



KATHERINE FERNANDEZ RUNDLE
STATE ATTORNEY

TRIAL NOTEBOOK

COUNTY COURT DIVISION
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-Prepared By-

ELVIA MEDINA MARCUS
Chief of County Court

CITRA JOSEPH
Chief of Litigation

ROBIN CRUZVAL, KARINA HARDUVEL,
MICHAEL MONAJEMI, & JOSHUA OLIN
Assistant Chiefs of County Court

—Acknowledgments—

DEISY RODRIGUEZ
Original Creator & Editor

CONTRIBUTIONS BY

Penny Brill, Serona Elton, Susan Leah Dechovitz, David Gilbert, Gina M. Giradot,
Jonathan Granoff, Cindy Lightbourne, Christina Martyak, Bronwyn Miller, Barnaby Min,
Kathleen Pautler, Kara L. Preissel, Stephen K. Talpins, Jeremiah Van Hecke, Michael Von Zamft,
Jason Winter, Andrea Ricker Wolfson, Miriam Fresco Agrait, Marlene Collazo, Ramon Crego, Juan Perez, Rebecca Gray,
Elizabeth Jimenez, Gizelle Rodriguez, Robert "Bobby" Shaw, Jenisse Grace, Joseph Torda, Kate McClelland, Jenna Sobelman

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TRIAL PREPARATION

A. CASE FILE ORGANIZATION

One of the most important skills a prosecutor must possess is organization. Organization provides the outline for the development of your case. Organization requires selecting, prioritizing and strategically utilizing evidence. The result of a well organized case is manifested in the juror's ability to grasp the evidence and be persuaded by its presentation. An organized prosecutor will appear to be in control, well-prepared, and familiar with all aspects of the case. Through the process of organizing and developing a case, the prosecutor will be able to anticipate defenses and proactively address weaknesses. The culmination of this work is a properly prepared trial with theme and theory. Each case should have a **theory** to explain the facts, and a **theme** to make the explanation memorable. Theme and theory will provide a natural outline and order of the witnesses' testimony and presentation of evidence.

- A well-organized prosecutor prepares a "Witness List" and "Evidence List" that set out the expected progression of the trial.
- The witnesses should be listed in the order they will testify, and a brief description of the testimony should be outlined.
- The evidence should be identified and sorted in the order it will be introduced at trial. Also, the evidence list should describe how and through what witness the exhibit will be introduced.
- The "Witness List" and "Evidence List" must be flexible because things always change during the trial process.

To ensure the appearance of preparation, a prosecutor should have folders with outlines for legal research, case law, motions in limine, jury selection, opening statement, direct examination, cross examination, closing argument, jury instructions, and the verdict form.

- The jury selection folder should contain a diagram of the jury box so you can have the jurors' names and comments about them easily accessible during the questioning. This folder should also have a basic outline with the types of questions you intend to ask during voir dire.
- The opening statement and closing argument folders should include both a completely written out version of the statements and a concise outline. The outline should be used as the guide when presenting the opening and closing to avoid reading from the materials.
- The closing argument folder should also include notes taken throughout the trial that are later used to write the closing argument.
- The witness folders should include a written version of the questions or an outline of the testimony (this may be accomplished by using the attached "Sample Predicate Questions" in the Appendix). In addition, the witness folders should include copies of any prior sworn statements or depositions the witness has previously given to law

enforcement or defense counsel. The folder should also contain any documentary evidence that will be introduced or discussed with the witness on the stand.

- The motions in limine folder should contain the motions filed prior to the trial day, the relevant case law, rules, and statutes. Similarly, the legal research folder should contain case law, rules, statutes, and any memoranda prepared on anticipated issues.

In trial, keep your table organized and clean except for a statute book, a legal pad, pen, and the particular folder that relates to the part of the trial you are handling at a given time. This strategy will tell the jury you are in control, well prepared, and familiar with all aspects of your case.

B. THE CHARGING DOCUMENT

- REVIEW THE CHARGING DOCUMENT (citations, arrest affidavit or information) IN ADVANCE OF THE TRIAL. The Date, Charges, Statute Numbers, and “to wit” sections MUST be accurate.
- A Statement of Particulars supersedes all other charging documents. Therefore, please make sure the information on the Statement of Particular is accurate.
- AMENDING A CHARGING DOCUMENT
 - The State can not amend an information to charge a defendant with a **new** crime after the expiration of speedy trial period has passed. *Pezzo v. State*, 903 So.2d 960 (Fla.App. 1 Dist.,2005).
 - Once trial commences, the State cannot amend the charging document without leave of court, and the court cannot grant leave to amend the information during trial if doing so would prejudice the rights of the defendant. *State v. Clements*, 903 So. 2d 919 (Fla. 2005); *See also, State v. Anderson*, 537 So. 2d 1373 (Fla. 1989).

C. BENCH OR JURY TRIAL

1) When Is a Defendant Guaranteed a Jury Trial?

- The Sixth Amendment provides that “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” SCOTUS has recognized that there is a class of petty offenses that may be tried without a jury. *See Baldwin v. New York*, 399 U.S. 66 (90 S. Ct. 1886). This notion has been codified in FL Stat. 918.0157.
 - In each prosecution for a violation of a state law or a municipal or county ordinance punishable by imprisonment, the defendant shall have, upon demand, the right to a trial by an impartial jury in the county where the offense was committed, **except** as to any such prosecution for a violation punishable for a term of imprisonment of 6 months or less, if at the time the case is set for trial the court announces that in the event of conviction of the crime as charged or of any lesser included offense a sentence of imprisonment will not be imposed and the defendant will not be adjudicated guilty, unless a right to trial by jury for such offense is guaranteed under the State or Federal Constitution. **Fla. Stat. 918.0157.**

- In short, there is no right to a trial by jury if the court announces that in the event of a conviction, a sentence of imprisonment will not be imposed (i.e., Order of Non-incarceration), **and** the Defendant will not be adjudicated guilty.
- The Florida Constitution (Fla. Const. art. I, sections 16 & 22), recognizes the right to trial by jury in those cases in which the right was recognized at the time of the adoption of the State's first constitution. *State v. Webb*, 355 So.2d 926 (Fla. 1976); *Webber v. City of Fort Lauderdale*, 675 So.2d 696 (Fla. 4th DCA, 1996); *Whirley v. State*, 450 So.2d 836 (Fla. 1984):
 - **CATEGORY I:** Crimes that are indictable at common law;
 - Common law crimes existed before criminal codification and are inherited from the common law of England. All crimes that were considered crimes at common law were considered *mala in se*. *State v. Gruen*, 586 So.2d 1280 (Fla. Dist. Ct. App. 3d Dist. 1991); *State v. Oxx*, 417 So.2d 287 (Fla. Dist. Ct. App. 5th Dist. 1982).
 - **CATEGORY II:** Crimes that involve moral turpitude;
 - The Florida Supreme Court defined ***moral turpitude*** in *Ex Rel Tullidge v. Hollingsworth*, 108 Fla. 607 (1933). "Involving the idea of inherent baseness or depravity in the private social relations or duties owed by man to man or by man to society..." Simply stated, crimes of moral turpitude are largely defined by public sentiment and may vary depending upon the moral opinions of the public.
 - Some crimes involving *moral turpitude* are:
 - Battery
 - Indecent exposure
 - Lewd and Lascivious Conduct
 - Petit Theft
 - Prostitution
 - Worthless Check
 - Possession of Drug Para
 - Note: Disorderly conduct has been found to not be a crime at common law. *See Weber v. City of Fort Lauderdale*, 675 So.2d 696 (Fla. 4th DCA 1996).
 - **CATEGORY III:** Crimes that are *malum in se*, or inherently evil at common law;
 - Crimes that are *malum in se* are considered **wrong in of themselves or inherently evil.**
 - Some commonly charged crimes are:
 - Assault/Battery
 - Prostitution
 - Criminal Mischief
 - Indecent Exposure
 - Lewd and Lascivious Conduct
 - Petit Theft
 - **CATEGORY IV:** Crimes that carry a maximum penalty of more than six months in jail.

- **Crimes Mala Prohibita**

- *Mala Prohibita* crimes constitute actions or omissions prohibited by statute that infringe on the rights of others or are deemed necessary for social order
- Crimes that are commonly *mala prohibita* are:
 - Loitering and Prowling
 - Resisting Without Violence
 - Trespass
 - Firearm Under the Influence

2) Waiver of Jury Trial

- The State Attorney's Office has no policy as to when it is appropriate for the State to waive its right to a jury trial. However, as a general rule, in all *pro se* defendant cases the State should waive its right to a jury trial. In addition, in all victim cases if the victim wants the State to proceed on a jury trial, then the State proceeds to trial. If you have questions or concerns about when it is appropriate for the State to waive its right to a jury trial contact an Assistant Chief prior to making any decisions.
 - **A right to a jury trial can be waived with the State's consent. A defendant may in writing waive a jury trial with the consent of the State. Fla. R. Crim. P. 3.260; See *State v. Thorup*, 659 So.2d 1116 (Fla. 2d DCA 1995).**
- The Defendant's waiver of a jury trial must be in writing pursuant to Fla. R. Crim. P. 3.260; *Tucker v. State*, 559 So.2d 218 (Fla. 1990); *See also State v. Upton*, 658 So.2d 86 (Fla. 1995).
- Oral Waivers
 - In *Tucker*, the Court held that a defendant may orally waive the right to a jury trial if:
 - The Defendant is represented by counsel, **and**
 - Court conducts a complete colloquy with the Defendant, so that the record indicates a knowingly, intelligent, and voluntary waiver by the Defendant, not his lawyer. *Tucker v. State*, 559 So.2d at 220.
 - In *Upton*, the Court found that a Defendant may waive his/her constitutional right to a jury trial either in writing or orally; however, the record must contain a sufficient showing that the waiver was knowingly, intelligently, and voluntarily made.
 - **NOTE:** In either case, the judge should focus the Defendant's attention to the value of a jury trial and apprise the defendant of the consequences of the waiver. *State v. Upton*, 658 So.2d 86 (Fla. 1995), and *Dechellis v. State*, 1 Fla. Law. Weekly Supp. 504 (Fla. 11th Cir. 1993).

3) Pro Se Defendants

- As you are well aware, the accused has the right to the assistance of counsel as guaranteed by both the Federal and State Constitutions. Both the Supreme Court and the Florida Courts have determined that there is an implied right to present one's own defense. (U.S.C.A. Const. Amend. VI; F.S.A. Const. Art. 1 section 16(a); *Faretta v. California*, 422 U.S. 806 (1975); *see also Dechellis v. State*, 1 F. Law Weekly Supp. 504 (Fla. 11th Cir. 1993).

- That said, when a defendant elects self-representation, the court must make a *Faretta* inquiry. The focus of the *Faretta* colloquy under Rule 3.11 is whether a defendant is competent to waive the right to counsel, not whether he is competent to provide an adequate defense. A proper *Faretta* inquiry consists of advising the defendant as to the dangers and disadvantages of self-representation. *Gillyard v. State*, 704 So.2d 165 (Fla. 2d DCA 1997) 9this case provides a list of 15 questions the Court should ask the defendant.

RELEVANT AUTHORITIES SECTION:

Right to Demand Jury Trial (Cases)

- *Antonacci v. State*, 504 So.2d 521 (Fla. 5th DCA, 1987): applied 4-part test found in *Whirley v. State* and found that assault was indictable at common law. The defendant did have the right to jury trial.
- *Baldwin v. New York*, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970): Crimes that carry a maximum penalty of more than six months in prison are entitled the right to demand a jury trial.
- *Blair v. State*, 698 So.2d 1210, 1212-13 (Fla. 1997): The United States Constitution includes three separate provisions addressing the right to demand a jury trial-Article III; the Sixth Amendment; and the Seventh Amendment.
- *Callan v. Wilson*, 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223 (1888): Crimes that were indictable at common law are entitled the right to demand a jury trial.
- *Coleman v. State ex. Rel Calver*, 119 Fla. 653, 161 So. 89 (Fla. 1935): Trespass is a crime that is mala prohibita and a defendant is not entitled the right to demand a jury trial.
- *Dees v. State*, 54 So.3d 644, 36 Fla.L.Weekly D475, Fla. App. 1Dist. March 02, 2011 (No.1D09-5638): Driving while license is suspended with knowledge is a crime that is mala prohibita and therefore a defendant is not entitled the right to demand a jury trial.
- *District of Columbia v. Colts*, 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177 (1930): Crimes that are malum in se, or inherently evil at common law are entitled the right to demand a jury trial.
- *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed. (1968); *City of Tampa v. Ippolito*, 360 So.2d 1316, (Fla. App. 1978): A “serious offense” is a crime with a maximum potential sentence of more than six months imprisonment or a fine of five hundred dollars or more, therefore the defendant is entitled the right to demand a jury trial.
- *King v. State*, 156 Fla. 817, 24 So.2d 573 (1946): Petit (petty) theft was a crime that was indictable at common law and is considered a crime malum in se. Therefore, the defendant has a right to demand a jury trial.
- *Lifka v. State*, 530 So.2d 371, 13 Fla.L.Weekly 1856, (Fla. App. August 08, 1988): Indecent Exposure is a crime that was indictable at common law and therefore the defendant is entitled the right to demand a jury trial.
- *Mainelli v. Ryan*, 285 F.2d 474 (2d Cir. 1961): Indecent exposure is a crime of moral turpitude and entitled the right to demand a jury trial.
- *Massey v. City of Gainesville*, 296 So.2d 64, (Fla. App.1Dist., 1974): Reckless driving is a crime that is malum prohibita and a defendant is not entitled the right to demand a jury trial.

- *Method v. State*, 920 So.2d 141, Fla. App. 4th Dist., 2006, 920 So.2d 141 (31 Fla.L.Weekly D355): Lewd and lascivious conduct is a crime that is mala in se, therefore, it was indictable at common law and the defendant has the right to demand a jury trial.
- *Parker v. State*, 18 So.3d 555, (Fla.App. 1Dist. 2008): Resisting officer without violence is a crime that is mala prohibita and a defendant is not entitled the right to demand a jury trial.
- *Pearl v. Florida Bd. of Real Estate*, 394 So.2d 189, (Fla. App., 1981): Possession of drug or paraphernalia is entitled the right to demand a jury trial.
- *Pino v. State*, 492 So. 2d 811 (Fla. 3rd DCA, 1986): Defendant charges with DWLS with a prior, a first-degree misdemeanor. Defendant had a right to a jury trial under *Baldwin and Whirley*. (presumably because he was facing up to one year in jail)
- *Powers v. State*, 370 So.2d 854, (Fla. App., 1979): Prostitution is considered a crime at common law and a defendant is entitled the right to demand a jury trial.
 - Disapproved of by *Whirley v. State*, 450 So.2d 836 (listed below)
- *Pugh v. Bowden*, 54 Fla. 302, 45 So.499 (1907): The right to demand a jury trial does not extend to those cases where the right and the remedy were unknown at the time of the adoption of the Florida Constitution.
- *Reed v. State*, 470 So.2d 1382 (Fla. 1985): The court found that criminal mischief was rooted in malicious mischief and therefore is a crime at common law and entitles the defendant the right to demand a jury trial.
- *Schick v. U.S.*, 195 U.S. 540, 8 S.Ct. 826, 49 L.Ed. 99 (1904): Battery is a crime of moral turpitude and considered a crime that is guaranteed the right to demand a jury trial.
- *Schick v. United States*, 195 U.S. 65, 24 S.Ct. 826, 49 L.Ed. 99 (1904): Crimes that involve moral turpitude are entitled the right to demand a jury trial.
- *Simms v. State*, 51 So.3d 1264, 36 Fla.L.Weekly D206, Fla. App. 2Dist. January 28, 2011 (No. 2D09-3971): Loitering and prowling is a crime that is mala prohibita and a defendant is not entitled the right to demand a jury trial.
- *State v. Webb*, 335 So.2d 826 (Fla. 1976): Our Florida constitution recognizes the right to a trial by jury in those cases, “in which the right was recognized at the time of the adoption of the State’s first Constitution.”
- *State ex. Rel. Tullidge v. Hollingsworth*, 146 So. 660, 661 (Fla. 1933): Crimes of moral turpitude are guaranteed the right to demand a jury trial.
- *State v. Gruen*, 586 So.2d 1280 (Fla. Dist. Ct. App. 3d Dist. (1991); *State v. Oxx*, 417 So.2d 287 (Fla. Dist. Ct. App. 5th Dist. 1982): All crimes that were indictable at common law are malum in se and guaranteed the right to demand a jury trial.
- *Weber v. City of Ft. Lauderdale*, 675 So.2d 696 (Fla 4th DCA 1996): useful on many different grounds read case!!
- *Whirley v. State*, 450 So.2d. 836 (Fla. 1984): The state has enumerated four classes of serious crimes as to which a defendant is entitled to trial by jury: Crimes that was indictable at common law; Crimes involving moral turpitude; Crimes that are malum in se, or inherently evil; and Crimes that carry a maximum penalty of more than six months in prison.

Right to Demand Jury Trial (Statutes)

- Florida Constitution, Art. I. section 16(a): The accused shall “have a speedy and public trial by an impartial jury.”

- Florida Constitution, Art. I, § 22: The right to trial by jury shall be secure to all and remain inviolate.
- Florida Statute 918.0157: The right to demand a jury trial is not guaranteed for sentences punishable by six months or less unless, if the court announces that in the event of a conviction of the crime as charged a sentence of imprisonment will not be imposed and the defendant will not be adjudicated guilty.
- United States Constitution, Art. III, §2, cl. 3: The right to demand a jury trial is guaranteed for the prosecution of all crimes, except for “petty offense.”

Waiver (Cases)

- *Brady v. U.S.*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed. 2d 747 (1970); *State v. Upton*, 658 So.2d 86 (Fla. 1995): An effective waiver of a constitutional right must knowingly, voluntary, and intelligent.
- *Parker v. State*, 636 So.2d 794 (Fla. 1st DCA), review denied, 642 So.2d 747 (Fla. 1994); *Dumas v. State*, 439 So.2d 246 (Fla.3d DCA): Where the record contains a written waiver signed by the defendant, the waiver will be upheld.
- *Patton v. U.S.*, 281 U.S. 276, 50 S.Ct. 253, 70 A.L.R 263, 74 L.Ed. 854; *State v. Garcia*, 229 So.2d 236, (Fla. 1969): The Supreme Court held that a defendant in a criminal case could waive his/her right to demand a jury trial and that a court had the power to try the defendant without a jury.
- *State v. Thorup*, 659 So.2d 1116 (Fla. 2d DCA 1995): Provides that a defendant’s waiver must be in writing with the government’s consent and the court must approve the waiver.
- *Tucker v. State*, 559 So.2d 218 (Fla. 1990): The defendant may waive the right to jury trial, as long as the waiver is on the record.
- *Williams v. State*, 440 So.2d 1290, 1291 (Fla. 4th DCA 1983), review denied, 450 So.2d 489 (Fla. 1980): A defendant may in writing waive a jury trial without consent of the state.

Waiver (FRCP)

- Florida Rules of Criminal Procedure (FRCP) Rule 3.260 governs the procedures for a waiver in a jury trial. It provides that a defendant’s waiver must be in writing, with the consent of the State.

The Right to Self-Representation—Faretta Inquiry

- *Carnley v. Cochran*, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962); *Freeman v. State*, 2011 WL 2418999, (Fla. App.2.Dist., 2011): If the waiver on the record is silent, the record must show, or there must be an allegation and evidence that an accused was offered counsel but intelligently and understandably rejected the offer.
- *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *Dechellis v. State*, 1 Fla. Law Weekly Supp. 504 (Fla. 11th Cir. 1993): There is an implied right to present one’s own defense.
- *McKaskie v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); *Goldsmith v. State*, 937 So.2d 1253, (Fla. App.2Dist., 2006): If the accused has not seen a lawyer prior to waiver, he must be provided one for consultation purposes.

- *Petty v. State*, 1 So.3d 1183, (Fla. App.1st Dist., 2009); *Davis v. State*, 10 So.3d 176, and (Fla. Dist.Ct.App.5th Dist. 2009): If the waiver is accepted, the Judge must inquire into the defendant's ability to represent himself.
- United States Constitution Amendment VI; Florida Statutes Annotated Constitution Article I, §16: The accused has the right to the assistance of counsel.

DOUBLE JEOPARDY

- In a non-jury trial, jeopardy attaches when the judge begins to hear evidence (i.e., when the first witness is sworn in to testify); in a jury trial, jeopardy attaches when the jury panel of six (6) and the alternate(s) is sworn.
- Double jeopardy does not bar the resumption of the same proceeding after a continuance as long as no prejudice to the defendant results. *See State v. Sipe*, 537 So.2d 178 (Fla. 3d DCA 1989); *see also Holcomb v. State*, 858 So.2d 1112 (Fla. 2d DCA 2003).

SUMMARY

- When a defendant is **NOT ENTITLED** to a Jury Trial:
 - Withhold certified
 - No jail being sought
 - Less than 6 months exposure
 - Not one of the 4 categories of cases listed above
- When **ENTITLED**, but want to waive a Jury Trial and go Bench:
 - Both the State and Defense can object; if either side objects, must be Jury
 - If the Defendant agrees, must be in writing, but can be oral if the defendant goes through the proper colloquy of knowingly, intelligently, and voluntarily agreeing (this colloquy must be with the defendant themselves answering the Judge's questions, not just the defense attorney!)

DISCOVERY ISSUES

Rules of Discovery can be found in the Florida Rules of Criminal Procedure 3.220. The purpose of discovery in criminal cases is “to avail the defense of evidence known to the state so that convictions [will] not be obtained by the suppression of evidence favorable to a defendant, or by surprise tactics in the courtroom.” *Cooper v. State*, 336 So.2d 1133, 1138 (Fla. 1976), *cert.denied*, 431 U.S. 925 (1977).

Discovery is also intended to assure a fair trial to a defendant, but it does *not* require the state to investigate or prepare the defendant’s case because the defense must exercise due diligence. *State v. Coney*, 272 So.2d 550, 553 (Fla. 1st DCA 1973). The discovery process is not intended to provide defendants with an opportunity to “create” evidence (e.g. misidentifications). *See State v. Kuntsman*, 643 So.2d 1172 (Fla. 3d DCA 1994).

There is no general constitutional right to discovery. *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). The scope of the State’s discovery obligation is enumerated in Fla.R.Crim.P. 3.220(b)(1)-(4). A Defendant is entitled to discovery only if the Defendant “formally” invokes discovery by filing a “Notice of Discovery” or if the Defendant informally invokes discovery, without filing a notice, by participating in the discovery process. A Defendant can informally participate in discovery by taking the deposition of any person, or knowingly or purposely sharing the discovery obtained by a codefendant. Once the Defendant invokes discovery, the State has fifteen (15) days to comply with the demand.

A. STATE’S DUTY TO DISCLOSE & *RICHARDSON*

The prosecutor is obligated to disclose and permit the defense to inspect information in the state’s control. Where there has been a violation of any discovery rule by the State in a criminal case, it is necessary for the trial court to conduct a *RICHARDSON* hearing. *See Richardson v. State*, 246 So.2d 771 (Fla. 1971). Upon a timely objection AND a finding that a violation has occurred, the court must provide a hearing to determine:

I. Whether said violation was:
INADVERTENT - OR - WILLFUL;

II. Whether said violation was:
TRIVIAL - OR - SUBSTANTIAL;

- AND -

III. What PREJUDICE, if any, would the defendant suffer upon admission of evidence.

B. PREJUDICE

Where there is a discovery violation, reversal will only result where the record discloses that the non-compliance resulted in prejudice or harm to the defendant. *Richardson, supra.*, at 774. The inquiry must focus on whether there was procedural rather than substantive prejudice, *Thompson*

v. State, 565 So.2d 1311, 1316 (Fla. 1990). First, courts must determine whether the violation impaired the defendant's ability to prepare for trial. Second, once it has been ascertained whether the discovery violation hindered the defendant in his preparation for trial, the court must consider the nature of the violation in fixing upon a sanction.

Procedural prejudice results when there is a reasonable possibility that the defendant's trial preparation or strategy would have been materially different had the violation not occurred. In other words, only if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless. *Scipio v. State*, 928 So.2d 1130 (Fla. 2006), see also *State v. Schopp*, 653 So.2d 1016, 1020 (Fla. 1995). However, surprise alone is inadequate to constitute prejudice. *Keen v. State*, 456 So.2d 571 (2d DCA 1984). Also, the lack of an opportunity to obtain impeachment material is insufficient to exclude witness. See *Baker v. State*, 522 So.2d 491 (1st DCA 1988); *Wheeler v. State*, 754 So.2d 827 (2d DCA 2000). If there is no prejudice, evidence should be admitted. *Holman v. State*, 347 So.2d 832 (3d DCA 1977)

At trial, the initial burden is on State to show that undisclosed evidence can be admitted without prejudice to defendant's right to a fair trial. *State v. DelGaudio*, 445 So.2d 605 (3d DCA 1984). The burden of proof is on the State to negate prejudice. *Cumbie v. State*, 345 So.2d 1061 (Fla. 1977). There is no prejudice where defendant through other means had been able to obtain the sought after evidence or information. *Mobley v. State*, 327 So.2d 900 (3d DCA 1976), *cert. denied*, 341 So.2d 292 (Fla. 1976) A violation is cured if defendant's attorney shown to have had prior knowledge. *Palmer v. State*, 483 So.2d 496 (1st DCA 1986)

C. SANCTIONS

Dismissal for a discovery violation is an *extreme* sanction that should only be utilized as a last resort. See *State v. DelGaudio*, 445 So.2d 605 (3d DCA 1984) *rev. denied*, 453 So.2d 45 (Fla. 1984)(Dismissal of an information or indictment is an action of such magnitude that resort to such a sanction should only be had when no viable alternative exists); See also, *State v. Guzman*, 667 So.2d 989 (3d DCA 1996); *State v. L.E.*, 754 So.2d 60 (3d DCA 2000) (The reason that dismissal of criminal charges should be utilized as a last resort is that this sanction punishes the public not the state or witness who fails to appear, and the results in a windfall to the defendant.)

Pursuant to Rule 3.220(b)(3), "The court may prohibit the state from introducing into evidence any of the foregoing material not disclosed, so as to secure and maintain fairness in the just determination of the cause". However, [t]he exclusion of a witness is a drastic remedy which should only be used upon the showing of a willful, substantial disregard of discovery rules which results in prejudice." See *Taylor v. State*, 643 So.2d 1122 (3d DCA 1994); *State v. Tascarella*, 580 So.2d 154 (Fla. 1991); *Duarte v. State*, 598 So.2d 270 (3d DCA 1992).

In fact, failure to disclose a witness can be cured by giving the defendant an opportunity to examine the witness. *King v. State*, 355 So.2d 831 (3d DCA 1978); *Zeigler v. State*, 402 So.2d 365 (Fla.

1981); *Mobley v. State*, 327 So.2d 900 (3d DCA 1976); *Smith v. State*, 515 So.2d 182 (Fla. 1987). There is no violation for State to provide supplemental witness day of trial where court allowed defense to depose the witness. *Staveley v. State*, 744 So.2d 1051 (5th DCA 1999). Therefore, the more appropriate procedure may be to permit a deposition, take a recess, or charge the State with a continuance. However, these remedies should not be stipulated if there is no PREJUDICE to the defense.

D. CASELAW

Where the defendant has been shown to have prior knowledge of the possibility of an unlisted witness testifying, the courts have held no error in permitting the witness to testify. *Holman v. State*, 347 So.2d 832 (3d DCA 1977); *Floyd v. State*, 361 So.2d 802 (3d DCA 1978)

Brown v. State, 743 So.2d 1213 (4th DCA 1999): No violation where defendant's prior counsel had knowledge of the witness.

Mansfield v. State, 758 So.2d 636 (Fla. 2000): The Court found no discovery violation when the State introduced photos, which were never formally listed, where the photos were reproduced from slides which part of the medical examiner's business records and were made available to defendant's original counsel during discovery depositions.

Carroll v. State, 815 So.2d 601 (Fla. 2002): A *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of that evidence. *Williams v. State*, 662 So.2d 437 (5th DCA 1995): "Although the State failed to furnish the dispatch card to the defense through the State Attorney's office, the record reflects that the same material was produced to the defense through the Sheriff's Department." "In other words, the defense had access to the material it now claims the 'State' failed to disclose."

State v. Eaton, 868 So.2d 650 (Fla. 3d DCA 2004): The trial court was required to hold a *Richardson* Hearing prior to suppressing the medical blood draw evidence. The Court found error in the suppression because it was an extreme remedy under the circumstances of this case.

E. MOTION TO COMPEL

(1) DOES THE STATE INTEND TO USE IT AT TRIAL?

Rule 3.220(b)(1) requires the State to "disclose to the defendant and permit the defendant to inspect, copy, test, and photograph" materials such as:

- (1) statements or reports prepared for or in connection with the case, excluding notes from which reports are compiled; and
- (2) any tangible papers or objects the prosecuting attorney intends to use in the hearing or trial and that were not obtained from or that did not belong to the defendant that are within the State's possession or control (emphasis added). Furthermore, the State is not required

to disclose information not within the State's actual or constructive possession. *See Sinclair v. State*, 657 So.2d 1138 (Fla. 1995) (recognizing that the Prosecutor was not aware of the witness' testimony during trial since no deposition was taken. However, the defense attorney had the opportunity, prior to trial, to speak with the witness).

Possession: The State is deemed to have constructive possession of all materials in police custody. However, if after making a public records request, the Defendant has not been able to obtain the materials then the State is required to provide that information to the defendant. They must show the court that they endeavored to first obtain the materials through avenues available to them before the State's constructive possession of police materials becomes relevant. *State v. Coney*, 294 So.2d 82 (Fla. 1973).

Note: Rule 3.220 does not require the State to photocopy, collect, and/or hand-over documents to the Defendant. *See State v. Williams*, 678 So.2d 1356 (Fla. 3d DCA 1996) (reversing the trial court for requiring the State to photocopy documents)

(2) IS IT BRADY?

The court should determine whether the information sought may reasonably be considered admissible and useful to the defense in the sense that it is probably material and exculpatory. Regardless of defendant's intention to participate in the discovery process, the State must always disclose any *Brady* material in its possession. Fla.R.Crim.P. 3.220(b)(4).

In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct 1194, 1197, (1963), the Supreme Court ruled that "the suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Gorham v. State*, 597 So.2d 782 (Fla. 1992) The Florida Supreme Court has held that in order to prevail on a *Brady* claim, the defendant must establish:

- (1) "[t]hat the Government possessed evidence favorable to the defendant (including impeachment evidence);
- (2) that the defendant does not possess the evidence, nor could he obtain it himself with any reasonable diligence;
- (3) that the prosecution suppressed the favorable evidence; and
- (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceeding would have been different." *Hegwood v. State*, 575 So.2d 170, 172 (Fla. 1991) (quoting *United States v. Meros*, 866 F.2d 1304, 1308 (11th Cir. 1989)), *cert. denied*, 493 U.S. 932 (1989).

The specific test for determining the materiality of *Brady* evidence was articulated in *United States v. Bagley*, 473 U.S. 667 (1985), where the Court held that the evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

There is no *Brady* violation where the information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through exercise of reasonable diligence. See *Provenzano v. State*, 616 So.2d 428 (Fla. 1993). In *United States v. Quinn*, 123 F.3d 1415 (11th Cir. 1997), the Court found that mere speculation a government file may contain *Brady* material is not sufficient to require a remand for *in camera* inspection, or reversal for a new trial. **NOTE:** If in doubt, turn over the material.

(3) CAN THE DEFENDANT OBTAIN IT ELSEWHERE?

When a pretrial motion for discovery is presented to the court for a ruling, a determination should be first made as to whether all or part of the information sought by the defendant is readily available to him by the exercise of **due diligence** by way of deposition, subpoena, or other means (e.g., public records requests pursuant to Florida Statute Chapter § 119). *Medina v. State*, 466 So.2d 1046 (Fla. 1985); *State v. Wright*, 803 So.2d 793 (Fla. 4th DCA 2001). If so, the motion should be denied.

A defendant may not on his or her own, have the clerk issue a subpoena duces tecum. He or she must first go to the Court and upon a showing of good cause, have the Court issue the subpoena duces tecum. *Heath v. Beckett*, 327 So.2d 3 (Fla. 1976). A subpoena duces tecum empowers the defense to require production of certain specific documents or items that are material and relevant to the case. However, the documents or items must be in the custody and control of the named party in the subpoena.

(4) CASE-SPECIFIC ARGUMENTS FOR MOTIONS TO COMPEL

a. Witnesses

Rule 3.220(b)(1)(B) requires the State to provide the defense with every listed witness's statements "prepared for or in connection with the case." The State has a duty to disclose all persons known to have any information which may be relevant to the offense, and to any defense, not just those that the State intends to call at trial. See *Richardson v. State*, 246 So.2d 771 (Fla. 1971); *Wortman v. State*, 472 So.2d 762 (Fla. 5th DCA 1985); *State v. Johnson*, 285 So.2d 53 (Fla. 2d DCA 1973) (holding that only witnesses having knowledge as to substantial matters involved in the case must be disclosed); *Johnson v. State*, 427 So.2d 1029 (Fla. 1st DCA 1983) (recognizing that there is no duty for a prosecutor to investigate further to determine whether a witness has relevant information).

The State also has a duty to disclose **rebuttal witnesses** whom they can reasonably anticipate to call to the stand. See *Lucas v. State*, 376 So.2d 1149 (Fla. 1979); *Smith v. State*, 500 So.2d 125 (Fla. 1986); *State v. Schopp*, 653 So.2d 1016 (Fla. 1995). The duty to disclose witnesses extends to **expert witnesses** as well. Thus, when a defendant lists an expert witness, and the State anticipates a need for their own expert, the State has a continuing duty to disclose their witnesses "promptly." Fla.R.Crim.P. 3.220. *State v. Thompson*, 565 So.2d 1311, 1316 (Fla. 1990). Both

parties to litigation have a duty to disclose witnesses as soon as they become aware of them, not when they are able to locate them. *See id.* at 1311; *Cooper v. State*, 336 So.2d 1133 (Fla. 1976).

When testimony for an officer is given, the Florida Supreme Court has recognized that there is no discovery violation when an officer testified regarding matters unknown by the defense, where the defendant deposed the witness and defense counsel failed to ask the pertinent questions regarding the officer's involvement in the case. *See Street v. State*, 636 So.2d 1297 (Fla. 1994).

However, the failure to disclose a change of deposition testimony can constitute a discovery violation. *State v. Evans*, 770 So.2d 1174 (Fla. 2000). Rule 3.220(b)(1)(J) requires the State to provide "reports or statements of experts made in connection with the particular case," including results of physical or mental examinations and of scientific tests, experiments or comparisons.

b. Statements

Pursuant to Fla.R.Crim.P. 3.220(b)(1)(C), the parties to litigation have a duty to disclose any written statement made by a witness which is signed or otherwise adopted or approved by the person making the statement, regardless of whether or not the party intends to use the statement at trial. *See also, Hickey v. State*, 484 So.2d 1271 (Fla. 5th DCA 1986).

The duty to disclose statements includes disclosure of any statements made by a codefendant if the trial is going to be a joint one. Fla.R.Crim.P. 3.220(b)(1)(D). Both parties must also disclose any statements of experts made in connection with the case. Fla.R.Crim.P. 3.220(b)(1)(J). The State is not required to disclose a law enforcement officer's notes outlining their recollection of the investigation unless and until they are used to refresh a witness' memory at trial. *See Wuornos v. State*, 644 So.2d 1000 (Fla. 1994); *Suaziano v. State*, 570 So.2d 289 (Fla. 1990).

Furthermore, the State need not disclose prosecutor's notes that did not reflect verbatim statements of any witness interviewed and had not been signed, adopted or approved by persons to whom they were attributed. *Williamson v. Dugger*, 651 So.2d 84 (Fla. 1994). The *Williamson* Court also recognized notes included interpretation of remarks made by witnesses. *Id.* This would be the prosecutor's opinion work product and as such is not subject to discovery.

c. Depositions

A defendant is not entitled to a deposition in County Court (misdemeanor) cases unless **good cause** is shown to the trial court. Fla.R.Crim.P. 3.220(h)(1)(C). However, this prohibition is not applicable if the State takes the deposition of a listed defense witness. In determining good cause, the trial court should consider:

- (1) the consequences to the defendant;
- (2) the complexity of the issues involved;
- (3) the complexity of the witness' testimony; and
- (4) the other opportunities available to the defendant to discover the information sought by deposition.

The State does not have the obligation to physically produce state witnesses for deposition. *See Colby v. McNeil*, 595 So.2d 115, 117 (Fla. 3d DCA 1992); *State v. Valdes*, 443 So.2d 302 (3d DCA 1983); *State v. Rodriguez*, 483 So.2d 751 (3d DCA 1986). Therefore, if a State witness fails to appear for deposition, the Court *cannot* charge a State continuance. In fact, failure of the State to comply with a court order to produce a witness for deposition, unless willful, does not constitute dismissal. *See State v. Saldarriaga*, 486 So.2d 683 (3d DCA 1986). However, when the State witness is in State custody, the court can order the witness's production for deposition and failure to comply may result in exclusion. *State v. Filipowich*, 528 So.2d 511 (3d DCA 1988),

PRACTICE NOTE: The appropriate mechanism for production of any witness for deposition or trial is filing a ***Rule to Show Cause***. Not only does the movant have to prove proper service on the witness, but the actual rule to show cause must be personally served on the witness, and request he or she explain why they should not be held in contempt of court for failing to respond to a previously properly served subpoena.

d. Tangible Papers or Objects

HGN Logs

In *Williams*, the Court does not require the introduction of HGN logs into evidence in order for the officer to be qualified to perform HGN on a subject. Furthermore, neither NHTSA nor the individual police agencies mandate the maintenance of an HGN log in order to administer HGN on a subject. Because the State rarely intends to introduce the HGN logs into evidence, it is not required to provide them to the Defendant under Rule 3.220(b)(1)(K) even though they are within the possession of the State as an arm of the police agency.

Radar Calibration Documents

Rule 3.220 does not require the State to provide these documents to the Defendant. First, Rules 3.220(b)(1)(B) and (J) are inapplicable because the police did not calibrate the officers' speedometer or create the calibration documentation "in connection with" a particular case. Second, Rule 3.220(b)(1)(K) is inapplicable where the State represents that it does not intend to introduce the speedometer calibration document. In addition, Radar Calibration Documents are public records. They are available via a public records request under Fla. Stat. §119 through the police agency.

NOTE: Where the Defendant argues that the State cannot introduce evidence of speed without the calibration documents, the court must recognize that a police officer's "visual estimation" of excessive speed is sufficient to establish reasonable suspicion for a stop. *State v. Joy*, 637 So.2d 946 (Fla. 3d DCA 1994); *State v. Eady*, 538 So.2d 96 (Fla. 3d DCA 1989).

Vehicle Storage Receipts

When these documents are in the possession of the State, they should be provided in discovery to the defense. This document, more specifically referred to as the “property receipt” or “tow slip,” is provided to the Defendant for accounting or liability purposes, by the police officer or tow truck driver, before the car is towed. In addition, in most circumstances, a Defendant will re-claim their car from the towing yard before hiring a defense attorney and this document (held by the civilian towing company) will be handed to the Defendant to ensure that no claim for missing items is subsequently made. Thus, this document is initially provided to the Defendant himself, or readily available at the towing company.

The mere fact a police officer may also, in addition to the towing company, have such a document does not impose an obligation upon the State to turn it over during discovery. The defense attorney can either get a copy from the Defendant or directly from the towing company. In short, the Defendant has access to this document. Assuming *arguendo*, the document is only in the hands of the police, the State still does not have an obligation to provide it unless, as stated above, they intend to use it during trial. This line of reasoning equally applies to any other property receipts. A vehicle storage receipt is a public record, and is available via a public records request under Fla. Stat. §119 through the police agency.

Daily Work Sheets

The police Daily Work Sheets do not fall within the parameters of Fla.R.Crim.P. 3.220(b)(1)(B) as “statements.” The defense may argue the wording of the rule, which requires the production of “all police reports . . . of any kind”, mandates the production of these documents. However, this rule is that broad because it also provides that the police reports referred to must have been “prepared for . . . the case, but shall not include the notes from which those reports are compiled.” A Daily Work Sheet is not completed for an investigative purpose, but for payroll and administrative purposes. In addition, the Work Sheets do not contain any “statements.” A Daily Work Sheet is a public record, and is available via a public records request through the police agency.

MOTIONS TO SUPPRESS OR EXCLUDE EVIDENCE

In County Court, pretrial motions to suppress or exclude evidence are heard on the day of trial shortly before jury selection. Some motions require testimony and some are purely legal argument. The judge will often address motions in several cases on the morning of the trial day. How the court rules on the motion will usually affect how the case proceeds. For example, if a motion to suppress the stop is granted, unless the State is going to appeal the ruling, the case will have to be *nolle prossed*. In some cases, only a minor piece of evidence is suppressed or excluded and the State is able to proceed without that evidence.

A. CRIMINAL RULES OF PROCEDURE

Fla. R. Crim. P. Rule 3.190 – Pretrial Motions

(a) In General. Every pretrial motion and pleading in response to a motion shall be in writing and signed by the party making the motion or the attorney for the party. This requirement may be waived by the court upon a showing of good cause. Each motion or other pleading shall state the ground or grounds on which it is based. A copy shall be served on the adverse party. A valid certificate of service must accompany the filing of any pleading.

(h) Motion to Suppress Evidence in Unlawful Search.

(1) *Grounds.* A defendant aggrieved by an unlawful search and seizure may move to suppress anything so obtained for use as evidence because:

- (A) the property was illegally seized without a warrant;
- (B) the warrant is insufficient on its face;
- (C) the property seized is not the property described in the warrant;
- (D) there was no probable cause for believing the existence of the grounds on which the warrant was issued; or
- (E) the warrant was illegally executed.

(2) *Contents of Motion.* Every motion to suppress evidence shall state clearly the particular evidence sought to be suppressed, the reasons for suppression, and a general statement of the facts on which the motion is based.

(3) *Hearing.* Before hearing evidence, the court shall determine if the motion is legally sufficient. If it is not, the motion shall be denied. If the court hears the motion on its merits, the defendant shall present evidence supporting the defendant's position and the state may offer rebuttal evidence.

(4) *Time for Filing.* The motion to suppress shall be made before trial unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion, but the court may entertain the motion or an appropriate objection at the trial.

(i) Motion to Suppress a Confession or Admission Illegally Obtained.

(1) *Grounds*. On motion of the defendant or on its own motion, the court shall suppress any confession or admission obtained illegally from the defendant.

(2) *Time for Filing*. The motion to suppress shall be made before trial unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion or an appropriate objection at the trial.

(3) *Hearing*. The court shall receive evidence on any issue of fact necessary to be decided to rule on the motion.

Fla. R. Crim. P. Rule 3.153 - Timeliness of Defendant's Motion; Waiver

(a) Timeliness; Waiver. A defendant's motion for severance of multiple offenses or defendants charged in a single indictment or information shall be made before trial unless opportunity therefore did not exist or the defendant was not aware of the grounds for such a motion, but the court in its discretion may entertain such a motion at the trial. The right to file such a motion is waived if it is not timely made.

(b) Renewal of Motion. If a defendant's pretrial motion for severance is overruled, the defendant may renew the motion on the same grounds at or before the close of all the evidence at the trial.

B. MOTION PREPARATION

- If it is your first time preparing a motion to suppress, please let your CTA know you have one set.
- Obtain a printed copy of all of the defense motions to suppress or exclude filed in the case. In traffic cases, these motions will be available via Spirit. Often times these motions will not post until the weekend before trial.
- Group all of the motions together in the case file and put them on top of all of the other documents in the file. It is a good idea to put them into a manila folder titled Motions within the case file.
- Read the motions thoroughly. Make sure you understand exactly what it is the defense is seeking to suppress or exclude and the legal theory behind their argument.
- Print all of the cases cited in the motion. Once you get familiar with common motions, you will already have a copy of the case law around.
- Read all of the cases cited in the motion. The defense may not be reflecting the actual holding of the case in their motion.
- Call your officers or witnesses to clear up any factual questions and accurately write the “fact” section of your written response.
- Once you have a solid grasp of the facts, do your own case law research.

