Florida's SEXUAL VIOLENCE BENCHBOOK

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Office of the State Courts Administrator

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INTRODUCTION

Goal 5.3 of the Long-Range Strategic Plan for the Florida Judicial Branch is to provide timely education and training to judges to ensure high level performance. The Office of the State Courts Administrator (OSCA), Office of Court Improvement (OCI), in collaboration with the Sexual Violence Benchbook Advisory Committee and the Florida Council Against Sexual Violence (FCASV), developed Florida's Sexual Violence Benchbook to update the 2011 Sexual Violence Benchbook and address the important and unique issues present in sexual violence cases. The OSCA will update this benchbook periodically to assist both new and experienced judges who hear sexual violence cases. This benchbook is a compilation of promising practices as well as a legal resource guide. It is intended to be a comprehensive tool for judges, providing information regarding legal and non-legal considerations in sexual violence cases.

This benchbook features –

- Sexual violence data
- Updated sexual violence statutes, definitions, and penalties
- Sexual violence jury questionnaires
- Sexual violence benchcards
- Trauma-informed court practices
- A Jimmy Ryce Act overview

Applicable federal law and relevant case law are also included. The information in the benchbook focuses primarily on the adult criminal sexual violence proceedings; however, the sexual violence injunction benchcard includes informative sections highlighting the issues in sexual violence civil injunction proceedings.
Our office invites suggestions for future editions and ways in which the benchbook can be made more useful to criminal courts in Florida. Please provide comments and suggestions to: Office of Court Improvement, Supreme Court building, 500 South Duval Street, Tallahassee, Florida, 32399-1900.

The citations in this benchbook have been abbreviated to improve the flow of the text. For example, a citation for § 960.01(1), Florida Statutes (2015), will appear as § 960.01(1), and a citation to Florida Rules of Criminal Procedure 3.350 will appear as Rule 3.350.

By request by an individual with a disability, this document will be made available in alternative formats. To order this document in an alternative format, please contact the Office of Court Improvement, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida, 32399-1900. Phone: (850) 414-1507.

SEXUAL VIOLENCE BENCHBOOK

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TAB 1: The Basics

SEXUAL VIOLENCE: AN OVERVIEW

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. 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 improvement of DNA evidence, several defendants have been exonerated after serving lengthy sentences for rape and other crimes of sexual violence. On November 14, 2016, Charles Moses-El was released from prison in Denver, Colorado, after spending 28 years in prison for rape of a girl that DNA evidence proved he did not commit. In December, 2016, Brian Franklin was re-tried and acquitted in Texas after being imprisoned for 21 years for sexually assaulting a child. In that case, the victim had actually been assaulted by her stepfather. The heinousness of these types of crimes requires justice for the victims, but there is no justice if innocent people are convicted and the actual perpetrators remain free. Therefore, the role of the judge in establishing a neutral playing field is vital in all criminal cases and in sexual violence cases particularly.

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. Judges need to be aware of the correct information surrounding sexual assault cases to ensure fundamental fairness in court proceedings. Proper procedures must be followed, competent evidence must be presented, and the credibility of witnesses must be weighed before a verdict can be rendered justly. These are the basic due process requirements that lead to overall fairness for defendants in criminal cases. 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.

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,[1] exposure of sexual organs,[2] and some offenses of prostitution,[3] the primary focus of this benchbook is on the various felony offenses that pertain to non-consensual sexual activity. 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, a judge should 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. Understanding the typical kinds of sexual violence cases judges will encounter will give the judicial officer the necessary tools to handle any sexual violence case that comes before the bench.

DEFINITIONS

There is no set definition of "sexual violence" codified in the Florida Statutes or Florida case law. However, the Center for Disease Control has written a very general definition:

Sexual violence is any sexual act committed against someone without that person's freely given consent.[4]

The following are a list of sexual violence statutes that a criminal court judge may encounter. These crimes comprise the phrase "crimes of sexual violence" in Florida.

- Sexual Battery § 794.011
- Kidnapping, False Imprisonment, Luring or Enticing a Child, Chapter 787
- Lewdness; Indecent Exposure, Chapter 800
- Incest, § 826.04
- Sexual Performance by a Child, § 827.071

[1] Section 800.02, Florida Statutes (2016).
[2] Section 800.03, Florida Statutes (2016).
[3] Sections 796.07(4)(a) and (b), Florida Statutes (2016).
[4] Center for Disease Control. *Sexual Violence: Definitions.* Retrieved January 27, 2017, at https://www.cdc.gov/violenceprevention/sexualviolence/definitions.html.

- Obscenity, Child Pornography, Computer Facilitated Offenses, Chapter 847
- Abuse, Neglect, and Exploitation of Elderly Persons and Disabled Adults, § 825.1025
- Stalking, § 784.048
- Sexual Cyber Harassment § 784.049
- Human Trafficking, Chapter 787

Each section of the Florida Statutes specifically defines the terminology used in 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).

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

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).

Human trafficking means transporting, soliciting, recruiting, harboring, providing, enticing, maintaining, or obtaining another person for the purpose of exploitation of that person. § 787.06(2)(d).

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.

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).

Lewd or lascivious conduct means intentionally touching a person less than 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).

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).

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).

Mentally defective means a mental disease or defect which renders a person temporarily or permanently incapable of appraising the nature of their conduct. § 794.011(1)(b).

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 their consent or due to any other act committed upon that person without their consent. § 794.011(1)(c).

Non-stranger refers to a victim's relationship to the offender. An offender who is either related to, well known to, or casually acquainted with the victim is a non-stranger.[5]

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

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). However *see* Palumbo v. State, 52 So.3d 834 (Fla. 5th DCA 2011) which held that "within the meaning of the statute criminalizing the sexual battery offense of union with the vagina includes the entire vulva area and not just the passageway between the cervix and vulva."

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

Physically incapacitated means bodily impaired or handicapped and substantially limited in ability to resist or flee. § 794.011(1)(j).

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

Serious personal injury means great bodily harm or pain, permanent disability, or permanent disfigurement. § 794.011(1)(g).

Sexual activity is defined in two different statutes in Florida; for lewd or lascivious offenses under § 800.04(1)(a) and for unlawful sexual activity with certain minors under § 794.05(1), sexual activity means the oral, anal, or vaginal penetration by, or

[5] OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS; https://www.bjs.gov/index.cfm?ty=tp&tid=941 (last visited January, 2017).

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.

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).

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. A mother's breastfeeding of her baby does not under any circumstances constitute "sexual conduct." § 847.001(16).

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.

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

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).

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.

STATUTES

A. Sexual Battery - § 794.011

General Information

Sexual battery is defined as 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 without consent. This is considered to be the main statute for sexual violence. It is a broad statute, and covers such crimes as rape, attempted rape, sexual contact,

and others.

Courts have noted that sexual battery is a **general intent** crime. Holland v. State, 773 So. 2d 1065 (Fla. 2000).

As noted above, the crime of sexual battery is one that requires a lack of consent. The Florida Statutes have provided a strong definition of consent. **Consent** is "intelligent, knowing, and voluntary consent." Consent 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).

Further, the crime of sexual battery requires "**penetration**." The Legislature provided helpful language as to the issue of what constitutes penetration, saying, "it was never intended that the sexual battery offense described in § 794.011(5) require any force or violence beyond the force and violence that is inherent in the accomplishment of 'penetration' or 'union.'" § 794.005. In the main case on the issue of "penetration," the Fourth DCA held that, "[t]he 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)." State v. Sedia, 614 So. 2d 533 (Fla. 4th DCA 1993).

In addition, some of the offenses under the section ""sexual battery" use language such as "**physically helpless**." While the term has some common definitions, courts have expanded on the definition to say the following: the term "physically helpless" as used in for the purposes of sexual battery, is defined as unconscious, asleep, or for any other reason physically unable to communicate unwillingness to an act. § 794.011(1)(e). *See* Sedia, *supra*.

Further, certain sections of the sexual battery section outline offenses done by certain persons in specific relationships to the victim. 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. The Supreme Court has held that "[t]he 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." State v. Rawls, 649 So. 2d 1350 (Fla. 1994)(superseded on other grounds).

Finally, note that sexual battery does not include an act done for a bona fide medical purpose. § 794.011(1)(h).

Below is a list of the offenses that fall under the general term "sexual battery."

Offenses

Section 794.011 (2)

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.
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.

Section 794.011(3)

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)

a) A person 18 years of age or older who commits sexual battery upon a person 12 years of age or older but younger than 18 years of age without that person's consent, under any of the circumstances listed in paragraph (e), commits a felony of the first degree.
b) A person 18 years of age or older who commits sexual battery upon a person 18 years of age or older without that person's consent, under any of the circumstances listed in paragraph (e), commits a felony of the first degree.
c) A person younger than 18 years of age who commits sexual battery upon a person 12 years of age or older without that person's consent, under any of the circumstances listed in paragraph (e), commits a felony of the first degree.
d) A person commits a felony of the first degree, punishable by a term of years not exceeding life or as provided in s. 775.082, s. 775.083, s. 775.084, or s. 794.0115 if the person commits sexual battery upon a person 12 years of age or older without that person's consent, under any of the circumstances listed in paragraph (e), and such person was previously convicted of a violation of:
    1. Section 787.01(2) or s. 787.02(2) when the violation involved a victim who was a minor and, in the course of committing that violation, the defendant committed against the minor a sexual battery under this chapter or a lewd act under s. 800.04 or s. 847.0135(5);
    2. Section 787.01(3)(a)2. or 3.;
    3. Section 787.02(3)(a)2. or 3.;
    4. Section 800.04;
    5. Section 825.1025;
    6. Section 847.0135(5); or
    7. This chapter, excluding subsection (10) of this section.
e) The following circumstances apply to paragraphs (a)-(d):
    1. The victim is physically helpless to resist.
    2. The offender coerces the victim to submit by threatening to use force or

violence likely to cause serious personal injury on the victim, and the victim reasonably believes that the offender has the present ability to execute the threat.

3. The offender coerces the victim to submit by threatening to retaliate against the victim, or any other person, and the victim reasonably believes that the offender has the ability to execute the threat in the future.
4. 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 that mentally or physically incapacitates the victim.
5. The victim is mentally defective, and the offender has reason to believe this or has actual knowledge of this fact.
6. The victim is physically incapacitated.
7. The offender is a law enforcement officer, correctional officer, or correctional probation officer as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9), who is certified under s. 943.1395 or is an elected official exempt from such certification by virtue of s. 943.253, 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.

Section 794.011(5)

a) A person 18 years of age or older who commits sexual battery upon a person 12 years of age or older but younger than 18 years of age, without that person's consent, and in the process does not use physical force and violence likely to cause serious personal injury commits a felony of the first degree.
b) A person 18 years of age or older who commits sexual battery upon a person 18 years of age or older, without that person's consent, and in the process does not use physical force and violence likely to cause serious personal injury commits a felony of the second degree.
c) A person younger than 18 years of age who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process does not use physical force and violence likely to cause serious personal injury commits a felony of the second degree.
d) A person commits a felony of the first degree if the person commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process does not use physical force and violence likely to cause serious personal injury and the person was previously convicted of a violation of:
    1. Section 787.01(2) or s. 787.02(2) when the violation involved a victim who was a minor and, in the course of committing that violation, the defendant committed against the minor a sexual battery under this chapter or a lewd act under s. 800.04 or s. 847.0135(5);

2. Section 787.01(3)(a)2. or 3.;
3. Section 787.02(3)(a)2. or 3.;
4. Section 800.04;
5. Section 825.1025;
6. Section 847.0135(5); or
7. This chapter, excluding subsection (10) of this section.

Section 794.011(8)
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:

a) Solicits that person to engage in any act which would constitute sexual battery under paragraph (1)(h) commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
b) Engages in any act with that person while the person is 12 years of age or older but younger than 18 years of age which constitutes sexual battery under paragraph (1)(h) commits a felony of the first degree, punishable by a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.
c) Engages in any act with that person while the person is less than 12 years of age which constitutes sexual battery under paragraph (1)(h), or in an attempt to commit sexual battery injures the sexual organs of such person commits a capital or life felony, punishable pursuant to subsection (2).

B. Kidnapping, False Imprisonment, Luring or Enticing a Child - Chapter 787

General Information

The crimes of kidnapping and false imprisonment may seem to be unrelated to the crimes of sexual violence. However, it is not uncommon for crimes of sexual violence to begin as crimes of kidnapping or false imprisonment. Thus, a judge who hears sexual violence cases may wish to be familiar with the crimes of kidnapping and false imprisonment.

Kidnapping is defined as forcibly, secretly, or by threat confining, abducting, or imprisoning another person against their will and without lawful authority, with intent to:

a) Hold for ransom or reward or as a shield or hostage,
b) Commit or facilitate commission of any felony,
c) Inflict bodily harm upon or to terrorize the victim or another person, or
d) Interfere with the performance of any governmental or political function. § 787.01(1)(a).

False imprisonment is defined as forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining another person without lawful authority and against their

will. § 787.02(1)(a).

The following are the list of offenses that fall within the kidnapping and false imprisonment statute.

Offenses

Section 787.01(3)

A person who commits the offense of kidnapping upon 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, as defined in s. 827.03;
2. Sexual battery, as defined in chapter 794, against the child;
3. Lewd or lascivious battery, lewd or lascivious molestation, lewd or lascivious conduct, or lewd or lascivious exhibition, in violation of s. 800.04 or s. 847.0135(5);
4. A violation of former s. 796.03 or s. 796.04, relating to prostitution, upon the child;
5. Exploitation of the child or allowing the child to be exploited, in violation of s. 450.151; or
6. A violation of s. 787.06(3)(g), relating to human trafficking,

commits a life felony.

Note: Similar to kidnapping are the crimes of false imprisonment and false imprisonment of a child under age 13 which are found in § 787.02.

C. Lewdness; Indecent Exposure - Chapter 800

General Information

Chapter 800 contains a host of offenses generally considered "lewd and lascivious." The severity of the offense depends greatly on the activity done by the perpetrator, the age of the victim, and other associated information.

The highest level of offense is termed "**lewd and lascivious battery**." This has been defined as 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). In addition, the Statutes define "sexual activity" for this section as "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." § 800.04(1)(a). However, please note again that sexual activity does not include an act done for a bona fide medical purpose.
§ 800.04(1)(a).

The second level of lewd behavior is termed, "**lewd and lascivious conduct**." This has

been defined as intentionally touching a person less than 16 years of age in a lewd or lascivious manner; or soliciting a person less than 16 years of age to commit a lewd or lascivious act. § 800.04 (6).

The third level of conduct has been termed, "**lewd and lascivious exhibition**." This phrase has been defined as 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).

The final level of offense under this section is termed "**lewd and lascivious molestation**." This has been defined as 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).

Please note, a mother's breastfeeding of her baby does not under any circumstance constitute a violation of this section. § 800.04(8).

The Legislature made very clear that certain **defenses** are not available to a defendant in a lewd and lascivious case. Section 800.04(2) states that "[n]either the victim's lack of chastity nor the victim's consent is a defense to the crimes proscribed by this section." The statute continues to say that the perpetrator's ignorance of the victim's age, the victim's misrepresentation of their age, or the perpetrator's bona fide belief of the victim's age cannot be raised as a defense in a prosecution under this section. § 800.04(3).

One very important issue in criminal sexual violence cases is the issue of **double jeopardy**. 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. 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. "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." State v. Hightower, 509 So. 2d 1078, 1079 (Fla. 1987) (superseded on other grounds).

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. King v. State, 834 So. 2d 311, 312 (Fla. 5th DCA 2003). However, when there are sufficient facts to establish both offenses as separate and distinct offenses, convictions for both sexual battery and lewd and lascivious are proper.

Below is a list of the offenses that fall under the general term “lewd and lascivious.”

Offenses

Section 800.02
A person who commits any unnatural and lascivious act with another person commits a misdemeanor of the second degree.

Section 800.04(4)
A person commits lewd or lascivious battery by:

1. Engaging in sexual activity with a person 12 years of age or older but less than 16 years of age; or
2. 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.

Except as provided below in (4)(c), an offender who commits lewd or lascivious battery commits a felony of the second degree.

Section 800.04(4)(c)
A person commits a felony of the first degree if the person is an offender 18 years of age or older who commits lewd or lascivious battery and was previously convicted of a violation of:

1. Section 787.01(2) or s. 787.02(2) when the violation involved a victim who was a minor and, in the course of committing that violation, the defendant committed against the minor a sexual battery under chapter 794 or a lewd act under this section or s. 847.0135(5);
2. Section 787.01(3)(a)2. or 3.;
3. Section 787.02(3)(a)2. or 3.;
4. Chapter 794, excluding s. 794.011(10);
5. Section 825.1025;
6. Section 847.0135(5); or
7. This section.

Section 800.04(5)(b)
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.

Section 800.04(5)(c)

1. An offender less than 18 years of age who commits lewd or lascivious molestation against a victim less than 12 years of age; or
2. 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 felony of the second degree.

Section 800.04(5)(d)
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 felony of the third degree.

Section 800.04(5)(e)
A person commits a felony of the first degree if the person is 18 years of age or older and commits lewd or lascivious molestation against a victim 12 years of age or older but less than 16 years of age and the person was previously convicted of a violation of:

1. Section 787.01(2) or s. 787.02(2) when the violation involved a victim who was a minor and, in the course of committing the violation, the defendant committed against the minor a sexual battery under chapter 794 or a lewd act under this section or s. 847.0135(5);
2. Section 787.01(3)(a)2. or 3.;
3. Section 787.02(3)(a)2. or 3.;
4. Chapter 794, excluding s. 794.011(10);
5. Section 825.1025;
6. Section 847.0135(5); or
7. This section.

Section 800.04(6)(b)
An offender 18 years of age or older who commits lewd or lascivious conduct commits a felony of the second degree.

Section 800.04(6)(c)
An offender less than 18 years of age who commits lewd or lascivious conduct commits a felony of the third degree.

Section 800.04(7)(b)
An offender 18 years of age or older who commits a lewd or lascivious exhibition commits a felony of the second degree.

Section 800.04(7)(c)
An offender less than 18 years of age who commits a lewd or lascivious exhibition commits a felony of the third degree.

Section 800.09
A person who is detained in a facility may not:

1. Intentionally masturbate;
2. Intentionally expose the genitals in a lewd or lascivious manner; or
3. Intentionally commit 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 person they know or reasonably should know is an employee. A person who violates such commits lewd or lascivious exhibition in the presence of an employee, a felony of the third degree.

D. Incest - § 826.04

General Information

Incest in Florida is a very specific crime. It does not include all aspects of consanguinity, and has other limiting factors. In general, however, incest has been defined as knowingly marrying or having sexual intercourse with a person to whom one is related by lineal consanguinity, or a brother, sister, uncle, aunt, nephew, or niece. § 824.04. Further, per the statute, sexual intercourse has been defined as the penetration of the female sex organ by the male sex organ, however slight; emission of semen is not required. § 826.04.

There has been some discussion as to the **limits of consanguinity** allowed under the incest statute. Courts have said that a 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 [defendant] adopted the victim does not alter the biological fact that she was not related to him by consanguinity." Beam v. State, 1 So. 3d 331, 333 (Fla. 5th DCA 2009).

Finally, please note the following regarding the **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. § 775.15(13)(a).This applies to any such offense except an offense the prosecution of which would have been barred by subsection (2) on or before December 31, 1984.

The following is the offense defined in the incest statute.

Offense

Section 826.04
Whoever knowingly marries or has sexual intercourse with a person to whom they are related by lineal consanguinity, or a brother, sister, uncle, aunt, nephew, or niece, commits incest, which constitutes a felony of the third degree.

E. Sexual Performance by a Child - § 827.071

General Information

Sexual performance by a child is a difficult set of offenses, as they can cross into multiple other categories of offense, such as sexual battery, lewd or lascivious offenses, incest, dependency under Chapter 39 Florida Statutes, child pornography, etc. The elements of the sexual performance by a child offense 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.

There are several important definitions to be aware of the first of which is **sexual conduct**. For the purposes of this section, 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(1)(h).

Additionally, **sexual performance** means any performance or part thereof which includes sexual conduct by a child of less than 18 years of age. § 827.071(1)(i). And finally, **simulated** means the explicit depiction of conduct set forth in paragraph (h) which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks. § 827.071(1)(j).

The following offenses are listed under § 827.071.

Offenses

Section 827.071(2)
A person is guilty of the use of a child in a sexual performance if, knowing the character and content thereof, they employ, authorize, or induce 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. Whoever violates this subsection is guilty of a felony of the second degree.

Section 827.071(3)
A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, they produce, direct, or promote any performance which includes sexual conduct by a child less than 18 years of age. Whoever violates

this subsection is guilty of a felony of the second degree.

Section 827.071(4)
It is unlawful 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 intent to promote. Whoever violates this subsection is guilty of a felony of the second degree.

Section 827.071(5)(a)
It is unlawful for any person to knowingly possess, control, or intentionally view a photograph, motion picture, exhibition, show, representation, image, data, computer depiction, or other presentation which, in whole or in part, they know to include any sexual conduct by a child. The possession, control, or intentional viewing of each such photograph, motion picture, exhibition, show, image, data, computer depiction, representation, or presentation is a separate offense. If such photograph, motion picture, exhibition, show, representation, image, data, computer depiction, or other presentation includes sexual conduct by more than one child, then each such child in each such photograph, motion picture, exhibition, show, representation, image, data, computer depiction, or other presentation that is knowingly possessed, controlled, or intentionally viewed is a separate offense. A person who violates this subsection commits a felony of the third degree.

F. Obscenity, Child Pornography, Computer Facilitated Offenses - Chapter 847

General Information

This section of offenses relies heavily on definitions and is very fact driven. The primary term, **child pornography,** means any image depicting a minor engaged in sexual conduct. § 847.001(3**). 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. § 847.001(16).

