IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

MARY JOYCE ROGERS,

Respondent.

_____/

Case No.: 81,727
1st DCA Case No.: 91-854

PETITIONER'S BRIEF ON JURISDICTION

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Preliminary Statement

Petitioner, the State of Florida, the prosecuting authority in the trial court and appellee below, will be referred to in this brief as the state. Respondent, MARY JOYCE ROGERS, the defendant in the trial court and appellant below, will be referred to in this brief as respondent. References to the appendix will be noted by the symbol "A," followed by the appropriate page number(s) in parentheses.

STATEMENT OF THE CASE AND FACTS

The state seeks review of the First District's decision in Rogers v. State, 18 Fla. L. Weekly D930 (Fla. 1st DCA Apr. 8, 1993).

Respondent was convicted of the first degree murder of her boyfriend (A1 at 1). At trial, respondent claimed self defense, and in this regard, sought to introduce the testimony of Dr. Harry Krop on the subject of battered woman's syndrome (A1 at 2). The trial court excluded the testimony of Dr. Krop "'because the evidence proffered is insufficient for this court to find that the state of the art or scientific knowledge pertaining to Battered Woman Syndrome permits a reasonable opinion to be given by an expert.'" (A1 at 2). The First District concluded that this exclusion constituted error, held as a matter of law that battered woman's syndrome is now generally acceptable in the relevant scientific community, and reversed and remanded this case for a new trial (A1 at 2).

In reaching this conclusion, the First District noted its Hawthorne v. State, 408 So. 2d 801 (Fla. 1st DCA 1982), decision, wherein that court

> first confronted the question of the admissibility of expert testimony regarding the battered woman's syndrome. We gave qualified approval to the use of such evidence, and explained that, in

> addition to the usual showing required for admission of expert testimony, a party offering expert testimony relating to the syndrome would be required to satisfy the trial judge that the state of the art or scientific knowledge is sufficiently developed to permit a reasonable opinion to be given by the expert.[1] Id. at 805 & 806.
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> ---
>
> [1] Compare this requirement for admission with the usual requirement for admission of novel scientific evidence that the scientific principle or principles upon which the testimony is based must be "'sufficiently established to have gained general scientific acceptance in the particular field in which it belongs,'" and must have "'attained sufficient scientific and psychological accuracy . . . [to be] capable of definite and certain interpretation.'" Stokes v. State, 548 So. 2d 188, 193 (Fla. 1989) (quoting Frye v. United States, 293 F.2d 1013, 1014 & 1026 (D.C. Cir. 1923)).

(A1 at 2).

The state moved for rehearing on several grounds, which the First District denied. See (A2 & A3). The state then timely filed its notice to invoke this Court's discretionary jurisdiction, and pursuant to City of Miami v. Arostegui, 18 Fla. L. Weekly D978 (Fla. 1st DCA Apr. 12, 1993), moved the First District to stay issuance of the mandate. See (A4). This jurisdictional brief follows.

STATEMENT OF JURISDICTION

The Supreme Court of Florida has jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. **Fla. Const.** art. V, §3(b)(3); **Fla. R. App. P.** 9.030(a)(2)(A)(iv).

SUMMARY OF THE ARGUMENT

The instant decision directly and expressly conflicts with Glendening v. State, 536 So. 2d 212 (Fla. 1988), Kruse v. State, 483 So. 2d 1383 (Fla. 4th DCA 1986), and Andrews v. State, 533 So. 2d 841 (Fla. 5th DCA 1988), by holding that the Frye v. United States, 293 F.2d 1013 (D.C. Cir. 1923), test for the admissibility of expert testimony applies to battered woman's syndrome. Glendening, Kruse and Andrews espouse the relevancy test derived from Florida's evidence code regarding the admissibility of expert testimony concerning sexual abuse, post traumatic stress syndrome, and DNA evidence, respectively. For this reason, this Court should exercise its discretionary jurisdiction.

ARGUMENT

Issue

WHETHER THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

The decision of the First District in the present case directly and expressly conflicts with decisions from this court and other district courts of appeal, namely: Glendening v. State, 536 So. 2d 212 (Fla. 1988); Kruse v. State, 483 So. 2d 1383 (Fla. 4th DCA 1986); and Andrews v. State, 533 So. 2d 841 (Fla. 5th DCA 1988). This conflict arises from the holding of the First District that evidence of battered woman's syndrome must be subjected to the admissibility test enunciated in Frye v. United States, 293 F.2d 1013 (D.C. Cir. 1923). Glendening, Kruse, and Andrews have held that the relevancy test gleaned from Florida's evidence code applies regarding the admissibility of expert testimony concerning sexual abuse, post traumatic stress syndrome, and DNA evidence, respectively.

In Glendening, a coordinator for the child protection team, recognized as an expert in the area of interviewing children concerning sexual abuse, testified that she had reached an opinion within a reasonable degree of professional certainty that the child had been sexually abused. In holding that this testimony was correctly

admitted into evidence, this Court cited to **Fla. Stat. §§** 90.403 & 90.702 (1985), and noted that Florida's evidence code sets forth four requirements for the admission of expert testimony: "(1) the opinion evidence must help the trier of fact; (2) the witness must be qualified as an expert; (3) the opinion must be capable of being applied to the evidence at trial; and (4) the probative value of the opinion must not be substantially outweighed by the danger of unfair prejudice." 536 So. 2d at 220.

In Kruse, an expert in child and adolescent psychiatry testified that the victim was suffering from post traumatic stress syndrome. In holding that this testimony was correctly admitted into evidence, the Fourth District cited to **Fla. Stat. §§** 90.401, 90.402, 90.403, & 90.702 (1983) in concluding:

> With some qualification, we believe the relevancy approach set out in the evidence code is the appropriate standard for determining the admissibility of expert testimony on child sexual abuse. The statutory relevancy standard also comports with the holdings of the Florida Supreme Court in the area of expert testimony. The court has stated that while trial courts have broad discretion in determining the range of subjects on which an expert may testify, such testimony should usually be received only where the disputed issue for which the evidence is offered, is beyond the ordinary understanding of the jury. This view is consistent with the first requirement of section 90.702, that the

> opinion evidence be helpful to the trier of fact, as well as the provisions of section 90.403, that the danger of prejudice may outweigh the value of the evidence.

483 So. 2d at 1385 (citation omitted).

In Andrews, the Fifth District exhaustively reviewed Florida case law and statutes to conclude that the relevancy test "should be followed in Florida." 533 So. 2d at 847. Specifically, the court reviewed Brown v. State, 426 So. 2d 76 (Fla. 1st DCA 1983), in which Judge Ervin concluded that it was unclear whether Frye had been accepted by the Florida courts. Ervin's "review of Kaminski v. State, 63 So. 2d 339 (Fla. 1952), Coppolino v. State, 233 So. 2d 68 (Fla. 2d DCA 1968), appeal dismissed, 234 So. 2d 120 (Fla. 1969), cert. denied, 399 U.S. 927 . . . (1970), and Jent v. State, 408 So. 2d 1024 (Fla. 1981) led him to conclude that the Frye test had not been adopted." 533 So. 2d at 844. The Andrews court also referenced Bundy v. State, 455 So. 2d 330 (Fla. 1984) [Bundy I], and Bundy v. State, 471 So. 2d 9 (Fla. 1985) [Bundy II], observing that, in Bundy I, this Court had never referenced Frye, and in Bundy II, this Court never specifically stated that it was adopting Frye. 533 So. 2d at 844-45. Finally, the Andrews court concluded:

> This "relevancy approach" suggested by the First District in Brown and adopted by the Fourth District in Kruse, has been referred to as the preferred

> approach and was substantially adopted by the federal Third Circuit in United States v. Downing, 753 F.2d 1224 (3d Cir. 1985). This approach recognizes relevancy as the linchpin of admissibility, while at the same time ensuring that only reliable scientific evidence will be admitted, and seems preferable to the "general acceptance" approach of Frye which is predicated on a "nose counting," Downing, 753 F.2d at 1238, and may result in the exclusion of reliable evidence. We believe this approach to be the one which should be followed in Florida.

533 So. 2d at 846-47 (footnotes omitted).

In the instant case, however, the First District concluded that an expert's testimony concerning the battered woman's syndrome must pass the Frye test, not the relevancy test. In so holding, the First District has created express and direct conflict with the cases referenced above. This Court should exercise its jurisdiction in this case not only to alleviate the conflict, but to rule dispositively on the question of whether Frye or the relevancy test controls the admission of expert testimony in Florida.[1] See, e.g., Stokes v. State, 548 So. 2d 188 (Fla. 1989).

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[1] The central importance of applying the relevancy, rather than the Frye, test is illustrated by the facts of this case. The victim was a "boyfriend" known by respondent for about two weeks and with whom respondent had stayed for two days before his death; the only evidence of abuse was respondent's testimony that the victim slapped her once four days before his death and slapped her once one day before his death. The First District's ready acceptance of so-called battered woman's syndrome evidence in a case such as this, where it defined battered woman's syndrome as "a

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Court to exercise its discretionary jurisdiction in this matter.

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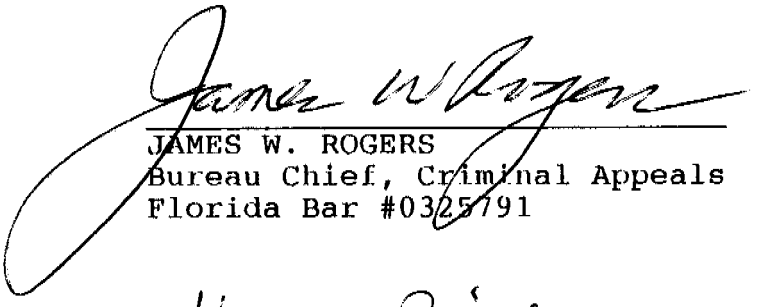
series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives" (A1 at 2; emphasis supplied), turns the concept of relevance on its head. Thus, the First District's additional holding that testimony by respondent's mother that respondent had been abused by her father and other boyfriends should have been admitted is particularly telling.

In determining whether to exercise its discretionary jurisdiction, this Court also should consider the pending nature of State v. Hickson, case number 79,222, which involves numerous questions about the battered spouse syndrome. This Court will recall the state's position in Hickson that evidence of battered woman's syndrome is nothing more than a subterfuge for self defense, which is admissible with or without expert testimony, when relevant. Because the instant opinion from the First District affects the admissibility of this syndrome evidence as a matter of law, it appears eminently prudent for this Court to exercise jurisdiction in this case so as to resolve both cases consistently on this important point of law.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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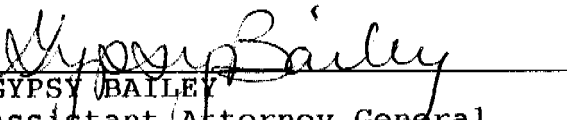

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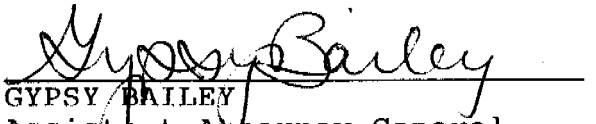
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to GWENDOLYN SPIVEY, ESQ., Post Office Box 14494, Tallahassee, Florida 32317; and JOSEPH E. SMITH, Assistant State Attorney, Post Office Box 477, Bronson, Florida 32621, this ~~13th~~ 17th day of May, 1993.



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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

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v.

MARY JOYCE ROGERS,

Respondent.

_____/

Case No.:
1st DCA Case No.: 91-854

APPENDIX

be[illegible] obtained through legal representation. We reverse.