- When possible, write a formal written response, e-file it, and email it to defense and the Judge/JA.
- Write out a line or two as to what you will say to the Court when you begin the motion.
- Prepare your response using the standard IRAC method
 - Which witnesses you need to call to the stand (e.g. if the issue is only PC for the traffic stop, you only need the officer who pulled the defendant over).
 - The questions to ask your witness, including case and issue specific facts you need to elicit. You may want to use a modified version of the trial predicate questions.
 - The *issue* of the motion (e.g. PC for the traffic stop)
 - The *rule* of law (e.g. what the case law says)
 - How the case law *applies* to your facts
 - What you want the court to *conclude*??

C. LEGAL SUFFICIENCY OF THE MOTION

- Fla. R. Crim. P. Rule 3.190 indicates that Motions to Suppress Evidence must
 - Be in writing and
 - State clearly the particular evidence sought to be suppressed and
 - The reasons for the suppression and
 - A general statement of the facts upon which the motion is based
- If you find the motion lacks any of these items, the first part of your response should be to move to strike the motion for legal insufficiency. You can do this in writing or argue it *ore tenus*. *State v. Hernandez*, 841 So.2d 469 (Fla. 3d DCA 2002). Tell the court that the motion is facially defective and must be stricken.
- A motion to suppress is legally insufficient where it is devoid of any statement regarding the particular evidence sought to be suppressed. *See Hernandez*; *See State v. Gay*, 823 So.2d 153 (Fla. 5th DCA 2002).
- A motion to suppress is patently defective where it is not supported by specific reasons for the suppression. *See State v. Hernandez*, 841 So.2d 469 (Fla. 3d DCA 2002); *State v. Butterfield*, 285 So.2d 626 (Fla. 4th DCA 1973); *Chapman v. State*, 446 So.2d 1186 (Fla. 4th DCA 1984); *Herring v. State*, 394 So.2d 433 (Fla. 3d DCA 1980).
- Accordingly, the burden does not shift to the State to prove that the search was valid. *See State v. Gay*, 823 So.2d 153 (Fla. 5th DCA 2002) (bare allegations unsupported by proof are insufficient to sustain Defendant's burden); *Black v. State*, 383 So.2d 295 (Fla. 1980).

D. LEGAL ANALYSIS

1. Who has the burden?

- a. Motions to suppress based on lack of reasonable suspicion or probable cause, or to suppress statements:

- i. On the threshold question as to the existence of a search or seizure, defendant, not the State, bears initial burden of proof; a showing that a seizure, once established, was effected without warrant raises presumption of illegality which then shifts burden to the State to show otherwise. *State v. Dodd*, 396 So.2d 1205 (Fla. 3d DCA 1981)
 - ii. Seizures in misdemeanor cases generally do not involve a warrant, and therefore, the burden is on the State to establish that the evidence sought to be suppressed was obtained lawfully. *See State v. Setzler*, 667 So.2d 343 (Fla. 1st DCA 1995); *State v. Hinton*, 305 So.2d 804 (Fla. 4th DCA 1975); *Bicking v. State*, 293 So.2d 385 (Fla. 1st DCA 1974). Meaning you have the burden of producing witness and evidence to support a stop or seizure.
- b. Motions in limine to exclude evidence or testimony:
- i. The initial burden for Motions in limine rests on the party that filed the motion. In some cases, with regards to particular issues like compliance with FDLE rules, the burden may shift.
 - ii. If the defense is bringing the motion, don't do their work for them. Stand back and let them present evidence and argue their point. Respond with your argument once they have made theirs.

MOTION	BURDEN	TESTIMONY
<u>Constitutional Motions</u>		
PC to Arrest (4th)	K	Yes
RS to Stop (4th)	K	Yes
Exclude Statements (5th)	K	Yes
Severance	Δ	No
Corpus Delecti (AccRpt Priv)	K	Yes
20 minute Motion	Δ	Yes
HGN	Δ	Yes
Exclude Roadsides	Δ	Yes
Exclude Breath	Shifting*	Depends
for lack of Substantial Compliance		
Meador Motion	Δ	No
Exclude Statements	K	Yes
Exclude Admission	Δ	No
of Evidence or of Refusal		
Exclude Verbal	K	Yes
Portion of Roadsides		
*NOTE: In certain cases the burden will shift. (i.e. once the defense has thrown the reliability of the breath test into question then the State must prove either substantial compliance with the FDLE Rules or accuracy and reliability in order to admit the breath test into evidence). The defense is basically questioning the State's right to the statutory presumptions.		

2. Will testimony be needed? What facts need to be brought out?

- a. For motions where there must first be a finding of fact before a legal rule can be applied, there will need to be testimony.
- b. If testimony is needed, determine from your reading of the substantive case law what facts you need to elicit from your witness to support your argument.
- c. For example, on a motion to suppress the traffic stop based on a lack of reasonable suspicion of a traffic violation, you should do the following:
 - i. Determine the elements of the traffic violation

- ii. Review the annotated statute and case law to see how the statute has been interpreted in the past (e.g. squealing tires alone did not constitute a traffic violation where officer only heard the tires squealing and did not see whether or not the car was parked at the time he first heard the squeal. *Donaldson v. State*, 803 So.2d 856 (Fla. 4th DCA, 2002)).
- iii. Elicit facts regarding exactly what your officer saw, making sure to ask questions regarding all of the elements of the infraction. (e.g. “Officer, did you actually see what position the car was in when you heard the tires squealing?”)

E. EVIDENTIARY ISSUES

- “A court must accept evidence which, like the material testimony of the police officers, is neither impeached, discredited, controverted, contradictory within itself, or physically impossible.” *State v. Fernandez*, 526 So.2d 192 (Fla. 3rd DCA 1988).
- “[T]he trial court must view the evidence in a light most favorable to the prosecution, unless the testimony is implausible or incredible as a matter of law.” *State v. Johnson*, 695 So. 2d 771 (Fla. 5th DCA 1997), citing to *State v. Jensen*, 765 P. 2d 1028 [Colo. 1988)]’ *but see Wheeler v. State*, 87 So.2d 5 (Fla. 5th DCA 2012) (holding that he trial court must weigh the evidence based upon the totality of the circumstances, without any favoritism towards the prosecution). This case is useful in situations where the defense brings out some inconsistencies in cross-examination, or where some parts of the testimony are contradictory. The court made the same point as in *Fernandez*, and found that the trooper “established probable cause (to draw blood)”, despite the fact that “there was some contrary testimony presented by the paramedics.” The court characterized this contrary testimony as “irrelevant”, since the officer’s view as to impairment was “based on her training and observation of [the defendant].”
- **Hearsay testimony is admissible during a motion even if not admissible at trial.** This is based on the idea that evidence is viewed in the light most favorable to the state at a motion hearing. [*Lara v. State*](#), 464 So. 2d 1173 (Fla. 1985). If there is a stop issue, hearsay may still be presented, but you must have your officer who conducted the stop present as hearsay exclusively is not enough. *State v. Bowers*, 87 So.3d 704 (Fla. 2012).

F. INVOKING THE RULE a.k.a. THE RULE OF SEQUESTRATION

The defense will usually “invoke the rule” shortly before the motion to suppress hearing, and again later at the trial stage. Upon a party’s request or the court’s own motion, the court will order that witnesses be excluded from a proceeding so that they cannot hear the testimony of other witnesses. Crim. R. Pro. Rule 8.625(d) and § 90.616(1) Fla. Stat. The purpose of the rule is to avoid coloring a witness’s testimony by that which is heard from other witnesses who have preceded the witness on the stand,] thereby discouraging fabrication, inaccuracy, and collusion. *See Knight v. State*, 746 So.2d 423 (Fla. 1998); *See also, Chamberlain v. State*, 881 So.2d 1087 (Fla. 2004).

A trial court should not, as a matter of course, permit a witness to remain in the courtroom during the trial when he or she is not on the stand, unless it is shown that it is necessary for the witness to

assist counsel in trial and that no prejudice will result to the accused. A hearing to determine these matters should be conducted if the rule excluding and sequestering witnesses has been invoked. *Randolph v. State* 463 So.2d 186 (Fla. 1984).

However, the Florida Constitution grants victims of crime the right to be informed, to be present, and to be heard when relevant. Art I §16(b) Fla. Const. Therefore, to the extent this constitutional right does not interfere with the constitutional rights of the defendant, a victim may be permitted to stay in the courtroom once they have testified. *See Gore v. State*, 599 So.2d 978 (Fla. 1992); *Booker v. State*, 773 So.2d 1079 (Fla. 2000)

G. APPEALING A RULING ON A PRE-TRIAL MOTION

Fla. Stat. § 924.07

- The State may appeal an order or ruling suppressing evidence in limine. Fla. Stat. § 924.07(1)(l). A pre-trial ruling suppressing breath results is an appealable order. *Blore v. Fierro*, 636 So.2d 1329 (Fla. 1994)

The Order Must be in Writing

- "A trial court's order is not appealable until it is rendered. Rendition does not occur until the order has been **reduced to writing and filed** with the clerk." *Billie v. State*, 473 So.2d 34, 34-35 (Fla. 2d DCA 1985)(citations omitted).
- Neither the notations on courtroom worksheet nor the trial court's oral pronouncement commence time for filing notice of appeal. *State v. Wagner*, 863 So.2d 1224 (Fla. 2004); *State v. Freire*, 1 FLA. LAW WEEKLY Supp. 161 (Fla. 11th Cir. 1992).
- If a trial court fails or refuses to enter a written order that is needed for an appeal, counsel has the remedy of filing a motion or a petition for writ of mandamus with the appellate court to compel the trial court to enter such an order. *State v. Bolick*, 512 So. 2d 960 n.1. (Fla. 2d DCA 1987).

Time for Filing Notice

- The State must file a notice of appeal within fifteen (15) days from the rendition of the order. Fla. R. App. P. 9.140.

The State Must Move to Extend Speedy Trial Time.

- When the State files an appeal from a dismissal of an indictment or information, it must request an extension of the speedy trial time period in accordance with Rule 3.191(d)(2). *Wheeler v. Barron*, 471 So.2d 146, 10 Fla. L. Weekly 1406 (Fla.App. 1 Dist. Jun 07, 1985).
- A State's appeal, standing alone, does not toll the speedy trial time period. *State v. Carter*, 397 So.2d 679 (Fla. 1981).
- State's filing of notice of appeal does not divest the trial court of jurisdiction to grant State's motion to extend speedy trial time pending appeal. *State v. Soles*, 661 So.2d 62 (Fla. 2d DCA 1995).

H. MOTION TO SUPPRESS ARGUED IN THE MIDDLE OF TRIAL

If the defense argues a motion to suppress in the middle of trial and the motion is granted, the State has no appellate remedy because of double jeopardy principles. Therefore, you should present the court with the Florida Supreme Courts rationale in *State v. Gaines*, 770 So. 2d 1221 (Fla. 2000), *Mallory v. State*, 866 So.2d 127, 29 Fla. L. Weekly D382 (Fla.App. 4 Dist. Feb 11, 2004); §90.104(1)(b).

:

"We also suggest the possibility of another alternative, utilizing the current procedural rules that would likewise avoid double jeopardy implications. The trial court could exercise its discretion to withhold ruling on the merits of the motion to suppress and motion for a judgment of acquittal and allow the case to be submitted to the jury. If the defendant is acquitted, no further proceedings regarding the motion to suppress or motion for a judgment of acquittal would be necessary. However, if the jury finds the defendant guilty of the crime charged, the trial court could then consider the motion to suppress post-trial in conjunction with the defendant's renewed motion for a judgment of acquittal or motion for new trial."

If the case is permitted to go to the jury, the State's appellate remedy is preserved.

I. OUTLINES FOR COMMON MOTIONS

Prior to beginning your motion preparation, you should first put some thought towards setting up a method or approach that can be used to prepare your motions in all of the cases you handle. Because everyone's thought processes are different no single method will work for everyone. The best approach is to have something handy that you can reuse each time you prepare for your motions, as you will find that many of the same motions will come up over and over again.

Some useful tips for motion preparation:

- Creating a separate manila folder for each defense motion. In that folder, place copies of all of the case law frequently cited by the defense, as well as your response to the motion and the case law you will cite.
- Creating a large binder with dividers for each defense motion. In each section, place copies of all of the case law frequently cited by the defense, as well as your response to the motion and the case law you will cite.
- You will find some responses to common motions to follow. However, you will likely want to create additional responses as you handle new motions. No matter how you go about it, whether typewritten or handwritten, lay out your response to each type of motion and keep it for reuse in the future.

ISSUE: Exclusion of HGN results

MOTION: Defense Motion in Limine to Exclude HGN because the state cannot lay the required scientific predicate; or because the officer is not a DRE, or because the State does not have a confirmatory breath sample.

WITNESSES NEEDED:

- Officer who administered HGN: Officer:_____

MOTION SPECIFIC QUESTIONS TO ASK:

- Officer's training on HGN
 - (pre-try) Any lab practices?
 - If yes, who was supervising?
 - Was it performed on subjects who were intoxicated and some who were not?
- How many times has he administered HGN
- How he administers HGN
- (pre-try) Does he keep HGN logs

RULE OF LAW:

I. A scientific predicate is not required for the admission of HGN Results

- **HGN was found to be “quasi scientific” in *State v. Williams*, 710 So.2d 24, 32 (Fla. 3d DCA 1998).** After reviewing voluminous testimony from police and medical experts who testified in an *en banc* hearing in front of the County Court of 11th Judicial Circuit, as well as many studies, the court held that “HGN is generally accepted in the relevant scientific community and the fact that HGN has met the Frye test in other legal jurisdictions, obviated the need for the trial court to reapply a Frye analysis.” The 3rd District decided HGN is ““quasi scientific’ evidence,” which is not “new or novel.”
- **The 3rd District has held HGN admissible without requiring the State to lay a scientific predicate.** *State v. Williams*. Other Circuits, however, hold HGN is inadmissible without a proper scientific predicate. Fourth DCA: *State v. Meador*, 674 So.2d 826 (Fla. 4th DCA 1996) (holding that HGN is subject to a *Frye* predicate which had not been satisfied); **(Meador is not the law in the 3rd DCA)**
- **HGN test results alone**, in the absence of a chemical analysis of blood, breath, or urine, are inadmissible to trigger the presumption of impairment as expressed in the statute (316.1934). *State v. Williams*
- HGN alone may not be used to establish a BAC of .08 percent or more. HGN is admissible to show impairment. *State v. Williams*

II. Any Officer may Administer HGN, not just DRE Officers

- **Williams** said “any qualified DRE” because the officers in that case were DREs. The court did not intend to imply DREs only. Williams cites out-of-state cases that held that the HGN results were admissible when the test was administered by a “properly trained officer”.
- *Bowen v. State*, 745 So.2d 1108 (Fla. 3rd DCA 1999), clarified that HGN is admissible even if the officer administering the test and testifying regarding the results of the test is not a DRE.
 - *(Only bring up if needed to explain why you are relying on Bowen for some things but not others)* Although *Bowen* goes on to say that there needs to be a confirmatory breath test before HGN is admissible, *Bowen* cites *Faires v. State*, 711 So.2d 597 (Fla. 3rd DCA 1998) for that proposition, and *Faires* makes it very clear that HGN is only inadmissible when the State is attempting to prove a specific breath alcohol level using the HGN results as the sole basis of that breath alcohol level. We see then that although *Bowen* correctly held that the officer administering the HGN exam need not be a DRE, *Bowen* used language that was too broad in interpreting the holding of *Faires*.
- In *State v. Gerardo Roman*, September 28, 2004, (unpublished opinion by Judge Slom) the court held that HGN evidence will be admitted if the State can establish that the officer who performed the examination was qualified to do so and that the examination was administered properly
- *(Only if Defense cites to Meador)* *State v. Meador* suggests that if an officer testified to his qualifications to perform the HGN, the HGN results may be admissible

III. HGN is admissible without a confirmatory breath sample

- If the Defense cites to *Bowen v. State* or *Faires v. State*: In *Bowen v. State*, 745 So.2d 1108 (Fla. 3^d DCA 1999) the Court improperly cited to *Faires v. State* 711 So.2d 597 (Fla 3^d DCA 1998) for the proposition that HGN is only admissible with “a confirmatory blood, breath or urine test.” The Defendant in *Bowen* provided a breath sample, therefore the Court’s discussion of the admissibility of HGN in refusal cases is dictum. Moreover, the Court in *Faires* simply held that the State could not use HGN results in a refusal case to establish that a defendant had a .08 or greater breath alcohol level. In other words, the HGN results were otherwise admissible as they relate to impairment. The legally offensive and improper evidence in *Faires* was the attempted correlation of the defendant’s HGN results with a specific breath alcohol level.
- If the Defense cites to *Cropper v. State*: In *Cropper v. State*, 7 FLW Supp 323 (11th Cir. Ct. App. February 29, 2000) the 11th Judicial Circuit neglected to examine the 3rd DCA’s flawed logic in *Bowen* when it reviewed the issue of the admissibility of HGN in a refusal case. In *Cropper*, the Court issued a one-sentence opinion that simply states: “There must be a confirmatory blood, breath or urine test before HGN evidence is admissible.” The Court then cited to *Bowen* and *Faires*. Obviously, when County Court Judges see this legally binding opinion with no explanation, it is hard to convince them that both the 3rd DCA and the 11th Circuit are simply wrong about this issue.

- In *State v. Gerardo Roman*, Sept. 28, 2004, the Court held that HGN results are admissible independently of other evidence as proof that a defendant was impaired. Thus, HGN evidence can be admitted even in the absence of a chemical test.

APPLICATION OF LAW TO FACTS OF THIS CASE:

- In this case we have an officer that testified that:
- HGN is quasi-scientific and is therefore admissible without establishing a scientific predicate.
- The State has established that this officer was qualified to administer the examination and administered it properly
- HGN is admissible to show impairment. The absence of a confirmatory breath sample only serves to prohibit the triggering of presumptions.

CONCLUSION: The Motion to Exclude should be denied

ISSUE: Admissibility of Evidence of Refusal

MOTION: Defense Motion to Suppress Evidence of the Defendant's Refusal

WITNESSES NEEDED:

- None, unless facts of how the defendant was presented with Implied Consent are at issue

MOTION SPECIFIC QUESTIONS TO ASK:

- No questions.
- State the facts of the case as written in the A-form and DUI paperwork if they are uncontested as to this issue.
- Get out that the Defendant was told the consequences of refusing (e.g. read implied consent... this is required by 316.1932(1)(a))

RULE OF LAW:

Fla. Stat. § 316.1932(1)(a) says that it is admissible

- “refusal to submit to a chemical or physical breath test or to a urine test upon the request of a law enforcement officer as provided in this section shall be admissible into evidence in any criminal proceeding.”
- **The use of refusal evidence does not violate the defendant's federal or Florida constitutional rights**
- *State v. Taylor*, 648 So.2d 701 (Fla.1995), regarding whether admitting a defendant's refusal to submit to a DUI sobriety test constitutes compulsory self-incrimination, whether the Due Process Clause is violated by the introduction of such evidence, and whether the defendant's refusal was probative of consciousness of guilt from an evidentiary standpoint.
- *Menna v. State*, 846 So.2d 502, (Fla. 2003) referring to the court's decision in *Taylor*: “We first determined that the use of refusal evidence did not violate the defendant's federal or Florida constitutional rights, and then turned to the defendant's claim that refusal was inadmissible under the Florida Evidence Code. *See id.* We rejected this argument, reasoning that the defendant had ample incentive to take the tests: he knew the circumstances surrounding the request, he knew the purpose of the test, and he knew there were possible adverse consequences attached to refusal. Finally, the officer had read the defendant Florida's implied consent law and warned him that his refusal would have adverse consequences. Under these circumstances, we concluded that... he knew refusal was not a "safe harbor" free of adverse consequences and acted in spite of that knowledge. His refusal thus is relevant to show consciousness of guilt. If he has an innocent explanation for not taking the tests, he is free to offer that explanation in court.
- Police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of *Miranda*. *See South Dakota v. Neville*, 459 U.S. 553 (1983).
- Therefore, refusals are admissible as inculpatory evidence in criminal trials. *See State v. Whitehead*, 443 So. 2d 196 (3d DCA 1983).

- An officer is not required to warn the defendant a second refusal to submit to a breath test is an additional misdemeanor charge. See *Grzelka v. State*, 881 So.2d 633 (Fla. 5th DCA 2004)
- Department may validly suspend a driver's license for a driver's refusal to submit to a breath-alcohol test when a law enforcement officer offers the driver the option of taking a breath test, a blood test, or a urine test. The fact that the officer provides the driver with additional alternative tests that may be more invasive but more accurate does not negate the fact that the officer asked the driver to take the required test. *DHSMV v. Nader*, 4 So.3d 705 (2nd DCA 2009) (Directly conflicts with *DHSMV v. Clark*, 974 So.2d 416 (Fla. 4th DCA 2007)).

Refusal is relevant to a material issue

- A refusal to submit to a breath test is circumstantial evidence probative of the defendant's consciousness of guilt and ultimately guilt itself. See *Herring v. State*, 501 So.2d 19 (Fla. 3d DCA 1986).
- The First DCA has held that there is "significant probative value" in a refusal to take a handwriting analysis test. *Wilson v. State*, 596 So.2d 775, 778 (Fla. 1st DCA 1992). **There is no right to refuse**
- A person who is requested to take a breath, urine, or blood test under the implied consent law has NO true "right" to refuse, merely the option to do so. See *State v. McInnis*, 581 So. 2d 1370 (5th DCA 1991); *State v. Hoch* 500 So. 2d 597 (3d DCA 1986); *Saylor v. State*, 35 Fla. Law Weekly Supp. 2d 64 (FL 5th Cir. Ct. 1987).
- Since the Constitution is not implicated, suppression is not a remedy unless provided by the statute. Here, the implied consent statutory scheme does not provide for suppression but expressly provides for admission of the refusal. *Jenkins v State*, 978 So. 2d 116, (Fla. 2008) ([The strip search statute] does not expressly provide for exclusion of evidence as a remedy for a violation of the statute ... therefore, [] the exclusionary rule is not a remedy for a violation of ... unless a constitutional violation has also occurred.)

APPLICATION OF LAW TO FACTS OF THIS CASE:

- In this case, the defendant was informed of the consequences of refusing
- This is evidenced by:
 - *(if applicable)* the implied consent form
 - *(if applicable)* the testimony presented
- The officer complied with the requirements of Florida Statute 316.1932(1)(a)
- Taylor and the other cases cited say the evidence is admissible

CONCLUSION: The motion to suppress should be denied

ISSUE: Admissibility of Statements, Admissions and Confessions

MOTION: Defense Motion to Suppress Confessions, Statements & Admissions

WITNESSES NEEDED:

- Possibly the officer the statements were made to, if there is a question regarding the circumstances surrounding the statements (e.g. if the defendant was in handcuffs at the time, or made statements in response to a question the officer asked)

MOTION SPECIFIC QUESTIONS TO ASK:

- None, unless facts of circumstances surrounding statements are at issue

RULE OF LAW:

Roadside Questioning Does Not Require Miranda

- Questioning the defendant at the roadside while the stop is being conducted does not require Miranda warnings as the defendant is not in custody at the time of the Roadside. *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138 (1984)
- Roadside questioning of a motorist detained pursuant to a routine traffic stop is not considered custodial interrogation even though the traffic stop “significantly curtails the freedom of action” of the motorist.; Police Procedure attendant to a routine vehicle stop do “cannot fairly be characterized as the functional equivalent of formal arrest.” See *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138 (1984).
- In *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138 (1984), a Trooper saw the defendant’s car weaving and conducted a routine traffic stop in order to charge the defendant with a traffic offense. Defendant had trouble standing. Trooper asked the defendant to perform the Romberg Balance exercise, which the defendant does not perform to standards. Trooper asks the defendant if he had been using intoxicants and defendant responds, “two beers and several joints of marijuana.” Defendant is arrested for DUI. The Supreme Court held that the Trooper did not have to read Miranda rights to the defendant before asking him if he had used intoxicants because at the roadside, the defendant was not in custody

Physical Components of Roadside are not Testimonial in Nature and Do Not Require Miranda

- Requests for field sobriety exercises, like requests to submit to chemical tests of a person’s blood, breath, etc., are requests for physical evidence, not testimony. Fifth amendment protections only apply to testimonial communications. See *State v. Hoch*, 500 So.2d 597 (Fla. 3d DCA 1986) (breath); *Brackin v. Boles*, 452 So.2d 540 (Fla. 1984) and *State v. Mitchell*, 245 So.2d 618 (Fla. 1971) (blood); *Woodard v. Duval Motor Co.*, 391 So.2d 700 (Fla. 1st DCA 1980), *reversed on other grounds*, 419 So.2d 303 (Fla. 1982) (Like blood tests, field sobriety tests are physical, non-testimonial responses.) *State v. Edwards*, 463 So.2d 551 (Fla. 5th DCA 1985).

Verbal Statements and Verbal Components of the Roadside Conducted Prior to Arrest Do Not Require Miranda

- At roadside, the defendant's statements and the verbal components of FST's (i.e., counting and reciting the alphabet) are admissible even though the officer did not read the defendant his Miranda rights. The defendant was not in custody at the roadside because he was merely the subject of a routine traffic stop. The defendant was stopped and had to display his license and registration and perform some FST's.
- In finding that the defendant was not in custody at the roadside, the Court noted that "the stop was short (eleven minutes), occurred in a public area, only one officer was present, and the tests were simple." *Burns v. State*, 661 So.2d 842 (Fla. 5th DCA), *cert. dismissed*, 676 So.2d 1366 (Fla. 1996). *See also State v. Duncan*, 659 So.2d 1283 (Fla. 4th DCA 1995); *State v. Spreitzer*, 659 So.2d 1110 (Fla. 5th DCA 1995); *cert. dismissed* 676 So.2d 1366 (Fla. 1996)

Response to Allred v. State

- *Allred v. State*, 622 So.2d 984 (Fla. 1993) does NOT apply to Pre-custody Roadside Situations. In *Allred*, the Florida Supreme Court held that the defendant's post-arrest alphabet recitation, obtained without first "Mirandizing" the defendant, was a product of custodial interrogation and, therefore, subject to suppression.
- But, in *Allred*, the defendant was already in custody when he performed the FSTs. Unlike in *Allred*, the FST's done here in Miami-Dade County are usually done before the subject is arrested.

Post Miranda statements, admissions and confessions

- These are usually not challenged in county court
- The State must prove the admissibility of a confession by a preponderance of evidence. *Lego v. Twomey*, 404 U.S. 477 (1972), *McDole v. State*, 283 So.2d 553 (Fla. 1973), *Cooper v. State*, 336 So.2d 1133 (Fla. 1976), *Colorado v. Connelly*, 479 U.S. 157 (1986)
- An extended period of silence during interrogation followed by an admission does not constitute an invocation of *Miranda*.

Other exceptions

Voluntary statements. 'Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.' *Miranda v. Arizona*.

APPLICATION OF LAW TO FACTS OF THIS CASE:

- In this case, the defendant made the following statements at the following stages of the investigation:
- Miranda only applies to custodial interrogations and testimonial communications
- Under *Berkemer*, the defendant was not in custody at the time he made these statements
- Under *Hoch*, the physical components of the roadside exercises are not testimonial in nature and therefore not subject to Miranda even if the defendant is in custody.
- Under *Burns*, the verbal components of the roadside exercises are also not subject to Miranda because the defendant was not in custody when they were made.
- (*if applicable to your facts*) This defendant's statements were voluntary and therefore not barred by the 5th amendment and are admissible without Miranda warnings beforehand.

CONCLUSION: The Motion to Suppress should be denied

ISSUE: Exclusion of Testimony Concerning Impairment

MOTION: Defense Motion in Limine to Exclude Testimony Concerning Term Impairment

WITNESSES NEEDED:

- None – legal argument only

MOTION SPECIFIC QUESTIONS TO ASK:

- None – legal argument only

STIPULATIONS:

- Stipulate to not using the terms “Tests,” “Pass,” “Fail,” “Points,” or “Cues

RULE OF LAW:

- *State v. Meador*, 674 So.2d 826 (Fla. 4th DCA 1996). Reference to the exercises by using terms such as "test," "pass," "fail," or "points," however, creates a potential for enhancing the significance of the observations in relationship to the ultimate determination of impairment, as such terms give these layperson observations an aura of scientific validity...Therefore, such terms should be avoided to minimize the danger that the jury will attach greater significance to the results of the field sobriety exercises than to other lay observations of impairment.
 - Note: The 11th Circuit, sitting in an Appellate capacity held that the word 'cue' or 'cues' lends an aura of scientific validity to a non-expert's observations" and "the repeated use of such words lent an aura of scientific validity to the field sobriety tests . . ." which creates a "high degree of danger that the jury attached an undue degree of significance to the results of the field sobriety exercise. *State v. Villalon*, 16 Fla. L. Weekly Supp. 498a April 17, 2009)
- In general, lay witnesses have been permitted not only to testify as to their observations of a defendant's acts, conduct, appearance and statements, but also to give opinion testimony of impairment based on their observations. *Meador*, citing *Cannon v. State*, 91 Fla. 214, 107 So. 360, 362 (1926); *City of Orlando v. Newell*, 232 So.2d 413 (Fla. 4th DCA 1970).
- The Florida Supreme Court held that there was no error in admitting the following evidence: “several witnesses, who had seen and had an opportunity to observe the acts, conduct, appearance, and statements of the defendant at or near her automobile shortly after the fatal injury to the deceased, were allowed to testify, over defendant’s objection, that she was ‘drunk’, or under the influence of intoxicants, or ‘staggered like she was drunk,’ or words of similar import.” *Cannon v. State*, 107 So. 360 (Fla. 1926).
- At trial, police officer may testify regarding opinion that the defendant was under the influence of intoxicating beverages to the extent that his normal faculties were impaired, provided that the testimony establishes a basis for that opinion (e.g. acts, conduct, appearance, etc.). *City of Orlando v. Newell*, 232 So.2d 413 (Fla. 4th DCA 1970).
- **Fla. Stat. § 90.701** allows for the introduction of opinion testimony by a lay witness when “the witness cannot readily, and with equal accuracy and adequacy, communicate what he has perceived to the trier of fact without testifying in terms of inferences or opinions.”

- **Fla. Stat. § 90.703** states “testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact.” The expression of opinion on an ultimate issue is inadmissible only when it is not helpful to the jury and, in fact, prejudices the defendant in some way. Ehrhardt, Florida Evidence, section 703.1.

APPLICATION OF LAW TO FACTS OF THIS CASE:

- Under Meador, Cannon and Newell, a lay witness may testify as to their observations AND opinions regarding the defendant’s impairment.
- While the officer’s opinion regarding the defendant’s impairment and being under the influence will lead the inference that the defendant committed the crime of DUI, it does not constitute an opinion that the defendant committed the crime of DUI or that the defendant is guilty of DUI.

CONCLUSION: The Motion to Exclude should be denied

ISSUE: Admissibility of Evidence Seized without a Warrant
(Traffic Stop - Infraction)

MOTION: Defense Motion to Suppress the traffic stop based on lack of probable cause

WITNESSES NEEDED:

- The wheel officer: Officer _____

MOTION SPECIFIC QUESTIONS TO ASK:

- What the officer observed the defendant's vehicle doing
- How close the officer was to the defendant's vehicle
- How clear a view did the officer have of the defendant's vehicle
- What infraction the officer believed the defendant committed and why
- (*look to case law on the specific infraction to determine what facts to elicit to establish probable cause*)

RULE OF LAW:

- The standard is whether or not the officer had probable cause to believe the defendant committed a traffic violation
- The standard is established in *Whren v. State*, 116 S. Ct. 1769 (1996), and then adopted in *Holland v. State*, 696 So. 2d 757, 759 (Fla. 1997) and *State v. Hernandez*, 718 So. 2d 833 (Fla. 3d DCA 1998).
- Whether the standard is termed "reasonable suspicion" or "probable cause" is of relatively minor significance, given that an officer will be observing the completed violation itself. In *Whren*, the Court quoted from *Delaware v. Prouse*, 440 U.S. 648, 654-655 (1979): "[T]he foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations . . . which afford the (necessary) 'quantum of individualized suspicion' . . ." *Whren* at 1769.

APPLICATION OF LAW TO FACTS OF THIS CASE:

- In this case, we have testimony that the officer observed the defendant's vehicle:
- *Cite cases indicating that the behavior by the defendant constitutes a traffic violation:*
- Therefore, it is clear that the officer had probable cause to believe that the defendant committed the traffic violation and was therefore justified in stopping him.

CONCLUSION: The Motion to Exclude should be denied

ISSUE: Admissibility of Evidence Seized without a Warrant
(Traffic Stop – Weaving/Failure to Maintain a Single Lane)

MOTION: Defense Motion to Suppress the traffic stop based on lack of probable cause

WITNESSES NEEDED:

- The wheel officer: Officer _____

MOTION SPECIFIC QUESTIONS TO ASK:

- Overall – get out of the officer not only that he believed the defendant was committing the traffic infraction Failure to Maintain a Single Lane, but that he also suspected that the Defendant was DUI.
- What the officer observed the defendant’s vehicle doing
 - How far out of the lane did the vehicle travel
 - How many times
- How close the officer was to the defendant’s vehicle
- How clear a view did the officer have of the defendant’s vehicle
- Where there other vehicles on the road?
 - How close were those vehicles to the defendant’s vehicle
 - Were they affected by the defendant’s driving pattern
- Was the officer affected by the defendant’s driving pattern
- Did the officer see the defendant reach for the radio
- Did the officer see the defendant drop a cigarette?
- Did the officer see the defendant reach for something in the back seat, glove compartment or console?
- Did the officer see any obstructions in the roadway that would cause a vehicle to swerve?
- Was the defendant checking the rear-view and side-view mirrors for other traffic (Essentially, was the Defendant unable to maintain his lane or was he intentionally trying to change lanes)
- Was the defendant talking on a cellular phone
- Did the defendant’s driving pattern create a safety concern

RULE OF LAW:

- Distinguishing *Crooks*, 710 So. 2d 1041 (Fla. 2d DCA 1998): The defense will argue that other traffic need be affected. **THAT IS NOT THE LANGUAGE USED IN THE CASE.** The standard in the case is that the driver’s conduct must create a reasonable safety concern. What is a “reasonable safety concern?” The *Crooks* court noted:
 - a. There was no evidence in the record to establish how far into the other lane the defendant drove on any of the three occasions.
 - b. There was no objective evidence suggesting that the defendant failed to ascertain that his movements could be made with safety (i.e. the officer didn’t say that he

didn't see the defendant look into his mirrors, look backwards to see if there were other vehicles around.)

- c. The officer did not suspect that *Crooks* was impaired or intoxicated.
- Try to elicit testimony from your officer on any of the above areas to distinguish your case from *Crooks*. Additionally, the State did not argue that the officer had reasonable suspicion of DUI or had witnessed an unusual driving pattern in *Crooks*.
 - *Yanes v. State*, 877 So. 2d 25 (Fla. 5th DCA 2004)—LEO's observations provided reasonable suspicion sufficient to justify stop where vehicle crossed the line three times in space of one mile and no traffic was effected. Stop valid because LEO thought the defendant was impaired based on the driving pattern. *Yanes* cites *Esteen v. State*, 503 So.2d 356 (Fla. 5th DCA 1987), *State v. Carillo*, 506 So. 2d 495 (Fla. 5th DCA 1987), *Roberts v. State*, 732 So.2d 1127 (Fla. 4th DCA 1999), and *State v. Davidson*, 744 So.2d 1180 (Fla. 2d DCA 1999)
 - *DHSMV v. Jones*, 935 So.2d 532 (3rd DCA 2006) "there is no requirement that operation of a vehicle create a risk to others to support a valid stop for failure to maintain a single lane".
 - *State v. Simmons*, 5 Fla. L. Weekly Supp. 273 (Fla. 15th Jud. Cir. App. 1997)—No other vehicles need be endangered. The court noted the plain meaning of Fla. Stat. § 316.089 only creates two requirements, "... (1) stay with your lane at all times and (2) if you intend to change lanes, make sure it is safe. Any other interpretation of this language is sure misplaced." *Id.* at 273. The court was not persuaded that the language in *State v. Riley* had any bearing on interpreting the failure to maintain a single lane statute. The court did find the logic in *State v. Padilla*.
 - *State v. Smith*, 3 Fla. L. Weekly Supp. 655 (Fla. 6th Cir. Ct. App. 1996) - No vehicles need to be endangered—There can be a valid stop based on a violation of Fla. Stat. § 316.089(1), even where no other vehicle is endangered by the defendant's failure to stay in his lane. The officer witnessed a violation even where no other car is endangered, as long as the officer reasonably suspects that defendant did not first determine the other lane was clear. The court stated that "[a]ny responsible police officer would have stopped a driver under such circumstances." *Id.* at 656.
 - *State v. Padilla*, 4 Fla. L. Weekly Supp. 866 (Fla. Dade Cty. 1997)—No other traffic need be affected—The court held that a driver violates § 316.089 even if no other traffic is affected, when it weaves from lane to lane (as distinguished from when it changes lanes, which a driver may do as long as he has determined that it can be done safely, i.e. without affecting other vehicles). Thus, the court addresses the policy arguments outlined below. Most importantly, the court clarifies that the same "driving pattern" which constitutes "failure to maintain a single lane" will usually amount to reasonable suspicion.
 - *State v. Briggs*, 5 Fla. L. Weekly Supp. 32 (Fla. Broward Cty. Ct. 1997)—No other traffic need be affected—Officer testified that she observed the defendant swerving within his lane. She then observed the defendant cross over into the lane to the left of his and swerve back. In

finding that no other traffic need be affected, the court reasoned “[I]t is an unreasonable interpretation of this State’s traffic code to make our citizens wait for a driver to strike another driver, pedestrian, animal or inanimate object or cause another driver to avoid a collision before a violation for erratic driving is committed.” *Id.* at 33. The court further held that “[t]here are always drivers affected most notably of whom include the Defendant himself.” *Id.* at 33. The court further noted that there was “a very good probability” that the Defendant did not ascertain that his swerving could be made with safety, without affecting other traffic.

- *U.S. v. Cooper*, 133 F.3d 1394 (11th Cir. 1998)—Defendant’s driving affected Officer—Officer testified that he noticed defendant in his rear-view mirror attempting to merge from the left to the center lane in order to change highways. Finding himself on the wrong road, the defendant accelerated and cut across the Officer’s lane to exit the highway. The defendant came close to the officer’s car to cause the officer to apply his brakes to avoid an accident. “Intending to issue Cooper [the defendant] a citation for improper lane change, King [the officer] signaled for Cooper to pull over into the exit’s emergency lane.” The court found this to be a valid stop for an improper lane change as the officer had to apply his brakes to avoid an accident.

Reasonable suspicion of DUI

- *Berkemer v. McCarty*, 468 U.S. 420 (1984)
- Officer made a valid Terry stop for suspected DUI when officer observed the vehicle weaving in and out of a highway lane.
- *Roberts v. State*, 732 So. 2d 1127 (4th DCA 1999): At approximately 2:00 a.m., a deputy observed the Defendant’s car weave from side to side, crossing over the left and right lane lines several times. The officer then turned on his car camera video to record the driving pattern. At the suppression hearing, the judge found that the video showed the Defendant was weaving significantly within the lane but did not show her cross over the lane lines as the deputy had described. The Fourth District Court of Appeal reversed the suppression of the evidence holding that - even in the absence of a traffic violation, an officer may stop a driver’s vehicle when the officer has a reasonable suspicion that the driver is under the influence.
- *State v. Duggins*, 691 So.2d 566 (Fla. 2d DCA 1997): Officer stopped the defendant, whom he observed "swerving in and out of the southbound lane of a lightly traveled side street." The court conclusively stated that the defendant was "properly stopped, and subsequently arrested, for DUI."
- *State v. Neumann*, 567 So.2d 950 (Fla. 4th DCA 1990): Officer stops defendant for suspected DUI after watching him cross the center line at least three times. The officer testified that he suspected that the Defendant might be intoxicated. The court upheld the stop.
- *State v. Slattery*, 6 Fla. L. Weekly Supp 400 (11th Cir. Ct. App., 1999): Officer testified he observed half of defendant’s vehicle swerve from the outside eastbound lane into the inside eastbound lane twice over a five or six block distance. Defendant jerked his car back into the proper lane on each occasion. Officer testified that based on this driving pattern, he suspected the defendant may be DUI. The Trial Court held that there was no violation of Fla. Stat. § 316.089 because no other traffic was affected. The Court also held that there was insufficient evidence to justify the officer’s suspicion that defendant was DUI.

- The Circuit Court, in its appellate capacity, reversed Judge Kevin Emas and found that “[w]hile the officer’s experience certainly gives him better insight into driving patterns of intoxicated persons than the average citizen, it is hard to imagine that a lay person would observe the defendant’s actions and not question whether he was ‘drunk.’ In short, the evidence clearly establishes probable cause for the officer to suspect or believe that the Defendant may be intoxicated.” Under those circumstances, the Court opined, the officer may very well have been “derelict in his duties” had he chosen to wait to take action. Finding probable cause for DUI, the Circuit Court did not address the State’s alternative theory for the stop, Failure to Maintain a Single Lane.

APPLICATION OF LAW TO FACTS OF THIS CASE:

- In this case, we have testimony that the officer observed the defendant’s vehicle:
- Therefore, it is clear, based on the case law cited and the facts of this case that the officer had probable cause to believe that the defendant committed the traffic violation of failing to maintain a single lane AND reasonable suspicion that the defendant was DUI, and was therefore justified in stopping him.

CONCLUSION: The Motion to Exclude should be denied

MOTIONS IN LIMINE

in limine /in-lim-e-nee/, adv. [Latin “at the outset”] Preliminary; presented before or during trial <motion in limine>, See MOTION IN LIMINE

A. MOTIONS IN LIMINE FOR EXCLUSION

A pretrial motion requesting the Court to prohibit opposing counsel from referring to or offering evidence on matters so highly prejudicial to the moving party that curative instructions cannot prevent predispositional effect on the jury. *Messler v. Simmons Gun Specialties, Inc.* 687 P.2d 121 (Okla. 1984).

The purpose of a motion in limine is to avoid jury exposure to matters that are irrelevant, inadmissible and prejudicial. Specifically, a motion in limine seeks to prevent argument and questions in front of the jury, and to instead require proffers and sidebars. Also, a motion in limine can be used to prevent the jury from hearing evidence you are seeking to exclude, and require the defense to reveal strategy through argument against the motion.

The FORMS drive contains standard Motions in Limine to be used in Crimes Case and DUI Cases. It is the responsibility of the trial ASA to make all necessary modifications and additions or subtractions to this standardized motion based on the particulars of the case.

B. STANDARD MOTIONS IN LIMINE

Standard Motions in Limine to File in All Cases

“Haliburton Motion”

Witnesses - Any mention of the State’s failure to call witnesses that are equally accessible to both parties. When such witnesses are equally available to both parties, no inference shall be made on the failure of either party to call the witness. See *Lasprilla v. State* 826 So.2d 396 (3rd DCA 2002), *Haliburton v. State*, 561 So.2d 248, 250 (Fla. 1990), cert. denied, 501 U.S. 1259, 111S.Ct. 2910, 115 L.Ed.2d 1073 (1991); *State v. Michaels*, 454 So.2d 560 (Fla.1984); and *Terry v. State*, 668 So.2d 954 (Fla.1996).

State Witnesses

There shall be no references to or testimony procured from witnesses listed on defendant’s discovery exhibit characterized by words to the effect of “any and all State witnesses.” “It is not enough to merely duplicate the list of state’s witnesses, and thus transform [the witnesses] into a witness ‘whom the defense counsel expects to call as [a witness] at the trial or hearing.’” See *Dufour v. State*, 495 So.2d 154 (Fla. 1986).