Very often the activities undertaken are examined through the lens of whether the activity is harmful to minors. The statute defines **harmful to minors** as any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:

1. Predominantly appeals to a prurient, shameful, or morbid interest;

2. 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
3. Taken as a whole, is without serious literary, artistic, political, or scientific value for minors. § 847.001(6).

Further, where material has been produced or is alleged to have been used in the course of conduct underlying the offense, the courts may examine the material to see if it fits into the definition of **obscene**. For the purposes of this section, obscene means the status of material which:

1. The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
2. Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; AND
3. Taken as a whole, lacks serious literary, artistic, political, or scientific value. § 847.001(10).

Finally, Chapter 847 examines obscenity from an anatomical mindset, referring to the **specific sexual activity** displayed. The term includes the following sexual activities and the exhibition of the following anatomical areas:

1. Human genitals in the state of sexual stimulation or arousal.
2. Acts of human masturbation, sexual intercourse, sodomy, cunnilingus, fellatio, or any excretory function, or representation thereof.
3. The fondling or erotic touching of human genitals, the pubic region, the buttocks, or the female breasts.
4. Less than completely and opaquely covered:
    a. Human genitals or the pubic region.
    b. Buttocks.
    c. Female breasts below the top of the areola.
    d. Human male genitals in a discernibly turgid state, even if completely and opaquely covered. § 847.001(20).

G. Abuse, Neglect, and Exploitation of Elderly Persons and Disabled Adults - § 825.1025

General Information

Abuse of elderly and disabled persons is a large and growing offense category in Florida. As such, courts should become familiar with the terminology of the offenses listed under this section.

In this section, **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. §825.1025(1).

There are three primary categories of abuse that may happen to an elderly or

disabled person. Those categories are as follows:

- Lewd or lascivious battery upon an elderly person or disabled person
    - This 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. § 825.1025(2)(a).
- Lewd or lascivious molestation of an elderly person or disabled person
    - This 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. § 825.1025(3)(a).
- Lewd or lascivious exhibition in the presence of an elderly person or disabled person
    - This occurs when a person, in the presence of an elderly person or disabled person: intentionally masturbates; intentionally exposes their genitals in a lewd or lascivious manner; or 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 their presence. § 825.1025(4)(a).

The following are the offenses listed under this section.

Offenses

Section 825.1025(2)(b)

A person who commits lewd or lascivious battery upon an elderly person or disabled person commits a felony of the second degree.

Section 825.1025(3)(b)

A person who commits lewd or lascivious molestation of an elderly person or disabled person commits a felony of the third degree.

Section 825.1025(4)(b)

A person who commits a lewd or lascivious exhibition in the presence of an elderly person or disabled person commits a felony of the third degree.

H. Stalking - § 784.048

General Information

Stalking, like false imprisonment and kidnapping, is a crime that may not by itself be an act of sexual violence; however, it is not uncommon for acts of stalking to accompany acts of sexual violence. As such, courts may wish to familiarize themselves with the language and offenses associated with the term "stalking."

Stalking has been defined in statute as when a person "willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person." § 784.048(2).

A 21st century version of stalking, cyberstalking, is also an offense in this section. **Cyberstalking** has been 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. § 784.048(1)(d).

Several terms must be understood for the general offenses to be understood. **Harass** means to engage in a course of conduct directed at a specific person which causes substantial emotional distress to that person and serves no legitimate purpose. § 784.048(1)(a). Further, **course of conduct** means a pattern of conduct composed of a series of acts over a period of time, however short, which evidences a continuity of purpose. The term does not include constitutionally protected activity such as picketing or other organized protests. § 784.048(1)(b).

Finally, some of the offenses require a "credible threat." **A credible threat** is a verbal or nonverbal threat, or a combination of the two, including threats delivered by electronic communication or implied by a pattern of conduct, which places the person who is the target of the threat in reasonable fear for their safety or the safety of their family members or individuals closely associated with the person, and which is made with the apparent ability to carry out the threat to cause such harm. It is not necessary to prove that the person making the threat had the intent to actually carry out the threat. The present incarceration of the person making the threat is not a bar to prosecution under this section. § 784.048(1)(c).

Below are the listed offenses associated with this section.

Offenses

Section 784.048(3)
A person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person and makes a credible threat to that person commits the offense of aggravated stalking, a felony of the third degree.

Section 784.048(4)
A person who, after an injunction for protection against repeat violence, sexual violence, or dating violence, or an injunction for protection against domestic violence, or after any other court-imposed prohibition of conduct toward the subject person or that person's property, knowingly, willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person commits the offense of aggravated stalking, a felony of the third degree.

Section 784.048(5)
A person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks a child under 16 years of age commits the offense of aggravated stalking, a felony of the third degree.

Section 784.048(7)
A person who, after having been sentenced for a violation of s. 794.011, s. 800.04, or s.847.0135(5) and prohibited from contacting the victim of the offense under s. 921.244, willfully, maliciously, and repeatedly follows, harasses, or cyberstalks the victim commits the offense of aggravated stalking, a felony of the third degree.

I. Sexual Cyber Harassment - § 784.049

General Information

The 2015 Florida legislative session passed this new law which criminalizes the dissemination of sexually explicit images of persons for the purpose of harassing them. In enacting the legislation, the legislature found that a person who is depicted in a sexually explicit image taken with the person's consent also has a reasonable expectation that the image will remain private. Further, the legislature found that it is becoming a common practice for persons to publish a sexually explicit image of another to internet websites without the depicted person's consent, for no legitimate purpose, and with the intent of causing substantial emotional distress to the depicted person.

When such images are published on internet websites, they are able to be viewed indefinitely by persons worldwide and are able to be easily reproduced and shared. The Legislature concluded that the existence of these images on internet websites causes those depicted in the images to suffer significant psychological harm because the publication of the images creates a permanent record of the depicted person's private nudity or private sexually explicit conduct.

The new crime, called "sexual cyberharassment," § 784.049, makes it a misdemeanor of the first degree (punishable by up to a year in the local jail) to publish a sexually explicit image of a person that contains or conveys the personal identification information of the depicted person to an internet website without the person's consent, for no legitimate purpose, and with the intent of causing emotional distress.

The new law defines “sexual explicit image” as any image depicting a person engaged in sexual conduct. The crime is a misdemeanor; however, if a person has a prior conviction for the same crime and commits a second or subsequent crime, the crime is a felony. The new law allows a law enforcement officer to arrest, without an arrest warrant, any person whom they have probable cause to believe has violated the law. The new statute also provides that the victim may initiate a civil action against a person who violates this law and such civil action may include an injunction and monetary damages.

One issue that comes up in cybercrimes is the geographic location where the crime occurs. Since the harassment can be initiated by an out of state computer, questions often arise as to whether Florida has the jurisdiction to prosecute the criminal case. The new law states that a violation of this law is committed within Florida if any conduct that is a part of the offense, or any harm to the depicted person resulting from it, occurs within this state. The Florida legislature, citing several existing federal laws, exempted a provider of interactive computer services from the criminal sanctions contained in the new law. § 784.049.

Offenses

Section 784.049(3)
A person who willfully and maliciously sexually cyberharasses another person commits a misdemeanor of the first degree. A person who has one prior conviction for sexual cyberharassment and who commits a second or subsequent sexual cyberharassment commits a felony of the third degree.

J. Human Trafficking - Chapter 787

General Information

Human trafficking is a crime that is certainly on the rise throughout the United States, but especially in Florida, a primary point of entry for many people. While not all human trafficking is sexual violence, there are certain types of human trafficking that are explicitly sexually violent in nature.

The areas of human trafficking that will be examined herein are ones that often involve commercial sexual activity. **Commercial sexual activity** means any violation of chapter 796 or an attempt to commit any such offense, and includes sexually explicit performances and the production of pornography. § 787.06(2)(b).

Often sex traffickers will offer victims as services to their clients. These services may include **sexually explicit performances** (an act or show, whether public or private, that is live, photographed, recorded, or videotaped and intended to arouse or satisfy the sexual desires or appeal to the prurient interest, § 787.06(2)(i)), sexual activity, or sexual conduct.

The statutes have been very careful to specify that a victim's lack of chastity or the willingness or consent of a victim is **not a defense** to prosecution under this section if the victim was under 18 years of age at the time of the offense. § 787.06(11).

The list of offenses below are those that pertain to human sex trafficking.

Offenses

Section 787.06(3)(b),(d),(f),(g)

Any person who knowingly, or in reckless disregard of the facts, engages in human trafficking, or attempts to engage in human trafficking, or benefits financially by receiving anything of value from participation in a venture that has subjected a person to human trafficking:

b) Using coercion for commercial sexual activity of an adult commits a felony of the first degree.

d) Using coercion for commercial sexual activity of an adult who is an unauthorized alien commits a felony of the first degree.

f) 1. For commercial sexual activity who does so by the transfer or transport of any child under the age of 18 from outside this state to within the state commits a felony of the first degree, punishable by imprisonment for a term of years not exceeding life.
2. Using coercion for commercial sexual activity who does so by the transfer or transport of an adult from outside this state to within the state commits a felony of the first degree.

g) For commercial sexual activity in which any child under the age of 18, or in which any person who is mentally defective or mentally incapacitated as those terms are defined in s.794.011(1), is involved commits a life felony.

Section 787.06(4)(a)

Any parent, legal guardian, or other person having custody or control of a minor who sells or otherwise transfers custody or control of such minor, or offers to sell or otherwise transfer custody of such minor, with knowledge or in reckless disregard of the fact that, as a consequence of the sale or transfer, the minor will be subject to human trafficking commits a life felony.

Section 787.06(4)(b)

Any person who, for the purpose of committing or facilitating an offense under this section, permanently brands, or directs to be branded, a victim of an offense under this section commits a second degree felony.

Tab 2: Victims' Experiences

A. The Varied Effects of Rape

Great strides have been made in recent years to understand the effects that rape can have on a victim's mental, physical, and emotional states. However, to understand how a person may be affected, it is critical to first understand the neurobiological changes that happen during the assault and how those changes can affect the victim in the short-term and long-term.

Neurobiology and Rape

Triggering event: The rape or sexual assault begins.
Step 1: The amygdala is triggered by the danger and violence or threat of violence. It instructs the hippocampus to act.
Step 2: The hippocampus directs the adrenal system to flood the body and brain with hormones to prevent pain (*opioids*), to manage energy (*cortisol*), and to engage the "fight, flight or freeze" response (*catecholamines*).
Step 3: The brain is flooded with these hormones. These same hormones affect the brain's abilities to reason and react.[6]

Immediate Effects

- **Impaired rational thought:** The hormones responsible for the "fight or flight" response act to inhibit the prefrontal cortex, which is responsible for rational thought and decision-making.
- **Flat affect** or **no emotional response:** The hormones responsible for pain management act to inhibit emotional responses.
- **Tonic immobility:** The hormones responsible for "fight or flight" can overload the brain, causing uncontrollable responses to extreme traumatic situations; possible responses include temporary paralysis, closed eyes, and increased breathing.[7] Tonic immobility, experienced by 12-50% of victims during an assault, is described as "like being awake during surgery." The person is unable to talk, run, fight or anything else she/he might otherwise do to diffuse or exit the situation.
- **Impaired information storage:** The flood of hormones impairs the hippocampus' ability to store information for later recall. Memories may be fragmented, disordered, or suppressed. Research suggests that sensory information may be more likely to be encoded, albeit in a fragmented form, even if contextual information is lost or severely fragmented.[8]

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[6] Campbell, Rebecca. *The neurobiology of sexual assault*. National Institute of Justice (2012). [Online]. Retrieved on 9 March 2016 from: http://nij.gov/multimedia/presenter/presenter-campbell/pages/presenter-campbell-transcript.aspx.
[7] *Id*. Researchers estimate that between 12 and 50% of rape victims experience tonic immobility, and that it is more common in victims who have experienced previous victimization.
[8] *Id*.

Short-Term Effects

The flood of hormones is elevated and may persist for 96 hours post-trauma.[9] This can cause a number of short-term effects:

- Flat affect or emotional swings – due to increased opioids in the system.
- Mood swings – due to increased opioids in system.
- Inability to concentrate – due to catecholamines in system.
- Physical pain – due to physical trauma; can also be as a result of opioids leaving system.
- Compromised decision-making – due to catecholamines in system.[10]

It is important to note that although the neurobiological cause will dissipate after 96 hours, the effects may last longer than 96 hours. The brain's chemical response can also be reactivated by activities related to the assault, such as in police interviews, depositions or testifying in court.

Long-Term Effects

Once the flood of hormones has abated, the victim can experience a number of effects in the moderate to long term. These effects have been well-documented, and include:

- Post-traumatic stress disorder (PTSD)[11] – in one study, approximately one-half of rape victims had a lifetime diagnoses of PTSD.[12]
- Depression[13] - 43% of victims demonstrated at least one major depressive episode and had a lifetime diagnosis of depression.[14]
- Suicide ideation[15] - approximately one-third of rape victims report considering suicide in their lifetime.[16]
- Anxiety[17]
- Pre-occupation with danger[18]
- Paranoia[19]
- Chronic fatigue[20]

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[9] *Id.*
[10] *Id.*
[11] Brown, Amy L., Maria Testa, and Terri L. Messman-Moore. *Psychological consequences of sexual victimization resulting from force, incapacitation, or verbal coercion*. Violence Against Women (2009), at 10-11.
[12] Zinzow, Heidi M., et al. *Prevalence and risk of psychiatric disorders as a function of variant rape histories: results from a national survey of women*. 47(6) Social Psychiatry and Psychiatric Epidemiology 893-902 (2012).
[13] Littleton, H. L., Axsom, D., Breitkopf, C., & Berenson, A. *Rape acknowledgment and post-assault experiences: How acknowledgment status relates to disclosure, coping, worldview, and reactions received from others*. 21 Violence and Victims 761–778 (2006); *see also* Perilloux, Carin, Joshua D. Duntley, and David M. Buss. *The costs of rape*. 41(5) Archives of Sexual Behavior 1099-1106 (2012).
[14] *Supra* note 8 at 898.
[15] *Rape in America: A Report to the Nation*. National Victim Center (1992).
[16] *Id.*
[17] *Supra* note 9.
[18] *Supra* note 7 at 11.
[19] Kilpatrick, Dean G., Patricia A. Resick, and Lois J. Veronen. *Effects of a rape experience: A longitudinal study*. 37(4) Journal of Social Issues 105-122 (1981). *See also* Resick, Patricia A. *The psychological impact of rape*. 8(2) Journal of Interpersonal Violence 223-255 (1993).

- Anger/hostility[21]
- Obsessive-compulsive behavior[22]
- Substance abuse[23]
- Vulnerability to retraumatization[24]

As has been noted, these effects can last a moderate length or time (a few months) or can last much longer, possibly lingering for the life of the victim.

Implications for Court

What does the foregoing information mean for judges who hear sexual violence cases?

Victim Behavior

A victim may exhibit behavior during or after a sexual assault that seems to be counter-intuitive. However, these actions are not irrational, once the neurobiological, psychological, emotional, and physical effects of sexual assault are understood.

- A victim's failure to fight back during a sexual assault may not signify consent, but rather may indicate tonic immobility.
- The victim's account may change over time. Due to an overload of hormones in the brain during the sexual assault, the victim may express inconsistent recall and/or fragmented or uncertain recall. Research demonstrates that even if disorganized, the memories are accurate. As the chemicals recede, memories will become more organized and stable.
- The victim may not contact law enforcement immediately. This may be due to a number of issues, including shame, anger, or fear, and/or may also be due to impaired decision-making due to an overload of hormones in the brain.
- The victim may engage in a relationship with the offender after a sexual assault. This could be an attempt by the victim to normalize the assault.
- The victim may not exhibit signs of emotion (e.g. anger or fear) when in initial contact with law enforcement. This may occur due to a series of hormones that flood the brain and dampen emotional responses. This flat affect can last long after the actual assault is over.

In the court

When a victim presents themselves at court, the court may be seen as a place of relief or justice. It may, however, be seen as a place of fear, vulnerability, and danger.[25] The court environment can have an impact on a victim's response.

- A victim may fear that the court will be a place of skepticism. Courts can help victims feel safe by allowing therapy animals to accompany the victim and by allowing victim advocates to be present to provide comfort to victims.

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[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Supra* note 9.
[24] Orth, U., & Maercker, A. *Do trials of perpetrators retraumatize crime victims?* 19(2) Journal of Interpersonal Violence 212-227 (2004) at 213.
[25] *Id at* 213.

- Much can be read into tone or language choice. A court can create a neutral atmosphere by refraining from using angry or disapproving vocal affects, by choosing words that do not indicate danger or anger or disappointment, and by striving to remain emotionally neutral in tone and word.
- Retraumatization is a potential risk for victims. Although research is inconclusive as to how likely a victim is to be retraumatized at trial,[26] a victim may experience retraumatization during the court proceedings. Courts can work to ease the fear of retraumatization by explicitly giving the victim the power to ask for short recesses, allowing them access to tissues, and make them aware of and recognize the victim rights afforded to them. (For more information on Victims' Rights, see General Issues tab, *infra*.)
- Encourage the victim to create and introduce a victim impact statement into evidence. This can serve to empower the victim; further, it can provide the victim a means of therapeutic outlet and can be useful for the court to understand how the victim has been affected by the assault.
- Courts should understand that a victim's likelihood of substance abuse skyrockets after a sexual assault. This may result in the victim engaging in criminal activity. None of these things should be taken as a sign that the survivor has not been victimized.

B. Sexual Violence and Substance Abuse

In the variety of studies done, an estimated 35%–55% of rape victims report alcohol use at the time of assault, 2% of rapes involve victim use of other substances, and approximately one in five cases of rape involve alcohol or drug facilitation or incapacitation.[27]

Further, recent reviews suggest a significant number substance use/drinking problems post-trauma, particularly in female trauma survivors.[28] Several studies have found associations between sexual assault and higher rates of binge drinking. Moreover, sexual assault has also been found to increase additional negative outcomes including PTSD, which in turn is associated with increased drinking and alcohol-related problems.[29] Researchers have termed it the "self-medication hypothesis"; it is the most commonly accepted theory to explain relationships between PTSD and alcohol misuse, and suggests that when alcohol is used to alleviate or minimize psychological distress it acts as "negative reinforcement" and over time can lead to alcohol

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[26] *Id at* 224.
[27] McCauley JL, Kilpatrick DG, Walsh K, Resnick HS. *Substance use among women receiving post-rape medical care, associated post-assault concerns and current substance abuse: Results from a national telephone household probability sample*. 38(4) Addictive Behaviors 1952-1957 (2013).
[28] Ullman SE, Relyea M, Peter-Hagene L, Vasquez AL. *Trauma Histories, Substance Use Coping, PTSD, and Problem Substance Use Among Sexual Assault Victims*. 38(6) Addictive Behaviors 2219-2223 (2013).
[29] Kaysen D, Atkins DC, Simpson TL, et al. *Proximal Relationships between PTSD Symptoms and Drinking among Female College Students: Results from a Daily Monitoring Study*. 28(1) Psychology of addictive behaviors : journal of the Society of Psychologists in Addictive Behaviors 62-73 (2014).

problems.[30]

It appears that very little research has been done to assess perpetrators' likelihood to engage in substance abuse; as such, this benchbook cannot provide any information on that subject.

C. Elder Populations

The number of Americans age sixty-five and older currently constitutes 13.3% of the population of the United States, or over one in every eight Americans.[31] By 2050 the elder population is expected to double to approximately 22%.[32] Older women currently outnumber older men: in 2012, for every 100 women aged 60, there were 84 men, and for every 100 older women aged 80 and above, there were only 61 men.[33]

According to most studies, sexual abuse is among the last detected, perceived, and reported type of elder mistreatment. Because of a number of factors, "a paucity of research exists from domestic as well as institutional settings."[34] The studies that have been done suggest that data collection on sexual violence in elderly populations is very difficult.

- Persons with disabilities, including elders, often do not know how to report a crime like rape and have no means of obtaining support to assist them.
- Elderly individuals with cognitive impairments may fear the criminal justice system with regards to reporting. They may think that their report will not be taken seriously given their mental impairment, or they may believe that their report will result in the loss of their independence if taken seriously.
- Cognitively impaired elders may not remember the details of the abusive incident, thus diminishing their credibility.
- Victims of sexual abuse may be uncertain as to whether a particular incident constitutes a crime at all and do not want to waste their time reporting.[35]

Further, data has shown the following:

- An estimated 450,000 elders are sexually abused every year and, for every case that is reported, up to five cases go unreported.[36]
- In a study of male nursing home residents from 50 to 93 years who had been subjected to sexual abuse, more than 80% of the victims had decreased self-care with cognitive impairment and/or disability. Types of abuse were

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[30] *Id.*
[31] Stephanie L. Tang. *When "Yes" might mean "No": Standardizing State Criteria to Evaluate Capacity to Consent to Sexual Activity for Elderly with Neurocognitive Disorders*. 22(2) The Elder Law Journal 450 (2015).
[32] Brownell P. *Neglect, abuse and violence against older women: Definitions and research frameworks*. South Eastern European Journal of Public Health 1-12 (2014).
[33] *Id.*
[34] Maria Helen Iversen, Astrid Kilvik, and Wenche Malmedal. *Sexual Abuse of Older Residents in Nursing Homes: A Focus Group Interview of Nursing Home Staff. Nursing Research and Practice* (2015).
[35] *Supra* note 28 at 467.
[36] *Id at* 464.

unwanted sexual attention, rape, and anal penetration. Of the suspected perpetrators 25% were other nursing home residents and 75% were staff.[37]

Finally, people over sixty years old constitute approximately eighteen percent (18%) of all sexual assault victims.[38] They represent a significant population at heightened risk for sexual violence and abuse, yet, along with the other at-risk populations, garner the least attention and research. More research needs to be done in this area of sexual violence and exploitation.

