

"Section 794.011(8), the sexual battery statute that applies to defendants in a position of familial and custodial authority, provides that the 'willingness or consent of the victim . . . is not a defense to prosecution under this subsection.' It is thus clear that the Legislature expressly precluded defendants from asserting the minor's consent as a defense to section 794.011(8)."[416] Moreover, the fact that a young victim does not resist is not the same as willing participation.[417]

While consent is not a defense to sexual violence crimes involving minors, a minor's consent or willing participation may be used to argue for a downward departure. "[T]rial judges are not prohibited as a matter of law from imposing a downward departure based on a finding that the victim was an initiator, willing participant, aggressor, or provoker of the incident. Of course, in determining whether this mitigator applies when the victim is a minor, the trial court must consider the victim's age and maturity and the totality of the facts and circumstances of the relationship between the defendant and the victim."[418]

414 Section 800.04(3), Florida Statutes (2010).
415 Section 800.04(2), Florida Statutes (2010).
416 *State v. Rife*, 789 So. 2d 288 (Fla. 2001).
417 *Id*.
418 *State v. Rife*, 789 So. 2d 288, 296 (Fla. 2001) (internal quotation omitted).

b. Other Defenses

i. Alibi

What is an alibi defense?

A true alibi defense as contemplated by rule 3.200 "necessarily means that the defendant will attempt affirmatively to establish not only that he was not at the scene of the crime involved but that, in fact, at the time thereof he was elsewhere, at a particular place sufficiently distant from the scene of the crime, so that he could not possibly have been present at its perpetration."[419] A defense predicated upon testimony that, for example, the defendant has been misidentified as the perpetrator of the offense or that the defendant was present at the scene but not involved in the commission of the offense is not an alibi defense.[420]

What are the notice requirements for alibi under Florida Rule of Criminal Procedure 3.200?

Rule 3.200 requires the defendant to provide the state with notice of his or her intent to claim the defense of alibi upon the prosecuting attorney's written demand specifying as particularly as is known the place, date, and time of the commission of the crime charged. The defendant's "notice of alibi" must be filed and served on the prosecuting attorney not less than 10 days before trial or such other time as the court directs and must contain the following information:

1. Notice to the prosecuting attorney of the defendant's intent to rely upon the claim of alibi;
2. Specific information as to the place at which the defendant claims to have been at the time of the alleged offense; and
3. The names and addresses of the witnesses, as particularly as is known to the defendant or the defendant's attorney, by whom the defendant proposes to establish the alibi.[421]

Not more than 5 days, or any other time as the court directs, after receipt of the defendant's witness list, the prosecuting attorney shall file and serve on the defendant the names and ad-

419 *State ex rel Mitchell v. Walker*, 294 So. 2d 124 (Fla. 2d DCA 1974); *see also Rostano v. State*, 678 So. 2d 1371 (Fla. 4th DCA 1996) *quoting Gray v. United States*, 549 A. 2d 347 (D.C. 1988) ("[I]t matters not whether the defendant was in the house next door or halfway across town; if he or she was not at the exact scene of the crime, the defendant has an alibi.').

420 *State ex rel Mitchell v. Walker* 294 So. 2d 124 (Fla. 2d DCA 1974); *Dunlap v. State*, 324 So. 2d 692 (Fla. 1st DCA 1976).

421 Fla. R. Crim. P. 3.200 Notice of Alibi.

dresses, as particularly as are known to the prosecuting attorney, the witnesses the state proposes to offer in rebuttal to discredit the defendant's alibi.[422]

Both the prosecuting attorney and defendant are under a continuing duty to promptly disclose the names and addresses of additional witnesses who come to the attention of either party subsequent to filing their respective witness lists.[423]

What are the possible consequences for failing to comply with the notice requirements of Florida Rule of Criminal Procedure 3.200?

If the defendant fails to file and serve a copy of the notice of alibi, the court may exclude evidence offered by the defendant for the purpose of providing an alibi, except the court may not exclude the defendant's own testimony regarding an alibi claim.[424] The court may exclude the witnesses of the prosecuting attorney or the defendant for their respective failure to provide the names and addresses of those witnesses.[425] Exclusion, however, is not mandatory - "[f]or good cause shown the court may waive the requirements of this rule."[426]

"[A] trial court's failure to conduct a good cause hearing regarding compliance with the notice of alibi rule should be reviewed to determine whether the defendant was harmed by such a failure."[427]

May a court decline to instruct the jury on an alibi defense if the defendant has failed to comply with the requirements of rule 3.200?

"A criminal defendant is entitled to have the jury instructed on the law applicable to his or her theory of defense where there is *any* evidence to support it, no matter how weak or flimsy."[428] Even where a defendant fails to comply with Rule 3.200, the court may not refuse to instruct the jury on the alibi defense if there is evidence supporting the instruction (i.e., a trial court may not refuse the instruction as a sanction).[429]

ii. Duress

What is a defense of duress?

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422 *Id*.
423 *Id*.
424 *White v. State*, 356 So. 2d 56 (Fla. 4th DCA 1978); Fla. R. Crim. P. 3.200.
425 Fla. R. Crim. P. 3.200 Notice of Alibi.
426 *Fedd v. State*, 461 So. 2d 1384 (Fla. 1st DCA 1984); Fla. R. Crim. P. 3.200.
427 *Small v. State*, 630 So. 2d 1087 (Fla. 1994); *Perez v. State*, 648 So. 2d 715 (Fla. 1995).
428 *Wright v. State*, 705 So. 2d 102 (Fla. 1998).
429 *Ivory v. State*, 718 So. 2d 233 (Fla. 4th DCA 1998).

The affirmative defense of duress is one that excuses a defendant for engaging in criminal conduct because the defendant chose the lesser of two evils confronting him or her.[430] The defense applies when "a person has threatened to inflict bodily harm on the defendant if the latter does not commit a certain crime."[431] [432]

What is the defendant's burden in establishing a defense of duress?

"The defendant has the burden of going forward with evidence that the affirmative defense exists. Once the defendant has presented competent evidence of the existence of the defense, the burden of proof remains with the state, and the state must then prove the nonexistence of the defense beyond a reasonable doubt."[433]

To be establish the defense of duress, the defense must demonstrate the following six elements:

1) the defendant reasonably believed that a danger or emergency existed that he did not intentionally cause;
2) the danger or emergency threatened significant harm to himself or a third person;
3) the threatened harm must have been real, imminent, and impending;
4) the defendant had no reasonable means to avoid the danger or emergency except by committing the crime;
5) the crime must have been committed out of duress to avoid the danger or emergency; and
6) the harm the defendant avoided outweighs the harm caused by committing the crime.[434]

A threatened harm that is "impending" is not only one that is "temporal, i.e. about to take place, but includes whether there is, no matter the lapse of time, a reasonable opportunity to escape the compulsion without committing the crime."[435]

"An 'imminent' danger is one which cannot be guarded against by calling for the protection of the law. Thus, the defense does not apply where a defendant has an opportunity to escape

430 *Driggers v. State*, 917 So. 2d 329 (Fla. 5th DCA 2005).
431 *Youngblood v. State*, 515 So. 2d 402, 404 (Fla. 1st DCA 1987), *review denied*, 520 So. 2d 587 (Fla. 1988).
432 For a brief analysis of the difference between the defense of duress and necessity, see *Hunt v. State*, 753 So. 2d 609 (Fla. 5th DCA 2000).
433 *Wright v. State*, 442 So. 2d 1058 (Fla. 1st DCA 1983); *see also Hansman v. State*, 679 So. 2d 1216 (Fla. 4th DCA 1996).
434 *Mickel v. State*, 929 So. 2d 1192 (Fla. 4th DCA 2006).
435 *Wright v. State,* 402 So. 2d 493, 497 n. 6 (Fla. 3d DCA 1981).

the compulsion without committing the crime."[436]

"The defense of duress is not available if the defendant intentionally or recklessly placed himself in a situation in which it was reasonably foreseeable that he would be subject to coercion."[437]

4. Sending the Case to the Jury

a. Jury Instructions

The standard jury instructions are the best place to start when considering what instructions to give to the jury, but they are really only the starting point. The standard jury instructions essentially track the language of the statutes, however, each defendant is tried based upon an information filed by the state. In the *Eaton* case, the court erred in instructing the jury that it could convict defendant of sexual battery by finding sexual union *or* penetration, even though that is the language used in the statute, because the information alleged only sexual penetration. "The law is well settled in Florida that where an offense can be committed in more than one way, the trial court commits fundamental error when it instructs the jury on an alternative theory not charged in the information."[438] It is essential to instruct the jury based on the offense(s) charged in the information.

Judges are also asked to instruct on necessary and permissive lesser included offenses and attempts. The starting point here is the Schedule of Lesser Included Offenses to see whether the requested lesser offense is really a lesser included offense. The Schedule of Lesser Included Offenses is instructive but it is not necessarily dispositive of the issue. When a permissive lesser included offense exists, judges must still decide whether the information and the evidence presented at trial actually support the lesser offense before giving an instruction thereon. For example, "[a] defendant charged under section 800.04(4), Florida Statutes, with lewd or lascivious battery on a child twelve years of age or older but less than sixteen years of age is <u>not</u> entitled to an instruction on simple battery when the information did not allege lack of consent and the evidence presented at trial did not support lack of consent."[439]

An instruction for attempt also requires sufficient evidence to have been presented at trial that would support an attempt of the offense charged. In *Brock*, the evidence presented at trial established either a completed sexual battery or no crime at all, so a jury instruction

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436 *Id*.

437 *Salas v. State*, 972 So. 2d 941 (Fla. 5th DCA 2008) *citing* Torcia, WHARTON'S CRIMINAL LAW (15th ed.) § 52, Duress.

438 *Eaton v. State*, 908 So. 2d 1164, (Fla. 1st DCA 2005).

439 *Khianthalat v. State*, 974 So. 2d 359 (Fla. 2008) (emphasis in original).

for attempt under rule 3.510(a) was reversible error.[440] "When a judge gives an instruction on a lesser-included offense over a defendant's objection and no evidence has been presented to support that instruction, the judge abuses his or her discretion, and error occurs."[441]

Following rule 3.510 and referencing it in your decision should help make for accurate determinations of which instructions to give and not give, and should prevent error or offer your decisions support on appeal.

Rule 3.510. Determination of Attempts and Lesser Included Offenses

On an indictment or information on which the defendant is to be tried for any offense the jury may convict the defendant of:

> (a) an attempt to commit the offense if such attempt is an offense and is supported by the evidence. The judge shall not instruct the jury if there is no evidence to support the attempt and the only evidence proves a completed offense; or
>
> (b) any offense that as a matter of law is a necessarily included offense or a lesser included offense of the offense charged in the indictment or information and is supported by the evidence. The judge shall not instruct on any lesser included offense as to which there is no evidence.

b. A Note on Lewd and Lascivious Conduct

Lewd and lascivious conduct is ***not*** a lesser included offense of sexual battery.

The issue of whether or not lewd and lascivious conduct is a lesser included offense of sexual battery is argued time and time again. This matter is well settled, and the clear answer is that lewd and lascivious conduct is not a lesser included offense of sexual battery. The statutory elements of the offenses are different so the offenses are mutually exclusive by law. The Schedule of Lesser Included Offenses, while not dispositive of the matter it is at least instructive, does ***not*** list lewd and lascivious conduct as a lesser included offense of sexual battery. Lastly, in case after case lewd and lascivious conduct has been held to <u>not</u> be a lesser included offense of sexual battery and the refusal to give a jury instruction for lewd and lascivious conduct in a case for sexual battery has routinely been upheld.[442]

In ***one*** instance, there is an exception. Despite its current absence from the Schedule of Lesser Included Offenses for sexual battery with a deadly weapon or use of physical force

440 *See*, *Brock v. State*, 954 So. 2d 87 (Fla. 1st DCA 2007).
441 *Id.* at 88.
442 *See, Welsh v. State,* 850 So. 2d 467, (Fla. 2003).

likely to cause serious personal injury, lewd or lascivious battery under section 800.04(4)(a), Florida Statutes is a permissive lesser included offense of a sexual battery charged under section 794.011(3)."[443]

c. Supplemental or Clarifying Instructions

When a party asks for a supplemental or clarifying instruction that is out of the ordinary, it is incumbent upon the judge to determine whether the requested instruction is relevant, necessary, and not prejudicial. A request for an instruction simply based on a statute may seem logical and reasonable, however, there are still issues for the judge to consider. In *Brown*, a judge gave an instruction pursuant to section 794.022(1), Florida Statutes that the testimony of the victim did not need to be corroborated in a sexual battery prosecution.[444] While the instruction is merely based on the language in the statute it was held to be an improper comment on the testimony by the judge.[445] While the attorneys could raise such an issue during their closing arguments, it was improper for the judge to instruct the jury on the issue.[446]

443 *Williams v. State,* 957 So. 2d 595 at 598 (Fla. 2007).
444 *Brown v. State*, 11 So. 3d 428 (Fla. 2nd DCA 2009).
445 *Id*.
446 *Id*.

D. Post Trial Issues

1. Post Trial Motions

a. Motion for New Trial

When a defendant has been found guilty by the court or a guilty verdict has been rendered, the defendant may motion for a new trial.[447] The defendant has 10 days from the day the verdict is rendered to file a motion for new trial or arrest of judgment.[448] The court has broad discretion to grant a new trial, whether or not the defendant makes a motion.[449] "A motion for new trial is addressed to the sound discretion of the trial court. Unless the appellant can clearly show an abuse of discretion, the trial court's action will not be disturbed."[450]

Judges should grant a new trial if certain grounds apply or if prejudice is established. The court shall grant a new trial if any of the following grounds is established:

1) The jurors decided the verdict by lot;
2) The verdict is contrary to law or the weight of the evidence; or
3) New and material evidence, which, if introduced at the trial would probably have changed the verdict or finding of the court, and which the defendant could not with reasonable diligence have discovered and produced at the trial, has been discovered.[451]

If substantial rights of the defendant have been prejudiced by any of the following, the court shall grant a new trial:

1) The defendant was not present at any proceeding at which the defendant's presence is required by these rules;
2) The jury received any evidence out of court, other than that resulting from an authorized view of the premises;
3) The jurors, after retiring to deliberate upon the verdict, separated without leave of court;

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447 Fla. R. Crim. P. 3.580 Court May Grant New Trial.
448 Fla. R. Crim. P. 3.590(a) Time for Filing in Noncapital Cases.
449 *Robinson v. State*, 989 So. 2d 747, 750 (Fla. 2nd DCA 2008), citing *Nigro v. Brady*, 731 So. 2d 54, 56 (Fla. 4th DCA 1999).
450 *Stone v. State*, 616 So. 2d 1041, 1043 (Fla. 4th DCA 1993).
451 Fla. R. Crim. P. 3.600(a) Grounds for Granting.

4) Any juror was guilty of misconduct;

5) The prosecuting attorney was guilty of misconduct;

6) The court erred in the decision of any matter of law arising during the course of the trial;

7) The court erroneously instructed the jury on a matter of law or refused to give a proper instruction requested by the defendant; or

8) For any other cause not due to the defendant's own fault, the defendant did not receive a fair and impartial trial.[452]

"Rule 3.600(a)(2) thus enables the trial judge to weigh the evidence and determine the credibility of witnesses. Thus, under rule 3.600(a)(2) the test is the weight, as distinguished from the sufficiency, of the evidence. Weight is a determination of the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other."[453] "'To obtain a new trial based on newly discovered evidence, a defendant must establish two things: First, the defendant must establish that the evidence was not known by the trial court, the party, or counsel at the time of trial and that the defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial."[454] In determining whether newly discovered evidence requires a new trial, the trial court must:

- consider all newly discovered evidence which would be admissible;
- evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial;
- consider evidence that goes to the merits of the case as well as impeachment evidence;
- consider a witness's newly recanted testimony;
- determine whether this evidence is cumulative to other evidence in the case;
- determine whether the evidence is material and relevant; and
- determine whether there are any inconsistencies in the newly discovered evidence.[455]

452 Fla. R. Crim. P. 3.600(b) Grounds for Granting if Prejudice Established.

453 *State v. Shearod*, 992 So. 2d 900 (Fla. 2nd DCA 2008)(internal citations and quotations removed), but *see also*, *Tibbs v. State*, 397 So. 2d 1120 (Fla. 1981).