Jury Nullification

Any request by the defense for a jury pardon on behalf of the Defendant. A Defendant has no constitutional right to request a jury pardon. *Lages v. State*, 640 So.2d 151 (2nd DCA 1994). Any request for sympathy or for the jury to “ignore the law” are misleading, irrelevant and prejudicial under a 403(b) analysis.

Mention of Penalties or defendant’s “liberty”

Any mention of the length of sentence for the crime charged or the sentence for lesser-included offenses. To insinuate penalties into argument is to suggest improper basis for the jury's decision. The jury should decide a case according to the law and the evidence presented and disregard the consequences of its verdict. A statement that the defendant’s liberty is at stake is a direct reference to the possible penalties See *Legette v. State*, 718 So.2d 878, 880 (Fla. 4th DCA 1998); *Keenan v. State*, 379 So.2d 147, 148, n.5 (Fla. 4th DCA 1980); *Mosley v. State*, 482 So.2d 530, 532-33 (Fla. 1st DCA 1989); *Kocsis v. State*, 467 So.2d 384 (Fla. 5th DCA); Fla.R.Crim.P. 3.390(a).

Improper Impeachment

There shall be no reference, for the purposes of impeachment to the omissions of acts, observations, or facts from any reports generated in connection to this offense. See *State v. Johnson*, 284 So.2d 198 (Fla. 1973).

Validity of Arrest

There shall be no reference concerning the validity of the arrest in that it has no bearing on the guilt or innocence of an accused. See *State v. Filoso*, 613 So.2d 69 (Fla. 4th DCA 1993).

Imposing Prejudice on Testifying Officer

Any generalized comment regarding police misconduct, or any comment involving misconduct which does not directly involve the Miami-Dade officers testifying in the above case. In particular, the State seeks to preclude the use of other incidents, either by name or by factual reference, which may have gained public notoriety in this or any other jurisdiction, in which there is either a claim or evidence of improper police conduct. Any such mention could not be relevant nor material to the issues to be resolved in this case, and would potentially both mislead and prejudice the jurors.

Defendant’s Remorse

Any mention of the defendant’s remorse. The purpose of such a comment could only be to evoke sympathy with the jury. Additionally, mention of the defendant's sympathy has no probative value and could be construed as irrelevant “subsequent remedial measure” evidence. Florida Evidence Code 407.1.

Improper Comment on Innocence

Any comment by the Defense that the Defendant said, and has always said, he is “not guilty.” Initially, such a comment is irrelevant. Secondly, the Public Defender consistently stands “mute” to the charges and does not plead “not guilty.” Finally, and most importantly, such a comment is factually inaccurate because the Defense attorney pleads for the Defendant, preventing the Defendant from making any statements at arraignment. Comment that the Defendant has maintained his innocence to the attorney is improper and is hearsay that triggers no exception. Fla. Stat. 90.803

Suggestion of Racial Motivation

Any suggestion or argument that the arrest, testimony, or prosecution in the instant case is racially motivated in the absence of evidence supporting the suggestion or argument. *See, e.g., Perez v. State*, 689 So.2d 306 (Fla. 3rd DCA 1997).

Mental Health

Any comment that directly or indirectly raises a mental health defense, including, but not limited to, testimony or arguments concerning the defendant's diminished mental capacity, marginal intelligence, or youth. Absent an insanity plea, expert or lay testimony as to the defendant's mental status is improper and inadmissible. Fla.R.Crim.P. Rule 3.216 (2000); *Chestnut v. State*, 538 So.2d 820, 821 (Fla. 1989).

Plea Offers

Any mention of plea offers extended to the defendant or the content of any plea negotiations in the above-styled case. Such information is irrelevant.

Impermissible Character Evidence

The Florida Evidence Code provides that evidence of a person's character or a trait of his character is inadmissible to prove that he acted in conformity with it on a particular occasion. [F.S. 90.404(1).] If the accused seeks to introduce evidence of a pertinent trait of his character, he must do so through testimony about his reputation. [F.S. 90.404(1)(a), F.S. 90.405(1).]

Defendant's Hearsay Statements

Any statement made by the Defendant, if offered by the Defendant. The only hearsay exception that may apply to the statement of the Defendant in this cause is Florida Statute 90.803(18)(a). Such an admission can only be offered by the State since it must be offered against the declarant and must be the Defendant's own statement. Thus, any presentation by the Defendant of his own statements cannot be seen as against himself and, therefore, all such statements would be inadmissible if offered by the Defendant. *See Fagan v. State*, 425 So.2d 214 (4th DCA 1983); and *Overton v. State*, 429 So.2d 722 (1st DCA 1983); *Moore v. State*, 530 So.2nd 61 (1st DCA 1988). This motion would also apply even if the defendant were to testify. A testifying witness has no more right to tell the jury what they said than someone else speaking about their statements. Florida Evidence Code 801.2; *Blue v. State*, 513 So.2d 754, 756 (4th DCA 1987) ; *Wells v. State*, 477 So.2d 26, 27 (3^d DCA 1985).

Improper Comment on Lack of a Criminal Record

Any mention of the Defendant's lack of impeachable criminal record. The lack of a criminal record is inadmissible at trial. *Wrobel v. State*, 410 So.2d 950 (Fla. 5th DCA 1982); *See also McCartney v. State*, 410 So.2d 1157 (Fla. 4th DCA 1985); *Mohorn v. State*, 462 So.2d 81 (Fla. 4th DCA 1985); *Whitted v. State*, 362 So.2d 668 (Fla. 1978).

Improper Reference to Evidence not Introduced

There shall be no reference, particularly during closing argument, to evidence that was never adduced at trial. *See State v. Cutler*, 785 So.2d 1288 (Fla. 5th DCA 2001).

Improper Impeachment – Unsworn Statements

Improper attempts to impeach witnesses with statements that are unsworn and not adopted by the witness, where the defense counsel conducting the examination is the only witness to such statements. The law of evidence does not provide that a party may attack the credibility of a witness simply by insinuating through his questions to the witness that the witness in fact has made statements which are inconsistent with the witness's present testimony, and then treating the insinuating questions as if they were impeaching evidence. *Marrero v. State*, 478 So.2d 1155, 1156 (Fla. 3rd DCA 1985).

[T]he predicate question--e.g., ‘*Didn't you tell me ...?*’ or ‘*Didn't you say to so-and-so*’--is itself testimonial, that is, the question suggests that there is a witness who can testify that such a statement was made. When this suggested witness is not actually called to give the impeaching testimony under oath, all that remains before the jury is the suggestion--from the question -- that the statement was made. When that occurs, the conclusion that must be drawn is that the question was not asked in good faith, and that the attorney's purpose was to bring before the jury inadmissible and unsworn evidence in the form of his questions to a witness. *Id.* at 1157.

Note: This issue particularly applies when a “hallway interview” by defense counsel has been conducted. Ensure that you address with the Judge that these “interviews” are not prior sworn statements, and cannot be used for impeachment purposes by insinuating that the interview was inconsistent with the testimony at trial. If the witness denies the inconsistency, the attorney may need to withdraw from the case and call herself as a witness. *State v. J.S.* --- So.3d --- (3rd DCA 2009) 2009 WL 1940510. Discussed *Infra* pgs.

Medical Conditions

Any mention of the defendant suffering from disease, illness, or disability without medical records made by one legally responsible for creating such documents meeting hearsay exception Fla. Stat. 90.803(4). Any testimony based on what the doctor told the patient (defendant) relating to the ailment is hearsay - an out of court statement offered for the truth of the matter asserted. Under this circumstance, the State does not have the opportunity to effectively cross-exam the doctor who made alleged diagnosis.

Personal Opinion

Any interjection of personal opinions by counsel in closing arguments such as “If the Police or State can do this in the America we live in, I am leaving.” See *Duncan v. State*, 776 So.2d 287 (Fla. 2nd DCA 2000) (quoting *Luce v. State*, 642 So.2d 4, 4 (Fla. 2nd DCA 1994); See also, *Ruiz v. State*, 743 So.2d 1 (Fla. 1999) (noting that counsel's role during closing arguments is to assist the jury in analyzing the evidence, not to obscure the jury's view with personal opinion, emotion, or non-record evidence).

C. STANDARD MOTIONS IN LIMINE TO FILE IN DUI CASES

DHSMV Administrative Review

Any and all mention of the decision of a DHSMV administrative review of the Defendant's license suspension. "The decision of the department under this section shall not be considered in any trial for a violation of s. 316.193, nor shall any written statement submitted by a person in his or her request for departmental review under this section be admissible into evidence against him or her in any such trial". §322.2615(14), Florida Statutes (2002) (emphasis added). See also §316.193(10), Florida Statutes (2002).

Videotape

Any comment mentioning that the Police Department's fail to videotape Field Sobriety Exercises. Such a comment is highly prejudicial, inasmuch as the Police Department does not have an obligation to videotape Field Sobriety Exercises. *State v. Betts*, 659 So.2d 1137 (Fla. 5th DCA 1995); *State v. Powers*, 555 So.2d 888 (Fla. 2nd DCA 1990); *State v. Waxman*, 2 Fla. L. Weekly Supp. 268 (Dade County Court, April 11, 1994).

Defendant's Right to an Attorney

There shall be no references concerning the defendant having a right, constitutional or otherwise, to an attorney when deciding to submit to a breath, blood or urine test. See *State v. Hoch*, 500 So.2d 597 (Fla. 3d DCA 1986); *State v. Nelson*, 508 So.2d 48 (Fla. 4th DCA 1987). Nor shall there be references concerning the defendant's having such right when deciding to submit to field sobriety tests. See *State v. Burns*, 661 So.2d 842 (Fla. 5th DCA 1995).

Defendant's BAC at Time of Driving ("Miller-Haas")

There shall be no references concerning the State's or State's witnesses' inability to determine the defendant's blood or breath alcohol level at the time of driving. "[W]e interpret Florida's statutory scheme to mean that *the test results shall be prima facie evidence that the accused had the same blood-alcohol level at the time of his operation of the vehicle.*" (emphasis added) See *Haas v. State*, 597 So.2d 770, 774 (Fla. 1992); *Miller v. State*, 597 So.2d 767 (Fla. 1991).

Normal Faculties Presumed

There shall be no references concerning the State's or State's witnesses failure to demonstrate that the defendant possessed normal faculties. "Normal faculties are presumed and, if the defendant contends otherwise, the burden is on him to present evidence that he does not possess normal faculties." See *State v. Macias*, 481 So.2d 979,982-983 (Fla. 4th DCA 1986); *City of Orlando v. Ford*, 220 So.2d 661 (Fla. 4th DCA 1969).

D. ADDITIONAL MOTIONS IN LIMINE

"Haliburton Motion" – Evidence

Any mention of the State's failure to enter into evidence all photographs taken in this case or in the previous Williams Rule cases. Such photographs have been provided in the State's discovery response and are equally available to both parties. When such evidence is equally available to both parties, no inference should be made on the failure of either party to enter into evidence such

exhibits. *See Generally Haliburton v. State*, 561 So.2d 248, 250 (Fla. 1990), cert. denied, 501 U.S. 1259, 111S.Ct. 2910, 115 L.Ed.2d 1073 (1991); *State v. Michaels*, 454 So.2d 560 (Fla.1984); *Terry v. State*, 668 So.2d 954 (Fla.1996).

Voluntary Intoxication

Any suggestion or argument that the defendant was voluntarily intoxicated at the time of the offense. Voluntary intoxication resulting from the consumption, injection, or other use of alcohol or other controlled substance as described in chapter 893 is not a defense to any offense proscribed by law pursuant to Fla. Stat. 775.051. Evidence of a defendant's voluntary intoxication is not admissible to show that the defendant lacked the specific intent to commit an offense and is not admissible to show that the defendant was insane at the time of the offense, except when the consumption, injection, or use of a controlled substance under chapter 893 was pursuant to a lawful prescription issued to the defendant by a practitioner as defined in s. 893.02.

Prior Arrests of Witnesses

Testimony regarding any prior arrests of State witness that did not result in felony convictions or convictions involving crimes of moral turpitude. *See, Torres-Arboledo v. State*, 524 So.2d 403 (Fla. 1988), cert. denied, 488 U.S. 901, 109 S.Ct. 250 (holding that an arrest is inadmissible to impeach a witness).

Additional Topics

Use of Juvenile Victim's Record

Attempts at Restitution

Reference to the witness having a past as a prostitute or drug dealer

Reference to the witness taking the 5th Amendment on certain points

Victim's Living Arrangements

Defendant's remorse

Deceased victim's statements (not dying declaration)

Expert Hearsay (expert as conduit)

Inappropriate Mental Health Defenses (i.e. diminished capacity)

Crime scene reputation

Cross as to investigation as to other subjects

Assistance by the State with other agencies

Details as to nature of crimes of a witness

Cases on police misconduct*

Defendant's mental competency

Status of co-defendant's cases

Alleged drug and alcohol usage of witness

Sentences for other crimes / waiver of parole (penalty phase)

Insufficient alibi defense

Expert on voluntariness (or similar)

Police discussions with other suspect (scope)

Witness comment on the credibility of another witness

Sexual orientation of a witness

Civil lawsuits for other acts

Medical or psychological history of a witness

Fight or flight syndrome (brain functioning)

Victim's previous injuries

Witness or victim gang association

Witness plea deals (or not)

Relation of defendant to any other victim

Age of the defendant (unless an issue)
Immigration status of defendant
Victim's family involvement in crime
Defendant claiming innocence
State's decision not to charge others
Uncharged acts of witnesses (not necessarily criminal)
Statutes having been found unconstitutional

E. MOTIONS IN LIMINE FOR ADMISSION

A motion in limine for admission of evidence is a pretrial motion requesting the court to allow the introduction of certain evidence so as to ensure efficient presentation of your case and to minimize hasty, in-trial rulings adverse to your case. For example:

1. Presence of Witnesses (Fla. Stat. 90.616) - Avoid Sequestration (e.g. Lead Detective, Next of Kin, or Experts)
2. Admission of Certain Evidence (e.g. Audio Tapes, 911 Tapes, Foreign Language, Dialects, Chain of Custody/Introduction Foundations, Videotapes, Cleansed Tapes, or Slowed Down Tapes)
3. Demonstrative Creations (e.g. Blowups, Mockups, Composites or Compilations)
4. Use of and reference to certain evidence during opening statement.
5. Williams Rule and Inextricably Intertwined

F. SAMPLE WRITTEN MOTION IN LIMINE

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

STATE OF FLORIDA,

Case No. _____

Section No. _____

v.

Judge _____

_____,
Defendant

MOTION FOR ORDER IN LIMINE

COMES NOW KATHERINE FERNANDEZ RUNDLE, State Attorney of the Eleventh Judicial Circuit of Florida, by and through the undersigned Assistant State Attorney, and moves this Honorable Court for an Order in Limine instructing the attorney for the defendant to refrain from making any direct or indirect mention whatsoever at trial before the jury of the matters hereinafter set forth, without first obtaining permission from the Court outside the presence and/or hearing of the jury, on the grounds that the said matters are incompetent, irrelevant, or immaterial to the issues involved herein, and will serve only to unfairly prejudice the jurors against the State. The subject matters in question are:

1. Testimony regarding specific acts of violence, prior bad acts or courses of conduct of the decedent absent a proper foundation pursuant to Section 90.405(2) Florida Statutes (2001). Any such testimony would be irrelevant absent the required foundation, as it would shed no light on the defendant's state of mind on the date in question. Such testimony would be utilized solely to demonstrate that the victim had a propensity for violence. Section 90.405, Florida Statutes (2001); Johnson v. State, Fla. 5th DCA 1998), rev. denied, 729 So.2d 392 (Fla. 1999).
2. Testimony regarding the reputation of the victim or witness absent a proper foundation and full compliance with the requirements of Section 90.405(1) Florida Statutes (2001).
3. Direct or indirect testimony regarding a mental health defense, including, but not limited to, testimony or arguments concerning the defendant's diminished mental capacity or marginal intelligence. Absent an insanity plea, expert or lay testimony as to the defendant's mental status is improper and inadmissible. Fla.R.Crim.P. Rule 3.216 (2000); Chesnut v. State, 538 So.2d 820, 821 (Fla. 1989).
4. Any reference to any high profile criminal cases involving alleged police misconduct.

5. Commenting on the failure of the State to call any particular witness listed in the State's discovery response. All witnesses listed in the State's discovery response are equally available to both the State and the defense, thus such comment would be misleading and prejudicial. Haliburton v. State, 561 So.2d 248 (Fla. 1990).
6. Testimony regarding any prior arrests of State witness that did not result in felony convictions or convictions involving crimes of moral turpitude. See, Torres-Arboledo v. State, 542 So.2d 403 (Fla. 1988), cert. denied, 488 U.S. 901, 109 S.Ct. 250 (holding that an arrest is inadmissible to impeach a witness).
7. Reference to the possible sentence the defendant could receive under the Florida Statutes and/or the guidelines should the defendant be convicted of any or all offenses as charged in the information. Kocsis v. State, 467 So.2d 384 (Fla.5th DCA); Rule 3.390(a), Fla.R.Crim.P. amended Jan. 1, 1985.
8. Reference to the State witness knowing the defendant was facing incarceration.
9. Reference to the prior bad acts or collateral matters involving State witness, and prior lawsuits.
10. Reference to specific facts involving prior convictions or open cases of State witness.
11. Characterization by the defense in the testimony of defense witness of the State's case, regarding _____ perception regarding the weight of the evidence in the instant case. Any reference to the time frame when defense alibi witnesses were listed or any reference to shortcomings of predecessor defense counsel.
12. Mention of the defendant's or any defense witness(es)' lack of priors. The District Courts of Appeals have agreed that it is improper to admit evidence of the lack of prior criminal record to prove good character whether the person involved is the accused, a witness, or a victim. See McCartney v. State, 410 So. 2d 1157 (Fla. 4th DCA 1985) (defendant not entitled to prove that he had no prior criminal record as substantive evidence of the defendant's good character); Wrobel v. State, 410 So. 2d 950 (Fla. 5th DCA 1982), review denied 419 So. 2d 120 (Fla. 1982) ("There is nothing under Section 90.405 nor the case law of Florida that authorizes the defense to introduce evidence of the absence of prior criminal convictions as a substitute for reputation testimony, even when it has been predetermined under Section 90.404 that evidence of character or a trait of character is inadmissible under the facts of a given case"); Mohorn v. State, 462 So. 2d 81 (Fla. 4th DCA 1985) (error to elicit testimony from State witness on direct examination that he had never been convicted of a crime, citing Whitted v. State, 362 So. 2d 668 (Fla. 1978), ("the good character of a witness may not be supported unless it has been impeached by evidence").

13. Impermissible character evidence. The Florida Evidence Code provides that evidence of a person's character or a trait of his character is inadmissible to prove that he acted in conformity with it on a particular occasion. [F.S. 90.404(1).] If the accused seeks to introduce evidence of a pertinent trait of his character, he must do so through testimony about his reputation. [F.S. 90.404(1)(a), F.S. 90.405(1).]

WHEREFORE, the State of Florida respectfully requests this Court grant the within Motion for Orders in Limine.

Respectfully submitted,

KATHERINE FERNANDEZ RUNDLE
STATE ATTORNEY

BY: _____

Assistant State Attorney
Florida Bar #
E.R. Graham Building
1350 N.W. 12th Avenue
Miami, FL 33136-2111
(305) 547-0100

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the above was furnished to Defense Counsel, on this the _____ day of _____, 2005.

Assistant State Attorney

JURY SELECTION

voir dire /vwár dir/. L. Fr. To speak the truth.

Jury Selection is the most import aspect of the trial. A prosecutor must select six members of the community who will be fair and impartial. However, a jury panel comes to the courthouse with preconceived opinions formed through life experience that affect the way they will view a case. For most people, opinions and attitudes will probably not change despite persuasive arguments. Therefore, use the *voir dire* process to accomplish three simple goals.

- Properly question the panel to determine who is prejudiced against the State's case.
- Educate the panel on the legal issues to determine if a juror is suited to decide the particular case.
- Establish a rapport with the jury panel.

These goals are accomplished by the use of open-ended questions designed to probe the juror's feelings about the issues. Jury selection is the only opportunity you have to speak directly to the jurors, therefore, make sure you interact and speak with each member on the venire. If the judge permits questionnaires, make sure to discuss the contents with each member of the panel. Remember jury selection is about the panel members, not the lawyers. Therefore, let the jurors to do the talking.

When a juror candidly states his or her position on a matter, ask the rest of the panel, "How many of you agree with that juror?" Have those jurors raise their hands, and then have them each explain what they believe. This process permits you to identify all jurors that have strong feelings about the important aspects of your case, and you can ask the necessary questions to have their bias and prejudice exposed. Thus, inappropriate jurors may be eliminated for cause without using a peremptory strike.

Jury selection is a challenging process. During *voir dire*, a prosecutor must ask proper questions, listen, take notes, keep track of what every juror is saying, evaluate the jurors' body language, and notice how jurors interact with each other. Once this is complete, a prosecutor must evaluate who may be inappropriate to keep on the panel by preparing challenges for cause and deciding who will be peremptory challenges. All this must be accomplished while making sure a proper record is preserved for appeal.

A. VOIR DIRE EXAMINATION

1. Challenges to Entire Panel

Challenges to the entire panel (e.g. potential jurors not selected according to law) must be **made in writing** before any individual juror is questioned. Fla. R. Crim. P. 3.290.

2. Time Limitations

In Florida attorneys have a right to conduct *voir dire* examinations. Fla. R. Crim. P. 3.300(b) states, “counsel for both the State and defendant shall have the right to examine jurors.” Of course, the judge can exercise control over this part of the trial as they may over any other part. However, the trial court cannot unreasonably limit or control counsel’s examination.

Gosha v. State, 534 So. 2d 912 (Fla. 3d DCA 1988): The court found the time limit of 1 to 3 minutes of inquiry per juror to be an unreasonable restriction on *voir dire* examination.

Pineda v. State, 571 So. 2d 105 (Fla. 3d DCA 1990): The court found the twenty-minute time limit for the examination of a twenty-three-member panel to be unreasonable. The court went on to state, “because the purpose of *voir dire* is to obtain a fair and impartial jury, time restrictions or limits on numbers of questions can result in the loss of this fundamental right.” *Id.* at 106. *See also, White v. State*, 717 So. 2d 1055 (Fla. 3d DCA 1998) (limiting defense counsel’s *voir dire* of potential jurors to 31 minutes was abuse of discretion.)

Wilkie v. State, 747 So. 2d 994 (Fla. 4th DCA 1999): The court held there was no error in picking two juries at once where one defense attorney represented two defendants on unrelated cases.

Ramirez v. State, 901 So.2d 332 (Fla. 3d DCA 2005): By unreasonably limiting the *voir dire* examination, the court prevented the defense from obtaining sufficient information to determine whether there was a basis for a challenge for cause.

3. Subject Matter

The contents of your *voir dire* examination will depend entirely on the type of case you are trying and the particular facts of your case. However, you can establish certain questions that will be relevant in any criminal case. Common subjects include: (1) Presumption of innocence; (2) Reasonable Doubt; (3) Burden of Proof; (4) Right of both defendant and state to fair trial; and (5) Following the Law.

a. Defendant’s Right Not to Testify

One topic the prosecution **should not deal with** during *voir dire* is **the defendant's right not to testify**. Case law suggests that **any comment by the prosecution on this topic can be the basis for a mistrial**. *State v. Fussell*, 436 So. 2d 434 (Fla. 3d DCA 1984)

The court should strike the entire panel where the prosecutor repeatedly makes improper statements concerning the defendant's right to remain silent. *Lawrence v. State*, 829 So. 2d 955 (Fla. 3d DCA 2002)

b. Use of Hypotheticals

- *Franqui v. State*, 699 So.2d 1312 (Fla. 1997)
- *Pope v. State*, 94 So. 865 (Fla. 1922)
- *Farina v. State*, 679 So.2d 1151 (Fla 1996) (reversed on other grounds)
- *State v. Wilson*, 509 So.2d 1281 (Fla. App. 3 Dist. 1987) (defense)
- *Dicks v. State*, 93 So. 137 (Fla. 1922) (defense)
- *Jackson v. State*, 881 So.2d 711 (Fla. 3d DCA 2004) (defense)
- *Moore v. State*, 939 So. 2d 1116 (Fla. 3d DCA 2006) (State) (Hypotheticals permissible if they make correct reference to the law of the case that aid in determining whether challenges for cause, or peremptory are proper ...)

c. Pre-Trying the case – Addressing a Potential Theory to the Jury

- *Lavado v. State*, 492 So. 2d 1322 (Fla. 1986)
- *Pait v. State*, 112 So.2d 380 (Fla. 1959) (reversed on other grounds)

d. Determining Possible Juror Prejudice Against the State

- *Moody v. State*, 418 So.2d 989 (Fla. 1982)

e. Notorious Case Examples

- *Jackson v. State*, 881 So.2d 711 (Fla. 3d DCA 2004)(The trial court has discretion to limit the discussion of notorious media cases. There must be some relevance to the facts in the case at hand.)

4. Rehabilitation of a Potential Juror

Either side has the opportunity to rehabilitate a juror during questing. However, a cause challenge should not be denied to the defense where a judge's leading question does not cure the bias expressed by the juror. *Johnson v. State*, 703 So. 2d 1233 (Fla. 3d DCA 1998). In *Johnson*, the juror expressed propensity for partiality when questioned by the defense attorney. The court held the answers given by the juror to the judge's leading questions did not cure the bias of their original responses as to the ability to be fair and impartial.

Judges in county court tend to quickly lead the jurors into giving what appears to be a “fair and impartial” answer - be careful. Under *Johnson*, the judge needs to do more than ask a confusing leading question. The record must be clear that the juror understood the question and now after further explanation and questioning by the judge, the juror can express that he/she is no longer bias.

Finally, you do not need to rehabilitate every potential juror. For example, if a potential juror stated that he thinks all police officers lie and would not believe anything they say, do not attempt to rehabilitate that juror. The reason is simple: if you succeed in rehabilitating him you cannot strike him for cause. If that is how a juror feels, you rehabilitate him and then he is selected to hear the case, more likely then not he will abide by his initial statement and, in this example, not believe your officers. As a rule of thumb, only rehabilitate those jurors who make bias statements that are pro-State.

5. Jurors Under Prosecution

A juror under prosecution **cannot serve on a panel**. *Lowrey v. State*, 705 So. 2d 1367 (Fla. 1998). In *Lowrey*, the court overturned a conviction because one of the jurors was under prosecution for battery. Although there was no demonstration of actual harm for seating the juror, the court found that the appearance of impropriety was great. The court held that inherent prejudice is presumed and went on to state: “the very foundation of our criminal justice process is compromised when a juror who is under criminal prosecution serves on a case that is being prosecuted by the same state attorney's office that is prosecuting the juror.”

Our county court judges skim through these types of questions. In order to ensure your case will not get reversed, you should inquire if any of your potential jurors are under prosecution with our office or any office. You should also ask if they have received a summons to answer to criminal charges. (Remember that an arrest is not the only way to initiate criminal charges.)

Look at *Tucker v. State*, 987 S0.2d 717 when determining what “Under Prosecution” means. “A person is not placed “under prosecution,” as used in the jury qualification statute, until the state attorney has exercised his or her discretion to pursue the charges through formal judicial proceedings.”

6. Appropriate Time to Begin Voir Dire

Ferrer v. State, 718 So. 2d 822 (Fla. 4th DCA 1998): The court found that beginning *voir dire* examination at 7:30 p.m. was an abuse of discretion. In *Ferrer*, the defense attorney objected to beginning jury selection so late, since he was tired and had been in court with the judge since 8:00 a.m. dealing with other clients. The attorney further stated that he would not be effective to his client. The court held: “we conclude that the procedures used by this trial judge unreasonably inhibited the ability of counsel to engage in meaningful *voir dire* examination of prospective jurors. A lawyer whose resources are depleted cannot be presumed to be able to operate at the ordinary skills level. And even if the lawyer is nonetheless able to perform with some competence, fatigue can impel the lawyer into subconsciously hurrying the process. In either event, the effect is to deprive the client of the lawyer’s skill, energy and dedication. For that reason, we find an abuse of discretion...In addition to wearing out the lawyers, these procedures unreasonably and unnecessarily exhaust the jurors and are unfair to them.”

Most likely the State cannot object to beginning at such a late hour. A defense attorney has to worry about the defendant's right and an ineffective assistance of counsel claim later. A way the argument may work is to argue that it is not only unreasonable to expect the State to be effective at the late hour, but it is unfair to the jurors. The opinion clearly states that the practice of continuing trials into the evening is abusive to jurors. However, if the venire is questioned and they agree to continue the State then loses the argument.

B. CHALLENGES AND STRIKES

Challenges should be exercised outside the hearing of the jurors and in the presence of the defendant. Fla. R. Crim. P. 3.315. In *Salcedo v. State*, 497 So. 2d 1294 (Fla. 1st DCA 1986), the defendant was not present when challenges were exercised and the court found that to be fundamental error, reversible even if defense counsel does not object in the trial court. The court in *Salcedo* recognized that the defendant can waive his presence by consent or by subsequent ratification of what occurred in his absence. Even if the defendant is in the courtroom, if the attorneys go sidebar to exercise challenges the defendant should come sidebar or should waive his right to be present.

A single mistake in jury selection can result in an entire new trial. Nowhere is that truer than in the area of “Neil Challenges” and peremptory strikes. A mistake there is usually reversible error per se. In *Garcia v. State*, 35 FLW D2328 (Fla 3rd DCA 2010).

While every judge is different, here is a sample of how a selection of the jury may occur.

(1) STATE CAUSE CHALLENGES. The judge will ask the State if it has any CAUSE challenges. The State identifies each juror it wishes to strike for cause, and it’s reason for that contention. The defense then has the opportunity to contest the State’s reasons for the cause challenge. If the Judge rejects the State’s cause challenge then the State can use a peremptory challenge. However, it may be better to wait and back strike the juror later depending on what transpires. (more on the back striking process later in this section).

(2) DEFENSE CAUSE CHALLENGES. The judge will ask the Defense if it has any CAUSE challenges. If the State disagrees (for example it thinks that the Defense is exaggerating a possible juror's deficiency) this would be the State's opportunity to contest it. Unless there is a legitimate justification (remember the goal of building credibility with the judge), the State should fight the Defense's cause challenges so that they will be forced to burn peremptory challenges.

C. CAUSE CHALLENGES

Florida Statute §913.03 lists twelve reasons for cause challenges. When exercising a cause challenge the attorney must state the grounds for the challenge. Fla. R. Crim. P. 3.220. When it appears that there is a member of the venire that should obviously be stricken for cause, do not assume that the reason is obvious to the court. For example, if a member of the venire is having difficulty with English, direct questions to that person so that it is clear to the court that the person does not adequately understand English.

Standard: "The test for determining juror competence is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." *Lusk v. State*, 446 So.2d 1038 (Fla. 1984). The trial court must grant a cause challenge if there is a reasonable doubt whether the person could be an impartial juror. *Hamilton v. State*, 547 So.2d 630 (Fla. 1989).

When prospective jurors express doubt in their ability to respect the defendant's right to remain silent either the prosecutor or the judge must "make sure the prospective juror can be an impartial member of the jury." *Watson v. State*, 651 So.2d 1159, n. 1 (Fla. 1994) quoting *Bryant v. State*, 601 So.2d 529, 532 (Fla. 1992).

A challenge for cause to an individual juror may be made only on the following grounds (Florida Statute 913.03):

- (1) The juror does not have the qualifications required by law;
- (2) The juror is of unsound mind or has a bodily defect that renders him or her incapable of performing the duties of a juror, except that, in a civil action, deafness or hearing impairment shall not be the sole basis of a challenge for cause of an individual juror;
- (3) The juror has conscientious beliefs that would preclude him or her from finding the defendant guilty;
- (4) The juror served on the grand jury that found the indictment or on a coroner's jury that inquired into the death of a person whose death is the subject of the indictment or information;
- (5) The juror served on a jury formerly sworn to try the defendant for the same offense;
- (6) The juror served on a jury that tried another person for the offense charged in the indictment, information, or affidavit;

- (7) The juror served as a juror in a civil action brought against the defendant for the act charged as an offense;
- (8) The juror is an adverse party to the defendant in a civil action, or has complained against or been accused by the defendant in a criminal prosecution;
- (9) The juror is related by blood or marriage within the third degree to the defendant, the attorneys of either party, the person alleged to be injured by the offense charged, or the person on whose complaint the prosecution was instituted;
- (10) The juror has a state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent the juror from acting with impartiality, but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not be a sufficient ground for challenge to a juror if he or she declares and the court determines that he or she can render an impartial verdict according to the evidence;
- (11) The juror was a witness for the state or the defendant at the preliminary hearing or before the grand jury or is to be a witness for either party at the trial;
- (12) The juror is a surety on defendant's bail bond in the case.

a. Cases holding proper grounds for cause challenges

- Defendant was charged as a Felon in Possession of a Firearm. During jury selection, a potential juror stated that she had been the victim of some prior offenses. She stated that she could be fair and impartial regarding those incidents, but further claimed she had a prejudice with regard to people using guns. No one followed up on this statement. It was error to deny defendant's challenge for cause. *Hill v. State*, 839 So. 2d 883 (Fla. 3d DCA 2003).
- A prospective juror gave answers indicating that he would give greater credibility to the testimony of a law enforcement officer. He hedged a little when the judge asked him questions. However, it was clear that there was a reasonable doubt concerning his ability to be fair and impartial. Defendant's challenge for cause should have been granted. *Salgado v. State*, 829 So. 2d 342 (Fla. 3d DCA 2002).
- Defense sought to strike a prospective juror in a Sexual Battery case whose job entailed working with sexually abused children. She had given equivocal responses regarding whether she could be fair and impartial. It was error to refuse to strike her for cause. *Miles v. State*, 826 So. 2d 492 (Fla. 3d DCA 2002).
- The potential juror had indicated a willingness to give police officers' testimony more credibility. Given the entire nature of the questions and answers, the trial court erred in denying defendant's Motion to Exclude Her For Cause. *Scott v. State*, 825 So. 2d 1067 (Fla. 4th DCA 2002).

- Jurors, who were equivocal in their ability to set aside the belief the defendant must be guilty of something or he wouldn't be on trial, should have been removed upon defense counsel's challenge for cause. When the defense used up its 10 challenges and wished to use an 11th for a specific juror, the defense did not have to give a reason for wanting to exercise that challenge. *Rodas v. State*, 821 So. 2d 1150 (Fla. 4th DCA 2002).
- Juror's ambivalent response to defense attorney's question about his ability to not hold it against the defendant if he didn't testify was grounds for a challenge for cause. *Darr v. State*, 817 So. 2d 1093 (Fla. 2d DCA 2002).
- Juror's repeated response that the defendant entered the trial with a presumption of guilt. *Joseph v. State*, 33 Fla. L. Weekly D1610a (Fla. 4th DCA 2008).
- Juror stated that he had been unjustly accused by the police in an encounter. *Riggins v. State*, 31 Fla. L. Weekly D2861a (Fla. 3d DCA 2006).
- Jurors stated that they could not convict solely based on testimonial evidence without physical evidence. *Moore v. State*, 939 So. 2d 1116 (Fla. 3d DCA 2006).

b. Cases holding NO grounds for cause challenges:

- Juror was ambivalent whether he could set aside his experience with domestic violence. The judge then asked if he could be fair and impartial, to which he responded yes. Defense counsel did not question the juror. There were no grounds for challenge for cause. *Brown v. State*, 818 So. 2d 652 (Fla. 3d DCA 2002).
- The mere fact that a person is a corrections officer is not per se grounds for a cause challenge. *See Busby v. State*, 894 So 2d 88 (Fla. 2004)
- Juror who answered that he would like to hear more when the State questioned him as to whether the juror could return a verdict if the State only produced one witness, but proved its case beyond a reasonable doubt with that one witness. Trial court later questioned entire panel as to whether it could follow the law as spelled out by the Judge, including instruction that the State COULD prove its case by use of only one witness. All jurors assented that they could follow the law. *Miller v. State*, 31 Fla. L. Weekly D1930b (Fla. 3d DCA 2006).
- Juror stated that he would not be able to be fair if defendant was charged with same or similar crime to the one that his cousin was a victim. When it was revealed that the defendant was not charged with the same or similar crime, denial of a cause challenge was proper. *Joseph v. State*, 33 Fla. L. Weekly D1610a (Fla. 4th DCA 2008).

D. PEREMPTORY CHALLENGES

The court will usually go through each juror and ask each party whether they accept or deny that juror. Usually, the court alternates between the State and the Defense on who first gets to voice whether they accept or deny each juror.

In misdemeanor cases, each side is given three (3) peremptory challenges. F.S. 913.08, F. R. Crim. P. 3.350(a)(3). Each side is entitled to one (1) peremptory challenge for each alternate juror to be picked. Fla. R. Crim. P. 3.350(d). A judge may exercise discretion to allow additional peremptory challenges when appropriate. Fla. R. Crim. P. 3.350(e).

If the State asserts a peremptory challenge and the defense makes the proper objection, the prosecutor needs to be prepared to support its challenge with a valid race or gender-neutral reason for the challenge. The State may also object to the defense using a peremptory strike in a discriminating fashion.

Objecting to a Peremptory Strike: *Neil/Johans/Slappy/Purkett* Test

STEP ONE: A party objecting to the other side's use of a peremptory challenge on racial grounds must:

- Make a timely objection on that basis ("*Your Honor, I object*");
- Show the venire-person is a member of a distinct racial group, *Neil*; ("*This juror is a [racially, ethnically, or gender distinct group] and the peremptory that is being exercised is [racially, ethnically, or gender] motivated.*") **and**
- Request that the court ask the striking party its reason for the strike. "*The state respectfully requests the Court to ask the Defense the reason for the strike.*"

If this initial requirement is met, the court must ask the proponent of the strike to explain the reason for the strike.

STEP TWO: At this point, the burden shifts to the proponent of the strike to come forward with a racially neutral explanation. *Purkett v. Elem.*, 514 U.S. 765 (1995). There is a presumption of race neutrality and explanation will be deemed race neutral as long as no predominant discriminatory intent is apparent on its face. According to *Slappy*, the striking party must demonstrate a "clear and reasonably specific racially neutral explanation of legitimate reasons for the strike."

STEP THREE: If the explanation is facially neutral and the court believes that, given all the circumstance surrounding the strike the explanation is not a pretext, the strike will be sustained. Relevant circumstances include the racial makeup of the venire; prior strikes exercised against the same racial group; strike based on a reason equally applicable to an unchallenged juror. *Melbourne*

v. State, 679 So.2d 759 (Fla. 1996). Here the court’s focus is not on the reasonableness of the explanation, but rather its genuineness.

NOTE: It is very important that the Judge get all the way through step 3. Stopping at step 2 can be grounds for a reversal of the conviction on appeal.

The court’s focus is not on the reasonableness of the explanation, but rather its *genuineness*. The burden remains on the opponent of the strike to prove purposeful racial discrimination. The explanation need not be non-racial and reasonable - only truly nonracial. *Purkett*.

Melbourne v. State, 679 So. 2d 759, 765 (Fla. 1996): The court stated, “to the extent that *Slappy* and its progeny require a “reasonable” rather than “genuine” nonracial basis for a peremptory challenge, we recede from those cases.” The burden of showing that a peremptory was not used based on race means just that. The party seeking to exercise the challenge need only show that the questioned peremptory challenges were not exercised solely on the basis of race. The proffered reasons need not rise to the level sufficient to justify a cause challenge.

The following are only some examples of “cognizable” groups:

- African Americans (*Neil*, 457 So.2d 481, *Slappy*, 522 So.2d 18)
- Hispanics (*Alen*, 616 So.2d 452)
- American Indians (*Tennie*, 593 So.2d 1199)
- Jews (*Joseph*, 636 So.2d 777)
- White Jurors (*Melendez*, 787 So.2d 918)
- Gender (*Abshire*, 642 So.2d 542)

NOTE: When providing a race-neutral reason to exclude a juror that is a member of a cognizable group, you should not have a similar juror remain on the jury who is not a member of a cognizable group. This issue was addressed in *Miller-El v. Dretke*, 545 U.S. 231 (2005). In *Miller-El*, the court found this to be evidence of discrimination.

Valid Race Neutral Grounds For Exclusion of a Juror

1. Juror has a criminal record. *Roundtree v. State*, 546 So. 2d 1042 (Fla. 1989); *Files v. State*, 613 So. 2d 1301 (Fla. 1st DCA 1991); *Knight v. State*, 559 So. 2d 327 (Fla. 1st DCA 1990); *Miller v. State*, 605 So. 2d 492 (Fla. 3d DCA 1992)
2. Juror’s relative had been subject to criminal prosecution. *Cunningham v. State*, 838 So. 2d 627 (Fla. 5th DCA 2003)
3. Juror has a difficult time reading the questionnaire and therefore may have difficulty with the jury instructions. *Stephens v. State*, 559 So. 2d 687 (Fla. 1st DCA 1990).
4. Juror has a hearing problem. *Knight v. State*, 559 So. 2d 327 (Fla. 1st DCA 1990).

5. Age of juror. *Daniels v. State*, 837 So. 2d 1008 (Fla. 3d DCA 2002)
6. Juror is on medication. *Knight v. State*, 559 So. 2d 327 (Fla. 1st DCA 1990).
7. Juror was recently prosecuted. *Knight v. State*, 559 So. 2d 327 (Fla. 1st DCA 1990); *Miller v. State*, 605 So. 2d 492 (Fla. 3d DCA 1992).
8. Juror was evasive or has memory problems. *Knight v. State*, 559 So. 2d 327 (Fla. 1st DCA 1990).
9. Juror is related to the defendant and/or defendant's family. *Lennon v. State*, 560 So. 2d 309 (Fla. 1st DCA 1990).
10. Juror knew a defense witness to be used during penalty phase. *Green v. State*, 583 So. 2d 647 (Fla. 1991).
11. Juror was reticent. *Lennon v. State*, 560 So. 2d 309 (Fla. 1st DCA 1990).
12. Juror was a Catholic psychology teacher at a community college and was more liberal than people in other professions. She would be more inclined not to believe in the death penalty. *Happ v. State*, 596 So. 2d 991 (Fla. 1992). (Still sound on this point of law 7/31/11).
13. Juror has a relative who is charged with a crime. *Browden v. State*, 16 FLW 5614 (Fla. 1991); *Gonzalez v. State*, 569 So. 2d 782 (Fla. 4th DCA 1990); *Fotopoulos v. State*, 608 So. 2d 784 (Fla. 1992); *Arkens v. State*, 609 So. 2d 765 (Fla. 3d DCA 1992); *Allen v. State*, 643 So. 2d 87 (Fla. 3d DCA 1994).
14. Juror could not follow the law unless compelled to do so. *Foster v. State*, 557 So. 2d 634 (Fla. 3d DCA 1990).
15. Juror could not sit in judgment of another. *Foster v. State*, 557 So. 2d 634 (Fla. 3d DCA 1990); *Aguilera v. State*, 606 So. 2d 1194 (Fla. 1st DCA 1992).
16. Juror's sister worked in the State Attorney's Office. *McNair v. State*, 579 So. 2d 264 (Fla. 2d DCA 1991).
17. Juror is unable to understand the presumption of innocence. *McNair v. State*, 579 So. 2d 264 (Fla. 2d DCA 1991).
18. Juror commented that the death penalty did not deter people from committing terrible crimes. *Green v. State*, 583 So. 2d 647 (Fla. 1991).
19. Juror ambivalence towards recommending the death penalty and opposition to the death penalty. *Kramer v. State*, 619 So. 2d 274 (Fla. 1993); *Holton v. State*, 573 So. 2d 284 (Fla. 1990).