D. LGBT Populations

While it is very difficult to collect data on the lesbian, gay, bisexual, and transgender (LGBT) communities, especially as it relates to sexual violence victimization and perpetration, the 2010 National Intimate Partner and Sexual Violence Survey (NISVS)[39] has provided the clearest picture to date. Two primary findings from that research are as follows:

- Lesbian women and gay men reported levels of intimate partner violence and sexual violence equal to or higher than those of heterosexuals; and
- Bisexual women had significantly higher lifetime prevalence of rape and sexual violence other than rape by any perpetrator when compared to both lesbian and heterosexual women.

The lifetime prevalence of rape by any perpetrator was:

- For women:
  - Lesbian – 13.1%
  - Bisexual – 46.1%
  - Heterosexual – 17.4%
- For men:
  - Gay – numbers too small to estimate
  - Bisexual – numbers too small to estimate
  - Heterosexual – 0.7%[40]

Other findings of note include:

- Most bisexual and heterosexual women (98.3% and 99.1%, respectively) who experienced rape in their lifetime reported having only male perpetrators. Estimates for sex of perpetrator of rape for other groups (lesbian women, gay and bisexual men) were based upon numbers too small to calculate a reliable estimate and, therefore, are not reportable.
- The majority of lesbian, bisexual, and heterosexual women (85.2%, 87.5%, and 94.7%, respectively) who experienced sexual violence other than rape in their

[37] *Supra* note 31 at 2.
[38] *Supra* note 28 at 464.
[39] Walters, M.L., Chen J., & Breiding, M.J. (2013). *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Findings on Victimization by Sexual Orientation*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (page 1).
[40] *Id.*

lifetime reported having only male perpetrators.
- 78.6% of gay men and 65.8% of bisexual men who experienced sexual violence other than rape in their lifetime reported having only male perpetrators.
- 28.6% of heterosexual men who experienced sexual violence other than rape in their lifetime reported having only male perpetrators, while 54.8% reported only female perpetrators, and 16.6% reported both male and female perpetrators.[41]

Further research needs to be done to examine the intersection between the LGBT community and stranger- or acquaintance-rape (as victim or as perpetrator), as the vast majority of current research examines the LGBT community from the domestic violence perspective.

E. Individuals with disabilities

Persons with disabilities constitute another population at higher risk for sexual violence. The World Health Organization estimates that around 15% of the world's population lives with a disability.[42] However, the research examining the rates of sexual violence by and toward people with disabilities is very scarce. As with the LGBT population, most research has examined sexual violence from the lens of domestic violence.

However, the few studies that have been done suggest that women with disabilities are at a heightened risk of becoming victims of sexual violence. In one study comparing risk of physical and sexual assault prevalence among women with and without disabilities, the authors found that women with disabilities experienced similar rates of physical abuse and were 4 times more likely to have experienced a sexual assault.[43] Another study examined persons with disabilities in situations where personal assistance is required and found that of the 200 women with either physical disabilities or combined physical and cognitive disabilities that were studied, lifetime rates of physical abuse was 67%, and of sexual abuse, 53%.[44]

Further, researchers have identified a number of specific factors as possible contributors to the increased risk of violence toward individuals with disabilities. Those factors include:
- Increased risk of isolation;
- Contact with multiple potential perpetrators;
- Increased physical, emotional, and economic dependency as a result of a

[41] *Id at* 1-2.
[42] Christopher Mikton; Holly Maguire; and Tom Shakespeare. *A Systematic Review of the Effectiveness of Interventions to Prevent and Respond to Violence Against Persons With Disabilities*. Journal of Interpersonal Violence 1-20 (2014).
[43] Sara-Beth Plummer and Patricia A. Findley. *Women With Disabilities' Experience With Physical and Sexual Abuse : Review of the Literature and Implications for the Field*. 13(1) Trauma, Violence, & Abuse 15-29 (2012), at 16.
[44] *Id at* 23.

disability;
- The incorporation of learned helplessness;
- Difficulties identifying disability related abuse; and
- Cultural/societal barriers that impede their ability to find and obtain assistance.[45]

Research examining the population of men with disabilities who have been victims of sexual violence is even more limited. However, one study did find the following data:

- Men with a disability were more likely than men without a disability to report lifetime sexual violence (8.8% vs 6.0%).
- Men with a disability were also more likely than men without a disability to report lifetime experience of attempted or completed sexual battery (5.8% and 2.3% vs 4.1% and 1.4%, respectively).
- There were no statistically significant differences between the two groups of men's reports of their relationship to the perpetrator of the most recent incident of sexual violence or perpetrator gender.[46]

F. Student Populations

Sexual assault on college campuses has garnered much attention in recent years. According to the Campus Climate Survey conducted by the Bureau of Justice Statistics released in January 2016, 1 in 5 women are sexually assaulted while attending college and it is estimated that for every 1,000 women attending college or university, there are 35 incidents of rape each academic year.[47] For men, 1 in 16 reported being the victim of a sexual assault during college.[48] The prevalence of rape for those who self-identify as LGBTQ+ was significantly higher than their straight counterparts.

The majority of rapes that occur on college campuses go unreported. Of those survivors who did report, only 11.2% reported to their university or to law enforcement.[49] Survivors are instead choosing to report to friends, with 66% of them doing so.[50]

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[45] *Id at* 23.
[46] Mitra, M., et al. *Prevalence and Characteristics of Sexual Violence against Men with Disabilities*. American journal of preventive medicine (2015).
[47] Fisher, B.S., Cullen, F.T., and Turner, M.G. *The Sexual Victimization of College Women*. National Institute of Justice, Bureau of Statistics (2000).
[48] Krebs, C.P., Lindquist, C., Warner, T., Fisher, B., and Martin, S. *The campus sexual assault (CSA) study: Final report*. (2007). Retrieved from National Sexual Violence Resource Center: http://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf
[49] Planty, M., Langton, L., and Stroop, J. *Campus Climate Survey Validation Study Final Technical Report*. Bureau of Justice Statistics Research and Development Series, January 2016.
[50] Sable, M.R., Danis, F., Mauzy, D.L., and Gallagher, S.K. *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*. Journal of American College Health 157-162 (2006).

Reasons for Underreporting

Fear plays a main role in the under reporting of rape cases, particularly in campus sexual assault cases. Research shows that a primary fear survivors have is the belief that other people might think that what happened was at least partly their fault.[51]

Often, alcohol is involved in rape cases and survivors may fear that they could be blamed or even charged with underage drinking. In 63% of cases the victim of rape had used drugs or alcohol in the hours prior to the incident and in 59% of the cases the victim perceived that the offender was under the influence of alcohol or drugs.[52] In many cases survivors are at a party prior to the rape or when the rape occurred and there is often underage drinking and other illegal substances being consumed. Survivors become concerned that if they report not only will they get in trouble but so will their friends and those hosting the party. One study found that sorority members are three times more likely than their independent counterparts to be raped.[53]

Fear is cited as a significantly more important barrier for women than men.[54] For college aged men barriers for reporting rape include jeopardizing their masculine self-identity, shame, guilt and embarrassment for not being able to prevent the rape. A significantly greater barrier for men was not wanting friends or family members to find out and being judged as gay.[55] Male survivors of rape are less likely than their female counterparts to disclose to anyone including friends that they were raped.

Students who responded to the Campus Climate Survey also stated that they were worried that either the person who did this to them or other people might find out and do something to retaliate.[56] Among college women who reported sexual assault 9 in 10 knew their attacker[57] and 55% of rapists were affiliated with the school, either as students, professors, or other employees of the school.[58] With most survivors who know their rapist, retaliation is a very real fear. The perpetrator is part of their community, and many times survivors are threatened or told by the perpetrator that they asked for it. Therefore, the survivor believes that they do not need assistance because they are not sure that a crime occurred, do not think the incident was serious enough to report, or they do not want any action taken by anyone.[59] This belief minimizes the crime and adds to non-reports as well as delayed reports of rape to law enforcement.

Other barriers identified by survivors to reporting rape are issues of confidentiality

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[51] *Supra* note 45.
[52] *Id.*
[53] Mohler-Kuo, M., Dawdall, G., Koss, M., and Wechsler, H. *Correlates of Rape While Intoxicated in a National Sample of College Women*. Journal of Studies on Alcohol 37-45 (2004).
[54] *Supra* note 47.
[55] *Id.*
[56] *Supra* note 45.
[57] *Supra* note 44.
[58] *Supra* note 47.
[59] *Id.*

and distrust of the legal system.[60] When survivors look to social systems they should be met with empathy and support. The very first interaction survivors have with medical staff and the criminal justice system will set the foundation for all future interactions and can have "profound implications for victims' recovery."[61] Survivors have reported law enforcement going as far as telling them that they could be charged for filing a false report if during the investigation doubt is found regarding their claim. Survivors also state that law enforcement would go in depth to explain how the victim would be humiliated during cross examination and telling survivors that there would be immense personal cost if they reported.[62] When survivors who had gone through the legal process were asked about their experiences 43%-52% saw their experience as "unhelpful or harmful."[63] Other survivors went on to say that the experience was dehumanizing and stated that had they known what the process was like they wouldn't have reported.[64]

Title IX

Institutions of higher education implement the Office of Civil Rights Title IX requirements of mandatory reporting of any alleged sexual assault to administration. Title IX does not only cover athletics; it addresses sexual harassment, gender based discrimination and sexual violence. It defines sexual violence, encourages universities to promptly investigate all allegations and use a 'preponderance of the evidence' as the standard of evidence to determine their finding, including sanctions should a violation been found to have occurred.

G. Immigrant Populations

Immigrants and undocumented persons 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.

- Under VAWA victims who are married to or recently divorced from an abuser who is a US citizen or lawful permanent resident may themselves apply for lawful permanent residence.
- U-visas are 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 participate in the investigation and prosecution of the crime that caused the abuse.
- T-visas are available for persons who survive a severe form of sex trafficking or forced labor. The victim must show that they would suffer extreme hardship if

[60] *Supra* note 45.
[61] Campbell, R. *The Psychological Impact of Rape victims' Experiences With the Legal, Medical, and Mental Health Systems.* American Psychologist 702-117 (2008).
[62] *Id.*
[63] *Id.*
[64] *Id.*

deported. If the victim is 18 or over, they must cooperate with law enforcement. If the victim is in the country without authorization, then their presence here must be related to the sex trafficking or forced labor.

Sex Trafficking

Sex trafficking is the exploitation of a person for the purposes of commercial sex, regardless of citizenship or nationality. Courts should be aware that victims who come before them may be victims of sex trafficking, as well as victims of other forms of sexual assault and abuse. The following are signs that a victim may be trafficked (Please note that one or more may be present):[65]

- Evidence of being controlled
- Evidence of an inability to move or leave job due to threats or coercion
- Bruises or other signs of battering
- Fear or depression
- Non-English speaking
- Recently brought to United States
- Lacks passport, immigration or identification documentation
- Inability to change housing/living conditions
- Deprivation of food, water, sleep or medical care
- Permission needed to eat, sleep or go to the bathroom
- Locks on doors and windows to keep victim from leaving
- Threats of serious harm to the victim's family or another person
- Causing or threating to cause financial harm to a person
- Providing a controlled substance as outlined in Schedule [I]-[II] of § 893.03 to any person for the purpose of exploitation of that person
- Permanent branding (*see* § 787.06 4(b))
- Anybody under the age of 18 offering sex acts

If the court has reason to believe that sex trafficking is present in a sexual violence case before them, the following are a series of recommended actions:[66]

- Do not question the potential victim in open court as their trafficker (or associate of the trafficker) may be present.
- If the potential victim is represented by counsel, conduct a sidebar conference and inquire of the attorney and seek counsel's assistance in reporting the issue to law enforcement.
- Obtain interpreting services from a neutral and trusted source.
- The court should contact the local law enforcement agency or human trafficking task force immediately. Other options include contacting the local State Attorney's Office, the Office of Statewide Prosecution, and/or filing an abuse report.
- If your jurisdiction has victim advocates or social workers, one should be

[65] *Human Trafficking Overview.* Office of the State Courts Administrator, Human Trafficking Task Force (2017).
[66] *Id at* 2.

contacted to assist the victim in navigating the various resources available.
- If the minor, dependent victim is not represented by counsel, appoint counsel pursuant to the process in § 39.01305(e).

H. Employment Issues

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 (3) 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. § 741.313(2). However:

- The leave may be paid or unpaid, at the employer's discretion; and
- The 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. § 741.313(3).

If a victim suffers a serious health condition as a result of the crime, the Family Medical Leave Act (FMLA) may also apply. The FMLA provides for up to 12 weeks of unpaid leave if employees meet eligibility requirements and the employer has 50 or more employees.

Finally, be aware that local ordinances may provide additional rights for victims of sexual violence and/or domestic violence.

I. *Victims' Rights*

There are also several statutory provisions that afford rights to victims of crimes of sexual violence.

Victim Advocate

Chapter 960 of the Florida Statutes affords all victims of crime with rights within the criminal justice process; one of those rights it to have a victim advocate present at all stages of the process. Although research is limited, it does show that survivors who had a victim advocate throughout the process had significantly lower PTSD scores than those who did not have an advocate to assist them.

- Advocates are trained in how to respond to survivors, address their concerns, provide information, and minimize the impact of the crime. Survivors who had advocates throughout their involvement with the criminal justice process reported that advocates were supportive and informative.

• Advocates understand that the medical system as well as the criminal justice system have incredible power to re-victimize rape survivors and can help avoid such issues and provide emotional support to the survivor.
• Advocates can also offer a safe space to process an interview and provide support as well as additional community resources to aid in the survivors healing process.

The impact of rape on survivors is far reaching and affects every aspect of their lives. Post-traumatic stress disorder symptoms are present in 94% of rape cases during the two weeks following the rape. After a rape the survivor is in a hypervigilant state. Survivors often experience any number of emotional or physical responses to their rape. Suicidality for rape survivors is of great concern with 33% of survivors contemplating suicide and 13% actually attempting. The trauma of rape not only impacts survivors themselves it also impacts those close to them as secondary victims to the crime. Further, rape trauma can affect a survivor's ability or inability to participate at school. Survivors listed negative impacts to schoolwork including taking time off and dropping out in almost a third of cases.

Section 794.052: Notification of Rights

The law enforcement officer who investigates an alleged sexual battery is required to assist the victim in accessing the following:

- Medical treatment;
- Forensic exam; and
- Advocacy and crisis-intervention services from a certified rape crisis center.

In addition the officer must allow the victim to view the final law enforcement report and provide a statement as to the accuracy of the final report.

The investigating officer must provide the victim with an informational brochure from the Florida Council Against Sexual Violence. This brochure must include the resource listing, including telephone number, for the area certified rape crisis center as designated by the Florida Council Against Sexual Violence.

Section 794.055: Access to Services

This section is also known as the "Sexual Battery Victims' Access to Services Act." It details a list of services that must be funded through the act and provided to victims of sexual battery.

The list of services includes:

- Medical services
- Hotline information
- Crisis intervention services
- Advocacy services
- Information as to therapy resources
- Outreach

- Service coordination.

Section 960.001: Fair Treatment of Victims

This section specifies a host of requirements as to the treatment of victims of crimes. Those requirements that apply to victims of crimes of sexual battery include:

- Law enforcement agencies must develop guidelines for treatment of victims throughout the criminal justice process;
- Law enforcement must ensure that service info is provided to victim;
- A right to be informed, present, and heard, when relevant, at crucial stages of process;
- A right to timely disposition of case to minimize the victim's stress regarding trial;
- A right to be informed within 4 hours of perpetrator's release from incarceration. A reasonable attempt to contact the victim must be made by the chief administrator of the facility where the perpetrator is held;
- A right to notification of schedule changes by the scheduling agency;
- A right to notification of the judicial process and a right to be present;
- Law enforcement must contact the victim or next of kin for victim notification card. Unless refused, the card must be included with report or warrant;
- A right to employer notification as to the crime and victim or witness cooperation. If, as a result of cooperation, victim or witness is experiencing serious financial strain, they shall be provided assistance in explaining issue to creditors;
- A right to have a victim advocate from a certified rape crisis center present for forensic exams;
- A right to the presence of a victim advocate of the victim's choosing during depositions;
- A right to have courtroom cleared during testimony at trial;
- A right to be heard, for felony cases involving physical emotional injury, and a right to be consulted during plea stage, sentencing phase, and pretrial release negotiations;
- A right to return of property;
- A right to request restitution; and
- A right to submit a victim impact statement.

Section 960.0015: Right to a Speedy Trial

The victim has the right to a speedy resolution of the case, secondary to the defendant's rights as to the criminal justice process. The statute allows for 125 days from arrest for a felony and 45 days from arrest for a misdemeanor if:

- The state has met its obligations under the rules of discovery;
- The charge is a felony or misdemeanor; and
- The court has granted at least three continuances upon the request of the defendant over the objection of the state attorney.

The statute allows for postponements for failure of service upon a witness, a granted motion by defense counsel to withdraw, or where it is necessary to prevent the deprivation of the defendant's due process rights.

Note that the State Attorney must initiate any motion for speedy trial on behalf of the victim.

Section 960.28: Payment for Forensic Exam

A medical provider who performs an initial forensic physical examination may not bill a victim, or the victim's parent or guardian, directly or indirectly for the cost of that examination, regardless of whether the victim has insurance.

Providers are allowed by statute to request reimbursement from the state for each forensic exam, in an amount up to $500.

Section 960.292: Civil Restitution Enforcement

Upon conviction, the convicted offender shall incur civil liability for damages and losses to crime victims. The statute allows for a victim to request a lien on the perpetrator's property as a remedy to the perpetrator's failure to provide restitution.

Section 92.56: Public Records Exemption

The victim of a sexual offense has the right to have their information protected from public records. This information includes records, court documents, and testimony. The exemption is waived only by written notice to the court by the victim.

However, a defendant who has been charged with a crime of human trafficking, lewdness or indecent exposure, sexual battery, or with child abuse, aggravated child abuse, or sexual performance by a child may apply to the trial court for an order of disclosure of confidential or excluded victim information. Any identifying information concerning the victim may be released to the defendant or their attorney in order to prepare the defense. A willful and knowing release of this information to any other person by the defendant is punishable by contempt.

The state may also use a pseudonym in such cases to designate the victim and protect their information.

Section 794.022: Rape Shield Law

Under the statute commonly known as the "rape shield law," the victim has several enumerated rights and protections.

- The victim's testimony does not need to be corroborated in prosecutions for sexual battery, lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age, or human trafficking.
- The victim's sexual history is not admissible. This includes any prior history with the defendant or with any other person. However, this information may be admissible if:
    - It is first established in camera to the court that the evidence in

question shows that the defendant was not the source of semen, pregnancy, injury, or disease; or
    - It is first established in camera to the court that such evidence tends to establish a pattern of conduct or behavior on the part of the victim that is so similar to conduct or behavior of victim in this case that it is relevant as to issue of consent.
- The victim's reputation and/ or manner of dress are not admissible to show incitement on the part of the victim.
- The victim's mental state is not admissible, except where the defense of consent is raised and the evidence goes to the issue of consent.
- The use of a condom or prophylactic, or the victim's request that the defendant use a condom or prophylactic, is not admissible as evidence of consent.

Section 960.199: Sexual Battery Relocation and Compensation

A victim may apply for relocation assistance for a crime of sexual battery if the following requirements are met:

- There must be proof that a sexual battery offense was committed;
- The sexual battery offense must be reported to the proper authorities;
- The victim's need for assistance must be certified by a certified rape crisis center in this state;
- The center's certification must assert that the victim is cooperating with law enforcement officials, if applicable, and must include documentation that the victim has developed a safety plan; and
- The act of sexual battery must be committed in the victim's place of residence or in a location that would lead the victim to reasonably fear for their continued safety in the place of residence.

Note that the application must be submitted within one year of the commission of the crime, or within one to two years of the commission of the crime where the victim must show good cause (i.e. the victim did not know about program, was not emotionally ready to file, or was pursuing other avenues of recourse). § 960.07(2).

Tab 3: General Issues

A. Data

National Data Sources

There are six national commonly cited sexual violence surveys. There are variances among them based on how they define "sexual violence," the source for reporting, and the gender of the victims.

Survey Title	Categories of Sexual Violence	Manner of Report	Victim gender	Type of Activity	Language Used in Survey
Uniform Crime Reports Summary Reporting System	▫ Rape ▫Attempted rape	Reported to police. Based on official records.	Both	Criminal sexual activity	Based on official reports.
National Crime Victimization Survey	▫ Rape ▫Attempted rape ▫ Several types of sexual assault	Self-report. In-person survey performed by census workers.	Both	Criminal sexual activity	Rape: male and female victims. Penetration: vaginal, anal, or oral, by penis, other body part, or other object. Sexual assault: attacks or attempted attacks generally involving unwanted sexual contact between victim and offender. May involve force, include such behavior as grabbing or fondling, and include verbal threats.
National Women's Study	▫ Rape ▫Attempted rape not examined	Self-report. Telephonic survey.	Women only	Incidents of rape	Rape: An event that occurred without the woman's consent. Involves use of or threat of force. Involves sexual penetration of the victim's vagina, mouth, or rectum.
National Intimate Partner and Sexual Violence Survey	▫Rape ▫Attempted rape ▫ Several types of sexual assault	Self-report. Telephonic survey.	Both	Unwanted sexual activity	Sexual assault: sexual coercion, sexual contact, and stalking. Sexual contact or sexual coercion could be attempted or completed. May involve the use of or threat of force.

National Violence Against Women Study	▫ Rape ▫Attempted rape	Self-report. Telephonic survey.	Women only	Unwanted sexual activity	Rape: an event that occurred without the victim's consent, that involved the use or threat of force to penetrate the victim's vagina or anus by penis, tongue, fingers, or object, or the victim's mouth by penis.
National College Women Sexual Victimization Study	▫ Rape ▫Attempted rape ▫ Several types of sexual assault	Self-report. Telephonic report.	College women only	Unwanted sexual activity	Rape: Unwanted completed penetration by force or the threat of force. Sexual contact: touching; grabbing or fondling of breasts, buttocks, or genitals, either under or over your clothes; kissing; licking or sucking; or some other form of unwanted sexual contact.