454 *Hurst v. State*, 18 So. 3d 975, 992 (Fla. 2009), *see also*, *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998).

455 *Id*. at 992.

"In reviewing the circuit court's decision as to a newly discovered evidence claim following an evidentiary hearing, where the court's findings are supported by competent, substantial evidence, we will not substitute our judgment for that of the trial court on questions of fact, credibility of the witnesses, or the weight to be given to the evidence by the trial court."[456] The standard for review is an abuse of discretion.[457]

A motion for a new trial should ***not*** be granted if the court believes that the evidence is not sufficient to sustain the verdict, but ***is*** sufficient to sustain a finding of guilt of a lesser degree of the offense or a necessarily included lesser offense. If this is the case, the court shall find or adjudge the defendant guilty of the lesser degree or necessarily included lesser offense unless a new trial is warranted due to some other prejudicial error.[458]

b. Arrest of Judgment

The court shall grant a motion in arrest of judgment only on one or more of the following grounds:

a) The indictment or information on which the defendant was tried is so defective that it will not support a judgment of conviction;

b) The court is without jurisdiction of the cause.

c) The verdict is so uncertain that it does not appear therefrom that the jurors intended to convict could be convicted under the indictment or information under which the defendant was tried; or

d) The defendant was convicted of an offense for which the defendant could not be convicted under the indictment or information under which the defendant was tried.[459]

Remember, however, that "[n]o indictment or information, or any count thereof, shall be dismissed or judgment arrested, or new trial granted on account of any defect in the form of the indictment or information or of misjoinder of offenses or for any cause whatsoever, unless the court shall be of the opinion that the indictment or information is so vague, indistinct, and indefinite as to mislead the accused and embarrass him or her in the preparation of a defense or expose the accused after conviction or acquittal to substantial danger of a new prosecution for the same offense."[460] "Courts should uphold indictments and informations if they are in

456 *Id*. at 993.
457 *Id*. at 992.
458 Fla. R. Crim. P. 3.620 When Evidence Sustains Only Conviction of Lesser Offense.
459 Fla. R. Crim. P. 3.610 Motion for Arrest of Judgment; Grounds.
460 Fla. R. Crim. P. 3.140(o) Defects and Variances.

substantial compliance with the statutory requirements. *See Barrentine v. State*, 72 Fla. 1, 72 So. 280, 282 (Fla. 1916). We noted in *Chicone v. State*, 684 So. 2d 736, 744 (Fla. 1996), because the legislature has the primary authority for defining crimes, it will be a rare occasion that an information tracking the language of the statute defining the crime will be found to be insufficient to put the accused on notice of the misconduct charged. In addition to using language from the statute, the information in this case referenced the specific section of the criminal code which sufficiently details all the elements of the offense. In *DuBoise v. State*, 520 So. 2d 260, 265 (Fla. 1988), we held that when the information references a specific section of the criminal code which sufficiently details all the elements of the offense, the State's failure to include an element of a crime does not automatically render an information so defective that it will not support a judgment of conviction."[461]

c. Release Pending Sentencing

"If a verdict of guilty is rendered the defendant shall, if in custody, be remanded. If the defendant is at large on bail, the defendant may be taken into custody and committed to the proper official or remain at liberty on the same or additional bail as the court may direct."[462]

"Clearly, it was the intent of both the legislature and this Court to deny postconviction bail to a person convicted of sexual battery upon a child of the age of eleven years or younger. Our holding in *Buford* that death is not an available penalty did not change the premise for the legislation or rule in that regard."[463]

Defendants who have been convicted of non-capital crimes may be released pending review of the conviction, at the discretion of either the trial or appellate court, so long as they have not previously been convicted of a felony or have other felony charges pending.[464] The court **must** make writing findings stating its reasons if it denies a request for post-trial release.[465]

> If the defendant is released after conviction and on appeal, the condition shall be:
>
> (1) the defendant will duly prosecute the appeal; and
>
> (2) the defendant will surrender himself or herself in execution of the judgment or sentence on its being affirmed or modified or on the appeal being dismissed; or in case the judgment is reversed and the cause remanded for a new trial, the defendant will appear in the court to which the cause may be remanded for a new trial, that the defendant

461 *Price v. State*, 995 So. 2d 401, 405 (Fla. 2008).
462 Fla. R. Crim. P. 3.550 Disposition of Defendant.
463 *Batie v. State*, 534 So. 2d 694, 695 (Fla. 1988).
464 Fla. R. Crim. P. 3.691(a) Post-Trial Release; When Authorized.
465 Fla. R. Crim. P. 3.691(b) Written Findings.

will appear in the court to which the cause may be remanded and submit to the orders and process thereof and will not depart the jurisdiction of the court without leave.[466]

Additionally, the court shall approve the sufficiency and adequacy of the bond, its security, and sureties, prior to the release of the defendant.[467]

2. Sentencing

Sentencing is one area in which sexual violence cases have many unique distinctions from other criminal offenses. Sexual offenders are often subject to penalties that exceed temporary physical incarceration. When sentencing a sexual offender, judges have to consider several aspects of a case to make an appropriate and informed sentencing determination. So what are some of the considerations a judge may have for determining a sentence in a sexual violence case, and are those considerations fair and appropriate?

Should convicted rapists have differing sentences because they either knew or did not know the victim when they committed their criminal assaults? While it may be a natural response to consider a rapist who is a stranger to the victim as deserving greater punishment, is there really a difference in the criminal choices and behavior between an assailant who is a stranger or one who is known to the victim? When victims were asked about the perception of a lesser sentence for a known perpetrator, they often indicated that this type of crime was more devastating to them due to the fact that the person was frequently still in their life in some way (often a relative or friend of the family) which caused the victims continued distress, isolation, and even derision from those who know both parties. Review the "Stranger vs. Nonstranger Rape" section supra for further discussion of this issue.

Race has also been a factor in sentencing in many types of cases, though it is always an inappropriate consideration whether conscious or not. A study in Dallas looked at the various sentences given to perpetrators of sexual violence based on the race of the perpetrator and the victim.

466 Fla. R. Crim. P. 3.691(e) Conditions of Release.
467 Fla. R. Crim. P. 3.691(f) Approval of Bond.

Dallas Times Herald from 1991		
Offender's Race	Victim's Race	Median Sentence
Black	White	19
White	Black	10
White	White	5
Hispanic	Hispanic	2.5
Black	Black	1

Black offenders who committed crimes against white victims were more likely to receive the highest sentences, while black offenders who committed crimes against black victims received dramatically lower sentences.

Are victims any more or less victimized by the race of the perpetrator? Are certain victims or perpetrators more or less "worthy" of justice based on their race? Obviously, neither the race of the victim nor the race of the perpetrator should be a factor that is considered in the sentencing. The crime is the same regardless of the races of those involved. Sentencing perpetrators based on their race and/or the race of the victim undermines the goal of applying the law equally, and it arbitrarily values the life and wellbeing of one victim over another. In fact, the Florida Rules of Criminal Procedure expressly warn against such considerations. "Sentencing should be neutral with respect to race, gender, and social and economic status."[468]

So what factors should be considered in sentencing? Certainly a sentencing score sheet should be the first thing to consider in deciding upon a sentence. Factors such as the nature of the crime, brutality, victim injury, disregard for human life, and minimum/maximum sentencing guidelines will be included on the score sheet. Other aspects the court is likely to hear include whether there are any mitigating or aggravating factors, and input from the victim, their family, and law enforcement.

a. Must Allow Argument

This is one of the key issues that will get a judge's ruling overturned on appeal. Judges must allow reasonable time to prepare and to present arguments for sentencing. It is natural to want to move cases along and keep a docket under control, however, wanting to move matters too quickly can lead to error.

468 Fla. R. Crim. P. 3.701(b)(1) Sentencing Guidelines; Statement of Purpose.

At a sentencing hearing, "the court shall entertain submissions and evidence by the parties that are relevant to the sentence."[469] Rule 3.720(b) has been interpreted to impose a mandatory sentencing hearing that entitles the defendant to submit evidence relevant to the sentence.[470] In some cases it may be appropriate to move to sentencing directly following a guilty verdict, but if either side objects based on not having a scoresheet, not being on notice that sentencing would directly follow a verdict, or not having a chance to present mitigation evidence, the judge should seriously consider those objections before moving forward. Not allowing the defendant to present relevant evidence as to sentencing when requested is reversible error.[471]

b. Degree of Offense

While it would seem to go without saying, it is essential to be mindful of the degree of the offense for which the defendant was convicted and the maximum possible penalties for that offense. In *Jones v. State,* the court ruled that the trial court erred in summarily denying defendant's rule 3.850 motion regarding the sentence on defendant's conviction for attempted sexual battery with great force because that crime was a second degree felony and not a first degree felony; thus, defendant's life sentence with a 30-year minimum mandatory exceeded the maximum provided by sections 775.082 and 775.084, Florida Statutes (2009).[472]

c. Capital Offenses

A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony.[473] Similarly, a person who is in a position of familial or custodial authority to a person less than 18 years of age commits a capital or life felony:

1) by engaging in any act which constitutes sexual battery with that person while the person is less than 12 years of age, or
2) by injuring the sexual organs of such person in an attempt to commit sexual battery.[474]

Though the term "capital felony" is still used in the sexual battery statute, the Florida Supreme Court has ruled that "a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment

469 Fla. R. Crim. P.3.720(b) Sentencing Hearing.
470 *State v. Scott*, 439 So. 2d 219, 221 (Fla. 1983).
471 *See Pringle v. State*, 6 So. 3d 673 (Fla. 2nd DCA 2009), *See also, Davenport v. State*, 787 So. 2d 32 (Fla. 2nd DCA 2001).
472 *Jones v. State,* 889 So. 2d 172 (Fla. 4th DCA 2004).
473 Section 794.011(2)(a), Florida Statutes (2010).
474 Section 794.011(8)(c), Florida Statutes (2010).

as cruel and unusual punishment."[475] Sexual offenders are ineligible for the death penalty, even when the statute uses the term "capital." If a defendant commits another capital offense, such as murder, however, during or immediately after the occurrence of a sexual battery, a sentence of death may be justified on that count, even though the death penalty could not be imposed for the sexual battery alone.[476]

The death penalty for capital sexual offenses has been replaced by the imposition of a life sentence. Capital felonies not resulting in the death penalty are subject to a mandatory sentence of life imprisonment without the possibility of parole.[477] A life sentence without parole for capital sexual battery on a minor does not violate the Eighth Amendment.[478]

Attempted capital sexual battery is a first degree felony punishable by a maximum sentence of 30 years. Any sentence in excess of that maximum, including the term of probation, will be reversed.[479]

d. Departure from Sentencing Guidelines

Depending on the date or dates of the offense, a defendant will be subject to one or more set of sentencing guidelines and/or the criminal punishment code. The criminal punishment code applies to all felonies, except capital felonies, committed on or after October 1, 1998.[480] "If an offender is before the court for sentencing for more than one felony and the felonies were committed under more than one version or revision of the guidelines or Criminal Punishment Code, separate scoresheets must be prepared and used at sentencing. The sentencing court may impose such sentence concurrently or consecutively."[481] "The lowest permissible sentence is the minimum sentence that may be imposed by the trial court, absent a valid reason for departure.[482] "Any downward departure from the lowest permissible sentence, as calculated according to the total sentence points under section 921.0024, Florida Statutes, is prohibited unless there are circumstances or factors that reasonably justify the downward departure."[483] Mitigating circumstances under which a departure from the lowest permissible sentence is reasonably justified include, but are not limited to:

a) The departure results from a legitimate, uncoerced plea bargain;

475 *Buford v. State*, 403 So. 2d 943 (Fla. 1981).

476 *See*, *Duckett v. State*, 568 So. 2d 891 (Fla. 1990) (The defendant's sentences of death for first-degree murder and life imprisonment for the mandatory minimum of twenty-five years for sexual battery were upheld.)

477 Section 775.082(1), Florida Statutes (2010), and *see*, *Gibson v. State*, 721 So. 2d 363 (Fla. 2nd DCA 1998).

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

479 *See*, *Adams v. State*, 901 So. 2d 275 (Fla. 5th DCA 2005), and *Forshee v. State*, 579 So. 2d 388 (Fla. 2nd DCA 1991).

480 Section 921.002, Florida Statutes (2010), and Fla. R. Crim. P. 3.704(a) The Criminal Punishment Code; Use.

481 Fla. R. Crim. P. 3.704(d)(3), The Criminal Punishment Code; General Rules and Definitions.

482 Fla. R. Crim. P. 3.704(d)(25), The Criminal Punishment Code; General Rules and Definitions.

483 Fla. R. Crim. P. 3.704(d)(27), The Criminal Punishment Code; General Rules and Definitions.

b) The defendant was an accomplice to the offense and was a relatively minor participant in the criminal conduct;

c) The capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired;

d) The defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction or for a physical disability, and the defendant is amenable to treatment;

e) The need for payment of restitution to the victim outweighs the need for a prison sentence;

f) The victim was an initiator, willing participant, aggressor, or provoker of the incident;

g) The defendant acted under extreme duress or under the domination of another person;

h) Before the identity of the defendant was determined, the victim was substantially compensated;

i) The defendant cooperated with the state to resolve the current offense or any other offense;

j) The offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse;

k) At the time of the offense the defendant was too young to appreciate the consequences of the offense; or

l) The defendant is to be sentenced as a youthful offender.[484]

A defendant's substance abuse or addiction, including intoxication at the time of the offense, is **not** a mitigating factor and does not, under any circumstances, justify a downward departure from the permissible sentencing range.[485]

"If a sentencing judge imposes a sentence that is below the lowest permissible sentence, it is a departure sentence and **must** be accompanied by a written statement by the sentencing court delineating the reasons for the departure, filed within 7 days after the date of sentencing. A written transcription of orally stated reasons for departure articulated at the time sentence was imposed is sufficient if it is filed by the court within 7 days after the date of sentencing. The sentencing judge may also list the written reasons for departure in the space provided on the

484 Section 921.0026(2), Florida Statutes (2010).

485 Section 921.0026(3), Florida Statutes (2010).

Criminal Punishment Code scoresheet."[486] "The written statement delineating the reasons for departure must be made a part of the record. The written statement, if it is a separate document, must accompany the scoresheet required to be provided to the Department of Corrections under subsection 921.0024(6)."[487]

Under the Criminal Punishment Code the statutory maximum penalty is the upper limit for sentencing so there are no "upward departures" or "enhancements" in these cases. Should you have a case that pre-dates the Criminal Punishment Code, then there are some additional factors to consider. Premeditation or calculation is *not* an inherent component of sexual battery, lewd or lascivious conduct in the presence of a child, or a lewd act upon a child, so evidence of heightened premeditation or calculation would be a valid reason for imposing a departure sentence.[488] "Where a court determines that a defendant stood in a position of familial authority to a victim and by virtue of that relationship a special trust existed between the defendant and the victim which the defendant abused, there exists a valid reason for departure."[489] Additional reasons for imposing an enhanced penalty include when the defendant is a habitual or violent felony offender or when the defendant is a repeat sexual batterer.