[illegible]n 440.34(2), Florida Statutes, provides:

> [illegible]warding a reasonable attorney's fee, the judge of compen[illegible] claims shall consider only those benefits to the claimant tha[illegible] attorney is responsible for securing. The amount, statutor[illegible]is, and type of benefits obtained through legal representatio[illegible]all be listed on all attorney's fees awarded by the judge of co[illegible]nsation claims. For purposes of this section, the term "bene[illegible]secured" means benefits obtained as a result of the claima[illegible]ttorney's legal services rendered in connection with the clai[illegible] benefits.[1]

After deter[illegible]ng the benefits obtained, the judge of compensation claims [illegible] then consider all the statutory factors in determining whe[illegible]to increase or decrease the guideline fee. Sec. 440.34(1), F[illegible]tat. *See Barco Vending Co. v. Villalonga*, 608 So. 2d 128 (Fl[illegible]t DCA 1992).

The judge o[illegible]mpensation claims issued an order which, in pertinent part, p[illegible]ded:

> After revie[illegible] the Affidavits submitted, hearing argument of counsel, rev[illegible]ng the file and being otherwise fully advised in the premises, [illegible]d that a reasonable fee for Claimant's attorney for represen[illegible]n of the Claimant in obtaining benefits is $49,500.00.

The order never mad[illegible] finding concerning the amount of benefits which were actual[illegible]btained by claimant's attorney. It is not possible to determine [illegible]her the judge of compensation claims awarded, or departed fi[illegible] the statutory fee.

The order of the juc[illegible]f compensation claims is reversed. The case is remanded f[illegible]e judge of compensation claims to determine the amount o[illegible]efits obtained as a result of the efforts of the attorney, and [illegible]etermine whether, based upon spe[illegible] findings regarding th[illegible]tors in section 440.34(1)(a)-(h), a [illegible]ation from the statuto[illegible]e schedule is justified. (ERVIN, BARFIELD, and WEBSTE[illegible]., CONCUR.)

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[1]The 1989 amendment to secti[illegible]0.34(2), Florida Statutes, which provides that the "amount, statutory b[illegible]and type of benefits obtained through legal representation shall be listed on [illegible]torney's fees awarded," is procedural in nature and applies to an award of [illegible]ey's fees in cases in which the accident preceded the amendment. *Cf. Vo[illegible]Memorial Park v. White*, 549 So. 2d 1114 (Fla. 1st DCA 1989).

* * *

Workers' compensation—Tempo[illegible] total disability—Error to award temporary total disability[illegible]nefits where that class of benefits was neither claimed nor ot[illegible]wise placed at issue

FLORIDA POWER CORPORATION, A[illegible]ant, v. FRED HAMILTON, Appellee. 1st District. Case No. 92-995. O[illegible]n filed April 8, 1993. Appeal from an order of the Judge of Compensat[illegible]Claims. William D. Douglas, Judge. Bernard J. Zimmerman and Charles H[illegible]n of Zimmerman, Shuffield, Kiser & Sutcliffe, P.A., Orlando, for Appellan[illegible]nnye L. Friedrich and Leon M. Boyajan, II, P.A., Inverness, for Appellee.

(ALLEN, J.) The employer appeals [illegible]rkers' compensation order by which the claimant was awar[illegible]temporary total disability benefits. Because the claimant di[illegible] specifically request this class of benefits, and the matter wa[illegible]t otherwise clearly placed at issue, we reverse the award.

Claims were filed for permanent total [illegible]bility or wage loss benefits, with the parties stipulating that the [illegible]mant had attained maximum medical improvement. The claim[illegible] did not appear at a hearing where medical and vocational evi[illegible]e was presented. The judge noted that he was thus unable to [illegible]tly evaluate the [illegible]imant's subjective complaints and credi[illegible]y. Finding the [illegible]dical evidence of disability to be insufficie[illegible]e judge determined that an additional medical opinion shoul[illegible] obtained as to certain questions including the advisability o[illegible]ther surgical intervention. The judge therefore ordered an add[illegible]al examinati[illegible]s pr[illegible]

parties. These documents were received as the court's ex[illegible] and the parties declined to present other evidence. The j[illegible] then entered the appealed order, accepting the examining do[illegible]'s recommendation for further evaluation and possible sur[illegible] Rejecting the parties' stipulation as to maximum medical i[illegible]vement, the judge determined that the claimant remains tempo[illegible]y totally disabled, and awarded such benefits.

The [illegible]e was entitled to reject the stipulation as to maximum medical [illegible]rovement upon the receipt of contrary evidence. *See Leeds Sh[illegible]v. Cucuzza*, 429 So. 2d 401 (Fla. 1st DCA 1983). But neithe[illegible]s circumstance nor the reservation of jurisdiction in connecti[illegible]ith the additional medical examination expanded the scope o[illegible]e hearing. *Leeds Shoes*; *see also Allman v. Meredith Co[illegible]*151 So. 2d 957, 959 n.1, (Fla. 1st DCA 1984). Although a ma[illegible]may be placed at issue by the presentation of evidence specif[illegible]y directed to the dispute, *see Dailey v. General Accounting [illegible]hs.*, 411 So. 2d 1030 (Fla. 1st DCA 1982), the evidence in t[illegible]esent case was not such as to necessarily expand the scope o[illegible] hearing.

Due process conc[illegible] preclude a ruling on matters which have not been placed at iss[illegible]s the parties are entitled to notice so that they may fairly prese[illegible]eir case. *See generally Austin Co. v. Lindenberger*, 410 So.[illegible]01 (Fla. 1st DCA 1982); *Albertsons Southco v. Williams*, 40[illegible]. 2d 1342 (Fla. 1st DCA 1981); *see also Kaplan Industr. v. [illegible]ett*, 565 So. 2d 404 (Fla. 1st DCA 1990). These cases indicat[illegible]t it is thus usually necessary that a claim identify the specific[illegible]nefit being requested. *See also United States Steel Corp. v. [illegible]n*, 353 So. 2d 86 (Fla. 1977).

In *Leeds Shoes* this court [illegible]rmined that a claim for permanent disability benefits wou[illegible]ot permit a temporary total award. It has likewise been ind[illegible]d in various other cases that a claim for one class of benefits w[illegible]ot permit an award of another class of benefits. *See, e.g., Unit[illegible]tates Steel*; *Albertsons*. The contrary rule which is sometime[illegible]plied in reliance on *Farm Stores v. Dyrda*, 384 So. 2d 269[illegible]a. 1st DCA 1980), is not applicable in the present case. *Fa[illegible]tores* involved an earlier specific request which remained pe[illegible]g as to the class of benefits ultimately awarded, and the prese[illegible]ase does not involve this circumstance. *Leeds Shoes* is directly [illegible]ntrolling authority precluding an award of temporary total b[illegible]ts which were neither claimed nor otherwise placed at issue. [illegible]*also Florida Production Engineering v. Fisher*, IRC Order 2[illegible]7 (May 19, 1978).

The award of temporary total disabil[illegible]enefits is reversed. (WIGGINTON and MICKLE, JJ., CONC[illegible])

* * *

Criminal law—First degree murder—Evidence—Battered woman's syndrome—Expert testimony relating to battered woman's syndrome is henceforth admissible, subject to statutory requirements regarding its relevancy and the qualification of the expert, without any necessity for case-by-case determination that scientific knowledge regarding battered woman's syndrome is sufficiently developed to permit a reasonable opinion by an expert—Battered woman's syndrome has gained general acceptance in the relevant scientific community as a matter of law—Reversible error to refuse to admit testimony by defendant's expert regarding battered woman's syndrome—Error to exclude testimony of defendant's mother that defendant had been physically abused by her father and by three former boyfriends to corroborate defendant's testimony regarding abuses she had endured in the past—New trial required

MARY JOYCE ROGERS, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 91-854. Opinion filed April 8, 1993. Appeal from the Circuit Court for Levy County. James Tomlinson, Judge. Gwendolyn Spivey, Special Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General, and Gypsy Bailey, Assistant Attorney General, Tallahassee, for Appellee.

(ALLEN, J.) This is an appeal from a conviction and sentence for first-degree murder. The appellant was charged in the shooting death of her boyfriend. At trial, she claimed self-defense.

sought to introduce the expert testimony of Dr. Harry Krop on the battered woman's syndrome and its applicability to her case. Concluding that the trial court erred in excluding this testimony, we reverse the appellant's conviction and remand for a new trial. Because the battered woman's syndrome is now generally accepted in the relevant scientific community, we hold that expert testimony relating to the syndrome is henceforth admissible, subject to the requirements of section 90.702, Florida Statutes, without any necessity for a case-by-case determination that the scientific knowledge regarding the syndrome is sufficiently developed to permit a reasonable opinion to be given by an expert.

The "battered woman's syndrome" has been defined as "a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives." *State v. Kelly*, 478 A.2d 364, 371 (N.J. 1984). In *Hawthorne v. State*, 408 So. 2d 801, 805 (Fla. 1st DCA), *rev. denied*, 415 So. 2d 1361 (Fla. 1982), we first confronted the question of the admissibility of expert testimony regarding the battered woman's syndrome. We gave qualified approval to the use of such evidence, and explained that, in addition to the usual showing required for admission of expert testimony, a party offering expert testimony relating to the syndrome would be required to satisfy the trial judge that the state of the art or scientific knowledge is sufficiently developed to permit a reasonable opinion to be given by the expert. *Id.* at 805 & 806.[1]

Subsequent cases have followed *Hawthorne*, leaving it to the individual trial judge in each case to determine whether the subject area of battered woman's syndrome has gained general acceptance in the relevant scientific community rendering it appropriate to support an expert opinion. *See, e.g., Terry v. State*, 467 So. 2d 761 (Fla. 4th DCA), *rev. denied*, 476 So. 2d 675 (Fla. 1985); *Borders v. State*, 433 So. 2d 1325 (Fla. 3d DCA 1983).

In the present case, the trial judge excluded the testimony "because the evidence proffered is insufficient for this court to find that the state of the art or scientific knowledge pertaining to Battered Woman Syndrome permits a reasonable opinion to be given by an expert." We are unable to understand how the judge could have reached this conclusion. The evidence below was that the battered woman's syndrome has now gained general acceptance in the relevant scientific community, i.e., the psychological community. *See Bechtel v. State*, 840 P.2d 1, 7 (Okla. Crim. App. 1992). The prosecution did not offer any of its own evidence to counter the testimony of Dr. Krop. On both direct examination and cross-examination Dr. Krop testified that the battered woman's syndrome is recognized by the American Psychological Association and that he was unaware of any disagreement regarding its acceptance. Although Dr. Krop stated that the data on the syndrome continues to be developed, he explained that in all medical and psychological fields, the search for new data is continual. And he reiterated that the battered woman's syndrome is accepted within a reasonable degree of psychological certainty within the psychological community.

Furthermore, Dr. Krop testified that battered woman's syndrome is essentially diagnosable as post-traumatic stress disorder, which is commonly recognized by the mental health community. Florida cases have consistently recognized the admissibility of expert testimony on post-traumatic stress disorder as it relates to war veterans. *See, e.g., Masterson v. State*, 516 So. 2d 256 (Fla. 1987); *Jones v. State*, 482 So. 2d 571 (Fla. 1st DCA 1986); *State v. Twelves*, 463 So. 2d 493 (Fla. 2d DCA 1985). *See also Kruse v. State*, 483 So. 2d 1383 (Fla. 4th DCA 1986).

We are also persuaded by the declarations of several of our sister courts that the theory underlying the battered woman syndrome has now gained general acceptance in the scientific community.[2] Equally compelling is the clear trend across the United States towards admissibility of expert testimony on battered women's syndrome.[3] Numerous books and articles also indicate general acceptance.[4]

Because the scientific principles underlying expert testimony relative to the battered woman's syndrome are now firmly established and widely accepted in the psychological community, we conclude that the syndrome has now gained general acceptance in the relevant scientific community *as a matter of law*. Accordingly, the trial judge's refusal to admit this evidence was erroneous. Because the record reveals no basis for disallowing this critical testimony, we conclude that the judge's ruling constitutes reversible error. We hold that expert testimony regarding battered woman's syndrome is henceforth admissible, subject to its relevancy and the qualification of the expert in any individual case. *See* § 90.702, Fla. Stat.[5] There will be no further need for a case-by-case determination as to whether the state of the art or scientific knowledge relative to the battered woman's syndrome is sufficiently developed to permit a reasonable opinion by an expert.