Florida Data

As is the case on the national level, Florida does not have one unified mechanism for collecting sexual violence data. For the purposes of this benchbook, the Florida data to be used is that which has been collected by the Florida Department of Law Enforcement (FDLE) during the year 2015.

Note that this data is pulled from official FDLE records, and as such reports criminal activity, as opposed to the much broader "unwanted sexual activity" used by several of the national surveys.

In 2015, the number of offense totals were:[67]

	2014 total	2015 total	Percent change
Rape	**7,102**	**7,537**	**6.1**
Knife/Cutting Instr.	115	137	19.1
Hands/Fists/Feet	5,650	5,898	4.4
Other	1,174	1,348	14.8
Fondling	**3,132**	**3,195**	**2.0**
Firearm	17	3	-82.4
Knife/Cutting Instr.	4	11	175.0
Hands/Fists/Feet	2,687	2,784	3.6
Other	424	397	-6.4

[67] *Crime in Florida: 2015 Annual Uniform Crime Report*. Florida Department of Law Enforcement (2016). Retrieved on January 29, 2017, at http://www.fdle.state.fl.us/cms/FSAC/UCR/2015/CIF_annual15.aspx.

Data including the age and gender of offenders:[68]

Offense	Juvenile Male	Juvenile Female	Adult Male	Adult Female	Total
Rape	247	11	1494	48	1800
Fondling	134	4	539	10	687

Data including race of the offender:[69]

	White	Black	Indian	Asian
Forcible Sex Offenses	1600	870	3	14

Please note that the first Florida chart details the total number of offenses, while the second chart deals with the number of offenders. These numbers may not be the same, as often a single offender is convicted of several offenses. Additionally, the racial demographic chart is only available for sexual violence under a broad category "forced sexual offenses." As such, it may not have numbers equal to those of the other charts. The FDLE does not capture victim data.

B. Managing the Courtroom

While public trials are essential to the judicial system's credibility, there is a countervailing need for courts to have the order and decorum in the courtroom, as well as the responsibility to protect the rights of the parties and witnesses. *See* Simpson v. State, 3 So. 3d 1135 (Fla. 2009).

Safety

Participant safety is an ever-present concern, but is of heightened importance in criminal sexual violence cases where the victim is called to testify. Jurisdictions may have their own safety rules, thus a "one-size-fits-all" list of rules cannot be developed in this guide. However, there are a number of general practices that may be considered as promising practices for courtroom safety.

- Verify your courthouse's local safety rules and ensure that all courtroom staff is completely compliant with those rules.
- Engage in a "self-audit" of your courtroom and courthouse. Identify the strengths and weaknesses that exist.
- Provide staff and courtroom bailiffs with a precise map of the courthouse, and verify that proper evacuation routes are known by all staff and bailiffs.[70]

[68] *Arrest Totals by Age and Sex, 2015*. Florida Department of Law Enforcement (2016). Retrieved on January 29, 2017, at http://www.fdle.state.fl.us/cms/FSAC/UCR/2015/Age_annual15.aspx.
[69] *Crime in Florida, 2015 Florida uniform crime report [Computer program]*. Florida Department of Law Enforcement (2016), p.19, retrieved on January 29, 2017, at http://www.fdle.state.fl.us/cms/FSAC/Documents/PDF/arr_age_race.aspx.
[70] Fautsko, Timothy F. "Courthouse Violence in 2010-2012: Lessons Learned." Williamsburg, VA: National Center for State Courts (2013), *at* 8.

- The presence of law enforcement officers outside and inside the courthouse and courtroom is imperative.[71] Encourage your courthouse security staff and courtroom bailiffs to engage in courthouse and courtroom practice drills periodically to assist in readiness.
- Verify that your courthouse security staff is knowledgeable about indicators of possible violence.
- Encourage your court staff to engage in threat assessment protocol, before and during court proceedings.
- Demonstrate leadership by engaging in regular drills along with your staff and courtroom bailiffs.[72]
- Encourage your jurisdiction to develop and use an Incident Report Form.[73]

Examples of the sorts of indicators of possible violence (referred to *supra*) that judges, courthouse staff, and law enforcement officers should be on the lookout for include:

- Someone milling around the courthouse with no particular purpose.
- Someone wearing inappropriate attire for a courthouse. This might include apparent "bulges" in areas of clothing such as the waistband or back.
- Someone with a focused stare, or withdrawn, shying away.
- Someone with tunnel vision, totally dismissing some people and focusing on others or locations; someone who does not want to face you to talk to you.
- Someone sitting in the courtroom who does not have a case on the docket, perhaps sitting in the back next to the door.
- Someone evidencing inappropriate communication.[74]

These practices can serve to inform the court as to any potential vulnerabilities that may be exploited to undermine the safety of the courtroom and threaten case participants. These are not simple fixes, but are long-term strategies for providing safety and security to all who come before the court.

Times to be on higher alert

There are times in sexual violence cases where emotions run higher than the norm, and where possible violence may be anticipated. These are situations when a judge may be able to subtly signal the bailiffs and or law enforcement to be on higher alert for possible violence.[75] These situations include:

- The announcement of a verdict of guilty.
- The announcement of a verdict of not guilty.
- The pronouncement of a prison sentence.

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[71] *Id at* 11.
[72] *Id at* 7.
[73] *See* Court Security Handbook. Conference of Chief Judges (CCJ) and Conference of State Court Administrators (COSCA) (2d Ed., 2012).
[74] *Supra* note 28 at 9.
[75] *Id at* 9-10.

- Emotional testimony.
- The announcement of bond, or of the need for pretrial detention.

Judges may consider discussing with the law enforcement officers assigned to their courtroom a subtle sign or signal that can allow the law enforcement officer to be on higher alert for possible violence.

Specific courtroom safety measures that may be considered prejudicial

Shackling is "inherently prejudicial;" however, visible shackles may be used when "justified by an essential state interest" specific to the defendant on trial. Deck v. Missouri, 125 S.Ct. 2007 (2005); *see also* Knight v. State, 76 So. 3d 879, 886 (Fla. 2011).

In a case in 2010, the Florida Supreme Court held that shackling the defendant during trial was not a violation of their 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.” Johnston v. State, 27 So. 3d 11 (Fla. 2010).

In a 2014 case, the Court reiterated that shackling may be warranted, based on a defendant’s behavior and courtroom layout, and that rearranging the courtroom so the defendant’s restraints are not visible is an acceptable procedure. Huggins v. State, 161 So. 3d 335 (Fla. 2014).

Use of a stun belt follows the same rationale as shackling. “A stun belt's potential for prejudice must be measured against other alternative forms of restraint and whether these alternatives are less prejudicial or viable. In this case, there was virtually no alternative to a stun belt given the visibility of other restraints and the security concerns posed by Weaver's pro se status.” Weaver v. State, 894 So. 2d 178 (Fla. 2004).

This case is somewhat at odds with the 11th Circuit’s ruling in United States v. Durham, 287 F.3d 1297 (11th Cir. 2002), insofar as the 11th Circuit held that the use of a stun belt presents "a far more substantial risk of interfering with a defendant's Sixth Amendment right" to confer with counsel and direct their own defense than do leg shackles and that discharge of a stun belt poses a greater threat to the dignity of the courtroom than shackles. Weaver, *citing* Durham. Further, the stun belt may disrupt the defendant’s ability to participate in their own defense; the defendant may be too busy concentrating on doing everything to prevent the belt's activation at the expense of their participation. Weaver. However, the Court distinguished Weaver from Durham, holding that “[u]nder these circumstances, the decision to employ a stun belt constitutes a rational exercise of the trial court's discretion that was reasonably necessary to ensure order and safety in the courtroom, especially in light

of defendant's pro se status." Weaver.

A final note about stun belts: the accidental discharge of a stun belt outside of the presence of the jury is not prejudicial to the defendant, Weaver; however, no Florida court has examined the issue of accidental discharge in the presence of the jury.

Handling sensitive witnesses

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 18 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.

The judge must make specific findings of fact, on the record, as to the basis for the ruling for testimony via closed circuit television. § 92.54.

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. § 92.54(3).

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 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. § 92.54(4).

C. Rape Kit Backlog

The issue of untested rape kits has garnered national attention. Major cities like New York, Detroit, and Cleveland had already begun efforts to remedy their issues before most jurisdictions even knew they had an inventory of untested kits. In 2015, the

Bureau of Justice Assistance (BJA) announced a grant in conjunction with the announcement of a grant from the District Attorney's Office in New York (DANY). Jacksonville in the 4th Judicial Circuit was the only city in Florida to be awarded the BJA grant and one of only five cities across the country to be awarded both the BJA and DANY grants.

With the help of Attorney General Pam Bondi and the Legislature mandatory inventory laws were passed requiring every agency in Florida to count the number of untested rape kits in their possession. The untested rape kit numbers in Florida at the time of the inventory exceeded 13,000, with some kits dating back decades.

In an effort to keep this issue from arising again the Legislature passed mandatory testing laws that, as of July 1, 2016, require law enforcement to pick up a sexual assault kit that has been collected pursuant to an investigation and submit that kit to a lab for testing within 30 days. The labs then have 120 days to test the kit.

Jurisdictions will face challenges with the investigation and prosecution of cases from many years prior. Many of those challenges will be whether or not victims and witnesses are deceased or can be found, whether evidence besides the rape kit itself still exists or has been purged, and whether or not reports and records are still available. If those challenges can be overcome by hearsay exceptions and good investigation then the issues of the statute of limitations and constitutional speedy trial challenges must be addressed.

The statute of limitations (SOL) is a factually specific challenge in each case, especially when dealing with the issue of untested rape kits. **The SOL that applies is that which was in effect at the time of the crime.** As such, courts may have difficulty tracking which rules apply to a case, especially if the case is decades old.

Another challenge that will arise relates to due process under constitutional speedy trial theory. Allegations may arise that the state has lost its ability to prosecute due to the speedy trial rule. Rule 3.191. The legal test to establish a due process violation based on a pre-indictment delay is two pronged:

- the defendant must show actual prejudice from the delay, and
- the court must weigh the state's reason for the delay against the specific prejudice caused to the defendant. U.S.C.A. Const. Amend. 14, *see also* Overton v. State, 976 So. 2d 536 (Fla. 2007).

The defendant bears the burden of establishing actual prejudice. This claim must be based on more than mere speculation and must be supported by substantial evidence; the prejudice must constitute a material impairment to the preparation of the defense. If the defendant shows actual prejudice then the state has the burden of showing why the delay was necessary, *see* State v. Hope, 89 So. 3d 1132 (Fla 1st DCA 2012).

As courts maneuver through the backlogged kits, flexibility will be useful in handling

these cases. Courts will need flexibility when examining the case in order to utilize the various court rules and Florida statutes that were in place when the crime was allegedly committed.

D. Jimmy Ryce Act

The Department of Children and Families' Process

The Sexually Violent Predator Program (SVPP) was created by statute in 1998 and went into effect in 1999. The Department of Children and Families (DCF) is charged with the responsibility to evaluate every person being released from the Department of Corrections (DOC), the Department of Juvenile Justice (DJJ), forensic facilities at DCF, and with a 2014 addition to the statute, county jails, who has ever been convicted of a sexually violent offense as defined in statute. DCF evaluates these individuals to determine if the person meets the criteria to be considered a sexually violent predator; that is, whether they:

- Have ever been convicted of a sexually violent offense;
- Suffer from a mental abnormality or personality disorder that makes them likely to commit acts of sexual violence in the future if not confined for long-term care, custody and control. § 775.21

When a referral comes from one of these entities, it is processed by the date of the person's release. Once the file is complete and a summary sheet completed, the file is then sent to one of the four DCF staff psychologists. The psychologist reviews the information and makes a determination whether a face-to-face interview of the individual is necessary.

The program contracts with roughly 20 psychologists located across the state of Florida to conduct face-to-face evaluations. When an evaluation is required, DCF contacts the psychologists based on proximity, availability and willingness to travel to the prison or facility where the person is located to conduct the interview. Approximately one-half the time the prisoner agrees to speak with the psychologists.

After the interview, the psychologist supplies SVPP with a written evaluation report following a specified template. The psychologists on staff then decide whether a second face-to-face interview is necessary; if the first interviewer says the person meets criteria, a second evaluator is automatically sent out. If any of the staff psychologists wish a second interview, a second evaluator is automatically sent out.

After all field evaluations are complete, the case is scheduled for a meeting of the multidisciplinary team (MDT). The MDT is comprised of all four staff psychologists, two contracted psychologists as well as the two field evaluators by proxy. The team discusses whether they feel the person meets criteria as a sexually violent predator. If the team determines the person meets criteria, a recommendation to file a petition seeking the person's civil commitment is made to the State Attorney's Office with jurisdiction. If the team determines the person does not meet criteria, a letter is sent

to the State Attorney's Office with the determination. The state attorney has discretion, by statute, to pursue a petition regardless of the recommendation.

Once a recommendation to the State Attorney is made, DCF's part of the process is over and the State Attorney in that jurisdiction manages the judicial process. The person is entitled to a jury trial. If a jury finds that the person meets criteria as a sexually violent predator, they are sent to the Florida Civil Commitment Center (FCCC) in Arcadia to pursue long term sex offender treatment. If a jury finds that the person does not meet criteria, they are released.

FCCC is run by CorrectCare through a contract with DCF. The average length of stay at the Center is six years. Every year on the anniversary of their commitment, the person is entitled to an Annual Review, conducted by the trial court. These can turn into bench trials with a court making the decision whether the person's condition has so changed that they are safe to be released to the community and no longer in danger to commit acts of sexual violence. No one leaves the Center without a court order.

This program is created and operated through F.S. §394.910 *et seq*. Florida Administrative Code 64E-25 contains rules regarding the operation of SVPP and Florida Rules of Civil Procedure for Sexually Violent Predator cases contain court rules for the conduct of cases in the judicial process. This is a civil proceeding with a "clear and convincing" standard.

The Numbers

The Judicial Process

After a petition is filed by the State Attorney's Office (SAO), the file is presented to the assigned judge. The statute allows the court to review the file ex parte and sign a probable cause order finding probable cause that the person meets criteria as a sexually violent predator and ordering them transferred to the Florida Civil

Commitment Center upon the expiration of their sentence and appointing the public defender. The operative time periods for all Jimmy Ryce issues begins with the signing of the ex parte probable cause order.

- Jimmy Ryce proceedings must be initiated before the expiration of the respondent's incarcerative sentence. A respondent must be in lawful custody to be subject to Jimmy Ryce proceedings. Phillips v. State, 119 So. 3d 1233 (Fla. 2013).
- 2014 changes to the Jimmy Ryce statute have eliminated many of the lawful custody concerns going forward as they allow a court to proceed even if a person is released from custody due to mistake or oversight.
- A first appearance notifying the respondent of the petition pending against them must be held within five days of the signing of the ex parte probable cause. The SAO must arrange for transport. The facility at FCCC has the capability to have video hearings, so that is always an option that has not been challenged legally. Either party may request a trial by jury.
- The statute provides for the respondent to be tried within 30 days of the signing of the ex parte probable cause order. In almost all cases, the respondent waives this right in order to better prepare a defense. The trial can be continued once at the request of either party for not more than 120 days upon a showing of good cause. The definition of good cause is not provided in the statute and has not been determined by an appellate court. No additional continuances may be granted unless there is a finding by the court that a manifest injustice would occur.
- Hearsay evidence is permitted at trial, but may not be the sole basis of commitment. § 394.9155(5).
- The court cannot rely or allow a jury to rely on "stale" mental health evaluations to determine whether the Respondent meets criteria as a sexually violent predator. Hartzog v. State, 133 So. 3d 570 (Fla. 1st DCA 2014). If a respondent refuses to cooperate with a state evaluator, the court may allow the state evaluator to rely on any documents, tests, reports, evaluations of the respondent's expert or prevent the respondent's expert from testifying. § 394. 9155(7).
- The respondent is entitled to annual evaluation of their mental condition upon the anniversary of their commitment.
- The standard to progress to bench trial is whether there is probable cause to believe that the respondent's condition has so changed that it is safe for the person to be at large and that the person will not engage in acts of sexual violence if discharged.
- At a bench trial, the state must prove by clear and convincing evidence that the person's mental condition remains such that it is not safe for the person to be at large and that, if released, the person is likely to engage in acts of sexual violence.
- All constitutional protections afforded to the respondent at the original trial are still afforded to them except for the right to jury. They are entitled to be present and represented by counsel.

E. Statute of Limitations

A number of offenses in this benchbook do not follow the standard statutes of limitation. Further, as this is 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." State v. Mack, 637 So. 2d 18 (Fla. 4th DCA 1994).

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

- Sexual battery of a child less than 12 years of age. § 794.011(2)(a) and (b).
- Sexual battery with the use of force or the use or threat to use a deadly weapon. § 794.011(3).
- Sexual battery of a child less than 12 years of age by a person in familial of custodial authority. § 794.011(8)(c).

Other crimes whose prosecution can be commenced **at any time** include:

- The kidnap of a child under 13 with an accompanying, enumerated offense is a life felony. § 787.01(3)(a).
- When a person 18 or older who commits a lewd or lascivious molestation against a child under 12 commits a life felony. § 800.04(5)(b).
- A first or second degree felony sexual battery under § 794.011 which is reported to a law enforcement agency within 72 hours after its commission. § 775.15(14).
- A first or second degree felony sexual battery under § 794.011 committed upon a victim under the age of 18 which is reported to a law enforcement or other governmental agency within 72 hours after its commission. § 775.15(13)(a).
- A first degree felony sexual battery committed on a victim under 18 years of age. § 775.15(13)(b).
- A violation of § 794.011(sexual battery) when the victim was under 16 years of age at the time the offense was committed. § 775.15(13)(c).

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 § 800.04, incest, or a computer facilitated lewd or lascivious exhibition under § 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. § 775.15(13)(a).

F. Record Sealing / Expungement

An effort to expunge or seal a criminal history starts with a written petition, filed with the clerk.

- The petition must state the grounds on which it is based and the official records to which it is directed and has to include an affidavit of the party seeking relief, which has to 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 (FDLE).
- 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).

However, please note that records pertaining to many of the sexual violence offenses outlined in the bench book may not be expunged. "A criminal history record that relates to a violation of § 393.135, § 394.4593, § 787.025, chapter 794, § 796.03, § 800.04, § 810.14, § 817.034, § 825.1025, § 827.071, chapter 839, § 847.0133, § 847.0135, § 847.0145, § 893.135, § 916.1075, a violation enumerated in § 907.041, or any violation specified as a predicate offense for registration as a sexual predator pursuant to § 775.21, without regard to whether that offense alone is sufficient to require such registration, or for registration as a sexual offender pursuant to § 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." § 943.0585.

Similarly, with regard to sealing a record, "A criminal history record that relates to a violation of § 393.135, § 394.4593, § 787.025, chapter 794, § 796.03, § 800.04, § 810.14, § 817.034, § 825.1025, § 827.071, chapter 839, § 847.0133, § 847.0135, § 847.0145, § 893.135, § 916.1075, a violation enumerated in § 907.041, or any violation specified as a predicate offense for registration as a sexual predator pursuant to § 775.21, without regard to whether that offense alone is sufficient to require such registration, or for registration as a sexual offender pursuant to § 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." § 943.059.

G. Civil Sexual Violence Injunctions

Section 784.046 creates a cause of action for injunctions against 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."

In accordance with § 784.046(2)(c), "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 their own behalf or on behalf of the minor child if:

- 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
- 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."

A victim who petitions for an injunction must allege the incidents of sexual violence and shall include the specific facts and circumstances that form the basis upon which relief is sought. § 784.046(4)(a).

Temporary Injunction

A temporary injunction may be issued ex parte upon determination by the court that an immediate and present danger of sexual violence exists, § 784.046(6)(a), considering only the information included in the verified pleadings/affidavits **unless** the respondent appears at the hearing or has received reasonable notice of the hearing. § 784.046(6)(b).

If the ex parte (temporary) injunction is granted:

- Any such ex parte temporary injunction shall be effective for a fixed period not to exceed 15 days. § 784.046(6)(c).
- If 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, then the ex parte temporary injunction shall be effective for 15 days following the date the respondent is released from incarceration. § 784.046(6)(c).
- A full hearing shall be set for a date no later than the date when the temporary injunction ceases to be effective. § 784.046(6)(c).
- The court may grant a continuance of the ex parte temporary injunction and the full hearing before or during a hearing, for good cause shown by any party,

or upon its own motion for good cause, including failure to obtain service. § 784.046(6)(c).

Final Injunction

Upon notice and hearing, the court may grant such relief as the court deems proper, including injunctions or directives to law enforcement agencies as provided in § 784.046(7).

If a final injunction is granted:

- Any relief granted shall be effective for a fixed period or until further order of the court. Florida Family Law Rules of Procedure 12.610(c)(4)(B), 12.980(s).
- The terms of the injunction shall remain in force and effect until modified or dissolved. Either party may move at any time to modify or dissolve the injunction. Such relief may be granted in addition to other civil and criminal remedies. § 784.046(7)(c).
- Upon petition of the victim, the court may extend the injunction for successive periods or until further order of the court. Broad discretion resides with the court to grant an extension after considering the circumstances. No specific allegations are required. Florida Family Law Rule of Procedure 12.610(c)(4)(B).

