F·L·O·R·I·D·A
DEFENDER

Volume 35 No. 2 A Publication of the Florida Association of Criminal Defense Lawyers Summer 2023

LEADERS

A FACDL Primer on Leadership

SAVE THE DATE

FACDL 37th Annual Meeting

Ritz-Carlton Sarasota

June 6-8, 2024

FLORIDA DEFENDER

FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
Post Office Box 1528
Tallahassee, Florida 32302
850/385-5080
E-mail: facdl@facdl.org
Web page: www.facdl.org

The Florida Defender is published quarterly by the Florida Association of Criminal Defense Lawyers.

The material contained herein is solely for informational purposes. Opinions expressed herein may not necessarily reflect the views and/or policies of FACDL.

Editorial matter, change in address, and correspondence regarding advertising should be mailed to P.O. Box 1528, Tallahassee, Florida 32302, or emailed to facdl@facdl.org.

FACDL 37th Annual Meeting . . . 2

From the President . . . 4
ERNEST L. CHANG

CLE IN-PERSON SEMINAR
▸Blood, Breath & Tears 2023 . . . 40

CLE VIRTUAL SEMINAR
▸Free Webinar Event: Racial Justice Advocacy at Every Level . . . 57

PAST CLE RECORDED SEMINARS FOR PURCHASE
▸Blood, Breath & Tears: A Seminar for the DUI Practitioner 2022 . . . 63
▸FACDL Criminal Law Certification & Review Seminar 2023 . . . 63

FACDL NEWS
▸FACDL Young Lawyers Committee Pro Bono Initiative . . . 22
▸FACDL Calendar . . . 49
▸Defender Publishing Policy . . . 56
▸New Members . . . 58
▸Affiliate Members . . . 59
▸Life Members . . . 60

FEATURES
Recipes for Success: A Note from the Editor . . . 6
JASON B. BLANK

A Message on Leadership from the NACDL President . . . 9
NELLIE KING

So You Want to Be a Leader: The Ten Commandments of Becoming and Being a Good Leader . . . 10
DAVID ROTHMAN

Capital Corner: Assessing Impacts of the 2023 Legislative Session . . . 11
AARON WAYT

The Opportunity in the Law . . . 12
JONAH K. DICKSTEIN

Leadership: Better Late Than Never . . . 14
R. WAYNE RICHTER

Pointing Your Leadership in the Right Direction . . . 15
SPENCER CORDELL

A Legacy that Endures . . . 16
JOE BUGNI

Death Is Different: Updates on Cases, Law, Rules & So Forth . . . 24
PETER N. MILLS

From the Pits: A Closed Mouth Doesn't Get Fed . . . 26
DENIS M. DEVLAMING

The Silly Nonsense of "Field Sobriety Exercises" . . . 27
MICHAEL KESSLER

Does Section 827.071(5)(a) Violate Due Process? . . . 28
RICHARD SANDERS

Don't Make a Federal Case Out of It . . . 34
LISA CALL

Uff's Preservation Points . . . 41
MICHAEL UFFERMAN

DUI Notes | Medical Journals and Field Sobriety Exercises . . . 42
ROBERT S. REIFF

Prosecution of Threats in the Era of School Shootings: Examining the Impact on Children . . . 44
BEN AND LORI WURTZEL

DUI: The Testifying Client . . . 48
DENIS M. DEVLAMING

Florida's Criminal Punishment Code: The Letter vs. the Spirit . . . 50
A. WELLINGTON "AL" BARLOW

Bail in Extradition Cases . . . 52
D. GRAY THOMAS

Want the Jury to Know the Contents of the Probable Cause Affidavit But Can't Figure Out How to Get into Evidence? . . . 53
JACQULYN MACK-MAJKA

Legally Bald® and Other Strange Criminal Law Related Thoughts ©2023 . . . 54
GEOFFREY GOLUB

RESOURCES
FACDL Membership Application . . . 62

One of the FACDL "Old Guys" Looks Back on 2022-2023

by
Ernest L. Chang

My year at the helm of FACDL is coming to an end shortly. I will take just a few sentences to thank all of the members who donated their time in furtherance of this organization. Many paid out of their own pockets to travel and speak at our seminars, travelled to Tallahassee to meet with and speak with legislators on behalf of our membership and our goals, attend seminars, and basically volunteered and helped in some way for the betterment of our clients and our members. Thank you to all who contributed.

FACDL took a far more active role in speaking out whenever we saw abuses within the Criminal Justice system. We lobbied hard to prevent the legislature from changing the rules on putting someone to death in Florida with just a plurality vote of 8 of 12 jurors. We fought to keep depositions as a discovery tool in Florida. The Supreme Court wanted to drastically change our speedy trial rules. It is a tool; it works. Few cases are dismissed because of speedy trial violations. There was no need to change it. Our "speedy trial committee" was actively involved in providing commentary to prevent any changes. We continue fighting to have a rule change allowing the criminal defense lawyer to appear at non-evidentiary hearings via remote video technology, just like our civil lawyer counterparts who are already mandated to do so. These are just a few highlights of what FACDL has done and will continue to do for you, the criminal defense practitioner.

Throughout the year FACDL advocated for the criminal defense bar and our clients. We hired a new lobbyist who has guided us and assisted greatly in passing the bills benefiting our practice and fighting alongside us for those that negatively affected our practice and our clients. With our new lobbyist, FACDL has an even stronger voice in the legislature. But, despite our best lobbying efforts, several oppressive bills were signed into law by the governor, the worst of which is the plurality death penalty bill. Florida is now in the very small minority of states which does not require a unanimous jury verdict before we execute someone. I am confident that this unconstitutional law will be challenged, and this abomination will someday be reversed.

Our long-range planning committee continues to work to implement plans for the future growth of FACDL. Our mission statement was refined to more clearly and concisely state our mission and

SEE PAGE 13

"The 'elder statesmen' of FACDL are a valuable resource to all members."

"Ah, so tell me about your childhood."

Mitigation prep should never be an afterthought. Begin every case with a biographical Mitigation Report in your file.

It's as easy as sending an email.

Improve plea negotiations, create more persuasive sentencing arguments, and increase client satisfaction.

Utilize up to 13 validated AODA, trauma, and mental health screens.

JusticeStory.com

RECIPES FOR SUCCESS

A note fom the editor...for now

by
Jason B.
Blank

For my final edition as editor of *The Defender*, I wanted to pick a theme that spoke to the strength and longevity of our organization: Leadership. Leadership comes in many different forms. Sometimes it is the strong, outspoken head of an organization who forces the group forward, even if it is into unknown territory. Sometimes it is the more subtle, quiet one who leads by example and grows and strengthens the group by showing what needs to be done themselves. There is no right or wrong way to lead or be a leader, but I think we can all agree that the best leaders are the ones who compliment the organization's members and mission. A leader should inspire and invigorate the members to become more engaged, to make a difference, to better the organization and those it represents.

FACDL has a long line of leaders who have allowed this organization to become the great representative of the criminal defense bar it is today. FACDL will continue to grow, both in size and influence, with the current leaders, as well as the future leaders that will be elected at the annual meeting. After another legislative session where we've seen the criminal justice system being attacked, and criminal defense lawyers painted as the bad guys, we must continue to ensure our voice is strong and powerful.

Ask yourself, "Am I the future?" Leadership, much like a blooming flower, often starts small and grows in influence and visibility. So, become a leader of FACDL. Join an active committee and get active. Don't sit on the sidelines expecting someone else to do it. We can only get better with stronger, more diverse voices in the room. Don't shy away from the responsibility. Let it be known that you want to be more involved, then do something about it. If you're not sure how, reach out to me or anyone else on the executive committee and we'll be happy to help you. We can only be our best when our best is working with us.

The same is true in cooking. Sometimes you have a strong flavor that is the leader of the dish and takes over. Think BBQ ribs or Buffalo Chicken Wings. Other times, the more subtle flavors are the compliment to the leader, like in a coq-au-vin or a good chili, where the flavors magically meld together. Here's a simple summer recipe to show off that melding effect. You decide which ingredient here is the leader.

SUMMER MANGO SALSA

2-3 ripe large mangos, diced
2 Tbps red onion, minced
1 jalepeno pepper, minced
1-2 limes, juiced
1/3 cup fresh cilantro. finely chopped
Salt and Pepper to taste

In a large bowl, combine mango, onion, jalapeno, salt, pepper, and cilantro. Pour lime juice over mixture, stirring and tasting as you go until desired acidity is reached. Allow the mixture to sit for 15-20 minutes before serving to allow the flavors to blend.

The best part of this dish is that you can adjust the ingredients to fit your desired taste. If you want more onion, add more. If you hate cilantro, leave it out. You could also try substituting pineapple or papaya for the mango. Regardless, this is a fresh and delicious salsa to enjoy during the upcoming hot summer days or during one of your future FACDL committee meetings.

There is greatness ahead. Become part of it.

JASON B. BLANK is Vice President of FACDL, Immediate Past Chair of The Florida Bar's Criminal Law Section, Vice-Chair of the Florida Bar's Criminal Procedure Rules Committee, and a partner at Haber|Blank, LLP in Fort Lauderdale.

F.A.I.R.L.A.W.S.

Fighting for Fairness

Come join FAIRLAWS inaugural Silent Auction!

givegrove.com/fairlaws2023

Go RIGHT NOW to get started.

Come bid on amazing items and experience packages donated by FACDL members and businesses from around the State!

All proceeds will benefit FAIRLAWS, the political committee whose sole mission is to assist FACDL accomplish its legislative goals. All bids and notifications will be sent directly through your personal phone so you can remain engaged with the silent auction throughout the weekend. Don't hesitate to get in on the fun TODAY!

Auction ends at the start of Saturday night's awards banquet immediately following the cocktail reception!

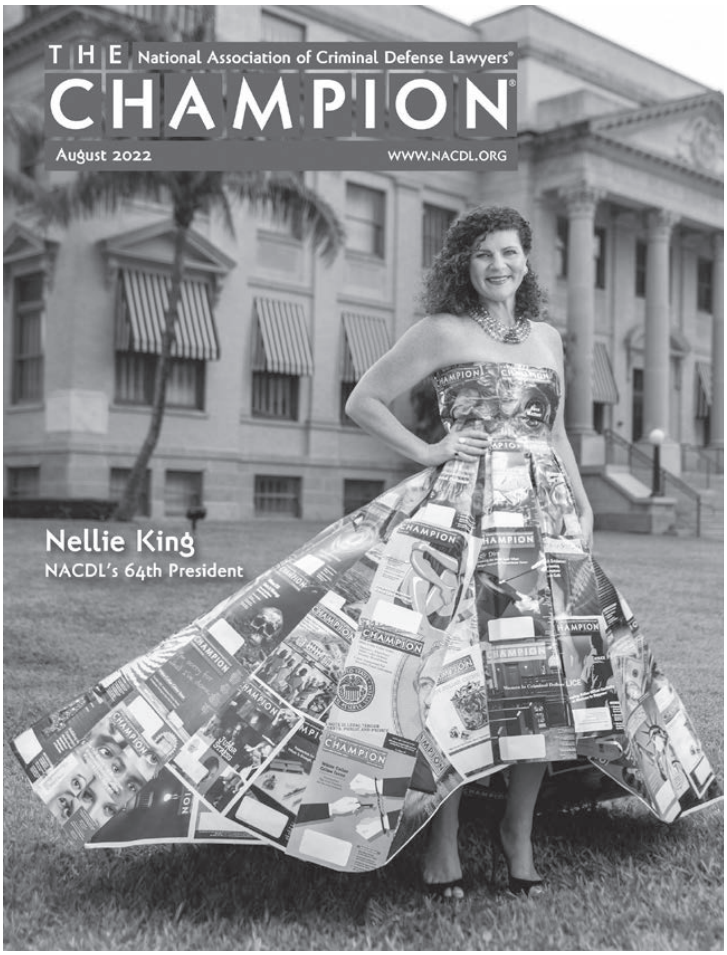
F.A.I.R.L.A.W.S. FIGHTING FOR FAIRNESS

Paid for by Floridians Associated to Insure Responsible Laws (FAIRLAWS).

A MESSAGE ON LEADERSHIP

FROM NACDL PRESIDENT NELLIE KING

by Nellie King



Each of us has an obligation to use our talents, energy, influence, and resources to fight the wrongs of the criminal legal system. Motivation for leadership in the sphere of criminal defense is not hard to conjure. The stories of each client, the faces, the families, the stark realities of incarceration, the fact that we bear witness daily to modern day slavery exacted by our very government institutions — these are the things that energize and propel my involvement in NACDL, FACDL, and PBACDL.

I view my leadership path as starting the day I became a public defender. Through time, experience, a lot of effort, and family, professional, and organizational support, my leadership trajectory progressed to the national level, where I now serve the interests of the 11,000-member NACDL. I am acutely aware that the road to the presidency of NACDL was paved by the vast network of like-minded justice warriors within this organization. The experiences I had leading FACDL were the best. This organization energized me to stay involved, not take a back seat to issues critical to our clients and our democracy. Although efforts to reform the criminal legal system are daunting, wreaking havoc on our sense of balance in the world, I know I can pick up the phone any time of the day or night to call on the brothers and sisters of FACDL. The leadership connections I cultivated through the years are available to me now when I need perspective and support to make difficult decisions, or simply to keep the faith in a system unparalleled in terms of human misery and intentionally destructive goals.

The efforts to humanize the approach to crime and justice in this country, a country marking a 50-year history of mass incarceration, are slow, underfunded, and challenged by the politics-over-people model in governmental leadership. Florida, where reaction to perceived political threats and poll ratings surpasses rationality and reality, requires us to collectively shout even louder than in other states. The efforts of FACDL are noticeable, however. FACDL's visibility and impact in the media, with the public, and with elected leaders has grown exponentially since I served as president in 2011. When travelling to other states, I often talk about FACDL's successes, as this organization is one of the strongest affiliates in the country, on a number of levels, and I am proud of the work being done here.

The greatest gift I have received through my leadership commitments has been the awareness that I am not alone. Staying in this game requires a willingness to reciprocate with others as well. We are a family of individuals who need each other as much as our clients need us. I treasure the annual meetings where we enjoy the war stories, the laughs, the friendship, the large bar tabs charged to Derek Byrd's room. The FACDL Board election efforts are also legend. Ufferman in a wig, liquor freebies, life-size candidate cardboard cutouts, babies pimped out for votes, my annual tennis tournament failings — if these things don't motivate you to stay involved, I don't know what will!

As my year as President of NACDL nears its end, I want to thank each of you that assisted me along the way. I will always value your friendship and support in the fight for a more humane and just criminal legal system. Here is to the next fight we wage together — cheers!

NELLIE KING is the 64th President of the National Association of Criminal Defense Lawyers and served as President of the Florida Association of Criminal Defense Lawyers from 2011-2012. She owns the Law Offices of Nellie L. King, P.A., in West Palm Beach and lives in Jupiter with her husband, John Wendel, and their children.

SO YOU WANT TO BE A LEADER?

THE TEN COMMANDMENTS OF BECOMING AND BEING A GOOD LEADER

by David Rothman

My father used to tell a joke about a pious man who lost his job and fell into a huge financial hole. For weeks, each night, the man would pray that when he woke, he would learn he hit the lottery. After months of prayer without success, from the heavens, a booming voice called to him "SCHMUCK, BUY A LOTTERY TICKET."

So, let me begin there. For any of you considering becoming a leader in any organization, as special as your mom and dad have made you believe you are, leadership doesn't just happen. No one will call a criminal defense attorney and ask her or him if they'd like to be president of their organization. And, although I agree that great leaders must have some leadership qualities, I've learned in almost five decades of experience in many organizations, leaders are made, not born.

Based on experience, here are 10 commandments (yeah, I know…) of becoming and being a good leader:

I

Begin as soon as you think you want to make a difference, not just case by case or client by client, but in a systemic or greater good sense. IN ORDER TO BE TRULY SUCCESSFUL, YOUR FOCUS MUST BE ON THE ORGANIZATION, NOT ON YOURSELF.

II

Find, keep, and consult at least one mentor you respect and who possesses the leadership qualities and experience you admire.

III

Go to experienced Bar leaders and politely and respectfully pick their brain.

IV

Join and be active on a committee of at least one established organization that makes our community (lay, legal, religious, political) better.

V

And once involved, learn about the committee and its members, figure out how to make the committee better and ask other committee members to help carry out the plan. Repeat this process.

VI

Once you have proven you have value, run for the Board of the organization. Replicate what you did in the committee. Once you prove your value on the Board, run for an officer's position.

VII

Always show respect for the organization and its leaders. Never bad-mouth anyone. Learn from good leaders how to behave.

VIII

Volunteer to do what others might not want to do. When you are asked to help, say yes, and then complete the task.

IX

As a leader,

a. Act like a leader — lead by example. A leader with no followers will fail.
b. Never forget it is always about the greater good of the organization and its members, not you or the Board.
c. Always demonstrate you have integrity.
d. Be confident, but not cocky.
e. Be honest but be cautious in what you say.
f. Be prepared and have a plan but when appropriate, show flexibility.
g. Act decisively. Encourage debate and listen to dissent but know when to cut off debate and make certain to address dissent.
h. Be yourself. A sense of humor can be helpful, if employed sparingly. If you are not funny, trying to be funny will make your board feel uncomfortable.
i. Treat everyone with respect, never show favoritism.
j. Establish and maintain your credibility. Being a hypocrite will destroy your ability to lead.

X

Pay attention and learn from experience, bad and good, yours and others.

Ok, now go out and buy that lottery ticket.

DAVID ROTHMAN, a member of TFB since 1977, is a Board Certified (TFB & NBTA) Criminal Trial Attorney. Among his leadership positions, he is a past president of FACDL (2000-2021), the Miami Chapter of FACDL, and the Dade County (now Miami Dade) Bar Association. He is a member and past chair of the Executive Council of the Criminal Law Section of TFB. He is a past member of TFB Board of Governors and the Board of TFB Foundation and he is a member of the board and former chair of the board of the Innocence Project of Florida.

Assessing Impacts of the 2023 Legislative Session

by Aaron Wayt

As criminal defense attorneys, we know all too well the impact that legislation can have on the lives of our clients. The recently concluded 2023 legislative session in Florida was no exception. It was a mixed bag for people accused of crimes and in this edition of the Capital Corner, we'll be taking a closer look at some of the bills that passed and those that died. But it's not just about the legislation itself; it's also about the leadership that made it happen. As legislative chair of our organization, I had a front-row seat to the action, and I'll be sharing my insights on how leadership played a crucial role in shaping the bills that crossed the finish line.

A few bills were pre-cooked by Governor DeSantis and only needed a quick reheat in the Legislature before getting signed prior to the end of session. SB 450 went into effect on April 20 which reduced the threshold for a death penalty recommendation from unanimous to only eight out of twelve. Florida now has the lowest threshold for the death penalty and the highest number of people exonerated from death row. DeSantis also tasked the Legislature with making capital sexual battery capital again. "But didn't the US Supreme Court in *Kennedy v. Louisiana* declare the death penalty unconstitutional for these crimes?" HB 1297, signed on May 1, created a new statute declaring the US Supreme Court case from 2008 "wrongly decided." Not by accident, the Legislature made sure to budget more money for the Governor to spend on legal fees to fight these bills that ignore the Supremacy Clause.

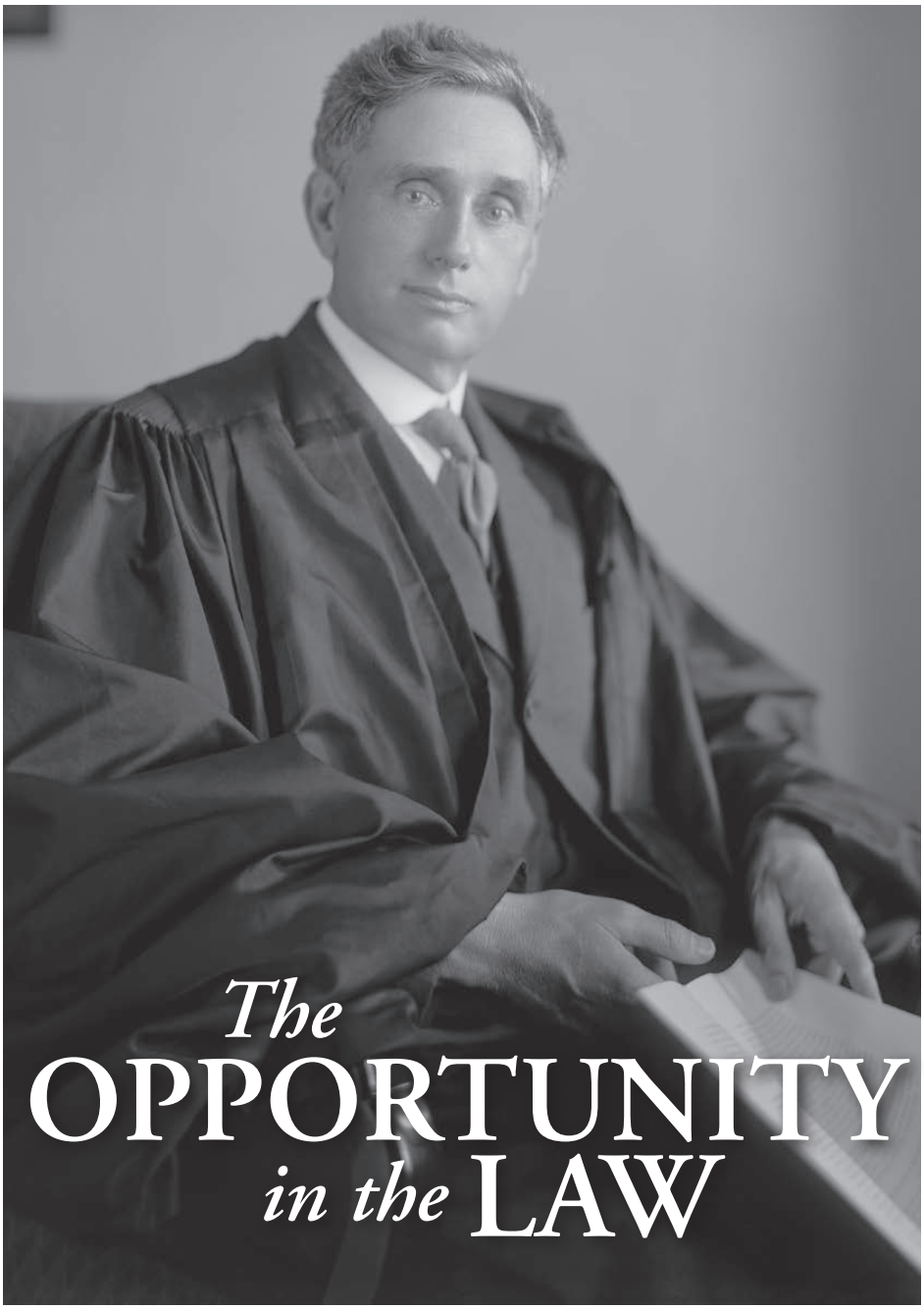
HB 1627, also signed prior to the end of session, transforms pretrial release and detention. By January 1, 2024, the Florida Supreme Court will create a uniform bond schedule for people to be released on certain crimes prior to first appearance. Everyone else, including all second-degree felonies and higher, must be held for first appearance. Continuing the alarming trend of taking discretion away from individual prosecutors and judges, the bill modified the current statute to require that a prosecutor or judge move for pretrial detention if probable cause is found on a Capital felony, life felony, first-degree felony or specified "dangerous crime." It's unclear how the Legislature intends for the judge to "move" against the accused and stay a neutral party. Early in the process, the bill also deleted language in the pretrial detention statute which prevented the judge from considering unlawfully gathered evidence at the pretrial detention hearing. Luckily, that change did not make it into the bill.

HB 95 was backed by the Fraternal Order of Police and intended to dissuade State Attorney's Offices from keeping "*Brady* lists." It originally created multiple opportunities for cops to appeal placement on the lists at different stages and various notice requirements for State Attorneys. After debate in committee highlighted the difficulty in following the new statute while also complying with Brady, the bill was watered down to one "request for reconsideration" the cop can make upon placement on the list.

HB 667 continued the fight from

SEE PAGE 39

AARON WAYT is a criminal defense attorney at Pumphrey Law in Tallahassee, Florida. He's a current Director-At-Large for FACDL and chair of the Legislative Committee.



The OPPORTUNITY *in the* LAW

by Jonah K. Dickstein

Louis Brandeis (1856-1941), American lawyer, was born in Kentucky to immigrant parents. He attended Harvard Law School, graduating at the age of 20 with the school's highest-ever grade average. Brandeis promptly founded his own law firm, recognized for his work on progressive social causes. Starting in 1890, he helped develop the "right to privacy" concept by writing a law review article by that title — later credited by legal scholar Roscoe Pound as having accomplished "nothing less than adding a chapter to our law." Brandeis fought against powerful corporations and public corruption — which he felt were detrimental to American values and culture. He often insisted serving on cases without pay, freeing him to address the wider issues involved.

Brandeis achieved recognition by submitting a special brief, relying on expert testimony from varied professionals for support, later called the "Brandeis Brief," setting a new precedent in evidence presentation. President Woodrow Wilson nominated Brandeis to the Supreme Court — a nomination bitterly contested, partly because, as Justice William O. Douglas wrote, "Brandeis was a militant crusader for social justice whoever his opponent might be. He was dangerous not only because of his brilliance, his arithmetic, his courage. He was dangerous because he was incorruptible." Brandeis was confirmed, serving from 1916 to 1939 as one of our most influential justices.

Brandeis gave a 1905 Address to the Harvard Ethical Society, worth our reflection, entitled "The Opportunity in the Law:"

> The great achievement of the English-speaking people is the attainment of liberty through law…. [I]n America the lawyer was in the earlier period almost omnipresent…. Nearly every great lawyer was then a statesman; and nearly every statesman, great or small, was a lawyer. De Tocqueville, the first important foreign observer of American political institutions, said… "In America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers, consequently, form the highest political class…. As the lawyers form the only enlightened class whom the people do not mistrust, they are naturally called upon to occupy most of the public stations. They fill the legislative assemblies and are at the head of the administration; they consequently exercise a powerful influence upon the formation of the law and upon its execution."

That said, Brandeis reached his central point:

> [T]he paramount reason why the lawyer has played so large a part in our political life is that his training fits him especially to grapple with the questions which are presented in a democracy. The whole training of the lawyer

leads to the development of judgment…. The lawyer's processes of reasoning, his logical conclusions, are being constantly tested by experience. He is running up against facts at every point. Indeed it is a maxim of the law: Out of the facts grows the law…. He is an observer of men even more than of things. He not only sees men of all kinds, but knows their deepest secrets; sees them in situations which "try men's souls." …His profession rests upon the postulate that no contested question can be properly decided until both sides are heard. His experience teaches him that nearly every question has two sides; and very often he finds—after decision of judge or jury—that both he and his opponent were in the wrong…. These are the reasons why the lawyer has acquired a position materially different from that of other men. It is the position of the adviser of men…. The ordinary man thinks of the Bar as a body of men who are trying cases, perhaps even trying criminal cases…. But by far the greater part of the work done by lawyers is done not in court, but in advising men on important matters….

Do we today live up to the tradition Brandeis celebrated—lawyers being public-spirited scholars—lettered yet pragmatic? Hopefully. Only if we push often-cramped legal boundaries and call out moral contradictions. "Nothing is more destructive of a society's values than the perceived hypocrisy that comes when we announce our reliance on well-established standards…for important public policy decisions but quickly abandon those standards in hard cases." *Brennan v. State*, 754 So. 2d 1, 13 (Fla. 1999) (Anstead, J., specially concurring).

> "The lawyer not only sees men of all kinds but knows their deepest secrets; sees them in situations which "try men's souls."
>
> LOUIS BRANDEIS

Our practicality as lawyers, not just intellect, gives us the confidence to act. For ultimately, "excellence in deliberation—practical wisdom—is the cardinal virtue of judges and practicing lawyers." James M. Altman, Book Review: *Modern Litigators and Lawyer-Statesmen. The Lost Lawyer*. By Anthony T. Kronman, 103 *Yale L.J.* 1031, 1032 (1994). For some observers, any "collapse of the lawyer-statesman ideal" would be "a devastating blow to the legal profession as a whole because that ideal sustained the belief of lawyers for almost two centuries that the practice of law is a noble calling." *Id.*

JONAH DICKSTEIN practices criminal, appellate, and constitutional law in Tampa, where he previously clerked for the Honorable Matthew C. Lucas of Florida's Second District Court of Appeal.

PRESIDENT • from page 4

goals. Along those lines, FACDL promotes excellence in the practice of criminal defense. The future of this organization is dependent on growth in the form of new and younger members of the profession. The "elder statesmen" of FACDL are a valuable resource to all members. Knowledge in the field can be passed on in the form of lectures (Seminars) by the "old folks," or in the form of mentoring of the younger lawyers. I am happy to report that at our last board meeting, we approved a record number of new members into FACDL. Membership is key to the longevity and the existence of any organization. I will continue to push for increased growth of our membership. If you practice criminal law, you belong in this organization.