We briefly address one other issue raised by the appellant. The appellant argues that the trial court erred in excluding the testimony of her mother that appellant had been physically abused by her father and by three former boyfriends. Although the appellant testified to the abuses she had endured in the past, the excluded testimony should be admissible to corroborate the appellant's testimony. *Cf. State v. Smith*, 573 So. 2d 306, 318 (Fla. 1990).

We do not address the other issues raised by the appellant because they are either meritless or rendered moot by our resolution of the issues discussed above. The judgment and sentence are reversed and this cause is remanded for a new trial. (WIGGINTON and MICKLE, JJ., CONCUR.)

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[1]Compare this requirement for admission with the usual requirement for admission of novel scientific evidence that the scientific principle or principles upon which the testimony is based must be " 'sufficiently established to have gained general acceptance in the particular field in which it belongs,' " and must have " 'attained sufficient scientific and psychological accuracy . . . [to be] capable of definite and certain interpretation.' " *Stokes v. State*, 548 So. 2d 188, 193 (Fla. 1989) (quoting *Frye v. United States*, 293 F. 1013, 1014 & 1026 (D.C. Cir. 1923)).

[2]*See, e.g., Bechtel v. State*, 840 P.2d 1, 7 (Okla. Crim. App. 1992); *State v. Koss*, 551 N.E.2d 970, 975 (Ohio 1990); *People v. Torres*, 488 N.Y.S.2d 358, 363 (N.Y. Sup. Ct. 1985).

[3]*See, e.g., Commonwealth v. Miller*, 1993 WL 13066, __ A.2d __ (Pa. Sup. Ct. 1993); *McMaugh v. State*, 612 A.2d 725 (R.I. 1992); *State v. Burtzlaff*, 493 N.W.2d 1 (S.D. 1992); *People v. Romero*, 13 Cal. Rptr. 2d 332 (Cal. Ct. App. 1992), *rev. granted* (Feb. 11, 1993); *People v. Wilson*, 487 N.W.2d 822 (Mich. Ct. App. 1992); *People v. Yaklich*, 833 P.2d 758 (Colo. Ct. App. 1991); *State v. Williams*, 787 S.W.2d 308 (Mo. Ct. App. 1990); *State v. Hennum*, 441 N.W.2d 793 (Minn. 1989); *Fielder v. State*, 756 S.W.2d 309 (Tex. Crim. App. 1988); *State v. Hodges*, 716 P.2d 563 (Kan. 1986), *clarified*, 763 P.2d 572 (1988); *State v. Hill*, 339 S.E.2d 121 (S.C. 1986); *State v. Gallegos*, 719 P.2d 1268 (N.M. 1986); *State v. Kelly*, 478 A.2d 364 (N.J. 1984); *State v. Allery*, 682 P.2d 312 (Wash. 1984); *People v. Minnis*, 455 N.E.2d 209 (Ill. Ct. App. 1983); *Smith v. State*, 277 S.E.2d 678 (Ga. 1981); *State v. Anaya*, 438 A.2d 892 (Me. 1981); *State v. Baker*, 424 A.2d 171 (N.H. 1980); *State v. Dozier*, 255 S.E.2d 552 (W.Va. 1979); *see also* Annotation, *Admissibility of Expert or Opinion Testimony on Battered Wife or Battered Woman Syndrome*, 18 ALR 4th 1143 (1982 & Supp. 1992) (and cases cited therein).

[4]*See, e.g.*, Lenore Walker, Terrifying Love: Why Battered Women Kill and How Society Responds (1989); Charles Patrick Ewing, Battered Women Who Kill: Psychological Self-Defense as Legal Justification (1987); Angela Brown, When Battered Women Kill (1987); Erich D. Andersen & Anne Read-Andersen, *Constitutional Dimensions of the Battered Woman Syndrome*, 53 Ohio St. L.J. 363 (1992); Susan Murphy, *Assisting the Jury in Understanding Victimization: Expert Psychological Testimony on Battered Woman Syndrome and Rape Trauma Syndrome*, 25 Colum. J.L. & Soc. Probs. 277 (1992); Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 Notre Dame J.L. Ethics & Pub. Pol'y 321 (1992); Laura H. Hauber, Note, *Ohio Joins the Majority and Allows Testimony on the Battered Woman Syndrome: State v. Koss, 551 N.E.2d 970 (Ohio 1990)*, 60 U. Cin. L. R. 877 (1992); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1 (1991); Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. Pa. L. Rev. 379 (1991); B. Sharon Byrd, *Till Death Do Us Part: A Comparative Law Approach to Justifying Lethal Self-Defense By Battered Women*, 1991 Duke J. Comp. & Int'l L. 169 (1991); Charles Bleil, *Evidence of Syndromes: No Need for a "Bet-*

ter Mousetrap," 32 S.Tex. L.R. 37 (1990); Victoria Mikesell Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Ex- Testimony*, 39 Mercer L. Rev. 545 (1988); Cynthia L. Coffee, Note, *A Emerges: A State Survey on the Admissibility of Expert Testimony Concerning the Battered Woman Syndrome*, 25 J. Fam. L. 373 (1986-87).

[5]Section 90.702, Florida Statutes, provides:

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, the opinion is admissible only if it can be applied to evidence at trial.

* * *

Cr al law—Sentencing—Habitual offender—Error to sen- efendant as habitual offender where defendant's present off s occurred more than five years after his release on parole fro ison sentence imposed for prior conviction—Remand for rese cing

ROB D. HUGGINS, Appellant, v. STATE OF FLORIDA, Appellee. 1st Distric se No. 92-1687. Opinion filed April 8, 1993. An Appeal from the Circuit t for Alachua County. David Reiman, Judge. Nancy A. Daniels, Public der, and Kathleen Stover, Asst. Public Defender, Tallahassee, for Appella bert A. Butterworth, Attorney General, and Marilyn McFadden, Asst. Att General, Tallahassee, for Appellee.

(PER CU M.) Robert D. Huggins has appealed from sentencing as an itual felony offender, following his conviction of two counts wd and lascivious assault on a child under 16. We reverse and and for resentencing.

At the sen ing proceeding following Huggins' conviction, the state intr ed evidence of two prior felony convictions for the purpose o ifying Huggins as an habitual felony offender, to wit: a 1957 d larceny conviction, and a 1976 sexual battery conviction which Huggins was released on parole on e 13, 1986. rial court found that, even though Huggins' ase from inc ration for the 1976 felony conviction occurred more than years before the July 14, 1991 commission of the instant offe he qualified as an habitual offender because he was on par t the time. The court sentenced him as an habitual offender to consecutive 30-year terms.

Huggins argues th e trial court erred in finding him qualified as an habitual of r, in that his present offenses did not occur "within 5 years is] *release on parole* . . . from a prison sentence" imposed prior conviction, as required by section 775.084(1)(a)2., F a Statutes (emphasis supplied). We agree. *See Lewis v. State* 7 So.2d 686 (Fla. 1st DCA 1991); *Allen v. State*, 487 So.2d (Fla. 4th DCA 1986); Further, the state concedes error and re s remand for resentencing. Based on the foregoing, we reve the habitual offender sentences imposed herein, and rema r resentencing other than as an habitual offender. (JOANOS J., BARFIELD and MICKLE, JJ., CONCUR.)

* *

Criminal law—Sentencing—Ha al offender statute not unconstitutional—Sentencing cour y infer that there has been no pardon or set aside of predic onvictions where there was no suggestion that defendant did qualify for classification as habitual offender and no content that his predicate convictions had been pardoned or set asid o error in failing to make statutory findings

KENNETH MURPHY, Appellant, v. STA F FLORIDA, Appellee. 1st District. Case No. 92-553. Opinion filed A 1993. An Appeal from the Circuit Court for Duval County; John South Judge. Nancy A. Daniels, Public Defender, and Carol Ann Turner, Assi Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, ey General, and Charlie Coy, Assistant Attorney General, Tallahassee, Appellee.

ON MOTION FOR REHEAR AND/OR CLARIFICATION ON PET N FOR WRIT OF MANDAM

[Original Opinion at 17 Fla. L. W D2395]

(JOANOS, Chief Judge.) The state has fi motion seeking aring or clarification of the opinion filed in this cause on ber 12, 1992. Appellant has filed a petition for writ of mand , asking us to enforce the mandate which appellant as- su was issued October 12, 1992.[1] We deny the petition for wri mandamus. We grant the state's motion for rehearing, with our opinion of October 12, 1992, and substitute the follow

App t, Kenneth Murphy, appeals his sentences as an habitual ny offender. First, appellant challenges the constitutionalit the habitual felony offender statute, section 775.084, da Statutes (1989), asserting that it deprives those sentenced ant to its provisions of due process of law, it violates the ration of powers principle by depriving judges of sentencing p tative, and it establishes a capricious system of selective puni ent which has no standards of application, and is non-appealab d unreviewable. Second, appellant maintains the trial judge e in failing to make the findings necessary to support an enhan sentence. We affirm as to both issues.

Appellant was ged with sale or delivery of cocaine, contrary to the provis of section 893.13(1)(a)1., Florida Statutes. The state file imely notice of intent to seek habitual felony offender sent ng, if appellant were convicted of the charged offense. Sub ently, appellant was found guilty by a jury of sale or delive f cocaine to an undercover officer. Appellant's motions fo lgment of acquittal and for new trial were denied.

The record reflects appellant had seven prior felony convictions, the two mo cent for possession of cocaine on October 25, 1989, and fo rglary of a dwelling on May 17, 1991. The cocaine sale for ch appellant was being sentenced occurred approximately thr months after his 1991 conviction for burglary of a dwelling, during the period that appellant was on community control f at offense. Certified copies of appellant's prior convictions w received in evidence, without objection by appellant or his sel. Moreover, appellant did not suggest that either of his t most recent prior felony convictions had been pardoned or aside in any post-conviction proceeding, although afforded a portunity to be heard on the issue. In short, appellant conce the existence of his prior felony convictions which formed predicate for his habitual offender sentence.

After hearing arguments of cou on the habitual offender question, the trial court observed t ppellant's past criminal record was well documented. Despi e urging of appellant's counsel, the court stated it could find ing in the presentence investigation report to support lenienc accordance with this observation, the court pronounced:

> ... on the jury's finding of guilt as to t harge, he is first adjudicated to be guilty. I am satisfied, bas on the evidence that was received this morning in the form rior judgments and sentences, that he meets the criteria for c ification as an habitual offender. As such, it's the sentence of this Court e committed to the custody of the Florida Department of Co ions for a term of 20 years. He is allowed one hundred and 5 s credit.

With regard to the first issue, appellan s presented the same, or substantially similar, due process, e protection, and separation of powers challenges to the habit felony offender statute that have been rejected numerous time e, *e.g.*, *Brazil v. State*, 604 So.2d 915 (Fla. 1st DCA 1992) dges v. State*, 596 So.2d 481 (Fla. 1st DCA 1992); *Perkins v* e, 583 So.2d 1103 (Fla. 1st DCA 1991), *approved*, __ So.2 (Fla. 1993) [18 F.L.W. S79]; *Wilson v. State*, 574 So.2d 1171 (Fla. 1st DCA), *review denied*, 583 So.2d 1038 (Fla.); *Barber v. State*, 564 So.2d 1169 (Fla. 1st DCA), *review de* 576 So.2d 284 (Fla. 1990); *Roberts v. State*, 559 So.2d 289 a. 2d DCA 1990); *King v. State*, 557 So.2d 899 (Fla. 5th A), *review denied*, 564 So.2d 1086 (Fla. 1990). Indeed, appel recogniz- es that his attack upon the constitutionality of sec 775.084,

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

MARY JOYCE ROGERS,

Appellant,

v. Case No.: 91-854

STATE OF FLORIDA,

Appellee.

_____/

MOTION FOR REHEARING

Appellee, the State of Florida, by and through its undersigned counsel, and pursuant to Fla. R. App. P. 9.330, moves this court for rehearing of its April 8, 1993, opinion, and alleges the following.