20. Juror's occupation. *Mayes v. State*, 550 So.2d 496 (Fla. 4th DCA 1989) (Occupation must have some relevance to present case.) See also, *Crews v. State*, 921 So.2d 864, (Fla. 4th DCA 2006).
21. Juror who had been victim of armed robbery but did not call police even though he could have ID'd assailant. *Williams v. State*, 619 So. 2d 487 (Fla. 1st DCA 1993).
22. Juror was sole caretaker for 84-year-old father. *Aguilera v. State*, 606 So. 2d 1194 (Fla. 1st DCA 1992).
23. Juror excused on grounds of speech impediment. *Clayton v. State*, 615 So. 2d 826 (Fla. 4th DCA 1993).
24. Juror had no visible means of support, was divorced and had five children. *Files v. State*, 613 So. 2d 1301 (Fla. 1992).
25. Jurors excused because they worked with young children. (Defendant charged with raping young child.) *Marshall v. State*, 593 So. 2d 1161 (Fla. 2d DCA 1992).
26. Juror was victim of robbery or mugging in trial of robbery. *Williams v. State*, 619 So. 2d 487 (Fla. 1st DCA 1993).
27. Juror was victim of crime and/or family members were victims of crime. *Barrens v. State*, 620 So. 2d 243 (Fla. 3d DCA 1993).
28. Juror did not belong to any particular religious or civic organization and had not expressed any interest in any activity except reading. *Mitchell v. State*, 622 So.2d 1156 (Fla. 5th DCA 1993).
29. Juror had been shot at by a person that juror could not identify. The prosecutor did not "want anybody on this jury that feels that there is a problem or a possibility that the victim of a crime who was shot at could identify the shooter." *King v. State*, 623 So. 2d 486 (Fla. 1993).
30. Juror equivocation. *Kramer v. State*, 619 So. 2d 274 (Fla. 1993); *Williams v. State*, 619 So. 2d 487 (Fla. 1993).
31. Juror inability to follow a specific jury instruction. *Alexander v. State*, 643 So. 2d 1151 (Fla. 3d DCA 1992); *Alen v. State*, 596 So. 2d 1083 (Fla. 3d DCA 1992).
32. Juror has family members who are police officers. *Alexander v. State*, 643 So. 2d 1151 (Fla. 3d DCA 1994); *Russell v. State*, 879 So.2d 1261 (Fla. 3rd DCA 2004)
33. Juror's misrepresentation of prior employment. *Willacy v. State*, 640 So. 2d 1079 (Fla. 1994).

34. Juror's testimony on behalf of defendant in drug trial. *Willacy v. State*, 640 So. 2d 1079 (Fla. 1994).
35. Juror said, "policemen are my friends, I could not live without policemen." *Hamilton v. State*, 642 So. 2d 817 (Fla. 3d DCA 1994).
36. Juror's expression of discomfort with death penalty. *Walls v. State*, 641 So. 2d 381 (Fla. 1994); *Atwater v. State*, 626 So. 2d 1325 (Fla. 1993).
37. Juror said the defendant's face looked familiar, "I don't know if he recognizes me or not, but I think I recognize him." *Adams v. State*, 646 So. 2d 273 (Fla. 5th DCA 1994).
38. Absent a showing of pretext, peremptory challenge of all persons with military experience permissible; despite disproportionate effect on male prospective jurors. *J.E.B. v. Alabama*, 114 S. CT. 1419 (1994).
39. Juror's problem with definition of murder, discussions with co-worker about the case, and status as a crime victim. *Turner v. State*, 645 So. 2d 444 (Fla. 1994).
40. Fact that potential juror had previously served as foreperson of a jury. *Betancourt v. State*, 650 So. 2d 1021 (Fla. 3d DCA 1995)
41. Prohibition against sex discrimination in exercise of peremptory challenges applies to male jurors as well as female jurors. *Thompson v. State*, 667 So. 2d 470 (Fla. 3d DCA 1995).
42. Pretrial publicity. *Abu Hamdeh v. State*, 762 So.2d 1030 (Fla. 3d DCA 2000).
43. The State wanted to strike an African-American juror on the basis of its belief that she appeared disinterested throughout jury selection. It was not error to allow this strike. The trial judge is given broad latitude to evaluate the good-faith basis of the prosecutor's motivation in striking a particular juror. *Dorsey v. State*, 806 So. 2d 559 (Fla. 3d DCA 2002).
 - NOTE: In *Dorsey v. State*, 868 So.2d 1192 (Fla. 2003), the court rejected the prosecutor's uncorroborated reason for the peremptory challenge of a juror's disinterest because it was: unobserved by the trial court, unsupported by the record, and directly contradicted by defense counsel's identification of facial expressions and recorded responses given by the potential juror indicating an interest in serving. In other words, make sure that your record is clear about the potential juror's disinterest when making this strike.

44. A policy of striking people in religious profession because of assumption that they are generally overly sympathetic upheld. *McKinnon v. State*, 547 So.2d 1254 (Fla. 4th DCA 1989).
45. Juror stated that he did not believe that convicted felons were reliable witnesses. State presented convicted felon as a flip witness during their case in chief. *Carillo v. State*, 32 Fla. L. Weekly D1872a (Fla. 3d DCA 2007).
46. Juror stated that police officers are “trained to lie” and stated that police had repeatedly harassed him and treated him differently than they treated others. *Glinton v. State*, 32 Fla. L. Weekly D1021a (Fla. 4th DCA 2007).

Invalid Race Neutral Grounds For Exclusion of a Juror

1. A feeling about the juror. *Reed v. State*, 560 So. 2d 203 (Fla. 1989); *Givens v. State*, 619 So. 2d 500 (Fla. 1st DCA 1993); *State v. Holiday*, 682 So.2d 1092, 1094 & n. 1 (Fla.1996) (affirming the trial court's refusal to allow a peremptory strike based on the defense counsel's "gut feeling" that the potential juror would favor the State).
2. Juror excused from "bad vibes" or "bad feeling." *Clark v. State*, 601 So. 2d 284 (3d DCA 1992); *Suggs v. State*, 624 So. 2d 833 (Fla. 5th DCA 1993).
3. The juror would be able to identify himself with the Defendant (both were black males of essentially the same age).
4. Personal rating scale of prosecutor. *Kramer v. State*, 619 So. 2d 274 (Fla. 1993).
5. The juror and prosecutor did not make eye contact and the prosecutors "felt uncomfortable about that." If the court observed this, it may be a race-neutral reason. This type of reason must be carefully scrutinized for genuineness.
6. Bare looks and gestures are not acceptable reasons, unless observed by the trial judge and confirmed by the judge on the record. *Warren v. State*, 632 So. 2d 204 (Fla. 1st DCA 1994); *Wright v. State*, 586 So. 2d 1024 (Fla. 1991).
7. Juror did not have adequate education. (However, no questions about education asked). *St. Louis v. State*, 584 So. 2d 181 (Fla. 4th DCA 1991).
 - Education as reason for striking juror in case involving complex evidence was not racial pretext. *Payne v. State*, 851 So.2d 227
8. To reach another juror on the venire. *Smellie v. Torres*, 570 So. 2d 314 (Fla. 1989); *Kibler v. State*, 546 So. 2d 710 (Fla. 1989); *Joiner v. State*, 618 So. 2d 174 (Fla. 1993); *Brown v. State*, 624 So. 2d 299 (Fla. 1st DCA 1993).
9. Juror was a teacher. *Gadson v. State*, 561 So. 2d 1316 (Fla. 4th DCA 1990); *Hicks v. State*, 591 So. 2d 662 (Fla. 4th DCA 1991).

10. Juror was looking down. *Shelton v. State*, 563 So. 2d 820 (Fla. 4th DCA 1990).
11. Counsel stated, "I don't like the way he responded, to be interested in this case or sitting on this jury." *American Security Insurance Co. v. Hettel*, 572 So. 2d 1020 (Fla. 2d DCA 1991).
12. A juror's nonverbal behavior, the existence of which is disputed by the opposing counsel and neither observed by the court nor otherwise supported by the record, is not a proper race neutral reason for a peremptory challenge, *Dorsey v. State*, 868 So2d 1192 (Fla. 2003)

NOTE: In the following cases, the Court found that the reasons given by counsel for striking potential jurors were not genuine, and therefore pre-textual. However, in each case, the Court points out that if the attorney had asked the penultimate question of how the preconceived notion actually affected the venire-person, it could in fact be a genuine reason. The Court is clear that these categories of individuals could sustain a genuineness finding, but the attorney stopped short of ensuring that the record was clear. In other words, if you would like to excuse a juror based on any of the following reasons, you must ask the questions to find out whether the juror actually does hold these beliefs. *See Melbourne v. State*, 679 So.2d 759 (Fla.,1996).

13. Juror excused, presumably, because he was a black fruit picker. Victims were Haitian fruit pickers. Dismissed because of alleged hostility between these groups. *Gibson v. State*, 603 So. 2d 711 (Fla. 4th DCA 1992). However, if the subject of the alleged hostility is broached, and it appears that the hostility actually exists, a sound argument could be made that the hostility is a valid race-neutral reason.
14. Juror removed by Judge because of IQ. *Spencer v. State*, 615 So. 2d 688 (Fla. 1993). However, a juror's lack of intelligence is race-neutral because it is a characteristic that can exist in people of any race, although it is virtually impossible to come to this conclusion without some kind of testing. Again, the issue of genuineness when this type of reason is given would be critical.
 - However, Prospective juror's alleged confusion justified use of peremptory challenge. *Burris v. State*, 740 so.2d 332
15. Strike because juror was a "renter." *Givens v. State*, 619 So. 2d 500 (Fla. 1st DCA 1993). This may be a valid race-neutral reason, but would have to be scrutinized for genuineness.

16. Juror worked for HRS. *Reeves v. State*, 632 So. 2d 702 (Fla. 1st DCA 1994). This may be a valid race-neutral reason, but would have to be scrutinized for genuineness.
17. Juror was a mental health professional and thus "more into helping than finding people guilty." *Stroder v. State*, 622 So. 2d 585 (Fla. 1st DCA 1993). This may be a valid race-neutral reason, but would have to be scrutinized for genuineness.
18. Juror excused due to marital status where marital status was determined not to be an issue in the case. *Givens v. State*, 619 So. 2d 500 (Fla. 1st DCA 1993). This may be a valid race-neutral reason, but would have to be scrutinized for genuineness.

Avoiding Reversal Due to Error in Jury Selection

If the defense cause challenge is legitimate, stipulate to striking the juror for cause. Do not allow the judge to "force seat" the juror so that the defense has to waste a peremptory strike. Also, if you do not stipulate at this juncture you may avoid a possible reversal by stipulating to an additional peremptory strike when the defense asks for one.

See, Pentecost v. State, 545 So. 2d 861 (Fla. 1989); *Trotter v. State*, 576 So. 2d 691 (Fla. 1990); *Rollins v. State*, 148 So. 2d 274 (Fla. 1963); *Brown v. State*, 728 So. 2d 758 (Fla. 3d DCA 1999); *Garcia v. State*, 570 So. 2d 1082 (Fla. 3d DCA 1990); *Gibson v. State*, 534 So. 2d 1231 (Fla. 3d DCA 1988); *Leon v. State*, 396 So. 2d 203 (Fla. 3d DCA 1981)

E. BACKSTRIKING

When there are seven people that have not been stricken for cause or preempted, the judge will name each juror by name and ask the State if they accept the panel. Now is the State's opportunity to use any other peremptory challenges that it hasn't used. The State has one to use on the alternate and three others. The defense will also be able to do this.

"A trial judge has no authority to infringe upon a part's right to challenge any juror, either peremptorily or for cause, prior to the time the jury is sworn." *Gilliam v. State*, 514 So.2d 1098, 1099 (Fla. 1987).

NOTE: It is reversible error to prohibit defense counsel from backstriking jurors for cause where the jury had not yet been sworn. *Montgomery v. State*, 622 So.2d 1116 (Fla. 3d DCA 1993).

There is language in *Foster v. State*, 767 So. 2d 525 (Fla. 4th DCA 2000), that may allow for objections even after a juror is accepted when a court permits back strikes. It states, "we reject appellant's argument that the objection came too late because it was not made at the moment of the actual strike. The objection was made before jury selection closed, before either party had finally accepted the jury as constituted, and thus also before it was sworn. As long as back strikes are allowed, the time of the objection here is enough."

F. SWEARING THE JURY

Jurors are sworn twice. Initially, they are sworn to truthfully answer the questions put to them during voir dire. Fla. R. Crim. P. 3.300(a). For the purposes of speedy trial, once the large venire is sworn for voir dire examination trial commences and the defendant's right to a speedy trial has been met. Crim.R.P. 3.191(c); *See also, Roberts v. State*, 842 So.2d 298 (Fla. 3d DCA 2003). After the jurors have been examined and selected, the panel of six jurors is sworn "to well and truly try the case between the State of Florida and (the accused) and a true verdict render, according to the law and the evidence." It is at that point that jeopardy attaches for purposes of double jeopardy.

G. JUROR DISCUSSION PRIOR TO DELIBERATION

1. Improper Communication

Although jurors are instructed not to speak amongst themselves or to others about the case throughout the trial, at times improper communications take place. The inquiry is whether the communications prejudiced the defendant. *Johnson v. State*, 696 So. 2d 317 (Fla. 1997). In *Johnson*, there were four different improper communications and the court found that none of them alone or as a whole prejudiced the defendant. The communications were as follows:

- a. One juror spoke to attorneys in the cafeteria about possible penalties in a murder case without disclosing that he was a juror on a murder case;
- b. Two jurors communicated in an attempt to clarify the names and nicknames of the defendant;
- c. Two jurors communicated about the doctor's testimony as to the wounds suffered by the victim; and
- d. Jurors spoke about the white paper (confession), but agreed to keep an open mind and resolve their confusion in favor of the defendant.

Based on *Johnson*, county court judges should not be granting mistrials for improper communications unless the proper standard is applied and there is prejudice to the defendant.

2. Burden of Proof

The defendant has the initial burden to establish a prima facie case of potential prejudice. If met, the State has the burden to rebut the presumption of prejudice.

H. SAMPLE QUESTIONS FOR JURY SELECTION IN CRIMES CASES

General Question

1. Common Sense:

- All of you came here with two things, your common sense developed through your life experiences and sympathy.
- The judge will instruct you that one of those things you will have to leave in the courtroom when you go into the jury room to deliberate. Can anyone guess which one you leave behind? (sympathy)
- The judge will instruct you that sympathy can play no part in your verdict can you all agree to follow the law in that regard?

2. Specific Answer - Yes or No:

- How many of you have been on an airplane?
- Mr./Ms. _____ imagine you are coming back from a great vacation and the pilot gets on the speaker and says, " good afternoon ladies and gentleman, I hope you had a nice flight. I am now going to *try* to land this plane?
- Mr./Ms. _____ how would you feel? (insecure)
- We don't mean to pick on anyone but we need a definite answer? Can you be a fair and impartial juror?

3. Sitting in Judgment:

- Is there anyone here that feels uncomfortable sitting in judgment of another person?
- Does anyone have any moral or religious convictions that will prevent them from sitting in judgment of another?

4. Witness to a Crime: (use when you have civilian witnesses)

- Anyone ever witness a crime?
- Anyone report a crime?
- Anyone not want to get involved?
- How do you feel about individuals getting involved and reporting crimes?

5. Miscellaneous

- Always know how long your jurors have been in Miami-Dade County
- Know what area of town they are from
- Know their occupation and their children's occupation
- Know whether or not they have children
- Know their feeling about your specific crime and about crime in Miami-Dade county in general
- Know their feeling about law enforcement and/or the State Attorney's Office

6. The Role of the Juror

A. Follow law:

- Mr./Ms. _____ why did you come to the courthouse today?
Summons
- Why didn't you disregard the summons? Duty as citizens

B. Jurors job:

- Does anyone know what the role of a juror is? Fact finder
- Whose job is it to change laws? Legislature in Tallahassee
- Does everyone agree a courtroom is not the place to change the laws of the state of Florida? Voting is way to change law

7. Police Officers as Witnesses

- Has anyone had a good or bad experience with a police officer?
- Would that experience prevent you from being fair to both D and K?
- Could you set aside the feelings you have from that experience and view the testimony of a police officer as any other witness?
- Does everyone agree that police officers are human and can and do make mistakes?
- Assume an officer makes hundreds of arrests a year. Would you agree that they cannot be expected to remember every detail perfectly?
- Do you think that if a witness makes mistakes it means the witness is lying?
- Is there anyone who feels that the police have too much power?
- Does anyone feel the police should have more power?
- Does anyone feel a police officer should have to take a little pushing, shoving, or verbal abuse because it's part of the job?
- Is there anyone who believes a police officer can't be afraid?
- Do you think a police officer could be a victim at times?
- Does anyone believe that people should be allowed to take their anger out on a police officer because he wears a uniform and is present during tense situations?

- Is it ever okay for a police officer to use violence in making an arrest?
- Do you agree that individuals who drink or use drugs may become violent and powerful against an officer?
- Does anyone have problems if only police officers are called to testify here today?
- Do any of you have friends/family members who are police officers? Do you speak to them about work? Would you favor the testimony of a police officer based solely on the fact that they are a police officer?
- If the judge instructs you that all witnesses are treated equally, would you be able to weigh the testimony of a police officer equal to any witness who may also testify?

8. Types of Evidence

Physical v. Testimonial:

- Does anyone know difference?
 - Physical: things seen: guns, knives, fingerprints, videotape, etc.
 - Testimonial: things you hear from witness stand
- Does anyone think one is better or more valuable than the other?
- If the judge instructs you the state can use either type of evidence, will anyone require both? Would anyone require a particular type?
- If judge instructs you law doesn't favor one over the other, can you follow the law?
- Who here feels that it is possible for the state to prove a case with only testimonial evidence? (caution: never ask jurors to commit to verdict)
- *Example:* Lets say a victim was stabbed by Δ with a knife and the K, for whatever reason, does not have the knife at trial. If the K only presents testimony and you found the witness credible could you reach a verdict based solely on testimonial evidence?
- Would anyone require physical evidence (knife)?

Direct v. Circumstantial

- Anyone know difference?
 - Direct: evidence proves fact at issue without inference (i.e. Eye witness testimony / video tape)
 - Circumstantial: circumstances that form such a well connected chain that leads you to the conclusion that a crime was committed
- The judge will instruct you that circumstantial evidence is sufficient, will anyone be unable to reach a verdict if K brings forward such evidence?
- Can all of you agree there may not always be an eyewitness to the crime?
- Can you agree that the surrounding circumstances should be considered as evidence?

9. Description v. Id

- Can anyone tell the difference?

- Description = white, male, 6 feet tall, brown hair, thin frame
- Id = being able to point and say that individual committed crime
- Who can describe President Clinton? Get multiple descriptions and comment on how they are different.
- Now can we all agree that if President Clinton walked into courtroom today, even though some of us have described him differently, we would point and immediately recognize him as the president?
- Sometimes witnesses are asked to describe someone and the description is a little different, just like we saw when three of you described the President. Does that mean the witness can't recognize the person?
- Can we all agree that being able to describe someone is different than being able to identify the person?
- Can we all agree that just because a witness may not accurately describe a person, it still does not mean the witness is unable to identify the person in court?

10. Credibility of Witnesses

- The judge will instruct you that it is your job to determine the credibility of a witness and you can choose whether to believe or disbelieve a witness? Does everyone understand that job?
- Can anyone think of anything that would make a witness lack credibility? (Discuss examples of judging credibility in jury instructions)
- What about if all that is presented here today is the testimony of one witness. Could you judge the credibility of the witness and deliberate?
- Is there anyone here who will require more than one witness?
- Law does not require multiple witnesses. In fact, all you will hear from the judge is that the law requires you to find the witness credible. If you find the one witness credible will you require multiple witness to reach a verdict?
- Does anyone here have difficulty deciding the guilt of another based on one witness testimony?
- Can you all promise to listen to the evidence, judge the credibility of the witness or witnesses and reach a verdict under the law that will be read to you?

11. Problem Witnesses

- Would any of you expect the state to ignore evidence?
- For example: a child: should the state ignore the witness because he/she is young? For example: a prostitute: what if the witness is a prostitute? Should she be ignored because of her occupation?
- What if the witness is a convicted felon?
- Do you agree that once a person is a convicted felon, their word has no value?
- Do you feel that you could not follow a rule that the judge will read, that requires you to weigh the credibility of all witnesses using the same rules?

- Would it be difficult for you to follow this rule knowing that the witness is a child, a prostitute, or a convicted felon?
- Can you promise me that you will look at the content of the message and look beyond the messenger and then determine if the witness is telling the truth?

12. Traumatic events

- Has anyone ever had a traumatic event happen in his or her lives?
- Think back to the first time that you told someone about the event.
- Was it difficult?
- Did it become easier over time the more you repeated the story?
- Have you told the story and minimized the details?
- Do we all agree that everyone reacts differently to trauma?
- Can you understand how over time a person may show less emotional when telling of an incident?
- Or how details may be obscured?

13. Conflicts in Testimony

- Example: 2 men run in here and have a fight. They run out. The police show up and take statements.
- Would everyone's statement be the same? Why? Why not?
- What if they took the statement 6 months later?
- What if the person who gave the story, had to testify 6 months after the incident?
- Would you all agree that over time we forget and we also remember things?

I. SPECIFIC CRIMES (GENERAL QUESTIONS)

1. Battery

- General areas
 - Focus on prior victims of crime
- Address follow the law
 - "Unlawful touching or striking "
 - Push?
 - Shove?
 - Pinch
 - Doesn't require showing that there was injury to the victim. Can everyone follow that law or do you think that unless there is injury, a battery could not have taken place?
- Address traumatic events.
- Address credibility of witnesses.
- Police officers as witnesses (if victim is a police officer).
- Self defense
 - Anyone here thinks that there is no right to ever use force against another?
 - Anyone think that force is the answer to every situation?
 - Isn't it true that the answer lies in the middle of those extremes?
- Words
 - Can words rise to the level of physical confrontation?
 - At that point, can a person take the situation into his or her own hands?

2. Contracting without a license:

- Does anyone have a job that requires a license? (teacher, doctor, attorney, etc.)
- What were the requirements you went through to get the license?
- Do you think the government should govern different professions/occupations? Why? (Consumer awareness)
- How would you feel if someone was doing work without struggling like you did to get a license?
- Knowing what you went through to get a license would you risk losing your right to work by letting someone else use your license?
- Who here has a driver's license?
 - Do you remember taking the test? (Recall feelings)
 - If you lent your DL to Mr. (other juror), do you think he could drive with it?
- Has anyone ever been to Home Depot?
 - Have you ever asked for help?
 - How did you know who to ask for help? (Person in orange)

- Have you ever ask for help and were told to wait and they will get person from the } specific section (i.e. Paint dept.)? Why do you think the divide people by specialties? (Better help)
- Would anyone want the 'paint person' to help them in the lumber department?
- Do you feel the state should be involved in regulating the construction industry? Why?
- Does anyone feel there is too much or too little regulation? (Discuss)
- Address types of evidence (remember you will have paper evidence)
- Address traumatic events (victim may not remember everything)
- Address id v. Identification (if applicable)

3. Stalking:

- Anyone know of someone who has been the v or d in stalking case?
- What do you think of the crime of stalking? (Strict or lenient)
- Will anyone here require injury on a misdemeanor stalking case even if the law does not?
- Address the different types of evidence in your case -(direct, circumstantial, physical or testimonial)
- Address witness issues - (credibility issues, one witness issues, & bad witness)
- Address conflicts in testimony / traumatic events
- Address what attorneys say is not evidence

4. Cases involving guns:

- What do you think about guns?
- Does anyone have any opinion on gun control laws? (Strict or lenient)
- Does anyone own a gun? What type?
- Does anyone subscribe to gun magazines?
- Is anyone a member of the N.R.A.?
- Does anyone have military training?
- What reasons would someone have to own a gun in Miami-Dade County?
- Would all of you agree that people should be licensed to carry guns?
- Does anyone have a problem with the prosecution of cow cases?

5. Worthless check

- Economic v. Street crime
- More tedious
- Criminal v. Civil
- Focus on intent
- Burden
- Address direct v. Circumstantial evidence

- Who has a checking account?
- Who balances the account?
- Who manages their own finances?
- Who has written a bad check?
- Circumstances?
- Should this be criminal?
- Address traumatic events.
- Address reasons for someone writing a bad check. Is it an excuse to break the law that you don't have the money for something?

J. QUESTIONS FOR JURY SELECTION IN DUIs

- Ladies and Gentlemen, my name is ----- and I am an Assistant State Attorney.
- I'd like to thank you for your service today and I hope you will find this experiencing rewarding.
- It is my job to ask you some questions as a way to get to know you and a little bit about your background as a way of determining if you will be selected for this jury panel.
- Please understand I am NOT trying to pry into your lives, I just need to see how you will relate to this case.
- If by chance I ask you a question that you do NOT want to answer then please let me know and we can arrange you to speak to the judge without the rest of the jurors present.
- Some of my questions will be specific addressed to a person --- while other questions may call for a general response from everybody.
- If by chance I ask a specific question to someone other than yourself and you would like to answer the question – please raise your hand and let me know.
- Please don't be shy, this is a great opportunity to learn.

Language Barrier

- Is there anyone that is having trouble understanding the language that I am speaking or what the judge has been saying?

Religious Barrier

- Is there anyone that has a religious belief that may hurt their ability to sit on a jury?
- Perhaps you have a belief that you shouldn't sit in judgment of another person or feel responsible for finding a person guilty of a crime?
- If YES
 - Name of Juror – please understand and the judge will instruct you as well that as a juror you will be sitting as a judge of the facts of the case.
 - So you will actually be judging the facts.
 - Will that help you in being a fair juror and objective of the facts of the case?

Any Friends in the Room

- Look around the courtroom – does anyone recognize any of the lawyers?
- Does anyone know the Defendant?
- Does anyone know someone that works for the state attorneys office?
- Does anyone know someone that works for the public defenders office?
- Does anyone know the Judge?

If YES:

- Do you think that it will hurt your ability to be fair and impartial in this case?
- Does anyone recognize anyone else on the jury?

If YES:

- Would the fact that your friend/boss/relative/colleague is also on the jury influence any decision that you would reach as a member of the jury?

Any One know these Witnesses

- In this case it is possible the State will call a number of witnesses to prove its case against the D.
- Does anyone know any of these people?
- Do you think that your relationship with or knowledge of this witness will influence your ability to decide the facts in this case?

The Law

- Who can tell me where the law is made?
- Is the law made in the courtroom or in Tallahassee?
- I ask this question only to point out that today is NOT a day where we will be creating law.
- The judge will read you the law as it applies to this case and it is your job to follow the law.
- Will anyone have a problem applying the law to the case even though they don't agree with it personally?
 - For Example:
 - If there was a law that made it illegal to walk outside during a rainstorm – would you apply that law even if you don't agree with it?
 - I have your commitment that you will apply the law to the facts, even if you don't personally agree with the law?

Victim of a Crime

- Has anyone ever been the victim of a crime?
- Juror name – I see that you have been a victim of a crime, would you mind telling us about your experience?
- Was the person that committed that crime brought to justice?
- How long ago was it?
- Did that experience leave you with a feeling about the police or justice system?
- Will that experience prevent you in any way from being fair and objective in this case?
- Can you set aside your personal experience or opinions and view the testimony as an objective juror?

Evidence

- Often in cases there are 2 types of evidence that the state uses to prove the elements of the crime.
- Direct Evidence and Circumstantial Evidence
- Direct Evidence – is something like an eyewitness to a crime
- Circumstantial Evidence – is something like testimony of a chain of facts that lead to a conclusion.
- Is there anyone here that would require the state to always have direct evidence before they would be willing to find a D guilty?
- Often the state only has circumstantial evidence to prove its case – does anyone have a problem sitting on a case where the state can only provide you with circumstantial evidence?

Hypo- REASONABLE DOUBT

- My wife and I have a beautiful black lab.
- She is crazy.
- One evening I came home and found my dog sprawled on the kitchen floor with food all over her and the plate that it was on – broken on the floor.
- She was eating as much as she could and loving every minute of it.
- Somehow the food found its way off of the counter and into my dogs mouth.
- Question – Is there anyone that would have a hard time concluding that the dog was responsible for getting the food off the counter?
- Did I need to see my dog actually knock the food down before I could conclude she did it?

DUI

- Who can tell me what DUI stand for?
- This is a case where the D is charged with the crime of DUI
- Based solely on knowing that the defendant is charged with this crime, will you be able to sit and be a fair judge of the facts in this type of case?

Elements

- The Judge will instruct you on the elements the state needs to prove in order to find the D guilty.
- Judge would you read the jury the elements to the crime right now?
- Does everyone understand that being charged with DUI does NOT mean that the D was necessarily drunk?
- This means that the D does NOT have to be drunk in order to find him guilty of DUI.
- State only needs to show that the D's normal faculties were impaired.
- Does anyone think the state should be required to prove a person is drunk before convicting them of DUI?
- Is there anyone that would NOT convict a person if the state ONLY proved the person was impaired when driving?

Impairment of Normal Faculties

- When we talk about the law of impairment, we are talking about whether or not someone's NORMAL FACULTIES are impaired. What are normal faculties?
 - Walk, talk, see, hear, judge distances, act in emergencies, drive a vehicle, perform all of the daily physical and mental tasks required
- Why are normal faculties important while driving a vehicle?
- When I say the word impaired, what do I mean?
- For example, (either pick on someone who wears glasses, or use yourself as an example) Mr./Ms. _____, if you take your glasses off, are you able to see?
- But is your ability to see impaired? Would it be better if you had your glasses on?
- That is what we mean by normal faculties being impaired. The State does not have to prove that all of the normal faculties do not exist, just that one or more is impaired.
- Is anyone uncomfortable following that law?

Drinking Questions

- Anyone here drink?
- Anyone been around someone who has been drinking?
- How did that person act?
- Silly – life of the party?
- Angry
- Tired – sleepy – mushy
- Regardless of how they acted you could tell that they weren't acting like their normal selves?
- Did you have to see them put the glass to their mouth or could you just look at them and tell they had been drinking? How?

Limit

- Who has heard the phrase “I know my limit”
- How about “I just had a couple”
- What does that sort of mean?
 - A person thinks they can drink 3 or 4 drinks and still be fine.
 - Is it possible that their limit or a couple of drinks is still too much?
- A person who is impaired – what does that do to their bodies?

Driving – A right or Privilege?

- Who has their license on them right now?
- Is driving in this state a right or a privilege?
- Anyone who thinks flat out that it is a right – no matter what?
- Would you read the bottom line of the license?
- Who agrees that operation of a motor vehicle in this state constitutes consent to a sobriety test required by law?
- Anyone who thinks that a person should NOT lose their license if they refuse to take a sobriety test?

Refusal – NO Breath Card

- Is there anyone that would require the state to show you a breath card that has the D's reading on it?
- Do you realize that this is something that is NOT always possible? What are some reasons that it might not be possible?
- Would you still demand the state to show it to you?
- In other words there is NO way that you would be willing to convict the D because the state did NOT show you a breath card?

Quality v. Quantity of Evidence – Which is reasonable doubt?

- Lets say I bring in 1 full box of evidence against the D.
- But you don't like any of it.
- You didn't like any of my witnesses
- Do you convict?
- Now, what if I brought in 100 boxes of evidence against the D.
- But again you didn't like any of it
- Do you convict?
- **Why, DON'T you convict?** Because the evidence was NOT quality-right?

BUT, what if I bring you only one witness or one piece of evidence?

- And you like that evidence
- You accept it and believe it beyond a reasonable doubt
- Can you convict even though it is only one piece of evidence?
- Would you require the state to bring more than what is required by the law?
- Would you be mad at the police for only having that one piece of evidence?
- Would you hold that against the state?

Past Run-ins with the Police

- Anyone have a situation where they have a prior contact with the police?
- Possibly a speeding ticket?
- Did you feel you were wrong
- Anyone feel the officer was wrong?
- Do you think the officer handled it properly?
- Did you try to talk your way out of it?
- Did anyone fight the ticket, even though you knew you were speeding?

What the Lawyers Say is Not Evidence

- The Judge will instruct you that you are to look to the evidence and testimony presented in the course of the trial, and to it alone to decide a verdict.
- Throughout the trial, you will hear from both defense counsel and myself.
- However, the Judge will also tell you that what the attorneys say is not evidence.
- For example, if I put a witness on the stand, and I ask him, “What color was the car?” and he responds, “Blue” and on cross examination, defense counsel says, “The car was red, wasn’t it?” and the witness responds, “No.” What is the evidence?
- Is there a conflict in the evidence?
- No, only the testimony of the witness is evidence. The evidence is that the car is blue. That is what you are to consider, not the question that defense counsel asked, but the answer given by the witness.

Wrap Up

- Is there anyone that would like to address any of my questions?
- Maybe you didn’t get a chance to speak earlier
- Anyone that would like me to ask another type of question?
- Is there anything that perhaps we didn’t cover that you think would affect your ability to sit on this jury?
- Anyone remember anything during the course of this talk that you think you should have answered earlier?

OPENING STATEMENT

An opening statement represents the prosecutor's first opportunity to persuade the jury in the State's favor. An opening statement should develop the State's case, and show what the evidence will prove. An opening should be prepared so that it tells a complete and interesting story. A prosecutor should avoid a bland, boring discussion of what the evidence will show, and should instead be alive, well organized, and persuasive. The theme of the case should be clearly and concisely presented. A good theme must provide the jury with a framework for the facts and an emotional message for the case. A theme should be a short sentence that jurors could use to answer the question, "What kind of case is this?" For example, in a DUI case, the theme may be, "This defendant must accept responsibility for his choice to drive while impaired."

In organizing the opening statement, remember that jurors tend to remember best what they hear first and last. Therefore, present the strongest evidence first, and at the end of your presentation, make statements that will leave the jury with an understanding of why the defendant is guilty. The opening statement should also be used to introduce the weak portions of your case. This technique will give you credibility with the jury. The important witnesses and their testimony should be highlighted, and you should identify the important documents and demonstrate what they will prove.

An opening statement is limited to what the evidence will show, and cannot be argumentative. However, this does not mean that you are prohibited from being interesting, persuasive, and delivering the opening with enthusiasm and conviction. An opening statement should not be read to the jury. If possible, move away from the podium and try to talk to the jury as if you were speaking to a group of friends. This will allow you to speak more freely, openly and relaxed.

Opening Statement Guidelines:

Theme: The opening statement should start with a clear statement of your theme. The theme should be a one-sentence statement that contains the factual and emotional bases for the case. The theme should be reinforced by restating it near the end of the opening. Many times the use of a defendant's own post-Miranda statements are a good way to keep the jury's attention at the beginning of the opening statement.

Clear and Organized: The opening statement should be presented in a clear and organized manner. The jury should not be confused by digressions. The prosecutor must simplify complex material by informing the jury how you will cover the material and the materials significance to the case.

Language: The opening statement should use direct and powerful language.

Overstating the Case: A prosecutor should not overstate the case. The opening should be detailed, powerful, and a realistic picture of the facts. If you overstate your case, you will lose credibility with the jury. In many instances, you may strategically decide to undersell your case, saving that one telling piece of evidence for revelation during the course of your case in chief.

Strong Beginning and Ending: The concepts of primacy and recency must be utilized by starting and ending your opening in a strong manner. You should memorize a conclusory statement that is persuasive and powerful that you can use to wrap up all of your opening statements.

Anticipate Defense Arguments: Without shifting the burden of proof, anticipate defense arguments. These arguments should be address by weakening the arguments and refuting the arguments. Also, discuss damaging evidence that you expect to appear at trial and take the sting out of the problem by putting it in the most favorable light.

Discuss Elements: Advise the jury of the elements of the crime the State must prove.

Physical Demeanor: The podium must not be used as a shield to hide behind, nor should a scripted opening in writing be used to give the statement.

DIRECT EXAMINATION

A successful direct examination can only be accomplished by controlling the witness without hampering the witness' ability to testify freely and truthfully. This goal can be reached by thoroughly preparing for the questioning. In preparing for direct examination, you must review the law, determine what essential elements must be proven through each witness, and list the facts and elements that will be established through the witness. In addition, you must outline all of the key points that must come out through the testimony of each witness that you are presenting at trial.

The key to preparing a good direct examination is to be organized. Therefore, you must prepare a file for each witness that includes your outline, copies of the exhibits that will be used with the witness, the relevant deposition, and any notes that you may have that relate to the witness. Prior to trial, you must meet with the witness in order to evaluate the witness's testimony, personality, ability to speak, and manner of dress. This stage of direct examination preparation is called "pre-trying" a witness.

When pre-trying your witness, you must review the expected testimony to cover the key points, the evidentiary foundations necessary to be established at trial, and any problem areas that may be encountered during the case. If the deposition of the witness has been taken, give the witness an opportunity to read the deposition well before the witness takes the stand. When using an exhibit, chart, or other demonstrative aid with a witness, allow the witness to see the exhibit before taking the stand so the witness will be comfortable with the exhibit at trial. When the exhibit is an audio or videotape, the witness must be permitted to hear and see the entire content of the exhibit prior to trial, and the witness must initial and date the exhibit that will be introduced at trial. This is an essential step in laying the proper evidentiary foundation.

In formulating direct examination questions, anticipate defense objections and research the law so you can present a solid argument to defeat the objection. If the objection is sustained, be prepared to proffer the excluded testimony on the record outside of the presence of the jury. A common defense objection during the state's direct examination is "leading." The Florida Legislature adopted section 90.612(3), which generally prohibits the use of leading questions on direct and redirect examination. However, leading questions are permitted when for example, a child is a witness or when the witness's memory is exhausted.

Leading questions are also permitted when: (1) preliminary matters such as a person's name, address, and background; (2) undisputed facts, for example: "I would like to direct your attention to October 23, 1995, you were in Paris on that day were you not?"; (3) an adverse or hostile witness Rule 1.450 Fla.R.Civ.Pro.; (4) when a witness has difficulty in speaking; (5) when necessary to refresh a witness's recollection Fla.Stat. §90.613; and (6) when encountering an unwilling, reluctant, or recalcitrant witness. See, *D.R.P. v. Carrol*, 438 So.2d 31 (Fla. 3d DCA in 1993). Furthermore, a question is not leading simply because the question may be answered with a "yes or no" response. See *Porter v. State*, 386 So2d 1209 (3rd DCA 1980).

In trial, develop the direct examination through the use of conversational language by not reading questions to the witness. The jury's focus of the direct examination should be on the witness and

not on the prosecutor. However, do not use a monotone, instead, change the tone of your voice based upon the importance of the testimony. A prosecutor should highlight key points in the testimony with the use of voice inflection. If you are having a hard time formulating a proper question, start your question with, who, what, why, when, where or how.

A prosecutor should not continuously repeat a witness's answer unless the evidence is significant. A prosecutor should avoid the use of "habit" responses such as "uh- huh", "okay", "alright", "and" etc. A prosecutor should also avoid nervous habits such as jingling keys or pocket change, playing with a pen, curling your hair, or creating any other physical distractions that will take the jury's attention away from the witness' testimony. The prosecutor must strive to listen to the witness' answers, appear interested in the responses, and follow up when the answers are incomplete. The direct examination should open and close with the strongest testimony because jurors remember best what is heard first and last. The most troubling testimony should be presented in the middle of the questioning.

The prosecutor must always be conscious of the manner in which the jury understands the questioning. In other words, make sure that you carry on a conversation with your witness. Pay attention to the answers given. As the prosecutor, you obviously know the facts of the case better than anyone in the room. However, remember that this is the first time that the jury is hearing the evidence. Make sure that when your witness answers your questions, you clarify any "police-speak" or abbreviations that may seem obvious to those of us who work in the justice system everyday, but would be confusing to the average citizen. Also pay close attention to the answers and make sure that you do not skip any material facts in an effort to get the next question asked.

EVIDENCE TRIAL FOUNDATIONS

In order to succeed in trial, a prosecutor must present evidence at trial, and successfully move the exhibit into evidence. Therefore, a prosecutor must know how to lay the proper foundation before a document may be introduced at trial as evidence.

PRACTICE NOTE: Prior to showing evidence to a witness, the State should pre-mark the exhibit with the clerk. When the Court permits the State to introduce the item into evidence, the item should be handed to the clerk for admission.

BUSINESS RECORDS: EXCEPTION TO HEARSAY

Do you recognize State's ____ for identification? How?

Can you identify these documents?

Were these documents prepared in the ordinary scope of the business of your company?

Is it a regular part of your business to keep and maintain records of this type?

Are these documents of the type that would be kept under your custody or control?

TAPE RECORDINGS

Have you had the opportunity to hear the voice of Mr. X before?

How many times have you heard his voice?

Tell us how you are familiar with Mr. X's voice?

Have you heard the recording marked as Exhibit "B" for identification?

Do you recognize the voice?

To whom does the voice belong?

PHOTOGRAPHS

I am showing you what has been marked as State's ____ for identification. Do you recognize what is shown in this photograph?

Are you familiar with the scene portrayed in this photograph?

How are you familiar with the scene portrayed in the photograph?

Does the scene portrayed in the photograph **fairly and accurately** represent the scene as you remember it on (date in question)?

AUTHENTICATING A LETTER

Are you familiar with the signature of (person who signed letter)?

How are you familiar with the signature?

I am showing you what is marked as State's exhibit ____ for identification, do you recognize the signature at the bottom of this letter?

Whose signature is it?

DIAGRAMS

I am showing you what has been marked as State's ____ for identification. Are you familiar with the area located at 16th Street and 12th Avenue in Dade County, Florida?

How are you familiar with this area?

Based on your familiarity with the area, can you tell us whether the scene depicted in this diagram **fairly and accurately** represents the area as you recall it on the date in question?

REFRESHING RECOLLECTION

To refresh an individual's memory on a particular matter, you should first establish that the witness does not remember something. Then ask the following questions:

Did you at sometime remember this?

Did you at anytime prepare a document setting out what happened?

Would a review of this document assist you in remembering the matters that we are concerned about today?

I am handing you State's exhibit ____ for identification.

Please review it and tell me if it helps you to remember.

Does that document refresh your recollection?

Do you now have an independent recollection of the facts?

Tell us what happened.

DEMONSTRATIVE EVIDENCE

Demonstrative evidence consists of trial exhibits that are admitted in evidence or visual aids that will not be entered in evidence, but are simply used by a witness or by the lawyer to explain matters that are relevant to the trial. Demonstrative evidence includes models, medical devices, diagrams, photographs, sketches, and objects at issue, as well as a variety of other items. Before a demonstrative exhibit may be used at trial, a witness should establish that the exhibit resembles and is substantially the same as the object or area in question. A witness intending on using an exhibit as an aid should first explain that the use of the exhibit will facilitate the presentation of the testimony to the jury.

Pursuant to Florida Rule of Evidence, §90.901, "authentication or identification of evidence is required as a condition precedent to its admissibility. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Thus, demonstrative exhibits must constitute an accurate and reasonable reproduction of the objects or matters involved in the actual case. *Brown v. State*, 550 So.2d 527 (Fla. 1st DCA 1989). The determination as to whether an exhibit accurately represents the object or area in the case is a matter decided by the trial court. Whether to allow the use of a demonstrative exhibit is a matter strictly within the trial court's discretion. *Brown v. State of Florida*. 557 So.2d 527 (Fla. 1st DCA 1989)

EVIDENCE BUZZWORDS

1. Photograph: "fairly and accurately depicts"
2. Physical Object

- fungible: chain of custody necessary (unless and until awitness has made the object non-fungible) - care, custody, and control, no evidence of tampering, and same or substantially same condition
 - non-fungible: chain of custody not necessary and same or substantially the same condition
3. Business Record:
Made in the normal course of business, **kept** in the normal course of business, and **by person with knowledge, at or near the time**
 4. Miranda Waiver Form
 - admission of a party opponent
 - same or substantially same condition
 - authentication of signatures
 5. Tape Recorded/Stenographed Statement of Defendant
 - freely/voluntarily provided
 - admission of party opponent
 - self-serving statements inadmissible (unless meets other hearsay exception)
 6. Transcription of Taped Statement (English)
 - demonstrative device and cannot be introduced into evidence
 - establish predicate through officer (reviewed tape and transcript and both are consistent)
 7. Transcription of Taped Statement (Foreign Language)
 - can be introduced into evidence
 - should be completed by official interpreter
 - can call interpreter to testify or get stipulation
 8. Photographic Lineup
 - same or substantially same condition (officer)
 - identification of signature and civilian witness must testify

EVIDENTIARY OBJECTIONS

Ambiguous: Confusing question in that is capable of being understood in more than one sense. 90.612(1)

Argumentative: Counsel's question is really argument to the jury in the guise of a questions or (2) Excessive quibbling with witness 90.612(1)

Asked and Answered: Unfair to allow counsel to emphasize evidence through repetition. Greater leeway permitted on cross-examination, but be especially ready to make objection during the redirect. 90.612(1)

Assumes Facts Not in Evidence: Fact not testified to contained in that question. 90.104(2); 90.612(1)

Authentication Lacking: Proffer must be offered that the exhibit is in fact what it is claimed to be. 90.901

Best Evidence Rule: If rule applies, original document must be offered or its' absence accounted for. If contents of documents are to be proved, the rule usually applies. 90.952

Beyond the Scope: Question unrelated to preceding examination buy opposing counsel, or to credibility. 90.612(1)

Common response on cross exam:
"your Honor, it goes to credibility."