One area where I watched FACDL grow was in how the legislature has increasingly listened to the voice of our membership. FACDL is now a recognized name within the Florida legislature. Our legislators want to hear from us. To that end, I would encourage each and every member to take the time and effort to get to know your local representative. There are times when we need to reach out to our legislators to give them our opinion on proposed legislation. If you have taken the time to develop that relationship with your local legislator, you can help be a voice for FACDL. Together as a statewide organization, with a statewide membership, we can make a difference in the laws that are passed here in Florida. Get out there. Become active in your local Bar Association. Get to know your local legislators. Make a difference.

This year has gone by so quickly. Thank you to my friends, colleagues and family who supported me throughout the year. It has been my privilege to serve as your President. I will continue to contribute any way I can, especially now that I will be considered one of the "old guys" of FACDL. Thank you.

BETTER LATE THAN NEVER

by
R. Wayne
Richter

I suppose with leadership, some seek it, and others find it. I was in the latter category. In 2003, right out of law school, I was hired by a two-lawyer criminal defense firm in West Palm Beach where bar involvement was not particularly prioritized. Even if it were, I felt that I was too busy learning the law and the business of law to be involved with voluntary bar organizations. As some time passed, I found myself comfortable within the firm and practice and did not recognize the value of bar involvement even though I was a dues-paying member of different voluntary bars, including FACDL. That would soon change.

In 2013, I made the daunting decision, that many of you have also made, or may be considering, to open my own practice as a sole practitioner. Surprisingly, striking out on your own does not come with potential clients pounding on your door. I realized that I needed to get involved in the legal community and meet lawyers from other practice areas who might be potential referral sources.

So, I joined the Palm Beach County Bar Association's North County Section. Sure, it was uncomfortable at first. I felt like a new kid at a new school. But I met and made friends and was soon encouraged to run for the section's board of directors. A few years later, I became President of the North County Section. Around the same time, I decided to get more involved in my local FACDL chapter and was elected as one of our chapter's representatives to the FACDL board, a position I value and still hold. That position has introduced me to fantastic people and lawyers from across the state with whom I have a shared experience. I live in Martin County, and I decided to join the Martin County Bar Association (MCBA) as well. I was eventually asked to serve as chairperson of their Criminal Law Committee. That small leadership role has now developed into me being sworn-in as President of the MCBA for 2023-2024.

I joined these organizations out of a perceived necessity, but I decided to get involved with leadership roles because I found joy in serving the profession. I did not get involved in leadership to be a boss, but to be a good steward and part of a team. There is pride in leadership and service. There is wonderful camaraderie in leadership and service. Let's face it, the criminal defense lawyer is often overlooked if not outright looked down upon. Leadership can elevate the standing of our practice area. Leadership can even elevate your own standing within the legal community. We, as criminal defense lawyers, need to put ourselves in places where decisions are being made. I hope that I made each of the organizations I have been a part of better, but they have given me so much more and I encourage other criminal defense lawyers, not to wait like I did, but to seek out opportunities to serve and lead within your communities.

R. WAYNE RICHTER is a Life Member of FACDL and current Palm Beach County Chapter Representative to the FCADL Board of Directors. He is currently President of the Marin County Bar Association. He has offices in West Palm Beach & Palm City. Shameless plug: Wayne is a candidate for at-large director seat on the FCADL board.

Your Association
Working for You!

FACDL STRIKE FORCE

Zealous advocacy of unpopular clients or causes can result in personal attacks on the criminal defense lawyer. When that happens, FACDL is there to help. Whether as counsel of record or amicus, the FACDL Strike Force will defend you against undeserved charges of misconduct in any forum and at every level.

Call or email the chair of the FACDL Strike Force:

DONNIE MURRELL

Telephone:
561/686-2700

Email:
ldmpa@bellsouth.net

We will respond.
You are not alone.

POINTING YOUR LEADERSHIP IN THE RIGHT DIRECTION

by Spencer Cordell

One of the biggest goals of any leadership position is getting people to do what you want. If the leadership position is for a voluntary organization, that can often be one of the biggest challenges. Unlike unemployment situation, or military situation, where you can direct people to address certain tasks, you are not going to get very far ordering around unpaid members of your organization. Even the ones that go along with it may not be that happy about it!

I speak from the experience of being involved in a lot of voluntary organizations including my local chapter of FACDL and, most recently, as president of the Lee County Bar Association. There is no "one size fits all" approach to leadership, even in the context of voluntary organizations. But I wanted to go through some points that I've picked up that are key elements in effective leadership.

Put in the effort.

You have to show the effort to get people to mirror your effort. You need to talk to people and follow through on things. You need to show up to events, help with setup, and help with the clean up too. Your ongoing effort, even if it's just making the phone calls or sending the emails, is the grease that keeps the engine running.

Listen to what people have to say.

Obviously if you are working with good people, they are going to have good ideas to contribute. But don't forget to listen to the people you don't agree with. Even if you cannot come to a compromise, just listening to, and acknowledging, other perspectives can show them you're willingness to compromise makes it conducive to working things out the next time around.

Empower others to lead as well.

You are going to get more done if other people will take on leadership roles alongside yours. You are better off asking them to take on responsibility than just telling them what to do. They become invested in the success of your project.

Know when to move on.

Be aware if things are not working and be prepared to make a change. Sometimes it means recognizing which people aren't best for a project, other times it's taking the "L" and moving on from a project that is not working. Don't spend the energy and effort to do something if the returns are not going to be there.

Make sure people know they are appreciated.

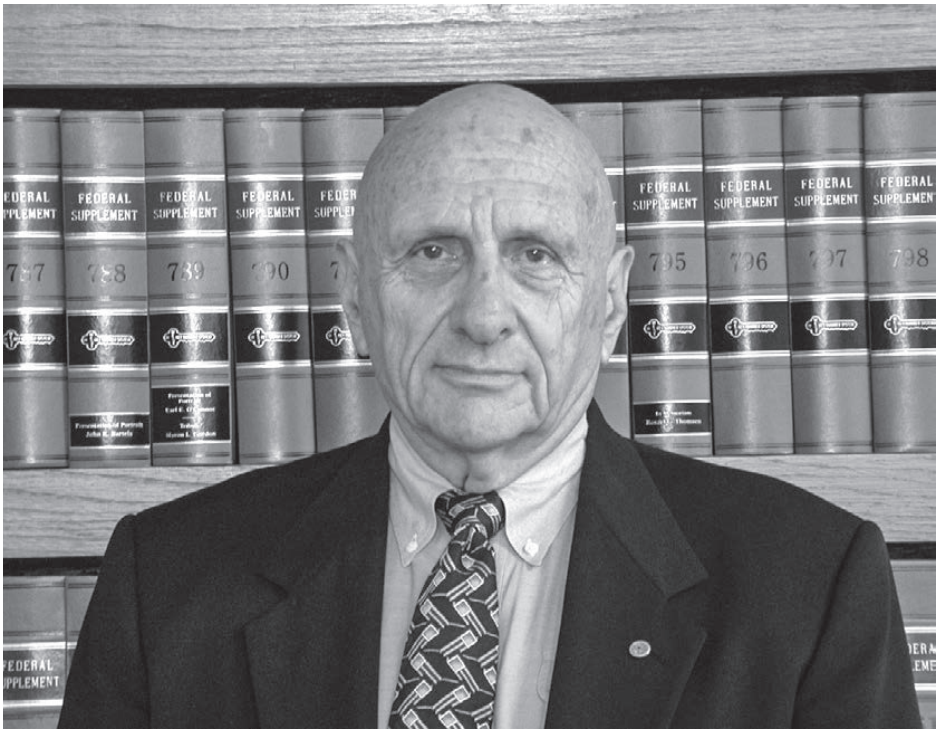
When you get over the hump and get people actively giving their efforts for your organization or project, make sure they know how much they are appreciated. A follow-up phone call — sometimes even an email — will pay dividends for future endeavors. If someone is an attorney, reach out and let their managing partner know how much their efforts are appreciated, those managers do like hearing that kind of feedback. It's even worth giving out awards for the people who go above and beyond to make things happen, even if it's a relatively insignificant gift or something. The gesture goes a long way.

This is by no means an exhaustive list of leadership practices, but they are pointers that have hit home for me time and time again. Choose what's appropriate for you and bring your own flair. I'm sure you'll find that you can effectively bring a team together for whatever your goal may be. 🏛

SPENCER CORDELL is President of the Lee County Bar Association, a Life Member of FACDL and a Chapter Representative on the FACDL Board from Lee County.

A LEGACY THAT ENDURES

by Joe Bugni



Some stories must be shared. When I was a law clerk in the Southern District of Florida, I'd often chat up the court reporters. I'd tell them that I wanted to practice criminal defense and ask: Who was the best? What made him or her so special? What did they do that set them apart? Through all those conversations, one answer stood out.

The court reporter told me: "Right now, kid, it's Roy Black. No question. And he's good. Top-notch. Worth every cent he charges — and he charges." Then he paused. "But if you want to know the best I ever saw; it's not even close — not even close, kid — it's Albert Krieger." Then he told me this story.

There was a big drug conspiracy trial, only the ceremonial courtroom was big enough to seat everyone and it booked months out. The day before jury selection, the *Herald* ran a front-page article about the case that threatened to taint the jury pool. Krieger immediately filed an emergency motion to move the trial.

The next morning before taking the bench, the judge was going on about Krieger's motion: "F—this, f—Krieger, I'm not moving it." Then, with a smile of pure appreciation, the court reporter explained how "Krieger rose and addressed the court; kid, he had a presence that commanded respect — the room was silent waiting for him." He then grabbed my arm, and exclaimed: "Kid, I shit you not, as Krieger spoke, it was as if the voice from Sinai commanded that the trial be moved."

After Krieger finished, the judge took a recess. And as they walked back to chambers, the judge remarked, "We better see when we can get the ceremonial courtroom." The court reporter exclaimed: "It was an amazing performance, simply amazing, and it was by an amazing man — Albert Krieger, he truly embodied the very best of the law. That's who you want to emulate, kid. Go be like Krieger."

After hearing that story, I had to meet Albert Krieger. So I sent him a letter and asked if we could meet. He invited me to join him for lunch. And for the next three-and-a-half hours, he and his wife Irene taught me lessons that I still carry deep within me.

The advice took many forms — some practical, some aspirational. We talked a lot about his mentor, Gil Rosenthal. At some point, I mentioned I was from Milwaukee. Hearing that, he demanded I reach out to his dear friend Jim Shellow, another Milwaukee native, and someone Krieger considered to be among the very best criminal defense attorneys in America. Krieger added: "The word genius has been stripped of its meaning, but in the proper sense of the word Shellow is truly a genius." He told me to reach out and tell him Albert insisted he buy me an expensive lunch — a very expensive lunch.

And so I wrote Jim Shellow and asked to meet for coffee. We met for dinner and talked for hours about his life and his cases and the law — but most of the evening was spent discussing his mentor, Frank Oliver. When I moved back to Milwaukee to work as a public defender, Shellow became my mentor and close friend, meeting weekly with me and others to talk cases and help me become a better attorney.

Reflecting on those initial meetings with Krieger and Shellow, what stood out most was their respective mentors' impact on their lives. Once you understand that both Shellow and Krieger flirted with failure and were saved by their mentors, you can understand why both men ascended so high and why their careers and lives were marked by (if not defined by) the generous attention they showered upon others. Beyond celebrating that legacy, this article's

great hope is that it will inspire others to emulate it.

ALBERT KRIEGER'S BEGINNING

Krieger was a gifted student and athlete. His studies mattered most to him, and he excelled in the classroom. And after serving in WWII, he went to law school.[1] While most criminal defense attorneys have admirable motivations, Krieger's were truly noteworthy. Horrified by what he'd seen in the service, he wanted to ensure that America lived up to its promise and commitment to liberty.[2] He carried that commitment into practice.

And this is where his story gets relatable. Despite his immense natural gifts and pedigree, Krieger initially struggled. He had no idea how to practice law. Two stories illustrate the point; the first is more entertaining, but the second is more enduring.

In the beginning, he scraped by with what came in through the door, just petty cases. Until Ben Roman — affectionately called Benny One-Eye — walked in. Roman was (*allegedly*) in the mob, and despite the mob having its own go-to lawyers, Roman wanted Krieger.[3] Krieger had no idea what to charge—this was his first "big case." So he quoted what he believed to be a fee worthy of his talents: $250. Roman smiled, pulled out a wad of bills and peeled off twice that amount. Krieger would later learn that the going rate for such a case was four times that amount — Roman was generous, but not too generous.

This is where the story gets great. Krieger threw himself into the case and uncovered the snitch. He told his client and the other attorneys as much. Unfortunately, word got around. Things got awkward and scary — fast. The snitch told everyone he was going to kill Krieger for spreading such calumny. Catching wind of this, Krieger started to second-guess his calling. But Roman would have none of it. He went to the snitch's hangout.[4] A true master of the dramatic, Roman made himself clear: "I am a superstitious man, and if anything were to happen to Albert, anything, you're dead. If Albert gets a headache, you're dead. If Albert gets struck by lightning, you're dead. If Albert gets in an automobile accident, you and your family are dead."

As chance would have it, around this time, Mario Puzo was doing research for a book. When Puzo heard the story, he did as any respectable author does with great material: he stole it and made it his. Fast forward to 1972, Krieger was watching *The Godfather*, and when Don Corleone rises to give his "superstitious man" speech, Krieger watched in disbelief as Brando cribbed Roman's speech — Roman's speech about him.

As much as Roman deserves credit for that line, the real testament to his brilliance was his eye for talent. In the years that followed, Krieger repeatedly vindicated Roman's trust: through four trials, he earned four acquittals.[5] That's the first story of Krieger's early days.

The second centers on how Krieger got past underquoting fees and learned how to try a case. Krieger had immense natural talent (his voice alone was a gift from on high) but he also had a burning love for the law — a recipe for success missing a single ingredient: he lacked the means of forming that talent.

Gil Rosenthal solved that problem. Rosenthal's name is sadly (almost) lost to history, but in his time, he was a true legend. He was among NACDL's founders.[6] Seeing the need to replicate (and spread) best practices, he gathered with other like-minded defense attorneys to make it happen. He envisioned an organization where the best lawyers in one city could take and improve upon the brilliant things being done elsewhere. After all, a rising tide lifts all boats.[7]

Beyond being a visionary, Rosenthal was also one hell of a lawyer. When he took Krieger under his wing, Rosenthal was retained on some of New York's biggest cases.[8] But while those cases are captured in archived *New York Times* articles, his true legacy was the investment he made in others — including Krieger. Rosenthal didn't just tell Krieger what to charge the next Benny One-Eye, he taught Krieger *how* to think like a lawyer and *how* to approach a case to win. He invited Krieger to try cases with him — cases that involved allegedly corrupt cops (conviction reversed), allegedly dirty union bosses (acquittal), and early challenges to government eavesdropping.[9] Those were retainers Krieger wouldn't have seen without Rosenthal's place beside him at counsel table.

Rosenthal's influence went beyond getting him on (many) well-publicized cases and extended to pushing brilliant legal arguments. Rosenthal subscribed to the principle that defense attorneys cannot simply rely on their courtroom skills — they must also have a robust motion practice.

And those experiences changed Krieger's entire career trajectory. During his first five years of struggle, there wasn't much to show for Krieger's immense natural talent. But under Rosenthal's guidance, Krieger quickly became a leader of the bar. Krieger put it this way: "Rosenthal was my mentor and my guide, a person who literally took me from the hallways of 100 Center Street into the courtrooms."[10] "I know that the lawyer that I was in 1950 is one hell of a far cry from the lawyer that I was in 1960."[11] By the mid-sixties, Krieger represented the heads of the Bonanno crime family; he was winning many, many trials and pushing novel legal arguments.[12] And it was all thanks to Rosenthal's influence. That brief survey of Krieger's career only brings us to 1973 — the year Krieger joined forces with Jim Shellow to do some very special things.

JIM SHELLOW'S BEGINNING

Like Krieger, Jim Shellow had many early markings of promise. Blessed with a curious mind, Shellow excelled in a few different careers before law school. There, he took to criminal law. When the time came to write his Note, he had just read an article in Life magazine about a conspiracy trial in New York. The primary evidence was that all the defendants — each under surveillance — attended a particular meeting but when questioned, denied knowing the meeting had even occurred.

New York's best lined up to defend the case.[13] Unfortunately, they lost at trial and all of the defendants were sentenced to prison.[14]

The case intrigued Shellow, and (as a 2L) he got a copy of the transcripts, totaling almost 7,000 pages. After a full review he felt that the verdict was an absolute injustice. A criminal conspiracy takes more than people being at a meeting and lying about it — the government must establish an actual agreement to violate the law. It had to prove they were doing something more than just having a tea party. Committed to that view, he wrote his Note, colorfully titling it *The Tea Party Theory of Conspiracy*.[15]

Adamant that the argument was mis-framed at trial, Shellow tried to convince the defense attorneys to embrace his theory on appeal. When his letters proved unpersuasive, he took a train to New York and asked for a meeting with one of the lawyers. Even then, Shellow had moxie. After hearing Shellow's spiel, the lawyer told him to enjoy the sights and to have a safe trip back to Milwaukee. Still convinced he was right, Shellow took another train (this time to Cleveland) to convince another lawyer to hear him out. As the story goes, after an hour, the lawyer got the argument. He immediately called the other attorneys; they adopted Shellow's theory. In the first of many instances, the Second Circuit agreed with Shellow and all the convictions were overturned.[16] The story has true Hollywood appeal: a gutsy (and dogged) law student sees an angle that had escaped some of the best attorneys in the country. After having doors shut in his face, he convinces them to adopt a new theory, *his* theory. And it wins! The clients are free. Despite being a year short of having a bar card, he's a hero in one of the nation's biggest cases.

Albert Kreiger speaking at the 2004 FACDL Annual Meeting, when he received the Steven M. Goldstein Criminal Justice Award.

But after graduation, Shellow couldn't pack up and move to New York and trade-in on this newfound capital. His wife, Gilda, had another year in law school, and he had two young kids at home. He would have to bloom where he was planted.

So, he did what he had to do: he put up his shingle and took whatever came. And he floundered — badly. Like Krieger, he had no idea what to charge for a case, or what to do once the case made it into a courtroom. As every practicing attorney knows, abstract legal theory is one thing, cross-examining a cop is something else. As Shellow's struggles mounted, he grew discouraged. It was a rough time. All the genius and chutzpah it took to sell his theory could have been lost to the realities of operating a criminal defense firm — constant and repeated failure. It's part of every criminal defense attorney's life. At this point, Shellow was in desperate need of a mentor.

Enter Frank Oliver. By all accounts, Gil Rosenthal was a classy man, distinguished, erudite — a true gentleman. Frank Oliver? Well, Oliver is the type of lawyer you'd bring to a knife fight. When Shellow met him, Oliver had never heard of *A Tea Party Theory of Conspiracy*. He was waiting for his case to get called and watching Shellow impale himself on his own line of questions. Whether Oliver recognized something special or was just being generous, only he knew. As Shellow left the courtroom, Oliver told him to sit down and watch — they'd grab a drink after court. Oliver then conducted a clinic.

What happened during Oliver's cross-examination isn't as important as what followed. Oliver took Shellow out and asked: "Who the hell taught you to ask questions like that?" When Shellow sheepishly explained his plight, Oliver told him to hop on the train and come down to Chicago later that week to watch some court. Recognizing the opportunity, Shellow went and sat in the back of the courtroom. There, he studied Oliver and others.

Afterwards, he went with them to Binyon's (a legendary bar a block from the federal courthouse) and heard the lawyers bat around their cases. Shellow wasn't the only one soaking up Oliver's genius. Lawyers like Rick and Judith Halprin and Tom Durkin (all legends of the Chicago bar) were there too, learning from and being formed by Oliver.[17]

Never content telling war stories, Oliver assigned these young lawyers reading. The assignments varied from Plato's *Dialogues* to nursery rhymes. Plato to develop a theory through questioning; Mother Goose for the rhythm of an effective cross; and *The House that Jack Built* for the perfect speech pattern for questioning — the rhythmic, incremental crescendo. Every NCDC graduate can thank Oliver for that lesson on looping. Those days were crucial to Shellow's development. Anyone interested in those lessons should read *Your Witness,* where two chapters are devoted to Oliver's lessons.[18]

Hooked, Shellow kept coming and kept learning. In response to Shellow's earnest desire to improve, Oliver's mentoring went far beyond running a reading group. When Oliver had a six-week federal trial, he invited Shellow to represent one of the co-defendants. Every day in court, Oliver modeled a different level of lawyering; and every night, Oliver got the daily transcript and would go over Shellow's questions, picking them apart. He let Shellow know where he sounded clumsy or where a witness had given him an answer that he failed to follow up on because he had not actually been listening to the witness.

But the greatest lesson Shellow took from that experience happened midway through the trial. Shellow floundered with an important witness, the bank

examiner. Among the case's central questions was whether the transactions crossed the threshold for federal jurisdiction. Shellow's cross didn't move the ball. After telling Shellow to sit down, Oliver took out a dollar bill, marked it with an exhibit sticker, and gave it to the witness. He asked the witness how much he had given him: one dollar. Oliver then asked to borrow that dollar. The witness obliged. And then he said he'd lend it back to the bank examiner. How many dollars does he have? One dollar. He borrowed it again. And gave it back again, asking how many dollars there were. There was still only one dollar. Oliver then asked if that was repeated six million times, how many dollars would he have? Still one dollar. And thus, a small amount passed back and forth could not (and did not) clear the jurisdictional threshold amount. After making the point, Oliver asked the judge to withdraw that exhibit. He wanted Mr. Shellow to remember the lesson. The judge agreed. And Oliver handed him that dollar — a dollar (exhibit sticker and all) that Shellow carried in his wallet for 60 years.

Oliver's mark on Shellow's career extended far beyond that trial. Oliver inspired Shellow to go to Mississippi and defend the Freedom Riders. There, he brought his signature style to the courtroom. After he won a dismissal, angry residents fired into the house where Shellow was staying.[19] He also represented many Vietnam War protestors and those who fought against segregation.[20] His efforts were showcased in a front-page headline from when the United States Supreme Court ordered his client — a civil rights hero and Catholic priest, Fr. James Groppi — released.[21] Not a bad record for someone eight years out of law school and who, without his mentor, would have been handling tickets or (if he was lucky) teaching. By 1973, with Oliver's influence and guidance, Shellow was truly making his mark on the law.

The mark of both men extends beyond those cases.

In 1973, Krieger and Shellow had hit their stride as attorneys. Both men had lucrative practices spanning the country. But both men shared a commitment to justice that ran far deeper than their pocketbooks. When hundreds of Native Americans were arrested at Wounded Knee for protesting at the trading post, the story made national headlines. Shellow and Krieger were at a NACDL meeting, and the story was so appalling that Krieger suggested they go assess the situation themselves.[22]

Both men were shocked at what they saw. The conditions were so deplorable and the injustice so patent, they decided they had to be involved. With others, they recruited NACDL's finest and organized the defense for six-hundred individuals. For both men, this wasn't a photo op or a marketing ploy. They threw themselves into the case, hunkering down for six months, taking the cases to trial — pro bono.

It's easy to pass over that and think: good for them, class acts, all around. But their decision goes far beyond laudable. It's heroic. It was a selfless and tangible sacrifice to the cause of justice. There is no other way to describe it. Both men, at the height of their careers, needing to make payroll back home, pushed off new business for six months, moved away from their families, and gave the cases everything they had without any tangible reward. That is answering the call of justice.

The end notes to this article have cites to several great accounts of the cases and both men's involvement.[23] From the many, many accounts of that case, there is one anecdote particularly noteworthy. It captures their abiding friendship and rich sense of humor and shows just how much they enjoyed working together. For six months Krieger and Shellow had breakfast at the same hotel restaurant every morning. And every morning, they talked over the day's strategy. At one point, they subpoenaed the trading-post's books. The trading-post manager's lawyer came to the hotel one morning bearing the ledger, demanding to know "what the hell was this all about, the books were fine, what was the big deal? Why are they harassing his client?"

Donning his CPA cap, Shellow opened the books and slowly paged through them, before exclaiming that the trading post was charging 6,000% interest — violating various federal laws concerning the Bureau of Indian Affairs. Krieger remarked that the lawyer should be prepared for a federal investigation and the likelihood that his client would be going to prison if he took the stand. The lawyer blanched. Without missing a beat, Shellow exclaimed, "Dammit, Albert, don't scare the man. It's not that bad. His client won't get anything more than five, maybe six years for this." The next day, when called to the stand, the trading post manager took the Fifth. Shellow's recitation of that story is always accompanied by a hearty laugh.

That wasn't the last time they would sit beside each other at counsel table. In the early 80s, Shellow and Krieger represented the Aladdin Hotel Corp. and others against a federal indictment.[24] The case centered on alleged kickbacks between the mob and the Teamsters Union; it was supposed to be the federal government's attempt to break the mob's hold on Vegas.[25] The case was simply massive. It required two years of pretrial preparation and involved over a million documents — not pages, documents. There were over a hundred government witnesses, with over six thousand exhibits. And true to both men's commitment to motion practice, there were scores of pretrial motions cutting at every aspect of the government's case.[26]

But it was in trial where both men shone. As one reporter who covered the trial recalled, "Shellow was super sharp, very thorough and deliberate in his arguments" armed "with an excellent courtroom presence." And when it came to Krieger he recalled him at times being "spellbinding." And just as it was at Wounded Knee, Krieger and Shellow spent every morning discussing the upcoming day over breakfast. The trial lasted eight months, with the defense battering and dismantling the government's case at every turn. Shellow submitted over 150 supplemental jury

instructions. In the end, the government was handed a stinging defeat: not guilty for every defendant, every count.

KRIEGER AND SHELLOW USE THEIR BRILLIANCE TO LIGHT THE PATH

As anyone can imagine, the next few decades brought great success for both men. Krieger's practice was lucrative, spanning the country.[27] Most readers know about his defense in the Falcon and Magutta case: it was popularized in the Netflix Series *Cocaine Cowboys,* produced by the same people behind David Oscar Markus's podcast *For the Defense*.[28] And everyone knows about his defense of John "Teflon Don" Gotti. But those highlights don't capture just how good Krieger was. Cribbing his CV doesn't say as much as this quote from Judge William Ingram in a letter addressed "to the best defense counsel we have ever seen." "Every aspect of your cross-examination: physical presence, voice, factual mastery, usually gentle confrontation, and relative brevity were a joy to watch."[29] A spot-on assessment that echoed what others thought when watching Krieger.

Shellow's success led him to different areas. He would argue two cases in the Supreme Court; two more were handled by members of his firm because he was in trial.[30] His cross-examination of drug experts was by then nationally recognized and commanded up to $250,000 per cross — yes, just for a single witness. The Fifth Circuit described his cross-examination this way: "In the trial, Shellow conducted what may properly be described as an extraordinarily able examination of the witnesses, based on his knowledge of the chemistry of cocaine."[31] And lest anyone dismiss this all as hyperbole, when the Supreme Court recognized that the confrontation right extends to drug analysts, it cited (you guessed it) Shellow's article on effective impeachment of drug analysts.[32]

Clearly, Shellow and Krieger occupy a place of honor in the pantheon of great trial attorneys of the last hundred years. But as impressive as that is, it's not something that endures. After all, before Krieger there was Rosenthal and before Rosenthal there was Samuel Leibowitz and before Leibowitz there was Martin Littleton; and before Shellow there was Oliver and before Oliver there was William Scott Stewart and before Stewart there was Clarence Darrow.[33] Greatness in this arena fades and is usually soon forgotten, with Darrow being the exception that proves the rule. What makes Shellow and Krieger so special and worthy of emulation and what makes their mark so enduring is what they did outside the courtroom — both at the height of their success and after.

Knowing how much they had relied upon their mentors, both men were committed to improving the practice of criminal defense across the country. Pairing up again, Krieger and Shellow helped organize the first board of directors for the National Criminal Defense College. They had the idea of bringing the best attorneys in the country together to teach young practitioners the craft. At the College, Shellow and Krieger worked 18-hour days teaching thousands of students. They invested more than time: with others, they made sure that the College was affordable. Criminal defense is not lucrative, especially at the beginning, so they endowed scholarships and underwrote the staff's salary.[34]

And both men gave back in other meaningful ways as well. Krieger followed Rosenthal's lead (and command) and dedicated himself to NACDL, giving lectures and teaching.[35] He was a tireless mentor and guide for a generation of attorneys across the United States. A former NACDL president put it best: "Albert loved NACDL. He guided many of us through the ranks and was always there for us. He never declined to talk with or help a fellow criminal defense attorney…Albert was an inspiration. Albert was the most influential teacher and mentor in my career."[36]

Not to let Krieger outdo him in generosity and commitment to the next generation, Shellow too taught and lectured at NACDL conferences. He wrote articles and a book that every defense attorney should study called *Cross Examination of the Analysist in Drug Prosecutions*. It's more than a treatise on one type of witness in one type of case, it's a study of how to cross examine an expert. It should be on every lawyer's bookshelf.