"[W]hen a departure sentence is grounded on both valid and invalid reasons … the sentence should be reversed and the case remanded for resentencing unless the state is able to show beyond a reasonable doubt that the absence of the invalid reasons would not have affected the departure sentence."[490]

e. Victim Participation at Sentencing

The Constitution of the State of Florida provides, "Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused."[491]

At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has been convicted of any felony or who has pleaded guilty or nolo contendere to any crime, the sentencing court **shall** permit the victim of the crime for which the defendant is being sentenced, the victim's parent or guardian if the victim is a minor, the lawful representative of the victim or of the victim's parent or guardian if the victim is a minor, or the next of kin of the victim if the victim has died from causes related to the crime, to appear before the sentencing court for the purpose of making a statement under oath for the record, and submit a written

486 Fla. R. Crim. P. 3.704(d)(27)(A), The Criminal Punishment Code; General Rules and Definitions (emphasis supplied).
487 Fla. R. Crim. P. 3.704(d)(27)(B), The Criminal Punishment Code; General Rules and Definitions.
488 *Marcott v. State*, 650 So. 2d 977 (Fla. 1995). *See also*, *State v. Obojes*, 604 So. 2d 474 (Fla. 1992).
489 *Gopaul v. State*, 536 So. 2d 296, 298 (Fla. 3rd DCA 1988).
490 *Albritton v. State*, 476 So. 2d 158, 169 (Fla. 1985).
491 Art. I, § 16 (b), Fla. Const.

statement under oath to the office of the state attorney, which statement shall be filed with the sentencing court.[492] For a written statement to be properly accepted by the court, the victim or family member who provides the written statement must either appear before the sentencing court under oath or submit the written statement under oath to the state attorney.[493]

Victims and their next of kin are not the only ones allowed to testify in the sentencing phase. The statute permitting victims and family members to testify at sentencing should not be construed to conflict with Fla. R. Crim. P. 3.720 which directs the court to "entertain submissions and evidence by the parties that are relevant to the sentence."[494]

f. Resentencing

If a matter is returned for resentencing, the new sentence must be made by the same judge who entered the original sentence unless it is necessary or an emergency. In *Durbrow v. State*, the defendant was improperly resentenced by a successor judge. The court noted that pursuant to rule 3.700(c)(1), it was improper for a successor judge to sentence a defendant unless the record showed that the substitution of judges was necessary or dictated by an emergency.[495] If a successor judge is assigned to preside over a resentencing in the case of the resignation, death, or impeachment of the presiding judge, the successor judge is required to become acquainted with the facts and to make an independent evaluation of the underlying case. This requirement prevents a successor judge from relying on their perceived intentions of the original judge.[496] A prisoner being resentenced is entitled to be present in the same manner and degree as when initially sentenced.[497]

Sometimes score sheet errors result in incorrect sentencing, in which case a defendant may be entitled to resentencing. Courts must apply the "would have been imposed" test to determine whether a score sheet error warrants resentencing. A score sheet error is harmless if the record shows that the trial court "would have imposed" the same sentence using a correct score sheet. If the sentence would have been the same anyway, the defendant is not entitled to resentencing.[498]

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492 Section 921.143(1), Florida Statutes (2010).
493 *Patterson v. State*, 994 So. 2d 428 (Fla. 1st DCA 2008).
494 *Smith v. State*, 982 So. 2d 69, 71 (Fla. 1st DCA 2008).
495 *Durbrow v. State*, 12 So. 3d 817 (Fla. 2nd DCA 2009).
496 *Snyder v. State*, 870 So. 2d 140 (Fla. 2nd DCA 2004).
497 *State v. Scott*, 439 So. 2d 219 (Fla. 1983).
498 *Ray v. State*, 987 So. 2d 155 (Fla. 1st DCA 2008).

3. Sexual Predator Designations

A "sexual offender" is essentially anyone who commits a sex crime as enumerated in section 943.0435, Florida Statutes (2010). Sexual offenders include many more people than the much narrower "sexual predator" designation. Courts are required to make certain written findings (the ages of the victim and the offender, the use of force or coercion, whether the offense involved sexual activity, and whether the offense involved unclothed genitals) in many sentencing proceedings involving sexual offenses, regardless of the designation of the offender.[499] While both sexual offenders and predators have requirements to register with and report to law enforcement and are subject to public notification requirements, designating someone as a "sexual predator" requires several additional steps by the court.

The Florida Legislature has found that "[r]epeat sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Sexual offenders are extremely likely to use physical violence and to repeat their offenses, and most sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. This makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant.

The high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:

1. Incarcerating sexual predators and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

2. Providing for specialized supervision of sexual predators who are in the community by specially trained probation officers with low caseloads, as described in ss. 947.1405(7) and 948.30. The sexual predator is subject to specified terms and conditions implemented at sentencing or at the time of release from incarceration, with a requirement that those who are financially able must pay all or part of the costs of supervision;

3. Requiring the registration of sexual predators, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public;

4. Providing for community and public notification concerning the presence of sexual predators; and

5. Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

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499 Section 943.0435(1)(a)2, Florida Statutes (2010).

The state has a compelling interest in protecting the public from sexual predators and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual predators to register and for requiring community and public notification of the presence of sexual predators.

It is the purpose of the Legislature that, upon the court's written finding that an offender is a sexual predator, in order to protect the public, it is necessary that the sexual predator be registered with the department and that members of the community and the public be notified of the sexual predator's presence. The designation of a person as a sexual predator is neither a sentence nor a punishment but simply a status resulting from the conviction of certain crimes.

It is the intent of the Legislature to address the problem of sexual predators by:

1. Requiring sexual predators supervised in the community to have special conditions of supervision and to be supervised by probation officers with low caseloads;

2. Requiring sexual predators to register with the Florida Department of Law Enforcement, as provided in this section; and

3. Requiring community and public notification of the presence of a sexual predator, as provided in this section."[500]

The Florida Sexual Predators Act enumerates the offenses that warrant an offender's classification as a sexual predator. This is an important and distinct criminal classification, as it has significant impact not only on sentencing, but on probation, post-release procedures, and civil commitment. The FSPA applies to crimes committed on or after October 1, 1993. Crimes that warrant the designation of sexual predator include capital, life, or first-degree felony violations of the statutorily enumerated offenses where the victim is a minor and the defendant is not the victim's parent or guardian.[501] Additionally, a felony violation, or attempt thereof, of an enumerated offense when the offender has previously been convicted or was found to have committed similar violations in this or other jurisdictions warrants a sexual predator designation.[502]

If an offender meets the criteria to be considered a sexual predator, the court **must** enter a written finding regarding the sexual predator designation.[503] The Florida Supreme Court has made clear that the Act does not enable trial courts to make discretionary designations of sexual predators.[504]

500 Section 775.21(3), Florida Statutes (2010).

501 Section 775.21(4)(a)(1), Florida Statutes (2010) (The list of enumerated offenses that qualify for sexual predator status is extensive and is best read directly from the statute.)

502 *Id*.

503 Section 775.21(5)(a), Florida Statutes (2010).

504 *Milks v. State*, 894 So. 2d 924, 929 (Fla. 2005).

Sexual predators must register with the Florida Department of Law Enforcement or with the Department of Corrections if in custody. The offender must remain registered for the duration of their life.[505] The FSPA also provides for community and public notification by law enforcement of a sexual predator's presence.[506]

When classifying crimes that warrant the sexual predator designation, judges should rely on the specific enumerated criteria when designating an offender as sexual predator. The Supreme Court has interpreted the legislative intent of the FSPA to indicate that "The *sole* criterion for determining whether a defendant must be designated a 'sexual predator' is whether the defendant was convicted of a qualifying offense."[507] When a defendant's offense does not meet the criteria under FSPA, it is reversible error to designate the offender a sexual predator.[508] The Act is therefore mandatory and trial judges do not have discretion in making that designation if one of the enumerated criteria is met. The Florida Supreme Court has ruled that the FSPA does not violate due process and is constitutional, despite the fact that that Act does not provide a pre-designation hearing on the offender's actual dangerousness and does not allow the trial court any discretion in making the designation.[509] A defendant may, however, file a rule 3.800(a) motion to challenge a sexual predator designation, but only in cases where it is apparent from the face of the record that the defendant did not meet the criteria for designation as a sexual predator.[510]

Additional **mandatory** conditions were put in place by the Florida Legislature in the 2010 legislative session. For anyone who has been designated a sexual offender or a sexual predator who must register with the Florida Department of Law Enforcement, the court **must** impose a prohibition on the person's "visiting schools, child care facilities, parks, and playgrounds, without prior approval from the offender's supervising officer. The court may also designate additional locations to protect a victim. The prohibition ordered under this paragraph does not prohibit the offender from visiting a school, child care facility, park, or playground for the sole purpose of attending a religious service as defined in s. 775.0861 or picking up or dropping off the offender's children or grandchildren at a child care facility or school."[511] Additionally, the court **must** impose a prohibition against "distributing candy or other items to children on Halloween; wearing a Santa Claus costume, or other costume to appeal to children, on or preceding Christmas; wearing an Easter Bunny costume, or other costume to appeal to children, on or preceding Easter; entertaining at children's parties; or wearing a clown costume; without prior approval from the court."[512]

505 Section 775.21(6), Florida Statutes (2010).
506 Section 775.21(7), Florida Statutes (2010).
507 *State v. Robinson*, 873 So. 2d 1205, 1212 (Fla. 2004)(emphasis in original).
508 *Lupianez v. State*, 909 So. 2d 600, (Fla. 2nd DCA 2005).
509 *Milks v. State*, 894 So. 2d 924 (Fla. 2005).
510 *Saintelien v. State*, 990 So. 2d 494 (Fla. 2008).
511 Section 948.30(4)(a), Florida Statutes (2010).
512 Section 948.30(4)(b), Florida Statutes (2010).

4. The Jessica Lunsford Act - Probation, Mandatory Conditions, and Electronic Monitoring

A recent addition to The Florida Statues is the Jessica Lunsford Act. The statute was adopted after the 2004 sexual assault and murder of nine-year-old Jessica Lunsford by a convicted sex offender, and it requires the imposition of electronic monitoring for certain enumerated offenders.

For a probationer or community controllee whose crime was committed on or after September 1, 2005, and who:

a) Is placed on probation or community control for a violation of chapter 794, s. 800.04(4), (5), or (6), s. 827.071, or s. 847.0145 and the unlawful sexual activity involved a victim 15 years of age or younger and the offender is 18 years of age or older;

b) Is designated a sexual predator pursuant to s. 775.21; or

c) Has previously been convicted of a violation of chapter 794, s. 800.04(4), (5), or (6), s. 827.071, or s. 847.0145 and the unlawful sexual activity involved a victim 15 years of age or younger and the offender is 18 years of age or older,

the court **must** order, in addition to any other provision of this section, **mandatory** electronic monitoring as a condition of the probation or community control supervision.[513]

Some have criticized residency restrictions and mandatory sentencing for sex offenders because of concerns that "forcing sex offenders to move to the fringe of their communities" may actually lead to a higher likelihood or re-offending.[514] Nevertheless, laws requiring sex offender registration and monitoring are becoming commonplace throughout the country.

5. Mandatory Court Costs

The Florida Legislature created the Rape Crisis Program Trust Fund to provide funding for rape crisis centers.[515] These funds are used exclusively to provide services to victims of sexual assault. Judges **must** impose a surcharge of $151 when a person pleads guilty or nolo contendere to, or is found guilty of, regardless of adjudication, a violation of:

Assault, § 784.011, Fla. Stat. (2010)

513 Section 948.30(3), Florida Statutes (2010).

514 Steven J. Wernick, *In Accordance with a Public Outcry: Zoning out of Sex Offenders Through Residence Restrictions in Florida*. 58 Fla. L. Rev. 1147, 1189.

515 Section 794.056(1), Florida Statutes (2010).

Aggravated Assault §784.021, Fla. Stat. (2010)

Battery; felony battery §784.03, Fla. Stat. (2010)

Felony battery; domestic battery by strangulation, §784.041, Fla. Stat. (2010)

Aggravated battery, §784.045, Fla. Stat. (2010)

Stalking, §784.048, Fla. Stat. (2010)

Assault or battery of law enforcement officers, firefighters, emergency medical care providers, public transit employees or agents, or other specified officers, §784.07, Fla. Stat. (2010)

Assault or battery on persons 65 years of age or older, §784.08, Fla. Stat. (2010)

Assault or battery on specified officials or employees §784.081, Fla. Stat. (2010)

Assault or battery by a person who is being detained in a prison, jail, or other detention facility upon visitor or other detainee, §784.082, Fla. Stat. (2010)

Assault or battery on code inspectors, §784.083, Fla. Stat. (2010)

Battery of child by throwing, tossing, projecting, or expelling certain fluids or materials, §784.085, Fla. Stat. (2010)

Sexual Battery, §794.011, Fla. Stat. (2010).[516]

Payment of the surcharge **shall be** a condition of probation, community control, or any other court-ordered supervision.[517]

The Rape Crisis Program Trust Fund mandatory cost is not currently applicable to juvenile delinquency cases.[518] The Court held that an adult sanction should not be imposed upon juveniles unless the legislature expressly makes the sanction applicable to juveniles.[519] Of course, defendants of any age are not subject to a cost that was not in effect at the time the offense was committed.[520]

Similarly, section 938.10, Florida Statutes provides for additional court costs to be imposed for certain crimes. If a person pleads guilty or nolo contendere to, or is found guilty of, regardless of adjudication, any offense against a minor in violation of s. 784.085, chapter 787, chapter 794, s. 796.03, s. 796.035, s. 800.04, chapter 827, s. 847.012, s. 847.0133, s. 847.0135(5), s. 847.0138, s. 847.0145, s. 893.147(3), or s. 985.701, or any offense in violation of s. 775.21, s.

516 Section 938.085, Florida Statutes (2010).
517 Section 938.085, Florida Statutes (2010).
518 *V.K.E. v. State*, 934 So. 2d 1276 (Fla. 2006).
519 *Id.* at 1282.
520 *Clark v. State*, 963 So. 2d 911 (Fla. 2nd DCA 2007).

823.07, s. 847.0125, s. 847.0134, or s. 943.0435, the court **shall** impose a court cost of $151 against the offender in addition to any other cost or penalty required by law.[521] This mandatory cost supports the Department of Children and Family Services' Grants and Donations Trust Fund for disbursement to the Office of the Statewide Guardian Ad Litem and the Florida Network of Children's Advocacy Centers, Inc., for the purpose of funding children's advocacy centers that are members of the network.[522]

6. Restitution

Section 775.089, Florida Statutes requires a defendant to "make restitution to the victim for: 1. Damage or loss caused directly or indirectly by the defendant's offense; and 2. Damage or loss related to the defendant's criminal episode, unless it finds clear and compelling reasons not to order such restitution."[523]

The Statute defines the term victim to include "each person who suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect result of the defendant's offense or criminal episode, and also includes the victim's estate if the victim is deceased, and the victim's next of kin if the victim is deceased as a result of the offense."[524]

"When an offense has resulted in bodily injury to a victim, a restitution order entered under subsection (1) shall require that the defendant:

1. Pay the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a recognized method of healing.

2. Pay the cost of necessary physical and occupational therapy and rehabilitation.

3. Reimburse the victim for income lost by the victim as a result of the offense.

4. In the case of an offense which resulted in bodily injury that also resulted in the death of a victim, pay an amount equal to the cost of necessary funeral and related services."[525]

When an offense has not resulted in bodily injury to a victim, a restitution order may require that the defendant reimburse the victim for income lost by the victim as a result of the offense.[526]

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521 Section 938.10(1), Florida Statutes (2010).
522 Section 938.10(2), Florida Statutes (2010).
523 Section 775.089(1)(a), Florida Statutes (2010).
524 Section 775.089(1)(c), Florida Statutes (2010).
525 Section 775.089(2)(a), Florida Statutes (2010).
526 Section 775.089(2)(b), Florida Statutes (2010).

Payment of restitution does not have to be given directly to the victim. The defendant can be ordered to pay the costs directly to the service providers.[527] Defendants can be ordered to pay the cost of a rape kit used during the victim's examination directly to the "medical facility that performed the examination."[528]

So long as the court orders restitution at sentencing, it can assess the actual amounts at a later date. This can become important when, for example, a child victim of sexual abuse needed little psychological counseling early on, however, upon reaching puberty or beyond the victim then requires psychological treatment due to the much earlier abuse. This type of expense is not incurred until long after sentencing, yet it is still proper to reimburse such a victim through the restitution order.