Possible relief ordered in a final injunction for protection against sexual violence:

- Restrain the respondent from committing any acts of violence. § 784.046(7)(a).
- Restrain the respondent from contact with the petitioner. Florida Supreme Court Approved Family Law From 12.980(s).
- Restrain respondent from knowingly coming within 100 feet of petitioner's automobile at any time. Florida Supreme Court Approved Family Law Form 12.980(s).
- Restrain respondent from going to, in, or within 500 feet of:
    - The petitioner's current or future residence;
    - The petitioner's current or any subsequent place of employment or school; and
    - The places frequented regularly by the petitioner and/or petitioner's minor child(ren). Florida Supreme Court Approved Family Law Form 12.980(s).
- Order respondent to not use or possess a firearm or ammunition and surrender any firearms and ammunition in respondent's possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Form 12.980(s).
- Order other relief as the court deems necessary for the protection of the petitioner, including injunctions or directives to law enforcement agencies as provided in this section. § 784.046(7)(b).

Enforcement

The court may enforce the respondent's compliance with the injunction through a civil or criminal contempt proceeding by imposing a monetary assessment or incarceration. § 784.046(9)(a). If the violation meets the statutory criteria, it may be prosecuted as a crime. Florida Family Law Rule of Procedure 12.610(c)(5).

A person who willfully violates an injunction for protection against sexual violence issued pursuant to § 784.046 or a foreign protection order accorded full faith and credit pursuant to § 741.315 commits a misdemeanor of the first degree punishable as provided in §§ 775.082 or 775.083. § 784.047.

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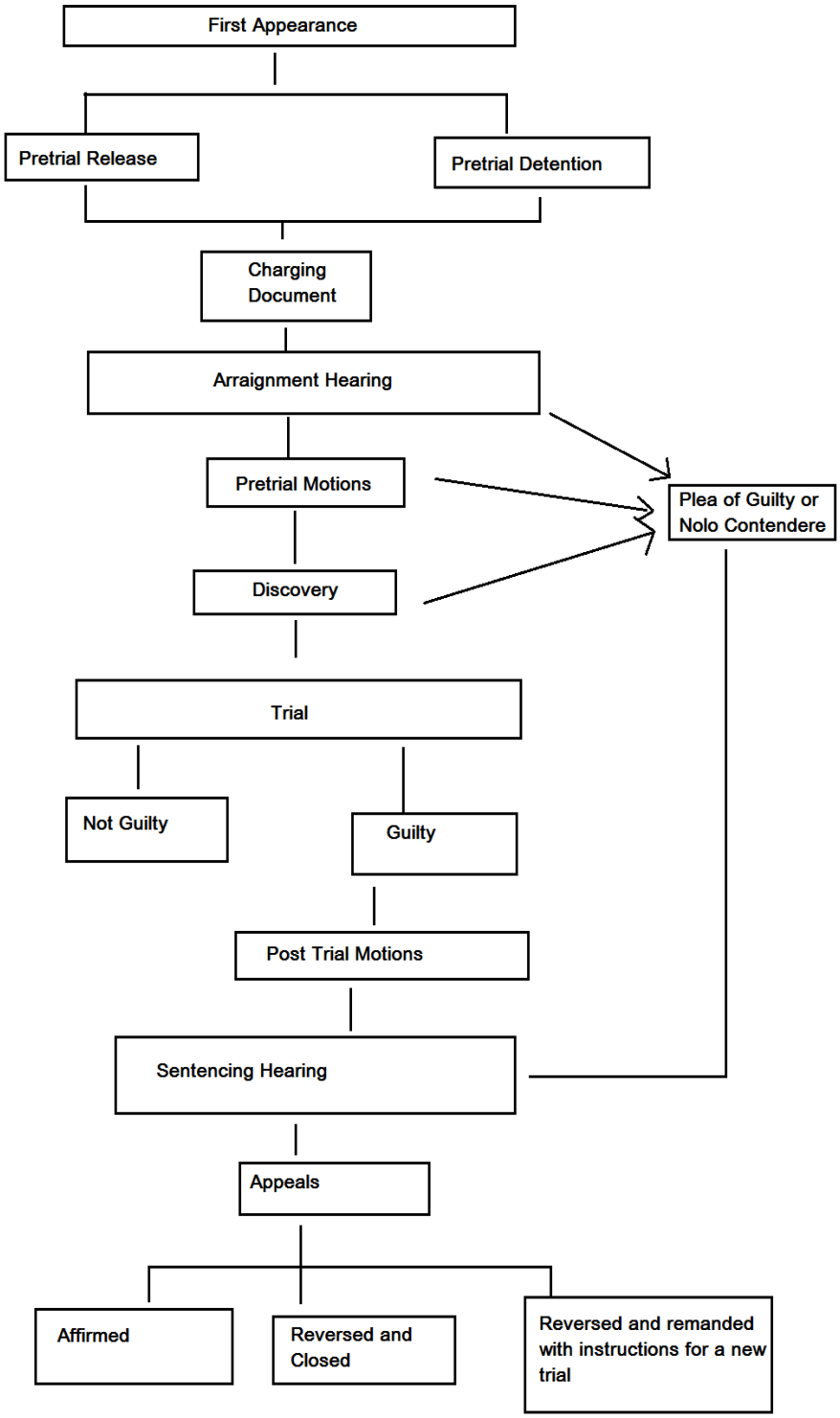
Tab 4: Case Flow

Sexual Violence Criminal Case Flow Chart



PRETRIAL HEARINGS BENCHCARD

A. Generally

- The purpose of the pretrial hearings is to determine whether there is probable cause to detain the alleged offender, determine whether pretrial release is available, and determine what conditions or sureties may be required if pretrial release is allowed.
- Follow the standard criminal procedure for criminal cases except where deviations are noted below.

B. First Appearance

- Advise the defendant as to the purpose of the hearing.
- Determine whether probable cause exists.
- Determine whether to hold the defendant on no bond if the charge is for a "non-bondable" offense, or whether a bond may be set and conditions of pretrial release imposed.

C. Probable Cause to Hold in Custody

- The probable cause determination must be made if the necessary proof is available at the time of first appearance.
- **No person charged with a capital offense or an offense punishable by life imprisonment where proof of guilt is evident or the presumption of guilt is great may be entitled to pretrial release.**
- **No person charged with a dangerous crime can be released on nonmonetary conditions under the supervision of a pretrial release organization**, unless specific conditions have been met.
- Make a pretrial release and bond assessment.
- Set pretrial release conditions.
- If bail is required, establish amount.

D. Pretrial Detention

- 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.

PRETRIAL HEARINGS OUTLINE

A. Generally

Follow the Standard Criminal Procedure for Criminal Cases.

The Florida Rules of Criminal Procedure outline the standards to be followed by a court for the following pretrial hearings:

- First Appearance (Rule 3.130)
- Nonadversarial Probable Cause Determination (Rule 3.133(a))
- Adversary Preliminary Hearing (Rule 3.133(b))
- Final Pretrial Release Hearing (Rule 3.132(c))
- Arraignment (Rule 3.160)

This benchbook is aimed at highlighting issues that the court should be aware of if a sexual violence case is presented. For more information on the general rules for hearings, please review the Florida Rules of Criminal Procedure.

B. Charging Documents

The Supreme Court of Florida struck down the death penalty for "capital" sexual battery in Buford v. State, 403 So.2d 943 (Fla. 1981). *See also* Hogan v. State, 427 So.2d 202 (Fla. 4th DCA 1983). Indictment by grand jury is no longer required to initiate a case of capital sexual battery and such cases can be initiated by filing an information.

However, crimes must be charged based upon the law that existed at the time they occurred. Thus, 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.

Information

The Information 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. Rule 3.140(d)(1).

When an information is not clear or includes an error, case law and rules tend 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. *See* State v. Haubrick, 997 So. 2d 1228 (Fla. 1st DCA 2008). Please note that the rules allow for amendment at any time prior to trial on motion by the prosecution or defense. Rule 3.140(j). However, post-conviction challenge of the information will generally not be permitted. *See* DuBois v. State, 520 So. 2d 260 (Fla. 1988).

Lesser Included Offenses

The Florida Supreme Court approved a "Schedule of Lesser Included Offenses" in STANDARD JURY INSTRUCTIONS, 723 So. 2d 123 (Fla. 1998). Since that time, no updates or modifications have been formally approved by the Court. The Schedule of Lesser Included Offenses is instructive but it is not necessarily dispositive. The sexual offenses and their lesser included offenses are listed below.

Offense	Statute	Necessary Lesser Included Offense	Permissible Lesser Included Offense
Stalking	§784.048(2)	None	Attempt
Aggravated stalking	§784.048(3)	Stalking - §784.048(2)	Attempt
Aggravated stalking	§784.048(4)	Stalking - §784.048(2)	Attempt Violation of injunction for protection against domestic violence - §741.31(4)
Sexual battery – victim under 12	§794.011(2)(a)(b)	Battery - §784.03	Sexual battery - §794.011(5)(b) Attempt Assault - §784.011 Aggravated assault - §784.021(1)(a) Aggravated battery - §784.045(1)(a)
Sexual battery – victim over 12 – weapon or force	§794.011(3)	Sexual battery- §794.011(5) Battery - §784.03	Sexual battery - §794.011(2)(b) Attempt Aggravated battery - §784.045(1)(a) Aggravated assault - §784.021(1)(a) Assault - §784.011 Sexual battery - §794.011(4)
Sexual battery – victim over 12 – special circumstances	§794.011(4)	Sexual battery- §794.011(5) Battery - §784.03	Attempt Battery - §784.03 Aggravated assault - §784.021(1)(a)

			Assault - §784.011
Sexual battery – victim over 12 – without force	§794.011(5)	Battery - §784.03	Attempt
Unnatural and lascivious act	§800.02	None	Attempt
Exposure of sexual organs	§800.03	None	Unnatural and lascivious act – §800.02
Lewd, lascivious, or indecent assault or act upon or in presence of child	§800.04	None	Attempt Assault - §784.011 Unnatural and lascivious act - §800.02
Lewd or lascivious offenses committed upon or in the presence of an elderly person or disabled person See In re: Standard Jury Instructions in Criminal Cases, 965 So. 2d 811 (Fla. 2007)	§825.1025	None	Attempt - §777.04(1) Assault - §784.011 Battery - §784.03 Unnatural and lascivious act - §800.02 Exposure of sexual organs - §800.03
Incest	§826.04	None	Attempt
Aggravated child abuse	§827.03(1)(a)	None	Attempt Child abuse - §827.04(1) Battery - §784.03 only under certain circumstances see Kama v. State, 507 So. 2d 154 (Fla. 1st DCA 1987)
Aggravated child abuse	§827.03(1)(b) §827.03(1)(c) §827.03(1)(d)	None	Attempt Child abuse – §827.04(1) Battery - §784.03 only under certain circumstances see Kama v. State, 507 So. 2d 154
Sexual performance by a child	§827.071(2)	None	Attempt Sexual performance by a child – §827.071(5)
Sexual	§827.071(3)	None	Attempt

performance by a child			Sexual performance by a child – §827.071(5)
Sexual performance by a child	§827.071(4)	Sexual performance by a child – §827.071(5)	None
Sexual performance by a child	§827.071(5)	None	Attempt
Kidnapping	§787.01	False imprisonment – §787.02	Attempt Aggravated assault – §784.021(1)(b) Battery – §784.03(1)(a) Assault – §784.011
False imprisonment	§787.02	None	Attempt Battery – §784.03(1)(a) Assault – §784.011

Note that lewd and lascivious conduct is ***not*** a lesser included offense of sexual battery.

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 likely to cause serious personal injury, lewd or lascivious battery under § 800.04(4)(a) is a permissive lesser included offense of a sexual battery charged under section 794.011(3). Williams v. State, 957 So. 2d 595 at 598 (Fla. 2007).

C. First Appearance

Advise the Defendant

At first appearance, advise the defendant of the following:

- The charges against them, and provide them with a copy of the complaint;
- The right to remain silent, and that anything they say may be used against them;
- 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. Rule 3.130(b).

D. Probable Cause Determination

Motion for Pretrial Detention

Has the state filed a motion for pretrial detention?

If YES, proceed to probable cause determination.
If NO, inquire as to intentions and grant the state up to 3 days to file.

Probable Cause

Is there probable cause that the defendant committed the crime? Rule 3.132(a).

> This issue can be determined reliably without an adversarial hearing. The standard is the same as that for arrest. The use of an informal procedure is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable doubt or a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt. Gerstein v. Pugh, 420 U.S. 103 (1975), at 120-122.

- If YES, proceed to defendant in pretrial detention. Rule 3.132(a).
- If NO, proceed to pretrial release and bond assessment. Rule 3.132(a).

Capital Offense

Is the defendant charged with a capital offense?

- If YES, pretrial detention is **MANDATORY**. Rule 3.131(a).
  Sexual violence crimes that carry the possibility of a capital punishment are:
  - **Sexual batteries** under §§ 794.011(2)(a) and (b), 794.011(3), 794.011(8)(c), and an offense with an enhanced penalty under § 794.023(2)(b);
  - **Kidnapping or false imprisonment** under §§ 787.01(2), 787.01(3), and 787.02(3)(a); and
  - **Lewd or lascivious molestation** under § 800.04(5)(b).
- If NO, continue to dangerous crime section.

Dangerous Crime

Is the defendant charged with a dangerous crime?

- If YES, the defendant is not entitled to pretrial release at first appearance.

*** No person charged with a dangerous crime shall be granted nonmonetary pretrial release at a first appearance hearing.** § 907.041(4)(b).

Offenses considered dangerous include:

- Aggravated assault;
- Aggravated battery;
- Kidnapping;
- Child abuse or aggravated child abuse;
- Homicide;
- Manslaughter;
- Sexual battery;
- Stalking and aggravated stalking;
- Abuse of an elderly person or disabled adult;
- Aggravated abuse of an elderly person or disabled adult;
- Lewd, lascivious, or indecent assault or act upon or in presence of a child under the age of 16 years;

- 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;
- Act of domestic violence as defined in s. 741.28; and
- Attempting or conspiring to commit any such crime. §907.041(4)(b).

➢ If NO, continue to pretrial release and bond assessment section.

Pretrial Release and Bond Assessment

If the defendant is not automatically barred from pretrial release, conduct a pretrial release assessment. Consider the following criteria:

- 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. Rule 3.131(b)(3).

Information provided by a defendant in their application to secure pretrial release and/or bail must be accurate, truthful, and complete, without omissions, to the best knowledge of the defendant. Rule 3.131(b)(5).

Information stated in, or offered in connection with, any order entered pursuant to this rule need not strictly conform to the rules of evidence. Rule 3.131(b)(6).

Monetary Bail Determination

If bail is appropriate, set a bail amount. Rule 3.131(2). In addition to the factors set out in Rule 3.131(b)(3), use the factors provided in § 903.046(2) as a guide to aid in

determining the proper bail amount. In particular, note § 903.046(2)(m):

> Whether the defendant, other than a defendant whose only criminal charge is a misdemeanor offense under chapter 316, is required to register as a sexual offender under s. 943.0435 or a sexual predator under s. 775.21; and, if so, they are not eligible for release on bail or surety bond until the first appearance on the case in order to ensure the full participation of the prosecutor and the protection of the public.

If the defendant is before the court for multiple offenses or charges, set a separate bail amount for each offense or charge. Rule 3.131(2).

Pretrial Release Conditions

Emphasize that the defendant must not have any contact of any type with the victim, except through pretrial discovery pursuant to the Rules. Rule 3.131(a).

The court can impose one or a combination of any of the following pretrial conditions:

- Personal recognizance of the defendant;
- Execution of an unsecured appearance bond in an amount specified by the judge;
- Placement of restrictions on the travel, association, or place of abode of the defendant during the period of release;
- Placement of the defendant in the custody of a designated person or organization agreeing to supervise the defendant;
- Execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; provided, however, that any criminal defendant who is required to meet monetary bail or bail with any monetary component may satisfy the bail by providing an appearance bond; or
- Any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

No person charged with a dangerous crime, as defined in § 907.041(4)(a), may be released on nonmonetary conditions under the supervision of a pretrial release service, unless it certifies that it follows conditions set forth therein. Rule 3.131(b)(4).

Though not established in law or rule, the court has latitude in ordering conditions that may be acceptable as "any other condition" as allowed by rule. Some conditions that may be considered include:

- Surrendering weapons, firearms, and ammunition;
- Submitting to electronic monitoring of defendant;
- Requiring defendant to contact pretrial services on a regular basis; and

- Requiring defendant to submit to random drug testing.

E. Pretrial Detention

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. Rule 3.131(a).

PRETRIAL MOTIONS BENCHCARD

Follow the standard criminal procedure for criminal cases except where deviations are noted below.

A. Motion to Suppress Evidence

- The motion must clearly state the evidence sought to be suppressed, the reasons for the requested suppression, and a general statement of facts on which the motion is based.
- A motion may be entertained, as may an appropriate objection, at or during the trial phase.

B. Motion to Suppress Confession or Admission

- The motion must identify with particularity the statement sought to be suppressed, the reasons therefore, and a general statement of facts on which the motion is based.
- A motion may be entertained, as may an appropriate objection, at or during the trial phase.

C. Motion to Take Deposition to Perpetuate Testimony

- Any such application to depose must include affidavits by credible persons that support that the intended deponent resides beyond the territorial jurisdiction of the court or may be unable to attend or may be prevented from attending.
- The rules governing the taking and filing of oral depositions in civil actions applies in criminal actions.
- If the court determines that the witness can be present at trial, the deposition may not be used or read into evidence.

D. Motion to Videotape Testimony of a Child under 18 for Use at Trial

- The court must find the victim is a child or is intellectually disabled and that there is substantial likelihood of least moderate emotional or mental harm due to the presence of the defendant.
- Court must afford certain protections to the defendant.

PRETRIAL MOTIONS OUTLINE

A. Motion to Suppress Evidence

A motion to suppress may be on any of the following five grounds:

- The property was illegally seized without a warrant.
- The warrant is insufficient on its face.
- The property seized is not the property described in the warrant.
- There is no probable cause for believing the grounds on which the warrant was issued.
- The warrant was illegally executed. Rule 3.109(g)(1).

Property was Illegally Seized Without a Warrant

In cases of sexual abuse and sexual violence, police may be called to a home that has children present. If a child answers the door, the police may request entry into the home in a limited number of circumstances. The Florida Supreme Court held that police can validly and warrantlessly enter a home upon a minor's consent IF the State can show:

1. The minor shares the home with an absent, nonconsenting parent;
2. The police officer conducting the entry into the home reasonably believes, based on articulable facts, that the minor shares common authority with the parent to allow entry into the home; and
3. By clear and convincing evidence that the minor's consent was freely and voluntarily given under the totality of the circumstances. Saavedra v. State, 622 So. 2d 952 (Fla. 1993).

If the police do not have consent but make an illegal entry into the home, any search thereafter is tainted. Even if the occupant provides consent to search after the police illegally enter the home, the presumption arises that the ostensible consent was involuntary, and the prosecution has the burden of rebutting the presumption of involuntariness by clear and convincing proof. Thomas v. State, 127 So. 3d 658 (Fla. 1st DCA 2013). The court here held that exigent circumstances do not exist where the police did not want to obtain a search warrant because they did not want to reveal information about the technology they used to track the cell phone signal. Thomas.

No probable cause for believing the grounds on which the warrant was issued

In 2001, the Second Circuit distinguished a 1991 case (Schmitt v. State, 590 So. 2d 404 (Fla. 1991) to hold that, "in order to establish probable cause, the warrant affidavit must have alleged sufficient facts to lead the issuing magistrate to believe that videos or photos depicting children engaged in 'sexual conduct' would be found." Fletcher v. State, 787 So. 2d 232 (Fla. 2d DCA 2001). Merely alleging that hidden cameras were present was insufficient – the affidavit did not establish that the hidden cameras

captured anything more than innocent conduct such as children using the toilet, dressing and bathing.

B. Motion to Suppress Confession

Confession without corpus

As a predicate to the admission of a confession into evidence, Florida law generally requires that the corpus delicti be established independently of the confession. "In order to prove corpus delicti, the State must establish: (1) that a crime of the type charged was committed; and (2) that the crime was committed through the criminal agency of another." Franqui v. State, 699 So. 2d 1312 (Fla.1997).

However, § 92.565 eliminates corpus delicti as a predicate for the admission of a defendant's confession when the state is unable to show the existence of each element of the offense because the victim is either physically helpless, mentally incapacitated, mentally defective, or physically incapacitated. Once this predicate is established, "the state must prove by a preponderance of the evidence that there is sufficient corroborating evidence that tends to establish the trustworthiness of the statement...." State v. Dionne, 814 So. 2d 1087 (Fla. 5th DCA 2002).

The relevant portion of § 92.565 indicates:

> (2) In any criminal action in which the defendant is charged with a crime against a victim under § 794.011; § 794.05; § 800.04; § 826.04; § 827.03, involving sexual abuse; § 827.04, involving sexual abuse;
> § 827.071; or § 847.0135(5), or any other crime involving sexual abuse of another, or with any attempt, solicitation, or conspiracy to commit any of these crimes, the defendant's memorialized confession or admission is admissible during trial without the state having to prove a corpus delicti of the crime if the court finds in a hearing conducted outside the presence of the jury that the state is unable to show the existence of each element of the crime, and having so found, further finds that the defendant's confession or admission is trustworthy. Factors which may be relevant in determining whether the state is unable to show the existence of each element of the crime include, but are not limited to, the fact that, at the time the crime was committed, the victim was:
> (a) Physically helpless, mentally incapacitated, or mentally defective, as those terms are defined in § 794.011;
> (b) Physically incapacitated due to age, infirmity, or any other cause; or
> (c) Less than 12 years of age.

C. Motion to take deposition to perpetuate testimony

A motion to depose must include affidavits by credible persons that support that the intended deponent resides beyond the territorial jurisdiction of the court or may be unable to attend or may be prevented from attending AND that "it is necessary to take the deposition to prevent a failure of justice." Rule 3.190(i).

The rules governing the taking and filing of oral depositions in civil actions applies in criminal actions. Rule 3.190(i)(5). If the court determines that the witness can be present at trial, the deposition may not be read into evidence on behalf of the defendant. Rule 3.190(i)(6). The court may deny the motion if it is made within 10 days of trial. Rule 3.190(i)(1).