But Shellow's most meaningful and lasting gift was the way he followed Oliver's lead. For years, Shellow gathered young criminal defense attorneys around him in Milwaukee and created what his students affectionately called "Shellow School." Every two weeks, he met with the attorneys to go over their cases (over a few bottles of wine). He helped them draft crosses and reviewed their motions — offering hard criticism and meaningful insight into how to improve.

And it wasn't just motion practice that Shellow trumpeted. He would go over the transcripts and, echoing Oliver, ask: "who the hell taught you to ask questions like that?" During these years, he was selfless, coming to court to watch his mentees and offering feedback well into the night. He was invested, celebrating their every success, and giving perspective with every loss. He was magnanimous with his time and attention. "For many of us who worked for him or attended Shellow School regularly," his one-time partner and longtime friend, Dean Strang, reflected, "Jim was the demanding mentor you wish everyone could have. And he'd stick with you if you stuck with him. Being a student of Jim's was my only lifetime appointment. I was very lucky." But more importantly, Strang added, "It's not that Jim Shellow wants other lawyers to be like him. He wants other lawyers to be the best versions of themselves they can be. If he hears a faint echo of himself or Frank Oliver in us from time to time, he's happier still."

At a time in life when both men could have been content to enjoy their well-earned retirements, neither did. They saw themselves in another generation of lawyers — a generation that was (as they had once been) floundering. And they emulated Gil Rosenthal's and Frank Oliver's very best qualities: they

gave back and invested their time in others. They knew the debt they owed for their mentors' investment, and so they passed that generosity on to others. While both Krieger and Shellow are often (and rightly) celebrated for their courtroom successes, the most enduring aspect of their legacy will be what they gave to another generation of lawyers. That legacy will not be forgotten, and it will (if we live up to those men's vision and that of their mentors) be passed on to another generation and another after that — truly providing a legacy that endures.

[1] Sam Roberts, "Albert Krieger, a Bulldog of the Criminal Defense Bar, Dies at 96," *New York Times* (June 10, 2020), www.nytimes.com/2020/05/28/us/albert-krieger-dead.html.

[2] Jay Weaver, "His Cases Inspired Hollywood Movies. Attorney Albert Krieger Has Died at 96 in Miami," *Miami Herald* (May 16, 2020).

3 Jeffrey S. Weiner, "Heeney Award Winner: Interview with Albert J. Krieger," 20 *The Champion* 26 (April 1996).

[4] *Id.*

[5] *Id.*

[6] Norman L. Reimer, "Inside NACDL: Albert J. Krieger: In Memory and Tribute," *The Champion* (July 23, 2020).

7 Past Presidents: Gilbert S. Rosenthal, NACDL (July 8, 2020), www.nacdl.org/People/Gilbert-S-Rosenthal.

[8] Norman L. Reimer, "Inside NACDL: Albert J. Krieger: In Memory and Tribute," *The Champion* (July 23, 2020); see also Jim Defede, "The Best Defense Money Can Buy," *Miami New Times* (Dec. 14, 1995); Rachel Lean, "John Gotti's Lawyer, Miami Defense Legend Albert Krieger, Has Died," *Daily Business Review* (May 18, 2020).

[9] *United States v. Kelly*, 420 F.2d 26 (2d Cir. 1969); *United States v. Brill*, 350 F.2d 171 (2d Cir. 1965); *People v. Berger*, 239 F. Supp. 219 (S.D.N.Y. 1965); *Balistrieri v. United States*, 395 U.S. 710 (1969) (On remand, the Southern District of Illinois found that the surveillance did violate the Fourth Amendment, though ultimately holding it didn't affect the outcome).

[10] Albert J. Krieger, "50th Anniversary Dinner: NACDL Reflections," 32 *Champion* 20 (Aug. 2008).

[11] John Pudlow, *Krieger: I would have been lost without the help of my mentor*, Florida Bar (Dec. 15, 2007), www.floridabar.org/the-florida-bar-news/krieger-i-would-have-been-lost-without-the-help-of-my-mentor/.

[12] Sam Roberts, "Albert Krieger, a Bulldog of the Criminal Defense Bar, Dies at 96," *New York Times* (June 10, 2020), www.nytimes.com/2020/05/28/us/albert-krieger-dead.html.

[13] "Valenti Brothers Will Talk about Gangland Meeting," *Democrat Chronicle* (Mar. 18, 1959), www.newspapers.com/image/135712325; "State Seeks Return of Valenti to Prison," *Democrat Chronicle* (June 10, 1960), www.newspapers.com/image/135673244.

[14] *United States v. Bonanno*, 177 F. Supp. 106 (S.D.N.Y. 1959); 178 F. Supp. 62 (S.D.N.Y. 1959); 180 F. Supp. 71 (S.D.N.Y. 1960).

[15] James M. Shellow, Comment, "The Teaparty Theory of Conspiracy," 44 *Marq. L. Rev*. 73 (1960).

[16] *United States v. Bufalino*, 285 F.2d 408 (2d Cir. 1960).

[17] Thomas Anthony Durkin, *Your Witness: Lessons on Cross-Examination* 2 (Steven F. Molo & James R. Figliulo eds., 2008).

[18] *Id.*

[19] United Press International, "Shotgun Blasts Hit House with Reuss Lawyer Inside," *New York Times* (Aug. 9, 1965).

[20] *See e.g., Groppi v. Leslie*, 311 F. Supp. 772 (W.D. Wis. 1970); *United States v. Fine*, 413 F. Supp. 740 (W.D. Wis. 1976).

[21] "Fr. Groppi Wins," *New York Times*, Jan. 16, 1972.

[22] Norman L. Reimer, "Albert J. Krieger: In Memory and Tribute," *The Champion* (July 23, 2020); See Albert J. Krieger, "Wounded Knee Revisited: The Personal Reflections of a Defense Attorney upon a Water-shed Life Experience," 10 *St. Thomas L.R.* 46 (1997).

[23] *See e.g.*, Albert J. Krieger, "Wounded Knee Revisited: The Personal Reflections of a Defense Attorney upon a Water-shed Life Experience," 10 *St. Thomas L.R.* 46 (1997); Rick Kammen, *A Giant Passes: A Tribute to Albert Krieger*, National Criminal Defense College (May 20, 2020); Steven M. Kaufman, *Thank You, Albert Krieger*, President's Message, NACDL Newsletter (Nov. 1996). Warren K. Ubrom, "You Can Bury My Heart at Wounded Knee," *Int'l Soc. Of Barristers Quarterly* 259, 263-64 (Mar. 1982).

[24] *See* Associated Press, "Indictment Alleges Plot to Defraud Teamster's Funds," *New York Times* (Sept. 6, 1979); *see also United States v. Linton*, 502 F. Supp. 861 (D. Nev. 1980).

[25] Mobbed Up: The Fight for Las Vegas, *available on* Apple Podcast and Spotify.

[26] *See e.g., United States v. Linton*, 502 F. Supp. 861 (D. Nev. 1980); *United States v. Linton*, 502 F. Supp. 871 (D. Nev. 1980); *United States v. Webbe*, 558 F. Supp. 55 (D. Nev. 1983).

[27] *Put to the blog post.*

[28] Rakontur Productions, *Cocaine Cowboys: The Kings of Miami*.

[29] Jan Pudlow, "Krieger Wins Criminal Law Section's Goldin Award," Florida Bar (Apr. 15, 2007), www.floridabar.org/the-florida-bar-news/krieger-wins-criminal-law-sections-goldin-award/.

[30] *See United States v. Orito*, 413 U.S. 139 (1973); *Bourjaily v. United States*, 483 U.S. 171 (1987).

[31] *United States v. Bockius*, 564 F.2d 1193 (5th Cir 1977).

[32] *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 320 (2009) (citing Shellow, "The Application of Daubert to the Identification of Drugs," 2 *Shepard's Expert & Scientific Evidence Quarterly* 593, 600 (1995)).

[33] *See* Paul Lloyd Stryker, *The Art of Advocacy: A Plea for the Reniansance of a Trial Lawyer* (1954).

[34] In an effort of full disclosure: This author, in fact, received the Gil Rosenthal scholarship so he could attend.

[35] *See* Albert Krieger, "50th Anniversary Dinner: NACDL Reflections," 32 *Champion* 20 (Aug. 2008); *see also* Jeffrey S. Weiner, "Heeney Award Winner: Interview with Albert J. Krieger," 20 *Champion* 26 (April 1996).

[36] Jeff Weiner, *Tributes: Albert J. Krieger*, nacdl.medium.com/inside-nacdl-albert-j-krieger-in-memory-and-tribute-9351578efd77 (July 23, 2020).

JOE BUGNI is a public defender in Madison Wisconsin. For over a decade, he was a faithful student of Jim Shellow.

FACDL Young Lawyers Committee Pro Bono Initiative

STARTING OCTOBER 1, 2022 UNTIL FUNDS DEPLETED

Establishment of Young Lawyers Committee Pro Bono Initiative Project – to assist young FACDL lawyers with out-of-pocket expenses from representing pro bono clients

Who Can Apply for Funds?

- Members of FACDL, who qualify as a Young Lawyer (Under Age of 36 or Having 5 Years or Less as a Member of The Florida Bar).

What Kind of Cases Qualify For Application?

- Pro Bono Cases Referred By FACDL Members
- Pro Bono Cases Through Any Local or State Provider Dedicated to Identifying Pro Bono Cases (i.e. local pro bono committee who may identify cases that are in need of pro bono services in the local community)
- Pro Bono Cases Identified By the Attorney Applying for Funds

Qualifying Costs:

- Subpoena Costs
- Transcript Fees
- Expert Reports, subject to additional criteria (stated below)
- Private Investigators
- Any other similar expense, which is required to be covered by the client (subject to approval)

Costs NOT Covered:

- Attorney Fees
- Travel costs
- Office Expenses

Expert Reports:

Since expert reports can go beyond the costs that can be provided by this project, if an applicant is applying for funds for an expert report, the applicant is required to show that the report is necessary for the specific case.

Request for Funds:

Any and all requests for funds must be specific and relate to a specific activity and case. Funds will not be distributed for predicted costs. All costs must be fronted and reimbursement sought with the proper documentation showing that the attorney has paid for the cost.

APPLICATIONS FOR THE YOUNG LAWYERS COMMITTEE PRO BONO INITIATIVE PROJECT

- Applications shall be made in writing, via E-mail, to the Young Lawyers Committee Co-Chairs Alli Heller (alli@halschuhmacher.com) and Caleb Kenyon (csk@toklegal.com)

- Application MUST include the following Information:
    - **Basic Information:**
        - Attorney's Name
        - Number of Years in Practice / Age
        - Mailing Address
        - County of Practice
    - **Case Information:**
        - Case Name and Number
        - Brief Description of Case / Why Chose for Pro Bono.
    - **Costs:**
      Costs expended on case, which are being sought for reimbursement along with receipts reflecting the cost had been paid.
    - **Disbursement of Funds:**
      If awarded funds, preferred mailing address for payment.
    - **Mentor (if applicable):**
      If senior attorney provided assistance in either identifying pro bono case or helped along the way, provide contact information.

- As the funds for the project are limited, priority is given to applications involving genuine hardship.

- All applicants will be notified in writing (email) whether their application has been successful or unsuccessful. The total amount that has been requested by an applicant is not required to be disbursed and the amount shall be determined by the committee.

DEATH IS DIFFERENT...

UPDATES ON CASES, LAW, RULES & SO FORTH

by Peter N. Mills

This case and law update is intended to serve as a research aid in highlighting issues primarily related to the death penalty that occurred during direct appeal and some other matters. Due to space limitations extensive summation has been used and full citation limited. Many of the more recent opinions have not been released for publication in the permanent law reports, and until released, are subject to revision or withdrawal. I encourage you to fully read the cases, statutes, and rules to gain a better understanding of them. If you have an opinion or suggestion about the column, let me know. Reach me at PMILLS@PD10.ORG.

OKAY...HERE IT COMES!

As predicted, we have new death penalty laws.

§§ 921.141 and 921.142, Fla. Stat. were amended as listed below:

- Eliminated unanimity for the overall jury vote on death and replaced with 8-4 (less than eight votes for death = life);
- For life to death overrides, judges are required issue written orders and include the reasons for not accepting the jury's recommended death sentence;

The new statutes took effect on April 20, 2023.

There are several groups of Defendants that will be impacted by this change in the statutes (*Hurst* re-sentencings with and without mandates, cases since *Hurst* up through the unanimity change in 2017 and then up to April 19, 2023, and those cases from April 20, 2023, forward). No doubts by now, you've likely seen the arguments below and others from Brian Stull, Steve Bolotin, and Rachel Roebuck. The offerings below are not complete and you should look for updated arguments.

If a Defendant's case is pending re-sentencing (a *Hurst* case) based on an opinion from the Florida Supreme Court, you should consider arguing that the order and mandate of the FSC, granted your client a capital resentencing in accord with the sentencing procedure required by *Hurst v. State*, 202 So. 3d 40, 57 (2016) (holding that "before a trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death"). Even though the FSC receded from this holding in *State v. Poole*, 297 So. 3d 487 (Fla. 2020), the mandate in your client's case should require the trial court to follow *Hurst v. State*. See *State v. Okafor*, 306 So.3d 930, 936 (2020) (holding a trial court may not "alter or evade the mandate of an appellate court"). Further, the law of the case doctrine requires the same result. See *Fla. Dept. of Transp. v. Juliano*, 801 So.2d 101, 106 (Fla. 2001). In addition to these rules, the doctrine of res judicata provides that, after a judgment has become final, "a change in the applicable rule of law from a later appellate decision in an unrelated case is not a ground for relief from the prior judgment[.]" *Theisen v. Old Republic Insurance Co.*, 468 So.2d 434, 434 (Fla. 5th DCA 1985).

If a Defendant's case is pending re-sentencing because a trial court or PCR court ordered it pursuant to *Hurst* and the State appealed that ruling but withdrew it or didn't appeal it, that Defendant should still get the benefit of unanimity despite the new statute and *Poole*. Under *Hurst v. State*, that Defendant could not be sentenced to death without the jury unanimously finding at least one aggravating factor, finding that sufficient aggravating factors exist to warrant a death sentence, finding that the existing aggravating factors outweigh the existing mitigating circumstances, and finding that he should be sentenced to death. Indeed, shortly after this decision, the Florida Legislature changed the law to comply with *Hurst v. State*. See Laws 2017, c. 2017-1, §1 (modifying Florida Statute 921.141 (2)(b)). Res judicata bars re-litigation of issues decided on final judgments (un-reversed), from any court: See *McGregor v. Provident Trust Co. of Philadelphia*, 162 So. 323, 327 (Fla. 1935) (citing *Black* on Judgments (2d Ed.) vol. 2, §504). Florida Courts have faithfully applied this doctrine even where, as here, subsequent appellate decisions have changed the law on which the final judgment had been based. "After a judgment has become truly final,

a change in the applicable rule of law resulting from a later appellate decision in an unrelated case is not a ground for relief from the prior final judgment[.]" *Theisen v. Old Republic Insurance Co.*, 468 So.2d 434 (5 DCA 1985). A court may "regret that [a party] was frustrated by the timing of the supreme court's decisions, but [it] cannot grant relief from the application of the law as it existed at the time" a judgment became final. *Petrysian v. Metro. Gen. Ins. Co.*, 672 So. 2d 562, 563 (5 DCA 1996) (citing Theisen for the proposition that a "change in the applicable rule of law resulting from a later appellate decision in an unrelated case is not a ground to vacate a final order"); *Fox v. Timepayment Corp.*, 316 So.3d 818, 818 (5 DCA 2021) (citing *Petrysian*, 672 So.2d at 563 (citing Thiesen, 468 So.2d at 435-36)); *Segall v. Wachovia Bank*, N.A. as trustee for J.P. Morgan Mortgage Trust, 356 So.3d 841 (4 DCA 2023) (citing *Petrysian* for the identical proposition); *Pinder v. State*, 217 So.3d 130, 133 (3 DCA 2017) (critiquing prisoner claim made "contrary to the judicial rule that a change in the law from a later appellate court is not a ground to vacate a final order" and citing *Petrysian* for this proposition). There can be no question that the PCR or trial court's decision granting *Hurst* relief was a final order and "final judgment," barring further litigation on the issues decided. State v. Jackson, 306 So.3d 936, 942 (Fla. 2020) (rejecting State's argument that the ongoing resentencing commenced after *Hurst* relief granted renders the judgment affording relief non-final, because, inter alia, in granting post-conviction relief, all judicial labor is complete and a new proceeding commences).

Under the Equal Protection Clause of the Fourteenth Amendment, the "State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 447 (1985). See U.S. Const. amend. XIV; Fla. Const., Art. I, §2. The change to Florida's capital sentencing scheme, if applied to this group of Defendants would be arbitrary.

If you have a client with a case pending since *Hurst* or get a client with a post-4/19/23 incident date, your arguments will be different and addressed further in the future.

F KENNEDY AND BUFORD!

As of about 20 minutes before I started typing this, Governor DeSantis signed CS/CS/HB 1297 (2023), the capital sexual battery death penalty bill, into law. This amended §794.011, Fla. Stat., amended §924.07, Fla. Stat., and created §921.1425, Fla. Stat.

Here are some of the highlights:

- The law now permits the death penalty for capital sexual battery and possibly attempted capital sexual battery;
- For a sentence of death the jury must:
- Unanimously find at least two aggravating factors and identify them;
- Determine whether sufficient aggravating factors exist for a death sentence;
- Determine whether aggravating factors exist which outweigh the mitigating circumstances found to exist;
- Determine whether the Defendant should be sentenced to life imprisonment without the possibility of parole or to death.

AGGRAVATING FACTORS INCLUDE: The capital felony was committed by a person designated as a sexual predator pursuant to §775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed or the capital felony was committed by a sexual offender who is required to register pursuant to §943.0435 or a person previously required to register as a sexual offender who had such requirement removed. So if a Defendant gets relief in a case that caused him/her to be labeled as a sexual predator or offender and that designation is removed, may the State still use it as an aggravator???

The Defendant knowingly created a great risk of death to one or more persons such that participation in the offense constituted reckless indifference or disregard for human life. Seriously??? How many cap sex batteries are going to have this? How many cap sex battery cases involves a bomb, an airplane crash, the firing of an automatic weapon, or a poisoning? WTF?

The capital felony was committed for pecuniary gain. I mean…I can't. I just can't. Come on!

The victim of the capital felony was particularly vulnerable due to age or disability, or because the defendant stood in a position of familial or custodial authority over the victim. While I'm pretty sure this won't include the elderly

as in §921.141, I do get an immediate sense of doubling and/or violating the 8th's protection against an automatic death penalty with *Woodson v. North Carolina*.

VICTIM IMPACT: Once the prosecution has provided evidence of the existence of two or more aggravating factors, the prosecution may introduce, and subsequently argue, victim impact evidence to the jury, which is to be designed to demonstrate the victim's uniqueness as an individual human being and the physical and psychological harm to the victim. A crying child on the witness stand that you might not even have had the opportunity to depose should provide for some clenching moments.

It's got the 8-4 jury vote, just like §921.141, Fla. Stat.

If these laws are declared unconstitutional under *Kennedy* or *Buford*, the Defendant shall be resentenced to life in prison without the possibility of parole.

The state may appeal from the sentence in a case of capital sexual battery on the ground that it resulted from the circuit court's failure to comply with sentencing procedures under §921.1425, Fla. Stat., including by striking a notice of intent to seek the death penalty, refusing to impanel a capital jury, or otherwise granting relief that prevents the state from seeking a sentence of death.

The law applies to those cases that occur on or after October 1, 2023.

THERE ARE STILL NO JURY INSTRUCTIONS

There are no jury instructions to address these new statutes. The previously proposed jury instructions had a comment due date of May 12, 2023. That date was eliminated and new proposals will be published with a due date for comments sometime in June. If you need a continuance because of the lack of jury instructions, consider citing to *Perriman v. State*, 731 So.2d 1243, 1246 (Fla. 1999), in which the Florida Supreme Court described the importance of standard jury instructions. See also *Holley v.State*, 423 So.2d 562, 564 (Fla. 1982) ("Florida standard jury instructions…are already written, well known by all judges and lawyers, and in a form of which judicial notice can be taken."). The FSC emphasized the importance of proper jury instructions as being essential to a fair and impartial jury in *Daniels v. State*, 121 So. 3d 409, 417 (Fla. 2013) (quoting *State v. Delva*, 575 So. 2d 643, 644 (Fla. 1991)).

If you have questions or concerns, about the new statutes or jury instructions, please, do not hesitate to reach out to me at pmills@pd10.org.

PETE MILLS is an Assistant Public Defender in the 10th Judicial Circuit, Bartow, in the trial unit. He is qualified to handle capital trials. In addition to his work as an APD, Pete has worked at the Office of the Capital Collateral Representative (CCR) and has handled personal injury cases. He is a 1993 graduate from the Valparaiso University School of Law. He may be reached at 863/534-4327.

From the Pits

A Closed Mouth Doesn't Get Fed

by Denis deVlaming

Defense lawyers are often confronted with a dilemma. Whether to recommend to a client to cooperate with the government at or shortly after his arrest or conduct discovery to see whether the government has a case or whether a lenient disposition can be obtained. Often times, the decision is very time sensitive because law enforcement wants the client to provide assistance immediately before other codefendants find out about the arrest. If too much time goes by, the client is "compromised" and of little value to the police.

The decision hinges on the frank honesty of the client when debriefing him. Almost always, a "come-to-Jesus" discussion needs to be had where the client understands that the best advice that we can give to them is based on an unfiltered discussion of the facts and the client's involvement, if any, in the case that led to his arrest. If, after thoroughly debriefing the client, there appears to be overwhelming evidence of his involvement in criminal activity and that the charge or charges for which he was arrested are provable, then the client is saddled with making the final decision on whether to cooperate or circle the wagons.

If the client chooses not to cooperate with law enforcement and pursue a plea of not guilty, there is an expression among prosecutors and police detectives: "A closed mouth doesn't get fed." When a client makes the decision to roll the dice and he no longer becomes valuable to law enforcement because his arrest is known throughout his peer community, his decision is usually irreversible. So if the cards are clearly stacked against him he may consider another expression: "Get fed or go hungry."

DENIS M. DE VLAMING, a Board Certified criminal defense attorney in Clearwater, has practiced criminal law exclusively since 1972. He has been on FACDL's Board of Directors since its inception in 1988 and is a Charter Member of the organization. He is a past president of FACDL.

The Silly Nonsense of "Field Sobriety Exercises"

by Michael Kessler

We have all seen them. Police have some poor unfortunate driver on the side of the road doing some strange gymnastic tricks, trying to convince the officer that they are safe to drive home. We all suspect that the efforts are hopeless, and the driver is soon headed to jail. But we might not really understand why. Here's why: The exercises don't prove anything.

The essence of the DUI law in Florida is that it is a crime to drive when under the influence of alcohol, drugs or even prescription medicines, when affected to the extent that one's *normal faculties* are impaired. Normal faculties include but are not limited to one's ability to see, hear, walk, talk, judge distances, operate a vehicle, make decisions, act in emergencies, and to generally carry out the mental and physical tasks of daily life. That's not my definition. That is the definition of normal faculties that the Florida legislature put into the law defining the crime of DUI. It is the exact definition that every Florida judge reads to every Florida Jury in every DUI trial.

The standardized field sobriety exercises utilized by Florida police include standing on one leg, walking heel to toe, and following a pen or flashlight without turning one's head. What is the point of each? Hard to say. The one leg stand probably ought to examine one's balance. The heel to toe walk might illustrate one's balance or coordination. Both might shed light on one's ability or willingness to remember and obey a detailed list of instructions. None of those things are included in the law's definition of normal faculties.

What about the eye test, you might ask. Like the others, it involves a detailed list of steps, none of which one would ever do while driving. Stand with your feet together and your hands by your side. Now follow the tip of the pen or flashlight with your eyes only, without turning your head. That part cracks me up. Can you imagine driving in today's traffic without turning your head? The crash would probably happen at the very first intersection! This exercise is actually referred to as HGN. Some call it horizontal gaze nystagmus. I call it Here Goes Nothing. The idea is that, under certain circumstances, the occurrence of nystagmus (an involuntary jerking of the eye muscle) might indicate an excessive amount of alcohol in one's blood stream.

One failing of this exercise is that it is invalid (of no value scientifically or otherwise) unless administered by the officer and scored or graded by the officer exactly according to protocol. So says the U.S. Department of Highway and Motor Vehicles, the originator and most significant proponent of this exercise. More importantly, courts and scientists across the country (and beyond) have recognized more than three dozen non-alcohol causes of the very same symptom.

Each of these exercises require the driver to stand in an unusual and abnormal posture while being instructed by the officer. Each of these exercises require the driver to perform an unusual and abnormal physical task. Abnormal stance or positioning. Abnormal task. To determine whether normal faculties are impaired? These

SEE PAGE 43

MICHAEL KESSLER is a Board Certified Criminal Trial Lawyer and the co-author of *The DUI Book: A Citizen's Guide to Fighting a Drunk Driving Case*. He is a longtime member of the Florida Association of Criminal Defense Lawyers, and a Founding Member of DUI Defense Lawyers Association. He is the father of two non-lawyers, and the grandfather of two more, with another grandchild on the way. Among his proudest accomplishments are his admission pro hac vice into the Commonwealth of Pennsylvania, where he managed to get a first degree murder indictment dismissed, and his successful performance of the one-legged stand for thirty minutes while drinking single malt scotch without putting his foot down.

Does Section 827.071(5)(a) Violate Due Process?

by Richard Sanders

Suppose the legislature passed a law that provided that, with charges of possessing or viewing child pornography images under §827.071(5)(a), neither defendants nor defense counsel can view the images alleged to be child pornography, a prohibition enforced by felony charges? Any due-process problem there?

Second question: Are people like judges, court clerks and defense counsel (all at both trial and appellate levels), and jurors, and civilian trial witnesses, and defendants, all "part of a law enforcement investigation" as they fulfill their roles in the court system? If you say no, and if you think the first question asked above does raise a due-process issue, then you might think the argument made here has some merit and §827.071(5)(a) may be unconstitutional on its face.

This article is based on a brief I recently filed in the Second District. I think it's a pretty good argument in the abstract although it's unlikely to succeed as a practical matter, for obvious reasons. It may have been a stronger argument when §827.071(5) was first enacted but there is no evidence the statute has been, or will be, applied in the troublesome manner noted here (although that may be irrelevant to the due-process issues). The "intentionally view" version of the offense was added in 2011, along with the law-enforcement-investigation exception created in §827.071(5)(b);[1] the argument is probably the strongest as applied to this "view" version of the offense.

Cynics steeped in the legal-realism tradition might suggest a court can easily avoid all these problems by adopting a very broad (and, those cynics might say, wholly unreasonable, given the statutory language) definition for the phrase "part of a law enforcement investigation" in §827.071(5)(b). Paraphrasing a famous Holmes quote, those cynics might say "the law is whatever a court says it is"[2] and further point to the famous legal-realist law review article that notes there are so many recognized (and sometimes contradictory) rules of statutory construction, that a court can always find at least one rule to support whatever conclusion it wishes to reach.[3] Alternatively, when the legislature learns this issue is percolating in the courts, it could simply add that broad definition to §827.071(5)(b) and say "this is what we meant all along," thus mooting the issue.[4]

Being steeped in legal realism, I suspect this is exactly what will happen to this issue. Nonetheless, perhaps others, less cynical, can do something with it. In any event, it's interesting, in a law-school-exam kinda way (assuming one is interested in that sorta thing).

INTRODUCTION AND SUMMARY

Section 827.071(5)(a) makes it "unlawful for *any* person to knowingly possess, control, or intentionally view a[n image that] he or she knows to include child pornography" (emphasis added). The only statutory exception to this flat ban is in §827.071(5)(b): "Paragraph (a) does not apply to any material possessed, controlled, or intentionally viewed as *part of a law enforcement investigation*" (emphasis added). The emphasized phrase is not defined in the statute or case law.

This statute is unconstitutional on its face for two reasons:

1) It violates substantive due process because it outlaws acts that, not only do not further the State interests promoted by §827.071(5)(a), they actually undermine those interests (and make criminals of innocent people in the process). Possession and viewing of child pornography are banned in order to dry up the market for such materials, which promotes the State interest in preventing the harm to children that occurs from the production of the materials.[5] But §827.071(5)(a) makes it illegal to possess or view child pornography even if one does so

for a purpose that actually furthers, rather than hinders, that State interest (*e.g.*, the innocent-discoverer, who accidentally finds the images and takes them to police; and people involved in the criminal justice system who will inevitably have to possess or view the images as part of their jobs). Thus, the statute is not rationally related to its purpose because it bans too many entirely innocent activities (*i.e.,* activities the State has no legitimate interest in banning).

2) It violates procedural due process, and interferes with defendants' right to counsel, because it makes it illegal for both defendants and counsel to view the images defendants are charged with possessing or viewing, thus making it very difficult, if not impossible, to defend against those charges.

I first address the scope and meaning of §827.071(5) and then turn to the two due-process issues.