I.

In Hawthorne v. State, 408 So. 2d 801, 805 (Fla. 1st DCA 1982), this court held that battered woman's syndrome could be admissible, provided it met three criteria: (1) the expert was qualified to give an opinion on the subject matter; (2) the state of the art permitted a reasonable opinion to be given by the expert; and (3) the subject matter of the expert opinion was so related to some science as to be beyond the understanding of the ordinary layperson. In Hawthorne, this court found that the third requirement

had been met, but there had been no determination as to the other two. Accordingly, this court reversed and remanded for a new trial.[1]

In the present case, the trial court engaged in a Hawthorne examination:

> Primarily I based . . . my reasoning on Hawthorne II found at 408 So. 2d 801, and Hawthorne III, found at 470 So. 2d 770. Both contain directions for trial court of this district in making the determination of the fields wherein expert testimony is permitted. Hawthorne II and III both hold that expert testimony regarding the battered woman syndrome is the proper subject matter of an expert opinion. It goes, therefore, that such testimony is relevant evidence. However, both cases also hold that two other criteria must first be met before an expert [will] be permitted to give an opinion in a particular field of endeavor. That is, number one, must be found that the expert is qualified to give an opinion on the particular subject matter, and, two, the state of the art or scientific knowledge pertaining to that particular subject matter permits a reasonable opinion to be given by an expert with regard thereto. Except for the concurring and dissenting opinion expressed in Hawthorne III, neither holding in Hawthorne II or III addresses Section 90.702 of the Florida Evidence Code, even though that section was addressed in Terry versus State, 457 So. 2d 761, Florida Appellate, Fourth

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[1] Upon retrial, the trial court found that the state of the art was not such that an expert could render a reasonable opinion. Hawthorne v. State, 470 So. 2d 770, 773-74 (Fla. 1st DCA 1985).

> District, an opinion published prior to the publication of Hawthorne III. Under these circumstances it would appear that the Hawthorne III majority would have referred that trial court to that section of the evidence code if the majority opinion deemed it appropriate. It therefore follows that this court rules that Dr. Krop, by his training, knowledge, skill, and experience is duly qualified as an expert in the fields of clinical and forensic psychology in general, but this court cannot and does not find him to be an expert in the field of battered woman syndrome because the evidence proffered is insufficient for this court to find that the state of the art or scientific knowledge pertaining to battered woman syndrome permits a reasonable opinion to be given by an expert.

(T 483-85) (emphasis supplied).

Three observations about this ruling are evident. First, the trial court found that evidence of battered woman's syndrome was relevant. Second, the trial court at no point ruled that, although relevant, the syndrome evidence was inadmissible. And third, the trial court ruled that Dr. Krop would not be permitted to testify because he was not qualified as an expert.

Nevertheless, in the instant opinion, this court reversed and remanded this case for a new trial because the trial court erroneously "refus[ed] to admit this [battered woman's] evidence . . . ." Slip op. at 6. This conclusion is not supported by the record. After all, the trial court

permitted appellant to testify that she was a battered woman, i.e., the victim mistreated her as did other boyfriends (T 252-54). Although the trial court precluded appellant from calling Dr. Krop as an expert, the trial court clearly allowed appellant to present her defense of self defense. Thus, this court's conclusion that the trial court precluded admission of the syndrome evidence is enigmatic.

It is easy to comprehend the trial court's holding in light of Hawthorne's holding. The trial court in this case examined the three requirements enunciated in Hawthorne, and found that the defense had failed to meet the first requirement, i.e., showing that Dr. Krop was an expert qualified in the field of battered woman's syndrome. Admittedly, the trial court stated that its reason for so concluding was the insufficient development of the "science" of battered spouse syndrome. Although this reason may not be accurate based on the current nationwide trend towards admissibility of this type of evidence, slip op. at 4, it is certainly understandable. Prior to this court's instant decision, no Florida case had established squarely that, as a matter of law, the state of battered woman's syndrome is sufficiently developed to permit a reasonable opinion to be given by an expert.

Thus, it can be said that the trial court ruled only that Dr. Krop was not qualified, but gave an erroneous reason for this decision. Such a ruling is quite capable of being affirmed by this court based on the firmly established principle that trial courts can be right for the wrong reason, and their orders sustained for any reason supported by the record. Caso v. State, 524 So. 2d 422, 424 (Fla. 1988); Robinson v. State, 393 So. 2d 33, 35 (Fla. 1st DCA 1981); Poole v. State, 247 So. 2d 443, 444 (Fla. 1st DCA 1971). Here, the record unequivocally indicates that the trial court was correct based on Dr. Krop's limited experience with the syndrome. Dr. Krop stated on proffer that he had testified in court regarding the battered spouse and battered child syndromes "about twelve times" (T 457, 461), and admitted to having conducted no research, studies or workshops, and having taken no courses, on the battered spouse syndrome (T 458, 462).

Nevertheless, this court did not address this record-supported reason, and inexplicably construed the trial court's order as ruling only that the syndrome evidence was inadmissible. Given the axiomatic principles that the trial court is presumed correct on appeal, and that, regarding evidentiary matters, the standard of review is whether the trial court abused its discretion, this court's opinion is particularly troubling.

Despite the state's citation to this court at page 17 of its answer brief of Robinson, this court has reversed appellant's conviction on the basis that the trial court erroneously refused to admit evidence of battered spouse syndrome. Clearly, the trial court did not preclude admission of syndrome evidence, as it found such evidence relevant. In any event, the trial court's ruling is sustainable under the theory that Dr. Krop was not qualified. In reversing, this court not only appears to have overlooked the rationale of Robinson, but to have misapprehended the actual holding of the trial court. For this reason, the state seeks rehearing.

II.

Even though this court acknowledged that battered woman's syndrome evidence is admissible, "subject to its relevancy and the qualification of the expert in any individual case," slip op. at 6, it nevertheless concluded that the trial court's alleged failure to admit the syndrome evidence was erroneous, and that such failure constituted reversible error "[b]ecause the record reveals no basis for disallowing this critical testimony . . . ." Id. This ruling appears internally inconsistent. To acknowledge that such evidence must first be shown to be relevant, but then state that the record shows no basis for the purported disallowing of this evidence, intimates a misapprehension of the instant record on appeal.

This court noted that battered woman's syndrome is "'a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives.'" Slip op. at 2 (citation omitted; emphasis supplied). Despite this requirement of abuse over an extended period of time, this court implicitly held that the syndrome evidence in this case was relevant. This conclusion is not supported by the record.

Appellant failed to show the relevancy of the syndrome evidence below, because she presented no evidence of abuse over an extended period of time. Appellant testified only that she had known the victim for about two weeks and had stayed with him for two days prior to his death (T 105-06). See Answer Brief at 10. Further, appellant testified that the only abuse she suffered at the hand of the victim was a slap about four days before his death, and another slap one day before his death (T 257). See Answer Brief at 14. Thus, appellant presented no evidence that she had known the victim for an extended period of time, much less evidence that she had been abused for an extended period of time.

Accordingly, the state seeks rehearing on this point. Although syndrome evidence is admissible subject to a showing of relevance and the qualification of an expert, relevance must be shown by a defendant. Based on the

definition of battered woman's syndrome, relevance is contingent on a showing that a person suffering from the syndrome has been physically and psychologically abused over an extended period of time. Where appellant made absolutely no showing of abuse over an extended time period, this court's conclusion that the trial court erred in allegedly refusing to admit the syndrome evidence is inexplicable.

III.

This court's ruling on the syndrome evidence also appears to be premature in light of the pending nature of State v. Hickson, case number 79,222 before the Florida Supreme Court. As this court is no doubt well aware, the Florida Supreme Court has never spoken on the admissibility of the battered woman's syndrome.[2] Pending before that Court in Hickson are questions concerning whether the state is entitled to have an expert examine a defendant pretrial if that defendant has engaged an expert who, on the basis of a private interview, will testify at trial that the defendant has the syndrome; whether an expert should be permitted to render the ultimate opinion that the defendant suffered from the syndrome at the time of the murder; and whether an expert should be permitted to testify only as to

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[2] For this reason, this court's decision is of exceptional importance. The state addresses this ground in its motion for rehearing *en banc* filed concurrently with this motion.

general characteristics of the syndrome. In this regard, attached is a copy of the state's supplemental brief recently submitted to the Florida Supreme Court on these points. The answers to these questions will affect the retrial of appellant, should this court deny rehearing in this case. Accordingly, the state alternatively asks this court to withdraw its opinion and stay this case until the Florida Supreme Court has ruled in Hickson.

IV.

This court's use of Frye v. United States, 293 F.2d 1013 (D.C. Cir. 1923), language concerning the syndrome evidence is troubling. This court concluded that "the syndrome has now gained general acceptance in the relevant scientific community . . . ." Slip op. at 5. As this court noted in its first footnote, this is the Frye standard for the admissibility of novel scientific evidence. This court's engrafting of Frye language onto battered woman's syndrome evidence is perturbing for two reasons. First, defense counsel below made no argument on this point, and neither party before this court presented argument on this point. Second, such an application is unsupported by this court's own case law.

In Brown v. State, 426 So. 2d 76 (Fla. 1st DCA 1983), Ward v. State, 519 So. 2d 1092 (Fla. 1st DCA 1988), Kruse v.

State, 483 So. 2d 1383 (Fla. 4th DCA 1986), and Andrews v. State, 533 So. 2d 841 (Fla. 5th DCA 1988), this court and other district courts of appeal have espoused the relevance test, gleaned from Florida's evidence code, and have embraced the nationwide trend to refine Frye into a relevance test or discard Frye altogether. See U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Criminal Justice Information Policy, Forensic DNA Analysis: Issues 18-20 (June 1991, NCJ-128567); Comment, The Admissibility of Expert Testimony on Child Abuse Accommodation Syndrome as Indicia of Abuse: Aiding the Prosecution in Meeting its Burden of Proof, 16 Ohio N.U.L. Rev. 81 (1989); Comment, Child Sexual Abuse Accommodation Syndrome: Curing the Effects of a Misdiagnosis in the Law of Evidence, 25 Tulsa L.J. 143 (1989); McCord, Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Non-traditional Psychological Evidence in Criminal Cases, 66 Oregon L. Rev. 19 (1987); Giannelli, The Admissibility of Novel Scientific Evidence: *Frye v. United States*, A Half Century Later, 80 Colum. L. Rev. 1197 (1980). Particularly of interest is this court's decision in Hawthorne v. State, 470 So. 2d 770, 773 (Fla. 1st DCA 1985), where Judge Ervin in his concurring/dissenting opinion suggested that the Frye standard should be rejected as a precondition to the admissibility of evidence relating to novel scientific techniques.

Stokes v. State, 548 So. 2d 188 (Fla. 1989), does not invalidate the Florida cases which espouse the relevance test. The Stokes Court strictly circumscribed its holding: "[W]e believe that the test espoused in Frye properly addresses the issue of the admission of posthypnotic testimony." Id. at 195. Significantly, the Florida Supreme Court did not refer to the statutory relevance test of Fla. Stat. § 90.402 (1989), and did not reference its Glendening v. State, 536 So. 2d 212 (Fla. 1988), decision the year before, in which the Court approved the relevance test. Accordingly, it cannot be said that Stokes disproved the relevance test, because the Court did not address that test. If the issue is ever squarely before that Court, it is likely that the relevance test will be victorious. In State v. Woodall, 385 S.E.2d 253, 259 (W.V. 1989), the West Virginia Supreme Court acknowledged Frye but found that its own statutory provision that "expert testimony is admissible when it 'will assist the trier of fact to understand the evidence or to determine a fact in issue'" overruled Frye. Florida has a similar provision. Fla. Stat. § 90.702 (1989).