D. Motion to videotape testimony of a child under 18 for use at trial

The biggest issues involving motions to take deposition arise where there are child victims, in large part because of the protection child victims are afforded where they "would suffer at least moderate emotional or mental harm due to the presence of the defendant if such victim or witness is required to testify in open court." § 92.53.

Court Findings

Where there is a child victim and a party wishes to use recorded testimony, the court must find:

- That the child is under 18 or has an intellectual disability AND
    - Is either unavailable as defined in § 90.804(1) OR
    - There is a substantial likelihood the victim would suffer at least moderate emotional or mental harm due to the presence of the defendant if the witness is required to testify in open court.

Defendant Protections

- The defendant and the defendant's counsel must be present. However, the defendant may waive their presence.
- The court may require the defendant to view the testimony outside of the presence of the child by a two-way mirror or similar method that ensures the defendant can observe and hear the testimony of the witness.
- The defendant must also be afforded means to communicate with their attorney in private. § 90.53(4).

DISCOVERY BENCHCARD

Follow the standard criminal procedure for criminal cases except where deviations are noted below.

A. Discovery Depositions

- Deposition procedure is the same as that provided in the Florida Rules of Civil Procedure.
- Discovery depositions are governed by Rule 3.220.
  - Depositions of sensitive witnesses (children under the age of 16) must be videotaped unless otherwise ordered. The court may order videotaping for depositions of witnesses with fragile emotional strength, or may order that such a deposition be taken in the presence of the court or a special magistrate.
  - A defendant shall not be physically present at a deposition except upon stipulation of the parties or as provided by rule. The court may order the defendant's presence for good cause shown.
- Depositions to perpetuate testimony are governed by Rule 3.190.
  - The court or the clerk may, upon application from a party, issue a subpoena for a person whose deposition is to be taken. A witness who refuses to obey a duly served subpoena may be adjudged in contempt of the court.

B. Sanctions

- The court may order compliance with discovery rules if noncompliance is brought to the attention of the court.
- Willful violation will subject the party to appropriate sanctions including contempt proceedings, jail, and/or costs where appropriate.
- The court may, upon receipt of a certification made in violation of the rule, impose sanctions upon the party or person making the request, response, or objection.

DISCOVERY OUTLINE

A. Depositions

Discovery Deposition - Fla. R. Crim. P. Rule 3.220

Depositions taken pursuant to Rule 3.220 are for discovery purposes only and, for a number of reasons, assist in shortening the length of trials. State v. Green, 667 So. 2d 756 (Fla. 1995). As there is no stated provision allowing a deposition to be used as substantive evidence, the Supreme Court has ruled that discovery depositions may not be used as substantive evidence. *See* Rodriguez v. State, 609 So. 2d 493 (Fla.1992), *and* State v. James, 402 So. 2d 1169, 1171 (Fla. 1981).

Special Considerations for Fla. R. Crim. P. Rule 3.220 Depositions in Sexual Violence Cases

- 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. § 960.001(1)(q).
- Several issues involve motions to take deposition arise where there are child victims, in large part because of the protection that child victims are afforded where they "would suffer at least moderate emotional or mental harm due to the presence of the defendant if such victim or witness is required to testify in open court." § 92.53.
- Check with your jurisdiction as to the existence of 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 discovery purposes. § 914.16.
    - 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. § 914.16.
- Depositions of sensitive witnesses or children under the age of 16 must be videotaped. Rule 3.220(h)(4).
- If a witness of any age is emotionally fragile, the court may order the deposition to be videotaped or conducted be in the presence of the trial judge or a special magistrate. Rule 3.220(h)(2).
    - Courts have not ruled on what, precisely, constitutes "fragile emotional strength."
- 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. To determine whether good cause exists, 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. Rule 3.220(h)(7).
- 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. Rule 3.220(l)(1).

Finally, a discovery deposition is not the equivalent of a prior opportunity for cross-examination, and by itself will implicate the Confrontation Clause. Corona v. State, 64 So. 3d 1232 (Fla. 2011).

Motion to Take Deposition to Perpetuate Testimony

Depositions taken pursuant to Rule 3.190(i) are specifically taken for the purpose of introducing those depositions at trial as substantive evidence. State v. Green, 667 So. 2d 756 (Fla. 1995). Note that the rules governing the taking and filing of oral depositions, the objections thereto, the issuing, execution, and return of the commission, and the opening of the depositions in civil actions shall apply in criminal cases. Rule 3.190(i)(5).

Any motion to hold deposition to perpetuate testimony must be verified or supported by affidavit, and must show:

- That a prospective witness resides beyond the territorial jurisdiction of the court or may be unable to attend or be prevented from attending a trial or hearing;
- That the witness's testimony is material; and
- That it is necessary to take the deposition to prevent a failure of justice. Rule 3.190(i)(1).

Special Considerations for Rule 3.190 Depositions

- As in the Rule 3.220 deposition, 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. § 960.001(1)(q).
- A defendant not in custody may be present at the examination, but the failure to appear after notice and tender of expenses shall constitute a waiver of the right to be present. Rule 3.190(i)(3). The concept of "present" is somewhat fluid.
  - *See* Glendening v. State, 536 So. 2d 212 (Fla. 1988), where the Supreme

Court held that a deposition of a child was constitutional where the defendant "was accompanied by counsel behind the two-way mirror and was able to communicate with counsel questioning the child if the need arose. His opportunity to engage in full and effective cross-examination was not interfered with by his exclusion."

- *See also* Blanton v. State, 880 So. 2d 798 (Fla. 5th DCA 2004). In this case, the court noted that a discovery deposition where the defendant was not present, followed by a second deposition, by defense, afforded the defense ample opportunity to cross-examine as required by law. The full case (not copied herein) provides a more comprehensive examination of Confrontation Clause issues.

B. Discovery Violations

Richardson Hearing

A defendant's right to a hearing on a possible discovery violation was first recognized in Richardson v. State, 246 So. 2d 771 (Fla.1971). The Court recognized that when a discovery violation is brought to the trial judge's attention, the trial court's discretion can be properly exercised "only after the court has made an adequate inquiry into all of the surrounding circumstances." Richardson.

The prongs of the Richardson hearing:

- The trial judge must first determine whether the state violated the discovery rules. *See* Sinclair v. State, 657 So. 2d 1138, 1140 (Fla.1995).
- If a violation occurred, the judge must then assess "whether the state's violation was inadvertent or willful, whether the violation was trivial or substantial, and most importantly, what effect, if any, [the violation had] upon the ability of the defendant to properly prepare for trial." Richardson (quoting Ramirez v. State, 241 So. 2d 744 (Fla. 4th DCA 1970)).
- Failure to conduct an adequate Richardson inquiry is not per se cause for reversal, but "harmful error is presumed." Acosta v. State, 856 So. 2d 1143 (Fla. 4th DCA 2003).

Sanctions

Willful violation by counsel or a party not represented by counsel of an applicable discovery rule, or an order issued pursuant thereto, shall subject counsel or the unrepresented party to appropriate sanctions by the court. Rule 3.220(n)(2). Allowable sanctions include continuance, mistrial, contempt proceedings, and assessment of costs. Rule 3.220(n). Further, while Rule 3.220(n)(1) authorizes a court to exclude evidence as a sanction for a violation of the discovery rules, the Second DCA ruled that that sanction should only be imposed when there is no other adequate remedy. Grace v. State, 832 So. 2d 224 (Fla. 2d DCA 2002).

PLEAS BENCHCARD

Follow the standard criminal procedure for criminal cases except where deviations are noted below.

A. Voluntary and Knowing

- Before accepting a plea, verify that it is voluntarily entered and that a factual basis for the plea exists.
- Verify that the defendant knows the direct consequences of the plea.
- Note that involuntary civil commitment per the Jimmy Ryce Act may be a collateral consequence of the plea.
- For a felony charge, ask whether the defense has reviewed the state's discovery.

B. 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.

C. Victim Input

- Per § 921.143(1), the victim has the right to a meaningful opportunity to address the court prior to sentencing.
- Where appropriate, consider allowing a victim to prepare and provide a victim impact statement to the court in support of or in lieu of the victim being physically present to address the court.

PLEAS OUTLINE

A. 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. Rule 3.172(a).

To determine voluntariness the judge should place the defendant under oath and determine that they understand:

- The nature of the charge to which the plea is offered, the maximum possible penalty, and any mandatory minimum penalty provided by law;
- 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 them;
- 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 their behalf, the right to confront and cross-examine witnesses against them, and the right not to testify or be compelled to incriminate themselves;
- That upon a plea of guilty, or nolo contendere without express reservation of the right to appeal, they give 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;
- 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 they waive the right to a trial;
- That if the defendant pleads guilty or nolo contendere, the trial judge may ask the defendant questions about the offense to which they have 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 them in a prosecution for perjury;
- The complete terms of any plea agreement, including specifically all obligations the defendant will incur as a result;
- That if they plead guilty or nolo contendere, if they are not a United States citizen, the plea may subject them 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
- 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 completion of their 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. Rule 3.172(c)1-9.

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. State v. Partlow, 840 So. 2d. 1040, 1043 (Fla. 2003).

Collateral consequences include:

- Statutory sexual offender and sexual predator reporting;
- Sexual offender and predatory offender registration;
- Public notification requirements; (Partlow, *supra*) and
- Involuntary civil commitment (Jimmy Ryce Act). *See* Watrous v. State, 793 So. 2d 6, 10 (Fla. 2d DCA 2001).

While involuntary civil commitment is a collateral consequence, Rule 3.172(c)(9) requires that the court inform defendants entering a plea of guilty or nolo contendere of potential involuntary civil commitment if their current or previous offense qualifies them for such.

Thus, it is a **promising practice** to inform all defendants of the Jimmy Ryce Act and the potential for involuntary civil commitment.

For more on the Jimmy Ryce Act, see General Issues, *infra*.

Accepting a Plea

Before accepting a defendant's plea of guilty or nolo contendere to a felony, the judge 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. Rule 3.172(d).

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. Rule 3.172(d).

When the plea is knowing and voluntary, when there is a factual foundation to support it, and when the State has agreed to it, the plea must be accepted. Rigabar v. Broome, 658 So. 2d 1038 (Fla. 4th DCA 1995). Further, "A defendant who pleads guilty or nolo contendere may expressly reserve the right to appeal a prior dispositive order of the lower tribunal, identifying with particularity the point of law being reserved." State v. Ashby, 245 So. 2d 225 (Fla.1971).

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

- Acknowledges their guilt or

- Acknowledges that they feel the plea to be in their best interest, while maintaining innocence. Rule 3.172(e).

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. Rule 3.172(h).

B. Withdrawing a Plea

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. Rule 3.170(f).

Once a sentence has been imposed, however, a defendant must demonstrate a manifest injustice requiring correction to withdraw a plea. Partlow, *supra*. Florida Appellate Rule 9.140(b)(2)(a)(ii)(a)-(e) provides that a defendant may not appeal from a guilty or nolo contendere plea with the exception that a defendant may directly appeal only:

- The lower tribunal's lack of subject matter jurisdiction;
- A violation of the plea agreement, if preserved by a motion to withdraw plea;
- An involuntary plea, if preserved by a motion to withdraw plea;
- A sentencing error, if preserved; or
- As otherwise provided by law.

C. Victim Input

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. Allow the victim a meaningful opportunity to address the court prior to the defendant's sentencing. § 921.143(1).

More information on victim input and involvement with sentencing can be found in the **Post-Trial "Sentencing" section**, *infra*.

TRIAL BENCHCARD

The purpose of the trial is to allow a jury to determine whether, beyond a reasonable doubt, the defendant is guilty of committing the offenses alleged. Follow the standard criminal rules of procedure for criminal cases except where deviations are noted below.

A. Jury Selection

- The prospective jurors may be sworn individually or collectively, as the court decides.
- Once sworn, the court may examine each prospective juror individually, or may examine them collectively. The state and defendant then have the right to examine jurors orally, in the order determined by the court.
- If, after examination, the court is of the opinion that a juror is not qualified to serve, the court shall excuse the juror from trial. If the court does not so excuse the juror, the parties may then challenge the juror if they choose.
- If a party challenges a juror for cause, the court must determine the validity of such a challenge. In making such a determination, the court may examine the juror and any other material witness on oath, and may consider any other evidence material to the challenge.

B. Privileges

- **Spousal privilege**: 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 married.
- Generally, there is no privilege where the proceeding is brought on behalf of one spouse against the other.
- **Doctor-patient privilege**: Information disclosed to a health care practitioner by a patient, in the course of the care and treatment of such patient, is confidential and may be disclosed only to other health care practitioners and providers involved in the care or treatment of the patient,

unless allowed by written authorization from the patient or if compelled by subpoena at a deposition, evidentiary hearing, or trial for which proper notice has been given.

- **Psychotherapist-patient privilege**: 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.
  - There is no privilege stemming from a court-ordered examination, nor is there privilege on communication involving a mental or emotional condition where the defendant is relying on that mental or emotional condition as part of their defense.
- **Sexual assault counselor-victim privilege**: 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.
- **Clergy privilege**: A person has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication by the person to a member of the clergy in their capacity as spiritual adviser.

C. Rape Shield Law

- 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.
- However, such evidence may be admitted if it is first established to the

court in a proceeding in camera that, 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, that such evidence tends to establish a pattern 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.

- Notwithstanding any other provision of law, 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.
- 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 whether the victim consented.

D. 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.
- In a criminal case in which the defendant is charged with a sexual offense, evidence of the defendant's commission of other crimes, wrongs, or acts involving a sexual offense is admissible and may be considered for its bearing on any matter to which it is relevant.

E. Scientific Evidence

- According to the Florida Supreme Court, Frye is the applicable standard in Florida for novel scientific evidence as well as expert opinion testimony.
- Where an expert witness has been called to testify, they may use scientific knowledge and experience to testify in the form of an opinion based on such knowledge and experience, as long as the opinion can be applied to the evidence at trial.

- The discretion to qualify a witness as expert lies with the trial court, and is unlikely to be reversed absent a clear showing of error.

F. DNA

- Where DNA evidence is used, an expert witness may be used by the state to interpret the results and/or form a conclusion as to the results. The expert does not have to be the technician who performed the test; an expert witness may testify as to a report they produced based on the results of the DNA tests performed.
- In addition to an expert witness testifying as to the results of the DNA test, the raw data itself may be admitted without violating the Confrontation Clause of the U.S. Constitution.

G. Rape Kits/Scientific Testing

- The results of a rape kit can be entered into evidence if it can be authenticated by either the person who obtained the contents of the rape kit or by other evidence and testimony of standard practice such that the rape kit falls under the business records exception.

H. Sexual Assault Nurse Examiner (SANE)

- Although there is no codified standard in Florida law, a commonly accepted training is called the "Sexual Assault Nurse Examiner" (SANE) training. These medical professionals are required to become certified through coursework and practical experience.
- The SANE may be allowed to testify at court if established as an expert. They may testify as to the examination done, the tests performed, the results obtained, and the nature and substance of any questions or conversation between the medical professional and the victim.

I. Hearsay Exception; Statement of a Child Victim

- Out-of-court statements by a child victim with the physical, mental, emotional, or developmental age of 16 or less that describes any act of child abuse or neglect, or sexual abuse or violence done in the presence of the child, may be admissible even if otherwise inadmissible.

- To determine admissibility, hold a hearing outside the presence of the jurors that there are other safeguards of reliability present.
- Make specific findings of fact on the record as to the basis for a ruling as to the admissibility of such a statement.

J. Confrontation Clause

- Although the Confrontation Clause guarantees a criminal defendant the right to physically confront accusers, this right is not absolute. There are certain exceptions where a defendant's right of face-to-face confrontation will give way to "considerations of public policy and the necessities of the case."
- For a discovery deposition pursuant to Rule 3.220(h) to meet the Crawford requirement of an opportunity for cross-examination, it would have to be the functional equivalent of a Rule 3.190(j) deposition to perpetuate testimony.

K. Courtroom Confidentiality

- In instances of courtroom closure, the Waller inquiry is necessary to overcome the presumption of openness.
  - The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced;
  - The closure must be no broader than necessary to protect that interest;
  - The trial court must consider reasonable alternatives to closing the proceedings; and
  - The court must make findings adequate to support the closure.

L. Witnesses

- When ruling on a child's competency to testify, 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.
- Failure to conduct an adequate competency evaluation on a child victim can lead to reversal.

Expert Witnesses

- The court has broad discretion in determining the range of subjects on which an expert witness may be allowed to testify and unless there is a clear showing of error, the decision will not be disturbed on appeal.
- If scientific, technical, or other specialized knowledge will aid in the 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.

Impeachment

- Impeachment by reputation is admissible, though it excludes prior bad acts or opinions.
- The Florida legislature has expressly forbidden attempts to impeach a victim's reputation by raising issue of their prior sexual conduct.

M. Defenses

Insanity

- In keeping with the requirements of the M'Naghten rule, to be relevant to an insanity defense, expert testimony must concern whether the defendant:
  - Was incapable of distinguishing right from wrong
  - As a result of a mental infirmity, disease, or defect.
- At trial, include in the instructions to the jury the consequences of a verdict of not guilty by reason of insanity.

Involuntary Intoxication

- Involuntary intoxication has been recognized as a defense to specific intent crimes but not to general intent crimes.
- However, a defendant is not entitled to an involuntary intoxication jury instruction when such a defense is not supported by the evidence.

Mistake of Fact

- Ignorance of the victim's age, the victim's misrepresentation of their age, or the perpetrator's bona fide belief of the victim's age cannot be raised as a defense in a prosecution for lewd and lascivious acts on a child of less

than 16 years of age.

Consent

- Consent is often the central issue in a sexual violence case. Be aware of the situations in which consent is absolutely barred as a defense.
- The fact that a victim did not resist is not the same as willing participation.

Duress

- The defense applies when “a person has threatened to inflict bodily harm on the defendant if the latter does not commit a certain crime.”

TRIAL OUTLINE

A. Jury Selection

Number of Jurors

The number of jurors is based on the degree of the offense.

- Capital cases require **12 jurors**.
- Capital sex offense cases require **6 jurors.**
- All other cases require **6 jurors**. Rule 3.270.

Number of Peremptory Challenges

The number of peremptory challenges is based on the possible punishment for the offense.

- For offenses which carry a possible punishment of life imprisonment or the death penalty, the State and the defense are allowed **ten (10) challenges**. Rule 3.350(a)(1).
- For all other offenses of a felony category, the State and the defense are allowed **six (6) challenges**. Rule 3.350(a)(2).

The court may, at its own discretion, allow additional peremptory challenges as appropriate. Rule 3.350(e).

Challenges for Cause

Challenges for cause are unlimited as long as a party can show cause. A challenge for cause may be based on the following:

- The juror does not have the qualifications required by law;
- The juror is of unsound mind or has a bodily defect that renders them 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;
- The juror has conscientious beliefs that would preclude them from finding the defendant guilty;
- 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;
- The juror served on a jury formerly sworn to try the defendant for the same offense;
- The juror served on a jury that tried another person for the offense charged in the indictment, information, or affidavit;
- The juror served as a juror in a civil action brought against the defendant for the act charged as an offense;
- 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;

- 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;
- 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 they declare and the court determines that they can render an impartial verdict according to the evidence;
- 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;
- The juror is a surety on defendant's bail bond in the case. § 913.03.

Jury Examination by the Court

The jury selection process is a complex process, and is one that has seen the greatest number of appeals. Courts have seen appeals based on alleged juror bias (Owen v. State, 986 So. 2d 534 (Fla. 2008)), nondisclosure of a juror's criminal history (Lugo v. State, 2 So. 3d 1 (Fla. 2008)), whether a juror presented "an unyielding conviction and rigidity toward the death penalty" (Conde v. State, 860 So. 2d 930 (Fla. 2003)), whether certain classes of employment should disqualify a juror (Lusk v. State, 446 So. 2d 1038 (Fla. 1984), whether nondisclosure of participation in litigation disqualifies a juror (Roberts Ex rel. Estate of Roberts v. Tejada, 814 So. 2d 334 (Fla. 2002)), and more.

Courts are encouraged to develop a written voir dire questionnaire for use in all sexual violence cases. Standard voir dire questions can be used to engage potential jurors, carefully examine their history, and pave the way for a more targeted verbal question session.

Courts are further encouraged to develop a colloquy template for any oral questioning that must be done as a result of answers provided on the questionnaire. Again, a standardized framework for oral examinations can be useful in ensuring that jury selection will withstand appellate scrutiny.

A sample voir dire questionnaire is included in this section for reference purposes. It is not exhaustive, but may provide some insight as to specific sexual violence questions to ask in voir dire. After the sample questionnaire, there is a sample oral colloquy for one-on-one examinations, again for reference.

Sample: Voir Dire Questionnaire

1. Do you know what is considered sexual abuse or sexual assault?
2. Have you been a victim of sexual abuse/violence?
3. When? How old were you?
4. Here in Florida? The US? Where did this occur?
5. Was the matter reported to the authorities?
6. By whom?
7. If not reported, was that your decision?
8. Was there a trial or was a court involved? How was the matter concluded?
9. Did you give a statement or more than one statement about the matter?
10. To whom?
11. If this matter was handled by law enforcement and/or went to court, how do you feel about the way the matter was handled?
12. Is this event something that you think you would be influenced by if selected as a juror in this case, or is this something you believe you can set aside?
13. For either answer, how can you be sure?
14. Has anyone close to you been a victim of sexual abuse/violence?
15. How do you know?
16. Regardless of the source of your understanding of what happened to your friend/loved one, would what you learned happened be something that would negatively impact your ability to be a fair and impartial juror in this case?
17. Have you or someone close to you ever been accused of sexual violence?
18. How do you feel about this?
19. Do you believe that this will negatively impact your ability to be a fair and impartial juror?

Sample: Oral Colloquy

(For use where a juror has been asked to engage in a dialogue without the rest of the jury present. This colloquy can be useful as a template to provide structure for a query, regardless of the specific topic in question.)