THE SCOPE AND MEANING OF SECTION 827.071(5)

Section 827.071(5)(a) creates three versions of the offense, possession, control and intentionally view. Although not defined in §827.071, possession is generally understood to mean one knows the item exists and intentionally exercises some control over it.[6] This definition has no time component; "the briefest moment of possession may be enough for a conviction."[7]

"Control" is not defined in §827.071 and, given that this is half of the definition of possession, it's not clear if this alternative adds anything to the section (5)(a) offense; can one "control" an item if one doesn't know it exists (*i.e.,* can one control an item one doesn't also possess)?[8]

The statutory definition of "intentionally view" is "to deliberately, purposefully, and voluntarily view. Proof of intentional viewing requires establishing more than a single [image] over any period of time."[9] There are no reported cases further interpreting this phrase but "any period of time" indicates that, to violate this part of the statute, a viewing need not last any longer than a possession. While "*intentionally* view" may limit liability for those who unexpectedly stumble upon an image they weren't seeking, an unintentional viewing can quickly morph into an intentional one as one lingers on the image to fully comprehend it (and, certainly, a second look, even if only to confirm the first look, is intentional).

Further, an illegal viewing can occur even if the viewer doesn't possess (*i.e.,* doesn't control) the image viewed. "Viewing" is not a lesser-included of possession. One can knowingly possess images without ever having viewed them, just as one can view images without possessing them; these are two separate ways to commit this offense.[10]

Section 827.071(5)(b) creates the only exception to a section (5)(a) offense: "Paragraph (a) does not apply to any material possessed, controlled, or intentionally viewed as *part of a law enforcement investigation*" (emphasis added). Nothing in the emphasized phrase is defined in the statute or case law. But the common-sense meaning of the phrase seems clear: A law enforcement investigation is an investigation initiated by an official agency that meets one of the various statutory definitions of law enforcement found in Florida statutes, for the purpose of determining whether some wrongdoing (often criminal in nature) has occurred; and, if so, whodunit?

The basic definition of "law enforcement officer" is contained in §943.10(1):

> any person who is elected, appointed, or employed full time by any municipality or the state or any political subdivision thereof; who is vested with authority to bear arms and make arrests; and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state. This definition includes all certified supervisory and command personnel whose duties include, in whole or in part, the supervision, training, guidance, and management responsibilities of full-time law enforcement officers, part-time law enforcement officers, or auxiliary law enforcement officers but does not include support personnel employed by the employing agency.

Note that nothing in this definition includes private citizens of any type or anyone (except bailiffs) who would normally be officially involved in trials or appeals. Other statutes contain definitions of LEOs as well, but none of those definitions include such persons either (although they sometimes expressly include people like prosecutors and their investigators, United States officials, military, and probation and correctional officers).[11]

The problem with this statute is obvious. For openers, consider the innocent-discoverer (*e.g.,* a computer tech is working on another's computer as part of the tech's business) and, upon discovering child pornography on the computer, she takes it to police to turn it in. She would have violated section (5)(a); she was not "part of a law enforcement investigation" when she possessed and viewed these images. This is a common fact pattern in child-pornography-possession cases; many such cases begin when an innocent party discovers the images and calls, or takes the images to, authorities (sometimes after first seeking advice from another private party, who may also view the images).[12]

Violations could also be committed by defense counsel, the jurors, deputy clerks who handle the evidence during trial, any courtroom spectators who saw the exhibits after they are introduced, and the trial judge. Appellate judges and their staffs, and the attorney general's office, and appellate defense counsel, may also be at risk; it should be noted here that, in my experience, it is not unusual for an appellate record to contain copies of the images found to be child pornography by a jury. It's not clear if the trial prosecutors are at risk as well. Even if they are considered law enforcement officers for this purpose, is a trial "part of a LE investigation"? A trial is not generally understood to be a continu-

ation of an investigation but rather is a proceeding that comes some time after the investigation is completed (and after charges are filed, and after all pretrial proceedings are handled), to determine what exactly that investigation uncovered and its significance from the perspective of criminal law. One does not necessarily have to be a fan of the TV series *Law and Order* (and its opening) to recognize that the criminal justice system is generally seen as including two basic, and separate, components, the investigatory (law enforcement) and the prosecutorial, with the latter coming into play (and taking over the case) after the former has done its job.

This is the crucial question: What exactly does "part of a law enforcement investigation" include? As to innocent-discoverers, we could say that, even if they were not part of an investigation at the moment of discovery (because there was no investigation at that point), they can retroactively become part of the investigation that results after they took their discovery to police.[13]

But what happens when the innocent-discoverer testifies at trial and must view and identify what they discovered in order to get it into evidence? Are they part of a law enforcement investigation at this point? Are all the other court personnel, and defense counsel reviewing discovery and showing it to clients, also part of the same investigation? Not, I would suggest, under any common-sense understanding of that phrase.

Consider also this factual variation. Suppose a statute allows LEOs to openly carry department-approved firearms (including heavy weaponry) while they are officially "part of a law enforcement investigation." Would this allow them the openly carry, say, door-busting shotguns or high-powered automatic rifles into court as they testified? Or would courts likely say testifying in court is not "part of a law enforcement investigation" for this purpose?

One might assume it is understood that section (5)(a) doesn't apply to all these people. But the statute expressly provides for only the part-of-investigation exception in section (5)(b). This indicates the legislature recognized this potential problem but chose to deal with it in the limited fashion it did, which in turn indicates it did *not* intend to recognize exceptions for all the others noted above.

This conclusion is reinforced by perusing 1) the detailed exceptions the legislature provided for drug-possession offenses,[14] and 2) the many specific exceptions provided for the various offenses created in chapter 790 that deal with possessing or carrying firearms and weapons.[15] Note immediately that §§893.13(9)(e) and (h) create specific separate exceptions for "law enforcement officers in the course of an active criminal investigation" and "government employees acting in official capacity." Like the creators of *Law and Order*, the legislature obviously here distinguishes these two components of the criminal justice system. Thus, court clerks handling evidence and appellate records, courts and their staff, prosecutors and public defenders, *etc.,* are *not* "part of a law enforcement investigation" but rather are "government employees acting in official capacity" (who are *not* excepted in §827.071(5)(b)). And this in turn corroborates the point made earlier: Court proceedings are not "part of a law enforcement investigation" but rather are separate proceedings that *may* occur after the investigation is over.

Similarly, the various provisions in chapter 790 create express exceptions for, not only law enforcement,[16] but also for: judges;[17] items stored in one's home or business[18] or safely carried during travel;[19] items possessed or used for defense of self, others and property;[20] a "brief[] open[] display [not] in an angry or threatening manner;"[21] people engaged in mandatory evacuations and similar public emergencies;[22] employees of certain private businesses;[23] private security guards for certain businesses;[24] gun clubs, sportsmen and related businesses;[25] investigators and medical personnel employed by some public agencies;[26] "person[s] performing official duties;"[27] certain officials "engaged in training or other lawful activity within the scope of [their] employment;"[28] and those who manufacture weapons for, and sell them to, law enforcement agencies.[29] Here again, we see the recognized distinction between law enforcement activity and other types of activity that merit exceptional treatment.

In sum, the legislature knows how to provide for detailed exceptions to possession offenses in order to avoid the problems created by §827.071(5)(a). But it did not do so. We can also note here the exception allowed in the analogous federal statute, for those who "promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access [the child-porn images,] took reasonable steps to destroy [the images or] reported the matter to a law enforcement agency and afforded that agency access to [the images]."[30]

The lack of needed exceptions in section (5)(a) creates the two due-process problems noted above, to which we now turn.

SECTION 827.071(5)(A) VIOLATES SUBSTANTIVE DUE PROCESS BECAUSE IT IRRATIONALLY OUTLAWS MANY POSSESSIONS AND VIEWINGS THAT HINDER, RATHER THAN PROMOTE, THE STATE INTEREST THE STATUTE IS DESIGNED TO PROMOTE

Section 827.071(5)(a) creates a criminal-possession offense, *i.e.,* an offense based primarily, if not entirely, on the fact that the defendant possessed an item he cannot lawfully possess. There are many types of criminal-possession offenses. Some items (*e.g.,* nuclear weapons) cannot be possessed by any member of the general public. Some items can be possessed by many but not by some specific groups (*e.g.,* felons and firearms). Some items can be possessed by limited groups of people for limited purposes (*e.g.,* drugs, which can be lawfully possessed with a prescription or for such valid purposes as health care, scientific research or law enforcement).[31]

With many criminal-possession offenses, the prosecution needs to prove only two basic elements, 1) defendant-

possessed-item and 2) item-is-banned-item-X. Some offenses also include attendant-circumstance elements (*e.g.,* defendant is a felon), and some require proof the defendant knew the item was an X.[32] And with some offenses, possession of the item itself is lawful and becomes unlawful only if accompanied by an additional element of knowledge or intent regarding its ultimate use (*i.e.,* to cause the harm the criminal-possession statute is intended to prevent).[33]

Although the very concept of criminal-possession offenses — especially those with no element of intent-to-harmfully-use — has generated some controversy, such laws are usually found to be facially constitutional.[34] There are exceptions. Courts sometimes find a substantive-due-process violation if an offense bans mere possession of an item that *can* cause harm but also has legitimate uses as well, if the offense doesn't also require proof that the defendant intended to, or did, use the item to cause that harm. Several Florida cases say such laws may fail the basic substantive-due-process test of being rationally related to a valid State interest because they "go[] beyond [what is] necessary to…protect th[at State] interest," *i.e.,* "there [are] other methods by which [that interest can be served other than] outlawing [the item's mere] possession."[35]

Put another way, laws that "prohibit the mere possession of [an item] regardless of whether [it was] used legitimately" may "interfere[] with [the] rights of [those] who use [the item for] *non-criminal activities*."[36] Thus, a criminal-possession law may infringe on one's right to engage in "*entirely innocent activities*"[37] if it "fails to require proof [of] an intent to put [the banned item] to unlawful use."[38]

While courts do not define phrases like *non-criminal activities* or *entirely innocent activities*, in context the meaning is clear: They are activities the legislature cannot ban because they do not, in themselves, cause a harm that would justify that ban.

These innocent-activity cases expose another point about criminal-possession offenses: They are "anomalous [because p]ossession of [the banned item] itself is not the law's real concern."[39] Rather, possession is banned "because the government wants to preclude [the item's] use" and outlawing possession "allows police to arrest [defendants] before [the item] can [be used to cause harm]."[40] Viewed this way, a criminal-possession offense is akin to an attempt offense; both are designed to catch criminal acts before the harm actually occurs.[41] Unlike the attempt offense, a criminal-possession offense does not *always* require proof of an intent to cause harm or to commit a greater crime. But, as noted above, if the banned item has many innocent (*i.e.,* non-harmful) uses, some further intent element *may* be constitutionally required, depending on the facts in the case.

With a few criminal-possession offenses, possession of the item is banned, not for the downstream (future) purpose of preventing its harmful use, but for the upstream (past) purpose of eliminating the market that provides that item to the possessor. Thus, possession of child pornography is banned in order to prevent the harm to children that occurs during production of the material, by "dry[ing] up the…market" for the product.[42] But even with these offenses, possession is outlawed to promote a social interest that goes beyond the prevention of any harm that results from the mere possession of the item itself.

Applying these principles to §827.071(5) compels the conclusion that this statute outlaws possessions and viewings that go well beyond what is reasonably related to the elimination of the harm the statute is meant to prevent (the harm that results from producing the images). Those who stumble upon child-pornography images and turn them into authorities are not trying to further or encourage the harm that results from the production of the images; they are trying to achieve the opposite result. Similarly, those involved in the legal system also have no malevolent intent; they are just doing their jobs. It is utterly irrational, and an outlawing of entirely innocent activities, to make all of these people criminals under section (5)(a).

And these problems will arise *every* time a child-pornography-possession charge is filed. Even if there is no innocent-discoverer, there will always be others involved in the system who must deal with the charges (including defense counsel and defendants themselves, who must either risk prosecution — or additional prosecution — or avoid looking at the items defendants are charged with possessing or viewing). Indeed, for every defendant, there will be (especially if the case goes to trial) several multiples of people who will have to possess or view the images at some point during the natural course of the trial proceedings.

A court cannot remedy this problem by reading into section (5)(a) exceptions for such persons. As the examples of §893.13(9) and chapter 790 establish, the legislature knows how to include detailed exceptions in a criminal-possession statute if it wishes. Again, in §§893.13(9)(e) and (h) the legislature expressly distinguished between exceptions for "law enforcement investigations" and for "government employees acting in official capacity" (and, clearly, neither private defense counsel nor defendants themselves fall into either category). The same is true with the various chapter 790 exceptions.

The only conclusion to draw as to §827.071(5) is that the legislature chose not to include such exceptions in it. For a court to now include them would amount to judicial legislating, a rewriting of — indeed, a significant entirely new addition to--the plain language of the statute. This, a court cannot do.[43]

IV. SECTION 827.071(5)(A) VIOLATES PROCEDURAL DUE PROCESS, AND INTERFERES WITH DEFENDANTS' RIGHT TO COUNSEL, BECAUSE IT MAKES IT A CRIME FOR DEFENDANTS AND THEIR COUNSEL TO VIEW THE IMAGES DEFENDANTS ARE CHARGED WITH POSSESSING

While this issue is part of the substantive-due-process issue raised above, there is also a second due-process problem here, which includes a violation of defendants' right to assistance of counsel. The only

way defendants and their lawyers could know exactly what defendants are charged with possessing or viewing is to view for themselves the images the State believes are child pornography; but viewing them, even for this purpose, is a crime under §827.071(5)(a). This situation makes it difficult, if not impossible, for defendants and their lawyers to defend the charges. At the most basic level, how could a lawyer move for a judgment of acquittal, or argue to the jury that the images do not met the statutory definition of child pornography, if she cannot view the images?

I can find no cases with remotely similar facts but "the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process…."[44] Procedural-due-process, and right-to-counsel, violations have been found when the State denies counsel the right to make a closing argument;[45] irrationally restricts defendants' ability to fully testify (like any other witness) in their own defense;[46] and unreasonably interferes with defendants' ability to obtain and call witnesses for the defense.[47] Surely, criminalizing the mere viewing of the crucial evidence against the defendant is an even more egregious violation of these fundamental rights.

This problem cannot be remedied by trial courts simply issuing orders allowing counsel and defendant to view the items. Nothing in §827.071 authorizes courts to do that. I can find no authority for the proposition that courts can, in effect, grant preemptive amnesty for planned violations of criminal statutes enacted by the legislature.

THE ABSURD-RESULT RULE AND CONCLUSION

Finally, these problems cannot be eliminated by simply invoking the absurd-result rule of statutory construction: "[Courts] should not interpret a statute in a manner resulting in unreasonable, harsh, or absurd consequences."[48] One advancing this argument is not seeking an "interpretation" of §827.071(5); rather, one is asking a court to apply its plain language as written. A "statute must be given its plain and obvious meaning" and, if "the language of the statute is 'clear and unambiguous and conveys a clear and definite meaning' there is no need to resort to statutory construction."[49] Thus, the absurd-result rule doesn't apply here.

Further, "[w]ith respect to criminal statutes, '[o]ne of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter," a "principle [that] ultimately rests on the due process requirement that criminal statutes must say with some precision exactly what is prohibited."[50] "Thus, when criminal statutes are subject to competing, albeit reasonable, interpretations, they must be 'strictly construed…most favorably to the accused.'"[51]

In addition, the result of a court adopting this reading of §827.071(5) would be to declare it unconstitutional. This result is not unreasonable, harsh or absurd. To the contrary, not only is this result somewhat common (see cases cited in endnotes 35-38), any *other* result here would be unreasonable, harsh and absurd: A law that violates due process in this manner *must* be declared invalid; it is a court's duty to do so. What would be unreasonable, harsh and absurd in the present situation is a court's doing anything other than that, *e.g.,* interpreting the (5)(b) exception to include all the above-noted people, who are clearly *not* "part of a law enforcement investigation" under any common-sense understanding of that phrase.

An example of the Florida Supreme Court using the absurd-result rule to add additional language to a criminal statute is found in *Polite*, in which the Court held "knowledge that a victim is a law enforcement officer is an essential element of the offense of resisting an officer with violence under section 843.01" and further asserted:

> [I]t would be incongruous to require knowledge of the officer's status for resisting an officer without violence, a first-degree misdemeanor, but not require knowledge of the victim's status for resisting an officer with violence, a third-degree felony. Concluding otherwise would arguably lead to an unreasonable and harsh result, where a defendant's required mental state for a felony offense is less than that required for a permissive lesser included misdemeanor offense.[52]

The issue with §827.071(5) is easily distinguishable. Section (5)(b) requires much more modification than simply reading a *knowledge* mental element (for an attendant-circumstance element of an offense) into a statute that doesn't expressly contain one (which is a fairly common occurrence when needed to avoid potential due-process problems[53]).

In sum, the obvious problems created by §827.071(5) cannot be eliminated unless we thoroughly rewrite the statute to provide exceptions for all the innocent actors noted above. This is a job for the legislature. A court must interpret the statute as written and declare it facially unconstitutional. 🏛

[1] Ch. 2011-220, §15, Laws of Fla.

[2] "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Oliver Wendell Holmes, The Path of the Law, 10 *Harv. L.R.* 457 (1897).

[3] Karl Llewellen, "Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed," 3 *Vanderbilt L.R.* (1950).

[4] Cf. §§794.005 and 893.101(1), Fla. Stat. (2022).

[5] *Osborne v. Ohio*, 495 U.S. 103, 109–10 (1990).

[6] See, e.g., *In re Standard Jury Instructions in Criminal Cases-Report 2017-03*, 238 So. 3d 182, 188 (Fla. 2018); *Dawkins v. State*, 547 A.2d 1041, 1045 (Md. 1988) (collecting cases).

[7] *United States v. Teemer*, 394 F.3d 59, 63 (1st Cir. 2005); accord, *State v. Eckroth*, 238 So. 2d 75, 76-77 (Fla. 1970) (affirming marijuana-possession conviction based on defendant's taking a puff from communal pipe; defendant's "control [over the drugs] need not be of great duration" and, when defendant "received the pipe [and] passed it on[, he] possess[ed] the pipe and the [drugs]"); *State v. Thornton*, 327 So. 2d 227 (Fla. 1976) (applying same rules to sharing marijuana joint).

This point is also illustrated by reverse-sting cases, in which courts affirm drug-possession convictions when the defendant is arrested moments after taking possession of the drugs from undercover officers. E.g., *Campbell v. State*, 577 So. 2d 932 (Fla. 1991); *Smith v. State*, 578 So. 2d 366 (Fla. 3d DCA 1991); *Lamanto v. State*, 547 So. 2d 1248 (Fla. 4th DCA 1989); *Angel v. State*, 450 So. 2d 292 (Fla. 4th DCA 1984).

[8] Strictly speaking, one can be said to control

something without knowing it exists if one possesses an opaque package without knowing its contents. Thus, people like mail carriers routinely control, in a sense, both the packages they deliver and their contents, even if they don't know what's inside. But if this is what "control" means in §827.071(5)(a), then the statute has another serious constitutional problem (although that one may arise only on an as-applied basis, if the State ever filed charges on such facts).

[9] §827.071(1)(f), Fla. Stat. (2022).

[10] The standard jury instructions for this offense recognize this. Fla. Std. Jury Instr. (Crim.) 16.11.

[11] E.g., §§784.07(1)(d); 790.001(8). Fla. Stat. (2022).

[12] E.g., *Jenrette-Smith v. State*, 114 So. 3d 427, 429 (Fla. 2d DCA 2013) (informant delivers images to police); *Elias v. State*, 308 So. 3d 1127, 1129 (Fla. 5th DCA 2020) ("deputies received a tip"); *Strouse v. State*, 932 So. 2d 326, 327 (Fla. 4th DCA 2006) (defendant's girlfriend discovers images on their joint computer and, after consulting with two friends, takes computer to police).

[13] Note here *Stanton v. State*, 746 So. 2d 1229, 1231 (Fla. 3d DCA 1999), in which a drug dealer gave Stanton a free-sample cocaine rock, which he immediately took to police, offering to help arrest the dealer. Reversing his drug-possession conviction, the court said a possession offense is not proven if a defendant "takes temporary possession of contraband for the sole purpose of turning it into the authorities, and promptly does so." *Id*. In dicta, the court also said "no crime is committed where a person takes temporary control of contraband in order to make a legal disposition of it by throwing it away, destroying it, or giving it to police." *Id*. The Fourth District agreed with this rule in principle while also finding the rule didn't apply in the pending case. *Ramsubhag v. State*, 937 So. 2d 1192 (Fla. 4th DCA 2006). Cases from other jurisdictions are split on this issue. Cf., e.g., *State v. Payne*, 2012 WL 9494166 (Idaho Ct.App. Aug. 2, 2012) and *Commonwealth v. Adkins*, 331 S.W.3d 260 (Ky. 2011) with *United States v. Holloway*, 744 F.2d 527 (6th Cir. 1984) and *State v. Martin*, 404 P.3d 375 (Kan.Ct.App. 2017) (unpublished).

[14] Section 893.13(9), Fla. Stat. (2022) provides:

> The provisions of subsections (1)-(8) are not applicable to the delivery to, or actual or constructive possession for medical or scientific use or purpose only of controlled substances by, persons included in any of the following classes, or the agents or employees of such persons, for use in the usual course of their business or profession or in the performance of their official duties:
> (a) Pharmacists.
> (b) Practitioners.
> (c) Persons who procure controlled substances in good faith and in the course of professional practice only, by or under the supervision of pharmacists or practitioners employed by them, or for the purpose of lawful research, teaching, or testing, and not for resale.
> (d) Hospitals that procure controlled substances for lawful administration by practitioners, but only for use by or in the particular hospital.
> (e) *Officers or employees of state, federal, or local governments acting in their official capacity only, or informers acting under their jurisdiction*.
> (f) Common carriers.
> (g) Manufacturers, wholesalers, and distributors.
> (h) *Law enforcement officers for bona fide law enforcement purposes in the course of an active criminal investigation*.
>
> (Emphasis added).

[15] See §§790.052, 790.053(1), 790.061, 790.10, 790.115(2)e) and (3), 790.145(2), 790.15(4)(a) and (b), 790.151(5), 790.16(2), 790.165(4), 790.166(7) and (8), 790.225(2), 790.23(2), 790.25(3), and 790.31(3), Fla. Stat. (2022).

[16] §§790.052, 790.145(2)(a), 790.165.(4), 790.25(3)(d) and 790.31(3)(a).

[17] §790.061.

[18] §§790.25(3)(m) and (n).

[19] §§790.25(3)(l) and (m).

[20] §§790.053(2), 790.15(4)(a), 790.151(5).

[21] §790.053(1).

[22] §790.01(3)(a).

[23] §790.145(2)(b).

[24] §790.25(3)(f).

[25] §§790.25(3)(g)-(k).

[26] §§790.25(3)(o)-(q).

[27] §790.15(4)(a).

[28] §§790.165(4), 790.166(7), and 790.25(3).

[29] §§790.31(3)(b) and (c).

[30] 18 U.S.C. §2252(3) (2022).

[31] §893.13(9), Fla. Stat. (2022).

[32] E.g., Chicone v. State, 684 So. 2d 736 (Fla. 1996), superseded by statute, §893.101, Fla. Stat. (2002).

[33] For instance, the Florida offense of possession of burglary tools requires proof the defendant possessed the item with the "intent to use [it] to commit [a] burglary." Fla. Stat. §810.06 (2022).

[34] See Wayne LaFave, *Substantive Criminal Law*, §5.1 (3d ed. 2021).

[35] *Delmonico v. State*, 155 So. 2d 368, 370 (Fla. 1963).

[36] *State v. Saiez*, 489 So. 2d 1125, 1127-29 (Fla. 1986) (striking law banning possession of credit card embossing machines because, without an intent-to-defraud element, it was "not reasonably related to achieving [the] legitimate legislative purpose" of preventing credit card fraud) (emphasis added).

[37] *State v. Walker*, 444 So. 2d 1137, 1138 (Fla. 2nd DCA 1984) (striking law banning possessing prescription drugs in non-original container because, "[w]ithout evidence of criminal behavior, the [law] lacks any rational relation to the legislative purpose of controlling drug[s]") (emphasis added), opinion adopted, 461 So. 2d 108 (Fla. 1984).

[38] *Delmonico*, 155 So. 2d at 370 (striking law that outlawed possessing spearfishing equipment in certain waters); see also *State v. Thomas*, 133 So. 3d 1133, 1134-36 (Fla. 5th DCA 2014) (striking law outlawing possession of "counterfeit payment instrument" because it had no intent-to-defraud element and thus "criminalizes behavior that is otherwise inherently innocent").

[39] Charles H. Whitehead and Ronald Stevens, "Constructive Possession in Narcotics Cases: To Have and Have Not," 59 *Va.L.R.* 751, 753 (1972).

[40] *Id*.

[41] See *Shaw v. State*, 677 P.2d 259, 260 (Alaska Ct.App. 1984) (asserting felon-in-possession statute "is analogous to an attempt statute except that it permits punishment before [defendant] has an opportunity to use the handgun for a criminal purpose"); People v. Persce, 97 N.E. 877, 878–79 (N.Y. 1912) (noting law outlawing possession of certain weapons is a "proper and efficient method[] to prevent the commission of crime [while using such] weapons [by] mak[ing] their possession [illegal] without delaying until [a crime is committed]").

[42] *Osborne v. Ohio*, 495 U.S. 103, 109–10 (1990). Similarly, a possessor of stolen property may use it for the same innocent activity as a lawful possessor, e.g., a lawn mower is used to cut grass regardless of whether it was stolen. The harm to be prevented by making this possession illegal is the upstream harm of the original theft.

[43] See, e.g., *Sult v. State*, 906 So. 2d 1013, 1022 (Fla. 2005) (refusing to read intent-to-deceive element into statute that outlawed wearing any apparel with law enforcement insignias that "could deceive a reasonable person into believing such item is authorized by any of the agencies described"; "there is no logical way to read a specific intent element into the statute as it is currently written. The plain language of the statute…requires [defendants] to merely possess the general intent to wear or display the item"; "we could not construe [this statute] otherwise without effectively rewriting it, and we decline to legislate in that fashion") (citation and internal quotation marks omitted); *Wyche v. State*, 619 So. 2d 231, 236 (Fla. 1993) (refusing to read intent-to-engage-in-prostitution element into city ordinance that outlawed "loitering under circumstances merely indicating the possibility of such intent"; "it is impossible to preserve the constitutionality of th[is] ordinance without effectively rewriting it, and we decline to 'legislate' in that fashion. Courts may not go so far in their narrowing constructions so as to effectively rewrite legislative enactments").

[44] *Herring v. New York*, 422 U.S. 853, 857 (1975).

[45] *Id*.

[46] *Brooks v. Tennessee*, 406 U.S. 605 (1972); *Ferguson v. Georgia*, 365 U.S. 570 (1961).

[47] *Webb v. Texas*, 409 U.S. 95 (1972).

[48] *Florida Dept. of Envtl. Prot. v. ContractPoint Florida Parks, LLC*, 986 So. 2d 1260, 1270 (Fla. 2008).

[49] *Id*. at 1265 (citations omitted).