7. Record Sealing and Expunging

In the course of any criminal case a great many records are developed and kept by various entities. Law enforcement agencies involved in an investigation and arrest will have records, the court will have records, and the Department of Corrections may have records. While courts have jurisdiction over their own records, additional considerations must be made when determining whether or not to seal or expunge nonjudicial criminal history records.[529] A written petition, filed with the clerk, shall initiate any action to expunge or seal a criminal history record pursuant to sections 943.0585 and 943.059, Florida Statutes. The petition shall state the grounds on which it is based and the official records to which it is directed and shall be supported by an affidavit of the party seeking relief, which affidavit shall state with particularity the statutory grounds and the facts in support of the motion. A petition seeking to seal or expunge nonjudicial criminal history records **must** be accompanied by a certificate of eligibility issued to the petitioner by the Florida Department of Law Enforcement. A copy of the completed petition and affidavit shall be served on the prosecuting attorney and the arresting authority. Notice and hearing shall be as provided in rule 3.590(c).[530]

Records pertaining to many of the sexual violence offenses outlined in the bench book, however, may not be sealed or expunged. "A criminal history record that relates to a violation of s. 393.135, s. 394.4593, s. 787.025, chapter 794, s. 796.03, s. 800.04, s. 810.14, s. 817.034, s. 825.1025, s. 827.071, chapter 839, s. 847.0133, s. 847.0135, s. 847.0145, s. 893.135, s. 916.1075, a violation enumerated in s. 907.041, or any violation specified as a predicate offense for registration as a sexual predator pursuant to s. 775.21, without regard to whether that offense alone is sufficient to require such registration, or for registration as a sexual offender

527 *Gladfelter v. State*, 618 So. 2d 1364,1365 (Fla. 1993)
528 *Drye v. State*, 691 So. 2d 1168, 1169 (Fla. 1st DCA 1997).
529 *State v. D.H.W.*, 686 So. 2d 1331 (Fla. 1996).
530 Fla. R. Crim. P. 3.692(a), Petition to Seal or Expunge.

pursuant to s. 943.0435, **may not be expunged**, without regard to whether adjudication was withheld, if the defendant was found guilty of or pled guilty or nolo contendere to the offense, or if the defendant, as a minor, was found to have committed, or pled guilty or nolo contendere to committing, the offense as a delinquent act."[531]

Similarly, "A criminal history record that relates to a violation of s. 393.135, s. 394.4593, s. 787.025, chapter 794, s. 796.03, s. 800.04, s. 810.14, s. 817.034, s. 825.1025, s. 827.071, chapter 839, s. 847.0133, s. 847.0135, s. 847.0145, s. 893.135, s. 916.1075, a violation enumerated in s. 907.041, or any violation specified as a predicate offense for registration as a sexual predator pursuant to s. 775.21, without regard to whether that offense alone is sufficient to require such registration, or for registration as a sexual offender pursuant to s. 943.0435, **may not be sealed**, without regard to whether adjudication was withheld, if the defendant was found guilty of or pled guilty or nolo contendere to the offense, or if the defendant, as a minor, was found to have committed or pled guilty or nolo contendere to committing the offense as a delinquent act."[532]

There is no constitutional or statutory **right** to have a record expunged, and the ultimate expunction of a record is at the sole discretion of the trial court.

531 Section 943.0585, Florida Statutes (2010).
532 Section 943.059, Florida Statutes (2010).

IV. Sexual Violence Injunctions

Sexual Violence Injunctions

Section 784.046, Florida Statutes (2010)[533] creates a cause of action for injunctions against repeat violence, dating violence and sexual violence. The statute defines sexual violence as "any one incident of:

- Sexual battery, as defined in chapter 794;
- A lewd or lascivious act, as defined in chapter 800, committed upon or in the presence of a person younger than 16 years of age;
- Luring or enticing a child, as described in chapter 787;
- Sexual performance by a child, as described in chapter 827; or
- Any other forcible felony wherein a sexual act is committed or attempted, regardless of whether criminal charges based on the incident were filed, reduced, or dismissed by the state attorney."

Unlike other injunctions that follow rule 1.610, proceedings for injunctions for protection against sexual violence follow rule 12.610(a).

While it is mandatory to order the surrender of firearms in domestic violence cases, the court may order surrender of firearms and ammunition in sexual violence injunction cases when there is a nexus between the firearm and the violence alleged.

The forms used in sexual violence injunction cases, including judgment forms, are located on the Florida State Courts website at the following link:

www.flcourts.org/gen_public/family/forms_rules/index.shtml

Copies of these forms are also included in the Appendix.

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533 Section 784.046(1)(c), Florida Statutes (2010).

Injunctions on Behalf of Children

A parent may seek an injunction for protection on behalf of a minor child. "A person who is the victim of sexual violence or the parent or legal guardian of a minor child who is living at home who is the victim of sexual violence has standing in the circuit court to file a sworn petition for an injunction for protection against sexual violence on his or her own behalf or on behalf of the minor child if:

1. The person has reported the sexual violence to a law enforcement agency and is cooperating in any criminal proceeding against the respondent, regardless of whether criminal charges based on the sexual violence have been filed, reduced, or dismissed by the state attorney; or
2. The respondent who committed the sexual violence against the victim or minor child was sentenced to a term of imprisonment in state prison for the sexual violence and the respondent's term of imprisonment has expired or is due to expire within 90 days following the date the petition is filed."[534]

Injunctions to Prevent Child Abuse

Similar to an injunction for protection sought on behalf of a minor, chapter 39 of the Florida Statues, provides a mechanism in dependency for the Department of Children and Families or another responsible person to seek an injunction to protect a child from child abuse. "At any time after a protective investigation has been initiated … the court, upon the request of the department, a law enforcement officer, the state attorney, or other responsible person, or upon its own motion, may, if there is reasonable cause, issue an injunction to prevent any act of child abuse. Reasonable cause for the issuance of an injunction exists if there is evidence of child abuse or if there is a reasonable likelihood of such abuse occurring based upon a recent overt act or failure to act."[535] The primary purpose of such an injunction is to protect and promote the best interests of the child while considering the preservation of the child's immediate family.[536]

"The conditions of the injunction shall be determined by the court, which conditions may include ordering the alleged or actual offender to:

1. Refrain from further abuse or acts of domestic violence.

2. Participate in a specialized treatment program.

3. Limit contact or communication with the child victim, other children in the home, or any other child.

534 Section 784.046(2)(c), Florida Statutes (2010).
535 Section 39.504(1), Florida Statutes (2010).
536 Section 39.504(3), Florida Statutes (2010).

4. Refrain from contacting the child at home, school, work, or wherever the child may be found.

5. Have limited or supervised visitation with the child.

6. Pay temporary support for the child or other family members; the costs of medical, psychiatric, and psychological treatment for the child incurred as a result of the offenses; and similar costs for other family members.

7. Vacate the home in which the child resides."[537]

"If the intent of the injunction is to protect the child from domestic violence, the conditions may also include:

1. Awarding the exclusive use and possession of the dwelling to the caregiver or excluding the alleged or actual offender from the residence of the caregiver.

2. Awarding temporary custody of the child to the caregiver.

3. Establishing temporary support for the child."[538]

537 Section 39.504(3)(a), Florida Statutes (2010).
538 Section 39.504(3)(a), Florida Statutes (2010).

V. Matters Related to Sexual Assault

A. Victim Services and Compensation

There are a variety of public and private services available to victims of sexual violence, and these services vary from county to county. The "Sexual Battery Victims' Access to Services Act"[539] creates a statewide nonprofit entity to provide a host of services to victims including:

a. A telephone hotline that is operated 24 hours a day and answered by a sexual battery counselor or trained volunteer,

b. Information and referral services,

c. Crisis-intervention services,

d. Advocacy and support services,

e. Therapy services,

f. Service coordination,

g. Programs to promote community awareness of available services, and

h. Medical intervention.

Law enforcement officers who investigate an alleged sexual battery must provide victims with information on their rights and the services that are available locally.[540] This information is statutorily required to be developed and distributed by the Florida Council Against Sexual Violence in conjunction with the Department of Law Enforcement.[541] The information on local and statewide providers of victim services can be found on the Council's website

539 Section 794.055, Florida Statutes (2010).

540 Section 794.052, Florida Statutes (2010).

541 Section 794.052(2), Florida Statutes (2010).

at **www.fcasv.org/information/find-your-local-center** or at the Attorney General's website at **myfloridalegal.com/directory**. Additionally, victims may call the Rape Crisis Hotline at 1-888-956-7273 to be referred to local victim services.

In addition to restitution, victims may also qualify for financial assistance under Florida's Crime Victim Compensation Program. Victims or designated relatives of victims may apply for assistance under the program to cover expenses directly related to the crime, such as: medical treatments, psychological counseling, lost wages, loss of support, costs of disability that resulted from the crime, relocation assistance for victims of domestic violence, and funeral expenses. Compensation under the program is initiated by application, not court order. Judges, attorneys, or certain court staff, however, may advise victims of the program's existence and their potential rights under the program. Victims wishing to apply for assistance or get more information on the program can contact the Division of Victim Services within the Office of the Attorney General toll free at 1-800-226-6667. The application is available online at **myfloridalegal.com/Compapp.pdf**.

B. Employment Issues

Sexual assault can take place anywhere including a place of employment. In addition to standard criminal investigations, when someone is sexually assaulted by a supervisor, a coworker, or while working, the Florida Commission on Human Relations (FCHR) and the Equal Employment Opportunity Commission (EEOC) may investigate these complaints and enforce anti-discrimination and harassment laws.

Victims of sexual and/or domestic violence may receive up to three days off work in any 12 month period to: seek an injunction for protection, obtain medical care and/or mental health counseling, obtain victim services, find a safe place to live or add security to their current home, seek legal assistance, or prepare and attend court proceedings.[542] This leave may be paid or unpaid at the discretion of the employer.[543] This law only applies to employers within the state who have 50 or more employees, and to employees who have been with the employer for 3 or more months.[544] Additionally, some localities may have ordinances offering additional rights. Miami-Dade County's ordinance provides for up to 30 days of unpaid leave to receive medical or dental care, legal assistance, counseling and to appear in courts.[545] If a victim suffers a serious health condition as a result of the crime, then the Family Medical Leave Act (FMLA) may also apply. The FMLA provides for up to 12 weeks of unpaid leave if employees have been employed for at least one year and the employer has 50 or more employees.

542 Section 741.313(2), Florida Statutes (2010).

543 *Id*.

544 Section 741.313(3), Florida Statutes (2010).

545 Section 11A-61, Miami-Dade County Code of Ordinances (2010).

C. Violence Against Women Act

The Violence Against Women Act (VAWA) is major federal legislation relating to many facets of domestic and sexual violence. VAWA is an essential catalyst for nation-wide policy on domestic and sexual violence issues. It was created in 1994 as Title IV, §§ 40001 -- 40703 of the Violent Crime Control and Law Enforcement Act.[546] VAWA has since been reauthorized by Congress in 2000 and again in 2005. It will be up for reauthorization again in 2011. The act addresses a broad spectrum of issues related to domestic abuse and sexual violence, and provides numerous grants to reduce the incidence of violence against women and to provide training on these issues.

D. Immigration Issues

Immigrants and undocumented aliens can be particularly susceptible to a whole host of abuses due to cultural, language, financial, and legal reasons. There are several avenues of assistance for people in these situations.

VAWA, as just discussed, provides immigrants relief if they are or become victims of sexual assault, human trafficking, and other violent crimes. Under VAWA, victims who are married to or recently divorced from an abuser who is a U.S. citizen or lawful permanent resident may themselves apply for lawful permanent residence.

A "U Visa" may be available when a victim has suffered substantial physical or mental abuse as a result of specified crimes such as: rape, human trafficking, incest, prostitution, female genital mutilation, kidnapping, etc. The abuse must have taken place in the U.S. and been a violation of U.S. law. An applicant for a U Visa must assist law enforcement in the investigation and prosecution of the crime that caused the abuse. The U Visa allows a person to live and work in the U.S. for up to 4 years. U Visa holders may apply for lawful permanent residence after 3 years.

A "T Visa" may be sought by a person who survives a severe form of sex trafficking or forced labor. The victim must show that she would suffer extreme hardship if deported. If the victim is 18 or over, she must cooperate with law enforcement. If the victim is in the country unlawfully, then her presence here must be relates to the sex trafficking or forced labor. A T Visa lasts for up to 4 years, and a person may apply for lawful permanent residency after 3 years.

546 Pub. L. 103-322, Sept. 13, 1994.

VI. Appendix

Standard Jury Instructions

The Florida Supreme Court keeps an updated list of all standard jury instructions at the following web site: **www.floridasupremecourt.org/jury_instructions/instructions.shtml**. Here you will find all of the standard jury instructions for criminal cases. If you would like the complete document in a single PDF, you can obtain one at the following web site: **www.floridasupremecourt.org/jury_instructions/chapters/entireversion/onlinejurryinstructions.pdf** .

Sexual Violence Injunction Forms

While the judgment forms will likely be the most useful to judges, all of the current injunction forms related to sexual violence are included here for your information. These are the official forms taken directly from the Florida State Courts website. If you would like to use the writeable forms, they can be found at the following website: **www.flcourts.org/gen_public/family/forms_rules/index.shtml**.

IN THE CIRCUIT COURT OF THE _________________________ JUDICIAL CIRCUIT,
IN AND FOR _________________________ COUNTY, FLORIDA

Case No.: __________________________
Division: __________________________

__________________________________,
Petitioner,

and

__________________________________,
Respondent.

ORDER SETTING HEARING ON PETITION FOR INJUNCTION FOR PROTECTION AGAINST
( ) DOMESTIC VIOLENCE ( ) REPEAT VIOLENCE ( ) DATING VIOLENCE
( ) SEXUAL VIOLENCE
WITHOUT ISSUANCE OF AN INTERIM TEMPORARY INJUNCTION

The Petition for Injunction for Protection Against Domestic Violence filed under section 741.30, Florida Statutes, or Repeat Violence, Dating Violence, or Sexual Violence under section 784.046, Florida Statutes, has been reviewed. This Court has jurisdiction of the parties and of the subject matter. A **Temporary** Injunction for Protection Against Repeat, Dating, or Sexual Violence, pending the hearing scheduled below, is **NOT** being entered at this time but an injunction may be entered after the hearing, depending on the findings made by the Court at that time.

FINDINGS

The Court finds that the facts, as stated in the Petition alone and without a hearing on the matter, do not demonstrate that Petitioner is a victim of domestic, repeat, dating, or sexual violence or that Petitioner has reasonable cause to believe that he or she is in imminent danger of becoming a victim of domestic or dating violence. Therefore, there is not a sufficient factual basis upon which the court can enter a *Temporary* Injunction for Protection Against Domestic, Repeat, Dating, or Sexual Violence prior to a hearing. A hearing is scheduled on the Petition for Injunction for Protection Against Domestic, Repeat, Dating, or Sexual Violence in section II of this Order. Petitioner may amend or supplement the Petition at any time to state further reasons why a *Temporary* Injunction should be ordered which would be in effect until the hearing scheduled below.

NOTICE OF HEARING

Petitioner and Respondent are ordered to appear and testify at a hearing on the Petition

for Injunction for Protection Against Domestic, Repeat, Dating, or Sexual Violence on *{date}* ______________,at ______ a.m./p.m. at *{location}*______________________________________, at which time the Court will consider whether a Final Judgment of Injunction for Protection Against Domestic, Repeat, Dating, or Sexual Violence should be entered. If entered, the injunction will remain in effect until a fixed date set by the Court or until modified or dissolved by the Court. At the hearing, the Court will determine whether other things should be ordered, including, for example, such matters as visitation and support.

If Petitioner and/or Respondent do not appear, orders may be entered, including the imposition of court costs or an injunction.

All witnesses and evidence, if any, must be presented at this time. In cases where temporary support issues have been alleged in the pleadings, each party is ordered to bring his or her financial affidavit (✎❐ Florida Family Law Rules of Procedure Form 12.902(b) or (c)), tax return, pay stubs, and other evidence of financial income to the hearing.

NOTICE: Because this is a civil case, there is no requirement that these proceedings be transcribed at public expense.

YOU ARE ADVISED THAT IN THIS COURT:

______ a. a court reporter is provided by the court.
______ b. electronic audio tape recording only is provided by the court. A party may arrange in advance for the services of and provide for a court reporter to prepare a written transcript of the proceedings at that party's expense.
______ c. in repeat, dating, and sexual violence cases, no electronic audio tape recording or court reporting services are provided by the court. A party may arrange in advance for the services of and provide for a court reporter to prepare a written transcript of the proceedings at that party's expense.

A RECORD, WHICH INCLUDES A TRANSCRIPT, MAY BE REQUIRED TO SUPPORT AN APPEAL. THE PARTY SEEKING THE APPEAL IS RESPONSIBLE FOR HAVING THE TRANSCRIPT PREPARED BY A COURT REPORTER. THE TRANSCRIPT MUST BE FILED WITH THE REVIEWING COURT OR THE APPEAL MAY BE DENIED.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact *{name}* ____, *{address}* ____, *{telephone}* ____________________, within 2 working days of your receipt of this order. If you are hearing or voice impaired, call TDD 1-800-955-8771.