JUDGE: I am very sorry we are going to ask you to talk about a difficult topic that you might not have been expecting to talk about today, but we want to make sure you would be comfortable as a juror if you served on this case. I also understand that you or someone you know may have been a victim of sexual violence or know someone who has been accused of sexual violence. Do you think there is anything we should know about your ability to serve on this kind of case?"
JUROR RESPONSE:
JUDGE: Thank you for your response, and I apologize again for discussing what I know can be a difficult topic. Based on your experiences and the way in which you have described them, do you believe… *(insert specific follow-up question here)*?
JUROR RESPONSE:
JUDGE: Again, thank you for your response, and for your willingness to discuss this. I want to give both the state attorney and the defense attorney a chance to ask you

clarification questions if they have any. Would that be alright?
JUROR RESPONSE:
JUDGE: Thank you. State, you may proceed with any questions you have.
Insert state attorney questions here.
JUDGE: Thank you for your responses. Now I'd like to give the defense an opportunity to ask questions. Is that alright?
JUROR RESPONSE:
JUDGE: Thank you. Defense, you may proceed.
Insert defense attorney questions here.
JUDGE: Thank you for your responses. At this time, I'd like to ask the attorneys if they have any concerns about your possible service on the jury.

"For Cause" challenges can be used here. If used:
JUDGE: Thank you for your willingness to assist us today, but we are going to excuse you from service on this jury. I apologize for any trouble or distress we might have caused you by talking about your experiences, but the law requires that our jury be fair and impartial. You are excused from service. Thank you again.

If there is no challenge raised:
JUDGE: Thank you for your willingness to assist us today. You've been very helpful, and we appreciate your cooperation. You can leave the courtroom now, but please remain with the rest of the potential jurors. Further, please refrain from discussing anything we've talked about here, as it may influence other jurors and… (insert warning here). Thank you again.

Excusing a Juror

The Florida Supreme Court has emphasized that, "A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind." Ault v. State, 866 So. 2d 674, 683 (Fla. 2003).

The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court. Lusk v. State, 446 So. 2d 1038 (Fla. 1984). "In evaluating a juror's qualifications, the trial judge should evaluate all of the questions and answers posed to or received from the juror." Parker v. State, 641 So. 2d 369 (Fla. 1994).

The mere fact that a juror gives equivocal responses does not disqualify that juror for service. The question is whether the responses are equivocal enough to generate a reasonable doubt about their fitness as a juror. Parker, *supra*. In close cases, any doubt as to a juror's competency should be resolved in favor of excusing the juror rather than leaving a doubt as to their impartiality. Segura v. State, 921 So. 2d 765 (Fla. 3d DCA 2006).

Also note that a party exercising a peremptory strike of a male juror can be called upon to give a gender-neutral reason for the strike. *See* J.E.B. v. Alabama ex rel.

T.B., 114 S. Ct. 1419 (1994) ("[T]he Equal Protection Clause prohibits discrimination in jury selection on the basis of gender . . . ."); Abshire v. State, 642 So. 2d 542 (Fla. 1994). Further, as long as the objecting party takes the steps necessary to preserve this issue, the court's failure to ask for a gender-neutral reason constitutes per se reversible error. Guevara v. State, 164 So. 3d 1254 (Fla. 2d DCA 2015).

Error in Jury Selection

"Where an appellant claims he was wrongfully forced to exhaust his peremptory challenges because the trial court erroneously denied a cause challenge, both error and prejudice must be established." Conde v. State, 860 So. 2d 930, 941 (Fla. 2003).

Errors in jury selection are "per se errors." Thomas v. State, 958 So. 2d 1047, 1049 (Fla. 2d DCA 2007). They are not subject to any harmful error analysis and instead require a new trial whenever there is a showing that an error occurred. *See also* Farina v. State, 680 So. 2d 392 (Fla. 1996).

If there is an appeal based on a juror's nondisclosure or alleged nondisclosure, the Florida Supreme Court has held that:

> [i]n determining whether a juror's nondisclosure of information during voir dire warrants a new trial, courts have generally utilized a three-part test. First, the complaining party must establish that the information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence. De La Rosa v. Zequeira, 659 So. 2d 239 (Fla. 1995).

Where the defendant appeals and alleges a more general claim of ineffectiveness of counsel in jury selection (or otherwise), the United States Supreme Court explained:

1. The defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.
2. The defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

> Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. Strickland v. Washington, 104 S.Ct. 2052 (1984).

B. Privileges

Spousal Privilege

"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." § 90.504(1). This privilege is specifically for *communications*, so observations of things or actions by a spouse are not subject to this privilege.

There is no spousal privilege under § 90.504:

- In a proceeding brought by or on behalf of one spouse against the other spouse;
- 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
- 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.

Ways in which privilege can be lost or waived:

- If the marital communication was recorded or overheard by a third party;
- If the spouse who holds the privilege affirmatively waives the privilege; or
- If the spouse who holds the privilege voluntarily discloses privileged communications. § 90.507.

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).

Doctor-Patient Privilege

Chapter 90, Florida Statutes, does not contain a doctor-patient privilege. Instead, chapter 456, Florida Statutes, holds the foundation of this privilege.

As a threshold matter, medical records may not be furnished to, and the medical condition of a patient 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. § 456.057(7)(a).

However, the medical records alone may 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. § 456.057(7)(a)(3).

Further, information disclosed to a health care practitioner by a patient in the course

of the care and treatment of such patient is confidential and may be disclosed only to other health care practitioners and providers involved in the care or treatment of the patient, if allowed by written authorization from the patient, or if compelled by subpoena at a deposition, evidentiary hearing, or trial for which proper notice has been given. § 456.057(7)(c).

Psychotherapist-Patient Privilege

The basic privilege is stated as follows: "[c]ommunications 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." § 456.059.
The privilege, as further explained in § 90.503(1)(c), states, "A communication between psychotherapist and patient is 'confidential' if it is not intended to be disclosed to third persons other than:

- Those persons present to further the interest of the patient in the consultation, examination, or interview.
- Those persons necessary for the transmission of the communication.
- Those persons who are participating in the diagnosis and treatment under the direction of the psychotherapist."

Further, "[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." (emphasis added.) § 90.503(2).

There are only three enumerated exceptions to the psychotherapist-patient privilege; it does not apply:

- During involuntary commitment proceedings;
- When there is a court-ordered mental examination; or
- When the patient, or a party after the patient's death, raises and relies on the issue of the patient's mental condition in litigation as part of any claim or defense. § 90.503(4).

Finally, absent evidence of an applicable statutory exception or waiver, it has been established that a trial court departs from the essential requirements of law when it enters an order compelling disclosure of communications or records in violation of the psychotherapist-patient privilege. SP EX REL. RP v. Vecchio, 162 So. 3d 75 (Fla. 4th DCA 2014).

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:

- Those persons present to further the interest of the victim in the consultation, examination, or interview;
- Those persons necessary for the transmission of the communication;
- Those persons to whom disclosure is reasonably necessary to accomplish the purposes for which the sexual assault counselor or the trained volunteer is consulted. § 90.5035(1)(e).

Specifically, 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. This privilege includes any advice given by the sexual assault counselor or trained volunteer in the course of that relationship. § 90.5035(2).

There is some uncertainty as to the strength of the counselor-client privilege, and other privileges as well (the psychotherapist-patient privilege specifically); this uncertainty will persist until the Supreme Court hears the conflict between State v. Pinder, 678 So. 2d 410 (Fla. 4th DCA 1996) and State v. Famiglietti, 817 So. 2d 901 (Fla. 3rd DCA 2002).

As the 4th DCA noted in Pinder, information and records shielded under this privilege may be examined through in camera review IF the defendant can "first establish a reasonable probability that the privileged matters contain material information necessary to his defense." Pinder at 417 (*citing to* State v. Young, 654 So. 2d 962, 963 (Fla. 3rd DCA) *review denied*, 661 So. 2d 825 (1995)).

Conversely, as the U.S. Supreme Court held, "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." Jaffee v. Redmond, 518 U.S. 1 (1996) at 17. Courts may wish to be mindful of these concerns when examining this privilege and any attempts to breach such.

Clergy Privilege

A communication between a member of the clergy and a person is "confidential" if made privately for the purpose of seeking spiritual counsel and advice from the member of the clergy in the usual course of their practice or discipline and not intended for further disclosure except to other persons present in furtherance of the communication. § 90.505.

There is only one case in Florida where a court has addressed the clergy privilege. In Nussbaumer v. State, 882 So. 2d 1067 (Fla. 2d DCA 2004), the court held that the clergy communication privilege statute contains no exceptions.

Further, the 2d DCA held that courts must be careful when examining the nature of

the communication – specifically whether the clergy person is engaging in "spiritual counsel" – so as not to run afoul of the **ecclesiastical abstention doctrine**. Pursuant to the ecclesiastical abstention doctrine, courts do not interpret religious doctrine or otherwise inquire into matters involving religious dogma. *See* Southeastern Conference Ass'n of Seventh-Day Adventists, Inc. v. Dennis, 862 So. 2d 842, (Fla. 4th DCA 2003).

Privileges Abrogated in Child Abuse and Vulnerable Adult 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. § 39.204.

Similarly, an abrogation of privileges exists with respect to situations involving known or suspected abuse, neglect, or exploitation of a vulnerable adult. § 415.1045(3).

C. Rape Shield Law

"It has been settled law in this state… that no corroborative evidence is required in a rape case when the victim can testify to the crime and identify [their] assailant." Marr v. State, 494 So. 2d 1139 (Fla. 1986).

In particular, the Rape Shield Law as codified in § 794.022 specifies the following:

- 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.
- 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.
- 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.
- When consent of the victim is a defense to prosecution, evidence of the victim's mental incapacity or defect is admissible to prove that the consent was not intelligent, knowing, or voluntary.

Note that specific instances of prior consensual sexual activity may be admissible on the issue of whether 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 tends to establish a pattern 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. § 794.022(2). In either situation, the court must hold a proceeding in camera and outside of the jury's presence to establish the admissibility. § 794.022(2).

D. 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." § 90.404(2)(a).

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

- Whether the evidence is relevant or material to some aspect of the offense being tried; and
- Whether the probative value is substantially outweighed by any prejudice. Alsfield v. State, 22 So. 3d 619 (Fla. 4th DCA 2009).

Where the purported relevancy of the collateral crime evidence is the identity of the defendant, the Florida Supreme Court has required "identifiable points of similarity" between the collateral act and charged crime that "have some special character or be so unusual as to point to the defendant." Drake v. State, 400 So. 2d 1217 (Fla. 1981). Before allowing Williams rule evidence to be presented to the jury, the trial court must find that the state has proved that the defendant committed the collateral acts by clear and convincing evidence. McLean v. State, 934 So. 2d 1248 (Fla. 2006).

However, where the defendant is charged with a crime involving child molestation, 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. § 90.404(2)(b).

As the Supreme Court held in 2006, "evidence of a collateral act of child molestation is relevant under the Williams rule to corroborate the victim's testimony in both familial and nonfamilial child molestation 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." McLean v. State, 934 So. 2d 1248 (Fla. 2006).

Further, even if the two offenses occurred approximately twenty years apart, it is recognized that the "opportunity to sexually batter young children in the familial setting often occurs only generationally" and when the opportunity arises; thus, the court ruled that the trial court did not err in allowing the evidence into court. McLean, *supra, at* 1257.

Reverse Williams Rule

In a 2014 case, the 4th DCA ruled that the defendant was allowed to cross-examine a child sexual battery victim regarding a prior report of sexual molestation against the same defendant, in which the child victim alleged the same or similar manner of abuse, which the child later recanted. Carlisle v. State, 137 So. 3d 479 (Fla. 4th DCA

2014). As the 4th DCA noted, for evidence to be admissible under the Williams' rule, the evidence must have probative value to show a material fact, and its probative value must not be substantially outweighed by its unduly prejudicial nature. In Carlisle, the evidence of the prior recantation was relevant to show motive because it showed the specific reasons why the victim may have fabricated allegations of sexual abuse. Carlisle, *supra, at* 486.

Note as well that reverse Williams rule evidence is admissible subject to the other exclusionary rules. Carr v. State, 156 So. 3d 1052 (Fla. 2015).

E. Scientific Evidence

Beginning July 1, 2013, the Florida Legislature amended §§ 90.702 and 90.704, which replaced the Frye "general acceptance test" with the standards set forth in Daubert. Under Frye, pure opinion was admissible as an exception. Since July 1, 2013, scientific evidence, whether novel scientific evidence or pure opinion testimony, is subject to a Daubert analysis.

However, on February 17, 2017, the Florida Supreme Court released In Re: Amendments to the Florida Evidence Code, SC16-181 (Fla. 2017), in which the Court ruled that it declined to adopt the Legislature's amendment; it re-affirmed that Frye was the applicable test for expert testimony and opinion testimony by experts. This issue is one of great importance, and as such should be watched very carefully for changes or corrections in the tears ahead.

The Frye test only applies to expert testimony based upon new or novel scientific evidence, and "in order to introduce expert testimony deduced from a scientific principle or discovery, the principle or discovery '**must be sufficiently established to have gained general acceptance in the particular field in which it belongs**.'" (emphasis added.) Flanagan v. State, 625 So. 2d 827, 828 (Fla. 1993) (quoting Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)).

F. DNA

The general reliability of DNA typing is accepted in the scientific community, and has been judicially noticed by the Florida Supreme Court, but the reliability of DNA evidence is predicated upon proper procedures being followed. Murray v. State, 838 So. 2d 1073 (Fla. 2002). Whether the testers followed proper procedures is always at issue and must be resolved on a case-by-case basis, and DNA evidence should not be admitted if proper procedures were not followed. Murray.

At trial, DNA evidence and results may be testified to by an expert even if that expert was not the person who actually performed the testing to extract DNA samples. Florida courts have held that such testimony does not implicate the Confrontation Clause because the expert formulates their own conclusions from the raw data

produced by the biologists under their supervision and control on their team, and they are also subject to cross-examination with regard to those conclusions. Smith v. State, 28 So. 3d 838 (Fla. 2009). In Smith, the court cited 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 they have drawn from those results.

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 is reliable, and the failure to follow TWGDAM recommendations as to developmental validation does not render DNA test results inadmissible. Boyd v. State, SC13-244, SC13-1959 (Fla. 2015).

G. Sexual Assault Forensic Exams

The sexual assault forensic exam is a procedure used to preserve possible DNA evidence and provide victims with important medical care. The evidence collected during an exam is generally referred to as a "rape kit," and consists of instructions, forms, swabs, and containers used for storing evidence. The procedure is performed by trained medical professionals such as sexual assault nurse examiners (SANEs).

The professional who performs the rape kit collection procedure does not need to testify at trial. Fencher v. State, 931 So. 2d 184 (Fla. 5th DCA 2006). The results of a rape kit can be entered into evidence if it can be authenticated by either the person who obtained the contents of the rape kit or by other evidence and testimony of standard practice such that the rape kit falls under the business records exception. Johnson v. State, 3D11-3109 (Fla. 3d DCA 2013).

Further, with respect to the issue of whether a rape kit record is testimonial (and thus by itself inadmissible under the 6th Amendment), if the defense is provided an opportunity to cross-examine the scientist who performed the DNA analysis, the right to confront has been satisfied. Fencher.

Finally, there have been instances of rape kits submitted into evidence that bear a statement similar to the following: SPECIMEN ANALYSIS WAS PERFORMED WITHOUT CHAIN OF CUSTODY HANDLING. THESE RESULTS SHOULD BE USED FOR MEDICAL PURPOSES ONLY AND NOT FOR ANY LEGAL OR EMPLOYMENT PURPOSES.
This warning does not render the evidence or results inadmissible; rather, the warning speaks to the weight of the evidence rather than the admissibility, and as such is an issue to be determined by the jury. Nimmons v. State, 814 So. 2d 1153 (Fla. 5th DCA 2002).

For more information on the backlog of forensic exams (also known as rape kits) and how they may impact the judicial process, please see General Issues, *supra*.

H. Sexual Assault Nurse Examiner (SANE)

A sexual assault nurse examiner (SANE) is a registered nurse who has been specially trained to provide comprehensive care to sexual assault patients, has demonstrated competency in conducting forensic exams, and is 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.

The information provided by a SANE may be non-testimonial (diagnostic) or may be testimonial (if the SANE is acting in concert with law enforcement to gather evidence for a potential criminal investigation, or both). Hernandez v State, 946 So. 2d 1270 (Fla. 2d DCA 2007).

I. Hearsay Exception; Statement of a Child Victim - § 90.803(23)

The hearsay exception for statements of a child victim of sexual abuse is not a firmly rooted exception, and by its terms is to be used when the child's out-of-court statement is "not otherwise admissible." Perez v. State, 536 So. 2d 206 (Fla. 1988).

If the State intends to use the hearsay exception, the court must first find, in a separate hearing, that "the time, content, and circumstances of the statement provide sufficient safeguards of reliability." Perez. Finally, if the child is unable to testify, the State must also provide "other corroborative evidence of the abuse or offense," which provides particularized guarantees of trustworthiness. Perez.
With regard to unavailability, the Florida Supreme Court held in 1994 that, “a finding of incompetency to testify because one is unable to recognize the duty and obligation to tell the truth satisfies the "testify or be unavailable" requirement of section 90.803(23).” State v. Townsend, 635 So. 2d 949 (Fla. 1994).

The trial court must still consider the competency of the child as a factor in determining the trustworthiness and reliability, and thus the admissibility, of hearsay statements attributable to the child. Townsend.

If the child victim hearsay exception is invoked, verify that the defendant was notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection was going to be offered as evidence at trial. § 90.803(23). Further, verify that the notice included:

- A written statement of the content of the child's statement;
- 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. § 90.803(23).

If the State has indicated its intent to use this hearsay exception, make specific findings of fact, on the record, as to the basis for the ruling under this subsection. § 90.803(23).

Be aware of the 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." Crawford v. Washington, 541 U.S. 36 (2004). 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.

Thus, Crawford only bars testimonial hearsay if the child victim does not testify at trial and was not subject to prior cross examination concerning the statements.

Finally, when a defendant thoroughly cross-examines a child during deposition, the court may allow testimony under child hearsay exceptions pursuant to §§ 90.803(23) and 90.804, where appropriate, without violating defendant's right to confront witnesses. Corona v. State, 929 So. 2d 588 (Fla. 5th DCA 2006).

J. Confrontation Clause

Article I, section 16(a) of the Florida Constitution states: "In all criminal prosecutions the accused ... shall have the right ... to confront at trial adverse witnesses...." Although the Confrontation Clause guarantees a criminal defendant the right to physically confront accusers, this right is not absolute. There are certain exceptions where a defendant's right of face-to-face confrontation will give way to "considerations of public policy and the necessities of the case." Harrell v State, 709 So. 2d 1364 (Fla. 1998).

However, such exceptions are only permitted when the reliability of the testimony is otherwise assured. Harrell.

In order to qualify as an exception, the procedure must:

- Be justified, on a case-specific finding, based on important state interests, public policies, or necessities of the case; and
- Must satisfy the other three elements of confrontation:
    - Oath;
    - Cross-examination; and
    - Observation of the witness's demeanor. Perez v. State, 536 So. 2d 206 (Fla. 1988).

Note that a discovery deposition is not the functional substitute of in-court confrontation of the witness. The defendant is usually prohibited from being present, the motivation for the deposition does not result in the "equivalent of significant cross-examination," and the resulting deposition cannot be admitted as substantive evidence at trial. Contreras v. State, 979 So. 2d 896 (Fla. 2008).

For a discovery deposition pursuant to Rule 3.220(h) to meet the Crawford requirement of an opportunity for cross-examination, it would have to be the functional equivalent of a Rule 3.190(j) deposition to perpetuate testimony. Contreras.

K. Courtroom Confidentiality

Section 918.16(1) requires partial courtroom closure if any person under the age of 16 or any person with mental retardation as defined in § 393.063 is testifying concerning any sex offense. Section 918.16(2) allows for discretionary partial courtroom closure at the request of a victim of sexual violence.

However, please note that in any situation where courtroom closure is contemplated, findings are still required as to the need for closure. Kovaleski v. State, 103 So. 3d 859 (Fla. 2012).

As the Florida Supreme Court noted in Kovaleski, there are four (4) elements that must be satisfied for courtroom closure:

- The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced;
- The closure must be no broader than necessary to protect that interest;
- The trial court must consider reasonable alternatives to closing the proceedings; and
- The court must make findings adequate to support the closure.

As to the fourth prong (the findings prong), the Supreme Court emphasized the need for “trial courts to ensure that the statute is in fact applicable to the case before them and is properly applied. Reflecting such determinations in the record will allow for proper appellate review.” Kovaleski.

L. Witnesses

The general rule is that every person is competent to be a witness, except as otherwise provided by statute. § 90.601. However, a person is disqualified to testify as a witness when the court determines that the person is:

- Incapable of expressing themselves concerning the matter in such a manner as to be understood, either directly or through interpretation by one whom can understand them.
- Incapable of understanding the duty of a witness to tell the truth. § 90.603.

Note that the court has broad discretion in determining whether or not a witness is competent to testify. State v. Green, 733 So. 2d 583 (Fla. 1st DCA 1999).

Child Witnesses

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:

- Whether the child is capable of observing and recollecting facts;
- Whether the child is capable of narrating those facts to the court or to a jury; and
- Whether the child has a moral sense of the obligation to tell the truth. Griffin v. State, 526 So. 2d 752 (Fla. 1st DCA 1988).

In making a competency determination, the court may base its determination on its own examination of the child or on the attorneys' examination of the child; the court may also consider expert testimony and reports in fulfilling its duty to determine competency. In re GS, 989 So. 2d 1282 (Fla. 2d DCA 2008) (citing Griffin).