Bolstering: Improper bolster or promote the credibility of a witness before that credibility is attacked. 90.609

Compound: More than one question contained in counsel's question; answer could be misunderstood. 90.612(1)

Conclusion: Except for an expert, witness must testify to facts within personal knowledge; conclusions are for the jury---and counsel during closing argument. 90.604; 90.701

Cumulative: Repeated presentation of the same evidence by exhibits or more witnesses s unfair and wastes time. 90.612(1)

Confusing: Unfamiliar words, disjointed phrases; or confuses facts or evidence. 90.612(1)

Insufficient Foundation: Failure to lay proper predicate for testimony or exhibit 90.604/90.901

Note: this objection may be found to be too general for purposes of preserving objection for appeal, so if overruled be more specific as to what the foundation lacks.

Hearsay: (Question): The answer would elicit hearsay, and no exception has been shown 90.802

Note: Always know if you are offering the statement for it truth because if you aren't respond to the objection by telling the judge that it is not being offered for its truth.

Hearsay (answer): Question did not call for hearsay but the witness gave it anyway. Consider a motion to strike and requesting the judge to instruct he jury to disregard the response. 90.802

Improper question or Improper form: Use only when you know that the question is improper, but cannot think of the specific basis of for the objection. This is better than not making any objection at all, as the judge may know that it is improper question and sustain, but it cannot be relied upon for purposes of appeal. 90.104(2); 90.612

Improper Characterization: The question or response has characterized a person or conduct with unwarranted suggestive, argumentative or impertinent language. (Example “He looked like a crook”) 90.404-405; 90.612(1)

Improper Impeachment: Methods of impeachment are limited and specific. 90.608

Incompetent Witness: Lack of qualification such as oath or mental capacity. Also applies if Judge or juror is called as a witness. Counsel should be specific as to the competency. 90.603; 90.607

Improper Opinion Testimony: Expert witness has not been qualified as such, or the testimony of a lay witness would be an opinion that is beyond the scope permitted by the Rules. 90.604/90.701-2

Irrelevant: Would not tend to prove or disprove a material fact. 90.401

Leading/Counsel Testifying: Form of question tends to suggest an answer. 90.612(3) / 90.605. Not for cross exam.

Misquoting Witness or Misstating Evidence: Counsel’s question misstates

prior testimony of witness. Similar objection based on assuming facts not in evidence. 90.104(2)

Narrative: Question is so broad or covers such a large period of time it would allow witness to ramble and possibly present hearsay or other inadmissible evidence before a specific objection could be made. Judge has broad discretion in this matter, however. 90.1-04(2)/90.612(1)

Prejudice outweighs Probative Value: Object, ask to approach the bench, and then argue that “the probative value of the evidence is substantially outweighed by the danger of unfair prejudice” May apply to exhibits as well as testimony. (Don’t let the jury hear you object “that the evidence is prejudicial”—they may be impressed) 90.403

Privileged: Answer would violate valid privilege (lawyer-client; husband-wife, clergy) 90.502-6

Speculation: Question calls for conjecture; allows witnesses who lack personal knowledge to guess. 90.604

Unresponsive: Answer includes testimony not called for by question. Especially applicable to voluntary response by hostile witness. 90.612(1)/90.104(2)

Note: An objection based solely on this ground is generally deemed appropriate only if made by examining attorney; therefore, opposing counsel should try to find some additional basis for the objection.

DEFENSE OBJECTIONS

If a part of a predicate is missing, the defense must object with **specificity**.

Jackson v. State, 456 So.2d 916 (Fla. 1st DCA 1984)

State introduced blood test into evidence through its expert but no evidence was presented that the expert held the required permit. Defense counsel made a general objection to the admissibility of the blood test results because "the proper predicate had not been laid" by the State. The general objection was not sufficient to put the court and State on notice whether the witness held the required permit. Counsel's failure to make a specific objection amounts to a waiver of that objection for appellate review. *See Also, Bailey v. State*, 358 So.2d 1169 (Fla. 3d DCA 1978)

Filan v. State, 25 Fla. L. 768 So.2d 1100 (4th DCA Feb. 2000)

State admitted lab report into evidence. Objection by defense counsel, "lack of foundation" was insufficient to preserve the record for appeal where the defendant on appeal attempted to argue that the State had failed to satisfy the business records exception to the hearsay rule.

Jackson v. State, 738 So.2d 382 (Fla. 4th DCA 1999)

State introduced BellSouth records without establishing the proper business record evidentiary foundation. The defense objected, "lack of foundation," and was permitted to voir dire the witness. The Court stated noted that "the objection "lack of foundation," like its first cousin "improper predicate," is not a specific ground of objection."

CROSS EXAMINATION

A. IMPEACHMENT OF A WITNESS

One of the most effective ways of impeaching a witness at trial is through the use of depositions and inconsistent statements. For the rules on impeachment of a witness see Fla. Stat. 90.608(1)(a) and 90.614. When a witness makes a statement in trial that is inconsistent with his or her deposition testimony, you should first highlight the question that was answered differently at trial. Make sure that the trial testimony being impeached is a direct inconsistent statement with the deposition given before trial. You should then ask the following questions:

Do you remember having had your deposition taken on (state the date)?
Do you remember that a court reporter was present at your deposition?
Do you remember having been sworn in to tell the truth?
Did you tell the truth on that date?

After you have set the foundation for the impeachment, then you should ask the witness the following question: "Do you remember having been asked the following question and giving the following answer." At this point, you should read the question previously asked and the answer given by the witness in the deposition.

A similar method may be used to impeach a person using an inconsistent statement in a document such as an affidavit, sworn statement or letter. First, highlight the inconsistent trial testimony that will be impeached. Next, the lawyer should identify and authenticate the document that will show the inconsistent statement given by that same witness. In order to establish the foundation necessary to impeach an individual with the use of an inconsistent statement, the witness should be asked the following questions:

Do you remember having given a statement to (person) regarding how the accident occurred?
Did you give that statement freely?
Who was present when you gave your statement?
When was the statement given?
The witness should then be shown the exhibit and asked the following question: I show you what has been marked as Plaintiff's Exhibit "A" for identification. Is this a copy of your sworn statement?
Finally, read the relevant portion of the statement that directly contradicts the trial testimony of the witness.

Impeachment through the use of depositions or documented inconsistent statements should be accomplished in an organized fashion and should be performed smoothly and directly. The relevant pages and sections of the deposition should be marked and highlighted beforehand so as not to fumble through pages or lose control of the witness. Defense attorneys are also required to lay the above proper foundation when attempting to impeach state witnesses on cross. The state should object based on foundation if this is not done.

B. EXPERT WITNESS & TESTIMONY

The prosecutor about to cross-examine an expert witness needs to be very careful and very well prepared prior to cross-examining the witness. One of the difficulties in effectively cross-examining an expert is that the expert usually controls the testimony by being very knowledgeable in the area, and the prosecutor usually is not as well versed in the subject as the expert. In preparing to cross-examine an expert witness, read and summarize the deposition taken of the expert witness in the case or read and summarize prior depositions given by that same expert in other cases. Also, research whether the expert has written any articles, books or editorials that may contradict his opinion in your case. In addition, the prosecutor should be thoroughly prepared on the subject that will be the basis of the cross-examination.

The most effective way of beginning cross-examination is to challenge the expert's credibility. The expert witness may be biased because of friendship, money, or his relationship with the attorney. Next, if possible, you should attempt to attack the expert's qualifications. There are probably levels in the expert's field that the expert has not reached. For example, if the expert witness has a master's degree, you may point out that he lacks a Ph.D. in his given field. If applicable, you should point out that the expert witness has not published any articles in his learned field, or has not held any teaching positions in colleges or universities. One way of learning this background information is by obtaining the expert's curriculum vitae in advance of the trial.

Another way of effectively cross-examining an expert witness is by making the expert your witness. If you are able to have the opposing expert testify as to general principles that are consistent with your theory of the case, you will have succeeded in your cross-examination. Another way of successfully cross-examining the expert witness is by attacking the expert's facts. Point out that the expert received his facts and materials from the opposing attorney, use hypothetical questions in order to change the facts so that they are consistent with your theory of the case, and ask the expert controlled questions within the restricted scenarios that you have presented. Even if the expert refuses to provide you with a favorable response, you have told the jury your story repeatedly by using the hypothetical question.

Fla. Stat. § 90.702: **Testimony by Experts** - If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, an opinion is admissible only if it can be applied to evidence at trial.

Brown v. State, 477 So. 2d 609 (Fla. 1st DCA 1985) - Former Highway patrol trooper who was presently a store owner was properly qualified as an expert on the effects of alcohol on the body. The witness had formerly been a trooper for 27 years and currently served as breathalyzer and Intoxilyzer instructor at a junior college, and had 60 hours of breathalyzer training at state highway patrol academy, and during his training and education, he had studied effects of alcohol on the human body. Court

held a witness may qualify as an expert by reason of his study of authoritative sources without any particular experience involving subject matter.

Fla. Stat. § 90.703: **Opinion on Ultimate Issue** - Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact. The jury has the power to accept or reject the testimony of expert or lay witnesses and are not bound by their conclusions. Merely because a witness expresses an opinion to an ultimate issue does not compel the jury to find that fact to be true. *See State v. McClain*, 525 So. 2d 420 (Fla. 1988).

Fla. Stat. § 90.704: **Basis of Opinion Testimony by Experts** - An Expert can base their opinion upon facts or data actually perceived by them or facts made known to them before trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data themselves do not need to be admitted into evidence for the expert to be able to rely on them. An expert can render an opinion based on the following:

Exception to F.S. §90.616: **Rule of Witness Sequestration.** - A witness may not be excluded if the witness is. . . a person whose presence is shown by the party's attorney to be essential to the presentation of the party's cause." F.S. §90.616(2)(c). Expert witnesses frequently fall within this exception. *See* Charles W. Ehrhardt, Florida Evidence, §616.1 (1996 ed.), *citing Burns v. State*, 609 So. 2d 600, 606 (Fla. 1992).

An expert may not act as a conduit for otherwise inadmissible evidence such as articles an expert has read, *see Nixon v. State*, 694 So. 2d 157 (Fla. 4th DCA 1997); medical records of other experts, *see Erwin v. Todd*, 699 So. 2d 275 (Fla. 5th DCA 1997); discussions with other experts, *see Schwartz v. State*, 695 So. 2d 452 (Fla. 4th DCA 1997).

C. HYPOTHETICAL QUESTIONS

Hypothetical questions must be based on facts that are supported by evidence which has been introduced in the trial. Ehrhardt at 539 (1996). *See also North Broward Hosp. Dist. v. Johnson*, 538 So. 2d 871 (Fla. 4th DCA 1988), *review denied*, 551 So. 2d 462 (Fla. 1989) (Proper to strike portion of hypothetical question which was based on a fact not in the record.) A hypothetical question may be based on both direct and circumstantial evidence. The prohibition against drawing an inference upon an inference is inapplicable. *See LaBarbera v. Millan Builders, Inc.*, 191 So. 2d 619 (Fla. 1st DCA 1966).

A hypothetical question can be based upon the logical inferences that can be drawn from the evidence. *See Burnham v. State*, 497 So. 2d 904, 906 (Fla. 2nd DCA 1986), *review denied*, 504 So. 2d 766 (Fla. 1987) ("[I]t is not necessary for a hypothetical question to be limited to only the facts that are directly established by the evidence. Such a question can be based upon an assumed state of facts which the evidence in the record tends to prove, even by inference."). A hypothetical question may be based on a fact in dispute as long as there is evidence in the record to support the fact. *See Cirack v. State*, 201 So. 2d 706, 709

(Fla. 1967); *Nationwide Mutual. Ins. Co. v. Griffin*, 222 So. 2d 754, 755 (Fla. 4th DCA 1969).

Fla. Stat. § 90.705(2): **Disclosure of Facts or Data Underlying Expert Opinion** - Prior to the witness giving the opinion, a party against whom the opinion or inference is offered may conduct a voir dire examination of the witness directed to the underlying facts or data for the witness's opinion. If the party establishes prima facie evidence that the expert does not have a sufficient basis for the opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data. Ordinarily, this voir dire would be done in camera.

Snow v. Fowler, 662 So. 2d 1295 (Fla. 3d DCA 1995) - Handwritten notes of an expert are not discoverable. Such notes are not the formal reports or statements of experts encompassed by Fla.R.Crim.P. 3.220. Note: If the expert has not done a report, you can ask for the notes under Rule 3.220(f) with a showing of materiality.

Fla. Stat. § 90.706: **Authority of Literature for Use in Cross Examination** - Statements of facts or opinions on a subject of science, art, or specialized knowledge contained in a published treatise, periodical, book, dissertation, pamphlet, or other writing may be used in cross examination of an expert witness if the expert witness formally recognizes the author or the treatise, periodical, book, dissertation, pamphlet or other writing to be authoritative, or notwithstanding nonrecognition by the expert witness, if the trial court finds the author or the treatise, periodical, book, dissertation, pamphlet or other writing to be authoritative and relevant to the subject matter.

D. DEFENSE CROSS-EXAMINATION OF STATE'S WITNESSES

Marrero v. State, 478 So.2d 1155 (3rd DCA 1985). In this case, the prosecutor tried to impeach defendant's witness based on statements made to the prosecutor several days earlier. The 3rd DCA stated:

It is said of course, that the predicate questions to impeachment must be asked in good faith, that is, with the intent and ability to later prove (if it is not admitted) that the witness gave some statement inconsistent with his or her present testimony. The reason that such proof must be forthcoming is because the predicate question – e.g., “Didn’t you tell me . . . ?” or “Didn’t you say to so-and-so” – is itself testimonial, that is, the question suggests that there is a witness who can testify that such statement was made. When this suggested witness is not actually called to give the impeaching testimony under oath, all that remains before the jury is the suggestion – from the question – that the statement was made. When that occurs, the conclusion that must be drawn is that the question was not asked in good faith, and that the attorney’s purpose was to bring before the jury inadmissible and unsworn evidence in the form of his questions to a witness.

In *State v. J.S.* --- So.3d --- (3rd DCA 2009) 2009 WL 1940510, the 3rd DCA found it was reversible error for a judge to restrict cross examination based upon prior inconsistent statements in a hallway interview. At trial, witness B.B. testified that J.S. initiated a fight with the victim, R.O. However, in a hallway interview with J.S.'s counsel immediately prior to trial, B.B. stated that the victim, not J.S. initiated the fight. The trial court precluded J.S. from cross-examining R.O. as to the prior inconsistent statement. Because the testimony of J.S. and R.O. was directly contradictory concerning who initiated the fight a material issue in the case, the 3rd DCA found that trial court erred in excluding B.B.'s testimony. However, "whether there is a conflict is a separate question and only arises if the witness contradicts what he or she said to defense counsel."

Based upon the caselaw set out by the 3rd DCA, Defense counsel may cross-examine a witness about an inconsistent statement made during a hallway interview. However, make sure that the alleged inconsistent statement is directly material to the case at hand. If the inconsistent statement is irrelevant or immaterial, object. In addition, if the witness does not admit to the prior inconsistent statement, Defense counsel may need to withdraw from the case and take the stand to testify. It is inappropriate to allow the Defense to insinuate the inconsistency, but not offer impeaching testimony. This may be grounds for a mistrial if the insinuation is unduly prejudicial. *See Marrero v. State* ("if the impeaching evidence is not produced, then, retroactively, the question is objectionable, and if prejudicial enough, mistrial is warranted. Remember, these same standards apply to prosecutors as well. *But see, Carpenter v. State*, 664 So.2d 1167 (4th DCA 1995) (criticizing *Marrero* for being too strict on impeachment evidence).

E. CROSS EXAMINATION OF A DEFENDANT

It is important during cross-examination to keep questions short and in a leading format. For example, if the testimony that you would like to elicit is that the defendant got into his vehicle, you would want to formulate the questions in the following way:

You were at the bar for 4 hours, correct?
You got up from your seat, right?
You walked out the front door?
You got your keys out of your pocket?
You opened your car door, correct?
You sat in the driver's seat, right?
You put the key in the ignition, correct?

In formulating your cross-examination in this way, you are necessarily getting the defendant to agree with you and with your presentation of the case. Additionally, if in a DUI case, your theme is "choices" or "this defendant chose to drive impaired", this highlights to the jury just how many decisions the defendant had to make in deciding to drive while impaired.

Some areas that you may consider cross-examining a defendant about:

- The elements of your crime: For example, in an impairment case, have the defendant admit to driving and drinking alcohol. In a battery, have the defendant admit to not having permission to touch the victim. You can then return to this in closing to show the jury that the defendant admitted to certain elements of the crime.
- Prior convictions: You can only impeach with prior convictions of a felony or crime of moral turpitude. You must also have certified priors of those convictions in order to ask the defendant the question of whether he has been convicted of a felony or crime of moral turpitude. If you are impeaching on the basis of prior felony conviction, you can only ask (1) if the defendant/witness has ever been convicted of a felony and (2) how many times. You cannot go into the type of crime unless it is a crime of moral turpitude or they lie on either of the two allowed questions.
- Interest in the outcome of the case: You may want to question the defendant on the fact that he has the most to lose in the case, hence his credibility is questionable. Tread lightly, though, as you do not want to comment on the possibility that the defendant's liberty is at stake in this proceeding.
- The police treatment of the defendant: If it has been established that the police were fair and polite with the defendant, boost the credibility of the officers by having the defendant agree that their treatment was fair.

F. COMMENT ON ANOTHER WITNESS

A party is not permitted to question a witness by asking the witness to comment on the credibility or truthfulness of another witness. *See Wilson v. State*, 880 So. 2d 1287 (Fla. 3d DCA 2004)

A party is also not permitted to question a witness about the testimony of another witness about any non-material issue. *See Fla. Stat. §90.608(5)*, *See Foster v. State*, 869 So.2d 743 (Fla. 3 DCA 2004).

TRIAL MOTIONS

A. MISTRIALS

There are FIVE ways for a mistrial to originate:

1. Both the State and the Defense agree that a mistrial is appropriate (make sure that it is clear **on the record** that defense is in agreement).
2. The State requests a mistrial (manifest necessity is the standard, or else double jeopardy attaches; do not ask for this without speaking to an Assistant Chief first).
3. Defense requests a mistrial.
4. The Trial Court declares a mistrial *sua sponte* (manifest necessity is the standard, or else double jeopardy attaches).
5. The jury cannot reach a verdict after due deliberation and an *Allen* charge has been read and the jury is hopelessly deadlocked, i.e. a hung jury. *Allen v. United States*, 164 U.S. 492 (1896). See also Florida Criminal Jury Instructions 4.1

A mistrial is the discontinuance of a trial before a decision on the factual issues because a fair or impartial trial has become impossible or when the jury is unable to agree on a verdict. Ordinarily, a mistrial occurs only in a jury trial because the court is presumed to be able to disregard matters that result in a mistrial.

If a matter arises in a nonjury trial that the court cannot disregard, a mistrial can be declared. The effect of a mistrial is to cancel the trial and leave the action as though the trial proceedings had not occurred. The action must be rescheduled for trial. The proceedings before trial remain unchanged.

Courts should be reluctant to declare mistrials. If an instruction to the jury will cure the problem, a mistrial should not be declared. Similar to any type of sanction that can be charged to the State or the Defense, the Court should always try to cure or rule for the least harmful remedy.

Common Scenarios For State & Defense to Agree to Mistrial

A ruling on a motion for a mistrial is within the sound discretion of the trial court and should be granted only when necessary to ensure that the defendant receives a fair trial. *Chamberlain v. State*, 881 So. 2d 1087 (Fla. 2004).

If the event giving rise to the request for a mistrial occurs during closing argument, an objection must be made. If the objection is sustained, a motion for mistrial must be made. If the objection is overruled, no motion for mistrial is required.

JUROR: Illness or death of a juror when no alternates have been selected requires a mistrial unless the parties stipulate to less than the required number of jurors.

Denial of Mistrial Appropriate

Denial of a mistrial is not error where an improper but inadvertent remark of a witness does not become a focus of the trial or is not directly material to disputed issues. *Clark v. State*, 881 So.2d 724 (1st DCA, 2004).

State's asking defendant whether he had discussed defenses with attorneys was not so prejudicial as to require mistrial in prosecution for trafficking, delivery, and possession of heroin and cocaine; State started to ask defendant if he spoke with attorneys about possible defense, but defense objected, defendant did not answer question, and trial court told State not to inquire any further and instructed jury to disregard question. *Perez v. State*, 856 So. 2d 1074 (5th DCA 2003).

Bailiff's removal of easel from jury room containing written results of jury's preliminary vote, which was seen by counsel for both sides and members of public seated in courtroom, did not warrant mistrial, where nothing arising out of removal of easel might have influenced jury's deliberation; jury was unaware that interim vote had been inadvertently made known. *Coates v. State*, 855 So. 2d 223 (5th DCA 2003).

State's request for mistrial & Defendant stands mute or objects

In a criminal case, because of double jeopardy sanctions, extreme caution should be observed by the court in exercising such discretion in favor of declaring a mistrial **over the defendant's objection**. The State's request for a mistrial during trial raises double jeopardy concerns that need to be fully evaluated before the request is made. Therefore, a request for a mistrial during trial, no matter how egregious the complained conduct, should not be made without consultation with one of the Chiefs.

The 'valid reason' (i.e., **MANIFEST NECESSITY**) for declaring a mistrial must be predicated either on:

1. Some misfortune which, although the fault of neither party, renders continuation of the trial impossible or unreasonably prejudicial to the substantial interests of either the judicial process itself, the defendant, the state or both,

or

2. It must be predicated upon some unfair or wrongful tactic, action or conduct on the part of the defendant by which a substantial interest of the state is unfairly frustrated or embarrassed. *State ex rel. Mitchell v. Walker*, 294 So.2d 124, 127 (2nd DCA 1974).

When mistrial is granted over defendant's objection, the prosecution has a **heavy burden** to show that mistrial was **justified by manifest necessity** and thus that subsequent trial is not precluded on ground of former jeopardy. *Spaziano v. State*, 429 So.2d 1344 (2nd DCA 1983).

If the jury is discharged for a legally insufficient reason, and without manifest necessity, and without the Defendant's consent **or his failure to object** or protest against an illegal discharge of the jury before verdict, does not constitute consent to such discharge. This is the same as acquittal of the charge. *Allen v. State*, 41 So. 593, (Fla. 1906).

Defense request for mistrial

Where a defendant requests a mistrial, the general rule is that the manifest necessity standard is inapplicable and double jeopardy is not a bar to re-prosecution, even where the motion is necessitated by prosecutorial error. Provided that the prosecutor's actions giving rise to the motion are not done intentionally so as to provoke the defendant into requesting a mistrial.

INABILITY TO CROSS-EXAMINE: Failure of state to present witness, after prosecutor had extensively recited, during opening statement, witness's anticipated testimony implicating defendant, warranted granting of mistrial in prosecution for first-degree murder, and home-invasion robbery; anticipated testimony was never subjected to cross-examination by defense, and evaluation by jury. *Mills v. State*, 875 So.2d 823 (2^d DCA 2004).

DISCOVERY VIOLATIONS: New trial required where trial court refused to permit Defendant to introduce exculpatory evidence in form of other official documents containing Defendant's signature, to prove that signature on forged check was not written by D. Although *Richardson* hearing was adequate, sanction of exclusion impacted D's fundamental right to defend herself. Where State claimed it would be prejudiced if documents were admitted, court could have recessed case OR declared mistrial to cure prejudice. *Casseus v. State*, 30 Fla.L.Weekly D1334b, (4th DCA, May 25, 2005).

Meador violations (DUI) 674 So.2d 826 (Fla. 4th DCA 1996)

Villalon v. State, 16 Fla. L. Weekly Supp. 498a (Fla. 11th Judicial Circuit, April 17, 2009).

Found the repeated use of the word "cue" and "test" lent an aura of scientific validity to the field sobriety tests and the curative instructions which followed insufficiently informed the jury that the field sobriety exercises were not scientific. Found a mistrial

was necessary because of the high degree of danger that the jury attached an undue degree of significance to the results of the field. “Test” was used three times by the police officer, and “cue” was mentioned by the ASA. You will see meador motions filed on all your DUI cases. Most of the officers know about Meador and not to say test but make sure to remind them prior to trial.

Trial Court Declares Mistrial, *SUA SPONTE*

When a trial court decides to declare a mistrial during trial, this action raises double jeopardy concerns if the manifest necessity standard is not met. Make an attempt to ensure that the court makes inquiries into other less onerous remedies.

Where a trial court declares a mistrial *sua sponte*, or at the request of the prosecution, the mistrial must be the result of “**manifest necessity**” for the defendant to be subject to retrial. *Thomason v. State*, 620 So.2d 1234 (Fla. 1993).

“Sometimes a mistrial is necessary because of inappropriate remarks or conduct by a defendant or defense counsel, even if defense counsel objects and the defendant does not waive his double jeopardy rights.” *Clark v. State*, 756 So.2d 244 (5th DCA 2000)

NOTE: This is a case where there were originally drug related charges, but the charge at trial was reduced to only resisting w/ violence because the drugs were somehow lost. A motion in limine was made by defense counsel to exclude any mention of drug transactions by the State, which was granted. During opening, the defense brought up the issue there were no drug charges, no drugs, and that this case stemmed from a drug investigation. This is a very fact specific case, and you should be careful of relying on it. However, it is an example of where the court could declare a mistrial on defense’s actions.

****Distinguished by *Jackson v. State*, 855 So. 2d 178 (Fla. 4th DCA 2003).** In *Clark* the Def attorney falsely informed the jury of certain material facts whereas in *Jackson* the Defense Counsel just made some rude remarks about a police officer. As stated above this is all very fact specific as it relates to mistrials and manifest necessity so it is imperative that the Judge inquires into alternatives.

“Absent circumstances thwarting the State’s one full and fair opportunity to present its case, the right of a defendant to completion of his or her trial by a particular tribunal should control.” **“Manifest necessity for declaring a mistrial without the defendant’s concurrence may be demonstrated only if the trial court has considered and rejected all possible alternatives.”** This necessarily requires an investigation into the viability of the alternatives. In this case, the State was precluded from retrying defendant on double jeopardy grounds after the trial court had, *sua sponte*, granted a motion for mistrial without the defendant’s consent. The trial court’s sole reason for granting the mistrial was that continuing the trial for a month would inconvenience the jurors. This reason did not rise to the level of “manifest necessity” where the court did not even inquire from the jurors whether they could return within 1 month to continue the trial. *Rodriguez v. State*, 719 So.2d 1215 (2nd DCA 1998)

In the absence of a motion for mistrial by the defense, a mistrial should be declared only where there is a manifest necessity for that action. *Parce v. Byrd*, 533 So.2d 812, 814 (Fla. 5th DCA 1988).

Court must first consider less onerous remedies than mistrial. A trial court must first consider less drastic possible alternatives before declaring a mistrial over the objection of a defendant. *Thomason v. State*, 620 So.2d 1234 (Fla. 1993).

Some alternatives to consider: a curative jury instruction, exclusion of evidence, or a continuance of the trial. Unless the defense invites the error or consents or stipulates to the mistrial, a court that grants a mistrial with no legally sufficient reason, in effect acquits the defendant because the defendant cannot be tried again due to double jeopardy. *Rodriguez v. Burk*, 637 So.2d 317 (4th DCA 1994).

Request for Mistrial when defendant fails to appear for trial proceedings AFTER trial has begun

The manifest necessity standard is not met when a defendant fails to appear for trial proceedings after trial has begun. In a case in which the defendant absconds during the trial proceedings by failing to appear, the court should still proceed with the trial. *See Fla. Rule Crim. Pr. 3.180*. This rule applies when the defendant absents himself from the proceedings by being disruptive as well.

B. JUDGMENT OF ACQUITTAL (JOA)

There are three times where a Defendant may make a motion for a judgment of acquittal.

1. AT THE CLOSE OF THE STATE'S CASE.
2. AT THE CLOSE OF ALL THE EVIDENCE PRESENTED (I.E., AFTER THE DEFENSE PRESENTS A CASE).
3. WITHIN 10 DAYS AFTER A GUILTY VERDICT, OR AFTER A JURY IS DISCHARGED WITHOUT HAVING REACHED A VERDICT. (NOTE: THIS DOES NOT APPLY TO BENCH TRIALS)

*****NOTE***** At all times, the motion must particularize the reasons for making the motion. Therefore, no “boilerplate” motions for JOA.

If, at the close of the evidence for the State, or at the close of all the evidence in the cause, the Court is of the opinion that the evidence is insufficient to warrant a conviction, it may enter a judgment of acquittal.

A motion for a judgment of acquittal is designed to test the sufficiency of evidence against the defendant, and to preserve the issue for appeal. It also provides the trial court with a procedural device to withdraw the case from the jury, saving time and expense of a lengthy

jury determination, in those cases where the State has failed to present competent evidence on one or more essential elements of the offense charged upon which the jury could reasonably reach a finding of guilt.

A motion for Judgment of Acquittal reserved upon by a judge and granted after the return of a jury verdict may be appealed by the State. Whereas a JOA granted at any other time is final.

NOTE In 1968, the statutory practice of granting Directed Verdicts was abolished in favor of having the trial court enter a Judgment of Acquittal. Sometimes, attorneys will refer to a Directed Verdict, but mean a JOA.

Statutory Authority

Fla. R. Crim. P. Rule 3.380

(a) Timing. If, at the close of the evidence for the state or at the close of all the evidence in the cause, the court is of the opinion that the evidence is insufficient to warrant a conviction, it may, and on the motion of the prosecuting attorney or the defendant shall, enter a judgment of acquittal.

(b) Waiver. A motion for judgment of acquittal is not waived by subsequent introduction of evidence on behalf of the defendant. The motion must fully set forth the grounds on which it is based.

(c) Renewal. If the jury returns a verdict of guilty or is discharged without having returned a verdict, the defendant's motion may be made or renewed within 10 days after the reception of a verdict and the jury is discharged or such further time as the court may allow.

Case Law

A motion for judgment of acquittal is properly denied when the State has presented sufficient evidence to establish a prima facie case. *Gray v. State*, 611 So.2d 100, (1st DCA 1992).

A motion for a judgment of acquittal should not be granted unless there is no legally sufficient evidence upon which the jury can find the defendant guilty of theft. *Anderson v. State*, 504 So.2d 1270, (1st DCA 1986).

Evidence presented must viewed in the light most favorable to the State. A court should not grant a motion for judgment of acquittal unless the evidence, when viewed in a light most favorable to the State, fails to establish a prima facie case of guilt. *Tyus v. State*, 845 So. 2d 318 (1st DCA 2003); *Dupree v. State*, 705 So.2d 90, 93 (4th DCA 1998) (*en banc*). *State v. Rivera*, 719 So.2d 335 (5th DCA 1998)

Timing of JOA and applicable standard. The **required analysis is the same** whether a motion for judgment of acquittal is made at the end of the State's case, at the close of all

evidence, or after the jury returns a verdict. *State v. Rivera*, 719 So.2d 335 (5th DCA 1998).

Cases based upon circumstantial evidence. A trial court should grant a judgment of acquittal in a circumstantial evidence case if the State fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. *Helm v. State*, 651 So. 2d 142, (2d DCA 1995).

Defense Admits All Facts and Reasonable Inferences: In moving for a judgment of acquittal, a defendant admits not only the facts stated in the evidence, but also every reasonable conclusion favorable to the State that a jury might fairly infer from the evidence. *Pagan v. State*, 830 So.2d 792, 803 (Fla. 2002); *L.R.W. v. State*, 848 So.2d 1263 (5th DCA 2003); *Brown v. State*, 294 So.2d 128 (3d DCA 1974).

Conflicting Evidence: Conflicts in the evidence do not entitle a defendant to JOA because the weight of the evidence and credibility of the witnesses are issues for jury determination. *Lynch v. State*, 293 So.2d 44, 45 (Fla. 1974); *Davis v. State*, 425 So.2d 654 (5th DCA 1983); *Sands v. State*, 403 So.2d 1090(3d DCA 1981).

“The testimony of a single witness, even if uncorroborated and contradicted by other State witnesses, is sufficient to sustain a conviction.” *Fernandez v. State*, 639 So.2d 658 (3d DCA 1975); *Bruton v. State*, 220 So.2d 669 (3d DCA 1969).

Circumstantial Evidence Cases

There is a separate standard for cases based upon circumstantial evidence. When a case is based upon circumstantial evidence, the State’s evidence must not only be consistent with the defendant’s guilt, but must also be inconsistent with any reasonable hypothesis of innocence. *State v. Law*, 559 So.2d 187 (Fla. 1989); *McArthur v. State*, 351 So.2d 972, 976 (Fla. 1977); *Spinkellink v. State*, 313 So.2d 666 (Fla. 1975).

Law at 189, elaborates the steps the Court must take in determining whether to grant a JOA in a circumstantial case:

1. Trial judge must review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences.
2. The evidence must be viewed in the light most favorable to the State.
3. The State is not required to “rebut conclusively every possible variation” of events which could be inferred from the evidence.
4. State’s threshold burden is only to introduce competent evidence that is inconsistent with the defendant’s theory of events.

5. Once that is met, it is jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

Affirmative Defenses

When an affirmative defense is raised the proper test is to determine:

1. Whether the defendant produced competent evidence of the affirmative defense;
AND
2. whether the State has carried its burden of contradicting that evidence to the extent that a jury issue is made.

A motion for JOA should only be granted if the evidence taken as a whole leads the trial court to determine that the jury could conclude only that there is a reasonable doubt as to the defendant's guilt. *Homes v. State*, 374 So.2d 944 (Fla. 1979); *Williams v. State*, 468 So. 2d 447, 449 (1st DCA 1985); *Grandison v. State*, 160 So. 3d 90 (Fla. 1st DCA 2015)

If a defendant establishes a prima facie case of self-defense, the State must overcome the defense by rebuttal, or by inference in its case in chief. *Rasley v. State*, 878 So.2d 473 (1st DCA 2004). Here the trial court was found to have properly denied a JOA motion on grounds that the State had failed to rebut the defense of self-defense, where the evidence was susceptible to two views, either justifiable self-defense, or an act arising out of jealousy and anger from the fact that the husband was having an affair.

Miscellaneous Cases

The State is not bound by a police officer's legal conclusion. *Anderson v. State*, 780 So.2d 1012, 1013 (4th DCA 2001). Here a JOA was properly denied in a fleeing/eluding case, even though the police officer expressed the belief that the defendant was not trying to get away.

Corpus delicti must be established beyond a reasonable doubt to survive a motion for JOA. *Schwab v. State*, 636 So.2d 3, 6 (Fla. 1994); *Chaparro v. State*, 873 So.2d 631, 634 (2d DCA 2004).

PRACTICE NOTE: IF IT APPEARS LIKELY THAT THE TRIAL COURT WILL GRANT A JOA AT THE CONCLUSION OF THE EVIDENCE, THE STATE SHOULD REQUEST THAT THE COURT RESERVE RULING ON THE MOTION UNTIL **AFTER** THE JURY RETURNS ITS VERDICT. THIS WILL ALLOW THE STATE A REMEDY OF APPEAL IF THE JURY RETURNS A VERDICT OF GUILTY AND THE JUDGE GRANTS A RESERVED JOA.

Regarding JOAs, State's Appellate Remedies and the Finality of Jeopardy

State v. Stone, 42 So.3d 279, (Fla. 4 DCA July 28, 2010) ("In sum, we hold that the circuit court's ruling granting a motion for judgment of acquittal before a jury verdict is not one that the state may appeal under section 924.07. The court's ruling was based on the state's failure to present evidence after being given the opportunity to do so, and not on a defect

in the indictment or other ground unrelated to factual guilt or innocence. The ruling granted a motion for judgment of acquittal before a jury verdict; it was not an appealable order dismissing an indictment. To allow the state to appeal the judgment of acquittal and reverse the ruling for retrial would be to put Stone twice in jeopardy for the same crimes. Accordingly, the state's appeal is dismissed”).

C. APPEALS

Statutory Authority

Fla. Stat. § 924.07 APPEAL BY STATE

(1) The state may appeal from:

- ...
- (j) A ruling granting a motion for judgment of acquittal after a jury verdict.
-

CASE LAW: In criminal cases, the State has only those rights of appeal that are expressly conferred by statute. *Ramos v. State*, 505 So.2d 418 (Fla. 1987).

The State’s appeal of judgment of acquittal, rendered after jury verdict of guilt, is authorized by § 924.07(1)(j), Fla. Stat., and does not violate double jeopardy. *State v. Rincon*, 700 So.2d 412, 414 (3d DCA 1997).

BUT SEE: The State was not allowed to appeal judgment of acquittal granted before jury rendered verdict. *Hudson v. State*, 711 So. 2d 244 (1st DCA 1998).

The State may not appeal judgment of acquittal where no verdict was rendered, due to jury deadlock. *State v. Fudge*, 645 So.2d 23, 24 (2d DCA 1994).

D. REOPENING THE CASE IN CHIEF

A trial judge has the discretion to allow a party to reopen its case to provide the jury with additional evidence. *See Pitts v. State*, 185 So.2d 164 (Fla. 1966) (ordinarily the question of allowing the reopening of cases is one involving sound judicial discretion which will rarely be interfered with at the appellate level), vacated in part on other grounds, 408 U.S. 941, 92 S.Ct. 2856, (1972). *See also*, *Adkins v. State*, 729 So.2d 955 (5th DCA 1998)(the State was allowed to reopen its case to provide additional evidence to prove the age of a sexual battery victim). Therefore, for example, if the State rests its case without establishing the venue of the crime, the attorney should request the court permit the case be reopened. *See, Dees v. State*, 357 So.2d 491 (Fla. App 1st DCA 1978)(the State was permitted to reopen the case to prove venue).

Technical Elements

The State may seek leave of court to re-open its case and supply missing, technical elements. *Johnson v. State*, 478 So.2d 885, 886 (3d DCA 1985). Here the State was

allowed to re-open the case to prove that the capital sexual battery victim was eleven years of age or younger, an essential element.

Reopening the Defense Case

The defense may also reopen its case at the court's discretion. Factors to be considered in reviewing a motion to reopen a defendant's case for submission of additional evidence include:

- (1) the timeliness of the motion,
- (2) the character of the evidence sought to be introduced,
- (3) the effect of allowing the evidence to be admitted, **AND**
- (4) whether the defendant has provided a reasonable explanation to justify reopening. *See, Jackson v. State*, 832 So.2d 885 (3rd DCA 2002); *Jones v. State*, 745 So.2d 1121 (5th DCA 1999).

Other Cases

In a possession of marijuana case, the State failed to introduce the marijuana into evidence although there was testimony that the substance tested positive for marijuana. The court recognized that it was most likely a "prosecutorial oversight" and if the defense had objected or moved for JOA on that ground "a trial court would undoubtedly permit the state to reopen its case to offer the contraband as evidence." *G.E.G. v. State*, 417 So.2d 975 (Fla. 1982)

Reopening of State's case in order to entertain additional evidence was permissible. Citing *Dees v. State*, 357 So.2d 491 (1st DCA 1978), holding that the decision of a trial judge to allow a party to reopen its case will not be reversed unless a clear abuse of discretion has been shown). *Fitzhugh v. State*, 698 So.2d 571 (1st DCA 1997).

E. AMENDING INFORMATION DURING TRIAL

The State may substantively amend an information during trial, even over the objection of the defendant, unless there is a showing of prejudice to the substantial rights of the defendant. Make sure to review the information prior to trial to make sure that the Defendant/Witness names are spelled correctly, the date of incident is correct and the witnesses can prove the elements presented. (Small oversights in those details could lead to a JOA)

State was properly permitted to amend its information to include the fact that some alleged crimes took place in two counties, as there was no showing of prejudice to defendant's substantial rights. *Darby v. State*, 748 So.2d 1069 (5th DCA 2000).

The state may substantively amend an information during trial, even over the objection of the defendant, unless there is a showing of prejudice to the substantial rights of the defendant. *Toussaint v. State*, 755 So.2d 170 (4th DCA 2000).

The state may amend its information during trial, either as to substantive or non-substantive matters, unless the defendant is prejudiced thereby. *Rivera v. State*, 745 So.2d 343 (4th DCA 1999).

"An amendment to correct a minor error that does not substantively prejudice to defendant" will not be barred by double jeopardy. Here, the amended information neither added a new charge nor a substantive element of the offense. *State v. Stell*, 407 So.2d 642 (4th DCA 1981).

BUT SEE

The court found that the filing of an amended information after the jury is sworn has the legal effect of a nolle prosequere of the original information. The court stated that "[i]t would be inconsistent with the principles of double jeopardy, if, after the defendant is placed in jeopardy for one crime, we permitted the State to amend the information to substitute another." *Scaife v. State*, 764 So.2d 827 (2d DCA 2000). Here, the amended information alleged new charges that were distinguishable from the original information.

CLOSING ARGUMENT

In a closing argument, all of the evidentiary pieces should be brought together and the case should be presented in a strong, fluid, and persuasive manner. All points that help prove the elements establishing the theory of the case must be fully explained. Closing argument must be delivered convincingly, clearly, and in an organized manner. In delivering a closing argument, the podium should not be used. The prosecutor should walk around freely because use of a podium blocks communication. A closing argument should not be presented by reading from notes. If notes must be used, an outline is most appropriate.

A basic formula for closing argument is to first present the facts in a “story” format. Next, discuss the law by explaining the elements of the crime charged. The prosecutor should next explain how the facts meet the elements of the crime. In this section of the closing argument, anticipate the defenses argument and attempt to rebut those claims. Finally, the last portion of the closing argument should be devoted to a “call for justice.”

A closing argument should not include:

- APPEAL TO BIAS, PASSIONS, PREJUDICE, OR SYMPATHY
- COMMENT ON THE APPEARANCE OR DEMEANOR OF THE DEFENDANT IN COURT OR THE CHARACTER OR CONDUCT OF THE ACCUSED
- SUGGEST THE DEFENDANT HAS THE BURDEN TO COME FORWARD OR COMMENT ON THE DEFENDANT’S RIGHT TO REMAIN SILENT
- DISCREDIT A LEGAL DEFENSE OR ATTACK THE DEFENSE COUNSEL
- REFER TO FACTS NOT IN EVIDENCE
- MISSTATE THE LAW
- COMMENT ON THE FAILURE OF THE DEFENDANT TO CALL A WITNESS OR COMMENT ON THE FAILURE OF THE DEFENDANT TO TESTIFY
- APPEAL TO THE FEARS OF THE
- CALLS TO “PROTECT THE COMMUNITY” OR “SEND A MESSAGE”
- VIOLATE THE GOLDEN RULE BY ASKING THE JURY PUT THEMSELVES IN THE VICTIM’S SHOES
- COMMENT ON OTHER OFFENSES COMMITTED BY THE DEFENDANT
- EXPRESS PERSONAL BELIEFS OF THE ATTORNEY
 - IMPROPER BOLSTERING –(*i.e.*, police officers are sworn to protect, officer does not arrest every person he pulls over for DUI) *McKeown v. State*, 16 So.3d 247 (4th DCA 2009)
 - Officer cannot testify about the percentage of people he arrests for DUI after stopping him.
- PERSONAL OPINION REGARDING CREDIBILITY OF WITNESSES

A closing argument may include a statement that certain evidence is uncontradicted. If there is no evidence other than a lawyer comment presented to contradict the state's witness then the state can refer to evidence as “uncontradicted.” *White v. State*, 377 So.2d 1149 (Fla. 1979). However, be cautious that the State is NOT permitted to argue that testimony is uncontradicted where the only person who could possibly contradict the testimony is the

defendant himself. *Rodriguez v. State*, 753 So.2d 29 (Fla. 2000). This can be interpreted to be a comment on Defendant silence which is a big NO NO.