In Lindabury v. Lindabury, 552 So. 2d 1117, 1118 (Fla. 3d DCA 1989), Judge Jorgenson comprehensively discussed the interplay of the relevance and Frye tests in Florida to conclude that the relevance test reigns supreme:

> The Florida Evidence Code sets a relevancy standard for evaluating "scientific, technical, or other specialized knowledge.["] §§ 90.702 and 90.703, Fla. Stat. (1987).
>
> Although the Florida Supreme Court in 1952 adopted the rigid "general acceptance" standard set forth in Frye v. United States, 293 F.2d 1013 (D.C. 1923), for admission of scientific evidence, Kaminski v. State, 63 So. 2d 339 (Fla. 1952), the supreme court, without expressly receding from Frye, approved the more lenient relevancy approach of the Florida Evidence Code in Glendening v. State, 536 So. 2d 212 (Fla. 1988) (no abuse of discretion in the trial court's determination that an opinion was within the province of the expert witness as to whether the minor child had been the victim of sexual battery), cert. denied, . . . 109 S.Ct. 3219 . . . (1989). The district courts of appeal have likewise approved the use of the relevancy approach. See Andrews v. State, 533 So. 2d 841, 847 (Fla. 5th DCA 1988), rev. denied, 542 So. 2d 1332 (Fla. 1989), Kruse v. State, 483 So. 2d 1383 (Fla. 4th DCA 1986), petition dismissed, 507 So. 2d 588 (Fla. 1987). In applying the relevancy approach, a trial court charged with determining the reliability of expert testimony may consider the level of acceptance which the opinion offered enjoys in a particular field. Andrews, 533 So. 2d at 847. See also C. Ehrhardt, Florida Evidence, § 702.2 (2d ed. 1984). However, that level of acceptance is but one factor used to determine the relevancy of the expert opinion evidence. Andrews, 533 So. 2d at 847.

See also Brown, 426 So. 2d at 87.

Accordingly, this court should recognize the nationwide trend embracing the relevance test. Florida's own

evidentiary code supports use of this test alone. Should this court nevertheless find Frye applicable, it must recognize that such a decision conflicts with this court's decisions in Brown and Ward, and creates intradistrict conflict warranting *en banc* review.[3] Further, such a decision creates conflict with Kruse and Andrews from the Fourth and Fifth Districts.

V.

This court finally decided that appellant's mother should have been permitted to testify about appellant's other abusive relationships, to corroborate appellant's testimony on this point. In so holding, and in relying on State v. Smith, 573 So. 2d 306, 318 (Fla. 1990), this court appears to have overlooked defense counsel's failure to present a sufficient proffer on this point. Although defense counsel alleged that appellant's mother had witnessed appellant's father disciplining her too harshly, defense counsel did not allege that appellant's mother had first hand knowledge of the other abusive relationships allegedly suffered by appellant. Specifically, defense counsel alleged only that appellant's mother "was aware" of these other relationships (T 509).

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[3] The state has filed concurrently with this motion a motion for rehearing *en banc* on this point.

Based on this cursory proffer, it appears appellant's mother would have testified appellant told her that other boyfriends had treated her abusively. Such testimony would have constituted inadmissible hearsay, i.e., an out-of-court statement offered to prove the truth of the matter asserted. This court appears to have overlooked that, in Smith, the defense witnesses were precluded from testifying "as to specific acts of violence allegedly committed by Cascio and known to those witnesses." 573 So. 2d at 318 (emphasis supplied). Here, defense counsel did not allege any specific acts or that these acts were known to appellant's mother.

Finally, this court appears to have overlooked that defense counsel never presented a corroboration argument to the trial court below. Instead, defense counsel posited only that the evidence was offered because it related to battered spouse syndrome (T 510). Accordingly, despite appellant's one sentence corroboration argument on appeal, see Appellant's Initial Brief at 51, appellant failed to preserve this argument in the trial court.[4] Pursuant to a

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[4] The state acknowledges that it did not argue preservation of this point in its answer brief, but submits that such failure is of no legal moment. State v. Lee, 531 So.2d 133 (Fla. 1988), and Ciccarelli v. State, 531 So. 2d 129 (Fla. 1988), "do not require reversal every time no such argument is made and [do not] preclude this court from determining sua sponte whether the error is harmless." Shaw v. State, 557 So. 2d 77, 78 (Fla. 1st DCA 1990) (Zehmer, J., specially concurring). After all, this court has a mandatory duty,

legion of case law, this court should have declined to address this point. Steinhorst v. State, 412 So. 2d 336 (1982).

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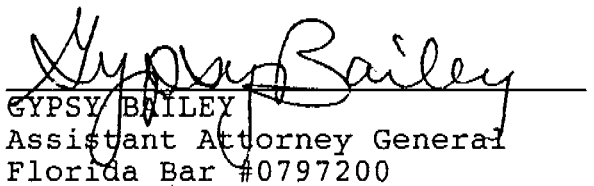
pursuant to Fla. Stat. § 924.33 (1991), to examine the record on appeal for error.

Conclusion

For these reasons, the state respectfully requests this Honorable Court to grant rehearing in this matter.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to GWENDOLYN SPIVEY, ESQ., Post Office Box 14494, Tallahassee, Florida 32317; and JOSEPH E. SMITH, Assistant State Attorney, Post Office Box 477, Bronson, Florida 32621, this 14th day of April, 1993.

GYPSY BAILEY
Assistant Attorney General

K
Personal

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No.: 79,222

MICHELLE L. HICKSON,

Respondent.

_____/

PETITIONER'S SUPPLEMENTAL BRIEF

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No.: 79,222

MICHELLE L. HICKSON,

Respondent.

_____/

PETITIONER'S SUPPLEMENTAL BRIEF

Preliminary Statement

Petitioner, the State of Florida, respondent in the case below and the prosecuting authority in the trial court, will be referred to in this brief as the state. Respondent, MICHELLE L. HICKSON, petitioner in the case below and defendant in the trial court, will be referred to in this brief as respondent.

STATEMENT OF THE CASE AND FACTS

The state relies on the statement of the case and facts supplied in its brief on the merits, except to note that this supplemental brief is filed pursuant to this Court's February 4, 1993, order, which is set out below:

> In order to assist the Court in its resolution of this appeal, the Court requests the parties to file a supplemental brief on what matters, facts or opinions an expert may testify about in reference to the battered spouse syndrome. Compare the holdings of State v. Hennum, 441 N.W.2d 793 (Minn. 1989), with State v. Briand, 547 [A.]2d 235 (N.H. 1988). As part of the foregoing, please discuss whether statements made by a defendant to such an expert are admissible or may be considered by the expert in any opinion he or she may render.

Although the state moved for reconsideration and clarification of this order, this Court advised undersigned counsel telephonically on March 5, 1993, that this motion had been denied.

SUMMARY OF THE ARGUMENT

The decision of the First District is erroneous in two regards. First, in finding that certiorari was appropriate, that court overlooked long-standing principles that certiorari lies only where there exists a clear violation of established law and an inadequate remedy on appeal. Neither of these principles is applicable in this case, because (1) no violation of established law has occurred yet, and the trial court's ordering that respondent be examined by a state psychiatric expert is in line with pertinent case law, and (2) in the event of a conviction, respondent may direct appeal the issue of battered spouse syndrome to the First District.

Second, as rephrased, the answer to the certified question must be affirmative. As noted in the well reasoned order of the trial court, should the defense call Dr. Krop to relate respondent's version of events, as told to him by respondent in a personal interview, the state is entitled to have its own expert examine respondent and testify based on that interview.

ARGUMENT

Issue

IS THE STATE ENTITLED TO HAVE A REBUTTAL EXPERT EXAMINE A DEFENDANT WHO ASSERTS SELF DEFENSE BASED ON THE BATTERED SPOUSE SYNDROME AND WHO INTENDS TO INTRODUCE TESTIMONY FROM A DEFENSE EXPERT OPINING THAT THE DEFENDANT SUFFERS FROM THE SYNDROME, WHEN THE EXPERT'S OPINION IS BASED "AS A PRIMARY SOURCE" ON INFORMATION OBTAINED IN A PRIVATE EXAMINATION OF THE DEFENDANT?

Initially, the state reiterates its position, with which *amicus curiae* apparently agrees, that the issue upon which supplemental briefing has been ordered is not ripe for review. Florida law makes unequivocally clear that all evidentiary determinations rest upon a determination of relevance by the trial courts. Fla. Stat. § 90.402 (1991). Relevance necessarily depends upon the particular case, and the evidence and theories of both parties. Thus, it is not possible for the state to address with any particular cogency the admissibility of evidence under various nonspecific hypotheticals. Nevertheless, because this Court has ordered supplemental briefing, the state offers the following hypothetical observations and discussion of the two cases cited in this Court's order.

First, under any circumstances, it is clear that Dr. Krop may not testify as a subterfuge for the introduction of testimony by respondent without her taking the stand. State

v. Briand, 547 A.2d 235, 239 (N.H. 1988). While *amicus curiae* agreed with this proposition at oral argument, the position of respondent is unclear.

Provided Dr. Krop's testimony is not a subterfuge for admitting respondent's statements, Florida law appears to permit an expert to relate facts which are otherwise inadmissible under the evidence code,[1] if the facts or data upon which the expert relies are of a type reasonably relied upon by experts in the area to support the opinion expressed.[2] Fla. Stat. § 90.704 (1991). See also Capehart v. State, 583 So. 2d 1009 (Fla. 1991), cert. denied 117 L.Ed.2d 122 (1992); Barber v. State, 576 So. 2d 825 (Fla. 1st DCA 1991); Burnham v. State, 497 So. 2d 904 (Fla. 2d DCA 1986); Bender v. State, 472 So. 2d 1370 (Fla. 3d DCA 1985). Thus, at trial, if defense counsel can prove the relevance of expert opinion testimony; if counsel can show that respondent's statements to a psychiatric expert are the type of facts reasonably relied upon by experts in the area of battered spouse syndrome; and if counsel can provide an adequate factual predicate for the expert opinion, then the

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[1] At oral argument, *amicus curiae* opined that respondent's statements to Dr. Krop could not be related by Dr. Krop because they would be inadmissible hearsay.

[2] Of course, there must be other independent evidence of battered spouse syndrome before an expert may testify about the statements made by respondent. See Fla. Stat. § 90.702 (1991); Johnson v. State, 478 So. 2d 885 (Fla. 3d DCA 1985); argument supra.

trial court could permit an expert to relate what respondent told him.

However, it is the state's unqualified position that Dr. Krop should not be permitted to testify as an expert on battered spouse syndrome because his opinion would be based upon a personal interview with respondent. The experts in the above cited cases, while permitted to testify as to evidence which was otherwise inadmissible, did not glean the evidence from personal interviews with the accused. See Capehart, 583 So. 2d at 1009 (expert relied on autopsy report which was not admitted into evidence); Barber, 576 So. 2d at 825 (expert should have been permitted to relate what the defendant told him about the amount of alcohol he consumed on the night of the murder, because the expert based his opinion regarding blood alcohol level on such information); Burnham, 497 So. 2d at 904 (experts relied on tests not in record); Bender, 472 So. 2d at 1370 (expert relied on C.A.T. scan which was not in record). Nevertheless, if Dr. Krop is permitted to testify as an expert, it is clear that the state must be afforded the opportunity to have its own expert examine respondent for the purposes of rebuttal.

In Briand, the state sought interlocutory relief from a pretrial order denying the state's motion requesting an expert of its own choosing to evaluate Briand for battered

spouse syndrome. Briand first argued that the trial court could not force her to submit to psychiatric examination by the state's expert because there was no statute in place granting it the authority to so order. The New Hampshire Supreme Court disposed of this claim, noting that trial courts have the inherent authority to authorize compelled examinations not only when a defendant pleads insanity, but when a defendant raises defenses which are distinct from insanity but typically require psychiatric evidence.

The New Hampshire Supreme Court then recognized that, despite this authority, a trial court may order such an examination only when it is consistent with the defendant's state and federal constitutional rights against self incrimination. The Court noted that many courts order such examinations on the principle that, when a defendant voluntarily submits to psychiatric examination by defense experts and introduces resulting psychiatric testimony at trial, he or she waives the constitutional right both to refuse a similar examination by the state's expert and to prevent the introduction of the results of such an examination in rebuttal. The Court also observed that others courts permitted such examinations on a general fairness principle: "There is simply no way for the State to challenge the conclusions of defense experts and no way for the finder of fact to arrive at the truth if the accused

may first introduce a defense dependent on psychiatric testimony based on an interview with the defendant, and then prevent the State from obtaining and introducing evidence of the same quality." 547 A.2d at 238.