Please note that failure to conduct an adequate competency evaluation on a child victim can lead to reversal. Black v. State, 864 So. 2d 464 (Fla. 1st DCA 2003).

Expert Witnesses (Frye remains the standard)

In 2017, the Florida Supreme Court declined to adopt the Legislature's amendment of the Evidence Code with regard to expert testimony. The Court re-affirmed that Frye is the applicable standard.

The test as outlined in Frye is as follows:

> 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.

Under Frye, "[t]he proponent of the evidence bears the burden of establishing by a preponderance of the evidence the general acceptance of the underlying scientific principles and methodology." Castillo v. E.I. Du Pont De Nemours & Co., Inc., 854 So. 2d 1264, 1268 (Fla. 2003).

Note that not all expert testimony must meet the Frye test order to be admissible. Pure opinion testimony, such as an expert's opinion that a defendant is incompetent, does not have to meet Frye, because this type of testimony is based on the expert's personal experience and training. While cloaked with the credibility of the expert, this testimony is analyzed by the jury as it analyzes any other personal opinion or

factual testimony by a witness.

Profile testimony, however, by the appearance that it relies on some scientific principle or test, is not pure opinion testimony. The jury will naturally assume that the scientific principles underlying the expert's conclusion are valid. As the Court held in Flanagan v. State, 625 So. 2d 827 (Fla. 1993), this type of testimony must meet the Frye test, to ensure that the jury will not be "misled by experimental scientific methods which may ultimately prove to be unsound." Flanagan.

Impeachment

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:

- The evidence may refer only to character relating to truthfulness.
- Evidence of a truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence. § 90.609.

However, any witness may have their truthfulness impeached for being convicted of a felony or of a crime involved dishonesty or a false statement. § 90.610.

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. § 794.022(3). Further, 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. § 794.022(2).

M. Defenses

Insanity

The defense of insanity is an affirmative defense – it must be raised by the defendant. Before accepting any evidence of insanity, verify that the defendant notified the State in advance in writing no later than 15 days after the arraignment of the filing of a written plea of not guilty. Rule 3.216(b).

In keeping with the requirements of the M'Naghten rule, to be relevant to an insanity defense, expert testimony must concern whether the defendant was incapable of distinguishing right from wrong as a result of a mental infirmity, disease, or defect. Hall v. State, 568 So. 2d 882 (Fla. 1990); Owen v. State, 986 So. 2d 534 (Fla. 2008).

Expert testimony that a defendant suffered from a mental infirmity, disease, or defect without concluding that as a result the defendant could not distinguish right from wrong is irrelevant. Owen.

At trial, include in the instructions to the jury the consequences of a verdict of not

guilty by reason of insanity.

Involuntary 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).

To establish an involuntary intoxication defense, a defendant must:

- Present sufficient evidence that an intoxicated condition was brought about by the introduction into the defendant's body "of any substance which he does not know and has no reason to know has a tendency to cause an intoxicated or drugged condition." Brancaccio; AND
- Present sufficient evidence to prove that this involuntary intoxication rendered them unable to understand what they were doing and to understand the consequences of their actions, or if they did understand, that they were unable to know that their actions were wrong. Hall v. State, 568 So. 2d 882 (Fla. 1990).

However, a defendant is not entitled to an involuntary intoxication jury instruction when such a defense is not supported by the evidence. Mora v. State, 814 So. 2d 322 (Fla. 2002).

Mistake of Fact

Ignorance of the victim's age, the victim's misrepresentation of their age, or the perpetrator's bona fide belief of the victim's age cannot be raised as a defense in a prosecution for lewd and lascivious acts on a child of less than 16 years of age. § 800.04(3).

Consent

Consent is very often the central issue in a sexual violence case. Please be aware of the following:

- Neither the victim's lack of chastity nor the victim's consent is a defense to the crimes of lewd and lascivious acts committed upon a child of less than 16 years of age. § 800.04(2).
- Similarly, 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." State v. Rife, 789 So. 2d 288 (Fla. 2001).

Finally, it must be emphasized that courts have recognized that "the fact that a victim did not resist is not the same as willing participation." Rife.

Duress

The defense of duress applies when "a person has threatened to inflict bodily harm on the defendant if the latter does not commit a certain crime." Youngblood v. State, 515 So. 2d 402 (Fla. 1st DCA 1987).

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. Wright v. State, 442 So. 2d 1058 (Fla. 1st DCA 1983).

To establish duress, the defendant must show the following:

- The defendant reasonably believed that a danger or emergency existed that he did not intentionally cause;
- The danger or emergency threatened significant harm to themselves or a third person;
- The threatened harm must have been real, imminent, and impending;
- The defendant had no reasonable means to avoid the danger or emergency except by committing the crime;
- The crime must have been committed out of duress to avoid the danger or emergency; and
- The harm the defendant avoided outweighs the harm caused by committing the crime. Mickel v. State, 929 So. 2d 1192 (Fla. 4th DCA 2006).

N. Jury Instructions

Jury Instructions can be found at the following website: http://federalevidence.com/pdf/JuryInst/FLA.CrimJI.pdf.

The section relating to jury instructions for sex offenses (Section 11) begins on page 211, and continues through page 298.

POST-TRIAL MOTIONS BENCHCARD

Follow the standard criminal procedure for criminal cases except where deviations are noted below.

A. Motion for New Trial

- On motion for new trial on grounds the verdict is against the manifest weight of the evidence, determine whether or not "a greater amount of credible evidence supports" the verdict. Geibel v. State, 817 So. 2d 1042, 1044 (Fla. 2d DCA 2002).
- Two requirements must be met in order for a conviction to be set aside on the basis of newly discovered evidence.
  - In order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or their counsel could not have known [of it] by the use of diligence." Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1324-25 (Fla.1994).
  - The newly discovered evidence must be of such nature that it would probably produce an acquittal or yield a less severe sentence on retrial.
- Newly discovered evidence satisfies the second prong of the Jones II test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability."

B. Motion for Post-Conviction DNA Testing

- The clear requirement of these provisions is that a movant, in pleading the requirements of Rule 3.853, must lay out with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence. In order for the trial court to make the required findings, the movant must demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case.

C. Release Pending Sentencing

- 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.

- Make written findings stating the reasons for the denial of a request for post-trial release.

POST-TRIAL MOTIONS OUTLINE

A. Motion for a 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. Rule 3.580. Note that, "[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." Stone v. State, 616 So. 2d 1041 (Fla. 4th DCA 1993).

Grounds for granting a new trial include establishing one or any of the following:

- The jurors decided the verdict by lot;
- The verdict is contrary to law or the weight of the evidence; or
- 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. Rule 3.600(a).

Further, a motion for a new trial may be granted if substantial rights of the defendant have been prejudiced by any of the following:

- The defendant was not present at any proceeding at which the defendant's presence is required by these rules;
- The jury received any evidence out of court, other than that resulting from an authorized view of the premises;
- The jurors, after retiring to deliberate upon the verdict, separated without leave of court;
- Any juror was guilty of misconduct;
- The prosecuting attorney was guilty of misconduct;
- The court erred in the decision of any matter of law arising during the course of the trial;
- The court erroneously instructed the jury on a matter of law or refused to give a proper instruction requested by the defendant; or
- For any other cause not due to the defendant's own fault, the defendant did not receive a fair and impartial trial. Rule 3.600(b).

Motion for New Trial Based on Newly Discovered Evidence

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. Hurst v. State, 18 So. 3d 975, 992

(Fla. 2009).

To determine whether newly discovered evidence requires a new trial:

- 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. Hurst.

"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." Hurst.

A 2010 case from the 4th DCA is worth highlighting as it relates to the issue of newly discovered evidence. In Brancaccio v. State, 27 So. 3d 739 (Fla. 4th DCA 2010), the defendant claimed involuntary intoxication as an affirmative defense, claiming that a drug he took (Zoloft) rendered him unable to understand what he was doing and to understand the consequences of his actions. The original trial ended in a murder conviction. In 2006, however, the FDA released a set of new advisories, warnings and publications concerning the possible side effects of Zoloft in minors, including aggressive and impulsive behavior. Brancaccio. The trial court conducted an extensive evidentiary hearing and analyzed the evidence, comparing it to the evidence of guilt. The court concluded that the evidence of the drug's side effects and the FDA warnings constituted newly discovered evidence. However, as to the second factor, the court concluded that the evidence would not have resulted in an acquittal on retrial, because the other evidence in the case showed that an involuntary intoxication defense would not have succeeded. Brancaccio. The trial court denied relief, and this determination was upheld on appeal.

B. Motion for Post-Conviction DNA Testing

Rule 3.853 governs the procedure for post-conviction DNA testing. It details the specifics required in the motion as well as the procedure for handling the motion and how to appeal the court's decision.

The rule specifies that when ruling on a motion a court must make the following findings:

- Whether it has been shown that physical evidence that may contain DNA still exists.

- Whether the results of DNA testing of that physical evidence likely would be admissible at trial and whether there exists reliable proof to establish that the evidence containing the tested DNA is authentic and would be admissible at a future hearing.
- Whether there is a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial. Rule 3.853(c)(5).

The requirements demonstrate that the movant must lay out with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence. In order for the trial court to make the required findings, the movant must demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case. Hitchcock v. State, 866 So. 2d 23 (Fla. 2004).

Where the defendant seeks a post-conviction motion to have a rape kit tested, alleging that the lack of their DNA is exonerative evidence, Florida courts have been very careful. In Galloway v. State, 802 So. 2d 1173 (Fla. 1st DCA 2001), the victim alleged that one assailant forcibly raped her while the other two held her down. The court denied the motion for testing, holding that, "[t]he fact that only appellant's co-defendants may have deposited DNA at the crime scene or on the body of the victim does not mean that appellant was not there." Galloway.

However, in Hampton v. State, 924 So. 2d 34 (Fla. 3d DCA 2006), the appellate court allowed such evidence to be admitted. In that case, the victim alleged that all three assailants had forcible intercourse with her; thus, if the rape kit yielded three DNA samples and none matched the defendant, that evidence may tend to exonerate them.

C. Motion for 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. Rule 3.550.

This rule notwithstanding, 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 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. Rule 3.691(a).

If the defendant is released after conviction and on appeal, the conditions of release shall be:

- The defendant will duly prosecute the appeal; and

- The defendant will surrender themselves 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 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. Rule 3.691(e).

Additionally, the court shall approve the sufficiency and adequacy of the bond, its security, and sureties, prior to the release of the defendant. Rule 3.691(f).

SENTENCING HEARING BENCHCARD

Follow the standard criminal procedure for criminal cases except where deviations are noted below.

A. Sexual Predator Guidelines

- 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.

B. Sentencing Guidelines

- The Florida Rules of Criminal Procedure guide courts as to sentencing guidelines. For offenses committed on or after October 1, 1988, the Criminal Punishment Code (Rule 3.704) should be used.
- Be aware of sentencing guidelines as well as mandatory minimums.

C. Mandatory Minimums for Dangerous Sexual Predators – § 794.0115

- Be aware of what offenses and/or aggravating factors of an offense may trigger the mandatory minimums as listed in § 794.0115.
- A dangerous sexual predator designation for offenses committed before October 1, 2014, triggers a mandatory minimum sentence of 25 years imprisonment up to and including a life sentence.
- A dangerous sexual predator designation for offenses committed on or after October 1, 2014, trigger a mandatory minimum sentence of 50 years imprisonment up to and including a life sentence.
- The mandatory minimum sentence must be imposed where the offender receives the dangerous sexual predator designation, even if the mandatory maximum of the underlying offense under Florida statute is less than the mandatory minimum here.
- An offender who receives the dangerous sexual predator designation is ineligible for gain time or any form of discretionary early release excluding

a pardon or executive clemency or conditional medical release.

D. Departing from the Guidelines

- Any departure from the mandatory minimum imposed by statute requires a valid reason for departure.
- Mitigating factors justifying a departure include are listed in § 921.0026(2).
- Substance abuse or addiction is not a mitigating factor justifying a downward departure.
- Where the court intends to depart from sentencing guidelines, include with the sentence a written statement delineating the reasons for the departure. This written statement must be part of the record and must accompany the scoresheet that is to be provided to the Department of Corrections.
- No departure is permitted where the offender is designated as a dangerous sexual predator.

E. Resentencing

- "[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." Albritton v. State, 476 So. 2d 158, 169 (Fla. 1985).
- 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.
- Where score sheet errors result in incorrect sentencing, a defendant may be entitled to resentencing. In such a case, 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 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.

F. The Jessica Lunsford Act

- Section 948.30(3) requires the use of an electronic monitoring device for certain categories of offenders released on probation or community control.
- Where a probationer or community controlee has been designated a sexual predator (§ 775.21), the court is obligated to require electronic monitoring, in addition to any other conditions imposed.
- Where an offender is placed on probation or community control for sexual battery, lewd and lascivious behavior, sexual performance, or human trafficking and the unlawful behavior involved a victim of 15 years or less and the offender is over the age of 18, the court is obligated to require electronic monitoring, in addition to any other conditions imposed.
- Where an offender is placed on probation or community control and has a previous offense of sexual battery, lewd and lascivious behavior, sexual performance, or human trafficking and the unlawful behavior involved a victim of 15 years or less and the offender is over the age of 18, the court is obligated to require electronic monitoring, in addition to any other conditions imposed.

G. Court Costs and Restitution

- There are mandatory court costs that must be imposed where the offender has committed certain offenses. These court costs fund rape crisis centers, Guardian ad Litem programs, and child advocacy programs throughout Florida.
- Restitution is permissible, and in some cases mandated, for offenses where damage or loss occurred as a result of the offense or the criminal episode.
- Restitution can be used to pay for medical care, psychological or psychiatric care, physical therapy and rehabilitation, lost income, and funerary costs.
- The offender can be required to pay the cost of the rape kit used during a victim's examination directly to the medical facility that performed the examination.

SENTENCING OUTLINE

A. Sexual Predator Guidelines

A "sexual offender" is essentially anyone who commits a sex crime as enumerated in § 943.0435. Sexual offenders include many more people than the much narrower "sexual predator" designation. Be aware that 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. § 943.435(1)(a)(2).

The Florida Sexual Predators Act (FSPA), § 775.21, states that the nature of serial sexual offenses, and the trauma that they cause individuals and communities, requires a strong state response. Florida's response includes:

- 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;
- Providing for specialized supervision of sexual predators who are in the community by specially trained probation officers with low caseloads, as described in §§ 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;
- 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;
- Providing for community and public notification concerning the presence of sexual predators; and
- Prohibiting sexual predators from working with children, either for compensation or as a volunteer. § 775.21(3)(b).

If an offender meets the criteria to be considered a sexual predator, enter a written finding regarding the sexual predator designation. § 775.21(5)(a). However, when classifying crimes that warrant the sexual predator designation, rely on the specific enumerated criteria. 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." State v. Robinson, 873 So. 2d 1205 (Fla. 2004). When a defendant's offense does not meet the criteria under FSPA, it is reversible error to designate the offender a sexual predator. Lupianez v. State, 909 So. 2d 600, (Fla. 2d DCA 2005). Additionally, be aware that the FSPA applies only to crimes committed on or after October 1, 1993.

There are additional mandatory conditions for anyone who has been designated a

sexual offender or a sexual predator who must register with the Florida Department of Law Enforcement. They include:

- A prohibition on the person's "visiting schools, child care facilities, parks, and playgrounds, without prior approval from the offender's supervising officer." (note: the offender is not prohibited from visiting a school, child care facility, park, or playground for the sole purpose of attending a religious service as defined in § 775.0861 or picking up or dropping off the offender's children or grandchildren at a child care facility or school.);
- A prohibition for additional locations to protect a victim, at the court's discretion; and
- 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." § 948.30(4).

B. Sentencing Guidelines

Sentencing should be neutral with respect to race, gender, and social and economic status. Rule 3.701(b)(1).

The most recent sentencing scoresheet was released in 1998. It is available for your review at: http://www.dc.state.fl.us/pub/sen_cpcm/cpc_manual.pdf. The scoresheet information is very voluminous, and as such cannot be reviewed in this benchbook. However, be aware the factors like the nature of the crime, brutality, victim injury, disregard for human life, minimum/maximum sentencing guidelines, mitigating or aggravating factors, and input from the victim, their family, and law enforcement may affect the score in a sexual violence case.

It should be emphasized that the parties must be allowed time to prepare and present arguments at sentencing. Rule 3.720(b). At sentencing, be prepared to "entertain submissions and evidence by the parties that are relevant to the sentence." State v. Scott, 439 So. 2d 219 (Fla. 1983).

It may be appropriate to move to sentencing directly following a guilty verdict; however, 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, it may be prudent to consider those objections before moving forward. Not allowing the defendant to present relevant evidence as to sentencing when requested is reversible error. *See* Pringle v. State, 6 So. 3d 673 (Fla. 2d DCA 2009).

C. Mandatory Minimums for Dangerous Sexual Predators - § 794.0115

The Florida Dangerous Sexual Felony Offender Act provides a mandatory minimum

sentence for a long list of sexual offenses (*see* § 794.0115(2) for the full list). Where a defendant is found guilty of one of the listed offenses, the Florida Legislature has determined that they are a dangerous sexual felony offender, with a mandatory minimum sentence of 25 years imprisonment up to, and including, life imprisonment. If the defendant has committed an offense described in this subsection on or after October 1, 2014, that defendant must be sentenced to a mandatory minimum term of 50 years imprisonment up to, and including, life imprisonment. § 794.0115(2).

Be aware that the court has the authority to stack mandatory minimum sentences, even when the offenses arose from the same criminal episode, when the nature of the crimes subjected the defendant to "the imposition of mandatory minimum sentences under two separate and distinct statutes." Fleming v. State, 75 So. 3d 397 (Fla. 5th DCA 2011) (*quoting* McDonald v. State, 564 So. 2d 523 (Fla. 1st DCA 1990)). Explained another way, stacking minimums is proper because the bases for the mandatory minimums derived from "different statutes addressing different evils." Valentin v. State, 963 So. 2d 317 (Fla. 5th DCA 2007).

The Florida Supreme Court affirmed that the court has the discretion in certain cases to stack mandatory minimums. *See* Williams v. State, 186 So. 3d 989 (Fla. 2016).

D. Departing from the 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. 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. Rule 3.704(d)(3).

Any downward departure from the lowest permissible sentence, as calculated according to the total sentence points under § 921.0024 is prohibited unless there are circumstances or factors that reasonably justify the downward departure. Rule 3.704(d)(27).

Mitigating circumstances under which a departure from the lowest permissible sentence is reasonably justified include, but are not limited to:

- The departure results from a legitimate, uncoerced plea bargain;
- The defendant was an accomplice to the offense and was a relatively minor participant in the criminal conduct;
- 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;
- 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;
- The need for payment of restitution to the victim outweighs the need for a

prison sentence;
- The victim was an initiator, willing participant, aggressor, or provoker of the incident;
- The defendant acted under extreme duress or under the domination of another person;
- Before the identity of the defendant was determined, the victim was substantially compensated;
- The defendant cooperated with the state to resolve the current offense or any other offense;
- The offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse;
- At the time of the offense the defendant was too young to appreciate the consequences of the offense; or
- The defendant is to be sentenced as a youthful offender. § 921.0026(2).

Please note that 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. § 921.0026(3).

If a sentence below the lowest permissible sentence is imposed, it is considered a departure sentence, and must be accompanied by written findings or a written statement delineating the reasons for departure. Rule 3.704(d)(27)(A).

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 a case pre-date the Criminal Punishment Code, be aware that upward modification is permissible. Thus, be aware that premeditation or calculation may be considered in cases where those are not inherent components of the offense. Marcott v. State, 650 So. 2d 977 (Fla. 1995). Additionally, issues such as habitual or violent felony offender or repeat sexual offender may be used as reasons for enhanced penalty.

E. 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. Rule 3.700(c)(1). 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. Snyder v. State, 870 So. 2d 140 (Fla. 2d DCA 2004).

If there is a score sheet error that results in incorrect sentencing, the defendant may be entitled to resentencing. 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. Ray v. State, 987 So. 2d 155 (Fla. 1st DCA 2008).

F. The Jessica Lunsford Act

The Jessica Lunsford Act was adopted after the 2004 sexual assault and murder of nine-year-old Jessica Lunsford by a convicted sex offender. 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; § 800.04(4), (5), or (6); § 827.071; or § 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; or
b. Is designated a sexual predator pursuant to § 775.21; or
c. Has previously been convicted of a violation of chapter 794; § 800.04(4), (5), or (6); § 827.071; or § 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. § 984.30(3).

Note that this electronic monitoring provision is mandatory and is not subject to the court's discretion. *See* State v. Flynn, 95 So. 3d 436 (Fla. 4th DCA 2012).

G. Restitution

Section 775.089 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.

The term "victim" is defined in the statute 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. § 775.089(1)(c).

Things that the court can order as a part of restitution:

- That the defendant pays 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;
- That the defendant pays the cost of necessary physical and occupational therapy and rehabilitation;
- That the defendant reimburses the victim for income lost by the victim as a result of the offense;
- In the case of an offense which resulted in bodily injury that also resulted in the death of a victim, the defendant pays an amount equal to the cost of necessary funeral and related services. § 775.089(2)(a).;
- In the case of an offense that did not result in bodily injury to a victim, the defendant reimburses the victim for income lost by the victim as a result of the offense. § 775.089(2)(b).

Note that restitution does not necessarily need to go directly to the victim. The court can order the defendant to pay service providers on behalf of the victim, Gladfelter v. State, 618 So. 2d 1364 (Fla. 1993), and can require the defendant to pay directly to the medical provider the costs of a rape kit used to examine the victim. Drye v. State, 691 So. 2d 1168 (Fla. 1st DCA 1997).

If restitution costs are not concrete, as in the case of a victim needing psychological counseling for an unknown amount of time, if the court establishes the requirement for restitution at sentencing, even if a specific amount is not ordered, the court may assess actual amounts at a later date. Gladfelter.

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