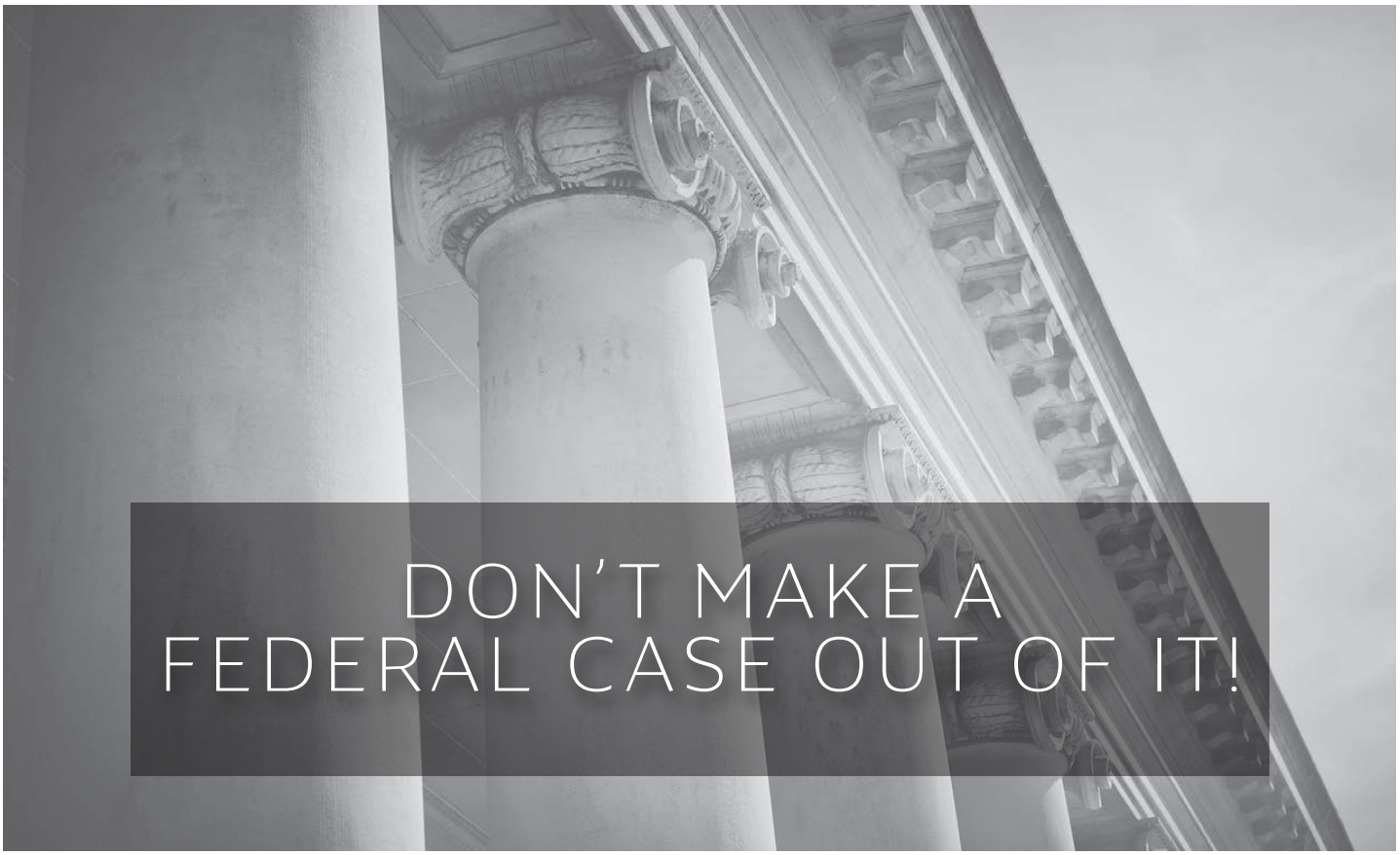
[50] *Polite v. State*, 973 So. 2d 1107, 1111 (Fla. 2007) (citations omitted).

[51] *Id*. (citations omitted).

[52] 973 So. 2d at 1108, 1114.

[53] E.g., *State v. Giorgetti*, 868 So. 2d 512 (Fla. 2004); *State v. Mancuso*, 652 So. 2d 370 (Fla. 1995)

RICHARD SANDERS graduated from the University of Pennsylvania Law School in 1982. He has worked in the appellate division of the public defender's office, 10th circuit, since 1996.



DON'T MAKE A FEDERAL CASE OUT OF IT!

by Lisa Call

GUIDELINES COMMENTARY: EN BANC DEFENSE WIN

United States v. Dupree,
57 F.4th 1269 (11th Cir. 2023) (en banc):

Dupree was sentenced as a career offender based partly on his conviction for conspiring to possess with intent to distribute a controlled substance in violation of 21 U.S.C. §846. On appeal, he argued that his §846 conspiracy conviction did not count as a controlled substance offense under the Guidelines because the plain language of the career offender guidelines, USSG §4B1.2, omitted inchoate offenses from the definition of "controlled substance offense." Further, Dupree argued that Application Note 1, which included inchoate crimes, was unenforceable because it was inconsistent with §4B1.2's plain text.

The Eleventh Circuit granted *en banc* review and held that the Supreme Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), applies to commentary's interpretation of the Guidelines. Therefore, when the text of a Guideline, like the definition of a "controlled substance offense" in §4B1.2(b), is unambiguously plain, there is no occasion to resort to the commentary. Because the definition of "controlled substance offense" unambiguously does not include inchoate offenses, the Court vacated Dupree's career-offender sentence and remanded the case for resentencing.

ASIDE: The Sentencing Commission has proposed amending the Career Offender definitions to move the sentence including inchoate offenses from the commentary into the text of the guidelines, so stayed tuned for further developments.

EXTRATERRITORIALITY

United States v. Rolle,
____ F. 4th _____,
2023 WL 2944940
(11th Cir. Apr. 14, 2023)

The Court affirmed the district court's denial of Mr. Rolle's motion to dismiss the indictment. Mr. Rolle was charged with one count of conspiracy to encourage and induce aliens to enter the United States, multiple counts of encouraging and inducing aliens to enter the United States, and one count of conspiracy to allow, procure, and permit aliens to enter the United States. Rolle moved to dismiss the indictment, arguing that it failed to state a crime because his conduct occurred outside the United States. The Court disagreed, and, as a matter of first impression, held that §§1324(a)(1)(A)(iv), (1)(A)(v)(I), and 2(B)(ii), apply extraterritorially.

HEALTH CARE FRAUD

United States v. Scott,
61 F.4th 855
(11th Cir. 2023)

Scott was sentenced to 120 months in prison for conspiracy to commit healthcare fraud, paying kickbacks in connection with a federal healthcare program, and conspiracy to pay and receive healthcare kickbacks. The charges arose from Scott's involvement in the submission of claims to Medicare for

genetic cancer-screening tests that were not covered by Medicare. On appeal, Scott argued that 1) the indictment failed to allege a crime because Medicare covers such testing and 2) the evidence at trial was insufficient to prove his guilt. The Eleventh Circuit stated that although Scott did not bring up sufficiency of the indictment before or during trial, under the plain error doctrine, he could raise the indictment defect on appeal. Nonetheless, the Court held that given the statutory and regulatory landscape, it was clear that Medicare was not required to cover the testing and the indictment was therefore sufficient to charge Scott with healthcare fraud. The Court also held that even if Scott had shown Medicare generally covered cancer-screening testing, he did not object to the instructions given by the district court on healthcare fraud, nor did he request specifical instructions. Finally, the Court found that there was sufficient evidence for the jury to find Scott willfully intended to defraud Medicare.

United States v. Esformes,
60 F.4th 621
(11th Cir. 2023)

Esformes was convicted of healthcare fraud, illegal kickbacks, and money laundering. After Esformes filed his appeal, then-President Donald Trump commuted Esformes' term of imprisonment to time served but "le[ft] intact and in effect the remaining three-year term of supervised release with all its conditions…." The Eleventh Circuit held that although a presidential commutation renders Esformes' appeal of his prison sentence moot, it does not otherwise affect his appeal. The Eleventh Circuit also held that the district court did not abuse its discretion when it declined to dismiss the indictment or disqualify the prosecutors due to misconduct, and that that there was sufficient evidence of money laundering.

CONTROLLED SUBSTANCES OFFENSES / RX BY DOCTORS

United States v. Ruan,
56 F.4th e1291
(11th Cir. 59 2023)

Ruan and other doctors were convicted of violating the Controlled Substances Act. The appellants challenged the jury instructions used for their substantive drug convictions under 21 U.S.C. §841(a), which prohibits the "knowing" or "intentional" dispensing of controlled substances "except as authorized." The appellants had requested that the jury be instructed that their good faith can be a defense to an allegation that they acted outside the "usual court of professional practice." The Eleventh Circuit affirmed in part, reversed in part, and remanded. The United States Supreme Court granted certiorari, vacated the Eleventh Circuit's decision, and remanded the case. On remand, the Eleventh Circuit held that the district court's instruction inadequately conveyed the required men rea. Nonetheless, the Court found that the instruction was harmless as to the other money laundering convictions.

United States v. Heaton,
59 4th 1226
(11th Cir. 2023)

The Court affirmed Dr. Heaton's convictions, where he was charged with one count of conspiracy to unlawfully distribute and dispense controlled substances, in violation of 21 U.S.C. §§841(b)(1)(C), 843, & 846; 102 counts of unlawful dispensing of controlled substances to patients, in violation of 21 U.S.C. §§841(a)(1), (b)(1)(C); and 27 counts of aiding and abetting a patient's acquisition of controlled substances by deception, in violation of 21 U.S.C. §843(a)(3) and 18 U.S.C. §2. He proceeded to trial and was found not guilty on the conspiracy and guilty on all substantive counts.

On appeal, he challenged the district court's jury instructions. He first challenged the court's use of "or" instead of "and" in its §841(a) offense instruction. He argued that §841(a) requires the government to prove that he prescribed medication both "outside the course of professional practice" *and* "for no legitimate medical purpose." The Court disagreed, citing to prior caselaw and 21 C.F.R. §1306.04(a).

Dr. Heaton next argued that the court's instructions as to mens rea for §841(a) ran afoul of the Supreme Court's recent decision in *Ruan*. More specifically, he argued that the district court erred in instructing the jury to apply an objective standard to the "outside the usual course of professional practice" requirement. The Court agreed that because the instruction allowed the jury to convict Dr. Heaton without considering whether he knowingly or intentionally issued prescriptions outside the usual course of professional practice, the jury instruction was erroneous under *Ruan*. The Court, however, found any instructional error to be harmless because the evidence extensively proved beyond a reasonable doubt that Dr. Heaton knew his prescriptions were issued outside the usual course of professional practice. In so holding, the Court distinguished this case from that of *Ruan* on remand, wherein the Court found the instructional error not to be harmless.

Finally, the Court rejected Dr. Heaton's argument that §841 is unconstitutionally vague as applied to him.

BRIBERY

United States v. Burnette,
_____F.4th _____
2023 WL 2883034
(11th Cir. Apr. 11, 2023)

Mr. Burnette, a real estate developer in Tallahassee, was accused of soliciting bribes from two undercover agents posing as property developers to sway a Tallahassee city commissioner's vote. He was found guilty of Hobbs Act extortion, in violation of 18 U.S.C. §1951(a); honest-services mail fraud, using a facility of interstate commerce to facilitate unlawful activity; and making a materially false statement to the FBI. On appeal, Mr. Burnette's main challenge turned on the Supreme Court's interpretation of the definition of "bribery"—as found in 18 U.S.C. §201—in *McDonnell v. United States*, 579 U.S. 550 (2016). In *McDonnell*, the Supreme Court narrowed the meaning of the term "official act," and clarified that to implicate the bribery

statute's prohibition, a public official must either engage or agree to engage in 1) a sufficiently serious act—such as casting a vote 2) concerning a sufficiently serious and concrete matter. His challenge was, however, denied on the reasoning that some errors were invited, and others unpreserved, and Mr. Burnette could not meet the showing required for plain error–that the error affected his substantial rights.

CHILD PORNOGRAPHY

United States v. Dawson,
61 F.4th 1227
(11th Cir. 2023)

The Court considered, as an issue of first impression, whether an adult who films himself exposing his genitals and masturbating in the presence of a child where the child is the object of the sexual desire in the film "uses" that child to engage in sexually explicit conduct for purposes of 18 U.S.C. §2251(a), and held that such conduct fits squarely within the language of the statute. On appeal, Mr. Dawson argued that he did not violate §2251(a) because the videos underlying his convictions depicted an adult engaging in solo, adult-only, sexually explicit conduct near a fully clothed minor who was neither the focal point of the images, depicted as a sexual object, nor otherwise involved in the sexual act. He argued that his conduct did not constitute "uses" as that term is defined. The Court disagreed, agreeing instead with the government's reading of §2251(a)—that it covered passive use of a child in sexually explicit conduct. That is, under §2251(a), a minor must be involved in the offender's sexually explicit conduct, but need not necessarily be actively engaging in his or her own sexually explicit conduct.

United States v. Moran,
57 F.4th 977 (11th Cir. 2023)

Moran was convicted of one count of possession of child pornography and three counts of attempted production of child pornography after he requested child pornography from "mom blogs." Moran appealed the attempted-production convictions arguing that 1) the government couldn't prove that he intended for the bloggers to post child pornography, as he was merely "internet trolling"; 2) there was insufficient evidence to satisfy 18 U.S.C. §2251(a)'s interstate-nexus element; 3) there was insufficient evidence to show that he took a substantial step toward the commission of the crime. The Eleventh Circuit rejected Moran's arguments. First, it held that a defendant's desire alone can establish intent for the underlying crimes. Second, it held that the interstate commerce element requires a showing that if the child pornography were produced, it would travel in interstate travel, which the government established. Third, the Court held that Moran did not previously challenge the sufficiency of the substantial- step element at trial when he moved for a judgment of acquittal, and accordingly, under plain error review, Moran hadn't met his burden of establishing all four prongs of the plain-error standard.

United States v. Downs,
61 F.4th 1306
(11th Cir. 2023)

On appeal, Downs challenged his production and possession of child pornography convictions for several reasons, including the government's failure to present sufficient evidence to satisfy §2251(a)'s interstate- commerce element, as well as the district court's decision to, in his absence, discharge a jury that was impaneled by not yet sworn. The Eleventh Circuit affirmed Downs's convictions. The Court held that the interstate commerce element was satisfied because the hard drives on which Downs's child pornography were found were manufactured overseas. The Court also held that because the jury hadn't been sworn in Mr. Downs's case, jeopardy never attached, and absent jeopardy, Downs had no right to have his case decided by the jury that the judge had initially impaneled.

FIREARMS / PROHIBITED PERSONS

United States v. Shamsid-Deen,
61 F.4th 935
(11th Cir. March 6, 2023)

Shamsid-Deen was found in possession of a firearm, in violation of §922(g)(9), based upon a previous misdemeanor conviction of battery under the Georgia Family Violence Act. The district court granted his pretrial motion to exclude the conviction under §921(a)(33)(B)

because Shamsid-Deen's waiver of a jury trial in that case had not been knowing or intelligent. The Eleventh Circuit held that the Shamsid-Deen had the burdens of production and persuasion on the §921(a)(33)(B) issue. After making that determination, the Court held that the district court erred when it found there was no evidence that Shamsid-Deen knowingly and intelligently waived his right to a trial. The Court therefore reversed the district court's order granting Shamsid-Deem's motion to suppress evidence of his misdemeanor battery conviction.

United States v. Turner,
61 F.4th 866
(11th Cir. Mar. 1, 2023)

Turner was convicted of being a felon in possession of firearms. He asserted three defenses, including his insanity at the time of the offense. On appeal, he argued that the government's expert witness opined that when Turner possessed the firearms, he understood the possession was unlawful. Turner argued that Rule 704(b) of the Federal Rules of Evidence precludes an expert witness from stating an opinion about whether the defendant has the mental state or condition that constitutes an element of a defense. The Eleventh Circuit held that although the district court abused its discretion in admitting the expert testimony, the error was harmless.

JURY INSTRUCTIONS
United States v. Morel,
63 F.4th 913 (11th Cir. 2023)

Morel went to trial for cocaine-trafficking offenses. Two codefendants were called by the prosecution to testify against him. One of them, Moreno, testified that he did not know Morel before they met at a cocaine offloading location. Morel's counsel asked Moreno, "[Y]ou're not alleging that you conspired with Morel in this case[?]" Moreno said, "[n]o." The district court held a sidebar conference in which the prosecution requested an instruction about the requirements of conspiracy. Though Moreno's counsel argued that a mid-trial instruction would prejudice his cross-examination, the district court gave an instruction that members of a conspiracy need not know each other. Morel was found guilty and sentenced to 82 months of imprisonment. Morel challenged his convictions on two grounds: 1) that trial judge should not have instructed the jury about elements of conspiracy after his cross-examination of a witness and 2) there was legally insufficient evidence of that he knew the item being trafficked was cocaine. The Eleventh Circuit affirmed Morel's convictions, holding that the district court did not depart from its role of neutrality when it instructed the jury about the elements of conspiracy. Moreno used the term "conspiracy" incorrectly, and the district court appropriately intervened to ensure the jury was not confused. The Court also held that, under the prudent-smuggler doctrine, the evidence of Morel's mens rea was sufficient. Under that doctrine, when the orchestrater of a conspiracy places substantial trust in an associate, a jury may infer the associate's knowing participation. The Court therefore affirmed his convictions.

SENTENCING / GUIDELINES
CRIME OF VIOLENCE
United States v. Harrison,
56 F.4th 1325
(11th Cir. 2023)

Harrison pled guilty to possession of a firearm by a felon under 18 U.S.C.§922(g)(1). Under USSG §2K2.1(a)(4)(A), a base level of 20 is prescribed when "a defendant who committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime or violence or a controlled substance offense." Probation classified Harrison's prior conviction for robbery by intimidation under Georgia law as a conviction of a "crime of violence." Harrison objected, arguing that robbery by sudden snatching, found within Georgia's robbery statute, is not a "crime of violence" and that the Georgia robbery statute is indivisible under Mathis. The district court held that the statute is indivisible and accordingly reduced Harrison's base offense level and total offense level. The government appealed and the Eleventh Circuit reversed and remanded. Specifically, the Court held that the text of the statute, caselaw, and the record material support divisibility and thus the modified categorical approach to robbery by intimidation must be applied. The Court also held robbery by intimidation was a "crime of violence" under the enumerated-crimes clause of the "crime of violence" definition.

SENTENCING / ACCA SERIOUS DRUG OFFENSE
United States v. Penn,
63 F.4th 1305
(11th Cir. 2023)64 F.

The Court affirmed the defendant's ACCA sentence based on prior Florida sale-of-cocaine convictions. In holding that the prior convictions were ACCA "serious drug offenses," the Court rejected three arguments. First, circuit precedent foreclosed the defendant's argument that a serious drug offense has a mens rea element requiring the defendant know the illicit nature of the substance, which Fla. Stat. §893.13 lacks. Second, and in a question of first impression resulting in an extended discussion, the Court held that, although the least culpable conduct prohibited by §893.13 was "attempted transfer," that conduct was covered by the word "distribution" in the ACCA definition and so was not overbroad. Third, applying *Wooden*, the Court held that the two prior convictions occurred on separate occasions because they occurred 30 days apart, and the Court rejected under plain error the defendant's *Apprendi* argument, which was raised for the first time on appeal, because there was no precedent directly resolving the issue.

United States v. Eugene Jackson,
55 F.4th 846
(11th Cir. 2022)

The Court reversed its earlier decision in *United States v. Jackson* which held that

for federal firearm offenses committed after September 2015, pre-July 2017 Florida cocaine convictions did not count as "serious drug offense" predicates under the ACCA because they could have involved the cocaine derivative ioflupane, a substance that is no longer controlled under federal law. In the revised decision, the Eleventh Circuit held that whether a prior conviction counts as a "serious drug offense" requires a backward- looking inquiry to the federal drug schedules in place at the time of the prior conviction. Because ioflupane was controlled under federal law at the time of Mr. Jackson's prior convictions, those convictions counted as "serious drug offense[s]."

SENTENCING / SUPERVISED RELEASE

United States v. Hall,
64 F.4th 1200
(11th Cir. 2023)

The Court held, as a matter of first impression, that a district court may not sentence a defendant to home confinement for violating the terms of his supervised release where the district court has also sentenced the defendant to the statutory maximum period of imprisonment for that violation. The Court vacated Mr. Hall's sentence to the extent it imposed a term of home confinement and remanded for resentencing. Mr. Hall, a class C felon, violated the conditions of his supervised release. After revoking his supervised release, the district court sentenced Mr. Hall to the statutory maximum two years' imprisonment and added one year of home confinement with location monitoring. The Court held that such a sentence is inconsistent with the limitation that a district court may impose home confinement "only as an alternative to incarceration." As such, the district court lacked the authority to impose an additional year of home confinement on top of the statutory maximum sentence of incarceration.

United States v. King,
57 F.4th 1334
(11th Cir. 2023)

After Probation alleged King violated the terms of supervised release by 1) failing to attend the required substance abuse treatment programs, 2) failing to report to his probation officer, and 3) failing to file a monthly supervision report, the district court imposed 36 months of prison, stating it had previously been lenient, that it needed to protect the public and King from himself, and that King needed at least 24 months to participate in an intensive residential substance abuse treatment program provided by the BOP. On appeal, King argued that the 36-month prison sentence was substantively unreasonable. The Court held that while King had challenged the substantive reasonableness of his sentence on some grounds, his appellate brief did not include an argument that the district court, in violation of Tapia, improperly considered rehabilitation. Accordingly, King forfeited that argument and could not satisfy plain-error review because it was unclear whether rehabilitation was the driving force in the decision to incarcerate King.

Judge Rosenbaum's dissent stated that while King did not raise the issue expressly, he challenged the substantive reasonableness of his sentence, which included the Tapia issue, and the district court violated Tapia by giving significant weight to rehabilitation as a factor.

SENTENCING / REASONABLENESS

United States v. Oudomsine,
57 F.4th 1262
(11th Cir. 2023)

Oudomsine pled guilty to wire fraud. He was sentenced to 36 months' imprisonment — an upward variance from the calculated range of 8 to 14 months. The Court held that the upward variance was procedurally reasonable because the district court adequately explained the upward variance. The district court's reasoning that deterrence was the most important sentencing factor was appropriate, the Court explained. And the district court was not required to state on the record that it explicitly considered each §3553(a) factor.

EXPUNGEMENTS

United States v. Batmasian,
63 F.4th 1299
(11th Cir. 2023)

The Court held that the district court lacked jurisdiction to consider the pardoned defendant's motion to expunge his conviction. The defendant filed his expungement motion in the district court that convicted him. But the Eleventh Circuit rejected the defendant's reliance on the doctrine of ancillary jurisdiction. No court had ever expressly embraced such jurisdiction for a constitutional expungement request. And the Court declined to do so because the alleged constitutional violation — a purported denial of his First Amendment right to donate to charities — was the natural result of an otherwise valid arrest or conviction.

FIRST STEP ACT

United States v. Files,
63 F.4th 920
(11th Cir. 2023)

The Court affirmed the denial of the defendant's motion for a reduced sentence under Section 404 of the First Step Act. The question in the case was whether the district court had authority to reduce the defendant's sentence for a non-covered offense in addition to a covered offense. In Denson, the Court had previously stated that district courts could reduce a sentence only for a covered offense. Here, the Court concluded that this statement in *Denson* was part of the holding of the case. And, it concluded, the Supreme Court's decision in *Concepcion* did not abrogate that holding. The Court engaged in a lengthy discussion (which Judge Luck did not join) about when a statement is "necessary" to the result and thus forms part of the holding rather than dicta.

United States v. Williams,
63 F.4th 908
(11th Cir. 2023)

The Court affirmed the denial of the defendant's motion for a reduced sentence under Section 404 of the First Step Act. The defendant was eligible

for a reduced sentence, and his life sentence exceeded the 30-year statutory maximum that applied after retroactive application of the Fair Sentencing Act. However, the Court held that the district court had the discretion to leave that life sentence in place because the text of the Fair Sentencing Act did not require the court to reduce any sentence, and the Supreme Court confirmed that understanding in *Concepcion*. The Court rejected the defendant's argument that leaving a sentence above the new statutory maximum was a per se abuse of discretion. The Court explained that defendants cannot use Section 404 to re-litigate the legality of their sentences. Finally, the district court adequately explained its decision to deny the motion by addressing the defendant's arguments and weighing the 3553(a) factors.

United States v. Clowers,
62 F.4th 1377
(11th 2023)

Clowers moved to reduce his life sentence under the First Step Act. The district court denied Clowers's motion because it concluded that it was bound by the sentencing court's drug-quantity finding when determining what his statutory penalties would have been under the Fair Sentencing Act. Because the drug quantity would still trigger a mandatory life sentence under the First Step Act, the district court concluded that it could not reduce Clowers's sentence. The Eleventh Circuit affirmed the district court's judgment, finding that the First Step Act does not authorize a sentence reduction below the statutory minimum sentence that would have applied if the Fair Sentencing Act had been in effect when the movant committed his offense. Nor does it change the legal significance that the sentencing court's drug-quantity findings held at the time. Thus, because Clowers would receive the same mandatory life sentence even under the Fair Sentencing Act, the district court could not have reduced his sentence on the Fair Sentencing Act.

The contents of this message are personal and do not reflect any position of the judiciary or the FLMD Federal Public Defender Office.

LISA CALL attended the University of Florida, receiving a Bachelor of Science in Business Administration with High Honors and a Juris Doctor with Honors. After being in private practice in Jacksonville from 1992 through 2000, she joined the Federal Public Defender's Office in July 2000. She served as president of FACDL 2016-2017.

CAPITAL CORNER • from page 11

last year between the prosecutors and the criminal defense bar on deposition restrictions and misrepresentations. The original bill was a carryover from last year's attempt to arrest defense attorneys without specific intent if the victim felt it wasn't clear who was on the other end of the phone. Fortunately, FACDL had enough support on its side to reduce the language to a "duty of candor" right in Marsy's Law, a duty we are already following through the Florida Bar, rather than a new crime. Unfortunately, Attorney General Moody used her influence to add deposition restrictions into the bill on the second-to-last day of session. Once signed by the Governor, the Court must hold a hearing to determine whether it is "appropriate" to take a deposition of a "victim of a sexual offense who is under the age of 16." If the victim is under 12, the death penalty is not on the table, and a forensic interview is available, then there is a presumption a deposition is not appropriate. Ironically, misrepresentation played a large role in the success of the amendment. In debate, Representative Taylor Yarkosky (R-Monteverde) told the House Floor that Miami-Dade State Attorney Katherine Fernandez-Rundle testified in committee in support of the restrictions (she didn't), that he worked with the criminal defense bar (he didn't) and that he didn't know the position of the Florida Bar Criminal Law Section. A representative for the Section testified in committee that the Section rejected a similar proposal a few years ago. He was also in the committee room when the Section announced it did not support the restrictions.

It wasn't all bad news for the accused this session. Senator Danny Burgess (R-Zephyrhills) passed SB 376 that expands automatic sealing of certain records in Fla. Stat. 943.0595. When someone has their charges dropped, dismissed, or is found not guilty at trial, in addition to FDLE sealing the arrest record the clerk will now also have to make their records confidential. Representative David Smith (R-Winter Springs) passed HB 605 that allows for an additional expungement under Fla. Stat. 943.0585 if the person used their one expungement as a juvenile. With SB 508, Senator Darryl Rouson (D-St. Petersburg) expanded access to problem solving courts. The bill deletes the ability of the State or judge to deny entry based on a prior rejection by the accused. It also removed the felony conviction bar to mental health court and the traffic offense bar to misdemeanor problem solving courts.

As the 2023 legislative session closes, it's clear that we must stay vigilant in watching what goes on in Tallahassee. While our job will get more difficult, we can take heart in the fact that our organization is strong, and our leadership is committed to fighting for our members and the accused. It's through our collective efforts, including our rock star new lobbying team of Corinne Mixon and Andrew Rutledge at Rutledge Ecenia, that we can continue to make a difference in the lives of those we represent. So let us not be discouraged by the challenges ahead. Instead, let us be emboldened by the knowledge that we are not alone in this fight. Together, we can continue to be liberty's last champion, and ensure that the rights of the accused are protected, now and in the future.

BLOOD BREATH & TEARS 2023

IN-PERSON SEMINAR FOR THE DUI AND JURY TRIAL DEFENSE LAWYER

At the Levin College of Law
University of Florida
Gainesville, Florida

November 16-17, 2023

Full mock jury trial and lectures covering the hot topics of DUI and trial practice.

PRICES:

- Non-member $420
- FACDL member $345
- FACDL member Public Defender $295
- Public Defender Non-member $335
- Materials only FACDL member $385.65
- Materials only Non-member $460.65

More details soon at
FACDL.ORG

Uff's Preservation Points[1]

by Michael Ufferman

TheLaw.Com provides the following definition of "proffer": "to offer to the court for display and observation so as to serve as evidence." TheLaw.com Dictionary, definition of "proffer," dictionary.thelaw.com/proffer/ (last visited May 2, 2023). In this column, I focus on the preservation tool of proffering evidence. This is an easy concept, but as explained below — many criminal defense lawyers are still failing to properly "proffer" testimony and evidence during trial.

A proffer is ALWAYS necessary when a trial court denies a request to present testimony or evidence. The following are some examples of when an attorney MUST proffer evidence:

If you request to present an expert in surrebuttal to respond to the expert that the State presented in rebuttal, but the judge denies your request — you MUST proffer what your expert would have said had s/he been permitted to testify.

If you attempt to impeach a State witness, but the prosecutor objects and asserts that you are attempting to impeach on a collateral matter, and judge sustains the prosecutor's objection — you MUST proffer the questions you would have asked AND anticipated answers (or actual answers from the witness) if the judge had not sustained the objection.

If you attempt to discuss a theory of defense during jury selection, but the prosecutor objects and the judge sustains the objection — you MUST proffer the questions you would have asked the prospective jurors had the judge not sustained the objection.

In sum, if you make an attempt during any stage of the proceedings to present testimony or evidence — and if you are prevented from presenting the testimony or evidence — you MUST proffer the testimony or evidence that you would have presented.

This is an easy concept. Unfortunately, you can still read cases in Florida Law Weekly (and yes, you should be reading Florida Law Weekly *every week* to stay updated on the law) where appellate courts are refusing to address claims on the merits because the defense attorney failed to proffer the testimony or evidence in question:

> ***Palos v. State,***
> **306 So. 3d 331, 335**
> **(Fla. 3d DCA 2020):**
> At the time Palos's counsel requested to re-cross Guillen Bueso and the trial court denied that request, *she was required to contemporaneously proffer, at minimum, the proposed question she would have asked*. Instead, Palos's counsel merely acquiesced to the trial court's denial… . The failure to proffer the proposed question or testimony to be elicited at the time of the trial court's denial means that the defense failed to properly preserve the issue for this Court's review.
>
> …In the absence of a proffer, Palos cannot establish that the trial court's denial of re-cross examination was error, much less fundamental error.