The New Hampshire Supreme Court decided to follow the waiver theory, finding that authority relevant because it viewed "the defendant's anticipated reliance on expert evidence as a mechanism for introducing her own account of the facts, which should carry the accepted consequence of waiving her [constitutional] privilege." Id. The Court continued:

> A defendant performs a functionally similar voluntary act when he calls a psychologist or psychiatrist to testimony on his behalf, based on a personal interview with him. This is so because the expert witness depends upon the defendant's own statements of relevant facts as the foundation for the expert's opinion. Presumably, the witness would lack an adequate foundation to form and express such an opinion, and would therefore be barred from giving one, without the defendant's account of the relevant events of his own history and state of mind. Because the expert's testimony is thus predicated on the defendant's statements, the latter are explicitly or implicitly placed in evidence through the testimony of the expert during his direct and cross-examination. Since a defendant would waive his privilege against compelled self-incrimination if he took the stand and made those same statements himself, his decision to introduce his account of relevant facts indirectly through an expert witness

> should likewise be treated as a waiver obligating him to provide the same access to the State's expert that he has given to his own, and opening the door to the introduction of resulting State's evidence, as the State requests here, to the extent that he introduces comparable evidence on his own behalf. Just as the State may not use a compelled psychological examination to circumvent the privilege against self-incrimination . . . neither may a defendant voluntarily employ a psychological witness wholly to negate the waiver that his direct introduction of personal testimony would otherwise effect.

Id. at 239.

Briand also contended that, even if a finding of waiver were appropriate in other cases, it was not in her case because self defense based on battered spouse syndrome differed from most other defenses which relied on expert psychiatric testimony. Briand claimed that, unlike insanity where a defendant admits guilt, battered spouse syndrome showed the absence of premeditation or proved self defense. Thus, Briand argued that the state's psychiatric evidence based on personal interviews in rebuttal would used her compelled statements to prove a substantive element of the case.

The New Hampshire Supreme Court found this argument without merit, holding that, regardless of the type of defense, psychiatric testimony ultimately goes to the guilt or innocence of the defendant. While the privilege against

self incrimination precluded the state from proving guilt with evidence "'wrested from a defendant,'" it did not prevent the state from examining the defendant to rebut evidence she presents on an issue she has introduced. Id. at 240 (citation omitted).

Thus, the Briand Court concluded that: (1) the state could only use this evidence in rebuttal "on matters covered by the expert for the defense"; (2) if the defense offered its expert's testimony for a limited purpose, the trial court must instruct the jury to limit its consideration of the testimony accordingly; and (3) upon request from defense counsel, the trial court must instruct the jury that testimony on the same subject from the state's expert must be considered only for that same limited purpose. Finally, due to the absence of a statute and court rule addressing the issue, the Court opined:

> We believe a statute and rules of this kind would aid the trial court in future cases of this nature. As there is now no requirement that defendants give notice of the intention to introduce psychiatric testimony generally, legislation in this regard would be helpful. For the purpose of this trial, however, the trial court may take such actions as are necessary to allow the parties to obtain necessary expert witnesses.

Id. at 241.[3]

Thus, although Briand supports the state's primary position in this case -- if respondent is permitted to call Dr. Krop to testify that, in his opinion, respondent suffers from battered spouse syndrome, then, in fairness, the state

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[3] This passage addresses Chief Justice Barkett's concerns at oral argument about the absence of a Florida criminal rule of procedure addressing compelled examinations in this context. Although this Court could certainly refer a question to the rules committee, see State v. Hennum, 441 N.W.2d 793, 800 n.4 (Minn. 1989), it should not answer the certified question as suggested by *amicus curiae* at oral argument, e.g., that, because there is no statute or rule which addresses the instant scenario, it should not be permitted. *Amicus curiae*'s reliance on Burns v. State, 16 Fla. L. Weekly S389, S392 n.7 (Fla. May 16, 1991), for its position is flawed. There, this Court addressed the claim that the trial court erred in allowing the state's expert to remain in the courtroom during the defense psychologist's testimony in the penalty phase of Burns's trial. This Court noted that the trial court permitted the state's expert to remain because it had denied the state's request to have Burns examined by its own expert. This Court then "pass[ed] on [the question of] whether the trial court erred in denying the state's request" and brought the matter to the attention of the rules committee. Thus, Burns does not support *amicus curiae*'s argument that this Court should pass on addressing the merits because there is no statute or rule. In fact, it appears more likely that the issue of whether the trial court erred in denying the state's request was not squarely before this Court in Burns, that issue being more appropriately addressed in a proper cross-appeal by the state.

As the court did in Hennum, this Court must address the issue on the merits so that a fair trial may be conducted in this case. Because compelled examinations may be permitted based on the trial court's inherent authority, this Court may so hold, while suggesting the need for a statute and rules as the Briand court did. Alternatively, this Court may limit battered spouse syndrome evidence strictly to general characteristics of the syndrome, thereby obviating the need for a statute and rules to address the issue, as the Hennum court did.

must be permitted to do the same -- it does not squarely address the issue of whether respondent's statements to Dr. Krop will be admissible through him. In fact, the Briand Court specifically noted: "[T]he exact nature of the psychologist's anticipated testimony [was] not a matter of record before [the court]. Suffice it to say that [the court] ha[d] no occasion to rule on its admissibility, as the State does not challenge it at this time." 547 A.2d at 236 (emphasis supplied). See also id. (at the time of the appeal, the Court had "no account of what the defendant mean[t] by 'battered woman's syndrome . . . .'"). This holding is equally applicable in this case, as argued by the state in its motion for reconsideration and clarification. The issue of admissibility is not squarely before this Court, as the State has not challenged it at this time. Accordingly, the state asks this Court to be as circumspect as the Briand court in not ruling on issues not presented to it at this juncture, but nevertheless addresses the point as ordered.

In State v. Hennum, 441 N.W.2d 793 (Minn. 1989), the Minnesota Supreme Court fashioned a different solution to the issue at hand. There, in a pretrial order, the trial court authorized a compelled psychiatric examination of the defendant by a state expert for the purpose of rebutting Hennum's battered spouse syndrome/self defense claim. At

trial, the defense expert described the profile of a battered woman and then stated that, in her opinion, Hennum was a battered woman suffering from the syndrome. Specifically, the expert referred to Hennum's feelings on the night of the shooting, which the expert had discussed with Hennum. Hennum also took the stand and testified about the incident. The jury convicted Hennum of second degree felony murder.

The Minnesota Supreme Court held that battered spouse syndrome evidence was admissible with some limits:

> We hold that in future cases expert testimony regarding battered woman syndrome will be limited to a description of the general syndrome and the characteristics which are present in an individual suffering from the syndrome. The expert should not be allowed to testify as to the ultimate fact that the particular defendant actually suffers from battered woman syndrome. This determination must be left to the trier of fact. Each side may present witnesses who may testify to characteristics possessed by the defendant which are consistent with those found in someone suffering from battered woman syndrome. This restriction will remove the need for a compelled adverse medical examination of the defendant. Since the expert will only be allowed to testify as to the general nature of battered woman syndrome, neither side need conduct an examination of the defendant.

In Hennum, the Court also addressed the absence of a statute and rules addressing compelled examinations, holding

that the trial court had no authority to compel an adverse medical examination of the defendant:

> We affirm the rationale behind our decision in Olson that questions as to the nature and scope of adverse medical examinations are best answered by legislative enactment, rather than by the courts on an ad hoc basis. Olson, 274 Minn. at 231, 143 N.W.2d at 73-74. However, we also note that allowing the defense to produce expert testimony based on a medical examination of a defendant without providing the state an opportunity to conduct a similar examination denies the state a fair chance to rebut the expert testimony of the defense. Our decision today will prevent such a situation from arising with regard to expert testimony on battered woman syndrome. In future battered woman syndrome cases, expert medical examination of a defendant will not be necessary since we hold today that expert testimony as to the ultimate fact of whether a particular defendant suffers from the syndrome will be inadmissible. It will be up to the trier of fact to make that finding or conclusion. Therefore, no compelled adverse medical examination, which could possibly jeopardize a defendant's constitutional rights, will be required to insure fairness for the state.

Id. at 800. See footnote 3 infra.

Thus, the issue of admissibility squarely before it, the Hennum Court, faced with the prospect of permitting an expert to render an ultimate conclusion and possibly infringing on a defendant's constitutional rights, opted to limit battered spouse syndrome evidence strictly to that

which generally describes the syndrome. This approach is feasible under Florida's evidence code, if the circumstances of the case show that expert opinion testimony is relevant.

Section 90.702, Florida Statutes (1991), permits the introduction of expert testimony if it will aid the jury in understanding the evidence, if and only if such testimony "can be applied to evidence at trial." In other words, a predicate must be provided before Dr. Krop or any expert's testimony concerning the general characteristics of battered spouse syndrome would be admissible. Ladd v. State, 564 So. 2d 587 (Fla. 2d DCA 1990), cert. denied, 114 L.Ed.2d 722 (1991); Faulk v. State, 296 So. 2d 614 (Fla. 1st DCA 1974).

Further, in Florida, "[n]ot even an expert witness may offer an opinion as to the ultimate issue in a criminal case." Brockington v. State, 600 So. 2d 29, 30 (Fla. 2d DCA 1992). See also Glendening v. State, 536 So. 2d 212 (Fla. 1988), cert. denied, 492 U.S. 907 (1989); Holliday v. State, 389 So. 2d 679 (Fla. 3d DCA 1980); Gibbs v. State, 193 So. 2d 460 (Fla. 2d DCA 1967); Branch v. State, 96 Fla. 307, 118 So. 13 (1928). Were Dr. Krop or any expert to testify that, in his opinion, respondent suffered from battered spouse syndrome at the time of the stabbing, he would be offering an opinion as to an ultimate issue, e.g., whether respondent had a "reasonable belief" that her conduct was necessary to defend herself against her husband's imminent use of unlawful force. See Fla. Stat. § 776.012 (1991).

Along with these positions on nonspecific hypotheses, this Court should evaluate this defense as one more appropriately entitled "battered person's syndrome." From a jury's perspective, it is unquestioned that women, both single and married, may be battered in relationships. But juries comprised of ordinary people also capably understand that battering occurs in, and has effects on, many other contexts -- a strong willed woman and a weak man; a big heavy man and a smaller man; a big brother or sister and a little brother or sister; etc. Thus, two things become clear. First, women are not the only battered persons. And second, having only a battered "spouse" syndrome which applies to women is unrepresentative of the population in which such a syndrome may occur.

Prior to Hawthorne v. State, 408 So. 2d 801 (Fla. 1st DCA 1982), and the judicial acceptance of the battered spouse syndrome, defendants claiming self defense generally had no need for experts. Instead, they typically called as witnesses family members and friends who had witnessed the defendant's relationship with the victim and who could attest to previous threats and altercations, and whether the defendant feared the victim. Defendants seemingly trusted that juries were fully capable of understanding that, if the victim had always picked on the defendant, chances were good that the defendant feared the victim on a given occasion and acted in a reasonable belief that harm was imminent.

Battered spouse syndrome did not change the basic premise of self defense. A person claiming that she suffered from the syndrome is claiming, in effect, that, because her husband had abused her repeatedly, she committed a violent act against him on this occasion, reasonably believing that, if she did not, the husband would have killed her. Thus, the phrase "battered spouse syndrome" is nothing more than a scientific moniker placed upon a straightforward defense which needs no such specialized title. Experts seem unnecessary when the theory of self defense has not been changed by giving it another name.[4]

Accordingly, the state suggests that reevaluation of Hawthorne is required.[5] As the state pointed out at oral argument, this Court should keep the demarcation between the defenses of insanity and self defense clear. The creation of a specialized version of self defense, e.g., battered spouse syndrome, by the Hawthorne court has caused self defense to take on characteristics of a mental defense.