It is important that the prosecutor relies solely on the evidence that was actually heard at trial. There may be evidence that the prosecutor knows about, but that the jury never hears. Therefore, in preparation for closing arguments, it is important to review all of the extensive notes that both you and your trial partner took during the case in order to formulate your argument.

CLOSINGS--REFUSAL

Watson v. State, 17 FLW Supp 262a (17th Judicial Circuit, 2009)

The state did not mention a breath refusal in its first closing argument. Defense mentioned in closing that the jury could reasonably infer from the evidence in the case, and to use their common sense. The state in rebuttal mentioned a breath refusal for the first time. The court found that the fact that the Defendant's refusal to submit to a breath test was consciousness of guilt and could reasonably be viewed as another sign of impairment, the decision to allow the argument as proper rebuttal, and the Appellate court found that it was not in error.

JURY INSTRUCTIONS & VERDICT FORMS

CHARGE CONFERENCE

Prior to delivering the closing arguments, the Judge will conduct the charge conference. During this conference, the parties must review the jury instructions and verdict form. In most misdemeanor cases, you will be using the standard jury instructions for the crime charged. If you have an unusual situation, have a proposed jury instruction prepared for the judge in advance along with case law that supports your instruction. However, suggested jury instruction **must** be approved by the Legal Division and is not recommended.

PRACTICE NOTE: Request that jury instructions go with the jury along with all evidence. Always review the verdict form to make sure the correct version of the statute is used (i.e. the impairment theory is included in the charging question even if the case is a DUI Breath case).

PRACTICE NOTE: Often time Defense Counsel will seek to pad jury instructions with confusion or claim to need “special jury instructions”. A motion in limine addressing this may be helpful and can be rendered as follows:

Requests for special or added instructions ask that the Court depart from the approved instructions of the Florida Supreme Court and should not be taken lightly, nor decided in haste, “[a]s we have before recognized, the standard jury instructions should be utilized whenever appropriate, *State v. Bryan*, 290 So.2d 482 (Fla.1974); *Rigot v. Bucci*, 245 So.2d 51 (Fla.1971), for a trial judge walks a fine line indeed upon deciding to depart”, *Kelley v. State*, 486 So.2d 578, 584 (Fla. 1986) (in the context of added contemporaneous instructions in response to a jury deadlock). Furthermore, there are specific requirements that must be met before departing from the standard, “[t]he standard jury instructions are presumed correct and are preferred over special instructions.” *Stephens v. State*, 787 So.2d 747, 755 (Fla.2001) (citing *State v. Bryan*, 290 So.2d 482 (Fla.1974)). However, the use of the standard jury instructions does not relieve the trial court of its obligation to determine whether the standard instructions accurately and adequately state the law. *Moody v. State*, 359 So.2d 557, 560 (Fla. 4th DCA 1978). If the trial judge determines that the standard jury instructions are erroneous or inadequate and departs from them in instructing the jury, it is mandatory that the trial judge “state on the record or in a separate order the respect in which the judge finds the standard form erroneous or inadequate and the legal basis of the judge's finding.” Fla. R.Crim. P. 3.985; see also *State v. Hamilton*, 660 So.2d 1038, 1045-46 (Fla.1995) (citing *Moody*, 359 So.2d at 560); *Holt v. State*, 987 So.2d 237, 240 (Fla. 1st DCA 2008)”, *Brown v. State*, 11 So.3d 428, 432 -433 (2nd DCA 2009).

DUI CASES

Refusal Instruction

Do not request the court to give an instruction on the meaning of a breath test refusal. *Diaz v. State*, 4 Fla. L. Weekly Supp. 71 (Fla. 11th Cir. Ct. 1996). Court held that the trial court's comments during voir dire on the meaning of a breath test refusal and a refusal jury instruction constituted reversible error. The court reasoned that such statements were impermissible comments on the evidence.

Miller-Haas Instruction: *Haas v. State*, 597 So. 2d 770 (Fla. 1992); *Miller v. State* 597 So.2d 767 (Fla. 1991)

In addition to the standard jury instructions, this should be used if the defense has argued that the defendant had a lower BAL at the time of driving then when he gave the sample. As long as the breath or blood test is taken within a reasonable time of driving, (3 to 4 hours deemed reasonable), the jury may consider the breath or blood test as proof of defendant's BAL at the time of driving. This instruction should always be used where the defense argues that the State cannot show what defendant's BAL was at the time of driving. Such argument by the defense is improper under the case law and should be objected to citing *Miller* and *Haas*. The proposed instruction is as follows:

"The State has presented evidence regarding the breath (or blood) test results of the defendant. You may, but are not required to, consider this evidence as proof of the defendant's breath (or blood) alcohol level at the time of driving if you find the breath (or blood) test was taken within a reasonable time after driving. This evidence can be rebutted or contradicted by the other evidence and testimony in this case."

Note: Along with this instruction, you must make a common sense type of argument to the jury in closing. You should argue, is it physically possible to show what the defendant's BAL was at the time of driving? Of course not. If that were the case, then the officer would have to take the defendant's breath or blood while the defendant was driving down the road before the officer stopped and arrested the defendant for DUI – something that is both physically and legally impossible to do. That is why the State need only show that the breath or blood test was taken within a reasonable time of driving.

Necessity Instruction

- In certain cases the defense may present an affirmative defense of necessity. They must prove all the elements of the instruction in order to secure a verdict of not guilty via necessity. You should by no means stipulate to the defense's right to assert this defense, but if the court wishes to err on the side of caution and read the instruction suggest the following and cite to the ruling case law for supporting this instruction. *Franco v. State*, 7 Fla. L. Weekly Supp. 169a (11th Cir. 1999); *Bozeman v. State*, 714 So.2d 570 (1st DCA 1998).

An issue in this case is whether the defendant acted out of necessity in committing the crime of _____. It is a defense to the crime of _____ if the

defendant acted out of necessity. In order to find the defendant acted out of necessity you must find the following 6 elements:

- 1. The defendant reasonably believed a danger or an emergency existed which was not caused by himself*
- 2. The danger or emergency threatened significant harm to himself or a third person*
- 3. The threatened harm must have been real, imminent, and impending*
- 4. The D had no reasonable means to avoid the danger or the emergency, except by committing the crime of _____.*
- 5. The crime of _____ must have been committed out of the necessity to avoid the danger or emergency.*
- 6. The harm that the defendant avoided must outweigh the harm caused by committing the crime of _____.*

Circumstantial Evidence Case

The defense may request the Court read a circumstantial evidence instruction to the jury when the defense alleges the State's case is "purely circumstantial." However, the Florida Supreme Court has found the former jury instruction on circumstantial evidence is no longer necessary because the Florida Standard Jury Instructions on Reasonable Doubt and Burden of Proof are sufficient to properly instruct the jury, and a separate instruction solely on circumstantial evidence would be duplicative. *See In re Standard Jury Instructions in Criminal Cases*, 431 So.2d 594 (Fla. 1981); *See also, Williams v. State*, 437 So.2d 133 (Fla. 1983); *Branch v. State* 685 So.2d 1250 (Fla. 1997).

Therefore, where a proper instruction on the burden of proof and reasonable doubt has been given, the State should argue there is no need for an instruction on circumstantial evidence, and a trial court may properly refuse to give such an instruction. *See, Floyd v. State*, 850 So. 2d 383 (Fla. 2002)(Trial judge did not abuse his discretion by failing to instruct the jury regarding circumstantial evidence in capital murder trial; judge instructed jury on reasonable doubt and burden of proof, and defendant did not assert that those instructions were faulty); *Huggins v. State*, 889 So.2d 743 (Fla. 2004)(Trial court acted within its discretion in trial for capital murder in refusing to give jury instruction on circumstantial evidence, where the Supreme Court had deleted instruction on circumstantial evidence from standard jury instructions); *Jorquera v. State*, 868 So.2d 1250 (Fla. 4th DCA 2004)(Jury instruction on circumstantial evidence was not required in drug trial; trial court gave proper instructions on reasonable doubt and burden of proof).

JURY QUESTIONS

- **Trial judge must be physically present in court during jury questions:** Per se, unwaivable error occurs when trial judge is not physically present when jury communication is received and responded to. *See Jackson v. State*, 636 So.2d 99 (Fla. 3d DCA 1994), *Brown v. State*, 538 So.2d 833 (Fla. 1989).
- **Trial judge must consult with counsel before responding to jury question:** *Woods v. State*, 634 So.2d 767 (Fla. 1st DCA 1994) Trial court committed per se reversible error by answering jury's request concerning expert witness's testimony without first consulting counsel

WHEN THE JURY CANNOT REACH A VERDICT

- In order to strike a proper balance on this sensitive issue, the Supreme Court Committee on Standard Jury Instructions in Criminal Cases has carefully crafted an instruction that allows a jury to continue deliberations even after it has announced its inability to do so, where there is a reasonable basis to believe a verdict is possible, while cautioning jurors that they should not abandon their views just to get a verdict or to accommodate the majority. That standard instruction is commonly referred to as an **Allen charge**, based upon the United States Supreme Court case that discussed the concerns about interference with a jury's deliberations and decision. *Washington v. State*, 758 So.2d 1148 (Fla. 4th DCA 2000)
- The Allen charge is derived from *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896)
- Florida's version of the Allen charge is located at Florida Standard Jury Instructions (Criminal) 4.1.
- The Florida Supreme Court described this standard charge in *Thomas v. State*, 748 So.2d 970, 977 (Fla. 1999). The Supreme Court stated the well-settled principle "*that a trial court should not couch an instruction to a jury or otherwise act in any way that would appear to coerce any juror to reach a hasty decision or to abandon a conscientious belief in order to achieve a unanimous position.*"
- Although it is recommended that a trial judge give an Allen charge when a jury is deadlocked, he is not required to do so. *See State v. Bryan*, 290 So.2d 482 (Fla.1974).
- In *Tomlinson v. State*, 584 So.2d 43, 45 (Fla. 4th DCA 1991), the Court held that it is per se reversible error to repeat a deadlock jury instruction and send a jury back for further deliberations after it has announced a second deadlock.

GENERATING JURY INSTRUCTIONS

- On your PC, go to: Forms > Trial Paperwork > Jury Instructions Check List:
 - Fill in the case information and click on all of the applicable instructions;
 - Click on File, Send To, Mail Recipient as Attachment to “Word processing Center” as the email recipient.
 - Call/Email the Law Librarian if you are requesting jury instructions if you cannot access them and they will create it and save it in vcase. However, you must review as there are certain boxes that the ASAs need to check before they are complete.
 - Be sure to make copies so that you have three sets – one for you, the defense and the judge
 - For most of the misdemeanor cases the Judge will have his/her JA prepare the jury instructions that the attorneys will review. However, nothing prevents the State from creating the instructions especially in cases when there are no standard jury instructions or the State requests special instructions.

POST TRIAL

JUROR CONTACT AFTER A CASE IS OVER

Rule 4-3.5(d)(4) of the Florida Rules of Professional Conduct *prohibits* an attorney from initiating communication or causing another to initiate communication with any juror regarding a trial after dismissal of the jury. It is, therefore, improper to approach a juror and advise him or her of their right to talk to you, but that you would like to talk to them about the trial in which they were involved. Even though the decision to talk is left to the juror, you have improperly initiated the communication.

MOTION FOR NEW TRIAL

At the end of trial, and upon a finding of guilt, the defendant may make a motion for a new trial within 10 after the rendition of a verdict or the finding of the trial court. A motion for a new trial should not be confused with a JOA. The sufficiency of the evidence test is only applicable to a JOA and not a motion for a new trial. Make sure that this motion is technically correct. If written "Motion for New Trial" is filed by defense, file a written response.

Fla. R. Crim. P. 3.580 COURT MAY GRANT NEW TRIAL: When a verdict has been rendered against the defendant or the defendant has been found guilty by the court, the court on motion of the defendant, or on its own motion, may grant a new trial or arrest judgment.

Fla. R. Crim. P. Rule 3.600 GROUNDS FOR NEW TRIAL:

(a) Grounds for Granting. The court shall grant a new trial if any of the following grounds is established.

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

(b) Grounds for Granting if Prejudice Established. The court shall grant a new trial if any of the following grounds is established, providing substantial rights of the defendant were prejudiced thereby.

- (1) The defendant was not present at any proceeding at which the defendant's presence is required by these rules.
- (2) The jury received any evidence out of court, other than that resulting from an authorized view of the premises.
- (3) The jurors, after retiring to deliberate upon the verdict, separated without leave of court.
- (4) Any juror was guilty of misconduct.
- (5) The prosecuting attorney was guilty of misconduct.
- (6) The court erred in the decision of any matter of law arising during the course of

the trial.

- (7) The court erroneously instructed the jury on a matter of law or refused to give a proper instruction requested by the defendant.
- (8) For any other cause not due to the defendant's own fault, the defendant did not receive a fair and impartial trial.

(c) Evidence. When a motion for new trial calls for a decision on any question of fact, the court may consider evidence on the motion by affidavit or otherwise.

CASE LAW

Sufficiency of the evidence was inappropriate ground on which defendant asserted motion for new trial, following his conviction for third-degree felony murder; sufficiency issue should have been raised in context of motion for directed verdict rather than new trial since, if trial court had accepted defendant's argument and deemed evidence insufficient as matter of law to support conviction, new trial was prone to violating defendant's guaranteed protection against double jeopardy. *Santiago v. State*, 874 So.2d 617, (5th DCA 2004).

When the defendant is granted a new trial as a result of a mistrial, rulings in limine do not become law of the case; motions must be renewed, failure to do so could result in evidence being admitted. *Strange v. State*, 579 So.2d 859 (1st DCA 1991).

SENTENCING

Sentencing hearings are governed by Florida Rule of Criminal Procedure 3.720; section (b) of that rule states that "The court shall entertain submissions and evidence by the parties that are relevant to the sentence." Make sure you know what degree misdemeanor you are prosecuting at sentencing, to ensure that you do not ask for an illegal sentence. Remember, if the charging document is an A-form, and the charge is a first-degree misdemeanor, then you will have sentencing limitations, as far as jail time.

Before sentencing, the ASA should take a moment to consider what he or she will ask the Court to sentence the defendant to and must be mindful of what NOT to say to create a situation with vindictive sentencing (reversible) or comments that can cause an appellate issue (no remorse shown, should have admitted he/she did it, comments on silence etc.). A review of what was elicited in evidence at trial, the severity and dangerousness of the defendant's actions or recidivism should factor into a sentencing request. An ASA should not just blurt out a recommended sentence. Rather, he or she should give a rendition of the above factors and then based on that request an appropriate period of incarceration, followed by a probationary term if appropriate. If you have questions or a particularly vexing case, ask a CTA or Assistant Chief to review what criteria to use and for suggested sentencing recommendations.

Jail Time

- 1st Degree Misdemeanor with **Information** as charging document: One Year Jail
- Crime Charged by **A-form** with enabling code (e.g., Battery): 60 Days Jail
- 1st Degree Misdemeanor with **Citation** as charging document: One Year Jail
- 2nd Degree Misdemeanor with **Information** as charging document: 60 Days Jail

Crime Charged by **A-form** with enabling code (e.g., Trespass): 60 Days Jail
2nd Degree Misdemeanor with **Citation** as charging document: 60 Days Jail

NOTE: There are statutory exceptions for DUI's:

1st DUI: 180 Days Jail

2nd DUI (w/i or o/s): 270 Days Jail

3rd DUI(w/i or o/s): 364 Days Jail

Second or Subsequent Refusal: 364 Days Jail

Fines

1st Degree Misdemeanor with **Information** as charging document: \$1,000.00

Crime Charged by **A-form** with enabling code (e.g., Battery): \$500.00

1st Degree Misdemeanor with **Citation** as charging document: \$1,000.00

2nd Degree Misdemeanor with **Information** as charging document: \$500.00

Crime Charged by **A-form** with enabling code (e.g., Trespass): \$500.00

2nd Degree Misdemeanor with **Citation** as charging document: \$500.00

*NOTE: Some statutes (i.e., Animal Cruelty, DUI, Prostitution, Criminal Mischief) increase the maximum fines allowed or include additional punishment that the Defendant must comply with such as Tests and Community Service.

Probation

The general rule is that the probationary period may not exceed the maximum jail sentence prescribed for an offense. However, Florida Statute §948.15 (1); § 775.081(2); indirectly extend the probationary period of a second- degree misdemeanor to 6 months.

1st Degree Misdemeanor with **Information** as charging document: One Year

Crime Charged by **A-form** with enabling code (e.g., Battery): 6 Months

1st Degree Misdemeanor with **Citation** as charging document: One Year Jail

2nd Degree Misdemeanor with **Information** as charging document: 6 Months

Crime Charged by **A-form** with enabling code (e.g., Trespass): 6 Months

2nd Degree Misdemeanor with **Citation** as charging document: 6 Months

CORRECTION AND MODIFICATION OF SENTENCE

Illegal Sentence

A Court may, at any time, correct an illegal sentence imposed by it. Fla. Stat. 3.800(a). *See also Anderson v. State*, 644 So.2d 147 (2d DCA 1994).

Reduction and Modification of Sentence

Sometimes, you will be presented with a situation where a defendant will need to turn him or herself in at a later date (family/job issues). When this occurs, you must ask the judge to impose a larger sentence (usually 364 days) that is then mitigated down, once the defendant surrenders. There is a **sixty (60) day** restriction on this type of sentencing.

A Court may reduce or modify a legal sentence imposed by it within sixty (60) days after such imposition. Fla. Stat. 3.800(b). The trial judge may not, in such modification, increase the original sentence.

Trial court had jurisdiction to resentence the defendant after expiration of the 60-day period which allowed for a mitigation hearing where the judge commenced mitigation hearing before end of original 60-day period to preserve defendant's rights to mitigation. The judge believed that it was in the interest of justice to consider the record more fully and to allow newly-appointed counsel time to prepare for a hearing. The judge further used due diligence in conducting the mitigation proceedings and entered an order on the motion with reasonable dispatch. *Abreu v. State*, 660 So.2d 703, (Fla. 1995).

APPEALS

Statutory Authority (When Defendant Files an Appeal)

Fla. Stat. § 924.06 APPEAL BY DEFENDANT

(1) A defendant may appeal from:

- (a) A final judgment of conviction when probation has not been granted under chapter 948, except as provided in subsection (3);
- (b) An order granting probation under chapter 948;
- (c) An order revoking probation under chapter 948;
- (d) A sentence, on the ground that it is illegal; or
- (e) A sentence imposed under § 921.0024 of the Criminal Punishment Code which exceeds the statutory maximum penalty provided in § 775.082 for an offense at conviction, or the consecutive statutory maximums for offenses at conviction, unless otherwise provided by law.

(2) An appeal of an order granting probation shall proceed in the same manner and have the same effect as an appeal of a judgment of conviction. An appeal of an order revoking probation may review only proceedings after the order of probation. If a judgment of conviction preceded an order of probation, the defendant may appeal from the order or the judgment or both.

(3) A defendant who pleads guilty with no express reservation of the right to appeal a legally dispositive issue, or a defendant who pleads nolo contendere with no express reservation of the right to appeal a legally dispositive issue, shall have no right to a direct appeal.

NOTE: Make sure that the notice of appeal enumerates an issue that may be appealed. Sometimes, a notice of appeal is really a motion for a new trial, or a renewed motion for judgment of acquittal. So make sure that any post trial motions made by the defendant are not technically deficient.

CASE LAW

"A trial court's order is not appealable until it is rendered. Rendition does not occur until the order has been **reduced to writing and filed** with the clerk." *Billie v. State*, 473 So.2d 34, 34-35 (2d DCA 1985).

Neither the notations on the courtroom worksheet nor the trial court's oral pronouncement commence time for filing notice of appeal. *State v. Wagner*, 863 So.2d 1224 (Fla. 2004).

See also: "An order is rendered when a signed, written order is filed with the clerk of the lower tribunal." **Fla. R.App. P. 9.020(h)**.

MOTION FOR SUPERSEDEAS BOND

A supersedeas bond is defined as a bond that a court requires from an appellant who wants to delay payment of the judgment until the appeal is over. You will likely be confronted with this motion once a notice of appeal is filed, particularly when a jail sentence is involved.

Defendant must first file a notice of appeal -- Fla. Stat. § 924.065(1) states that "upon filing of notice of appeal, the court shall set the amount of the appeal bond if the defendant is entitled to bond."

Defendant's Burden to show that appeal is taken in good faith:

If an appeal is taken '**merely for delay, bail should be refused**: but, if taken in good faith, on grounds not frivolous but fairly debatable, in view of the decisions of the Supreme Court then petitioners should be admitted to bail.' In addition, the court should consider

- (1) the habits of the individual as to respect for the law,
- (2) his local attachments to the community, by way of family ties, business, or investments,
- (3) the severity of the punishment imposed for the offense, and any other circumstances relevant to the question of whether the person would be tempted to remove himself from the jurisdiction of the court.

Younghans v. State, 90 So.2d 308, 310 (Fla. 1956): If a trial court denies a motion for supersedeas bond, the court must make a written order with findings consistent with *Younghans*.

JURY MISCONDUCT – RULE 3.575

A party who has reason to believe that the verdict may be subject to legal challenge may move the court for an order permitting an interview of a juror or jurors. This motion must be filed within **10 days** after rendition of the verdict unless the moving party can show good cause why it was not filed within that period.

DUI PREDICATE QUESTIONS



**Arresting Officer
Breath Officer
Maintenance Officer
Bender Predicate
Toxicologist
Chemist
Blood - Arresting Officer
Blood - VAMP
Blood Toxicologist - Bender Predicate
Urine Collection Officer
DRE Officer**

ARRESTING OFFICER

Experience / Training

- Good _____, could you please introduce yourself to the court and the members of the jury?
- Mr./Mrs _____, where do you work?
- How long have you worked for the _____ police department?
- What prior LEO experience do you have (only ask question if officer has prior LEO experience)
- What special training, if any, have you had in the field of detecting and apprehending drivers impaired by alcohol or drugs?
____ Police Academy
____ HRS 40 hour course
____ College courses
____ DRE Course
____ Intoxilyzer training
- Approximately how many times have you stopped possibly impaired drivers?
- How many DUI arrests have you made? [**Make sure you know the answer to this question ahead of time**]

Now I'd like to talk about the morning/evening of (INSERT DATE) :

- Do you recall the morning/evening of _____?
- Were you on duty that morning/evening?
- What were your duties that evening/morning?
- Where were you?
- Did you notice anything unusual?
- What did you see?
- What type of car?
- Did you follow it?
- For approximately how long?
- How far was that?
- **EXPAND ON DRIVING PATTERN**
- Can you please tell the members of the jury what the car was doing during this time?
- How many times did the car cross the line? (IF RELEVANT)
- How far over the line did it cross over the line? (IF RELEVANT)
- How fast was the car traveling? What is the posted speed?
- How long did the car exhibit this activity?
- At any time as you were watching the driving pattern of this vehicle, was your view obstructed?
- What were the weather conditions?
- How far were you from the car when you witnessed this activity?
- Was there any other traffic on the road that could account for this driving pattern?
- After seeing this driving pattern, did you pull the vehicle over?
- How long did it take the car to stop?

- During your training and experience, did you learn what types of driving patterns signify that a driver might be impaired? [MAY NOT WANT TO ASK IF THERE IS NO DRIVING PATTERN]
- What were some of those driving patterns?
- And, what were the driving patterns that caused you to pull over that vehicle on (INSERT DATE).

Identification

- Once the car stopped, what did you do?
- Do you see the person who was behind the wheel of the car in the courtroom here today?
- Please point at the person and identify him/her by an article of clothing he/she is wearing.
- LET THE RECORD REFLECT THAT THE WITNESS HAS IDENTIFIED THE DEFENDANT

Venue

- What county did this stop occur in?
- Did everything you have testified about and are going to testify about occur in Dade County?

Defendant's Appearance

- When you first approached, did you ask the defendant anything?
 _____ Asked for DL / Reg / Insurance
 _____ How did the defendant produce these documents [Only ask question if defendant had trouble finding these documents]
 _____ In your experience stopping cars for traffic infractions, is it common for person not to know where there DL and car documents are?
- Now when you first saw the Defendant behind the wheel of the car, what did you observe about his/her appearance? Could you please describe the defendant's physical condition and appearance when you first approached him?
 _____ Odor
 _____ Bloodshot eyes
 _____ Slurred speech
 _____ Flushed face
- Did you ask him/her to get out of the car?
 _____ How did he/she get out of the car?
 _____ Walk?
 _____ How was their Balance?
 _____ Did he/she lean against the car?
- Did he/she say anything unusual [**Make sure no Miranda problems**]?

Roadsides

- **Once the Defendant was outside the vehicle, did you make him/her do anything?**
- **What are FSEs?**
- Do you have any special training in FSE's?
- Please describe your training.
- Were you taught what to look for during these exercises?
- Approximately, how many times have you conducted FSE's? [Make sure you know the answer]
- What is the purpose of FSE's? [measure divided attention skills]
- What are divided attention skills?
- How do FSE's measure divided attention skills?
- What does it mean when a person is not able to understand instructions? [Be careful if there are language issues]
- Does a person need divided attention skills to drive a car safely ?
- Why?
- How many tasks do you perform while driving?
- *Who established FSE's? [Pretry]*
- *Are they standardized? [Pretry]*
- How many FSEs are there?
- ***Now you previously mentioned that these exercises help you determine if someone's normal faculties are impaired***, what are some examples of normal faculties? [Pretry]
- How does performance on FSE's relate to measuring a person's normal faculties?
- Through your training and experience, can you determine whether a person is impaired by his/her performance on the FSE's? [If objection: goes to reliability, thus relevancy of test]
- Now let's turn to (INSERT DATE) with the Defendant, could you please describe the area where you gave these exercises in this case?
 - _____ Was the area well lit?
 - _____ Was the ground smooth and flat?
 - _____ Were you far enough from the flow of traffic so as not to distract the defendant?
- Which FSE's did you have the defendant perform FIRST?
- HGN (pretry this whole area)
 - ⇒ What is HGN?
 - ⇒ Who established HGN?
 - ⇒ Are you qualified to perform HGN?
 - ⇒ How many times have you conducted HGN?
 - ⇒ Do you keep logs [Make sure officer has logs]
 - ⇒ What things do you look for in the subject's eyes when HGN is being performed?
- _____ Can not smoothly follow moving object
- _____ Distinct nystagmus at Maximum deviation
- _____ Onset of nystagmus occurs before 45 degrees
 - ⇒ What does it allow you to do?
 - ⇒ What causes eyes to exhibit these motions? [Pretry]
 - ⇒ Are these motions caused by things other than alcohol?

- ⇒ Are there different types of HGN?
- ⇒ Are these other types of HGN alcohol induced?
- ⇒ Could you compare the eye action of an impaired person's HGN to any other every day occurrence so that the jury may better understand the concept of HGN? [compare HGN to a windshield wiper on a dry windshield - the jerking motion of the wiper]
- ⇒ Someone who cannot follow smoothly with their eyes, would that affect their ability to drive? How? [Pretry]
- ⇒ How did the defendant's eyes react when you performed this FSE?
- ⇒ Could this reaction be caused by anything else?

ASK THE NEXT GROUP OF QUESTIONS FOR EACH OF THE OTHER FSE'S PERFORMED

- ◇ What was the next exercise you administered?
- ◇ Did you instruct the defendant how to perform this exercise?
- ◇ How?
- ◇ Did he appear to understand the instructions?
- ◇ Did the defendant say anything or do anything to you before he/she performed the exercise that indicated to you that he did not understand your instructions? [Make sure no Miranda Issues]
- ◇ Did you ask the defendant whether he had any injuries before conducting this exercise?
- ◇ Did the defendant appear to have any injuries?
- ◇ Did you demonstrate the exercise to the defendant? Please step down and demonstrate for the jury how you demonstrated to the defendant that evening. [make sure the officer is capable of doing this]
- ◇ After you showed the Defendant how to conduct the exercise and he appeared to understand your instructions, how did the defendant perform this exercise? (or was he able to follow instructions and perform this exercise?)
- ◇ How many clues did he miss on the exercise?
- ◇ How many clues indicate being unable to perform the exercise?
- ◇ If the defendant makes one or two mistakes does that automatically mean he is impaired?
- ◇ Does it automatically mean he will be arrested?
- ◇ Why not?
- ◇ What does the defendant's performance on this exercise have to do with divided attention skills?
- ◇ What does the defendant's performance on this exercise have to do with normal faculties?

____ Walk and turn - did you use a real or imaginary line?

- REPEAT ABOVE QUESTIONS AS WELL

IF DASH CAM/BWC OF ROADSIDES: INTRODUCE VIDEOS BEFORE EACH EXERCISE.

- Ask which exercise he conducted first
- Then play video (relevant portion)
- Then ask the officer to explain what we just saw/ describe Defendant's appearance
- ****DO THIS ALONG WITH ROADSIDE QUESTIONS****

After FSE's:

- After administering the FSE's, what did you do? [arrested defendant] (if excluded go straight to transported Defendant to station)
- Who transported the defendant to the station?
- What was he like in the car? [Make sure no Miranda Issues]
- What was demeanor at the station versus the scene?
[if the officer testifies that he appeared better at the station, ask him what he attributes it to (i.e. sobering up). This line of questioning is critical in cases with a low reading because it will allow you to argue that his breath/blood reading was higher at the time of driving]

If Video of Defendant back at Station:

- Was a video taken of the defendant back at the station?
- How long after the arrest was that video taken?
- Were you present when the video was made?

OR

Have you had an opportunity to watch that video?

- Could you compare the defendant's appearance at the arrest location to his appearance on the video?
- Could you tell us why the defendant looked better on video than he did at the scene? [passage of time / absorption]

IF FSE'S WERE DONE AGAIN ON VIDEO AT STATION AND ON AT THE SCENE:

- Were FSE's done on video?
- Could you compare the defendant's performance on the FSE's at the station to his performance of the tests at roadsides?
- Could you tell us why the defendant looked better on video than he did at the scene?

FINAL/ CLOSEOUT QUESTIONS

- *Based on your training and experience the [driving pattern, defendant's physical appearance, odor, and the defendant's performance on FSE's] do you have opinion as to whether the defendant was too impaired to drive a car that night?*
- *What is that opinion?* (UNLIKELY TO GET THESE QUESTIONS IN. IMPROPER OPINION). IF OBJECTED TO, MAY BE ABLE TO ASK --- Based on everything you observed of the Defendant on the scene and at the station, what did you conclude?

THANK YOU. NO FURTHER QUESTIONS

BREATH TEST OPERATOR

Experience / Training

- Good _____, could you please introduce yourself to the court and the members of the jury?
- Mr./Mrs _____, where do you work?
- How long have you worked for the _____ police department?
- What prior LEO experience do you have (only ask question if officer has prior LEO experience)?
- What special training, if any, have you had in the field of detecting and apprehending drivers impaired by alcohol or drugs?

_____ Police Academy
_____ HRS 40 hour course
_____ College courses
_____ Books read
_____ DRE Course
_____ Intoxilyzer training

Breath Test Qualification / Relevance to Present Case

- Who conducts the Intoxilyzer Training?
- Officer, can you tell the court what FDLE stands for?
- What does FDLE do?
- Do you have an FDLE permit certifying successful completion of its 40 hour course?
- Did you learn how to operate the breath testing instrument in accordance with FDLE rules?
- Why are the FDLE rules important?
- How many breath tests have you administered?
- Have you been trained in the instrument used in **this** case?

ID / Venue

- Were you on duty on _____ at around _____?
- Where were you assigned?
- On that evening did you come into contact with someone who later became known to you as _____?
- Do you see that person in the courtroom today?
- Please identify him by an article of clothing.
- LET THE RECORD REFLECT THAT THE WITNESS HAS IDENTIFIED THE DEFENDANT
- What county were you in when the breath test was administered to the defendant?
- Did everything you are about to testify to happen in Dade County?

20 Minute Observation/Breath Test

- Please explain to the jury how you came into contact with this defendant.
- Did you offer the defendant a breath test?
- Did he agree to take it?

- Did you watch the defendant continuously for 20 minutes prior to the administering test?
- Why is it necessary to watch the subject for 20 minutes? [Pretry]
- Did the defendant regurgitate, burp, or put anything into his mouth during that time?
- Why is that important?
- Officer, on _____ did you have the opportunity to administer a breath alcohol test to _____ ?

Defendant's Appearance

- How did the defendant appear to you. [Pretry]
- _____ Breath
- _____ Eyes
- _____ Face
- _____ Speech
- _____ Attitude
- _____ Appearance
- _____ Walked
- _____ Balance

Implied Consent (ONLY READ IF THE DEFENDANT REFUSES!)

- What is the implied consent law?
- Did you fill out any paperwork regarding this law?
- YOUR HONOR, MAY I APPROACH THE WITNESS. [SHOW IC FORM TO DEFENSE COUNSEL]
- Officer, I am showing you what has been previously marked as State's exhibit _____ for identification. Do you recognize it?
- How do you recognize it
- What is it?
- Is there a signature? Whose signature?
- What date was the document produced?
- Did you write the name of the person who you read the IC law to?
- Who is that person?
- Is this document a **record of your reading the implied consent law to the defendant?**
- Is this document filled out in the regular course of police business?
- Made at or near the time of the incident by a person with knowledge?
- Is this document in the same or substantially the same condition as the night you filled it out?
- Is it a fair and accurate copy of the document you read to the Defendant?

AT THIS TIME, THE STATE MOVES EXHIBIT ____ FOR IDENTIFICATION INTO EVIDENCE. [Business Records Exception]

- Please read to the jury the implied consent law just as you read it to the defendant that morning/evening.
- Did the defendant appear to understand the implied consent law as read?
- Did he sign the implied consent paperwork?
- Did he read it himself?

- Was there any indication that the defendant did not understand the implied consent law you read to him?
- Was the Defendant seated near the Intoxilyzer when he refused?
- How close to the Intoxilyzer?
- Did you point out the Intoxilyzer to the Defendant?
- Did the Defendant make any statements during this portion [make sure no Miranda issues]

Taking the test

- What did you do to start the Intoxilyzer and begin the breath test?
 - ◊ Push the Start Test Button on the instrument.
 - ◊ Enter the required information.
 - ◊ Make sure the instrument automatically ran an “air blank.”
- Please tell the jury what an “air blank” is. (PRETRY)
 - ◊ The instrument read 0.000 after running the air blank.
 - ◊ What does that mean?
- Did the instrument automatically run a “control test”?
- Did it pass the “control test”?
- Please tell the jury what a “control test is.”
 - ◊ The instrument displayed the “please blow” message.
 - ◊ Connected the mouth piece.
- Did the defendant blow into the mouth piece until the tone stopped?
- Did the defendant provide a deep lung air sample?
- How do you know?
- Did the instrument “air blank” again?
- What was the result?
- Did the instrument display “please blow” again?
- Did the defendant blow into the instrument again?
- Did the instrument “air blank” again?
- What was the result?
- Did the instrument do a second “control test”?
- Did it pass the “control test”?
- How much time elapsed between the first and the second blow?
- Without telling us the readings, were the results within plus or minus .02 of each other?
- What is the significance of that? [ONLY ASK QUESTION IF OPERATOR IS EXPERT OR YOU PRETRIED AND YOUR WITNESS KNOWS THE ANSWER]

Operational Checklist / Foundation for Admitting into Evidence

- Did the instrument generate a printout (breath affidavit) of the test results?
- What is the serial number of the Intoxilyzer 8000 which you administered this test on?
- YOUR HONOR, MAY I APPROACH THE WITNESS. SHOW BREATH AFFIDAVIT TO DEFENSE COUNSEL.
- Officer, I am showing you what has been previously marked as State’s exhibit _____ for identification. Do you recognize it?

- How do you recognize it
- What is it?
- Is there a signature?
- Whose?
- What date was the breath affidavit produced?
- Does the breath affidavit have the name of the person whose BAL this reflects?
- Who is that person?
- Is this Breath Test affidavit a **record of your results** produced from the test you performed on that person?
- Are these Breath test affidavits made in the regular course of police Business?
- Is this Breath test affidavit in the same or substantially the same condition as the night the instrument generated this printout?

[WAIT TO ADMIT THE BREATH TEST AFFIDAVIT THROUGH THE MAINTENANCE OFFICER VIA LINKUP]

Questioning Section of DUI Report

- **ONLY DO THIS SECTION IF HE WAIVED MIRANDA AND SPOKE TO OFFICER**
- Did you read the defendant Miranda?
- Did you tell him that he had the right to remain silent?
- Did he indicate to you that he understood this right?
- How did he indicate that to you?
- Did you tell him that anything he said could be used against him in court?
- Did he indicate to you that he understood this right?
- How did he indicate that to you?
- Did you tell him he had the right to an attorney?
- Did he indicate to you that he understood this right?
- How did he indicate that to you?
- Did you explain to him that if he could not afford a lawyer that one would be provided for him?
- Did he indicate to you that he understood this right?
- How did he indicate that to you?
- Did he knowingly, voluntarily and intelligently waive his rights?
- Did you ask the defendant [QUESTIONS FROM DUI TEST REPORT PAGE 2]
 - ◊ Are you ill?
 - ◊ Taking any medication?
 - ◊ Any Drugs? If YES, when was his last dose?
 - ◊ Whether he was injured?
 - ◊ How much he slept in the last 24 hours?
 - ◊ Whether he'd been drinking?
 - ◊ What?
 - ◊ How much?
 - ◊ When did he start?
 - ◊ When did he stop?
 - ◊ What time is was? What was the actual time?
 - ◊ Whether he was driving?

If there is a Video

- Officer ____, I am showing you what has been previously marked as State's exhibit ____ for identification
- Do you recognize it?
- How?
- What is it?
- Have you viewed this videotape?
- Does this tape fairly and accurately depict the defendant's condition on the night of his arrest?
- Does the police dept. make such tapes in the regular course of its business?
- Are these tapes ordinarily kept in the regular course of its business?
- AT THIS TIME WE MOVE STATE'S EXHIBIT ____ FOR IDENTIFICATION INTO EVIDENCE AS STATE'S EXHIBIT ____
- PUBLISH TO JURY
- GO THROUGH THE TAPE AND ASK HIM TO EXPLAIN

Closeout Question

- Based on your training and experience, and your observations of the defendant's performance, do you have an opinion as to whether the defendant was under the influence of alcohol or drugs that evening making him too impaired to drive a car?
- What is that opinion?

PUBLISH ALL DOCUMENTS TO JURY.
THANK YOU. NO FURTHER QUESTIONS.

MAINTENANCE OFFICER

WHEN GOING TO TRIAL YOU MUST HAVE THE FOLLOWING DOCUMENTS

- * *REGISTRATION*
- * *ANNUAL INSPECTION*
- * *AGENCY INSPECTION FOR MONTH BEFORE, OF, AND MONTH AFTER*
- * *CERTIFICATES OF ASSURANCE*
- * *BREATH TEST AFFIDAVIT*

Experience / Training

- Officer _____, before we begin, please introduce yourself to the court and the members of the jury.
- How are you currently employed?
- How long have you worked for the _____ police department?
- What prior LEO experience do you have (only ask question if officer has prior LEO experience)?
- What training do you have in maintaining the Intoxilyzer?
 - _____ Police Academy
 - _____ College courses
 - _____ Books read
 - _____ **Intoxilyzer training - Operation and Maintenance**

- What is FDLE?
- What does FDLE do?
- Why does FDLE issue Intoxilyzer permits?
- Do you have a permit to operate AND MAINTAIN the Intoxilyzer 8000?
- What is the significance of the permit?
- What agency issued you the permit?
- How did you qualify to receive the permit?
- Is the permit currently valid?
- If not, were you qualified at the time of the test?

- Are you familiar with Intoxilyzer 8000 Serial Number _____
- Where is this instrument kept?
- Is this in Dade County?
- Are you familiar with the room where the instrument is kept?
- Please describe it.
- Is the area clean? Dry? Dust free? Why is that important?
- Is the instrument secured? How?
- Why?

- Who has access to the instrument?
- Based on your training, how is a result produced?

I AM SHOWING YOU WHAT HAS PREVIOUSLY BEEN MARKED AS STATE'S
COMPOSITE _____ FOR IDENTIFICATION

Registration

- Is the Intoxilyzer ____ registered in the State of Florida? By whom?
- In the composite, is there a document which reflects this Intoxilyzer's registration?
- What is it?
- How do you recognize it?
- Is that the registration for Intoxilyzer _____ ?
- Is it an original or a photocopy?
- Is it a true and exact copy of the original?
- Is there a signature at the bottom of the document?
- Do you recognize it?
- How?
- Who did _____ work for at the time she signed it?
- Is that a state agency?
- Why is the document prepared? (required by FDLE rules incorporated by the Florida statutes governing breath testing)

Maintenance Procedures

Monthly Inspection for Months Before, Of, and After

- How do you maintain the instrument on a monthly basis? Why do you do that?
- Given an estimate on how many times you have inspected Intoxilyzer 8000 instruments?
- Is there a specified procedure to perform an inspection on the Intoxilyzer? [Yes. Procedure outlined in Inspection procedure checklist - FDLE Form 39]
- Without getting into the procedures, what is an Alcohol Reference Solution?
 - [Three premixed solutions of known quantities of alcohol .05g/210L, .08g/210L and .20g/210L of alcohol used to inspect the Intoxilyzer]
- When an inspection on the intoxilyzer is performed, how are the ARS solutions used?
 - A. Place the ARS for each level into the intoxilyzer into the breath simulator
 - B. Heat solutions separately
 - C. Solutions produce a vapor similar to human breath, and the instrument analyzes the vapor and records the result as it would if a person blew into the instrument.
- Are there documents in the composite, which reflect monthly maintenance?
- What are they?
- How do you recognize them?
- The tests referred to in those documents were done on which instrument (serial number _____)?
- Are they originals or photocopies?
- Are they true and accurate copies of the original?
- Are they records or data compilation?

- What are they records of?
- When were the tests done?
- Where they prepared at or near the time the tests were done ?
- Who did the tests?
- Who prepared those forms?
- Are those forms kept in the regular course of business by the _____ police department?
- Are the results of these tests recorded on the maintenance documents in your hand?
- After this testing what must be shown on the maintenance record for the instrument to pass the inspection?
- According to FDLE how often are these inspections performed? [Monthly and Annually]
- Are the results of the inspections recorded? [Yes. On the Departmental Agency inspection reports]

Annual Inspection

- Let me direct your attention to the composite again. Is there a document which references the annual inspection?
- What is it?
- How do you recognize it?
- Is that the annual inspection for Intoxilyzer _____ ?
- When was that inspection done?
- How often is that inspection to be done? [Once every calendar year]
- Is it an original or a photocopy?
- Is it a true and exact copy of the original?
- Is there a signature at the bottom of the document?
- Do you recognize it?
- How?
- Who did _____ work for at the time he signed it?
- Why is the document prepared? {required by FDLE rules incorporated by the Florida statutes governing breath testing)
- What is contained on that document? e.g. Number of tests
- Did the Intoxilyzer _____ pass its annual inspection?
- How is this different from the monthly inspections?

Certificates of Assurance

- Does the composite contain Certificates of Assurance for the Alcohol Reference Solutions?
- What are Certificates of Assurance (COA)?
- Are they originals or photocopies?
- Are they true and exact copies of the originals?
- Is there a signature on these documents?
- Whose signature [Laura Barfield]?
- For who did Laura Barfield for at the time she signed these documents? [FDLE]
- Is this a state agency?
- Do these documents set forth Data compilations of the FDLE?