(Emphasis added).

> ***Savell v. State,***
> **277 So. 3d 1110, 1110**
> **(Fla. 1st DCA 2019):**
> Petitioner challenges the trial court's denial of her motion to dismiss an information charging her with two counts of aggravated battery with a firearm. She argues that the trial court incorrectly applied the Best Evidence Rule at the hearing on petitioner's motion to dismiss by excluding testimony about an unrecoverable video tape depicting the altercation that led to her charges. While it appears the trial court failed to determine whether the evidence was admissible pursuant to section 90.954(1), Florida Statutes, *we nonetheless deny the petition because petitioner failed to proffer the excluded testimony*.

(Emphasis added).

> ***Arrascue v. State,***
> **42 So. 3d 1927, 929**
> **(Fla. 5th DCA 2010):**
> Because defense counsel did not proffer his cross-examination outside of the presence of the jury, we have no way of knowing how the trial court would have addressed the issue given questions that might (or might not) have been asked and responses that might (or might not) have been given. Additionally, we have no way to assess whether the contemplated cross-examination would have made any difference in the outcome.... Without a proffer it is impossible for

SEE PAGE 47

Medical Journals and Field Sobriety Exercises

by
Robert S.
"Bobby" Reif

If you have followed my previous columns[1] (and thank you for doing so!), you may have noted that I am not a big fan of the use of these exercises in an attempt to determine a person's impairment at the scene of a traffic stop. The problem with police relying on these exercises to determine one's level of impairment may have first occurred to me when I was a healthy, 25-year-old prosecutor who could not walk a straight line or stand with my foot in the air for 30 seconds. "If I cannot successfully *perform* these exercises in a level, carpeted courtroom, how can I prosecute someone for DUI when they cannot *perform* the same exercises on a roadway at night?"

As I evolved (dissolved?) into being a criminal defense attorney, I took it upon myself to review the literature about these exercises, not only by reviewing the police literature provided by the National Highway Traffic Safety Administration [NHTSA] but by reviewing the medical journals as well.[2] And not surprisingly, the medical folks have a radically different view of these exercises.

In a National Institute of Health [NIH] study[3] of diagnostic tests to determine neurologic impairment, they discuss the Romberg balance test. "The purpose of this evaluation, administered by any trained individual, is to identify a particular impairment in patients with specific proprioception difficulties for purposes of intervention and improving patient outcomes. This activity covers the proper execution and interpretation of the Romberg test as a diagnostic tool." Romberg Test, at p.1.

So, I thought it was interesting when they provided some of the history of the Romberg test:

> The Romberg's sign or Romberg's test is named after a European neurologist, Moniz Romberg, historically, this was described by Marshall Hall, Moritz Romberg, and Bernardus Brach. Initially, this sign was tethered *specifically with tertiary syphilis patients*[4] who exhibited neurologic signs of late-stage disease referred to as locomotor ataxia, or tables dorsalis.
>
> When examining a patient's neurological effects from sequelae *involving late-stage syphilis*, the Romberg sign became a precise test to determine the integrity of the dorsal column pathway of the brain and spinal cord, which controls proprioception. Proprioception is the sense of awareness of the position and movement of the body. Romberg described this sign as a severe postural impairment in a darkroom setting or with eyes closed of patients who had severe damage to the posterior dorsal columns of the spinal cord. Used as a precise clinical tool, the Romberg test is positive if a patient cannot maintain an upright stance with vision eliminated or in the darkness.

Id. (emphasis added).

In another interesting observation, the authors of this paper wrote that "[t]he Romberg maneuver is a commonly performed test during the neurological exam. It is a valuable clinical sign to evaluate the integrity of the dorsal columns of the spinal cord and is particularly useful in patients with ataxia or severe incoordination." *Id.* at p.2.

Of course, this test is not specific to syphilis. "*The Romberg test is quite helpful in a broad range of neurologic disease* states in assessing and confirming various neurological conditions including but not limited to Parkinson's disease (causes postural instability and a shuffling gait), Friedreich ataxia (causes staggering gait and frequent falls), *Vitamin B12 deficiency* (causes ataxia gait), Tertiary syphilis (causes sensory ataxia; impaired proprioception), normal pressure hydrocephalus in the elderly (truncal ataxia with falls), Wernicke's syndrome (associated with chronic alcoholism which causes limb ataxia), and Ménière's disease." *Id.* at p.2 (emphasis added).

That portion of their observations

troubled me as I have been diagnosed with a Vitamin B12 deficiency after my annual physical's blood test results were received. Did that cause me to have an ataxia gait? Um, what exactly is an ataxia gait? My Funk & Wagnall's New World Encyclopedia[5] was nearby and I soon learned that "[a]taxia is typically defined as the presence of abnormal, uncoordinated movements. This usage describes signs & symptoms without reference to specific diseases. An unsteady, staggering gait is described as an ataxic gait because walking is uncoordinated and appears to be 'not ordered.'" *See* www.hopkinsmedicine.org/neurology_neurosurgery/centers_clinics/ataxia/conditions/#:~:text=Ataxia%20is%20typically%20defined%20as,to%20be%20'not%20ordered.

I know that some of my teammates have accused me of playing ice hockey[6] reminiscent to a giraffe on ice skates but could this all be due to my Vitamin B deficiency? Huh! I was concerned! But seriously, an examination of these materials showed so many other causes other than the syphilis condition that I started to be concerned. Was this exercise really a good judge of syphilis impairment?! More importantly, why do the police think this exercise is a good one, as administered *by the police*, to detect impairment due to alcohol consumption?

One of the other things that has troubled me with the Romberg exercises is that the police ask the subject "[w]hen I tell you to start, I want you to tilt your head back slightly and close your eyes." *See Advanced Roadside Impairment Driving Enforcement* (revised 02/2018), at Session 5, p.21. I have even seen/heard some officers tell the subject to "tilt your head *all the way back*" when performing the exercise.

In the exercise created by Dr. Romberg, and subsequently used by doctors, the individual being examined is *not* asked to tilt their head back. *See* Romberg Test, at p.3 (Technique). Why does that difference in instructions make a difference in the test results? Well, a human head, on average, weighs eleven pounds. See www.gwosteopathy.co.uk/much-head-weigh/#:~:text=Believe%20it%20or%20not%2C%20the,keeping%20that%20weight%20in%20place. Additionally, tilting your head causes certain fluids in your ear, nose and head to be altered. So we have a heavy weight now altering your positional stance, and the fluids accumulating in areas that are not the normal locations for them.

The medical study also notes that "[i]f performed in the correct setting and manner by a trained medical professional, there are no known complications of this clinical test." *See* Romberg Test, at p. 4 (Complications). Police officers are *not* trained medical professionals and the side of the road, usually in the dark of the night, is hardly the setting Dr. Romberg anticipated when he created this test.

The medical Romberg exercise first asks the subject "to keep their eyes open while the examiner assesses the patient's body movement relative to balance." *Id.* (Technique). Yet, the officer on the side of the road never attempts to set a baseline for the individual's examination.

The Romberg study also warned that "*a positive Romberg test may result from inherited, metabolic, toxic, immunologic, or other disorders.*" *Id*. (Clinical Significance) (emphasis added), citing to Khasnis A, Gokula RM. Romberg's test. J Postgrad Med. 2003 Apr-Jun;49(2):169-72. [PubMed: 12867698].

So, the next time the officer claims that your client could not perform the Romberg balance exercise, and that was indicative of impairment, perhaps a short history lesson should be given during your cross-examination of them.

Then again, I could be wrong; just ask my wife.

[1] See, e.g. "DUI Notes: A Little Light Pandemic Reading…The Best of the Worst," *The Defender*, Summer 2021; "DUI Notes: Combating the Use of Field Sobriety Exercises in the DUI Prosecution," *The Defender*, Winter 2020.

[2] This harkens me back to a scene from one of the funniest movies ever made, Animal House:

Otter: Point of parliamentary procedure!
Hoover: Don't screw around, they're serious this time!
Otter: Take it easy, I'm pre-law.
Boon: I thought you were pre-med.
Otter: What's the difference?

[3] See Forbes J., Munakomi S., Cronovich H., Romberg Test. [Updated 2022 Nov. 2]. In: StatPearls [Internet]. Treasure Island (Fla.): StatPearls Publishing; 2022 Jan. Available from: www.ncbi.nlm.nih.gov/books/NBK563187/.

[4] I cannot wait until I have a client who is prepared to state, and then prove, that they are suffering from syphilis as a defense to their DUI case. Or should I just ask the officer if they were trying to determine if the suspect suffered from syphilis?

[5] See *The Tonight Show Starring Johnny Carson*, www.newworldencyclopedia.org/entry/Johnny_Carson.

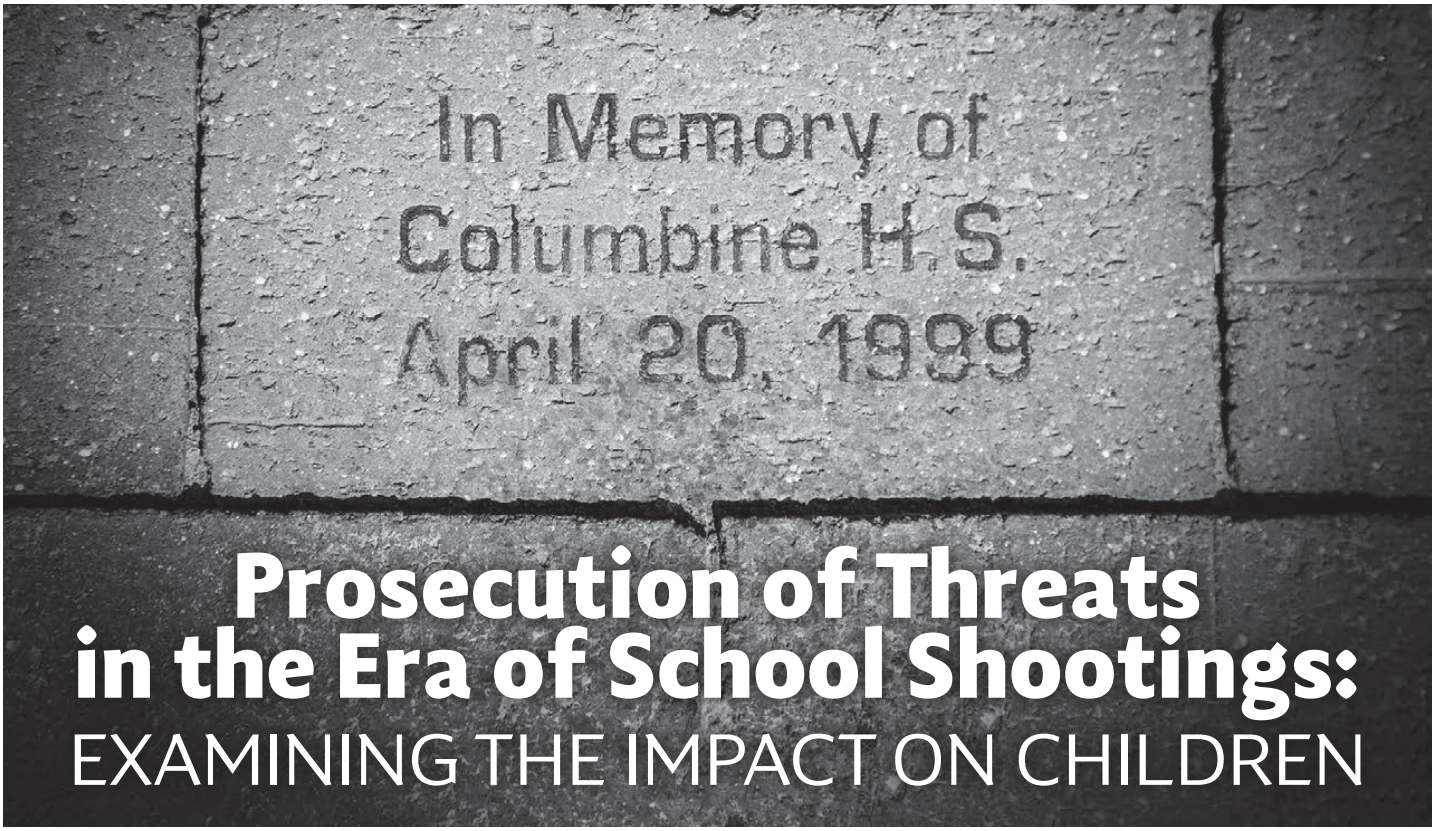
[6] "A Force to Recon with On the Ice and In the Courtroom," *The Florida Bar News*, www.floridabar.org/the-florida-bar-news/a-force-to-recon-with-on-the-ice-and-in-the-courtroom.

ROBERT (BOBBY) REIFF is a board certified criminal defense attorney licensed to practice in Florida and New York. He has practiced law since 1983. A graduate of the Boston University School of Law, he specializes in handling DUI Manslaughter, Vehicular Homicide and DUI offenses. He is author of the *Florida DUI Law Practice Guide* which is a part of the LexisNexis Practice Guide series and the previously published *Drunk Driving and Related Vehicular Offense* (5th Edition), which was also published by the LEXIS Law Publishing Company. He is also a contributing author for *Defending DUI Vehicular Homicide Case*, 2012 Ed. (published by the West Law Publishing Company, a subsidiary of Thomson, Reuters); *DUI And Other Traffic Offenses in Florida* (published by The Florida Bar); and *Drunk Driving Defense: An Expert's Approach* (published by the Professional Education Group, Inc.). He is on the editorial board of the *DWI Law & Science Journal*, and is a frequent lecturer and author on topics involving the defense of alcohol-related offenses.

FIELD SOBRIETY TESTS • from page 27

so-called field sobriety exercises used by the police illustrate things that Florida law ***does not*** include in the definition of DUI. These so-called field sobriety exercises used by the police fail to illustrate any of the things that Florida law *does* include in the definition of DUI.

I am reminded of the Witch Scene from the classic movie *Monty Python and the Holy Grail*. "If she weighs the same as the duck, she's made of wood and therefore a witch!" That's nonsense, you might say. And it's silly. Yes, and so are field sobriety exercises.



Prosecution of Threats in the Era of School Shootings: EXAMINING THE IMPACT ON CHILDREN

by Ben Wurtzel

and Lori Wurtzel

Since the mass shooting at Columbine High School in 1999, more than 338,000 students in the U.S. have experienced gun violence at school, with more than 46 shootings taking place in schools in 2022 alone.[1] In 2020, gun violence surpassed car accidents as the leading cause of death for people under the age of eighteen, living in the United States.[2] While the crisis of gun violence in America may come as no surprise to readers, the increasingly severe consequences that children face as a direct result of the policies meant to address that problem may be unfamiliar to many. In Florida, a child accused of making a threat may face criminal, civil, and academic sanctions that impact their life forever.

CRIMINAL PROSECUTIONS UNDER SECTION 836.10, FLORIDA STATUTES

Criminal prosecutions for threats directed at a school will generally fall under Section 836.10, Florida Statutes, which makes it a second-degree felony "to send, post, or transmit" a threat to kill, do bodily harm, or conduct a mass shooting or act of terrorism.[3] The statute, once aimed at threats sent to the intended target in writing, evolved substantially over the last decade, in response to both technological advances and current events. In 2010, the Florida Legislature amended Section 836.10 to allow the prosecution of those who sent threats by means of "electronic communication."[4] As advancements in technology changed the ways people communicated, Florida courts began considering gaps in the law.

In 2016, the Fourth District Court of Appeals considered a series of Twitter posts made by a juvenile in *J.A.W. v. State*.[5] The tweets, which included references to "shooting up" a school, tagged a group of the child's friends, none of whom attended that school, or even lived in Florida. The posts were ultimately retweeted and viewed by thousands of people. Because the language of the 2010 version of the statute, under which the child was prosecuted, required proof that a threat was sent to the person to whom the threat was directed, the Court reversed the underlying disposition.[6]

After the decision in *J.A.W.*, the Florida Legislature began working on amendments to Section 836.10, ultimately passing their revisions in March 2018, less than one month after 17 people were killed in a mass shooting at Marjorie Stoneman Douglas High School in Parkland, Florida. The amended version of the statute included threats "to conduct a mass shooting or act of terrorism" and, instead of requiring that a threat be sent directly to the intended target, clarified that it would punish a threat sent "in any manner in which it may be viewed by another person."[7]

Although the Florida Legislature has, in recent years, prioritized the expansion of the range of conduct that may be prosecuted under Section 836.10, it has not yet defined the term "threat" as used in that section. For decades, Florida courts have widely relied on the test articulated by the Second District Court of Appeal in *Smith v. State*, which focuses

on whether a statement is "sufficient to cause alarm in reasonable persons."[8] While Florida lawmakers have ensured that criminal statutes prohibiting threats keep pace with technology, they fail to acknowledge how current events have drastically changed what might "cause alarm in reasonable persons" from the time the *Smith* opinion was written (1988), until now.

In *State v. Cowart*, the Fifth District Court of Appeal considered a Snapchat message that the defendant, a former North Marion High School student, sent directly to a friend and current North Marion High School student.[9] The photo message depicted a scoped AR-15 rifle with an extended, large capacity magazine, and included the caption, "Show and Tell @NM on Monday."[10] Although Snapchat messages are designed to automatically delete 24 hours after they are opened, the recipient saved the message and reposted it to his own Snapchat account. When later confronted by police, the original recipient of the message said that the defendant told him the message was a joke. The Fifth District Court of Appeals, in reviewing the trial court's denial of the defendant's motion to dismiss, held that the State established a prima facie showing that the message was sufficient to cause alarm in a reasonable person; whether the message was reasonably perceived as a threat was a matter for the jury to determine.[11]

When evaluating whether a statement constitutes a "threat" under Section 836.10, Florida Courts have traditionally ignored the intent of the author. It is significant, then, that the Fourth District Court of Appeals recently held in *T.R.W. v. State* that a mens rea element must be read into the statute.[12] Specifically, the *T.R.W.* Court found that a defendant must have intended to make a "true threat," defined as a communication made with the purpose of issuing a threat, or with knowledge that it will be viewed as a threat.[13] It should be noted, however, that the *T.R.W.* Court reviewed an order of violation of probation, in which the trial court explicitly found that the child's intent was irrelevant.[14] The Court declined to certify conflict with cases with contrary holdings that reviewed a trial court's denial of a motion to dismiss, where consideration of intent is improper.[15] In contrast, the *T.R.W.* Court noted that the decision in *Smith v. State* — which previously set the standard for evaluating threats- did not "comport with the necessity of finding some level of mens rea in order to sustain the conviction."[16] While the impact of this recent decision remains to be seen,[17] the precedent appears to have value for judgment of acquittal or special jury instruction arguments, aimed at evidence of intent.[18]

SCHOOL DISCIPLINE

The vast majority of the "threats" made by children pertain to schools, where it is well-established and widely accepted that students have a reduced expectation of privacy. A child who is first confronted with these allegations at school may be searched and interviewed before law enforcement (or their parents) are ever notified, without the protections afforded by *Miranda* or the Fourth Amendment.

Although individual school districts write their own procedural rules and codes of conduct, a set of minimum standards concerning disciplinary practices is established in Florida statutes and administrative rules. These laws have also been amended in recent years to address the widespread fear of gun violence in schools. For example, in 2018, the Florida Legislature amended Section 1006.07, Florida Statutes, to require school boards to establish "threat assessment teams", tasked with evaluating possible threats made by students.[19] This statute requires each threat assessment team include at least one law enforcement representative, while Section 1006.13 mandates reports of "concerning" patterns of behavior to law enforcement.[20] Thus, if you have a criminal case involving a juvenile and an allegation of a threat, there is a significant chance that the child has been subjected to the threat assessment process. This is true, even in circumstances where the threat was not made at, or about, the school, as the districts' codes of conduct are written to give broad authority to regulate conduct which "affects" the functioning of the school or its students.

The districts' rules often define offenses vaguely, while extending virtually no due process to accused students. For example, the Orange County Public School District Student Code of Conduct defines a "Level Four" (mandatory expulsion) threat as, "any direct or indirect threat that may harm the school or may disrupt the function of the school campus or school sponsored activity including, but not limited to, threats made verbally or nonverbally by act, through social media, or by text."[21] The Code further notes that "all threats are taken seriously, regardless of intent." In another example, the Miami-Dade School District Code of Conduct prohibits students "from making direct or indirect threats of violence against individuals or groups, any school/district property, including school-sponsored transportation, or any school/ district-sponsored activity or function," clarifying that, "even threats made in jest or in exaggeration must be treated as serious threats."[22]

The statement of one child, accusing another child of a threat, will almost certainly lead to an internal disciplinary investigation and law enforcement involvement. Aside from the harsh academic consequences that await, many parents worry about the impact these proceedings may have on their child's academic record. Although education records, which include records of disciplinary actions, are protected by the Family Educational Rights and Privacy Act ("FERPA"), the effects on a student accused of making a threat can continue well after the disciplinary proceeding resolves.[23] Even if no disciplinary action results, the Florida Department of Education requires that records of threat assessments be maintained in a student's file "as long as determined useful by a threat assessment team," and must be sent with the student to a new school upon the student's transfer.[24] Further, the mandatory involvement of school

resource officers often leads to generation of an investigative report, maintained by the local law enforcement agency, and generally outside the reach of FERPA.

RISK PROTECTION ORDERS

Created as part of the Marjory Stoneman Douglas High School Public Safety Act, Section 790.401, Florida Statutes created the risk protection order ("RPO").[25] This statute allows a circuit court, upon the appropriate procedures and findings, to issue an order preventing a respondent from purchasing, receiving or possessing a firearm or ammunition. Although it is otherwise illegal in most circumstances for a minor to possess a firearm, law enforcement agencies can (and routinely do) seek risk protection orders against minors.[26]

A petition for RPO must be filed by a law enforcement officer or agency, in either the county where the law enforcement office is located or where the respondent resides.[27] The petition must allege, under oath, specific statements or actions by the respondent, or any other facts which establish a reasonable fear that the respondent "poses a significant danger of causing personal injury to himself or herself or others by having a firearm or any ammunition in his custody or control."[28] It is not necessary that the petition allege that the respondent has any access to firearms, or that the respondent has made any statements or threats regarding firearms.

A trial court, in considering a petition for RPO, can consider several factors, including: acts or threats of violence (against self or others) within the last 12 months; evidence of serious or recurring mental health issues; recent acquisition of firearms or ammunition; evidence of the unlawful or reckless use or display of firearms; prior convictions (including withholds of adjudication) for crimes of violence; evidence of past threats/physical force/stalking of another person (even where the respondent was not convicted or arrested); or prior convictions for or evidence of use of controlled substances or alcohol.[29] The standard of evidence at the hearing is clear and convincing evidence, and the rules of evidence apply to the same extent as in a hearing on a petition for a domestic violence injunction.[30]

The entry of an RPO presents special concerns when applied to minors. First, as part of its order, a trial court must also consider whether a mental health evaluation or chemical dependency evaluation is appropriate.[31] At minimum, courts frequently order a mental health evaluation, which becomes part of the court record. Further, unlike a juvenile criminal record, the record of an RPO is not exempt from disclosure under public records laws, even when the respondent is a minor child. In fact, Section 790.401 requires that RPOs be forward to FCIC and NCIC and must stay in the system for the period stated in the order. There is no mechanism for expunging these orders, even if the petition is ultimately denied.[32]

A student protests at the Florida Capitol following the 2018 shooting at Marjory Stoneman Douglas High School.

CONCLUSION

In 1969, the United States Supreme Court, in deciding *Watts v. United States*, advised courts to exercise caution "in distinguishing true threats from crude hyperbole—a judgment derived from examining the totality of the circumstances."[33] It is difficult to imagine a group more inclined toward hyperbole than children. Yet, in recent years, their often impulsive, thoughtless, and unrealistic threats are taken quite seriously.

There is no doubt that the panic surrounding the topic of mass shootings, particularly in schools, is well-founded. It makes sense, of course, to aim public policy at early prevention of such violence. Gun violence prevention campaigns encourage students, that if they "see something," they should "say something;" children are told that they bear some responsibility for preventing violence in their own schools.[34] In this environment, allegations fly freely and are taken seriously. As a result, in addition to the risk of gun violence, children face serious academic, civil, and criminal consequences at school each day. 🏛

[1] Ulmanu, J. W. C. S. R. L. C. L. T. J. M. M. (April 3, 2023). There have been 377 school shootings since Columbine. *Washington Post*. www.washingtonpost.com/education/interactive/school-shootings-database/.

[2] Choi, A. (March 29, 2023). Children and teens are more likely to die by guns than anything else. CNN. www.cnn.com/2023/03/29/health/us-children-gun-deaths-dg/index.html.

[3] §836.10, Fla. Stat. (2021).

[4] §836.10, Fla. Stat. (2010).

[5] *J.A.W. v. State*, 210 So.3d 142 (Fla. 4th DCA 2016).

[6] *Id.* at 143.

[7] §836.10, Fla. Stat. (2018).

[8] *Smith v. State*, 532 So.2d 50 (Fla. 2d DCA 1988).

[9] *State v. Cowart*, 310 So.3d 332 (Fla. 5th DCA 2020).

[10] *Id.* at 332.

[11] *Id.* at 335.

[12] *T.R.W. v. State*, 48 Fla. L. Weekly D341c (Fla. 4th DCA, February 15, 2023).

[13] *Id.* at 7 (citing *Romero v. State*, 314 So.3d 699 (Fla. 3d DCA 2021)).

[14] *Id.* at 1.

BEN and LORI WURTZEL are co-owners of Wurtzel Law, PLLC in Winter Park, FL. Ben is a Board-Certified Criminal Trial Attorney, an FACDL Director at Large and member of the FACDL Long Range Planning Committee. Lori handles appellate, post-conviction and administrative law matters and is co-chair of the FACDL Communications Committee.

[15] *Id.* at 10 (citing *State v. Major*, 30 So.3d 608, 610 (Fla. 4th DCA 2010)).

[16] *Id.* at 10-11(citing *Smith v. State*, 532 So.2d 50 (Fla. 2d DCA 1988)).

[17] In *N.D. v. State*, 315 So.3d 102 (Fla. 3d DCA 2020), the court, also acting as fact finder in a violation of probation hearing like T.R.W., noted that Section 836.10, Florida Statutes must be construed to include mens rea — but then applied the reasonableness test of Smith to conclude that the juvenile's threatening language was sufficient to warrant finding of violation.

[18] In *Elonis v. United States*, the defendant's requested jury instruction, that "the government must prove that he intended to communicate a true threat" was denied. *Elonis v. United States*, 575 U.S. 723 (2001). The U.S. Supreme Court overturned the conviction, finding that, for purposes of federal law, the government must prove that the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." *Id.*

[19] §1006.07(7), Fla. Stat. (2022).

[20] §1006.07(7)(a), Fla. Stat. (2022); §1006.13, Fla. Stat. (2019).

[21] Orange County Code of Student Conduct, 2022-2023.

[22] Miami Dade Code of Student Conduct, 2022-2023.

[23] 20 U.S.C. §1232g; 34 CFR Part 99.

[24] Florida Administrative Code, 6A-1.0955.

[25] §790.401, Fla. Stat. (2018).

[26] §790.401, Fla. Stat. (2019) (prohibits minors from possessing firearms, with exceptions for unloaded firearms in the minor's home and for certain lawful hunting or marksmanship practice).

[27] §790.401, Fla. Stat. (2019).

[28] §790.401(2)(e), Fla. Stat. (2019).

[29] §790.401(3)(c), Fla. Stat. (2019).

[30] §790.401(3)(e), Fla. Stat. (2019).

[31] §790.401(3)(f), Fla. Stat. (2019).

[32] Under the statute, a law enforcement agency "may" remove RPOs from their database once they have ended or are vacated. §790.401(10)(b), Fla. Stat. (2019)

[33] *Watts v. United States*, 394 U.S. 705 (1969)(Petitioner's remark during political debate that "the first man I want to get in my sights is L.B.J.," was held to be crude political hyperbole which, in light of its context and conditional nature, did not constitute a knowing and willful threat against the President.

[34] Comments from Sandy Hook Promise. (2023). "17 Facts About Gun Violence And School Shootings," Sandy Hook Promise, www.sandyhookpromise.org/blog/gun-violence/facts-about-gun-violence-and-school-shootings/:

> "Almost all mass school shooters shared threatening or concerning messages or images…more than 75% raised concern from others prior to the attacks… bystanders saw warning signs in most documented active shooter cases…. Truly, you can prevent school shootings when you know the signs."

UFF'S PRESERVATION POINTS • from page 41

> the appellate court to determine whether the trial court's ruling was erroneous and if erroneous what effect the error may have had on the result.

(Cleaned up).

Do not let your next case suffer the same fate as the cases cited above!