Nothing in this order limits Petitioner's rights to dismiss the petition.

ORDERED on ______________________.

____
CIRCUIT JUDGE

COPIES TO:
Petitioner: ___ by hand delivery in open Court
___ by U.S. mail
Respondent: ____ forwarded to sheriff for service
Other: ____

I CERTIFY the foregoing is a true copy of the original as it appears on file in the office of the Clerk of the Circuit Court of ___________ County, Florida, and that I have furnished copies of this order as indicated above.

CLERK OF THE CIRCUIT COURT

(SEAL)

By: ____
Deputy Clerk

IN THE CIRCUIT COURT OF THE ________________________ JUDICIAL CIRCUIT,
IN AND FOR ________________________ COUNTY, FLORIDA

Case No.: ___________________________
Division: ___________________________

_________________________________,
Petitioner,

and

_________________________________,
Respondent.

ORDER DENYING PETITION FOR INJUNCTION FOR PROTECTION AGAINST ( ) DOMESTIC VIOLENCE ( ) REPEAT VIOLENCE ( ) DATING VIOLENCE ( ) SEXUAL VIOLENCE

The Court has reviewed the Petition for Injunction for Protection Against Domestic, Repeat, Dating, or Sexual Violence filed in this cause and finds that Petitioner has failed to comply with one or more statutory requirements applicable to that petition including the following:

____ 1. Petitioner has failed to allege in a petition for domestic violence that Respondent is a family or household member as that term is defined by Chapter 741, Florida Statutes.
____ 2. Petitioner has used a petition form other than that which is approved by the Court and the form used lacks the statutorily required components.
____ 3. Petitioner has failed to complete a mandatory portion of the petition.
____ 4. Petitioner has failed to sign the petition.
____ 5. Petitioner has failed to allege facts sufficient to support the entry of an injunction for protection against domestic, repeat, dating, or sexual violence because: _______________
____
____
____
____.
____ 6. Other: ____
____
____
____.

It is therefore, ORDERED AND ADJUDGED that the Petition is denied without prejudice to amend or supplement the petition to cure the above stated defects.

ORDERED ON _________________.

____
CIRCUIT JUDGE

COPIES TO:
Petitioner: ____ by hand delivery in open Court
____ by U.S. mail

I CERTIFY the foregoing is a true copy of the original as it appears on file in the office of the Clerk of the Circuit Court of ___________ County, Florida, and that I have furnished copies of this order as indicated above.

CLERK OF THE CIRCUIT COURT

(SEAL)

By: ____
Deputy Clerk

IN THE CIRCUIT COURT OF THE ________________________ JUDICIAL CIRCUIT,
IN AND FOR _________________________ COUNTY, FLORIDA

Case No.: ____________________
Division: ____________________

_________________________________,
Petitioner,
and

_________________________________,
Respondent.

ORDER OF DISMISSAL OF TEMPORARY INJUNCTION FOR PROTECTION AGAINST ( ) DOMESTIC VIOLENCE ( ) REPEAT VIOLENCE ( ) DATING VIOLENCE ( ) SEXUAL VIOLENCE

THIS CAUSE came before the Court on *{date}* ____________________, upon Petitioner's action for an injunction for protection against domestic violence, repeat, dating, or sexual violence, and it appearing to the Court as follows:
[**√ all** that apply]
____ Petitioner failed to appear at the hearing scheduled in this cause.
____ Petitioner appeared at the hearing but desires to voluntarily dismiss this action.
____ The evidence presented is insufficient under Florida law (section 741.30 or 784.046, Florida Statutes) to allow the Court to issue an injunction for protection against domestic, repeat, dating, or sexual violence.

Accordingly, the case is dismissed without prejudice.

ORDERED on ____________________.

____
CIRCUIT JUDGE

COPIES TO:
Sheriff of ___________ County
Petitioner ___ by U.S. Mail ___ by hand delivery in open court
Respondent ___ by U.S. Mail ___ by hand delivery in open court
____ State Attorney's Office
____ Other: _____________________________________

I CERTIFY the foregoing is a true copy of the original as it appears on file in the office of the Clerk of the Circuit Court of __________ County, Florida, and that I have furnished copies of this order as indicated above.

CLERK OF THE CIRCUIT COURT

(SEAL)

By: ____________________________________
Deputy Clerk

INSTRUCTIONS FOR FLORIDA SUPREME COURT APPROVED FAMILY LAW FORM 12.980(g),
SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF PETITION FOR INJUNCTION FOR PROTECTION AGAINST DOMESTIC VIOLENCE, REPEAT VIOLENCE, DATING VIOLENCE, OR SEXUAL VIOLENCE

When should this form be used?

You may use this form if your **Petition for Injunction for Protection Against Domestic Violence**, ✎❒ Florida Supreme Court Approved Family Law Form 12.980(a), or your **Petition for Injunction for Protection Against Repeat Violence**, ✎❒ Florida Supreme Court Approved Family Law Form 12.980(f), or your **Petition for Injunction for Protection Against Dating Violence**, ✎❒ Florida Supreme Court Approved Family Law Form 12.980(n), or your **Petition for Injunction for Protection Against Sexual Violence,** ✎❒ Florida Supreme Court Approved Family Law Form 12.890(q), was denied by the **judge**. You should use this supplemental **affidavit** to add facts or clarify the facts you wrote in your original **petition**. For a domestic violence case, you should include FACTS that establish that you have been a victim of violence or are in **imminent** danger of becoming a victim of violence from the **respondent**. For a repeat violence case, you should include FACTS that establish that you or a member of your immediate family have or has been a victim of at least two prior incidents of violence, that one of those incidents occurred within the last six months and that there is an immediate and present risk of danger to you or a member of your immediate family. For a dating violence case, you should include FACTS that establish that you have been a victim of violence or are in imminent danger of becoming a victim of violence from the **respondent** who is an individual with whom you have or have had a continuing and significant relationship of a romantic or intimate nature, to be determined by consideration of such facts as the dating relationship existed within the past six months, the nature of the relationship included an expectation of affection or sexual involvement and the frequency and type of interaction between you and the individual included involvement over time and on a continued basis. Dating violence does not include violence in a casual acquaintanceship or violence between individuals who only have engaged in ordinary fraternization in a business or social context. For a sexual violence case, you should include FACTS that establish that you are a victim of sexual violence or the parent of a minor child living at home who is a victim of sexual violence, that you have reported the sexual violence to law enforcement and are cooperating in the criminal proceeding if there is one. If the respondent was in state prison for sexual violence against you or the minor child and respondent is out of prison or is getting out within 90 days of the petition, include that information in your supplemental affidavit, along with a copy of the notice of inmate release.

This form should be typed or printed in black ink. After completing this form, you should sign the form before a **notary public** or the **clerk of the circuit court**. You should then **file** the original with the clerk in the county where the petition was filed and keep a copy for your records.

What should I do next?

After you complete this supplemental affidavit, the clerk will attach it to your original petition and all the documents will be submitted to the judge as your "Amended Petition."

IN THE CIRCUIT COURT OF THE ________________________ JUDICIAL CIRCUIT,
IN AND FOR ________________________ COUNTY, FLORIDA

Case No.: ________________________
Division: ________________________

________________________________,
Petitioner,

and

________________________________,
Respondent.

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF PETITION FOR INJUNCTION FOR PROTECTION AGAINST ( ) DOMESTIC VIOLENCE ( ) REPEAT VIOLENCE ( ) DATING VIOLENCE ( ) SEXUAL VIOLENCE

I, *{full legal name}* ________________________________, being sworn, certify that the following statements are true:

1. On *{date}* ____________________, at *{place and address}* ____________________
____,
Respondent said or did the following things that hurt me or a member of my immediate family and made me afraid for my or my family member's safety:
____
____
____
____
____
____
____
____
____
____
____
____
☐ Check here if you are attaching additional pages to continue these facts.

2. On *{date}* ____________________, at *{place and address}* ____________________
____,
the following event(s) took place: ________________________________

____
____
____
____
____
____
____
____
____
____
____
____

☐ Check here if you are attaching additional pages to continue these facts.

3. ____ Check here if you are attaching copies of medical records for treatment you may have received for injuries referred to in your petition or in this supplemental affidavit, copies of any police or sheriff reports concerning incidents of violence involving you and Respondent, or any notice of inmate release.

I understand that I am swearing or affirming under oath to the truthfulness of the claims made in this supplemental affidavit and that the punishment for knowingly making a false statement includes fines and/or imprisonment.

Dated: ___________________________

____
Signature of Petitioner

STATE OF FLORIDA
COUNTY OF ______________________

Sworn to or affirmed and signed before me on ________________ by ________________________.

____
NOTARY PUBLIC or DEPUTY CLERK

____
[Print, type, or stamp commissioned name of notary or clerk.]

____ Personally known
____ Produced identification
Type of identification produced _________________________

Florida Supreme Court Approved Family Law Form 12.980(g), Supplemental Affidavit in Support of Petition for Injunction for Protection Against Domestic Violence, Repeat Violence, Dating Violence, or Sexual Violence (07/04)

INSTRUCTIONS FOR FLORIDA SUPREME COURT APPROVED FAMILY LAW FORM 12.980(h), REQUEST FOR CONFIDENTIAL FILING OF ADDRESS (12/10)

When should this form be used?

If you fear that disclosing your address would put you in danger because you are the victim of sexual battery, aggravated child abuse, aggravated stalking, harassment, aggravated battery, or domestic violence, you should complete this form and **file** it with the **clerk of the circuit court**.

This form should be typed or printed in black ink. After completing this form, you should file the original with the clerk of the circuit court in the county where your petition was filed and keep a copy for your records.

IN THE CIRCUIT COURT OF THE ______________________ JUDICIAL CIRCUIT,
IN AND FOR _______________________________ COUNTY, FLORIDA

Case No: _________________________
Division: _________________________

___________________________________,
Petitioner,
And

___________________________________,
Respondent.

REQUEST FOR CONFIDENTIAL FILING OF ADDRESS

I, {full legal name} _______________________________________, request that the Court maintain and hold as confidential, the following address:

Address ____
____
City _______________________________ State ______________________ Zip ________________
Telephone (area code and number) ____

This request is being made for the purpose of keeping the location of my residence unknown for safety reasons pursuant to section 119.071(2)(j)1, Florida Statutes.

Dated: ________________________________

____
Signature

CLERK'S CERTIFICATE AS TO
REQUEST FOR
CONFIDENTIAL FILING OF ADDRESS

I, ____, as Clerk of the Circuit Court, do hereby certify that I received and filed the above and will keep the above address confidential, subsequent to further order of the Court relative to such confidentiality.

CLERK OF THE CIRCUIT COURT

(SEAL)

By: ____
Deputy Clerk

Florida Supreme Court Approved Family Law Form 12.980(h), Request for Confidential Filing of Address (12/10)

INSTRUCTIONS FOR FLORIDA SUPREME COURT APPROVED FAMILY LAW FORM 12.980(i),
MOTION FOR EXTENSION OF INJUNCTION FOR PROTECTION AGAINST DOMESTIC VIOLENCE, REPEAT VIOLENCE, DATING VIOLENCE, OR SEXUAL VIOLENCE

When should this form be used?

If you are the **petitioner** on a previously entered injunction for protection against domestic violence, repeat violence, dating violence, or sexual violence and that injunction will soon expire, you may use this form to request that the court **extend the injunction. You must file a motion for extension BEFORE the previously entered order expires.**

This form should be typed or printed in black ink. After completing this form, you should sign it before a notary public or the **clerk of the circuit court**. You should then **file** the original with the clerk in the county where the petition was filed and keep a copy for your records. If you have any questions or need assistance completing this form, the clerk or **family law intake staff** will help you.

What should I do next?

For your case to proceed, you will need to set a **hearing** on your motion. You must properly notify the other party of the motion and hearing. You should check with the clerk of court for information on the local procedure for scheduling a hearing. When you know the date and time of your hearing, you should file **Notice of Hearing (General)**, ✎❐ Florida Supreme Court Approved Family Law Form 12.923, or other appropriate notice of hearing form. You will need to serve a copy of your motion and Notice of Hearing to the other party. Service of your motion must be in a manner that is reasonably calculated to apprise the other party of your motion and the hearing. *Please note that if notice is mailed, the court in certain circumstances may not consider mailing to be adequate notice. If you want to be sure, you should consider using certified mail, return receipt requested, or having the motion personally served. This is a technical area of the law; if you have any questions about it, you should consult a lawyer. For more information on personal service, see the instructions for **Summons: Personal Service on an Individual,** ✎❐ Florida Family Law Rules of Procedure Form 12.910(a).

You will need to appear at the hearing on your motion. After the hearing, if the judge grants your motion, he or she will prepare an **Order Extending Injunction for Protection Against Domestic Violence, Repeat Violence, Dating Violence, or Sexual Violence**, ✎❐ Florida Supreme Court Approved Family Law Form 12.980(m). After the judge signs the order, the clerk will provide you with the necessary copies. **Make sure that you keep a certified copy of the previously entered injunction AND a certified copy of the order extending that injunction with you at all times.**

Where can I look for more information?

Before proceeding, you should read "General Information for Self-Represented Litigants" found at the beginning of these forms. The words that are in "**bold underline**" are defined in that section. The clerk of the circuit court or family law intake staff will help you complete any necessary domestic, repeat, dating, or sexual violence forms and will answer any question that you may have.

Special notes...

With this form you may also file the following:

- **Petitioner's Request for Confidential Filing of Address**, ✎❐ Florida Supreme Court Approved Family Law Form 12.980(h), if your petition is for an injunction for protection against domestic violence or sexual violence and you wish to keep your address confidential.
- When completing this form, you should make sure that your reasons for requesting that the injunction be extended are stated clearly and that you include all relevant facts.

IN THE CIRCUIT COURT OF THE ________________________ JUDICIAL CIRCUIT,
IN AND FOR ________________________ COUNTY, FLORIDA

Case No.: ________________________
Division: ________________________

________________________________,
Petitioner,

and

________________________________,
Respondent.

MOTION FOR EXTENSION OF INJUNCTION FOR PROTECTION AGAINST ( ) DOMESTIC VIOLENCE ( ) REPEAT VIOLENCE ( ) DATING VIOLENCE ( ) SEXUAL VIOLENCE

I, *{full legal name}* ______________________________, being sworn, certify that the following statements are true:

SECTION I. PETITIONER (This section is about you. It must be completed. However, **if this is a domestic violence or sexual violence case and you fear that disclosing your address to the respondent would put you in danger**, you should complete and file **Petitioner's Request for Confidential Filing of Address**, ✎❐ Florida Supreme Court Approved Family Law Form 12.980(h), and write "confidential" in the space provided on this form for your address and telephone number.)

1. Petitioner currently lives at: *{street address}* ______________________________
   {city, state and zip code} ______________________________
   Telephone Number: *{area code and number}* ______________________________

2. Petitioner's attorney's name, address and telephone number is: ____________________
   ____.
   (If you do not have an attorney, write "none.")

SECTION II. RESPONDENT (This section is about the person you want to be protected from. It must be completed.)

New information about Respondent, since the current injunction was issued: (If known, write Respondent's new address, place of employment, physical description, vehicle, aliases or nicknames, or attorney's name.)

____
____

____
____
____
____

SECTION III. CASE HISTORY AND REASON FOR SEEKING EXTENSION OF INJUNCTION

1. Describe any attempts since the date of the current injunction by either Petitioner or Respondent to get an injunction for protection in this or any other court (other than the injunction you are asking to extend in this motion). ______________________________
____
____

2. Describe any other court cases (including city, state, and case numbers, if known) since the date of the current injunction between Petitioner and Respondent, including any cases involving the parties' minor child(ren), divorce, juvenile dependency, guardianship, or other civil or criminal cases. ____
____
____

3. Petitioner requests that the previously entered injunction for protection against domestic violence, repeat violence, dating violence, or sexual violence be extended for the following **specific** reasons: *{State <u>in detail</u> why you wish the injunction to remain in effect.}* ____
____
____
____
____
____
____
____
____
____
____
____
____

☐ Check here if you are attaching additional pages to continue these facts.