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[4] *Amicus curiae* appears to agree with this general proposition, as it opined at oral argument that experts are not necessary in this case.

[5] Reevaluation of Hawthorne at this point in the proceedings appears inappropriate for the same reason that the admissibility of respondent's statements to Dr. Krop seems inappropriate -- the issue is not ripe and not squarely before the Court for review. However, if this Court is nevertheless going to address the admissibility of such evidence, it should consider the theoretical underpinnings of this type of evidence as well.

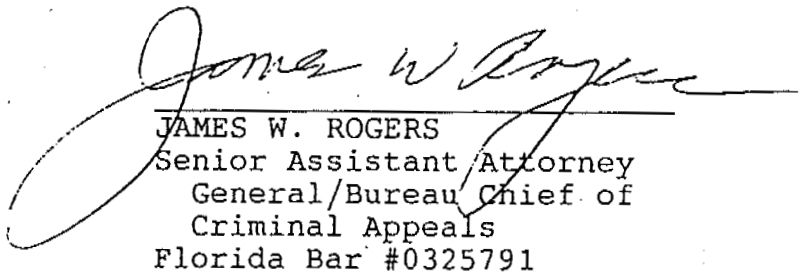
This is both unwarranted and unprecedented under Florida law. See Chestnut v. State, 538 So. 2d 820, 825 (Fla. 1989).

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to: (1) find that certiorari was inappropriately granted in this case; and (2) answer the certified question as rephrased by the state in the affirmative.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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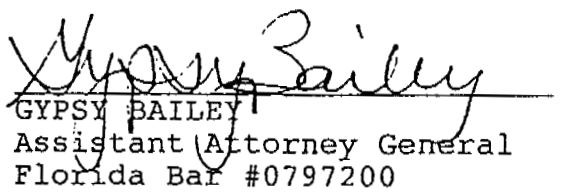

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to JON R. PHILLIPS, Assistant State Attorney, Special Prosecution Division, 421 West Church Street, Suite 814-21, Jacksonville, Florida 32202-4157; THOMAS G. FALLIS, ESQ., of ELIA & FALLIS, P.A., 343 East Bay Street, Jacksonville, Florida 32202; and JAMES T. MILLER, ESQ., for THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, 407 Duval County Courthouse, 330 East Bay Street, Jacksonville, Florida 32202, this 8th day of March, 1993.

GYPSY BAILEY
Assistant Attorney General

R. 4-14-93 (13)

91-110815 TCR

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

MARY JOYCE ROGERS,

Appellant,

v. Case No.: 91-854

STATE OF FLORIDA,

Appellee.
_____/

MOTION FOR REHEARING *EN BANC*

Appellee, the State of Florida, by and through its undersigned counsel, and pursuant to Fla. R. App. P. 9.331(c), moves this court for rehearing *en banc* of its April 8, 1993, opinion, on the grounds that consideration by this court *en banc* is necessary to maintain uniformity in its decisions, and that this case is of exceptional importance.

In this regard, undersigned counsel expresses a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of this court and that a consideration by the full court is necessary to maintain uniformity of decisions in this court: Brown v. State, 426 So. 2d 76 (Fla. 1st DCA 1983), and Ward v. State, 519 So. 2d 1092 (Fla. 1st DCA 1988). Specifically, both Brown and Ward embrace the relevance test enunciated in Florida's evidence for the admissibility of novel scientific evidence, whereas the instant decision

embraces the Frye v. United States, 293 F.2d 1013 (D.C. Cir. 1923), standard.

Further, undersigned counsel expresses a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance. Specifically, it rules upon the admissibility of battered woman's syndrome, an issue which has never been ruled upon by the Florida Supreme Court and which is currently pending before that Court in State v. Hickson, case number 79,222.

For these reasons, the state respectfully requests this Honorable Court to rehear this cause *en banc*.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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GYPSY BAILEY
Assistant Attorney General
Florida Bar #0797200

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COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to GWENDOLYN SPIVEY, ESQ., Post Office Box 14494, Tallahassee, Florida 32317; and JOSEPH E. SMITH, Assistant State Attorney, Post Office Box 477, Bronson, Florida 32621, this 14th day of April, 1993.

GYPSY BAILEY
Assistant Attorney General

Bailey
AAG
91-110815-TYK

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904)488-6151

May 4, 1993

CASE NO: 91-00854

RECEIVED

L.T. CASE NO. 90-24-CF

MAY 05 1993

Mary Joyce Rogers v. State of Florida

Appellant(s), Appellee(s).

Docketed
5-6-93
Florida Attorney General

BY ORDER OF THE COURT:

Motion for rehearing, filed April 14, 1993, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

JON S. WHEELER, CLERK

By: Laurie Black
Deputy Clerk

Copies:

George Nelson
Gwendolyn Spivey
Gypsy Bailey
Lynn A. Williams
James W. Rogers

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K 5-6-93
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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

MARY JOYCE ROGERS,

Appellant,

v. Case No.: 91-854

STATE OF FLORIDA,

Appellee.

_____/

MOTION TO STAY ISSUANCE OF MANDATE

Appellee, the State of Florida, by and through its undersigned counsel, pursuant to Fla. R. App. P. 9.120 and City of Miami v. Arostequi, 18 Fla. L. Weekly D978 (Fla. 1st DCA Apr. 12, 1993), moves this Court to stay issuance of the mandate in this case, and as grounds for this motion, alleges as follows.

This court issued its opinion on April 8, 1993, reversing and remanding this case for a new trial for the trial court's alleged failure to admit evidence of battered spouse syndrome in support of appellant's defense of self defense. The state moved for rehearing on April 14, 1993, on a number of grounds: (1) this court's misapprehension of the record on several points; (2) the pending nature of State v. Hickson, Case Number 79,222, in the Florida Supreme Court; and (3) conflict between this court's own cases and

the instant decision, and between cases from the Florida Supreme Court and other district courts of appeal and the instant decision, on the applicability of Frye v. United States, 293 F.2d 1013 (D.C. Cir. 1923), to the admission of expert testimony. This court denied the motion for rehearing on May 4, 1993.

The state has filed its notice to invoke the discretionary jurisdiction of the Florida Supreme Court on express and direct conflict grounds concerning the Frye issue, and submits that a stay of the mandate is essential. This case should not be remanded for a new trial until the Florida Supreme Court is permitted to address the standard for the admissibility of this type of evidence. Before such a determination, a remand to the trial court would result in confusion, as the lower tribunal, in determining the admissibility of the battered spouse syndrome evidence, would be faced with whether to apply the Frye test as directed by this court, or the relevance test as espoused by the Florida Supreme Court in Glendening v. State, 536 So. 2d 212 (Fla. 1988).

As the state pointed out in its motion for rehearing, this court's determination of the applicability of Frye conflicts with Kruse v. State, 483 So. 2d 1383 (Fla. 4th DCA 1986) (expert testimony regarding posttraumatic stress syndrome), and Andrews v. State, 533 So. 2d 841 (Fla. 5th

DCA 1988) (expert testimony regarding DNA evidence). There, the Fourth and Fifth Districts adopted the relevance test gleaned from Florida's evidence code, and embraced the nationwide trend to refine Frye into a relevance test or discard Frye altogether. This court's decision also conflicts with Glendening, where the Florida Supreme Court adopted the same test concerning expert testimony on sexual abuse.

This court's citation to Stokes v. State, 548 So. 2d 188 (Fla. 1989), in its first footnote overlooked the fact that Stokes did not invalidate Glendening, Kruse, or Andrews, as the Stokes Court strictly circumscribed its holding: "[W]e believe that the test espoused in Frye properly addresses the issue of the admission of posthypnotic testimony." Id. at 195 (emphasis supplied).

> Although judges must consistently make this determination in trial, the weighing process becomes significantly more complicated when considering the translucent nature of hypnosis and hypnotically refreshed testimony. Doubtless such a determination would require the parties to call numerous expert witnesses to advocate or oppose the use of the testimony. This foreshadows an extremely expensive and time-consuming procedure preceding each trial in which posthypnotic testimony is sought to be introduced. Moreover, the balancing approach provides no guidelines for judges attempting to balance the probative value against the danger of unfair prejudice. Thus, while sufficiently flexible to allow admission

> of relevant, reliable posthypnotic testimony and to exclude testimony which is not reliable, the balancing approach is impractical and difficult to apply.

Id. (emphasis supplied). Thus, based on its finding that posthypnotic testimony was inherently unreliable and its stated aim to avoid "the problems associated with the other recognized judicial approaches," id., the Stokes Court applied the strict Frye test.

Significantly, the Stokes Court did not refer to the statutory relevance test of Fla. Stat. § 90.402 (1989), and did not reference its Glendening decision the year before, in which the Court approved the relevance test. Accordingly, it cannot be said that Stokes disproved the relevance test, because the Court did not address that test in the context of posthypnotic testimony. If the issue is ever squarely before that Court in another context, such as DNA, posttraumatic stress syndrome, sexual abuse, or battered woman syndrome, it is highly likely that the relevance test would be victorious. In State v. Woodall, 385 S.E.2d 253, 259 (W.V. 1989), the West Virginia Supreme Court acknowledged Frye but found that its own statutory provision that "expert testimony is admissible when it 'will assist the trier of fact to understand the evidence or to determine a fact in issue'" overruled Frye. As this court is well aware, Florida has a similar provision. Fla. Stat. § 90.702 (1989).

SHAW, J., concurs specially with an opinion.

GRIMES, J., Did not participate in this case.

OVERTON, Justice, concurring specially.

I concur. I am, however, concerned about a judge making a determination that the child's statements are reliable based solely on third party statements. I feel the procedure would better meet constitutional objections if the judge personally saw and examined the child in camera.

SHAW and KOGAN, JJ., concur.

SHAW, Justice, concurring specially.

I agree that section 90.803(23), Florida Statutes (1985), is constitutional. I write separately because the majority opinion omits the critical facts which show that there were sufficient indicia of reliability to enable the judge to admit the hearsay statements without personally examining the child. The hearsay statements were made to a number of people, not merely the mother. It is unlikely that the hearers (witnesses) were engaged in a conspiracy to convict the petitioner. Even more significantly, the hearsay statements were consistent with the confession of petitioner that he sexually abused the child. Under these circumstances, the hearsay corroborated the confession and served only to prove corpus delicti by showing that a crime had been committed. Prima facie proof is sufficient to prove corpus delicti and to admit the confession. *Jefferson v. State*, 128 So.2d 132, 135 (Fla.1961). In many cases, the reliability of the statement would not be so easily shown as the majority opinion suggests. In those cases where the hearsay is the primary evidence, showing both that the crime was committed and that it was committed by the defendant, it is imperative that the indicia of reliability be clearly established. This, in my opinion, would normally require that the judge personally examine the child.

David Edward GLENDENING, Petitioner,

v.

STATE of Florida, Respondent.

No. 70346.

Supreme Court of Florida.

Dec. 1, 1988.

Rehearing Denied Feb. 3, 1989.

Defendant was convicted of sexual battery of child 11 years of age or younger, by the Circuit Court, Sarasota County, Andrew Owns, Jr., J., and he appealed. The District Court of Appeal, 503 So.2d 335, Grimes, J., affirmed, and defendant applied for review. The Supreme Court, Ehrlich, C.J., held that: (1) statute allowing admission of hearsay statements of children regarding sexual abuse was constitutional; (2) application of statute to defendant did not violate prohibition against ex post facto laws; (3) allowing child's testimony to be video taped did not violate defendant's right of confrontation; (4) judge was not required to determine whether child was testimonially competent prior to allowing admission of hearsay statements; (5) admission of expert testimony that defendant was person who sexually abused victim was not fundamental error; and (6) defendant waived issue of whether expert improperly vouched for credibility of hearsay declarant.

Affirmed.

Overton, J., concurred in result only.