Finally, there are different ways to proffer testimony and evidence. The easiest way is to present an immediate proffer outside the presence of the jury (i.e., "Judge, I understand your ruling and I respectfully object, and I need to proffer what my witness would have said — can we please excuse the jury so that I can question the witness and place on the record what the witness would have said to the jury had s/he been permitted to testify?"). I recognize, however, that some judges are not always willing to allow proffers in the middle of a trial (but you need to try). If your request to present an immediate proffer is denied, you should ask if you can present your proffer during the next break. If that request is also denied, then you should attempt to present your proffer at the conclusion of the day (with or without the judge) while the court reporter is still in the courtroom (or, if no court reporter, while the proceedings are still being recorded). If none of these options work, then you should file a written proffer — and the written proffer can be in question-and-answer form (if you have someone transcribe your questions and the witness' answers) or the written proffer can simply be a summary of what the witness would have said. And if the proffer relates to evidence, then you need to file the evidence (i.e., either give it to the courtroom clerk or file it on the Florida Courts E-Filing Portal).

Good luck — and always remember to proffer! 🏛

[1] I am writing my "Preservation Points" columns in honor of Jim Miller, who was both a friend and mentor to me. Beginning in 2005, Jim wrote a series of columns for *The Defender* dealing with preservation of error — using the acronym "Nine Lives." Jim entitled the first column: "Giving Nine Lives to a Busy and Overworked Trial Lawyer: 9 Ways to Preserve the Record on Appeal or, 'When you come to a fork in the road, take it.'"

In his three columns, Jim discussed the following "Nine Lives":

❶ **NEVER GO TO TRIAL UNPREPARED:** Know the law — Use the collective wisdom and experience of your office.

❷ **IN CONTEXT:** A contemporaneous objection is made at or about the time of the event, so that the trial court can correct error in context. It does not have to be an instantaneous or simultaneous objection.

❸ **NAME THE PREJUDICE:** Blood on the tracks — You must be able to show some type of real prejudice with each objection. Otherwise, why bother to object?

❹ **EXCLUDE PREJUDICIAL EVIDENCE:** Section 90.403, Florida Statutes — You must use 90.403 as much as possible in light of expanded view of relevance and diminished scope of constitutional and fundamental error.

❺ **LET THE COURT KNOW WHY:** Proffer = time = prejudice = power — You can proffer anything! Proffer will establish prejudice and give you more control.

❻ **INSIST ON RENEWING OBJECTIONS:** A simple rule: always renew objections and never rely upon fundamental error.

❼ **EXPECT TO WIN:** What to do if and when the court sustains your objection – Motions for mistrial, to strike and disregard, cautionary instructions.

❽ **VOCALIZE:** More is more — "When in doubt, spit it out!" — make as many objections/points as you feel are appropriate for each issue. On appeal you can only subtract arguments raised at trial, you cannot add them.

❾ **STAND UP TO THE PETTY TYRANT:** Approaching the bench; speaking objections; Section 90.104(2), Florida Statutes.

James T. Miller, "Nine Ways to Preserve the Record on Appeal," *Florida Defender* (Winter 2005 & Spring and Summer 2006). Like Jim, I am hopeful that the tips in my columns will help make you a more effective trial lawyer and will ensure that — should you finish in second place at trial — you have preserved all issues for appeal.

MICHAEL UFFERMAN is a board-certified criminal appellate lawyer and a past president and a life member of FACDL. He is the author of the *Florida Criminal Practice and Procedure* treatise, 2022 ed. (Vol. 22, Florida Practice Series).

DUI:
The Testifying Client

by
Denis M.
deVlaming

It is rare that a defendant will testify on his or her own behalf in a DUI trial. But it happens. Making that decision can be risky but it can also pay off.

Any experienced criminal defense lawyer will agree with the following statement "the jury had a doubt up until the time the defendant took the stand." That comment certainly has validity but there are times when a defendant's testimony can make or break their case. Trey Gowdy, former U.S. Congressman, trial lawyer, and author of *Doesn't Hurt to Ask*, said in his book, "Direct examination, more often than not, is where cases are actually won and lost." Making the decision will depend on a number of factors. First and foremost, is he or she likable? Clarence Darrow, the famed criminal defense attorney who practiced in the beginning of the last century, commented, "I never won an acquittal for a client that the jury did not like." If the client is angry and argumentative about his arrest and charge, that will be held against him by the jury. What should be asked is "does something need to be explained by the client?" If the answer is no, then testifying may not be a viable option. But even if something needs to be explained, trial counsel should consider whether or not another person, such as a passenger or someone who was with the client before being stopped can provide the needed explanations.

However, if, in the end, the decision is made by counsel and client that the client will testify at his trial, all information favorable to the client's life should be gathered and discussed, even if its admissibility is questionable. Military service is important and may have an impact on the jury. After all, the majority of the public are impressed and grateful for those who served in the military. It is also an opportunity to bring out what the client was taught while serving. For example, the client may be asked on direct examination at trial "why did you perform the walk and turn test the way you did?" The answer may be "because I was taught in the military to follow orders. The officer instructed me to do the test exactly the way I did." This explains not only why the test was performed the way it was but has the added benefit of getting in the client's military service and the importance of following orders.

When defense counsel is told by the client that the arresting officer was abusive, condescending or unfair, it is important to temper the client's testimony so as not to "badmouth" the officer. Obviously, the arresting officer is not going to show that side of him when he testifies and so criticisms by the client may be held against them. It is better for trial counsel, in his or her cross-examination of the arresting officer, to bring out that the client was treated unfairly. The best way to do that is to have the client tell you EXACTLY what the officer said to him, word for word. With that information, the following cross-examination example may prove effective:

Officer, when you were with my client at the scene, did he have his cell phone with him? Answer: I don't know.

Do you know if he was tape recording the conversation that you were having with him? Answer: I don't know.

Then let me ask you straight up. When you were arresting Mr. Jones, did you say to him (and then quote verbatim what the client told you during trial preparation).

There are two benefits to this strategy. First, the officer may think that the conversation was recorded and does not want to commit perjury and so admits to the question. The second benefit, perhaps even more important, is that by giving the officer the opportunity to admit or deny making the statement, trial counsel has effectively kept the officer from being a rebuttal witness to contradict the client after the client testifies to the offensive statement the officer made. The officer was given the opportunity to admit or deny the statement and so rebuttal on that subject is inappropriate.

It is important to note that both direct and cross-examination should be practiced with the client pre-trial. An effective way of preparing the client is to videotape him at the office. Two lawyers should be involved. One does direct and the other cross. A cell phone recording using a tripod will allow the client to experience direct and cross-examination and then be critiqued by the lawyer. After the session, the client should leave with the video of his testimony and the critique so that he can review it at home.

If the client tells his lawyer that the field sobriety exercises were done unfairly counsel should consider going to the scene with the client for an explanation. For example, if the client says that

the arresting officer had him do the walk and turn exercise on a slope, a video demonstrating that would help to prove to the jury that at least that test was unfair (authors note: a short videotape showing someone at the scene holding a tennis ball with their finger, letting it go, and showing it race down the driveway and across the street is powerful testimony after getting the officer to commit that the surface was level). And on a positive note, if the client has never been stopped for DUI and holds a "safe driver" driver's license, the client should testify that the field sobriety exercises were difficult "because he had never done them before." Furthermore, a statement that he holds a safe driver license should also be told to the jury. Such testimony is not the same as the prohibition that the client "has never been convicted of a crime or that he has never been in trouble with the law before." They are not the same. A clean driving record is not the same as the absence of any prior criminal convictions.

There may be times when a client has significant medical issues that prohibit him from passing the field exercises. Without the client testifying, that may be difficult to put before the jury. If a client has had knee surgery or back surgery, it becomes understandable why he would have difficulty passing those tests. Along with a discussion of medical issues, the testifying client needs to be reminded how to answer the prosecutor's questions. That is, he should not fall for the cadence the prosecutor tries to engage in. He should be reminded to listen to the question, not interrupt counsel, and answer it slowly, factually and not argumentatively. The fact that, at any given time, at least one juror will be looking over at him before his testimony even begins is important. Making faces or being visually critical of the state witness' testimony should also be covered and condemned in trial preparation.

Clients should also be prepared on how to act even before taking the stand. When called, they should walk with a purpose to the witness stand, look over at the jury and then back to counsel. They should project confidence and believability. Speaking slowly after understanding the question should be covered (authors note: some lawyers like the client to look over at the jury when critical questions are asked. Some don't. Lawyers should make that decision based upon the client's personality). If there is some harmful testimony that is going to come out at trial (for example, the client being heard on video using foul language), this should be covered on direct examination. It is better to be in control of the question and answer than to wait for it to come out on cross-examination.

Many people know that drunks cannot remember details when they are intoxicated. With that in mind, it is important that the client testify to as many details as possible. Even the slightest detail is important. It tells the jury that the client remembers and was not so impaired that they forgot. Along with bringing out details, counsel should consider asking and proving that the client passed the jury instruction on impairment. Often times it is a variation of a person's ability to "walk, talk, judge distances, follow instructions, drive a car, etc." Taking the client through each of these criteria that the judge will ultimately tell the jury, is powerful. It shoots down suggestions of impairment because everything the judge tells the jury to look for is answered favorably by the client. Having the client narrate a scene video during their testimony is something that will also increase the chances of an acquittal.

Many factors go into whether or not a defendant should or should not take the witness stand. Understandably, most of the time it is not a good idea. However, there are times when it increases the chances of an acquittal if the client testifies and testifies well. If they are likable, smart, articulate, and persuasive, the decision to have the client testify and explain to the jury, in their own words, that the field tests were unfair and that the arresting officer had his or her mind made up as soon as the client stepped out of their vehicle, may very well be a risk worth taking.

2023 FACDL CALENDAR

JULY 2023

THURSDAY, JULY 20, 2023

Racial Justice Advocacy at Every Level Webinar

NOVEMBER 2023

THURSDAY, NOVEMBER 16 - FRIDAY, NOVEMBER 17, 2023

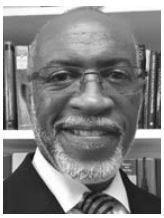
Blood, Breath & Tears/Jury Trial Seminar

UF School of Law-Gainesville

DENIS M. DE VLAMING, a Board Certified criminal defense attorney in Clearwater, has practiced criminal law exclusively since 1972. He has been on FACDL's Board of Directors since its inception in 1988 and is a Charter Member of the organization. He is a past president of FACDL.

FLORIDA'S CRIMINAL PUNISHMENT CODE: *The Letter vs. The Spirit*

An enigma is "[a] dark saying in which some known thing is concealed under obscure language; an obscure question; a riddle."
–webstersdictionary1828.com/Dictionary/Enigma



by
A. Wellington "Al" Barlow

Florida's Criminal Punishment Code (CPC) is a very perplexing enigma. Unfortunately, this is especially so for judges, prosecutors and criminal defense attorneys who are charged with professional responsibility of understanding *and properly deploying the CPC to avoid inequitable and disparate sentences of the criminally accused. The failure to comprehend the CPC, and/or the lack of the requisite chutzpah to adhere to the true essence of its principles, too often lead(s) to diametric opposite outcomes of the purposes for which it was instituted. The CPC derived from structured sentencing guidelines*.

SENTENCING GUIDELINES

"Florida has seen several iterations of sentencing guidelines over the past 35 years. Before the enactment of sentencing guidelines in 1983, Florida utilized indeterminate sentencing. Under indeterminate sentencing, the court wielded broad discretion to sentence defendants up to the statutory maximum" as follows:

Third Degree Felony = Five Years
Second Degree Felony = 15 Years
First Degree Felony = 30 Years
Life Felony = Life

An-Analysis-of-Florida-CPC-June-2019.pdf

Most inmates were eligible for parole prior to 1983. "Florida's interest in sentencing guidelines dates from the winter of 1977 with the chief justice's appointment of a committee "to examine the extent and causes of sentence disparity and to explore the variety of sentencing alternatives available-judicial, legislative, and administrative-to reduce unreasonable sentence variation." (Id.) After an extensive review of felony sentencing practices within the state and an examination of the various sentencing proposals currently in vogue throughout the country, the Sentencing Study Committee endorsed, [I]n principle, the exercise of judicial discretion in the sentencing process. However, in order to *achieve a greater degree of consistency and fairness in the sentencing process throughout the state*, the Committee recommend[ed] the development and implementation of structured sentencing guidelines in combination with a sentence review panel that would operate within the sentence parameters prescribed by the Legislature." (https://ir.law.fsu.edu/lr/vol11/iss1/3/)

The timeline for Florida's sentencing laws are as follows:

Indeterminant Sentencing
•Until 1983

Sentencing Guidelines
•1983 to 1994

Revised Sentencing Guidelines
•1994 to 1998

Criminal Punishment Code
•1998 to the present

Id. Analysis of Florida's CPC

The CPC was specifically enacted to achieve statutory objectives as follows:

(a) Sentencing is neutral with respect to race, gender, and social and economic status.

(b) The primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment.

(c) *The penalty imposed is commensurate with the severity of the primary offense and the circumstances surrounding the primary offense*.

(d) The severity of the sentence increases with the length and nature of the offender's prior record.

(e) The sentence imposed by the sentencing judge reflects the length of actual time to be served, shortened only by the application of incentive and meritorious gain-time as provided by law, and may not be shortened if the defendant would consequently serve less than 85 percent of his or her term of imprisonment as provided in s. 944.275(4). The provisions of chapter 947, relating to parole, shall not apply to persons sentenced under the Criminal Punishment Code.

(f) *Departures below the lowest permissible sentence established by the code must be articulated in writing by the trial court judge and made only when circumstances or factors reasonably justify the mitigation of the sentence. The level of proof necessary to establish facts that support a departure from the lowest permissible sentence is a preponderance of the evidence*.

(g) *The trial court judge may impose a sentence up to and including the statutory maximum for any offense, including an offense that is before the court due to a violation of probation or community control.*

(h) *A sentence may be appealed on the basis that it departs from the Criminal Punishment Code only if the sentence is below the lowest permissible sentence or as enumerated in s. 924.06(1).*

(i) *Use of incarcerative sanctions is prioritized toward offenders convicted of serious offenses and certain offenders who have long prior records, in order*

to maximize the finite capacities of state and local correctional facilities.

(www.flsenate.gov/Laws/Statutes/2022/0921.002)

The core principles of the CPC as envisioned by the legislature are embedded in Florida code. (Id. Analysis of Florida's CPC) These three principles emphasize the following:

- Fairness,
- Proportionality and
- Uniformity

"The Florida code lays out a number of specific principles embodied by the CPC. First, sentencing must be unbiases and neutral with respect to race, gender, and social and economic status. (Id.) These principles underline proportionality with respect to the current offense and prior criminal history, with the penalty imposed…*commensurate with the severity of the primary offense and the circumstances surrounding the primary offense and the severity of the sentence increase[sing] with the length of the nature of the offender's prior record. Id.*

THE LETTER OF THE LAW VS. THE SPIRIT OF THE LAW

While the black letter law of the CPC ideally fosters equitable and therefore non-disparate dispositions of accused persons with similar statutory charges, offense levels, prior criminal penalties and enhancements, the results often produce sentencing outcomes that violate the spirit of CPC. It is written "…the letter kills, but the Spirit gives life." (II Corinthians 3:5 NKJ) While the letter or the purpose of the CPC is to foster proper punishment that's both equitable and properly proportional, the practical results are too often the diametric opposite of the statutory objectives. The non-partisan Criminal Justice Institute analyzed the CPC in 2018 and found disparate sentencing across the entire State of Florida in its Florida Legislature sanctioned study.

The question is what, if anything, can be done to align the letter of the CPC with the spirit such that equitable sentences can be realized across the state? It starts with prosecutors, criminal defense attorneys and especially judges. Technologies for Justice created, developed and implemented web-based software to foster equitable and proportional sentences that would fulfill the true purposes of the CPC. The Equity and Sentencing Analysis System (ESAS©®) (https://technologiesforjustice.com/esas-successes) effectively audits the CPC by comparing and contrasting prior sentences in closed cases with prospective sentences that are being contemplated in open cases with the same dynamics. Closed case sentencing data is effectively "Sentencing Precedent" that prosecutors, criminal defense attorneys and judges *can examine to foster sentences that meet the CPC's requirements*.

The core problem with aligning the letter and the spirit of the CPC are two age-old human factors that have always been an enemy of progress as follows:

- Lack of knowledge
- Taking comfort in the known while simultaneously rejecting the unknown.

Such mind sets reject the spirit of the CPC by holding onto tradition. Here's what's too often thought and expressed:

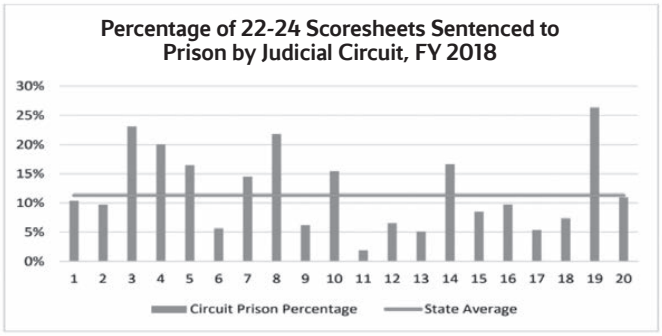
Some prosecutors say, *"each case is different, and the facts are different so sentences can't be compared and contrasted,"* while others objectively consider the data.

SEE PAGE 56

Likelihood of Prison Sanction Varies Dramatically by Circuit and County

One of the main principles of the CPC is neutrality with respect to race, gender, and social and economic status. Despite this stated goal of fairness, defendants with similar criminal conduct and criminal histories experience vastly different outcomes. One variable that appears to have a significant impact on the sanction received is the judicial circuit and county handling the scoresheet. Figure 7 represents the percentage of 22 to 44 point scoresheets in FY 2018 that received a prison sentence in each of Florida's 20 judicial circuits. The horizontal line represents the state average, where 11 percent of 22 to 44 point scoresheets result in a state prison sanction.

Figure 7. Wide Variation in Likelihood of Prison Sanctions Among Judicial Circuits



Across the state, there is significant variation in rates of prison sentences. In the 11th Judicial Circuit, which consists solely of Miami-Dade County, 2 percent of 22 to 44 point scoresheets received a prison sentence. In contrast, one in four scoresheets received a prison sentence in the 19th Judicial Circuit, which consists of multiple counties (Indian River County, Martin County, Okeechobee County, and St. Lucie County). Overall, eight of the 20 circuits sentenced scoresheets in the 22 to 44 point range to prison at a rate higher than the state average of 11 percent.

A. WELLINGTON "AL" BARLOW, J.D. (85) & B.A. (83) from U.F., is licensed in Florida (86) and Georgia (94). He wields over 33 years of trial court experience in both criminal and civil litigation, advancing the constitutional rights of clients in both areas of law. He served on the 4th Circuit Judicial Nominating Commission as a gubernatorial appointee from 1991 to 1994 having been the first African-American to hold the position of chairman. He also chaired a Florida Bar grievance committee in the mid 2000's. He's an accomplished author, co-developer of ESAS® and shareholder of Technologies for Justice.

Bail in Extradition Cases

by
D. Gray
Thomas

As perfunctory and often thoughtless as bail settings are at other first appearance hearings,[1] my experiences over the years have repeatedly shown complete ignorance among almost all judges, prosecutors, extradition officers and many defense attorneys that the vast majority of people arrested on felony warrants from other states are eligible for bail. Regardless of any bail amount set (or denied) on out-of-state warrants, Florida courts have authority to make their own bail determinations in accordance with the familiar considerations, such as danger to the community, risk of flight and ties to the community.

In speaking with extradition officers before the start of first appearance hearings, most have said, "You can't get bail on an extradition case." To one who had his back the most bowed up at the notion of bail in such a case, I said, "Just watch me." And when I have presented the governing statutes to judges, I have always succeeded in obtaining bail under the familiar considerations for non-extradition cases.

Law enforcement officers assigned to handle extradition warrants where I mostly practice approach arrestees before court, urge them to sign waivers of extradition and either affirmatively tell them they cannot obtain release on bail or don't mention that they are eligible for bail. First appearance judges have not so advised arrestees unless they have counsel to inform the court. Being uninformed, unless they claim not to be the same person wanted in the other state, or are advised otherwise by informed counsel, almost all sign the waiver of extradition.

All the states and commonwealths in the United States have adopted the Uniform Interstate Extradition Act, part of the uniform interstate statutes that also address detainers from other states and transfers of sentenced prisoners from one state to another. Chapter 941, Fla. Stat., is Florida's codification of the uniform interstate compact on these corrections issues. Sections 941.01-941.42 are Florida's codification of the interstate extradition act and address the several provisions ranging from detention to bail, to extradition warrants issued by governors, to waivers of the right to challenge extradition, and other circumstances. This article is limited to the issue of bail following arrests on out of state felony warrants.

The only non-bailable charged out-of-state offenses are the most severe. Under Sec. 941.16, Fla. Stat., "this state may admit the person to bail by bond, with sufficient sureties," conditioned by the person's appearance at a time specified, "[u]nless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed," or, shall we say, alleged to have been committed. And under the uniform act, none of its provisions "shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state…." Sec. 941.26(2), Fla. Stat.

Absent a setting of bail, the arrestee is committed to the local Florida jail where he or she has been arrested for up to 30 days to provide time for the issuance of a warrant by the governor of the other state, or retrieval by the other state's law enforcement if the arrestee waives extradition rights, "unless the accused gives bail as provided in s. 941.16, or until the accused shall be legally discharged." Sec. 941.15, Fla. Stat. Of course, if the arrestee has signed a waiver of extradition rights, the demanding state can quickly retrieve him or her, including when counsel is hired after first appearance, files a bail motion and battles with the court to obtain a hearing date. If no governor's warrant from the demanding state is issued within 30 days and the arrestee has not been picked up by the demanding state on an extradition waiver, the Florida court may either "discharge the accused," extend detention for up to 60 days or grant bail for a further appearance within 60 additional days. Sec. 941.17, Fla. Stat. The guilt or innocence of the arrestee may not be challenged or inquired into, only whether the arrestee is the same person who is charged in the demanding state. Sec. 941.20, Fla. Stat.

I have yet to have an extradition

SEE PAGE 54

D. GRAY THOMAS has practiced criminal defense, appellate matters, Bar discipline defense and civil rights since 1992 after receiving his J.D. from the University of Florida. He has practiced primarily in northeast Florida but also throughout the state and elsewhere, and has been a member of the FACDL board of directors for a number of years.

Want the Jury to Know the Contents of the Probable Cause Affidavit But Can't Figure Out How to Get into Evidence?

by
Jacqulyn
Mack-Majka

Nothing interrupts the smooth flow of a trial like an objection to your admission of evidence; state's evidence at that! You're probably thinking "what state evidence could a defense lawyer possibly want the jury to see?" What state evidence is so important that you, the defense lawyer, has been caught dumbfounded and stunned, like the proverbial "glazed zombie," when opposing counsel objects to its entry as either irrelevant or double hearsay? *Van Zant v. State*, 372 So.2d 502 (1st DCA 1979). You think "uh oh" I want to not just impeach the cop, I want the jury to see, his or her, failure to state probable cause (we call 'em "lies") at the time of arrest, in contrast to what, shockingly, is fundamentally different trial testimony.

Fearless as your internal lightbulb explodes with brilliance you respond, "Your Honor pursuant to the hearsay exception found at Fla. Stat. 90.803 (8), coupled with the arresting officer's materially conflicting trial testimony, a complete lack of trustworthiness has been more than adequately demonstrated by the defense. Therefore, the probable cause affidavit is a public record or report and a brief review by the Court will reveal the probable cause affidavit's lack of trustworthiness (a.k.a. 'lies')." As a result the probable cause affidavit in this type of factual scenario fits squarely within the confines of Fla. Stat. 90.803 (8) and as such is an exception to hearsay. Can we just say "substantive evidence"? Heck yeah!

Ok so maybe your lightbulb is dim or perhaps it's the Court who suffers from a lack of illumination. Have no fear you can still get errors and, or, omissions contained within the probable cause affidavit in front of your jury through careful cross examination of the cop.

Q: Deputy X, did you prepare a sworn statement the night of the arrest regarding Ms. Q?

A: Yes.

Q: Your Honor, may I approach the witness?

As you advise the Court that the witness will not be presenting the document or other item to the jury and is simply using it to refresh the witnesses' recollection.

The Court: Of course, you may.

So, you trot on over to state's counsel table, show your adversary your document and then head up to the witness stand all the while describing for the "silent record" what you are physically doing while you are in the midst of the particular action. i.e. "approaching the witness with document marked for identification as Z." It makes us appellate lawyers squeal with pleasure when we read a trial transcript with such descriptors because suddenly your two dimensional transcript becomes a 3D masterpiece!

Even a document which is itself absolutely privileged and inadmissible may be used to refresh the recollection of a witness. But that use will not render the document admissible as an exhibit in evidence. "If a writing is admissible independently, its use to spur a witness' memory does not disqualify it, but *it cannot come into evidence on the coattails of the testimonial recollection it sparks*." *Auletta v. Travelers Indemn. Co.*, 388 So. 2d 1067, 1068 (Fla. 4th DCA 1980)(reversing judgment based on erroneous introduction of vehicular damage estimate after it was properly used to refresh recollection of witness about what parts of vehicle were damaged)(emphasis added).

The first two elements of the foundation for using a document to refresh recollection are: 1) to establish that the witness once knew the answer to the question but 2) has forgotten the answer by the time of trial. However, don't try to "refresh" the recollection of someone who never knew the answer in the first place. See *Claussen v. State Dept. of Transportation*, 750 So. 2d 79, 82 (Fla. 2d DCA 1999), where the court reversed based on the improper use of a letter to ostensibly refresh the recollection of the plaintiff. "Mr. Claussen, however, professed no lack of memory; rather, he denied ever receiving the suggested information. Essentially, *he had no memory to refresh*." (Emphasis added).

To establish the foundation for the second element is to show the witness the document or item in question. Once the cop has the probable cause affidavit you say something like: "Please read this to yourself and let me know when you are finished." Once the cop has refreshed his or her recollection with the document, you may consider asking the following: "Now that your memory is refreshed, can you tell the jury why you wrote A on the night of the arrest, and testified to L in front of this jury?"

There is no limitation on the source or nature of a document used to refresh recollections. The writing does not have to be prepared by the witness or at their direction, and the writing does not have been made at or near the time of the

event recorded. In fact, the item used to refresh recollection may be a tangible object or other non-documentary item. "Anything may in fact revive a memory: a song, a scent, a photograph, and allusion, even a past statement known to be false. When a witness declares that any of these has evoked a memory, the opposite party may show, either that it has evoked what appears to the witness as a memory, or that, although it may so appear to him, the memory is a phantom and not a reliable record of its contents." *United States v. Rappy*, 157 F.2d 964, 967 (2d Cir. 1946). Florida's evidence code, Section 90.613, is equally liberal as to refreshing recollections allowing the witness to be presented with "a writing *or other item* to refresh memory while testifying" *Id.* (Emphasis added).

Finally, if all else fails there are multiple other methods of presenting this type of evidence to the jury, this article focuses on a lesser known avenue of entry. Thanks for reading and remember just keep trying because if you don't we all lose.

JACQULYN MACK-MAJKA is a shareholder at Mack Law Firm Chartered and is a member of FACDL's State and local Charlotte County, Chapter. She has practiced law with her Mother for the last 25 years in Florida's sunny Gulf-Coast.

BAIL • from page 52

case in which my client entertained any serious notion of challenging whether he or she was the same person as the one sought by the demanding state, but it happens occasionally. As a result, my advice has uniformly been for the client to obtain counsel immediately in the demanding state, if they have not done so already, and go to that state to deal with the matter as advised by counsel in that state. Informing the extradition court in Florida that my client will do just that further assures the court of my client's intention to appear.

[1] This short article is something of a footnote to the excellent article about rapid-fire, assembly line bail settings by Judge O.H. Eaton in the Spring 2023 *Florida Defender*.

Legally Bald® and Other Strange Criminal Law Related Thoughts ©2023

by Geoffrey Golub

THE COUNTY JAIL HOUSE OF GOD

A lot of people wonder, where is God? If there is a God, why can't we see God? How can God let all these bad things happen? Where can God be found.? Why is God taking the Fifth? Why is God on the lamb? Well, according to my jail clients, God's in the jail. You want to find God, get arrested. Serve some time in jail. The County Jail House of God is non-denominational and caters to any, and all religions. Lots of followers. Sometimes the Congregation is even overcrowded.

MOTION FOR INEFFECTIVE ASSISTANCE OF JESUS

Many inmates who believe in the Jesus they find in jail, AKA the "Jail Jesus" reject plea offers and demand a trial because the outcome is all in "Jesus' hands." "Jesus is on my side." "I put my faith in Jesus." "Jesus told me I would be found not guilty." Which is of course fine. But because of their new-found faith in Jesus, they reject and ignore their lawyer's advice. If they prevail at trial, then of course they thank Jesus for acquitting them. Which is again fine. But when they are found guilty, they don't blame Jesus. They blame their lawyer. They file a motion for ineffective assistance of counsel. Not a motion for ineffective assistance of Jesus.