4. Petitioner genuinely fears the continued threat of violence by Respondent.

SECTION IV. REQUESTED RELIEF

1. Petitioner understands that the Court will hold a hearing on this motion and that he or she

must appear at the hearing.

2. Petitioner asks the Court to enter an order in this case that extends the previously entered injunction for a period of ( ) ________________ or ( ) until modified or dissolved by the court.

I certify that a copy of this document was [√ **one** only] ( ) mailed ( ) faxed and mailed ( ) mailed by certified mail, return receipt requested, ( ) furnished to a law enforcement officer for personal service to the person(s) listed below on *{date}*______________.
Other party or his/her attorney:
Name:______________________________
Address:____________________________
City, State, Zip:_______________________
Fax Number:_________________________

I understand that I am swearing or affirming under oath to the truthfulness of the claims made in this motion and that the punishment for knowingly making a false statement includes fines and/or imprisonment.

Dated: ________________________

____
Signature of Petitioner

STATE OF FLORIDA
COUNTY OF ___________________

Sworn to or affirmed and signed before me on ______________ by _____________________.

____
NOTARY PUBLIC or DEPUTY CLERK

____
[Print, type, or stamp commissioned name of notary or clerk]

___ Personally known
___ Produced identification
Type of identification produced ______________________

Florida Supreme Court Approved Family Law Form 12.980(i), Motion for Extension of Injunction for Protection Against Domestic Violence, Repeat Violence, Dating Violence, or Sexual Violence (07/04)

INSTRUCTIONS FOR FLORIDA SUPREME COURT APPROVED FAMILY LAW FORM 12.980(j),
MOTION FOR MODIFICATION OF INJUNCTION FOR PROTECTION AGAINST DOMESTIC VIOLENCE, REPEAT VIOLENCE, DATING VIOLENCE, OR SEXUAL VIOLENCE

When should this form be used?

This form may be used if you are a **party** to a previously entered injunction for protection against domestic violence, repeat violence, dating violence, or sexual violence and you want the court to **modify the terms** of the injunction. If you use this form, you are called the moving party.

This form should be typed or printed in black ink. After completing this form, you should sign the form before a **notary public** or the **clerk of the circuit court**. You should then file the original with the clerk in the county where the original petition was filed and keep a copy for your records. **You must file a motion for modification before the previously entered order expires.** If you have any questions or need assistance completing this form, the clerk or **family law intake staff** will help you.

What should I do next?

For your case to proceed, you will need to set a **hearing** on your motion. You must properly notify the other party of the motion and hearing. You should check with the clerk of court for information on the local procedure for scheduling a hearing. When you know the date and time of your hearing, you should file **Notice of Hearing (General)**, ✎❐ Florida Supreme Court Approved Family Law Form 12.923, or other appropriate notice of hearing form. You will need to serve a copy of your motion and Notice of Hearing to the other party. Service of your motion must be in a manner that is reasonably calculated to apprise the other party of your motion and the hearing. *Please note that if notice is mailed, the court in certain circumstances may not consider mailing to be adequate notice. If you want to be sure, you should consider using certified mail, return receipt requested, or having the motion personally served. **If you are not represented by an attorney in this action, you must file proof that the other party personally received notice of your motion.** This is a technical area of the law; if you have any questions about it, you should consult a lawyer. For more information on personal service, see the instructions for **Summons: Personal Service on an Individual,** ✎❐ Florida Family Law Rules of Procedure Form 12.910(a).

You will need to appear at a hearing on your motion for modification of injunction. After the hearing, if the judge grants your motion, he or she will prepare a new injunction for protection that contains the modifications. After the judge signs the new injunction, the clerk will provide you with the necessary copies. **Make sure that you keep a certified copy of the new injunction with you at all times!**

Where can I look for more information?

Before proceeding, you should read "General Information for Self-Represented Litigants" found at the beginning of these forms. The words that are in "**bold underline**" are defined in that section. The clerk of the circuit court or family law intake staff will help you complete any necessary domestic, repeat, dating, or sexual violence forms and will answer any question that you may have.

Special notes...

If the injunction you are seeking to modify is for domestic violence and you want the court to modify **alimony**, **custody** of a minor child(ren), or **child support**, you must establish that there has been a change in circumstance(s), as required by chapter 61, Florida Statutes, or chapter 741, Florida Statutes, as applicable, that requires this (these) modification(s). Be sure that you make these change(s) clear in your motion.

With this form you may also file the following:

- **Petitioner's Request for Confidential Filing of Address**, ✎❒ Florida Supreme Court Approved Family Law Form 12.980(h), if your petition is for an injunction for protection against domestic violence or sexual violence and you wish to keep your address confidential.
- **Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) Affidavit**, ✎❒ Florida Supreme Court Approved Family Law Form 12.902(d), must be completed and attached if the modification(s) you are seeking involves temporary custody of any minor child(ren).
- **Family Law Financial Affidavit**, ✎❒ Florida Family Law Rules of Procedure Form 12.902(b) or (c), must be completed and attached if the modification(s) you are seeking involves temporary alimony or temporary child support.
- When completing this form, you should make sure that your reasons for requesting that the injunction be modified are stated clearly and that you include all relevant facts.

IN THE CIRCUIT COURT OF THE ________________________ JUDICIAL CIRCUIT,
IN AND FOR ________________________ COUNTY, FLORIDA

Case No.: ____________________________
Division: ____________________________

________________________________,
Petitioner,

and

________________________________,
Respondent.

MOTION FOR MODIFICATION OF INJUNCTION FOR PROTECTION AGAINST ( ) DOMESTIC VIOLENCE ( ) REPEAT VIOLENCE ( ) DATING VIOLENCE ( ) SEXUAL VIOLENCE

I, *{full legal name}* ______________________________, being sworn, certify that the following statements are true:

SECTION I. MOVING PARTY (This section is about you. It must be completed. However, **if you are the petitioner and this is a domestic violence or sexual violence case and you fear that disclosing your address to the respondent would put you in danger,** you should complete and file **Petitioner's Request for Confidential Filing of Address**, ✎❐ Florida Supreme Court Approved Family Law Form 12.980(h), and write "confidential" in the space provided on this form for your address and telephone number.)

1. Moving Party is the ( ) petitioner ( ) respondent in this case.

2. Moving Party currently lives at: *{street address}* ______________________________
   {city, state and zip code} ______________________________
   Telephone Number: *{area code and number}* ______________________________

3. Moving Party's attorney's name, address and telephone number is: __________________
   ____.
   (If you do not have an attorney, write "none.")

SECTION II. NEW INFORMATION

New information since the previous injunction was issued: (If known, write the other party's new address, place of employment, physical description, vehicle, aliases or nicknames, or attorney's name.)

____

____

SECTION III. CASE HISTORY AND REASON FOR SEEKING MODIFICATION OF INJUNCTION

1. Describe any attempts since the date of the current injunction by either Petitioner or Respondent to get an injunction for protection in this or any other court (other than the injunction you are asking to modify in this motion). ______

2. Describe any other court cases (including case numbers, if known) since the date of the current injunction between Petitioner and Respondent, including any cases involving the parties' minor child(ren), divorce, juvenile dependency, guardianship, or other civil or criminal cases. ______

3. Moving Party requests that the previously entered injunction for protection against domestic violence, repeat violence, dating violence, or sexual violence be modified for the following **specific** reasons: *{State why you wish the injunction to be changed.}* ______

☐ Check here if you are attaching additional pages to continue these facts.

SECTION IV. REQUESTED RELIEF

1. Moving Party understands that the court will hold a hearing on this motion and that he or she must appear at the hearing.

2. Moving Party asks the Court to enter an order in this case, that modifies the previously entered injunction in the following ways: *{State how you wish the injunction to be changed.}*

____
____
____
____
____
____
____
____
____
____

I certify that a copy of this document was [√ **one** only] ( ) mailed ( ) faxed and mailed ( ) mailed by certified mail, return receipt requested, ( ) furnished to a law enforcement officer for personal service to the person(s) listed below on *{date}*________________________________.

Other party or his/her attorney:
Name:______________________________________
Address:____________________________________
City, State, Zip:______________________________
Fax Number:_________________________________

I understand that I am swearing or affirming under oath to the truthfulness of the claims made in this motion and that the punishment for knowingly making a false statement includes fines and/or imprisonment.

Dated: __________________________

____
Signature of Party

STATE OF FLORIDA
COUNTY OF _____________________

Sworn to or affirmed and signed before me on _______________ by _______________________.

____
NOTARY PUBLIC or DEPUTY CLERK

____
[Print, type, or stamp commissioned name of notary or clerk.]

____ Personally known
____ Produced identification
Type of identification produced ________________________

Florida Supreme Court Approved Family Law Form 12.980(j), Motion for Modification of Injunction for Protection Against Domestic Violence, Repeat Violence, Dating Violence, or Sexual Violence (07/04)

IN THE CIRCUIT COURT OF THE ___________________________ JUDICIAL CIRCUIT,
IN AND FOR ___________________________ COUNTY, FLORIDA

Case No.: ____________________________
Division: ____________________________

___________________________________,
Petitioner

and

___________________________________,
Respondent.

ORDER EXTENDING INJUNCTION FOR PROTECTION AGAINST
( ) DOMESTIC VIOLENCE ( ) REPEAT VIOLENCE ( ) DATING VIOLENCE
( ) SEXUAL VIOLENCE

THIS CAUSE came before the Court on *{date}* ______________________, upon Petitioner's motion for an extension of injunction for protection and it appearing to the Court as follows:

___ **Ex parte.** The claims in the motion for extension of injunction for protection make it appear to the Court that there is an immediate and present danger of domestic, repeat, dating, or sexual violence, as required under section 741.30 or section 784.046, Florida Statutes. The previously entered injunction is extended until *{date}* __________________. A full hearing on the petition is scheduled for *{date}* _______________ at ____________ a.m./p.m. in ____.

NOTICE: Because this is a civil case, there is no requirement that these proceedings be transcribed at public expense.

YOU ARE ADVISED THAT IN THIS COURT:

______ a. a court reporter is provided by the court.
______ b. electronic audio tape recording only is provided by the court. A party may arrange in advance for the services of and provide for a court reporter to prepare a written transcript of the proceedings at that party's expense.
______ c. If this is a repeat violence, dating violence, or sexual violence action, no electronic audio tape recording or court reporting services are provided by the court. A party may arrange in advance for the services of and provide for a court reporter to prepare a written transcript of the proceedings at that party's expense.

A RECORD, WHICH INCLUDES A TRANSCRIPT, MAY BE REQUIRED TO SUPPORT AN APPEAL. THE PARTY SEEKING THE APPEAL IS RESPONSIBLE FOR HAVING THE

TRANSCRIPT PREPARED BY A COURT REPORTER. THE TRANSCRIPT MUST BE FILED WITH THE REVIEWING COURT OR THE APPEAL MAY BE DENIED.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact
{name} ____,
{address} ________________________, *{telephone}* __________,
within 2 working days of your receipt of this order. If you are hearing or voice impaired, call TDD 1-800-955-8771.

After notice and hearing. Respondent was served with a copy of the temporary injunction, if applicable, and a notice of this hearing within the time required by Florida law and was afforded an opportunity to be heard. The notice and opportunity to be heard were sufficient to protect Respondent's right to due process. The following persons attended the hearing:
( ) Petitioner ( ) Respondent.

After hearing the testimony of each party present and of any witnesses, or upon consent of Respondent, the Court finds that Petitioner is a victim of domestic, repeat violence, dating violence, or sexual violence or reasonably fears that he/she will become a victim of domestic or dating violence from Respondent. The previously entered injunction is extended until *{date}*__________ or until further order of the Court.

ORDERED on ____________________.

____
CIRCUIT JUDGE

COPIES TO:
Sheriff of ______________ County
Petitioner (or his or her attorney): ____ by U.S. Mail
____ by hand delivery in open court (Petitioner must acknowledge receipt in writing on the face of the original order — see below)
Respondent (or his or her attorney): ____ forwarded to sheriff for service
____ by hand delivery in open court (Respondent must acknowledge receipt in writing on the face of the original order — see below)
____ by certified mail (may only be used when Respondent is present at the hearing and Respondent fails or refuses to acknowledge the receipt of certified copy of this injunction)
____ State Attorney's Office

Florida Supreme Court Approved Family Law Form 12.980(m), Order Extending Injunction for Protection Against Domestic Violence, Repeat Violence, Dating Violence, or Sexual Violence (03/04)

____ Other: ____

I CERTIFY the foregoing is a true copy of the original as it appears on file in the office of the Clerk of the Circuit Court of __________ County, Florida, and that I have furnished copies of this order as indicated above.

CLERK OF THE CIRCUIT COURT

(SEAL)

By: ______________________________________
Deputy Clerk

ACKNOWLEDGMENT

I, *{Name of Petitioner}* ____, acknowledge receipt of a certified copy of this Injunction for Protection.

____
Petitioner

ACKNOWLEDGMENT

I, *{Name of Respondent}* ____________________________________, acknowledge receipt of a certified copy of this Injunction for Protection.

____
Respondent

INSTRUCTIONS FOR FLORIDA SUPREME COURT APPROVED FAMILY LAW FORM 12.980(q),
PETITION FOR INJUNCTION FOR PROTECTION AGAINST SEXUAL VIOLENCE

When should this form be used?

If you are a victim of **sexual violence** or the parent or legal guardian of a minor child who is living at home and is a victim of sexual violence, you can use this form to ask the court for a protective order prohibiting sexual violence. Sexual violence means any one incident of:

- sexual battery, as defined in chapter 794, Florida Statutes;
- a lewd or lascivious act, as defined in chapter 800, Florida Statutes, committed upon or in the presence of a person younger than 16 years of age;
- luring or enticing a child, as described in chapter 787, Florida Statutes;
- sexual performance by a child, as described in chapter 827, Florida Statutes; or
- any other forcible felony wherein a sexual act is committed or attempted

In order to get an injunction you must have reported the sexual violence to a law enforcement agency and be cooperating in the criminal proceeding if there is one. It does not matter whether criminal charges based on the sexual violence have been filed, reduced, or dismissed by the state attorney's office. You may also seek an injunction for protection against sexual violence if the respondent was sent to prison for committing one of the sexual violence crimes listed above against you or your minor child living at home and respondent is out of prison or is getting our of prison within 90 days of your petition. Attach the notice of inmate release to your petition.

Because you are making a request to the court, you are called the **petitioner**. The person whom you are asking the court to protect you from is called the **respondent**. If you are seeking an injunction for protection against sexual violence on behalf of a minor child who is living at home, the parent or legal guardian must have been an eyewitness to, or have direct physical evidence or **affidavits** from eyewitnesses of, the specific facts and circumstances that form the basis of the petition. If you are under the age of eighteen and have never been married or had the disabilities of nonage removed by a court, one of your parents or your legal guardian must sign this petition on your behalf.

If the respondent is your **spouse**, former spouse, related to you by blood or marriage, living with you now or has lived with you in the past (if you are or were living as a family), or is the other parent of your child(ren) whether or not you have ever been married or ever lived together, you should use **Petition for Injunction for Protection Against Domestic Violence**, ✎❐ Florida Supreme Court Approved Family Law Form 12.980(a), rather than this form.

This form should be typed or printed in black ink. You should complete this form (giving as much detail as possible) and sign it the presence of a notary or in front of the **clerk of the circuit court** in the county were you live. The clerk will take your completed petition to a **judge**. You should keep a copy for your records. If have any questions or need assistance completing this form, the clerk or **family law intake staff** will help you.

What should I do if the judge grants my petition?

If the facts contained in your petition convince the judge that an immediate and present danger of violence exists, the judge will sign a **Temporary Injunction for Protection Against Sexual Violence**, ✎❐ Florida Supreme Court Approved Family Law Form 12.980(r). A temporary injunction is issued without notice to the respondent. The clerk will give your **petition**, the temporary injunction, and any other papers filed with your petition to the sheriff or other law enforcement officer for **personal service** on the respondent. The temporary injunction will take effect immediately after the respondent is served with a copy of it. It lasts until a full **hearing** can be held or for a period of 15 days, whichever comes first, unless the **respondent** is incarcerated, and in such instance the temporary injunction is effective for 15 days following the date the **respondent** is released from incarceration. The court may extend the temporary injunction beyond 15 days for a good reason, which may include failure to obtain **service** on the respondent.