- Is the FDLE required to report the results contained in this documents? [Yes. FDLE rules require the creation of this document after testing]

MOVE COMPOSITE INTO EVIDENCE

_____ Self authenticating document under 90.902(2)

_____ Hearsay: Public Records Exception 90.803(8)

Results of Inspections – Months Before/Of/After and Annual

- Looking at the Monthly Agency Inspection reports, were the required monthly inspections for the months of _____, _____, and _____ performed using ARS solutions that would produce simulated breath results of .05, .08, .20?
- Looking at the Annual Inspection performed for Year _____, was that inspection conducted using ARS that would produce simulated breath tests of .05, .08, .20?
- What are the lot numbers of ARS that were used for the monthly and annual inspections?
- Were those lots tested by FDLE? [Yes. Pursuant to Rule 11D-8.0035]
- Why are these solutions tested by FDLE? [To make sure that ARS are accurate and reliable]
- Do these COA's refer to the same lot numbers of ARS that were used in the inspection of Intoxilyzer _____ for the month of _____, _____, and _____?
- Do these COA's refer to the same lot numbers of ARS that were used in the annual inspection of Intoxilyzer _____ ?
- Looking at the COA's, were the ARS solutions approved for use by FDLE used to test the instrument in this case?
- Looking at the COA's, were all the ARS solutions approved by the FDLE for accuracy and reliability?
- Looking at the agency inspection for the month (before)_____, was the instrument working properly for month of _____?
- How do you know?
- Looking at the agency inspection for the month (after)_____, was the instrument working properly for month of _____?
- How do you know?
- Looking at the agency inspection for the month (of)_____, was the instrument working properly for month of _____?
- How do you know?
- Were you or any other maintenance officer notified at any point between _____ and _____ that the instrument was not working properly.
- How do you know?
- Is it possible for the instrument to fix itself?
- If the instrument was working properly on _____ and _____, and you were never notified of any possible problems, is there any reason at all to think the instrument was not working properly on _____ ? (date of breath test)

Breath test affidavit

- Officer, I am showing you what has been marked as state's exhibit number _____ for identification. Do you recognize it?
- What is it?
- How do you recognize it?
- Which instrument produced that Breath test affidavit?
- AT THIS TIME, I WOULD LIKE TO ADMIT STATE'S EXHIBIT _____ FOR IDENTIFICATION INTO EVIDENCE AS STATE'S EXHIBIT _____
- Can you please tell us when that Breath test affidavit was printed (Date and Time)?
- Referring to the Agency inspection report, can you please tell us who blew into the instrument?
- Does the intoxilyzer have a mouth alcohol detector?
- How does it work?
- If a person just used mouthwash or took a shot of whiskey, what would the instrument say?
- Looking at the Breath test affidavit, can you tell us whether the instrument indicated any mouth alcohol when the defendant took the test?
- What is the legal BAC level in Florida?
- Referring to the results indicated by the Breath test affidavit, what was the defendant's BAC at the time he blew into the instrument?

THANK YOU. NO FURTHER QUESTIONS.

TRADITIONAL BENDER PREDICATE

In order for the state to introduce breath results, the state must establish **either** that the method used substantially complied with the procedures contained in the Florida Statutes and the relevant FDLE rule **OR** that the result should be admitted under the traditional predicate. *Robertson v. State*, 604 So.2d 783 (Fla. 1992). It is reversible error for the court to deny the state the right to establish the traditional predicate. *State v. Mehl*, 602 So.2d 1383 (Fla. 5th DCA 1992).

In order to establish the traditional predicate, the state must establish:

1. That the test was reliable
2. The test was performed by a qualified operator with the proper equipment and
3. The meaning of the test by Expert Testimony.

State v. Bender 382 So.2d 697, 699 (Fla. 1980).

PRONG 1

TEST PERFORMED BY QUALIFIED OPERATOR

Experience / Training / Background

- Please introduce yourself to the court.
- How are you employed? For how long?
- Do you have any special training regarding the operation & maintenance of Intoxilyzer 5000R?
- Please explain your training.
- What is the FDLE?
- Who is qualified to operate the Intoxilyzer 5000R?
- Do you have a permit to operate the Intoxilyzer?
- How did you get it?
- What is the significance of the permit?
- Do you currently have a valid permit?
- How long have you been conducting breath tests?
- Approximately how many breath tests have you given in your career?

Maintenance Officer Training and Experience

- You mentioned that you were also trained to maintain the Intoxilyzer.
- What's the purpose of training officers to maintain the Intoxilyzer?
- Have you ever trained or given lectures on how to maintain the Intoxilyzer 5000R?
- How often in your career have you conducted maintenance on the int.?
- Have you ever taken the instrument apart and put it back together?
- Are you authorized to do repairs to the Intoxilyzer?
- Have you conducted minor repairs?

- Is the Intoxilyzer 5000R recognized as reliable for measuring BAC in the State of Florida?
- What about nationwide?
- Do you have the capacity to explain how the Intoxilyzer functions?
- Do you have the capacity to explain the meaning of a breath reading?
- How many times have you testified as an expert regarding the Intoxilyzer 5000R?

PRONG 2

TEST PERFORMED WITH THE PROPER EQUIPMENT

What is the Intoxilyzer 5000R and how does it operate?

- Please describe for us how the Intoxilyzer operates.
- -Time
- -Slope
- -Pressure
- -Mouth piece
- -Runs air blank

Deep lung air

- Are you familiar with the term deep lung air sample?
- What is the significance of a deep lung air sample?
- Regarding a deep lung air sample, if a subject blows for 6 seconds versus the same subject who blows 10 or 15 seconds, will the readings be different?
- Why is that?
- When an operator conducts a breath test, is there a certain amount of time required to register a valid breath?
- What is the required time?
- Will a reading where a breath is longer than 6 seconds be a valid sample?
- What about a breath sample less than 6 seconds?
- How many breath samples does the FDLE require from the defendant?
- Why is that?
- What is the .02 compliance requirement?
- What is the purpose of the .02 requirement?
- Is it possible that readings may not be within .02 of each other due to the subject's blowing at different strengths or different levels?
- What does it mean when 2 breath samples are not in .02 of each other?
- What is a low sample volume?
- If a defendant offered a low sample volume, would the Intoxilyzer indicate that?
- How?

Mouth Alcohol and 20-Minute Observation

- You mentioned mouth alcohol earlier, please explain to us what that is?
- So mouth alcohol would make a breath reading inaccurate?
- Then what has the FDLE implemented to protect the accuracy of a subject's reading against mouth alcohol?

- What is the 20-minute observation?
- What's the purpose?
- What if the subject was not observed for 20 minutes prior to offering a breath sample? Does that mean his sample is inaccurate?
- What if the subject was observed for only 12 minutes? Would his results be accurate?
- Is it absolutely necessary to observe the defendant prior to collecting a breath sample in order for the sample to be reliable and accurate?
- Does the Intoxilyzer 5000R have the ability to detect mouth alcohol? (mouth alcohol reader/slope detector)
- How does the mouth alcohol reader work? **OR** What's the slope detector?
- So if a person just used mouthwash or took a shot of whiskey, would the instrument say so?
- If the subject drank alcohol previously prior to blowing and hiccupped, burped or vomited into the Intoxilyzer at the time of the reading would the mouth alcohol reader indicate this?
- So would I be correct in saying that the whole purpose of the 20-minute observation is an additional safeguard against mouth alcohol?

PRONG 3 - TEST IS RELIABLE

Location of Instrument

- Are you familiar with Intoxilyzer 5000R #_____?
- Where is the instrument kept?
- Are you familiar with this area?
- Please describe it?
- Is the area clean?
- Dry?
- Dust free?
- Is the instrument secured?
- Why?
- Who has access to this instrument?
- You mentioned that you've done numerous maintenances on the Intoxilyzer. What requirements have the FDLE implemented to make sure the Intoxilyzer is reliable and functioning properly? (monthly and annual)
- Is there a specific procedure you use in conducting the monthly maintenance?
- What about the yearly maintenance?
- What's the difference between the annual and the monthly maintenance?
- Are the results of these inspections recorded?
- If the instrument fails either a monthly or annual inspection, is it taken off line?
- Is the Intoxilyzer 5000R #_____ registered in the State of Florida?
- Was an annual inspection done in _____, the year the defendant blew into the Intoxilyzer?
- The defendant gave a breath sample in Intoxilyzer_____ on _____. Was a monthly inspection done for the month before the breath sample? Was one done for the month after the defendant's breath sample?

Maintenance Documents and Reliability of the Instrument

Registration

- I'm showing you what has been marked as state's exhibit _____ for identification purposes. Do you recognize it?
- What is it?
- Is that the registration for Intoxilyzer _____.
- Is it an original or a photocopy?
- Is it a true and exact copy?
- Is there a signature at the bottom of the document?
- Do you recognize it?
- How?
- Who did _____ work for at the time he signed it?
- Is that a state agency?
- Why is that document prepared?
- MOVE INTO EVIDENCE

Annual

- Let me direct your attention to the Annual Departmental Inspection you were talking about, I'm showing you what has been marked as State's exhibit _____ for id purposes. Do you recognize it?
- What is it?
- How do you recognize it?
- Is that the inspection for Intoxilyzer _____?
- When was that inspection done?
- Is it an original or a copy?
- Is it a true and exact copy?
- Is there a signature at the bottom of the document?
- Do you recognize it?
- Who did _____ work for at the time he signed it?
- Is that a state agency?
- Why is that document prepared?
- MOVE INTO EVIDENCE

Monthly

- I'm showing you what has been marked as State's Composite Exhibit _____ for Identification purposes only. Do you recognize it?
- What is it?
- How do you recognize it?
- Please take a few moments to examine the exhibit. The tests referred to in those documents were done on which instrument?
- Are they originals or photocopies?
- Are they true and accurate copies?
- Are they records or data compilations?
- What are they records of?
- When were the tests done?

- Were they prepared at or near the time the tests were done?
- Who did the tests?
- Who prepared those forms?
- Are those forms kept in the regular course of business by the Metro Dade police department?
- Are those forms made in the regular course of the Metro Dade police department's business?

MOVE INTO EVIDENCE

Business Record 90.803(6)

- Looking at State's Composite Exhibit _____, was the required monthly inspection done for the months of _____, _____, and _____?
- Was the instrument working properly for those months?
- Were the readings in the inspections within the range required by FDLE?
- What are those required ranges?
- Why are they significant?
- Was the mouth alcohol detector functioning properly?
- Was the instrument registering interferent subtracted?
- If the instrument stopped working correctly at any time between the maintenance dates would you or any other maintenance officer have been notified?
- Were you or any other maintenance officer notified at any point between _____ and _____ that the instrument was not working properly?
- Is it possible for the instrument to fix itself?
- If the instrument was working properly on _____ and _____, and there were no problems indicated during this time period, is there any reason at all to think the instrument was not working properly on _____ (date of breath)?

Evidence Card

- I'm showing you State's exhibit. #1, the result of the defendant's breath on _____, what were his results?
- What do these results indicate to you? (how much alcohol in his system)
- How much alcohol would a man approximately _____ tall and about _____ pounds have to drink in order to give a reading this high?
- Are the two samples within the .02 requirement you talked about earlier?
- Were the samples deep lung air samples?

PRONG 4 - THE MEANING OF THE TEST AS EXPLAINED BY THE WITNESS

20-Minute Bender

- Prior to the defendant giving this breath sample, the defendant was not observed for 20 minutes. Does the breath card indicate that the defendant's results were affected and unreliable?
- Was any mouth alcohol detected at all?
- Is there anything on that breath card that indicates that there was anything wrong with the breath samples and that they are not reliable or accurate?

Clock not Working / Correct time not Recorded by Test Operator

- How does the clock on the Intoxilyzer work in relation to the measurement of the BAC of the defendant?
- Can the Intoxilyzer continue to give valid sample readings even though the clock time may be incorrect?
- Do they have the same power source?
- If the clock is not displaying the correct time, what do the FDLE rules mandate?
- If these rules were not followed, by recording the correct time on the breath card, how would this affect the reliability and accuracy of the breath reading?
- Is there anything on this breath card that I have shown you which would lead you to believe that this defendant's, BAC level is unreliable or inaccurate?

TOXICOLOGIST

Training /Experience

- Please introduce yourself to the members of the jury.
- What is your occupation? (forensic toxicologist)
- What is forensic toxicology?
- What does a forensic toxicologist do?
- What is your educational background?
- What training and experience do you have in the field of forensic toxicology?
- What training and experience do you have that enables you to test urine specimens for the presence of drugs?
- How are you currently employed?
- How long have you been so employed?
- Where were you previously employed? How long?
- How long have you been a forensic toxicologist?
- Do you do both bench testing and supervising?
- What other substances do you test for the presence of drugs?
- How many cases does the laboratory test annually?
- How many urine tests have you run in your career?

IF YOUR WITNESS TEACHES - PRETRY WITNESS

- Have you taught in the field of forensic toxicology?
- Have you published any articles in the field?
- Have you written any articles on the field?
- Are you a member of any Professional Organizations? Please name them.
- How did you become a member of these professional organizations?
- To which forensic toxicology groups do you belong?
- Have you held any offices or positions of responsibility in these organizations?
- Do you attend seminars and conferences held by these professional organizations?
- Have you ever interpreted the results of a urine test in a court of law?
- Have you ever testified in court as an expert in the field of toxicology?
 - ◇ Specifically in the field of testing urine and blood?
 - ◇ Specifically in the affect of controlled substances on the body?
- How many times?
- In which courts have you testified as an expert?
- Were they Civil or Criminal proceedings?
- Have you ever been called by the defense to testify? (pretry first to decide if you want to ask this)

Court cannot “tender” on the record in front of jurors; just go into your expert questions when you have laid foundation and if there is an objection, go sidebar or excuse the jurors so the defense can voir dire the expert. *See Tengbergen v. State*, 9 So.3d 729 (Fla. 4th DCA 2009); *see also Osorio v. State*, 186 So.3d 601 (Fla. 4th DCA 2016).

- How many toxicologists are on staff at the lab?
- How many usually testify in court?
- Why doesn't everyone come to court?

Admitting Results Into Evidence

- Showing you what has previously been marked as State's Exhibit ____ [urine report] for identification, do you recognize it?
- How do you recognize it? [bears his signature]
- Whose urine results does this report contain?

Safeguards for Urine / Chain of Custody

- How is it that you came to test the urine of this defendant?
- In what condition was the urine sample and kit when you received it at the lab? [Sealed]
- Was there any evidence of tampering?
- When the sealed sample was received, was it identified in any way by the lab?
- How was it identified?
- Is the lab a secured environment?
- What security features does the lab maintain?
- Does the lab have limited access?
- Without discussing the results of the testing, what if anything was done with the urine sample when you received it at the lab?
- From the time the seal was broken on the sample until the sample was re-sealed, was the sample continuously in the care, custody and control of your lab?
- How do you know that?
- What do you do with the urine kit after you test it?
- Was there a leftover sample for the defendant to do his own testing? [only ask if known]
- As the lab director, are you responsible for all activities of the lab?
- Do you approve all procedures used to test and report results?
- Do you personally review all data generated that results in a positive report?
- Once you have reviewed the analytical data and approved it, what is the next step in the testing procedure? [a lab report is prepared]
- Was a lab report prepared for the sample of defendant _____ ?

Testing

- What is the testing procedure used to analyze this sample?
- Is this testing procedure accurate and reliable?
- Is this testing procedure generally accepted in the scientific community?
- What is considered the best testing method in forensic urine drug testing? Why is this so?
- Is this the same method used in toxicology labs throughout the nation?
- Was the instrument reading accurately and reliably during the analysis of this sample?
- How do you know?

Business Record Predicate

- Turning your attention back to State's Exhibit ____ for identification, was this document made at or near the time of the test?
- Was it made in the ordinary course of the lab's business?
- Are these reports usually kept in the ordinary course of your business?
- Is it a copy or the original?
- It is a true and accurate copy of the original?

MOVE LAB REPORT INTO EVIDENCE PURSUANT TO BUSINESS RECORD EXCEPTION 90.803

- Showing you what has been marked as State's Exhibit _____ (lab report), did you review all aspects of the testing of this sample before signing the report?
- What were the results of the laboratory analysis of the defendant's urine sample?
- Are you familiar with the drug _____?
- How are you familiar with this drug _____?
- Is it a chemical substance under F.S. 877.111 or a controlled substance under F.S. chapter 893?
- Are controlled substances divided into categories?
- What is the purpose of these categories?
- What signs and symptoms does the drug _____ produce in the body?
- If "normal faculties" are defined as the ability to see, hear, walk, talk, make judgments, drive an automobile, etc. and do the many mental and physical acts of daily life, can the drug _____ impair a person's normal faculties?
- Are you familiar with the term "psychoactive"?
- What does it mean?
- How long would _____ drug be "psychoactive" in a person's system?
- Can you determine how much _____ was in the defendant's urine sample?
- Does that have any impact on whether a person is DUI?
- What is a "cutoff"?
- Why is that important in reporting your test results?
- What level are the University of Miami cutoffs set at?
- Does having a cutoff hurt or help a defendant?

IF HAVE MORE THAN ONE DRUG IN SYSTEM

- What other drugs did the defendant have in his/her system?
- Are you familiar with the term "synergistic" effect?
- What does it mean? [multiplier effect]
- Are you familiar with the term "additive" effect?
- What does it mean?
- Would this combination of drugs have an additive effect?

DRE Program and Results [Pretry Witness]

- Are you familiar with the DRE program?
- Do you believe that 12 step DRE protocol can allow properly trained officers to DETECT what categories of drugs a person has in his/her system?
- Do you believe the DRE protocol can allow a properly trained officer to DETECT what categories of drugs may be impairing a person?
- Have you had an opportunity to review the reports prepared by the police officers in this case regarding the Defendant's arrest for DUI?
- Have you had an opportunity to hear the officer's testimony regarding the defendant's condition at the time of the arrest and during the DRE evaluation?
- Is this behavior consistent with drug impairment?
- Based on your knowledge and experience, can consuming these drugs produce symptoms described by the officers in their testimony and written reports?
- Does the positive urine toxicology report corroborate the signs and symptoms as described in the testimony and written reports of the officers?
- Based on your knowledge, training and experience and your review of the officer's reports and testimony, do you have an opinion as to whether the defendant's normal faculties were impaired at the time of driving?
- What is that opinion?

Poppy Seed Defense

- How much morphine was in the defendant's urine specimen?
- Is it possible for a person to consume poppy seeds, for example, a poppy seed bagel, and test positive for Morphine?
- How many bagels would a person have to consume to test positive for the amount of morphine?

CHEMIST

- Please introduce yourself to the members of the jury.
- How are you employed and by whom?
- How long have you been so employed?
- Could you please describe your education?
- Could you please describe your background and training in analytical chemistry and or forensic toxicology?
- Where do you generally conduct urine and blood testing?
- What is your primary duty at the University of Miami Lab?
- Is this a secured environment?
- What security features does the lab maintain?
- Showing you what has been previously marked as States Exhibit ____ [urine kit] for identification, do you recognize this?
- How do you recognize it?
- What was the condition of State's Exhibit ____ [urine kit] for identification when it was received into the lab? (sealed urine kit in a plastic bag)
- Was there any evidence of tampering?
- When the specimen was received, was it identified in any way by the lab?
- How was it identified?
- What if anything was done with the specimen? [Specimen was removed from secured refrigerator storage, sealed checked and the box is opened. The specimen cup and its seals are checked and the information on the seal is compared with the information on top of the box. A sample of urine is removed for screening purposes. After the screening sample is removed, the original specimen cup is returned to its box and then returned to the refrigerator for storage]
- Did there come a time in which you removed the sample from the refrigerator for testing?
- Without describing the testing procedure or the results of such testing, what if anything, was then done with the sample? (sample was re-sealed and stored in the refrigerator)
- Did there come a time when you removed State's Exhibit ____ (urine kit) for identification from the refrigerator for further testing?
- Was the urine kit in the same condition as when you stored it after testing?
- From the time you broke the seal until the time that you completed your testing, was the sample continuously in your care, custody or control?
- What, if anything, did you do with the urine kit? [re-sealed sample and placed in refrigerator]
- Is the kit in the same or substantially the same condition as it was when you received it in the lab?
- What testing procedure was used to analyze the urine?
- What are your qualifications in regards to this testing?

BLOOD-ARRESTING OFFICER

Experience / Training

- Officer _____, before we begin, please introduce yourself to the court and the members of the jury
- How are you currently employed?
- How long have you worked for the _____ police department?
- What prior LEO experience do you have? (only ask question if officer has prior LEO experience)
- What special training, if any, have you had in the field of detecting and apprehending drivers impaired by alcohol or drugs?

_____ Police Academy

_____ HRS 40-hour course

_____ College courses

_____ Books read

[_____ DRE Course]

[_____ Intoxilyzer training]

Identification

- On _____ date, did you happen to come into contact with someone who later became known to you as _____?
- Did you see that person in the courtroom here today?
- Please point at the person and identify him/her by an article of clothing he/she is wearing.
- LET THE RECORD REFLECT THAT THE WITNESS HAS IDENTIFIED THE DEFENDANT

Venue

- What county did this incident occur in?
- Did everything you are going to testify about occur in Dade County?

Officer Coming onto Scene / APC Issues

- Please relate to the jury how you came into contact with the defendant.
- Was the defendant in the car when you came into contact with him?
- If not, where was he in relation to the car when you came into contact with him?
- Did he have the keys in his possession?
- Was the car registered to him?
- Did he have injuries consistent with driving?
- Did he exert ownership over the car in any way?
- Was there anyone else in the car?
- Was there anyone else injured?
- What was the defendant's condition?
- Was the defendant injured: face, limbs, vomiting, conscious?
- Was there blood on defendant's face?
- Did the defendant require any medical treatment?

- Why?
- Was the defendant taken, or did he go to the hospital? In an ambulance?
- Was a breath test impracticable or impossible?
- Why?
- What was the passenger's condition?
- Was the passenger injured: face, limbs, vomiting, conscious?
- Was there blood on passenger's face?
- Did the passenger require any medical treatment?
- Why?
- Was the passenger taken, or did he go to the hospital? By ambulance?

Consensual Blood Draw

- Did you ask the defendant to submit to a blood test?
- Did he agree?

Forced Blood

- Was anyone injured in the accident?
- How badly?
- How did you know that?
- Did you discuss the nature of the injury with _____ [the victim]?
- What did he/she say?
- Did you discuss injuries with a paramedic / rescue personnel / other officers?
- What did they say?
- Did you believe that someone involved in the accident was seriously or permanently injured [or dead]?

Collecting Blood

- **MARK THE BLOOD SPECIMEN KIT**
- I am showing you what has previously been mark as State's exhibit ____ for identification. Do you recognize it?
- How? (Defendant's name, date, time, drawer's initials, evidence tape)
- What is it?
- What does a blood kit contain?
 - Gray topped tubes which contain anticoagulants
 - Betadine solution swab (non-alcoholic swab so as to not contaminate sample)
 - Needle and vacotainer
- What do you do with the paperwork and vials in the blood kit?
 - Officer fills out all seals and has appropriate parties sign
 - Officer fills out property receipt forms and blood draw request form with the vamp's information (and has the defendant sign the consent form if applicable)
- Did you draw the defendant's blood?
- Who did?
- And who is?

- Where or for whom does this person work?
- Do you know of their medical training?[Only ask if you know answer]
- Did you instruct him to withdraw a blood sample using the contents of the blood kit?
- Did you watch him withdraw the blood?
- Was the blood immediately placed in sealed tubes from the kit?
- Did you put the tubes back in the blood kit?
- Did you seal the entire kit with evidence tape and write identification information on the kit or tape?
- Did you bring the kit to the police property room or other appropriate place? (where)
- What was done with the blood sample after it was collected?
- Was the sample in your sole care, custody and control from the time you took possession of it until the time it left your custody?
- How was it stored?
- Is the blood kit in substantially the same condition as when you last saw it?
- What is different?

THANK YOU. NO FUTHER QUESTIONS.

BLOOD VAMP

- Please introduce yourself to the jury.
- How are you employed?
- For how long have you been employed there?
- What is your occupation?
- How long have you had this occupation?
- Could you please tell the jury your medical training and experience?

If Paramedic

- Did you respond to the scene of an accident at _____ on _____ (date) at _____ (time)?
- At that time did you come into contact with a person who later became known to you as _____?
- Did you draw blood from this person?
- Do you see that person here in court today?
- Please point out that person and identify them for the record by an article of clothing.

LET THE RECORD REFLECT THAT THE WITNESS HAS IDENTIFIED THE DEFENDANT.

If Nurse

- Were you working at the hospital on _____ (date)
- On that date, did you come into contact with a person who later became known to you as _____ (defendant)?
- Did you draw blood from this person?
- Do you see that person here in court today?
- Please point out that person and identify them for the record by an article of clothing.

LET THE RECORD REFLECT THAT THE WITNESS HAS IDENTIFIED THE DEFENDANT

-
- Were you requested by a law enforcement officer to draw blood from that person?
 - What was the procedure to draw the blood?
 - Swab arm with non-alcoholic antiseptic
 - Drew blood
 - Put sample in gray-topped and vacuum-sealed tube
 - What does the tube contain?
 - Tube contains anti-coagulant
 - Why?
 - To preserve the sample and prevent clotting
 - Did Officer _____ watch you draw the blood?
 - What did you do with the blood sample?
 - Do you know the method of storage / transport used?

- I'm showing you what has been marked as State's Exhibit _____ for identification (blood kit). Do you recognize it?
- How? (name of defendant, initials)
- What is it?
- Is in substantially the same condition as when you last saw it?
- What if anything is different?

THANK YOU. NO FURTHER QUESTIONS.

PRACTICE TIP: REFER TO FDLE RULES 11D-8.012 – 8.014 FOR SPECIFICS REGARDING BLOOD COLLECTION.

BLOOD TOXICOLOGIST - TRADITIONAL SCIENTIFIC PREDICATE

(UNDER STATE V. BENDER)

QUALIFY WITNESS AS EXPERT IN BLOOD ALCOHOL TESTING/FORENSIC TOXICOLOGY

PRONG 1

TEST PERFORMED BY QUALIFIED OPERATOR

- Please introduce yourself to the jury.
- How are you employed?
- What is a forensic toxicologist?
- For whom do you work?
- How long have you worked in that position?
- Please describe your educational background and training.
- Describe the training you received in the area of testing blood alcohol content.
- Describe your training testifying in court about blood alcohol content in samples you have tested or supervised testing on.
- Have you ever been qualified as an expert to analyze blood for alcohol content?
- How many times?
- How many times have you conducted tests of blood to determine its alcohol content?
- How often do you conduct tests of blood to determine its alcohol content?
- Are you required to do proficiency testing for blood alcohol testing? (*Pretry witness*)
- What is proficiency testing?
- What is the FDLE?
- Do you have a permit issued by the FDLE which allows you to analyze blood samples for alcoholic content?
- Was it valid on _____ ?
- What are you required to do to get this Permit from the FDLE?
- Have you previously testified as an expert in the area of blood alcohol testing and forensic toxicology? How many times?

PRONG 2

TEST PERFORMED WITH THE PROPER EQUIPMENT

- What type of instrument do you use to test blood samples?
- What is the Gas Chromatograph?
- Can you describe how it works?
- What procedure do you follow when you test a blood sample?
- Do you use any controls during your analysis?
- What controls do you use?
- Why you use controls?
- How do the controls work?

- Is the Gas Chromatograph generally accepted in the scientific community as a reliable method for testing for alcohol content?
- Do other States use the Gas Chromatograph for blood alcohol testing?

PRONG 3 - TEST IS RELIABLE

- On or about _____, did you test a blood sample taken from _____?
- I am showing you what has been marked as State's Exhibit Number _____ for identification purposes. (blood kit and defendant's blood samples) Do you recognize it?
- How?
- Whose blood is this?
- How do you know?
- How did that exhibit come into your possession?
- How was it packaged and marked?
- Was it in a sealed container?
- Was the seal intact?
- Can you describe its condition when you received it? (Came in sealed blood kit)
- Where do you store blood kits prior to testing?
- Were the defendant's blood samples stored in that area?
- Who has access to that area?
- Did you test the defendant's blood sample using the gas chromatograph?
- Was the defendant's blood coagulated when you ran the sample?
- How could you tell?
- What does coagulated mean?
- Why does it matter whether the defendant's blood was coagulated?
- What procedures did you use to ensure that the gas chromatograph results in this case were reliable?
- Was the gas chromatograph working properly?
- How did you know?
- What did you do with the blood sample when you finished?
- From the time you opened the blood kit until the time you tested the samples were the defendant's blood samples in your care custody and control?
- Is State's exhibit number _____ for identification in substantially the same condition as when you finished sealing it?

MOVE BLOOD KIT INTO EVIDENCE

- I'm showing you what has been marked as State's Exhibit Number _____ for identification (lab results). Do you recognize it?
- How?
- What is it?
- Whose blood results does this report contain?
- Who made this report?
- Was it made at or near the time of the test?
- Are these reports made in the usual course of business?
- Is it part of your regular lab practice to make such reports?
- Is this report a copy or the original?

- Is this a true and exact copy of the original?

MOVE LAB REPORT INTO EVIDENCE [BUSINESS RECORD PREDICATE]

- Please tell us the results of the test.
- Do you have an opinion as to whether these blood test results are reliable?
- What is that opinion?
- Why do you have that opinion?

PRONG 4 - THE MEANING OF THE TEST AS EXPLAINED BY THE WITNESS

- Why is there only one blood test result?
- What does _____ (blood test result) mean?
- What does grams of alcohol per 100 milliliters of blood mean (*Pretry witness*)?
- What is the legal limit in the State of Florida for blood alcohol levels?
- Again, what was the defendant's blood alcohol result?

URINE COLLECTION OFFICER

You must establish that the defendant was under arrest prior to the urine collection.

Police Officer

- Please state and spell your name for the record.
- Are you employed?
- What is your occupation?
- How long have you been so employed?
- Please tell the jury about your training and experience in law enforcement.
- I would now like to call your attention to an incident that occurred on _____ (date) at around _____ (time).
- Do you remember that day?
- What were your duties on that date?
- Did you collect a urine sample from the defendant?
- Do you see the defendant you collected a urine sample from here today?
- Could you please identify him/her by an article of clothing?

LET THE RECORD REFLECT THAT THE WITNESS HAS IDENTIFIED THE DEFENDANT.

- Prior to requesting a urine sample from the defendant did you request a breath sample from the defendant also?
- **WHY DID YOU ASK THE DEFENDANT TO SUBMIT TO A BREATH TEST?**
- Where did you collect the urine sample?
- How did you collect the urine sample?
- What provisions did you take to ensure that the defendant was given reasonable privacy in which to provide the sample?
- What did you use (i.e. type of collection kit) to collect the sample?
- What is in that kit?
⇒ If used a genie cup
- What is a genie cup?
- How does it work?
- What mechanisms or safeguards does the genie cup have in order to ensure that tampering does not occur?
- When you received the sample from the defendant, was there a cover on it? [Probably not]
- Who sealed the cup?
- Did you in any way change, alter, or add anything to the sample?
- What did you do with the sample after it was collected? [Sealed the container, filled out the top of the box and sealed the box with evidence tape]
- Did you allow anyone else to change, alter, or add anything to the sample?
- From the time you received the urine sample from the defendant until the time that you turned it into the [property room or another office], was the sample continuously in your care, custody and control?

- What did the urine kit look like when you turned it over to the [MDPD] property room?

DRUG RECOGNITION EXPERT – ABB. VERSION

Background / Training

- Officer _____, before we begin, please introduce yourself to the court and the members of the jury.
- How are you currently employed?
- How long have you worked for the _____ police department?
- What prior LEO experience do you have? (only ask question if officer has prior LEO experience)
- What special training, if any, have you had in the field of detecting and apprehending drivers impaired by alcohol or drugs?

_____ Police Academy

_____ HRS 40-hour course

_____ College courses

_____ Books read

_____ DRE Course

_____ Intoxilyzer training

- Have you ever participated in drinking labs?
- How many times?
- What is the purpose of a drinking lab?
- During these labs, did you have an opportunity to administer field sobriety exercises to people and then compare your opinions regarding their level of impairment to other officers and the subject's actual breath alcohol level?
- Were you able to accurately and reliably discern their level of alcohol impairment?
- Have you participated in any labs where subjects were provided illegal or illicit drugs?
- What not? [That would be illegal]
- Approximately how many times have you stopped possibly impaired drivers?
- Do you arrest everyone whom you initially suspect of being impaired?
- Why not?
- How many DUI arrests have you made? [Make sure you know the answer to this question ahead of time]
- When you arrest someone who you believe is impaired, do you arrest for any one thing? [No]
- What do base your arrest on? [Totality of the circumstances]

DRE Testimony

- Are you familiar with the national Drug Recognition Evaluation Program?
- What is it?
- What is the National Highway Traffic and Safety Administration?
- How is NHTSA involved with the DRE program? [sponsors the program]
- How many states participate in the DRE program? Countries? [pretry]
- Are you a certified DRE?
- Who certified you?
- Do they issue you a certification card? [You may introduce a copy if you have one]
- When were you certified as a DRE?

- How does a police officer become certified as a DRE? [80 hours of training]
- Please explain to the jury what is involved in that 80 hour training period. [FSE's, pharmacology, human physiology, written exam, perform and draft DRE reports in the field under instructor supervision]
- What procedures do DRE's use to determine whether or not someone is under the influence of drugs? [administer a drug influence exam]
- What is a drug influence exam? [FSE's, medical history (blood pressure, body temperature, pupil size, reaction to light), etc.]
- Is this evaluation standardized?
- Is the DRE protocol generally accepted to be an accurate and reliable means of identifying drug influence and impairment? [Yes: US Dept. Of Transportation, ACLU, American Bar Association, International Association of Chiefs of Police]
- How many people have you evaluated for drug influence and impairment?
- Approximately how many times have you determined that a DUI suspect was under the influence of drugs?
- Have you ever confirmed your opinions by taking urine samples?
- Based on your training and experience, can you accurately and reliably determine whether someone is under the influence of drugs?
- Based on your training and experience, can you accurately and reliably identify the particular drug category causing a person's impairment? [Yes]
- How many drug categories are there? [7]
- How are drugs grouped? [Drugs are grouped according to common or shared effects, known as signs or symptoms]
- What are the seven categories? [CNS depressants, CNS Stimulants, Hallucinogens, PCP, Inhalants, Narcotic Analgesics, Cannabis]

DRE Protocol

- Please explain to the jury how a drug influence evaluation is performed?
 - ◊ Breath Test
 - ◊ Interview of Arresting Officer
 - ◊ Preliminary Exam and First Pulse
 - ◊ Eye Exam
 - ◊ Divided Attention Psychophysical Tests
 - ◊ Vital Signs and Second Pulse
 - ◊ Dark Room Examination
 - ◊ Examination of Muscle Tone
 - ◊ Check for Injection Sites and Third Pulse
 - ◊ Suspect's Statements and Other Observations
 - ◊ Opinions of Evaluator
 - ◊ Toxicological Examination

1. BAC

- Officer, please describe the first component of the evaluation.
- Was the defendant given a breath test in this case?

- Are you familiar with the defendant's breath test results?
- How?
- What experience do you have in recognizing a person who is under the influence of alcohol?
- Based on your training was the breath reading consistent with the level of impairment displayed by the defendant?
- If you suspect drugs in an individual why is a breath reading necessary?

2. Interview of Arresting Officer

- Please tell us about the second phase of the evaluation.
- Did you interview the arresting officer?
- What did he tell you? [You will probably get an objection for hearsay]
- Were his observations consistent with the defendant's breath reading?

3. Preliminary Exam and First Pulse

- Please describe the third phase. [ask series of standardized questions, look at speech, coordination, breath, face]
- What is the purpose of the preliminary exam?
- Did you conduct the preliminary exam on the defendant in this case?
- Did you ask the defendant a series of questions?
- Please tell us what you asked the defendant and what answers he gave.
 - ◊ What time did he indicate it was?
 - ◊ When did he last sleep?
 - ◊ How long did he sleep?
 - ◊ Was he sick or injured?
 - ◊ Did he indicate that he is a diabetic?
 - ◊ An epileptic?
 - ◊ That he suffered from allergies?
 - ◊ That he was taking insulin?
 - ◊ Whether he had any physical defects?
 - ◊ Whether he was under the care of a doctor?
 - ◊ Taking any medication or drugs?
- What observations did you make of the defendant?
 - ◊ Speech?
 - ◊ Eyes?
 - ◊ Face?
 - ◊ Breath?
 - ◊ Balance?
- Based on your training and experience, what did the results of the preliminary exam mean to you?
- Did you rule out the possibility that the defendant was suffering from a medical problem?

4. Eye Examination

- Please explain to the jury what the fourth phase of the evaluation is.
- HGN

- ◊ What is HGN?
- ◊ How is HGN performed?
- ◊ Did you perform HGN on the defendant?
- ◊ Who established HGN?
- ◊ Are you qualified to perform HGN?
- ◊ How many times have you conducted HGN?
- ◊ Do you keep logs? [Make sure officer has logs]
- ◊ What things do you look for in the subject's eyes when HGN is being performed?
- _____ Cannot smoothly follow moving object. What is a lack of smooth pursuit?
- _____ Distinct nystagmus at Maximum deviation. How long do you hold his eye at the outer corner? (4 seconds)
- _____ Onset occurs before 45 degrees. What does it mean if onset is before 45 degrees?
- ◊ What is Tharp's equation? [Make sure officer knows answer]
- ◊ What causes someone's eyes to behave in this way? [pretry]
- ◊ Can HGN occur naturally?
- ◊ Could you compare the eye action of an impaired person's HGN to any other every day occurrence so that the jury may better understand the concept of HGN [compare HGN to a windshield wiper on a dry windshield - the jerking motion of the wiper]
- ◊ Did you perform this exercise on the defendant?
- ◊ Which eye did you do first?
- ◊ How did the defendant's eyes react when you performed this field sobriety exercise?
- ◊ Based on your training and experience with HGN, what did the defendant's performance on the exercise mean to you?
- VGN
 - ◊ What is the second eye exam you conducted?
 - ◊ What is VGN?
 - ◊ How is it performed?
 - ◊ Did you perform VGN on the defendant?
 - ◊ What did you observe?
 - ◊ Based on your training and experience, what did this performance indicate to you?
 - ◊ Is the presence of VGN specific to certain drug categories? What about HGN?
- Lack of Convergence [Convergence Exam]
 - ◊ What is the third exam you performed?
 - ◊ What is the convergence test?
 - ◊ How is it performed?
 - ◊ Did you perform this test on the defendant?
 - ◊ What did you observe?
 - ◊ Based on your training and experience, what did this indicate to you?
 - ◊ Is LOC naturally occurring in a percentage of the population?

5. Divided Attention Psycho-physical Tests

- Please describe the fifth component of the Drug Influence Evaluation. [FSE's]
- Are these exercises designed to test divided attention skills?
- What are divided attention skills?
- What do divided attention skills have to do with operating a car?
- Are these exercises used only in drug evaluations? [No]
- What are the FSE's that you performed on the defendant? [Romberg Balance, Walk and Turn, One Leg Stand, Finger to Nose]
- ASK ALL OF FOLLOWING QUESTIONS FOR EACH OF THE FSE'S PERFORMED

- ⇒ What was the [first] exercise you administered to the defendant?
- ⇒ Did you instruct the defendant on how to properly perform this exercise?
- ⇒ Did you demonstrate this exercise? [Make sure this was done]
- ⇒ Would you please explain and demonstrate this exercise as you did for the defendant on that day in question?
- ⇒ Did you fully explain and demonstrate the exercise to the defendant?
- ⇒ Did they defendant appear to understand you?
- ⇒ Did he appear to have any injuries that would prevent him from performing this exercise?
- ⇒ What do DRE's look for when the defendant is performing this exercise?

[Below are the qualifications for each exercise]

⇒ Romberg Balance

- * Body Tremors
- * Eyelid Tremors
- * Sways (distance and direction)
- * Muscle rigidity / flaccidity
- * Statements
- * Speech Patterns
- * Number of seconds estimated as 30

⇒ Walk and Turn

- * Keeps balance during the instruction phase
- * Starts too soon
- * Steps off line
- * Raises arms while walking
- * Misses heel to toe
- * Stops walking
- * Wrong numbers of steps
- * Improper turn
- * Body Tremors
- * Muscle rigidity / flaccidity
- * Statements
- * Speech patterns

⇒ One leg Stand

- * Raises arms
- * Sway

- * Hopping
- * Puts foot down
- * Standing still and straight during instructions
- * Body tremors
- * Muscle rigidity / flaccidity
- * Statements
- * Speech Patterns
- ⇒ Finger to Nose
 - * Fingertip or pad of finger used to touch nose
 - * Defendant misses nose and hits other parts of face
 - * Sway
 - * Body Tremors
 - * Eyelid tremors
 - * Abnormal muscle tone
 - * Statements
 - * Speech patterns
- ⇒ Did the defendant perform this exercise?
- ⇒ How did the defendant perform?
- ⇒ What clues in the exercise did the defendant miss?
- ⇒ How many clues are necessary to indicate the defendant could not perform the exercise?
- ⇒ Do you allow for mistakes?
- ⇒ What signs of impairment did the defendant exhibit?
- ⇒ Based on your training and experience, what did this indicate to you

6. Vital Signs and Second Pulse

- Please describe the sixth phase of the examination.
- What is the [first] vital sign that DRE's check?

A. Pulse

- ◆ H
How do DRE's check a subject's pulse rate?
- ◆ H
How do DRE's know that they are feeling an artery rather than a vein?
- ◆ D
Do you have medical training to administer this evaluation as part of the DRE training? (pretry)
- ◆ H
How often do DRE's take a subject's pulse?
- ◆ I
Is there a normal range in which most people's pulse rates fall?
- ◆ W
What is the normal range? [60-90 beats per minute]
- ◆ I
Is this a medically acceptable range of normal?

- ◆ id you take the defendant's pulse? D
- ◆ ow many times? [3] H
- ◆ id you use the same procedure you just described? D
- ◆ hat were the results? W
- ◆ Based upon our training and experience, what if anything did this indicate to you? B

B. Blood Pressure

- ◆ What is blood pressure?
- ◆ What instrument do DRE's use to measure blood pressure?
- ◆ What training do DRE's have in the use of this instrument?
- ◆ How do DRE's use this device?
- ◆ How do you know when the blood begins to spurt within the vein, as opposed to when it is flowing? [Use a stethoscope]
- ◆ Is there a normal range in which most people's systolic and diastolic blood pressures fall?
- ◆ What is the normal range for a person's systolic blood pressure? [120 to 140 mmHg]
- ◆ What is the Normal range for a person's diastolic blood pressure? [70-90 mmHg]
- ◆ Is this a medically accepted range?
- ◆ Did you take the defendant's blood pressure?
- ◆ What were the results?
- ◆ Based upon your training and experience, what if anything did this indicate to you?

C. Temperature

- ◆ How do you determine the subject's body temperature?
- ◆ Do DRE's rely on a range of normal in to which most people's body temperature falls?
- ◆ What is the normal range? [97.6-99.6]
- ◆ Is that a medically accepted range of normal?
- ◆ Did you take the defendant's body temperature?
- ◆ What were the result's?
- ◆ Based on your training and experience, what if anything did this indicate to you?

7. Dark Room Examination

- Please describe the 7th component of the drug influence evaluation. [Eye examinations and nasal and oral examinations]
- *Eye Examinations:*
- How do DRE's determine the size of a person's pupils? [eye gauge]
- How does an eye gauge work?
- Under what lighting conditions do DRE's examine people's eyes?
 - ⇒ Room Light
 - ⇒ Darkness
 - ⇒ Indirect Light
 - ⇒ Direct Light
 - ⇒ ASK THE NEXT GROUP OF QUESTIONS FOR ALL LIGHTING CONDITIONS
 - * How do DRE's perform the {room light} portion of this test?
 - * Did you perform the {room light} exam?
 - * What did you observe?
 - * Was there anything distinctive about the size of the defendant's pupils?
 - * Based on your training and experience, what if anything did this indicate to you?
- *Nasal and Oral Examinations*
- When do you check the nasal and oral cavities? [During the dark room examination]
- What kinds of things do DRE's look for in the nose and mouth?
- What do those things indicate?
- Did you examine the nasal and oral cavities?
- What did you observe?
- Based on your training and experience, what if anything did this signify?