THE COME-TO-JESUS SPEECH VS. THE JAIL JESUS

Many attorneys use the expression, "The Come-to-Jesus Speech," when they have to set the client straight on what the client must do. Like accept the plea offer because you will not prevail at trial and when you lose, you are going to go away for a long, long time. But if the client has already "Come to the Jail Jesus," and the Jail Jesus has told them to take the case to trial then which Jesus is the right Jesus? The one who the lawyer says wants the client to plea or the Jail Jesus who says take the case to trial. This is what is known as "Dueling Jesuses." In the case of dueling Jesuses, the Jail Jesus usually prevails. The client can never accept the fact that perhaps the good plea offer is Jesus' doing.

WHEN AN APPEAL IS NOT SO APPEALING

In *Matos v. State*, 48 FLW D742 (Fla. 4th DCA 2023), Edwin Matos was sentenced to forty years for Human Trafficking. He decided to appeal claiming that he should not have been found guilty of Human Trafficking. He also appealed the amount of the cost of prosecution which was $200.00 but he claimed it should have been $100. The state cross-appealed claiming that the forty-year sentence was illegal since it should have been mandatory life. The state won their appeal. Matos lost his appeal for a dismissal of his charge but won his claim that the cost of prosecution was too high. So, to sum it all up, Matos went from 40 years to life, but saved a hundred dollars that he now has a lifetime to pay.

JAMES BONDSMAN

I want to open a Bail Bond Agency to bail people out of jail. I want to name it "James Bondsman." All the bondsmen will wear Tuxedos when they go to the jail to bond inmates out. The first thing they will say upon meeting someone is, "I'm a Bondsman. James Bondsman." Commercials will show the bondsmen in their tuxedos jumping out of helicopters and planes that are flying over various jails, breaking the inmates out and then speeding away in an Alfa Romeo. And then you'll hear the voice over: You want to get out of jail quick. Call Bondsman. James Bondsman. 1-800-007-Bond. (I'll change my name to James Bondsman to avoid any lawsuits.)

THE SEX OFFENDER STATE

A Florida senator has proposed a new law to identify sex offenders on their driver' license and on their Florida License plates. The license plates for sex offender will be fluorescent green. I think they should just write "Sex Offender State," where "Sunshine State" used to be, keeping everything else about the license plate (color, design, letter-font) the same. So, when people look, they may think they are seeing "Sunshine State," when they are actually seeing "Sex Offender State," or vice versa. (A subtle change, to help law enforcement identify sex-offenders, while cutting down on vigilantes).

HERTZ, AVIS, AND ENTERPRISE ORDER SEX OFFENDER LICENSE PLATES

Presuming that the new proposed law that will make sex offenders put fluorescent green license plates not only on their own car, but also on any that they lease or borrow or rent, rental agencies are trying to get a jump on each other by ordering the license plates ahead of time. These license plates will be made by incarcerated sex offenders. Imagine walking into the rental agency to rent a car. "Excuse me, do you have any of those Fluorescent green plates, my children really dig the color. Do you have a glow in the dark version?

A SEX OFFENDER EVEN IN DEATH

A new Florida Statute will make it mandatory that all sex offenders who die have to have the words "Sex Offender" or the like written on their tombstone. "Loving Father, Stepfather, Brother, Uncle, and Sex Offender." Or: The Wrong Kind of Loving Father, Stepfather, Brother, or Uncle. Also, all sex offenders must be buried in an area of the cemetery that is not within one thousand feet of any non-sex offender burial plots.

LIFETIME ACHIEVEMENT IN CRIME

I think when someone is designated a Career Criminal, they should have some kind of Court room ceremony for the person. And the person should be allowed to invite friends on the inside and outside and family to the ceremony. The Judge should formally designate the person a Career Criminal and hand him a Career Criminal Certificate. Then the person could make a speech. "Thank you for this award. I'd like to thank the State of Florida, my parents for my messed-up childhood, the police for arresting me, my lawyers for railroading me. The prosecutors for prosecuting me, the juries who found me guilty, and the Judges who sentenced me." I think there should also be a Lifetime Achievement in Crime award given out once a year.

CAREER CRIMINAL DAY

I had a friend whose father was a career criminal. We were in High School together. On Career Day his father received a furlough from prison to talk to the class about his career in crime.

They really should have a day for Career criminals. On that day anyone who is a Career criminal and is incarcerated should receive a free care package and if they are not incarcerated a free cup of coffee at Starbucks and a free donut at Dunkin' Donuts.

NO JOGGING: YOU LIVE IN A HIGH CRIME AREA

Flight alone or running away from the police used to not be enough for the police to detain or stop a person. A person was allowed to run away if he saw the police, and the police could not stop him for just running away. But now the law says that if the flight or running away takes place in a high crime area then the person can be detained. What if people happen to live in a high crime area? Can they no longer jog because then the police will be able to detain them? "We saw you running when you saw us (the police) show-up, so we can detain you. "I was just jogging." "Sure, you were, no one just jogs in a high crime area." This law discriminates against people who have the bad luck of living in a high crime area. And what is the definition of a high crime area? How much crime does an area need to be branded the distinction of being called a high crime area? "Look, your neighbor's house was burglarized a couple of months ago, you live in a high crime area so stop jogging." How are people in High Crime areas supposed to stay in shape if every time they are out jogging the police can detain them?

A SIMPLER PLEA COLLOQUY MADE FOR MISDEMEANANTS*

JUDGE: By accepting this plea you are giving up all the rights given to you under the United States and Florida Constitutions. If you don't know what those rights are, then they probably don't mean that much to you anyway. The only right you have left is a meaningless right to an Appeal to challenge the voluntariness and legality of your plea, which by accepting this plea you are agreeing that you are doing so voluntarily anyway, and as for the legality of your plea and sentence, the chances of success on an appeal are about the same

as winning the lottery…. Oh, and by the way, you might lose your license because DHSMV can do whatever they want.

*ADDED FOR CRIMES THAT CAN BE ENHANCED: If you commit this crime again, really bad things are going to happen to you.

RECKLESS NOODLES

I got pulled over today. The Officer said he smelled the odor of Drunken Noodles on my breath. I told him the Noodles I had eaten were not under the influence of alcohol to the point where their normal taste was impaired. He asked me to take a breath test. I said, 'no.' He said to me, 'what are you scared? You some kind of Chicken Noodle.' I said 'no' again. He said if I refused, I wouldn't be able to eat any kind of noodles for one year. If this was my second refusal, I would have to stay noodle-free for eighteen months, and I could also be charged with a misdemeanor. I told him he needed to arrest the Drunken Noodles. To leave me alone. He arrested me. I hired a lawyer named, "Ramen." Best DUIN (DRIVING UNDER THE INFLUENCE OF NOODLES) lawyer in the world. He worked for thirty years in Japan specializing in DUIN. He worked my case down to Reckless Noodles. And it was a dry reckless. I pled to noodles that were still wrapped in plastic.

GEOFFREY P. GOLUB is a sole practitioner in Melbourne, Florida. He was admitted to practice in November 1993 after earning his A.B. at Washington University in St. Louis and a J.D. from University of Miami School of Law. He spent two and a half years as an Assistant Public Defender with the 18th Judicial Circuit in Brevard County. He is a Florida Board certified criminal trial lawyer.

F·L·O·R·I·D·A
DEFENDER

PUBLISHING POLICY

Articles submitted for publishing in *The Defender* are not guaranteed to be published but are subject to review by the editor(s) for content supporting FACDL's mission and any possible theme of a particular issue.

The editor(s) shall have full authority to determine the content and layout of The Defender in accord with FACDL's mission.

Any person with knowledge of and interests in, any of the ideals and goals stated in the FACDL mission statement may submit an article for the *Defender.* Any published article may be republished as long as the FACDL *Florida Defender* is properly cited at the time of republishing.

Articles must be submitted already proofed and edited.

Articles must be submitted in Word format or other format required by editor(s) for ease of publishing.

The author of a submitted article must provide their full name or enough of their name to be easily identified.

The author of a submitted article must provide a biography of no more than 100 words.

The author of a published article, who is not a FACDL member, may request a courtesy copy of *The Defender* issue containing their article be mailed to them.

The author of a submitted article mayalso provide a headshot to accompany their article.

Any entity with a clear connection to the FACDL mission may purchase advertisement space in *The Defender* magazine, but the content of such advertisement is subject to the editor(s) review and approval for appropriate content in accordance with the FACDL social media policy.

The editor(s) may reject or delay publishing any article or advertisement that does not conform with the FACDL Mission and/or does not conform with a theme set for a particular issue.

CRIMINAL PUNISHMENT CODE • from page 51

Some defense attorneys are too fearful to present sentencing data from closed cases, think and therefore say, *"the state will reject it*, or *prosecutors don't want to consider sentences in other cases*," while others present the data in plea-bargaining and contested sentencing hearings and fulfill the letter and the spirit of the CPC.

Some judges say, "*this case is in my courtroom so I don't care what other judges have done or sentences they have imposed*," while others simply treat the data as additional information that helps them make more informed decisions.

These statements reflect mindsets from those of us who are charged with the responsibility of implementing the CPC. Sentences from closed cases are effectively "sentencing precedent" that should be analyzed to determine whether a prospective sentence in a pending case satisfies both the letter of the law and the spirit of the law.

FACDL'S FREE WEBINAR EVENT

RACIAL JUSTICE ADVOCACY AT EVERY LEVEL

Thursday, July 20, 2023 | 1:30pm- 4:30pm.

Join FACDL for this one-of-a-kind virtual CLE program. The program focuses on the ways in which defenders can advocate for their clients better by adding a lens of racial justice.

FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
FACDL

FACDL.ORG

NEW MEMBERS

- **Adriene Ables**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Robert Adams**, Orlando
  CHAPTER: David Redfern
  SPONSOR: Central Florida
- **Andre Alvarez**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Yamilette Alvarez-Pagan**, New Port Richey
  CHAPTER: Pasco
  SPONSOR: Sara Mollo
- **Tricia Andrew**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Jason Back**, Tampa
  CHAPTER: Hillsborough
  SPONSOR: Michael Maddux
- **James Barnes**, Pensacola
  CHAPTER: Pensacola
  SPONSOR: Gene Mitchell
- **Peter Beckstrom**, Dade City
  CHAPTER: Pasco
  SPONSOR: Sara Mollo
- **Jamie Bellet**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Justin Berrier**, Dade City
  CHAPTER: Pasco
  SPONSOR: Sara Mollo
- **Erin Berry,** Orlando
  CHAPTER: Central Florida
  SPONSOR: David Redfern
- **Tawnee Bradham**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Allison Brennan**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Edward Brock**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Brendan Callahan**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Sarah Callahan**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Maria Castagliuolo**, Clearwater
  CHAPTER: Sarasota
  SPONSOR: Vanessa King
- **Robert Clark**, Dade City
  CHAPTER: Pasco
  SPONSOR: Sara Mollo
- **Lee Cohen**, Lakeland
  CHAPTER: Polk
  SPONSOR: Cory Chastang
- **Palmer Cole**, Tampa
  CHAPTER: Hillsborough
  SPONSOR: Michael Maddux
- **Seth Cole**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Eben Cowles Self**, Orlando
  CHAPTER: Central Florida
  SPONSOR: James Scott Herman
- **Gerald Cruz**, Dade City
  CHAPTER: Pasco
  SPONSOR: Sara Mollo
- **Keegan Cunningham**, St. Petersburg
  CHAPTER: Pinellas
  SPONSOR: Michael Maddux
- **Andrew Darling**, Orlando
  CHAPTER: Central Florida
  SPONSOR: David Redfern
- **Shane Davis**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Tisha DeAnne**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Kyle Delgado**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Philip DiSpirito**, New Port Richey
  CHAPTER: Pasco
  SPONSOR: Sara Mollo
- **Barbara Ellis-Wiggins**, Pensacola
  CHAPTER: Pensacola
  SPONSOR: Gene Mitchell
- **Amir Elmonairy**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **James Etheridge**, Milton
  CHAPTER: Pensacola
  SPONSOR: Gene Mitchell
- **Shadi Fackih**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Paley Podhurst Falb**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Jenna Fletcher**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Mellina Fortunato**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Eric Gardner**, Lakeland
  CHAPTER: Polk
  SPONSOR: Katrina Barcellona
- **Catherine Garrett**, New Port Richey
  CHAPTER: Pasco
  SPONSOR: Sara Mollo
- **Brian Gibbons**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **James Goodman**, New Port Richey
  CHAPTER: Pasco
  SPONSOR: Sara Mollo
- **Thomas Gore**, Pensacola
  CHAPTER: Pensacola
  SPONSOR: Gene Mitchell
- **Peter Gorn**, Dade City
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Summer Greenawald**, Jacksonville
  CHAPTER: Jacksonville
  SPONSOR: Jeanine Sasser
- **Cortney Hackett**, Temple Terrace
  CHAPTER: Hillsborough
  SPONSOR: Tracy Henry
- **Will Hamilton**, Tampa
  CHAPTER: Hillsborough
  SPONSOR: Michael Maddux
- **Dustin Harscher**, Milton
  CHAPTER: Third Judicial Circuit
  SPONSOR: Gene Mitchell
- **Steven Heusser**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Emma Hirschy**, Tallahassee
  CHAPTER: Tallahassee
  SPONSOR: Aaron Wayt
- **Scott Horn**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Kemily Van Houten**, Tampa
  CHAPTER: Hillsborough
  SPONSOR: Michael Maddux
- **Raine Johns**, Dade City
  CHAPTER: Pasco
  SPONSOR: Sara Mollo
- **Alex Johnson**, Kissimmee
  CHAPTER: Central Florida
  SPONSOR: Susan Malove
- **Christopher Johnson**, New Port Richey
  CHAPTER: Pasco
  SPONSOR: Sara Mollo
- **Brittany Jones**, New Port Richey
  CHAPTER: Pasco
  SPONSOR: Sara Mollo
- **Melissa Joy Ford**, Tallahassee
  CHAPTER: Tallahassee
  SPONSOR: Kareem Todman
- **Deirdre Kelsey-Holley**, Dade City
  CHAPTER: Pasco County
  SPONSOR: Keeley Karatinos
- **Robert Kennedy**, Punta Gorda
  CHAPTER: Charlotte
  SPONSOR: Tauna R. Bogle
- **Mallory Keyser**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Lauren Krasnoff**, Miami
  CHAPTER: Miami-Dade
  SPONSOR: Dianne Carames
- **Kirby Kreider**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Robert Lancaster**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Todd Landrigan**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Lei Lei**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Alex Liebmann**, Pensacola
  CHAPTER: Pensacola
  SPONSOR: Gene Mitchell
- **Jacob Martin,** Tampa
  CHAPTER: Hillsborough
  SPONSOR: Michael Maddux
- **Hugo Martin-Ridriguez**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **LaMark McGreen**, Clearwater,
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Kayla McGreen**, Clearwater
  SPONSOR: Pinellas
  SPONSOR: Sara Mollo

NEW MEMBERS

- **David Messinger**, Orlando
  CHAPTER: Central Florida
  SPONSOR: Susan Malove
- **Alexandra Messmore**, Pensacola
  CHAPTER: Pensacola
  SPONSOR: Gene Mitchell
- **Arthur Michael Miksis**, Saint Petersburg
  CHAPTER: Pinellas
  SPONSOR: Vanessa Albaum King
- **Nicholas Michailos**, New Port Richey
  CHAPTER: Pasco
  SPONSOR: Sara Mollo
- **Diana Miers**, Orlando
  CHAPTER: Central Florida
  SPONSOR: Susan Malove
- **Nikole Miller**, Tampa
  CHAPTER: Hillsborough
  SPONSOR: Michael Maddux
- **Rebecca Morgan**, Palm Bay
  CHAPTER: Brevard
  SPONSOR: Ernie Chang
- **Richard Morrow**, Tampa
  CHAPTER: Pinellas County
  SPONSOR: Jonah Dickstein
- **Bryan Neal**, Jacksonville
  CHAPTER: Jacksonville
  SPONSOR: Gray Thomas
- **John Nohlgren**, Clearwater
  CHAPTER: Pinellas County
  SPONSOR: Sara Mollo
- **Mary O'Connell**, Pensacola
  CHAPTER: Pensacola
  SPONSOR: Gene Mitchell
- **Dylan Olney**, Tampa
  CHAPTER: Hillsborough
  SPONSOR: Michael Maddux
- **Katlyn Orobello**, Pensacola
  CHAPTER: Pensacola
  SPONSOR: Gene Mitchell
- **Somerlyn Oxendine**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Victor Palacios**, Key West
  CHAPTER: Monroe
  SPONSOR: Colleen Reed
- **Paige Parish**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Jamie Perissien**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Carson Petty**, Tampa
  CHAPTER: Hillsborough
  SPONSOR: Denis deVlaming
- **Mark Porrello**, New Port Richey
  CHAPTER: Pasco
  SPONSOR: Sara Mollo
- **Kimberli Quintero**, Tampa
  CHAPTER: Hillsborough
  SPONSOR: Michael Maddux
- **Keongela Randle**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Mark Rankin**, Tampa
  CHAPTER: Pinellas
  SPONSOR: Frank McDermott
- **Hunter Rhyne**, Fort Lauderdale
  CHAPTER: Broward County
  SPONSOR: Jason Blank
- **Ashley Roura**, Clearwater
  CHAPTER: Pinellas County
  SPONSOR: Sara Mollo
- **Charles Russell**, Shalimar
  CHAPTER: Okaloosa-Walton
  SPONSOR: Gene Mitchell
- **Hareesha Sannareddy**, West Palm Beach
  CHAPTER: Palm Beach County
  SPONSOR: Ernest Chang
- **Stacey Schroeder**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Julia Seifer-Smith**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Samantha Van Scoik
- **Brandon Shelley**, Pensacola
  CHAPTER: Pensacola
  SPONSOR: Gene Mitchell
- **Sylvia Siedler**, Pensacola
  CHAPTER: Pensacola
  SPONSOR: Gene Mitchell
- **Claudia Sousa**, Sarasota
  CHAPTER: Sarasota
  SPONSOR: Aaron Getty
- **Jennifer Strouf**, Clearwater
  CHAPTER: Manatee
  SPONSOR: Julianne Holt
- **Richard Symanski**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Adam Teichler**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Scott Tolliver**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Julio Cesar Torrente**, Miami
  CHAPTER: Miami-Dade
  SPONSOR: Matthew Meyers
- **Mayra Trinchet**, Coral Gables
  CHAPTER: Miami-Dade
  SPONSOR: Tom Cobitz
- **Allison Tringas**, Shalimar
  CHAPTER: Okaloosa-Walton
  SPONSOR: Jay Patel
- **Michael Uchrin**, New Port Richey
  CHAPTER: Pasco
  SPONSOR: Sara Mollo
- **Sara Van Lier**, Dade City
  CHAPTER: Pasco
  SPONSOR: Sara Mollo
- **Kenneth Vancura**, Oviedo
  CHAPTER: Central Florida
  SPONSOR: Susan Malove
- **Alexander Villatte**, Punta Gorda
  CHAPTER: Charlotte
  SPONSOR: Richard Ruhl
- **Raudel Vitier**, Tampa
  CHAPTER: Hillsborough
  SPONSOR: Jim Skuthan
- **Magdalena Wagoner**, Sarasota
  CHAPTER: Sarasota
  SPONSOR: Aaron Getty
- **Christina Walker**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Doug Warlick**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **William Wasson**, Kissimmee
  CHAPTER: Central Florida
  SPONSOR: Belkys Yzquierdo
- **Gabrielle Wheeler**, Fort Lauderdale
  CHAPTER: Broward County
  SPONSOR: Jason Blank
- **Craig Whisenhunt**, Pinellas Park
  CHAPTER: Pinellas
  SPONSOR: Allison Miller
- **Nancy Williams**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Rachel Wise**, Clearwater
  CHAPTER: Pinellas
  SPONSOR: Sara Mollo
- **Shimeki Wright**, Tampa
  CHAPTER: Hillsborough
  SPONSOR: Michael Maddux
- **Jamie Xarras**, Clearwater
  CHAPTER: Pinellas County
  SPONSOR: Sara Mollo

ACTIVE AFFILIATE MEMBERS

Christopher M Bacot, Ph.D.

Andrew Garrett
Garrett Discovery Inc

Marc Hurwitz
Crossroads Investigations

James Knurek
Knurek Investigations

Harold D. McFarland, PI
Quantum Cyber Security & Investigations, Inc.

Darryl Neier, CFE, CFCFE
DLG, Consulting and Advisory Services, LLC

Tony Olivo, LPI,CPCI
CSI Group LLC

Thomas V. Pellegrino, Jr
Pellegrino & McFarland

Ellen S Podgor
Stetson University College of Law

Denise Rock
Rock Legal Services & Investigations Inc.

FACDL'S LIFE MEMBERS

LIFE MEMBERSHIP CATEGORIES

Effective January 1, 2023, there will be three tiers of Life Membership to be recognized upon initial payment:

- **BRONZE** $5,000 paid at a minimum of $500 per year
- **SILVER** $10,000 paid at a minimum of $1,000 per year
- **GOLD** $20,000 paid at a minimum of $2,500 per year

All current Life Members are recognized at the Bronze Level and credited with that current level of giving regardless of prior cost of their current Life Membership.

If a Life Member desires to achieve a higher level of Life Membership, they will be required to pay the balance of the additional fees in accordance with the yearly schedule above.

Failure to make payments stated by the schedule above will be addressed by the executive committee.

SILVER

$10,000

Ernest L. Chang

Michael Ufferman

BRONZE

$5,000

Keeley Rae Karatinos (new)

Tim Alan Pribisco

Edward John Schwob, III (new)

Terry J. Shoemaker

Jamie Washo Spivey

$4,000

Spencer Cordell

Annabell Dias

Jonathan Dingus

John M. Howe

Andy J. Ingram

Tony Moss

Wayne Richter

Richard Ruhl

Samantha Stevins

Ayuban Tomas

$2,500

Huda Ajlani

Lisa Anderson

Michael Barfield

Douglas R. Beam

Riley H. Beam

James S. Benjamin

Barry V. Beroset

John C. Beroset

Jerry Berry

Scott Berry

Jason B. Blank

Joseph C. Bodiford

Tauna R. Bogle

Ben Bollinger

Bjorn E. Brunvand

Derek Byrd

Joe Campoli

Steven G. Casanova

John J. Cascone

Ronald Chapman

Adam Chrzan

Daniel S. Ciener

Stephen G. Cobb

Andrew C. Colando

Mark Conan

Hugh Cotney

Hoot Crawford

Thomas E. Cushman

Clinton A. Couch

Donald P. Day

Jeffrey D. Deen

Ramon De La Cabada

Aaron Delgado

FACDL'S LIFE MEMBERS

Jeri Delgado
Bruce Denson
Denis DeVlaming
Todd Doss
Patrick Dray
Bryce A. Fetter
Cherie Fine
Robert B. Fisher
Kepler B. Funk
David D. Fussell
Roger D. Futerman
Anne Marie Gennusa
Mark S. Germain
William Grant
Randall Grantham
Norman Green
Michael Griffith
Bobby Guttridge
Fred Haddad
Steven Hammer
Jeffrey Harris
Robert Harrison
Carey Haughwout
William Heffernan
Wayne Henderson
Michelle Hendrix
Scott Herman
Jim Jenkins
David J. Joffe
Ira Karmelin
Julia Kefalinos
Edward J. Kelly
Nellie L. King
Ronald Kozlowski
Benedict Kuehne
Michael Lambert
Bryan Lambert
Kelly V. Landers
Beatriz Llorente
Nicholas Matassini
Liane McCurry
Andrew B. Metcalf
Ashley Minton
Gene Mitchell
Andrew Moses
Donnie Murrell
John P. Musca
Robert A. Norgard
Peg O'Connor
Matthew Olszewski
Hunter Pfeiffer
Brian Phillips
Adam Pollack
Thomas L. Powell
Sabrina Puglisi
Don Pumphrey
Christopher Rabby
James Regan
Eric Romano
Jay R. Rooth
Steve Rossi
David Rothman
Anthony Ryan
Michael Salnick
Milan (Bo) Samargya
Jason Sammis
Leslie Sammis
Hal G. Schuhmacher
Steven Sessa
Kelly B. Sims
Teresa Sopp
Eric Stevenson
Brandon O. Stewart
Mitchell A. Stone
Keith F. Szachacz
Brian Tannebaum
Jordan Tawil
William G. Tesh
Todd Thurow
John F. Tierney
Cyrus K. Toufanian
George E. Tragos
John H. Trevena
Karen Tufte
Joseph Turner
Michael Ufferman
Varinia Van Ness
William Wade
Robert J. Watson
Ethan A. Way
Jeffrey Weiner
Michael Weinstein
Robert Wesley
Flem K. Whited
Elliot Wilcox
John L. Wilkins
Michael C. Williams
Satasha Williston

JOIN THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS!

FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
Membership Application

Please check the appropriate category:

LIFE MEMBER TIERS:

- ☐ **Bronze** . . . . . $5,000 paid at a minimum of $500 per year
- ☐ **Silver** . . . . . $10,000 paid at a minimum of $1,000 per year
- ☐ **Gold** . . . . . $20,000 paid at a minimum of $2,500 per year

Regular Membership in FACDL is available to private practitioners and public defenders who are members of The Florida Bar, actively engaged in the defense of criminal cases. Regular membership is also available to Federal Public Defenders or Assistant Federal Public Defenders who are members in good standing of another State Bar, and who are actively engaged in the defense of criminal cases in Florida.

Membership dues are based on year of admission to The Florida Bar and run on the fiscal year of January 1 to December 31st. Renewals are NOT prorated. Only new members joining subsequent to the fall board meeting will extend membership into the following fiscal year.

PRIVATE ATTORNEY — **ANNUAL DUES**

- ☐ 0 - 3 years Member of The Florida Bar $50
- ☐ 4 - 6 years Member of The Florida Bar $125
- ☐ 7 - 9 years Member of The Florida Bar $150
- ☐ 10+ years Member of The Florida Bar $225

PUBLIC DEFENDER — **ANNUAL DUES**

- ☐ 0 - 3 years Member of The Florida Bar $35
- ☐ 4 - 9 years Member of The Florida Bar $50
- ☐ 10+ years Member of The Florida Bar $95
- ☐ STUDENT $15
- ☐ AFFILIATE $225

☐ Check here if you do not want $10 of your dues to be contributed to the FACDL Political Action Committee (FAIRLAWS). This contribution does not affect the total amount of your dues and is not tax deductible.

NOTICE:

Dues paid to the Florida Association of Criminal Defense Lawyers are deductible as an ordinary and necessary business expense. Dues which are expended for lobbying purposes are not deductible. It is estimated that 40% of the dues are expended for lobbying purposes and are not deductible.

Please complete the following information:

NAME

SPONSOR REQUIRED FOR NEW MEMBER: Sponsor must be a current, active FACDL Member.

BAR NUMBER | YEAR OF ADMISSION | CIRCUIT

BUSINESS ADDRESS

CITY / STATE / ZIP

BUSINESS PHONE | FAX | E-MAIL

Approximate percentage of practice devoted to defense of criminal cases _____%

Mail this application with appropriate dues amount to: Florida Association of Criminal Defense Lawyers, Inc.
P.O. Box 1528 • Tallahassee, FL 32302

☐ Enclosed is my check payable to the Florida Association of Criminal Defense Lawyers, Inc., or please charge as indicated below:

☐ VISA ☐ MasterCard ☐ AMERICAN EXPRESS ☐ DISCOVER

CARD NO. | EXP. DATE | SECURITY CODE

NAME ON CARD | SIGNATURE

BILLING ADDRESS

EMAIL

QUESTIONS?

Telephone: (850) 385-5080 E-mail: facdl@facdl.org

Apply for FACDL membership online at www.facdl.org

PAST FACDL CLE SEMINARS AVAILABLE FOR PURCHASE

BLOOD BREATH & TEARS 2022

A Seminar for the DUI Practictioner

CLE:

Florida Bar approved for
17.0 General Certification Credits:

Criminal Appellate Law	17.0
Criminal Trial Law	17.0

Approval period: 9/22/2022 - 3/31/2024

COURSE MATERIALS AND VIDEO RECORDING FOR CLE CREDIT:

☐ FACDL Members $385.65

☐ Non-Members $460.65

FACDL CRIMINAL LAW REVIEW & BOARD CERTIFICATION TIPS 2023

COMPREHENSIVE SEMINAR FOR STATE AND FEDERAL LAW

CLE:

The Florida Bar has approved: General 16.5 | Ethics 1.0

CERTIFICATION CREDITS

Criminal Appellate Law 16.5
Criminal Trial Law 16.5
State and Federal Government and Administrative Practice 16.5
(minus 1 hour as Judge Hirsch is not recorded)

COURSE MATERIALS AND AUDIO RECORDING FOR CLE CREDIT:

☐ FACDL Members $314.63

☐ Non-member/Government attorney or judge. $384.63

Course material prices include all written materials and recordings via Dropbox and information for attorney to post Continuing Legal Education Credit with The Florida Bar.

NO REFUNDS AVAILABLE ONCE PURCHASED.

FACDL
Post Office Box 1528
Tallahassee, Florida 32302

PRSRT. STD.
US Postage
PAID
Tallahassee, FL
Permit No. 801