The temporary injunction is issued "**ex parte**." This means that the judge has considered only the information presented by one side — YOU. Section I of the temporary injunction gives a date that you should appear in court for a hearing. You will be expected to testify about the facts in your petition. The respondent will be given the opportunity to testify at this hearing, also. At the hearing, the judge will decide whether to issue a **Final Judgment of Injunction for Protection Against Sexual Violence (After Notice)**, ✎❐ Florida Supreme Court Approved Family Law Form 12.980(s), which will remain in effect for a specific time period or until modified or dissolved by the court. **If you and/or the respondent do not appear, the temporary injunction may be continued in force, extended, or dismissed, and/or additional orders may be granted, including the imposition of court costs.**

If the judge signs a temporary or final injunction, the clerk will provide you with the necessary copies. **Make sure that you keep one certified copy of the injunction with you at all times**!

What can I do if the judge denies my petition?

If your petition is denied on the grounds that it appears to the court that no immediate and present danger of sexual violence exists, the court will set a full hearing on your petition. The respondent will be notified by **personal service** of your petition and the hearing. If your petition is denied, you may: amend your petition by filing a **Supplemental Affidavit in Support of Petition for Injunction for Protection**,✎❐ Florida Supreme Court Approved Family Law Form 12.980 (g); attend the hearing and present facts that support your petition; and/or dismiss your petition.

Where can I look for more information?

Before proceeding, you should read "General Information for Self-Represented Litigants" found at the beginning of these forms. The words that are in "**bold underline**" are defined in that section. The clerk of the circuit court or **family law intake staff** will provide you with necessary forms. For further information, see section 784.046, Florida Statutes.

Special Notes . . .

If you fear that disclosing your address to the respondent would put you in danger, you should complete **Petitioner's Request for Confidential Filing of Address,** ✎❒ Florida Supreme Court Approved Family Law Form 12.980(h), and file it with the clerk of the circuit court and write "confidential" in the space provided for your address on the petition.

IN THE CIRCUIT COURT OF THE ___________________________ JUDICIAL CIRCUIT,
IN AND FOR ___________________________ COUNTY, FLORIDA

Case No.:_____________________________
Division: _____________________________

____________________________________,
Petitioner,

and

____________________________________,
Respondent.

PETITION FOR INJUNCTION FOR PROTECTION AGAINST SEXUAL VIOLENCE

I, *{full legal name}* _____________________________________ being sworn, certify that the following statements are true:

SECTION I. PETITIONER (This section is about you. It must be completed. However, **if you fear that disclosing your address to the respondent would put you in danger,** you should complete and file Petitioner's Request for Confidential Filing of Address, Florida Supreme Court Approved Family Law Form 12.980(h), and write "confidential" in the space provided on this form for your address.)

1. Petitioner currently lives at: *{address, city, state, zip code}* _________________________
____.
Date of Birth of Petitioner:____

[√ **if** applies]
_____ **Petitioner seeks an injunction for protection on behalf of a minor child.**
Petitioner is the parent or legal guardian of *{full legal name}*__________________
____________________________________, a minor child who is living at home.

2. Petitioner's attorney's name, address, and telephone number is:_________________________
____
(If you do not have an attorney, write "none.")

SECTION II. RESPONDENT (This section is about the person you want to be protected from. It must be completed.)

1. Respondent currently lives at: *{address, city, state, and zip code}* _______________________
____
Respondent's Driver's License number is: *{if known}* ________________________________

2. Respondent's last known place of employment:______________________
Employment address:______________________________
Working hours: ______________________________

3. Physical description of Respondent:
Race: ______ Sex: Male ___ Female ___ Date of Birth:__________
Height: ______ Weight: ______ Eye Color: ______ Hair Color: __________
Distinguishing marks and/or scars: ______________________________
Vehicle: (make/model) ______________ Color: __________ Tag Number:__________

4. Other names Respondent goes by (aliases or nicknames):______________________

5. Respondent's attorney's name, address, and telephone number is:______________________
____
(If you do not know whether Respondent has an attorney, write "unknown." If Respondent does not have an attorney, write "none.")

6. If Respondent is a minor, the address of Respondent's parent or legal guardian is: ________
____

SECTION III. CASE HISTORY AND REASON FOR SEEKING PETITION (This section must be completed.)

1. Petitioner has suffered sexual violence as shown by the fact that the Respondent has: *{describe the facts of violence}*______________________________
____
____
____
____
____
____
____
____
____

☐ Check here if you are attaching additional pages to continue these facts.

[√ **all** that apply]

____ a. Petitioner reported the sexual violence to law enforcement and is cooperating in any criminal proceeding. The incident report number by law enforcement is:______________. *{If there is a criminal case, include case number, if known}*________________.

____ b. Respondent was sent to prison for committing sexual violence against Petitioner or Petitioner's minor child living at home and Respondent is out of prison or is getting out of prison within 90 days. The notice of inmate release is attached.

2. Has Petitioner ever received or tried to get an injunction for protection against domestic violence, dating violence, repeat violence, or sexual violence against Respondent in this or any other court?
( ) Yes ( ) No If yes, what happened in that case? *{include case number, if known}*
____
____

3. Has Respondent ever received or tried to get an injunction for protection against domestic violence, dating violence, repeat violence, or sexual violence against Petitioner in this or any other court?
( ) Yes ( ) No If yes, what happened in that case? *{include case number, if known}*
____
____

4. Describe **any other** court case that is either going on now or that happened in the past **between Petitioner and Respondent** *{include case number, if known}*:______________
____
____
____

5. **Additional Information**

[√ **all** that apply]

____ a. Respondent owns, has, and/or is known to have guns or other weapons.
Describe weapon(s):

____ b. This or prior acts of violence have been previously reported to: *{person or agency}*
____.

SECTION IV. INJUNCTION (This section must be completed.)

1. Petitioner asks the Court to enter an injunction prohibiting Respondent from committing any acts of violence against Petitioner and:
a. prohibiting Respondent from going to or within 500 feet of any place Petitioner lives;
b. prohibiting Respondent from going to or within 500 feet of Petitioner's place(s) of employment or the school that Petitioner attends; the address of Petitioner's place(s) of employment and/or school is:______________________________________
____;
c. prohibiting Respondent from contacting Petitioner by telephone, mail, by e-mail, in writing, through another person, or in any other manner;
d. ordering Respondent not to use or possess any guns or firearms;

[√ **all** that apply]

____ e. prohibiting Respondent from going to or within 500 feet of the following place(s) Petitioner or Petitioner's immediate family must go to often: ______________________

____
____;

____ f. prohibiting Respondent from knowingly and intentionally going to or within 100 feet of Petitioner's motor vehicle;

and any other terms the Court deems necessary for the safety of Petitioner and Petitioner's immediate family.

I UNDERSTAND THAT BY FILING THIS PETITION, I AM ASKING THE COURT TO HOLD A HEARING ON THIS PETITION, THAT BOTH THE RESPONDENT AND I WILL BE NOTIFIED OF THE HEARING, AND THAT I MUST APPEAR AT THE HEARING.

I UNDERSTAND THAT I AM SWEARING OR AFFIRMING UNDER OATH TO THE TRUTHFULNESS OF THE CLAIMS MADE IN THIS PETITION AND THAT THE PUNISHMENT FOR KNOWINGLY MAKING A FALSE STATEMENT INCLUDES FINES AND/OR IMPRISONMENT.

Dated: ______________________________

____
Signature of Petitioner
Printed Name:________________________________
Address:____________________________________
City, State, Zip:______________________________
Telephone Number:___________________________
Fax Number: ________________________________

STATE OF FLORIDA
COUNTY OF

Sworn to or affirmed and signed before me on__________________ by_______________________.

____
NOTARY PUBLIC or DEPUTY CLERK

____
[Print, type, or stamp commissioned name of notary or clerk.]

______Personally known
______Produced identification
______Type of identification produced_________________________

IN THE CIRCUIT COURT OF THE __________________________ JUDICIAL CIRCUIT,
IN AND FOR __________________________ COUNTY, FLORIDA

Case No.: ____________________________
Division: ____________________________

__________________________________,
Petitioner,

and

__________________________________,
Respondent.

TEMPORARY INJUNCTION FOR PROTECTION AGAINST SEXUAL VIOLENCE

The Petition for Injunction for Protection Against Sexual Violence under section 784.046, Florida Statutes, and other papers filed in this Court have been reviewed. Under the laws of Florida, the Court has jurisdiction of the petitioner and the subject matter and has jurisdiction of the respondent upon service of the temporary injunction. The term "Petitioner" as used in this injunction includes the person on whose behalf this injunction is entered.

It is intended that this protection order meet the requirements of 18 U.S.C. § 2265 and therefore intended that it be accorded full faith and credit by the court of another state or Indian tribe and enforced as if it were the order of the enforcing state or of the Indian tribe.

SECTION I. NOTICE OF HEARING

Because this Temporary Injunction for Protection Against Sexual Violence has been issued without notice to Respondent, Petitioner and Respondent are instructed that they are scheduled to appear and testify at a hearing regarding this matter on *{date}* _________________, at __________ a.m./p.m., when the Court will consider whether the Court should issue a Final Judgment of Injunction for Protection Against Sexual Violence, which shall remain in effect until modified or dissolved by the Court, and whether other things should be ordered. The hearing will be before The Honorable *{name}*___________________________, at *{room name/number, location, address, city}*_______________________________________, Florida. If Petitioner and/or Respondent do not appear, this temporary injunction may be continued in force, extended, or dismissed, and/or additional orders may be granted, including the imposition of court costs. All witnesses and evidence, if any, must be presented at this time.

NOTICE: Because this is a civil case, there is no requirement that these proceedings be transcribed at public expense.

YOU ARE ADVISED THAT IN THIS COURT:

______ a. a court reporter is provided by the court.
______ b. electronic audio tape recording only is provided by the court. A party may arrange in advance for the services of and provide for a court reporter to prepare a written transcript of the proceedings at that party's expense.
______ c. no electronic audio tape recording or court reporting services are provided by the court. A party may arrange in advance for the services of and provide for a court reporter to prepare a written transcript of the proceedings at that party's expense.

A RECORD, WHICH INCLUDES A TRANSCRIPT, MAY BE REQUIRED TO SUPPORT AN APPEAL. THE PARTY SEEKING THE APPEAL IS RESPONSIBLE FOR HAVING THE TRANSCRIPT PREPARED BY A COURT REPORTER. THE TRANSCRIPT MUST BE FILED WITH THE REVIEWING COURT OR THE APPEAL MAY BE DENIED.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact *{name}*______________________________, *{address}*______________________________, *{telephone}*______________, within 2 working days of your receipt of this temporary injunction. If you are hearing or voice impaired, call TDD 1-800-955-8771.

SECTION II. FINDINGS

The statements made under oath by Petitioner make it appear that section 784.046, Florida Statutes, applies to the parties, that Petitioner is a victim of sexual violence by Respondent and meets the requirements for an injunction established by law.

SECTION III. TEMPORARY INJUNCTION AND TERMS

This injunction shall be effective until the hearing set above and in no event for longer than 15 days, unless extended by court order or unless the Respondent is incarcerated, and if incarcerated, shall be effective for 15 days following the date Respondent is released from incarceration. If a final order of injunction is issued, the terms of this temporary injunction will be extended until service of the final injunction is effected upon Respondent. This injunction is valid and enforceable in all counties of the State of Florida. The terms of this injunction may not be changed by either party alone or by both parties together. Only the Court may modify the terms of this injunction. Either party may ask the Court to change or end this injunction.

Willful violation of the terms of this injunction, such as refusing to vacate the dwelling which the parties share, going to Petitioner's residence, place of employment, school, or other place prohibited in this injunction, telephoning, contacting or communicating with Petitioner, if prohibited by this injunction, or committing an act of sexual violence against Petitioner constitutes a misdemeanor of the first degree punishable

by up to one year in jail, as provided by sections 775.082 and 775.083, Florida Statutes.

Any party violating this injunction may be subject to civil or indirect criminal contempt proceedings, including the imposition of a fine or imprisonment and also may be charged with a crime punishable by a fine, jail, or both, as provided by Florida Statutes.

ORDERED and ADJUDGED:

1. **Violence Prohibited.** Respondent shall not commit, or cause any other person to commit, any acts of violence against Petitioner, including assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnaping, or false imprisonment, or any criminal offense resulting in physical injury or death. Respondent shall not commit any other violation of the injunction through an intentional unlawful threat, word, or act to do violence to Petitioner.

2. **No Contact. Respondent shall have no contact with the Petitioner unless otherwise provided in this section.**
a. Unless otherwise provided herein, Respondent shall have no contact with Petitioner. Respondent shall not directly or indirectly contact Petitioner in person, by mail, e-mail, fax, telephone, through another person, or in any other manner. Further, Respondent shall not contact or have any third party contact anyone connected with Petitioner's employment or school to inquire about Petitioner or to send any messages to Petitioner. Unless otherwise provided herein, **Respondent shall not go to, in, or within 500 feet of:** Petitioner's current residence *{list address}*______________________________________
____
or any residence to which Petitioner may move; Petitioner's current or any subsequent place of employment *{list address of current employment}* ________________________
________________________________ or place where Petitioner attends school *{list address of school}*____; or the following other places (if requested by Petitioner) where Petitioner or Petitioner's minor child(ren) go often: ____
____
____
____
____
____

[Initial **if** applies; write N/A **if not** applicable]
____ b. Respondent may not knowingly come within 100 feet of Petitioner's automobile at any time.
____ c. Other provisions regarding contact:____
____
____

3. **Firearms.**
[Initial **all** that apply; write N/A **if does not** apply]

____ a. Respondent shall not use or possess a firearm or ammunition.
____ b. Respondent shall surrender any firearms and ammunition in Respondent's possession to the County Sheriff's Department.
____ c. Other directives relating to firearms and ammunition: ______________________________
____
____

4. **Mailing Address.** Respondent shall notify the Clerk of the Court of any change in his or her mailing address within 10 days of the change. All further papers (excluding pleadings requiring personal service) shall be served by mail to Respondent's last known address. Such service by mail shall be complete upon mailing. Rule 12.080, Fla.Fam.L.R.P., section 784.046, Florida Statutes.

5. **Additional order(s) necessary to protect Petitioner from sexual violence:**__________
____
____
____
____
____
____
____

SECTION IV. OTHER SPECIAL PROVISIONS

(This section to be used for inclusion of local provisions approved by the chief judge.)

SECTION V. DIRECTIONS TO LAW ENFORCEMENT OFFICER IN ENFORCING THIS INJUNCTION

(Provisions in this injunction that do not include a line for the judge to either initial or write N/A are considered mandatory provisions and should be interpreted to be part of this injunction.)

1. The Sheriff of ______________ County, or any other authorized officer, is ordered to serve this temporary injunction upon Respondent as soon as possible after its issuance.

2. **This injunction is valid and enforceable in all counties of the State of Florida.** Violation of this injunction should be reported to the appropriate law enforcement agency. Law enforcement officers of the jurisdiction in which a violation of this injunction occurs shall enforce the provisions of this injunction and are authorized to arrest without a warrant pursuant to section 901.15, Florida Statutes, for any violation of its provisions, which constitutes a criminal act under section 784.047, Florida Statutes.

3. Should any Florida law enforcement officer having jurisdiction have probable cause to

believe that Respondent has knowingly violated this injunction, the officer may arrest Respondent, confine him/her in the county jail without bail, and shall bring him/her before the Initial Appearance Judge on the next regular court day so that Respondent can be dealt with according to law. The arresting agent shall notify the State Attorney's Office immediately after arrest. THIS INJUNCTION IS ENFORCEABLE IN ALL COUNTIES OF FLORIDA AND LAW ENFORCEMENT OFFICERS MAY EFFECT ARRESTS PURSUANT TO SECTION 901.15(6), FLORIDA STATUTES.

4. **Reporting alleged violations.** If Respondent violates the terms of this injunction and there has not been an arrest, Petitioner may contact the Clerk of the Circuit Court of the county in which the violation occurred and complete an affidavit in support of the violation or Petitioner may contact the State Attorney's office for assistance in filing an action for indirect civil contempt or indirect criminal contempt. Upon receiving such a report, the State Attorney is hereby appointed to prosecute such violations by indirect criminal contempt proceedings, or the State Attorney may decide to file a criminal charge, if warranted by the evidence.