8. Examination of Muscle Tone

- Please describe the 8th component of the DRE evaluation.
- How do DRE's examine muscle tone?
- Did you examine the subject's muscle tone in this case?
- What did you observe?
- Based on your training and experience, what did this indicate to you?

9. Check for Injection Sites and Third Pulse

- What is the 9th component of the DRE evaluation? Please describe it.
- How do DRE's check for injection sites?
- What is the DRE procedure to inspect for injection sites? [run hands over arms, neck and feel for bumps]
- How do DRE's determine whether the bumps were caused by a needle or other things? [using a light and a magnifying lens]
- Did you examine the defendant for injection sites?
- What did you observe?
- Based on your training and experience, what did this indicate to you?

SKIP THIS SECTION IF THE DEFENDANT DID NOT WAIVE MIRANDA. MAKE SURE TO INSTRUCT OFFICER NOT TO MENTION THIS SECTION!! ALSO, DO

NOT COUNT THE NUMBER OF STEPS IN YOUR QUESTIONS IF YOU ARE GOING TO BE SKIPPING THIS. IT WILL BE OBVIOUS.

10. Suspect's Statements and Other Observations

- Please describe the 10th phase of the DRE exam.
- Did you read the defendant Miranda?
- Did you tell the defendant he has the right to remain silent?
- Did you tell the defendant that anything he said could be used against him in a court of law?
- Did you tell him that he had the right to an attorney?
- Did you explain to him that if he could not afford a lawyer, one would be appointed for him at no cost?
- Did he voluntarily, knowingly and intelligently waive his rights?
- Did you ask the defendant a series of questions?
- I'm going to go through the questions you asked. Please tell the jury his response to each question.
 - ⇒ Have you eaten today?
 - ⇒ When?
 - ⇒ What have you been drinking?
 - ⇒ How much?
 - ⇒ Time of last drink?
 - ⇒ Time now? What was the actual time?
 - ⇒ When did you last sleep?
 - ⇒ How long?
 - ⇒ What medicine or drug have you been using?
 - ⇒ How much?
 - ⇒ Time of use?
 - ⇒ Where were the drugs used?
 - ⇒ Were you driving? [Do not ask question if defendant answered "No" - self-serving hearsay]
 - ⇒ Do you feel that you are under the influence? [Do not ask question if defendant answered "No" - self-serving hearsay]

11. Opinions of Evaluator

- Please describe the 11th component of the DRE evaluation.
- Did you form an opinion in this case?
- What is that opinion?
- What are you basing that opinion on?
- IF THERE IS A CONFIRMATION IN THE TOX REPORT ASK THE FOLLOWING QUESTIONS [PRETRY OFFICER]
 - ⇒ Officer, are you familiar with the drug ____?
 - ⇒ Is that drug within the drug category that you believe was under the influence of?
 - ⇒ How long does it take for that drug to have an effect on the body once the defendant has ingested it?
 - ⇒ How long will the effects of that drug last?

12. Toxicological Examination

- Please describe the 12th component of the DRE evaluation.
- Did you request a urine sample?
- Did you inform the defendant of the implied consent law?
- What is the implied consent law?
- Did the defendant provide a urine sample?
- No
 - ⇒ Why not?
- Yes
 - ⇒ Please describe how you obtained the sample.
 - ⇒ Did you witness the taking of the sample?
 - ⇒ What did you do with the urine sample after you obtained it?
 - ⇒ What happened to the urine sample after you logged it in?
 - ⇒ How did you complete your evaluation of the defendant?

DUI/DRE PREDICATES: EXTENDED VERSION

I. EXPERIENCE/TRAINING/GENERAL BACKGROUND

Officer _____, before we discuss today's case, I'd like to take a few minutes to introduce you to the court and the members of the jury.

1. Please introduce yourself.
2. How are you employed?
3. How long have you worked for the _____ police department?
4. What prior LEO experience do you have?
(Determine if he or she has any before asking the question)
5. What special training and/or experiences, if any, have you had in the field of detecting and apprehending drivers impaired by alcohol or drugs?
____ Police Academy
____ College courses/formal degrees
____ HRS/FDLE forty (40) hour course
____ Books read
____ Narcotics training
____ Drug Alcohol Recognition Technician (D.A.R.T.) Course
____ DRE Course/certification
____ DRE Instructor Course
____ Specialized conferences
____ Published articles/classes taught (by the DRE)
6. Have you ever participated in a "drinking lab"?
7. How many times?
8. What is the purpose of a drinking lab?

9. During the lab(s), did you have an opportunity to administer field sobriety tests to people and then compare your opinions regarding their levels of impairment to their actual breath alcohol levels?
10. Were you able to accurately and reliably discern their level of alcohol impairment?
11. Have you participated in any labs where subjects were provided illegal or illicit drugs?
12. Why not?

*It would be illegal and dangerous.

13. Approximately how many people have you stopped for DUI?
14. Did you arrest everyone you stopped whom you initially suspected was DUI'?

*No. (Check with the witness prior to asking this question).

15. Why not?

*If a person passes the field sobriety tests, I do not arrest him or her.

16. How many times have you administered the field sobriety tests?
17. How many people have you arrested for DUI?
18. After you arrested them, did you have an opportunity to give them breath tests?
19. Did you compare your opinions regarding the arrestees' levels of impairment to their actual breath alcohol levels?
20. Based on that comparison, could you tell us whether you were able to make good arrest decisions using the field sobriety tests?

II. THE INSTANT CASE

21. Calling your attention to _____ (date of arrest). Were you working on that date?
22. Where were you at approximately _____?
23. On that date and at that time, did you perform a Drug Influence Evaluation on someone who later became known to you as _____?

24. Do you see that person in the courtroom today?
25. Please point at that person and identify him/her by a unique article of clothing that he/she is wearing.

LET THE RECORD REFLECT THAT OFFICER _____ HAS IDENTIFIED THE DEFENDANT, _____.

III. DRE Testimony

26. Are you familiar with the national Drug Evaluation and Classification Program, also referred to as the DRE Program?

*Yes.

27. What is the DRE Program?

*The national Drug Evaluation and Classification Program, is a NHTSA sponsored program which allows specially trained police officers, called Drug Recognition Experts (Evaluators), or DREs, to accurately and reliably determine whether a person is under the influence of drugs, and, if so, what category of drugs.

28. What is NHTSA?

*NHTSA is the National Highway Traffic Safety Administration. It is a federal agency which operates under the auspices of the United States Department of Transportation.

29. How many states participate in the DRE Program?

*Thirty-eight (38), plus the District of Columbia.

30. How does NHTSA provide for the education and training of DREs?

*NHTSA sponsors DRE schools around the country. NHTSA also sponsors the publication of DRE manuals and other materials.

31. Are you a certified DRE?

*Yes.

32. Who certified you?

*The International Association of Chiefs of Police (IACP).

33. Did they issue you a certification card?

*Yes.

34. I'm showing you what has been marked as State's exhibit _____ for identification. Do you recognize this exhibit?

(WARNING: Do NOT introduce the officer's original card into evidence. If you do, the officer may NOT get the card back [though most judges would grant a motion to substitute a copy for the original]).

*Yes

35. Can you tell us what it is?

*Yes. It is my certification card.

36. Is it an original or a photocopy?

*Photocopy.

37. Is it a true and exact copy of the original?

AT THIS TIME, THE STATE MOVES STATE'S EXHIBIT _____ FOR IDENTIFICATION INTO EVIDENCE AS STATE'S EXHIBIT _____

38. When were you certified as a DRE?

39. How does a police officer achieve certification as a DRE?

*Officers seeking DRE certification, also called DRE candidates, must attend eighty (80) hours of classroom DRE training. The classroom training includes field sobriety testing and basic human physiology and drug pharmacology. After completion of the eighty (80) hour course, DRE candidates must take and pass a written certification examination.

The candidates that pass the written test must participate in and complete an internship period where they conduct actual drug evaluations under the tutelage of a certified DRE instructor. During this period, DRE candidates must conduct and draft a minimum of fifteen (15) drug influence evaluations and must be corroborated by laboratory analysis at least seventy-five percent (75%) of the time. They must also correctly identify four (4) different categories of drugs as confirmed by laboratory analysis. Finally, they must be recommended for certification by at least two (2) certified DRE instructors. DRE candidates who comply with all of these requirements may be certified as DREs by the International Associations of Chiefs of Police (IACP).

40. What procedures do DREs use to determine whether or not someone is under the influence of drugs?

*We administer a drug influence evaluation.

41. What is a drug influence evaluation?

*The drug influence evaluation incorporates the DRE protocol. The drug influence evaluation is a standardized and systematic process for identifying drug influence and impairment. It utilizes a variety of readily observable signs and symptoms that medically are accepted as reliable indicators of drug influence. The examination includes a brief medical history, pulse, blood pressure, body temperature, pupil size and reaction to light. The process allows a trained Drug Recognition Expert to determine whether or not someone is under the influence of a drug or drugs and, if so, what category of drugs. The process is systematic because it is based on a complete set of observable signs and symptoms that are known to be reliable indicators of drug impairment. The process is standardized because it generally is conducted in the exact same way by every DRE for every subject.

42. Is the DRE Protocol generally accepted to be an accurate and reliable means of identifying drug influence and impairment?

*Yes. In fact, that national DRE Program is recognized by the United States Department of Transportation, the ACLU, the American Bar Association and the International Association of Chiefs of Police. The 1988 Surgeon General's Workshop on Drunk Driving Panel on Law Enforcement also endorsed the program. Miami-Dade County's DRE Program is endorsed by the Dade County Medical Association, the Broward County Medical Association and the Broward County Psychiatric Association.

43. How many people have you evaluated for drug influence and impairment?

44. Approximately how many times have you determined that a DUI suspect was under the influence of drugs?

45. Have you ever confirmed your opinions by taking urine samples?

46. Based on your training and experience, can you accurately and reliably determine whether someone is under the influence of drugs?

47. Based on your training and experience, assuming a person is impaired, can you accurately and reliably identify the particular drug category causing a person's impairment?

*Yes.

48. How many drug categories are there?

*Seven (7).

49. How are the drugs grouped?

*Drugs are grouped according to common or shared effects, known as signs and symptoms.

50. What are the seven (7) drug categories?

*They are:

- 1) Central Nervous System (CNS) Depressants
- 2) CNS Stimulants
- 3) Hallucinogens
- 4) Phencyclidine (or PCP)
- 5) Inhalants
- 6) Narcotic Analgesics
- 7) Cannabinoids

IV. THE DRE PROTOCOL

51. Can you briefly describe how a drug influence evaluation is performed?

*There are twelve (12) stages in a DRE evaluation. They are:

- 1) Breath Alcohol Test
- 2) Interview of the Arresting Officer
- 3) Preliminary Examination and First Pulse
- 4) Eye Examination
- 5) Divided Attention Psychophysical Tests
- 6) Vital Signs and Second Pulse
- 7) Dark Room Examination
- 8) Examination for Muscle Tone
- 9) Check for Injection Sites and Third Pulse
- 10) Suspect's Statements and Other Observations

- 11) Opinions of Evaluator
- 12) Toxicological Examination

A. Breath Alcohol Test

52. Officer, please describe the first component of the DRE evaluation?

*During the first phase, an officer administers a breath test to the suspect for the purpose of determining the suspect's breath alcohol level (BrAC). Based on the suspect's BrAC, we can determine whether alcohol may be a contributing cause or the sole cause of the suspect's observable impairment.

53. Was the defendant given a breath test in this particular case?

54. Are you familiar with the defendant's breath test results?

*Yes, I am.

55. How are you familiar with his/her results?

*I reviewed the breath alcohol test results evidence card that the instrument generated when the defendant blew into it.

56. What experience, if any, do you have in recognizing alcohol-induced impairment?

57. What did the breath alcohol test results indicate to you as to whether or not alcohol was the sole cause or a contributing factor to the defendant's impairment?

*The test indicated that alcohol was/was not a sole/contributing factor.

B. Interview of the Arresting Officer(s)

58. Please tell us about the second phase of the DRE examination.

*During the second phase, we discuss the circumstances of the arrest with the arresting officer(s). We ask the arresting officer(s) about the suspect's behavior, appearance, and driving pattern. We also ask the arresting officer(s) whether the suspect made any statements and whether the arresting officer(s) found any other relevant evidence like a small pipe or a baggie.

59. Did you interview the arresting officer in this case?

*Yes.

60. Did the arresting officer tell you how the defendant behaved and what, if anything, he said?

*Yes.

(IF THE JUDGE ALLOWS YOU TO DO SO, ASK THE DRE WHAT, IF ANYTHING, THE DEFENDANT'S ACTIONS OR STATEMENTS MEANT TO HIM)

C. Preliminary Examination and First Pulse

61. Please describe the third phase of the DRE evaluation.

*During the third phase, we ask the suspect a series of standard questions relating to the suspect's health and recent ingestion of food, alcohol and drugs. We make observations regarding the suspect's attitude, coordination, speech, breath and face. We also determine whether the suspect's pupils are equal in size and whether the suspect's eyes can track equally and follow a moving stimulus. Finally, we look for HGN and take the suspect's pulse for the first of three times.

62. What are the purposes of the preliminary examination?

*There are two (2) main purposes of the preliminary examination. First, we determine whether the suspect may be suffering from an injury or other condition unrelated to drugs. If we believe that this is a possibility, he must seek medical help immediately. If we believe that the suspect's condition is drug related, we continue with the evaluation. Second, we obtain information and make observations which assist us in coming to a conclusion later on.

63. Did you conduct a preliminary examination in this case?

*Yes.

64. Did you ask the defendant some questions?

*Yes.

65. Please tell us what questions you asked the defendant and what answers the defendant gave.

NOTE: You may need to refresh the witness' recollection by having the witness refer to the drug influence evaluation form. If such is the case, use the following predicate:

- a. Would the Drug Influence Evaluation refresh your recollection?

b. I'm showing you what is marked as State's exhibit _____ for identification.

c. Do you recognize it?

d. What is it?

*The Drug Influence Evaluation I filled out in this case.

e. Is your memory refreshed?

f. Please tell us what questions you asked and the answers the defendant gave.

*What time is it now?

Defendant's answer: _____

*When did you last sleep?

Defendant's answer: _____

*How long did you sleep?

Defendant's answer: _____

*Are you sick or injured?

Defendant's answer: _____

(NOTE: The questions relating to medical conditions and treatments are important because they allow us to exclude alternate medical explanations for the impairment)

*Are you diabetic?

Defendant's answer: _____

*Are you epileptic?

Defendant's answer: _____

*Do you suffer from allergies?

Defendant's answer: _____

*Do you take insulin?

Defendant's answer: _____

*Do you have any physical defects?

Defendant's answer: _____

*Are you under the care of a doctor or dentist?

Defendant's answer: _____

*Are you taking any medication or drugs?

Defendant's answer: _____

66. What observations, if any, did you make of the defendant during the preliminary examination?

_____ Speech

_____ Eyes

_____ Face

_____ Breath

_____ Balance

67. Based upon your training and experience, what did the results of your preliminary examination mean to you?

D. Eye Examination

68. Please describe the fourth phase of the DRE evaluation.

*During the fourth phase, we examine the suspect for horizontal gaze nystagmus, vertical gaze nystagmus, and a lack of convergence.

1. HGN

69. What are the first things DREs look for in the eyes?

*Horizontal gaze nystagmus, also referred to as HGN.

70. How do you look for HGN?

*There are three (3) parts to this. During the first part, we examine the subject's smooth pursuit. We examine the subject's smooth pursuit by moving an object, usually a pen or small flashlight, from a point near the person's nose outwards towards the side of his face so that the eyeball follows it from one side of the eye to the other.

71. What do you mean by “smooth pursuit?”

*Normally, a person’s eyes smoothly track moving objects just as a car’s windshield wipers move across a wet windshield. However, if a person is under the influence of depressants, including alcohol, inhalants or phencyclidine, his eyes may exhibit a jerking or tugging motion to the center as his eyes track a moving object. The motion is similar to windshield wipers moving across a dry windshield.

72. Why is HGN important?

*It’s important because HGN is an impairment of the eyes’ ability to track. In the context of driving, it means that a person may have difficulty observing and tracking other cars or pedestrians.

73. Can you please demonstrate how you check for smooth pursuit when conducting HGN?

*We hold a pen or other stimulus twelve (12) to fifteen (15) inches from the subject’s face. We move the pen from side to side to see and observe whether or not the subject is able to smoothly follow the moving object.

74. Did you check for smooth pursuit with the defendant?

75. Did you check for smooth pursuit in the defendant’s left eye?

76. What observations, if any, did you make?

77. Did you check for smooth pursuit in the defendant’s right eye?

78. What observations did you make?

79. What is the second part of HGN?

*During the second part of HGN, we examine the subject’s eye for distinct jerkiness at maximum deviation. We hold the pen steady and look to see if the subject’s eye jerks at that position. Jerking at this deviation is considered an indicator if it is “distinct”.

80. How long do DREs have a subject hold his eye at the outer corner?

*About four (4) seconds.

81. Did you perform this second part on the defendant’s left eye?

82. What observations did you make?

83. Did you perform this second part on the defendant's right eye?

84. What did you observe?

85. What is the third part of the HGNt?

*During the third part of HGN, we determine if and at what angle from the nose the eye begins to jerk.

86. How is this third part performed?

*Again, we place the pen twelve (12) to fifteen (15) inches from the subject's face and slowly move the pen toward the outer corner of his eye. We always start with the left eye. If we see any jerking, we stop moving the pen and hold it steady. We make sure that the eye is really jerking. If it is not, we start moving the pen further towards the outer portion of the eye and again look for jerking. If the eye jerks, we locate the point at which the jerking begins and estimate the angle of onset.

87. Why do you estimate the angle of onset?

*Research demonstrates that a person's breath or blood alcohol level can be estimated to within 0.02 by subtracting the angle of onset from fifty (50).

88. Did you perform this third part on the defendant's left eye?

89. What did you observe?

90. Based upon your training and experience, and your familiarity with HGN related research, what, if anything, does this indicate to you?

91. Did you perform this this third part on the defendant's right eye?

92. What did you observe?

93. Based upon your training and experience, and your familiarity with HGN related research, what, if anything, did the defendant's performance on the HGN test indicate to you?

2. VGN Test

94. What is the second thing you look for in the eyes?

*Vertical gaze nystagmus, or VGN.

95. How do DREs look for VGN?

*We ask the subject to look at a stimulus and move the stimulus straight up. We check to see whether the subject's eyes jerk while gazing upward.

96. Did you check for VGN in this case?

97. What did you observe?

98. Based upon your training and experience, what did this indicate to you?

3. Convergence Test

99. What is the third thing that DREs look for in the eyes?

*Convergence

100. How do you check for convergence?

*We hold a pen or other stimulus about fifteen (15) inches from the subject's face and point the tip of the pen toward the subject's nose. We ask the subject to hold his head still and follow the pen with his eyes. We then move the pen in a slow circle. Once we determine the subject is following the pen, we bring it in slowly and steadily towards the bridge of the subject's nose. We look to see if the subject's eyes converge. A subject's eyes are said to lack convergence if his eyes are unable to converge on the stimulus.

101. Did you check for convergence in this case?

102. What did you observe?

103. Based upon your training and experience, what did this indicate to you?

E. Divided Attention Psychophysical Tests

104. Please describe the fifth component of the drug influence evaluation.

*During the fifth phase of the evaluation, we administer four (4) psychophysical exercises: the Romberg Balance; the Walk and Turn; the One Leg Stand; and the Finger to Nose. We can accurately determine whether a suspect is impaired by administering these exercises.

105. Are these exercises divided attention exercises?

*Yes.

106. What is a divided attention exercise?

*A divided attention exercise is a means to assess a subject's ability to perform a mental and a physical task at the same time. For example, on the One Leg Stand, we ask the subject to count out loud while holding one foot six inches off of the ground.

107. Why are divided attention exercises important?

*Driving requires people to perform mental and physical tasks simultaneously all of the time. For example, when a driver approaches a yellow light he needs to consider distance, speed and the traffic at the same time, or shortly afterwards. He may need to remove his foot from the accelerator and begin to brake. Thus, examinations that test a driver's divided attention skills tell us a lot about the driver's ability to safely operate a motor vehicle.

108. Are these psychophysical exercises used exclusively by DREs?

*No. DUI officers traditionally rely on these same tests to identify alcohol influence and impairment. In addition, medical doctors have relied upon these or similar tests for decades.

1. Romberg Balance Exercise

109. What is the first psychophysical test that DREs administer?

*The Romberg Balance Exercise.

110. Do DREs instruct each subject how to properly perform the exercise?

*Yes.

111. Do DREs demonstrate the exercise to each subject?

*Yes.

112. Would you please explain and demonstrate the exercise for the court in the same manner that DREs do for each subject?

*We ask the subject to stand straight with his feet together and his arms down at his sides. We tell the subject to remain in this position until we tell him to begin. We then ask the subject whether he understands this instruction. This is important because an inability to follow instructions is indicative of impairment.

We then tell the subject that when we say to begin, he should tilt his head back slightly and close his eyes. We tell the subject that once he closes his eyes

and tilts his head back, he is not to open his eyes until he thinks that thirty (30) seconds have elapsed. We then ask the subject if he understood the directions and tell the subject to begin.

113. What do DREs look for when administering this exercise?

*We look for:

- _____ Body tremors
- _____ Eyelid tremors
- _____ Sway (distance and direction)
- _____ Muscle rigidity/flaccidity
- _____ Statements or sounds
- _____ The number of seconds that the subject estimates as 30.

114. Did you administer the Romberg Balance exercise in this case?

115. Did you fully explain and demonstrate the exercise before asking the defendant to perform?

116. In the same manner you described and demonstrated earlier?

117. Did the defendant perform this exercise?

118. How did the defendant perform?

119. Based upon your training and experience, what did this indicate to you?

2. Walk and Turn Exercise

120. What is the second psychophysical exercise that DREs administer?

*The Walk and Turn exercise.

121. Do DREs instruct each subject how to properly perform the exercise?

*Yes.

122. Do DREs demonstrate this exercise to each subject?

*Yes.

123. Can you please explain and demonstrate the exercise for the court in the same manner that DREs do for each subject?

*We tell the subject to place his right foot on the line ahead of his left foot with the heel of the right foot against the toe of the left foot. We tell the subject to put his arms down against his sides and keep them there throughout the test.

We then make sure that the subject understands these directions. We instruct the subject that when we tell him to begin, he is to take nine (9) heel to toe steps up the line. We tell him that, on the ninth step, he is to leave his front foot on the line and turn around, taking a series of small steps with the other foot. We instruct him to take nine (9) heel to toe steps back after he completes the turn. We instruct him to watch his feet as he walks and to count off the steps out loud from one to nine. Finally, we tell him that once he begins, he is to keep walking until the test is completed. We then ask him if he understands the instructions.

124. What do DREs look for when administering the Walk and Turn exercise?

*We look for:

- _____ Keeps balance during the instruction phase
- _____ Starts too soon
- _____ Steps off of the line
- _____ Raises arms while walking
- _____ Misses heel to toe
- _____ Stops walking
- _____ Wrong number of steps
- _____ Improper turn
- _____ Body tremors
- _____ Muscle rigidity/flaccidity
- _____ Statements/sounds

125. Did you administer the Walk and Turn exercise in this case?
126. Did you fully explain and demonstrate the exercise before asking the defendant to perform?
127. In the same manner you described and demonstrated earlier?
128. Did the defendant perform this exercise?

129. How did the defendant perform?
130. Based upon your training and experience, what did this indicate to you?

3. One Leg Stand

131. What is the third psychophysical exercise that DREs administer?

*The One Leg Stand.

132. Do DREs instruct each subject how to properly perform the exercise?

*Yes.

133. Do DREs demonstrate this exercise to each subject?

*Yes.

134. Can you please explain and demonstrate the exercise for the court in the same manner that DREs do for each subject?

*We ask the subject to stand straight with his feet together and his arms down at his sides. We tell him to maintain this position while we give him the instructions and emphasize that he is not to start the test until we instruct him to begin. We ask him if he understands.

We then tell him that when we tell him to begin, he is to raise his right foot in a stiff leg manner and hold the foot about six (6) inches off of the ground, with the toes pointed outward. We instruct him to keep his arms at his sides and keep looking directly at his foot while counting out thirty (30) seconds as follows: one thousand and one, one thousand and two, etcetera. We then ask him once again if he understands. Finally, we tell the subject to begin. After he completes the test while raising his right leg, we then ask him to perform the test again while raising his left leg.

135. What do DREs look for when administering the One Leg Stand?

*We look for:

- _____ Raises arms
- _____ Sway
- _____ Hopping
- _____ Puts foot down
- _____ Standing still and straight during instructions
- _____ Body tremors

_____ Muscle rigidity/flaccidity
_____ Statements/sounds

- 136. Did you administer the One Leg Stand in this case?
- 137. Did you fully explain and demonstrate the exercise before asking the defendant to perform?
- 138. In the same manner you described and demonstrated earlier?
- 139. Did the defendant perform the One Leg Stand?
- 140. How did the defendant perform?
- 141. Based upon your training and experience, what did this indicate to you?

4. Finger to Nose Exercise

- 142. What is the fourth psychophysical exercise that DREs administer?

*The Finger to Nose exercise.

- 143. Do DREs instruct each subject how to properly perform the exercise?

*Yes.

- 144. Do DREs demonstrate this exercise to each subject?

*Yes.

- 145. Can you please explain and demonstrate the exercise for the court in the same manner that DREs do for each subject?

*We ask the subject to place his feet together and stand straight. We then tell him to put his arms by his sides and close his hands. We instruct him to extend his index fingers and to remain in that position until we tell him to begin. We then tell the subject that when we tell him to begin he is to tilt his head slightly back and close his eyes.

We instruct the subject that when we tell him to begin, he is to bring the tip of his index finger up to the tip of his nose. We further tell him that as soon as he touches the tip of his nose, he is to return his arm to his side immediately. We tell the subject that we will call out "left" or "right." If we call out "right," he is to bring his right hand index finger forward to his nose; when we tell him "left," he is to move the left hand index finger to his nose. We then ask the subject if he understands the

instructions. We then instruct the subject to tilt his head back and close his eyes and to keep them closed until we tell him to open them. We then call out “left ... right ... left ... right ... right ... left.”

146. What do DREs look for when administering the Finger to Nose exercise?

*We look for:

- _____ Fingertips touch nose or other parts of face
- _____ Sway
- _____ Body tremors
- _____ Eyelid tremors
- _____ Abnormal muscle tone
- _____ Statements/sounds

147. Did you administer the Finger to Nose exercise in this case?

148. Did you fully explain and demonstrate the exercise before asking the defendant to perform?

149. In the same manner you described and demonstrated earlier?

150. Did the defendant perform this exercise?

151. How did the defendant perform?

152. Based upon your training and experience, what did this indicate to you?

E. Vital Signs and Second Pulse

153. Please describe the sixth phase of the DRE examination.

*During the sixth phase, we take the suspect’s blood pressure, temperature and pulse. Some drug categories may elevate the vital signs. Others may lower them. Vital signs thus provide considerable evidence of the presence and influence of a variety of drugs.

1. Pulse

154. What is the first vital sign that DREs check?

*The subject’s pulse rate.

155. How do DREs check a subject’s pulse rate?

*We check the pulse by placing our fingers on the subject's skin next to an artery. We press down slightly to feel the artery expand as the blood surges through. Each surge is a pulse. We count the pulses that occur in thirty (30) seconds and multiply by two (2) to give us the pulse rate in beats per minute.

156. How do DREs know that they are feeling an artery rather than a vein?

*Because you can't feel the surge or pulse in a vein.

157. How often do DREs take a subject's pulse?

*Three (3) times. We take it during the preliminary examination, we take it following the Finger to Nose Test and we take it again during the vital signs examination.

158. Is there a normal range in which most peoples' pulse rates fall?

*Yes.

159. What is the normal range?

*From sixty (60) and ninety (90) beats per minute.

160. Is this a medically acceptable range of normal?

*Yes.

161. Did you take the defendant's pulse?

*Yes.

162. How many times?

*Three (3).

163. Did you use the same procedure you just described?

164. What were the results?

165. Based upon your training and experience, what did this indicate to you?

2. Blood Pressure

166. What is the next vital sign that you checked?

*Blood pressure.

167. What is blood pressure?

*Blood pressure is the force that the circulating blood exerts on the walls of the arteries.

168. What do DREs use to measure a person's blood pressure?

*An instrument called a sphygmomanometer.

169. What training, if any, do DREs have in the use of this instrument?

*We are trained how to use the instrument during the classroom instruction phases of DRE Pre-School and School.

170. How do DREs use this device?

*We wrap a special cuff that is attached to the device around the subject's arm. We apply a stethoscope to the subject's brachial artery pulse point and inflate the blood pressure cuff with air. As we pump the air in, the cuff squeezes the subject's arm. When the pressure is high enough, the cuff squeezes the artery completely shut so that no blood flows through it.

We then slowly release the air in the cuff until we can hear the blood spurting through the artery when the subject's heart contracts. The point at which we can first hear the blood spurting is the systolic level and the pressure that this occurs is called the systolic blood pressure.

We continue to release the air from the cuff until it drops down to the point where the blood flows continuously through the artery. This level is called the diastolic level and the pressure reading at this point is called the diastolic blood pressure.

171. How do DREs know when the blood started to spurt, as opposed to when it was flowing?

*We listen to the spurting blood using the stethoscope. When there is no blood flowing, we can't hear anything through the stethoscope. When we release the air from the cuff, we start hearing a spurting sound when the blood starts to spurt. As we continue allowing the air to escape, the blood surges become steadily longer. When we reach the diastolic pressure, the blood flows steadily and the sounds cease.

172. Is there a normal range in which most peoples' systolic and diastolic blood pressures fall?

*Yes.

173. What is the normal range for a person's systolic blood pressure?

*From 120 to 140 mmHg.

174. What is the normal range for a person's diastolic blood pressure?

*From 70 to 90 mmHg.

175. Are these medically accepted ranges of normal?

*Yes.

176. Did you take the defendant's blood pressure?

*Yes.

177. Using the same procedure you just described?

178. What were the results?

179. Based upon your training and experience, what did this indicate to you?

3. Temperature

180. What is the next vital sign that you checked?

*Body temperature.

181. How do you determine a subject's body temperature?

*We measure body temperature with a thermometer.

182. Do DREs rely on a range of normal in which most peoples' body temperature falls?

*Yes.

183. What is that range?

*Between 97.6 and 99.6 degrees.

184. Is that a medically accepted range of normal?

*Yes.

185. Did you take the defendant's body temperature?

*Yes.

186. Using the same procedure you described earlier?

187. What were the results?

188. Based upon your training and experience, what did this indicate to you?

F. Dark Room Examinations

189. Please describe the seventh component of the drug influence evaluation.

*During the seventh phase of the evaluation, we estimate the size of the subject's pupils under four (4) different lighting conditions to determine whether the subject's pupils are dilated, constricted, or normal. Some drugs increase pupil size. Others may decrease pupil size. We also check the eyes' reaction to light. Certain drugs may slow the eyes' reaction to light.

Finally, we examine the suspect's nasal and oral cavities for signs of ingestion.

1. Eye Examinations

190. How do DREs determine the size of a suspect's pupils?

*We estimate pupil size with an eye gauge.

MARK AND INTRODUCE THE EYE GAUGE

191. How does the eye gauge work?

*The eye gauge has a series of dark circles. The diameters of the circles range from 1.0 mm to 9.0 mm, in half mm increments. We hold the eye gauge along side the subject's eye and move the gauge up or down until we identify the circle closest in size to the subject's pupil.

192. Under what lighting conditions do DREs examine a person's eyes?

*We examine each subject's eyes under four (4) different lighting conditions: room light, near total darkness, indirect light, and direct light.

a. Room Light

193. How do DREs perform the room light portion of this test?

*We simply estimate the size of the subject's pupils in room light.

- 194. Did you perform the room light portion of the test in this case?
- 195. Using the same procedure you just described?
- 196. What did you observe?
- 197. Based upon your training and experience, what did this indicate to you?

b. Darkness

- 198. How do DREs perform the near total darkness portion of the evaluation?

*We take the subject into a room that is almost completely dark. We then wait 90 seconds to allow the subject's eyes to adapt to the dark. We then examine the subject's eyes with a penlight. We cover the tip of the penlight with his finger so that only a reddish glow emerges. We move the glowing tip of the light toward the subject's left eye and estimate it. We then repeat the process on the right eye.

- 199. Did you perform the near total darkness portion of the test in this case?
- 200. Using the same procedure you just described?
- 201. What did you observe?
- 202. Based upon your training and experience, what did this indicate to you?

c. Indirect Light

- 203. How do DREs perform the indirect light portion of the test?

*We shine a light across the subject's eye so that the light just barely eliminates the shadow from the ridge of his nose. We make sure that the light does not shine directly into the subject's eye, but rather, across it. We then determine the size of the subject's pupil. We do this for each eye.

- 204. Did you perform the indirect light portion of the test in this case?
- 205. Using the same procedure you just described?
- 206. What did you observe?
- 207. Based upon your training and experience, what did this indicate to you?

d. Direct Light

208. How do DREs perform the direct light portion of the test?

*We shine a penlight into the subject's left eye and estimate the pupil. We then repeat the test on the right eye.

209. Did you perform the direct light portion of the test in this case?

210. Using the same procedure you just described?

211. What did you observe?

212. Based upon your training and experience, what did this indicate to you?

2. Nasal and Oral Examination

213. You stated earlier that DREs also check each subject's nasal and oral cavities during the dark room examination. What do you look for?

*We look for signs that the subject has been using drugs.

214. What kinds of things do DREs look for?

*We examine the tongue to see if the taste buds are raised. We check to see if the tongue is coated and what color it is. We look for residue in the teeth, gums and nose. We look for nasal irritation and septal perforation.

Different categories of drugs have different effects. For example, certain kinds of drugs will have a distinct odor. Others may cause the nose to run. The existence or absence of any of these signs is helpful in determining what category of drugs may be causing a subject's impairment.

215. Did you examine the defendant's nasal and oral cavities?

216. What did you observe?

217. Based upon your training and experience, what did this signify to you?

G. Examination for Muscle Tone

218. Please describe the eighth component of the DRE evaluation.

*During the eighth phase, we examine the subject's muscle tone. Certain categories of drugs may cause the muscles to become rigid. Other categories may cause the muscles to become very loose and flaccid.

219. How do DREs examine the subject's muscle tone?

*We examine the subject's arms, legs and neck visually and by touch.

220. Did you examine the defendant's muscle tone?

221. Using the same procedure you just described?

222. What did you observe?

223. Based upon your training and experience, what did this indicate to you?

H. Check for Injection Sites and Third Pulse

224. What is the ninth component of the DRE evaluation?

*During the ninth phase of the evaluation, we examine the suspect for injection sites. Injection sites may indicate the recent or patterned use of certain types of drugs. We also take the suspect's pulse for the third and final time.

225. How do DREs examine a subject for injection sites?

*We check the subject's arms and neck. We look for needles marks.

226. Specifically, what procedure do DREs use?

*We run our hands over the subject's arms and necks and feel for bumps because bumps may indicate needle marks. Once we locate a possible injection site, we verify it by using a lighted magnifying glass to see if the bump is from a needle.

227. How do DREs determine whether bumps were caused by a needle or other things?

*By using a light and a magnifying lens.

228. Did you examine the defendant for injection sites?

229. What did you observe?

230. Based upon your training and experience, what did this indicate to you?

I. Suspect's Statements and Other Observations

231. Please describe the tenth component of the drug influence evaluation.

(WARNING: Skip to Section J, Opinions of the Evaluator, if the defendant did not waive Miranda)

*During the tenth phase, we read Miranda, if we have not done so previously, and ask the suspect a series of questions. We also confirm our prior observations.

- 232. Did you read the defendant his Miranda rights?
- 233. Did you tell the defendant that he has a right to remain silent?
- 234. Did you tell the defendant that anything he said could be used against him in court?
- 235. Did you tell him that he has a right to an attorney?
- 236. Did you explain to him that if he could not afford a lawyer, one would be appointed for him at no cost?
- 237. Did you ask him whether or not he understood these rights?
- 238. What did he say?
- 239. Did he voluntarily, knowingly, and intelligently waive these rights?
- 240. Did you ask the defendant a series of questions?

*Yes.

- 241. Please tell us what questions you asked the defendant, and what answers the defendant gave.

(NOTE: If the DRE is unable to remember the questions and answers, you should refresh his memory as described under Section C, Preliminary Examination)

*Have you eaten today?

Defendant's answer: _____

*When?

Defendant's answer: _____

*What have you been drinking?

Defendant's answer: _____

*How much?

Defendant's answer: _____

*Time of last drink?

Defendant's answer: _____

*Time now?

Defendant's answer: _____

(ASK THE OFFICER WHAT THE ACTUAL TIME WAS)

*When did you last sleep?

Defendant's answer: _____

*How long?

Defendant's answer: _____

*Were you driving?

(THIS QUESTION SHOULD NOT BE ASKED IF THE DEFENDANT SAID NO. IF THE DEFENDANT SAID "NO", THE PROSECUTOR SHOULD EXCLUDE THE DEFENDANT'S ANSWER PRETRIAL ON THE BASIS THAT IT IS SELF-SERVING EXCULPATORY HEARSAY)

Defendant's answer: _____

*Do you feel that you are under the influence?

(THIS QUESTION SHOULD NOT BE ASKED IF THE DEFENDANT SAID NO. IF THE DEFENDANT SAID "NO", THE PROSECUTOR SHOULD EXCLUDE THE DEFENDANT'S ANSWER PRETRIAL ON THE BASIS THAT IT IS SELF-SERVING EXCULPATORY HEARSAY)

Defendant's answer: _____

*What medicine or drug have you been using?

Defendant's answer: _____

*How much?

Defendant's answer: _____

*Time of use?

Defendant's answer: _____

*Where were the drugs used?

Defendant's answer: _____

J. Opinions of the Evaluator

242. Please describe the eleventh component of the DRE examination.

*During the eleventh phase, we form an opinion, based on the totality of the evaluation, as to whether the suspect is impaired. If we determine that the suspect is impaired, we indicate what category or categories of drugs may explain the suspect's impairment.

243. Did you form an opinion in this case?

244. What is that opinion?

245. What are you basing that opinion on?

(IF THERE IS A POSITIVE TOXICOLOGICAL RESULT, OR THE ARRESTING OFFICER FOUND A PARTICULAR DRUG ON THE DEFENDANT OR THERE IS CIRCUMSTANTIAL EVIDENCE AS TO WHICH DRUG THE DEFENDANT CONSUMED, THE PROSECUTOR SHOULD ASK THE FOLLOWING QUESTIONS. IF NOT, THE PROSECUTOR SHOULD PROCEED TO SECTION K, TOXICOLOGICAL EXAMINATION)

246. Officer, are you familiar with the drug _____?

*Yes.

247. Is that drug within the category of drugs that you believe was influencing the defendant?

NOTE: Pre-try the witness on the following two questions:

248. How long does it take for that drug to have an effect on an individual, once he has taken it into his body?

249. How long will the effects of that drug last?

K. Toxicological Examination

250. Please describe the twelfth component of the DRE evaluation.

*During the twelfth phase, we request a urine sample from each suspect. We then send the sample to the toxicology lab for analysis.

251. Did you request a urine sample in this case?

252. Did you inform the defendant that, if he refused, he would lose his license for twelve (12) months for a first refusal and eighteen (18) months for a second or subsequent refusal?

AFTER July 1, 2002:

Did you inform the defendant that if he previously refused to take a blood, breath or urine test, and refused once again, that he would be committing a misdemeanor?

253. Did you obtain a urine sample?

(IF NO, ASK THE OFFICER WHY NOT? IF YES, PROCEED TO THE NEXT QUESTION)

254. Please describe how you obtained the sample?

*I brought the defendant into a bathroom. I asked him to urinate into a container which we use to collect urine samples.

255. Did you witness the defendant provide the sample?

256. What did you do with the urine sample after you obtained it?

257. What happened to the urine sample after you logged it in?

258. Did this complete your evaluation of the defendant?

NOTES:

1. There are numerous cases supporting the admissibility of DRE testimony and evidence. See State v. Baity, 140 Wash.2d 1, 991 P.2d 1151 (Wash. 2000); State v. Sampson, 6 P.3d 543 (Or. App. 2000); United States v. Everett, 972 F.Supp. 1313 (U.S.D.C. Nev. 1997); Williams v. State, 710 So. 2d 24 (Fla. 3d DCA 1998); State v. Klawitter, et al., No. 92065882 et seq. (Minn. Cty. Ct. 1993); State v. Johnson and Rodriguez, Nos. 90056865 and 90035883 (Ariz. City Ct. Nov. 2, 1990), rev. denied, Dayton Johnson, et al. v. Honorable Rita Jett, (real party in interest, City of Tucson) 90056865 et seq.; CV-91-0488-SA (Ariz. May 7, 1992); People v. Quinn, 153 Misc.2d 139, 580 N.Y.S.2d 818 (N.Y.D.C. 1991); People v. Hernandez, No. 92M181 (Colo. Cty. Ct. Aug. 14, 1992). Cf State v. Squire, No. 892099008 (Md. Cir. Ct. 1992). For a good summary of the case law, see Sandler, D., Expert and Opinion Testimony of Law Enforcement Officers Regarding the Identification of Drug Impaired Drivers, 23 U. Hawaii LR 151 (Winter 2000).
2. Prosecutors should consider filing a Motion to Compel the Defendant to Submit to a Pre-trial (or In Trial) Abbreviated DRE Examination so that the DRE can compare the defendant's performance while impaired to the defendant's performance while sober. Most courts in most states will compel the defendant to submit to the non-testimonial portion of the examination. See e.g. Macias v. State, 515 So. 2d 206 (Fla. 1987) ("Fifth Amendment rights of a defendant charged with driving under the influence were not violated when trial court required her, in presence of jury, to perform sobriety test in order to permit arresting officer to make comparison between in-court test performance and test performance at time of arrest"). There are risks associated with this. First, the defendant can easily control his or her performance of the psychomotor tests. Second, the defendant may be under the influence of drugs at the time of the pre-trial evaluation. Accordingly, if a prosecutor wants the DRE to conduct an evaluation of the defendant while the defendant is not under the influence of alcohol or drugs, I recommend: (1) the DRE limit the examination to the portions of the evaluation the defendant cannot easily control; (2) the DRE conduct the examination several weeks before trial and collect urine and breath samples to confirm the defendant's sobriety

URINE COLLECTION OFFICER

Note: In Florida, the defendant must be under arrest before urine can be taken in a DUI case.

1. Did you collect a urine sample from (defendant)?
2. Do you see _____ (defendant) in court here today?
3. Could you please identify him/her by describing a unique article of clothing that he/she is wearing?
4. WHY DID YOU ASK THE DEFENDANT TO SUBMIT TO A URINE TEST?
5. Where did you collect the urine sample?
6. How did you collect the urine sample? (Did you use a standard urine collection kit?)
7. What provisions did you take to ensure that the defendant was given reasonable privacy in which to provide the sample?
8. Did you in any way change, alter, or add anything to the sample?
9. What did you do with the sample after it was collected? (Sealed the container, filled out the top of the box and sealed the box with evidence tape.)
10. Did you allow anyone else to change, alter, or add anything to the sample?
11. From the time that you received the urine sample from the Defendant until the time that you turned it into the (property room), was the sample continuously in your care, custody and control?
12. In what condition was the urine kit when you turned it over to the (Metro-Dade Property Room)?