ORDERED on _________________________________.

____
CIRCUIT JUDGE

COPIES TO:
Sheriff of _______________County
Petitioner:____by U. S. Mail_____by hand delivery
Respondent:______forwarded to sheriff for service
Other:______________________________

I CERTIFY the foregoing is a true copy of the original as it appears on file in the office of the Clerk of the Circuit Court of _________ County, Florida, and that I have furnished copies of this order as indicated above.

CLERK OF THE CIRCUIT COURT

(SEAL)

By: ____
Deputy Clerk

IN THE CIRCUIT COURT OF THE ________________________ JUDICIAL CIRCUIT,
IN AND FOR ________________________ COUNTY, FLORIDA

Case No.: ____________________________
Division: ____________________________

________________________________,
Petitioner,

and

________________________________,
Respondent.

FINAL JUDGMENT OF INJUNCTION FOR PROTECTION AGAINST SEXUAL VIOLENCE (AFTER NOTICE)

The Petition for Injunction for Protection Against Sexual Violence under section 784.046, Florida Statutes, and other papers filed in this Court have been reviewed. The Court has jurisdiction of the parties and the subject matter. The term "Petitioner" as used in this injunction includes the person on whose behalf this injunction is entered.

It is intended that this protection order meet the requirements of 18 U.S.C. § 2265 and therefore intended that it be accorded full faith and credit by the court of another state or Indian tribe and enforced as if it were the order of the enforcing state or of the Indian tribe.

SECTION I. HEARING

This cause came before the Court for a hearing to determine whether an Injunction for Protection Against Sexual Violence in this case should be ( ) issued ( ) modified ( ) extended.

The hearing was attended by ( ) Petitioner ( ) Respondent
( ) Petitioner's Counsel ( ) Respondent's Counsel

SECTION II. FINDINGS

On *{date}* ____________________, a notice of this hearing was served on Respondent together with a copy of Petitioner's petition to this Court and the temporary injunction, if issued. Service was within the time required by Florida law, and Respondent was afforded an opportunity to be heard.

After hearing the testimony of each party present and of any witnesses, or upon consent

of Respondent, the Court finds, based on the specific facts of this case, that Petitioner is a victim of sexual violence by Respondent and meets the requirements for an injunction established by law.

SECTION III. INJUNCTION AND TERMS

This injunction shall be in full force and effect until ( ) further order of the Court ( )*{date}* ___________________________. This injunction is valid and enforceable throughout all counties in the State of Florida. The terms of this injunction may not be changed by either party alone or by both parties together. Only the Court may modify the terms of this injunction. Either party may ask the Court to change or end this injunction.

Willful violation of the terms of this injunction, such as refusing to vacate the dwelling which the parties share, going to Petitioner's residence, place of employment, school, or other place prohibited in this injunction, telephoning, contacting or communicating with Petitioner, if prohibited by this injunction, or committing an act of sexual violence against Petitioner constitutes a misdemeanor of the first degree punishable by up to one year in jail, as provided by sections 775.082 and 775.083, Florida Statutes.

Any party violating this injunction shall be subject to civil or indirect criminal contempt proceedings, including the imposition of a fine or imprisonment, and also may be charged with a crime punishable by a fine, jail, or both, as provided by Florida Statutes.

ORDERED and ADJUDGED:

1. **Violence Prohibited.** Respondent shall not commit, or cause any other person to commit, any acts of violence against Petitioner, including assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnaping, or false imprisonment, or any criminal offense resulting in physical injury or death. Respondent shall not commit any other violation of the injunction through an intentional unlawful threat, word or act to do violence to the Petitioner.

2. **No Contact. Respondent shall have no contact with Petitioner unless otherwise provided in this section.**
   a. Unless otherwise provided herein, Respondent shall have no contact with Petitioner. Respondent shall not directly or indirectly contact Petitioner in person, by mail, e-mail, fax, telephone, through another person, or in any other manner. Further, Respondent shall not contact or have any third party contact anyone connected with Petitioner's employment or school to inquire about Petitioner or to send any messages to Petitioner. Unless otherwise provided herein, **Respondent shall not go to, in, or within 500 feet of:** Petitioner's current residence *{list address}*____
   ____
   ____or any residence to which Petitioner may move; Petitioner's current or any subsequent place of

employment *{list address of current employment}*__________________________________
or place where Petitioner attends school *{list address of school}*____________________
____; or the following other places (if requested by Petitioner) where Petitioner or Petitioner's minor child(ren) go often:______
____
____
____
____.

[Initial **if** applies; write N/A **if not** applicable]

___ b. Respondent may not knowingly come within 100 feet of Petitioner's automobile at any time.

___ c. Other provisions regarding contact:____
____
____

3. **Firearms.**

[Initial **all** that apply; write N/A **if does not** apply]

____ a. Respondent shall not use or possess a firearm or ammunition.

____ b. Respondent shall surrender any firearms and ammunition in the Respondent's possession to the ____________________ County Sheriff's Department.

____ c. Other directives relating to firearms and ammunition: ___________________________
____

4. **Mailing Address.** Respondent shall notify the Clerk of the Court of any change in his or her mailing address within 10 days of the change. All further papers (excluding pleadings requiring personal service) shall be served by mail to Respondent's last known address. Such service by mail shall be complete upon mailing. Rule 12.080, Fla.Fam.L.R.P., section 784.046, Florida Statutes.

5. **Additional order(s) necessary to protect Petitioner from sexual violence:** __________
____
____
____
____
____
____
____
____
____

SECTION IV. OTHER SPECIAL PROVISIONS

(This section to be used for inclusion of local provisions approved by the chief judge.)

SECTION V. DIRECTIONS TO LAW ENFORCEMENT OFFICER IN ENFORCING THIS INJUNCTION

(Provisions in this injunction that do not include a line for the judge to either initial or write N/A are considered mandatory provisions and should be interpreted to be part of this injunction.)

1. **This injunction is valid and enforceable in all counties of the State of Florida.** Violation of this injunction should be reported to the appropriate law enforcement agency. Law enforcement officers of the jurisdiction in which a violation of this injunction occurs shall enforce the provisions of this injunction and are authorized to arrest without a warrant pursuant to section 901.15, Florida Statutes, for any violation of its provision, which constitutes a criminal act under section 784.047, Florida Statutes.
2. Should any Florida law enforcement officer having jurisdiction have probable cause to believe that Respondent has knowingly violated this injunction, the officer may arrest Respondent, confine him/her in the county jail without bail, and shall bring him/her before the Initial Appearance Judge on the next regular court day so that Respondent can be dealt with according to law. The arresting agent shall notify the State Attorney's Office immediately after arrest. THIS INJUNCTION IS ENFORCEABLE IN ALL COUNTIES OF FLORIDA AND LAW ENFORCEMENT OFFICERS MAY EFFECT ARRESTS PURSUANT TO SECTION 901.15(6), FLORIDA STATUTES.
3. **Reporting alleged violations.** If Respondent violates the terms of this injunction and there has not been an arrest, Petitioner may contact the Clerk of the Circuit Court of the county in which the violation occurred and complete an affidavit in support of the violation or Petitioner may contact the State Attorney's Office for assistance in filing an action for indirect civil contempt or indirect criminal contempt. Upon receiving such a report, the State Attorney is hereby appointed to prosecute such violations by indirect criminal proceedings, or the State Attorney may decide to file a criminal charge, if warranted by the evidence.
4. Respondent, upon service of this injunction, shall be deemed to have knowledge of and to be bound by all matters occurring at the hearing and on the face of this injunction.
5. The temporary injunction, if any, entered in this case is extended until such time as service of this injunction is effected upon Respondent.

ORDERED on ________________________________.

____
CIRCUIT JUDGE

Florida Supreme Court Approved Family Law Form 12.980(s), Final Judgment of Injunction for Protection Against Sexual Violence (After Notice) (07/04)

COPIES TO:
Sheriff of ____________________ County

Petitioner (or his or her attorney):	____	by U. S. Mail
	____	by hand delivery in open court (Petitioner must acknowledge receipt in writing on the face of the original order - see below)
Respondent (or his or her attorney):	____	forwarded to sheriff for service
	____	by hand delivery in open court (Respondent must acknowledge receipt in writing on the face of the original order - see below)
	____	by certified mail (may only be used when Respondent is present at the hearing and Respondent fails or refuses to acknowledge the receipt of certified copy of this injunction)

____ State Attorney's Office
____ Other: ______________________________

I CERTIFY the foregoing is a true copy of the original as it appears on file in the office of the Clerk of the Circuit Court of ___________ County, Florida, and that I have furnished copies of this order as indicated above.

CLERK OF THE CIRCUIT COURT

(SEAL)

By: ____
Deputy Clerk

ACKNOWLEDGMENT

I, *{Name of Petitioner}* ___________________________, acknowledge receipt of a certified copy of this Injunction for Protection.

____
Petitioner

ACKNOWLEDGMENT

I, *{Name of Respondent}*___________________________, acknowledge receipt of a certified copy of this Injunction for Protection.

____
Respondent

INSTRUCTIONS FOR FLORIDA SUPREME COURT APPROVED FAMILY LAW FORM 12.980(t), PETITION BY AFFIDAVIT FOR ORDER TO SHOW CAUSE FOR A VIOLATION OF FINAL JUDGMENT OF INJUNCTION FOR PROTECTION AGAINST DOMESTIC VIOLENCE, REPEAT VIOLENCE, DATING VIOLENCE, OR SEXUAL VIOLENCE

When should this form be used?

You may use this form if you have a valid **Final Judgment of Injunction for Protection Against Domestic Violence, Repeat Violence, Dating Violence, or Sexual Violence** in force which has been violated. You should use this **affidavit** to state the essential facts which establish a violation of the Final Judgment of Injunction.

This form should be typed or printed in black ink. After completing this form, you should sign the form before a **notary public** or the **clerk of the circuit court**. You should then **file** the original with such clerk or judge as determined by the chief judge of your circuit to be the recipient of affidavits of violation, provide a copy to the state attorney of that circuit and keep a copy for your records.

IN THE CIRCUIT COURT OF THE __________________________ JUDICIAL CIRCUIT,
IN AND FOR __________________________ COUNTY, FLORIDA

Case No.: ___________________________
Division: ___________________________

___________________________________,
Petitioner,

and

___________________________________,
Respondent.

PETITION BY AFFIDAVIT FOR ORDER TO SHOW CAUSE FOR A VIOLATION OF FINAL JUDGMENT OF INJUNCTION FOR PROTECTION AGAINST ( ) DOMESTIC VIOLENCE ( ) REPEAT VIOLENCE ( ) DATING VIOLENCE ( ) SEXUAL VIOLENCE

I, *{full legal name}* ____, being sworn, certify that I have actual knowledge of the following facts as set forth and the following statements are true:

1. The Court has previously issued [√ **one** only]
____ a. Final Judgment of Injunction for Protection Against Domestic Violence
____ b. Final Judgment of Injunction for Protection Against Repeat Violence
____ c. Final Judgment of Injunction for Protection Against Dating Violence
_____ d. Final Judgment of Injunction for Protection Against Sexual Violence

in this case on the ___ day of ____________________, _____.

2. The Final Judgment of Injunction for Protection was served on Respondent on the ___ day of ____________________, _____.

3. On *{date}* _________________________, at *{place and address}* ___________________
____,
the following event(s) took place:____
____
____
____
____
____

____
____
____
____
____
____
____

□ Check here if you are attaching additional pages to continue these facts.

4. Respondent has willfully violated the Injunction by (explain what Respondent did that violated the Order of Protection.)

____
____
____
____
____
____
____
____
____
____
____
____
____
____

□ Check here if you are attaching additional pages to continue these facts.

5. _____ Check here if you are attaching copies of medical records for treatment you may have received for injuries referred to in your affidavit, or copies of any police or sheriff reports concerning incidents of violence involving you and Respondent.

6. Respondent acted to impair, interfere with, delay, hinder, lessen the authority of, dignity of, and embarrass the cause of justice in a manner contemptuous of this court.

WHEREFORE, I respectfully request that the Court issue an Order to Show Cause, requiring Respondent to appear before the Court to show cause why Respondent should not be held in contempt of court for failure to abide by the terms and conditions of the Final Judgment of Injunction for Protection.

I understand that by filing this affidavit, I am asking the court to hold a hearing, that both Respondent and I will be notified of the hearing, and that I must appear at the hearing. In addition to my own testimony, I understand that I can bring other proof of the violation such as, for example, people who saw Respondent violate the order, pictures, medical records,

police reports, or anything that might help show the judge how Respondent violated the Final Judgment of Injunction for Protection.

I have read every statement made in this affidavit and each statement is true and correct. I understand that the statements made in this affidavit are being made under penalty of perjury, punishable as provided in Section 837.02, Florida Statutes and that the punishment for knowingly making a false statement includes fines and/or imprisonment.

Dated: ____________________________

____
Signature of Petitioner

STATE OF FLORIDA
COUNTY OF ____________________

Sworn to or affirmed and signed before me on _______________ by ______________________.

____
NOTARY PUBLIC or DEPUTY CLERK

____
[Print, type, or stamp commissioned name of notary or clerk.]

____ Personally known
____ Produced identification
Type of identification produced _______________________

I certify that a copy of this document was [√ **one** only] ( ) mailed ( ) faxed and mailed ( ) hand delivered to the person(s) listed below on *{date}*________________________________.

Other party or his/her attorney:
Name:____
Address:____________________________________
City, State, Zip:______________________________
Fax Number:________________________________

IN THE CIRCUIT COURT OF THE __________________________ JUDICIAL CIRCUIT,
IN AND FOR __________________________ COUNTY, FLORIDA

Case No.: ___________________________
Division: ____________________________

____________________________________,
Petitioner,

and

____________________________________,
Respondent.

Description of Respondent:

Sex: ________ Eye color: __________
Race: ________________ Hair color: __________
Height: _________ Last known address: _______________________________
Weight: _________ ____
DOB: _________________

ORDER TO SHOW CAUSE

This cause comes before the court for review based upon the alleged conduct of Respondent for the issuance of an Order to Show Cause directed to *{name}*__________________ ______________________ for violation of the Final Judgment of Injunction for Protection as is more specifically set forth in the **Petition By Affidavit For Order To Show Cause For a Violation Of Final Judgment Of Injunction For Protection,** a copy of which is attached hereto and made a part hereof.

NOW, THEREFORE, you,*{name}* ______________________________, are hereby ORDERED to appear before this court before Judge *{name}* ____________________________, on *{date}* __________________, at *{time}* ___________.m., in Room _________ of the _____________Courthouse, located at ___________________________, to be arraigned. A subsequent hearing will be scheduled requiring Respondent to show cause why he/she should not be held in contempt of this court for violation of the Final Judgment of Injunction for Protection as is stated in the attached **Petition By Affidavit For Order To Show Cause For a Violation of Final Judgment of Injunction For Protection**. Punishment, if imposed, may include a fine and incarceration.

Should the court determine, based on the evidence presented at the hearing, that Respondent's conduct warrants sanctions for civil contempt in addition to or instead of indirect criminal contempt, the court reserves the right to find Respondent guilty of civil contempt and impose appropriate civil sanctions.

Florida Supreme Court Approved Family Law Form 12.980(u), Order to Show Cause (03/04)

The court hereby appoints the State Attorney's Office to prosecute the case.

Respondent is advised that he/she is entitled to be represented by counsel.

IT IS FURTHER ORDERED that the Sheriff of this county serve this **Order to Show Cause** by delivering copies to Respondent, with proof of Sheriff's service.

ORDERED in ______________ County, Florida, on *{date}* ________________________.

____
Judge

Copies to:
_____ State Attorney
_____ Petitioner or Counsel for Petitioner
_____ Respondent or Counsel for Respondent

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact *{name}* ____, *{address}* ____, *{telephone}* ___________________, within 2 working days of your receipt of this order. If you are hearing or voice impaired, call TDD 1-800-955-8771.

Notes

Florida's Sexual Violence Benchbook was developed through grant 2009-EF-S6-0043 awarded by the Violence Against Women Grants Office, Office of Justice Programs, U.S. Department of Justice. Points of view in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice or the Florida Department of Children and Families.