1. Criminal Law ⇐662.8

Statute which allowed admission of hearsay statements by children concerning sexual abuse did not violate confrontation clause; in order for statements to be admitted court was first required to find, in a hearing, that time, content, and circumstances of statement provided sufficiency of guards of reliability and child must either testify or be unavailable as a witness. West's F.S.A. § 90.803(23); U.S.C.A. Const. Amend. 6; West's F.S.A. Const. Art. 1, § 16.

2. Constitutional Law ⇐202
Infants ⇐12

Application at trial of statute which allowed admission of hearsay statements made by children regarding sexual abuse, which statute was not in effect at time of offense, did not violate prohibition against ex post facto laws; statute did not effect crime with which defendant was charged, punishment prescribed therefore, or quantity or degree of proof necessary to establish guilt. West's F.S.A. § 90.803(23); U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1.

3. Infants ⇐20

Videotaped testimony of child sexual abuse victim was "testimony" under statute allowing admission of hearsay statements by children regarding sexual abuse when child testifies. West's F.S.A., §§ 90.803(23), 92.53(1).

See publication Words and Phrases for other judicial constructions and definitions.

4. Criminal Law ⇐662.1

Allowing child sexual abuse victim's testimony to be videotaped and shown to jury rather than given live in open court did not violate defendant's right to confront witness; evidence showed that child would have suffered emotional and mental harm had the child been forced to testify in court, and defendant was permitted to watch testimony behind two-way mirror and conduct full cross-examination of child. U.S.C.A. Const.Amend. 6; West's F.S.A. Const. Art. 1, § 16; West's F.S.A. §§ 90.803(23), 92.53(4).

5. Criminal Law ⇐1168(2)

Child sexual abuse victim's testimony did not implicate defendant in any wrongdoing, and child specifically stated that defendant had not hurt her, rendering testimony totally exculpatory, and thus any error in denying defendant opportunity to confront child witness face-to-face was harmless beyond a reasonable doubt. U.S. C.A. Const.Amend. 6; West's F.S.A. Const. Art. 1, § 16.

6. Infants ⇐20

Even if child sexual abuse victim's videotaped testimony was not "testimony" under statute allowing admission of hearsay statements of children regarding sexual abuse when child testifies and, requiring other corroborative evidence of abuse when child does not testify, child's hearsay statements were sufficiently corroborated by medical testimony and by two witnesses that testified that defendant admitted to them that he committed the sexual abuse. West's F.S.A. § 90.803(23).

7. Infants ⇐20

Trial judge was not required to determine that child sexual abuse victim was competent to testify in order to allow, under evidence statute, admission of hearsay statements made by child concerning sexual abuse, but rather was only required to determine that statements were trustworthy and reliable. West's F.S.A. § 90.803(23).

8. Criminal Law ⇐469

Qualified expert in interviewing child sexual abuse victims was entitled to express opinion on issue of whether child had been sexually abused. West's F.S.A. §§ 90.702, 90.703.

9. Criminal Law ⇐469

Qualified expert in interviewing child sexual abuse victims was not entitled to give opinion as to whether defendant was child's abuser, and admission of such testimony was error. West's F.S.A. §§ 90.403, 90.702, 90.703.

10. Criminal Law ⇐1036.6

Any error in admission of testimony of child sexual abuse expert that defendant was person who sexually abused victim was not fundamental error, and because defendant did not object to testimony or move to strike, court would not consider propriety of remark on appeal. West's F.S.A. § 90.403.

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11. Criminal Law ⇐1043(3)

Defendant's objection to expert testimony as irrelevant did not preserve for appeal issue of whether testimony had effect of improperly vouching for credibility of hearsay declarant.

Stuart C. Markman of Winkles, Trombley, Kynes & Markman, P.A., Tampa, and Ronald K. Cacciatore, P.A., Tampa, for petitioner.

Robert A. Butterworth, Atty. Gen., and Katherine V. Blanco and Kim W. Munch, Asst. Attys. Gen., Tampa, for respondent.

EHRLICH, Chief Justice.

We have for review *Glendening v. State*, 503 So.2d 335 (Fla.2d DCA 1987), in which the district court expressly declared valid section 90.803(23), Florida Statutes (1985). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

On July 26, 1985, Glendening was charged by information with sexual battery upon a child eleven years of age or younger, in violation of section 794.011(2), Florida Statutes (1985). The acts upon which the charge was based were alleged to have occurred between September 1, 1984 and June 24, 1985. The alleged victim was Glendening's three-and-one-half-year-old daughter.

Glendening was found guilty of the charged offense and received a life sentence with a mandatory minimum twenty-five years of incarceration. On appeal, the Second District Court of Appeal affirmed Glendening's conviction and sentence, rejecting the arguments that the trial court erred in admitting out-of-court statements made by the young victim under section 90.803(23), Florida Statutes (1985).

Glendening now seeks review of the decision of the Second District Court of Appeal. As the district court below noted, the major thrust of Glendening's argument involves the constitutionality of section 90.803(23), its applicability to his case, and compliance with the section's requirements. Section 90.803(23) is a hearsay exception which permits, under certain circumstances, the introduction of out-of-court statements made by a child victim of sexual abuse describing any act of child abuse, sexual abuse, or any other offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, if the child has a physical, mental, emotional, or developmental age of eleven or less.

[1] We first reject Glendening's contention that section 90.803(23) is unconstitutional on its face. Glendening relies upon the arguments set forth in the brief of Petitioner Perez filed in the case of *Perez v. State*, Case No. 70,027 in regard to this issue. We rejected these arguments in our decision in *Perez v. State*, 536 So.2d 206 (Fla.1988), released simultaneously with the present decision.

We next address Glendening's argument that because he was charged with an offense occurring before the effective date of section 90.803(23), application of the new hearsay exception to his case violated the prohibition against *ex post facto* laws. The United States Supreme Court has stated that there has been no attempt to precisely delimit the scope of the phrase "*ex post facto* law." One statement of the characteristics of an *ex post facto* law set forth by the Supreme Court, however, provided that " 'any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.' " *Dobbert v. Florida*, 432 U.S. 282, 292, 97 S.Ct. 2290, 2297, 53 L.Ed.2d 344 (1977) (quoting *Beazell v. Ohio*, 269 U.S. 167, 169–70, 46 S.Ct. 68, 69, 70 L.Ed. 216 (1925)). Another formulation, reiterated recently in *Miller v. Florida*, also provides that " '[e]very law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender' " violates the prohibition against *ex post facto* laws. 482 U.S. 423, 107 S.Ct. 2446, 2450, 96 L.Ed.2d 351 (1987) (quoting *Calder v. Bull*, 3 U.S. (Dall.) 386, 1 L.Ed. 648 (1798)). No *ex post facto* violation occurs if a change is merely procedural and does not alter "substantial personal rights." *Miller*, 107 S.Ct. at 2451; *Dobbert*, 432 U.S. at 293, 97 S.Ct. at 2298.

Relying primarily upon that portion of the formulation of the scope of *ex post facto* laws from *Miller* which is set forth above, Glendening contends that section 90.803(23) alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense. He further contends that because he was disadvantaged by the retrospective application of the exception, admission of the out-of-court statements of the child victim pursuant to section 90.803(23) in his case violated the prohibition against *ex post facto* laws. We disagree.

The proscription against laws which affect the legal rules of evidence and receive less, or different, testimony in order to convict the offender has been construed as prohibiting those laws which " 'change the ingredients of the offence or the ultimate facts necessary to establish guilt.' " *Miller*, 107 S.Ct. at 2453 (quoting *Hopt v. Utah*, 110 U.S. 574, 590, 4 S.Ct. 202, 210, 28 L.Ed. 262 (1884)). Changes in the admission of evidence have been held to be procedural. Two examples of this, noted in *Dobbert*, are found in *Hopt* and *Thompson v. Missouri*, 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed. 204 (1898). In *Hopt*, the law in effect on the date of the alleged homicide provided that a convicted felon could not be called as a witness. Prior to trial of the case, the law was changed and a convicted felon, called to the stand to testify, implicated Hopt in the crime. The Supreme Court rejected the argument that the law was *ex post facto*, stating that "[a]ny statutory alteration of the legal rules of evidence which ... only removes existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only" and "are not *ex post facto* in their application to prosecution for crimes committed prior to their passage." 110 U.S. at 589, 590, 4 S.Ct. at 209–10. In *Thompson*, the Missouri Supreme Court reversed Thompson's conviction of murder because of the inadmissibility of certain evidence. Letters written by the defendant to his wife were submitted for handwriting comparison, which was prohibited by the rules of evidence. Prior to the second trial, the law was changed to make this objectionable evidence admissible and Thompson was again convicted. The United States Supreme Court rejected the argument that this change was violative of the *ex post facto* clause and held that the change was procedural. *See Dobbert*, 432 U.S. at 293, 97 S.Ct. at 2298.

[2] The same reasoning which resulted in the Supreme Court's determination that the statutes in *Hopt* and *Thompson* were procedural leads to the conclusion that section 90.803(23), Florida Statutes, is also procedural and that the statute does not affect "substantial personal rights." As in *Hopt*, "[t]he crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by" the enactment of section 90.803(23). 110 U.S. at 589–90, 4 S.Ct. at 209–10. As in *Thompson*, section 90.803(23) "left unimpaired the right of the jury to determine the sufficiency or effect of the evidence declared to be admissible, and did not disturb the fundamental rule that the state ... must overcome the presumption of his innocence, and establish his guilt beyond a reasonable doubt." 171 U.S. at 387, 18 S.Ct. at 924. Accordingly, we conclude that the district court below correctly held that application of section 90.803(23) in the present case does not violate the prohibition against *ex post facto* laws.

The third issue addressed concerns compliance with the requirements of section 90.803(23) in the trial court below. Prior to trial, the state served a motion to videotape the child's testimony for introduction at trial pursuant to section 92.53, Florida Statutes (1985). Section 92.53 provides that upon

a finding that there is a substantial likelihood that a victim or witness [in a sexual abuse or child abuse case] who is under the age of 16 would suffer at least moderate emotional or mental harm if he were required to testify in open court or that such victim or witness is otherwise unavailable as defined in s. 90.804(1), the trial court may order the videotaping of the testimony of the victim or witness in a sexual abuse case or child abuse case, whether civil or criminal in nature, which videotaped testimony is to be utilized at trial in lieu of trial testimony in open court.

The trial court heard evidence on the motion and found that there was a substantial likelihood that the child would suffer at least moderate emotional or mental harm if she were required to testify in open court. The trial court accordingly entered an order permitting the videotaping and required Glendening to view the testimony outside the child's presence.

At the videotaping session, the trial court first conducted a voir dire examination of the child to determine her competency to testify. The trial court concluded that the child was competent to testify because she showed an above average intelligence for a three-and-one-half-year-old child and was aware of her surroundings, attributing her inability to explain the difference between the truth and a lie to the inartful questioning by the court and the state attorney. Thereafter, when the child was interrogated concerning the matters involved in the case, she did not implicate her father in any misconduct.

Glendening made a pretrial motion to exclude all hearsay statements made by the child. In response, the state filed a notice of the various hearsay statements it intended to introduce. The trial court ruled that the state's response did not constitute adequate compliance with the notice requirements of section 90.803(23)(b) and permitted the state to file a more detailed response. Thereafter, but more than ten days before trial, the state filed a detailed recitation of the hearsay statements to be offered at trial. At a subsequent hearing on the motion, the trial court observed that it could not rule upon the admissibility of the hearsay statements without hearing the witnesses' testimony concerning the circumstances under which the child's statements were made.

At trial, the witnesses listed on the state's notice testified concerning the out-of-court statements made by the child and the circumstances under which the statements were made. The videotape of the child's testimony was shown to the jury once during the state's case-in-chief and then again by the defense.

Glendening raises several arguments in regard to the compliance with section 90.803(23) by the trial court. Glendening contends that the requirements of section 90.803(23)(a)(2) were not met. This subsection provides that in order to admit the hearsay statements of a child under this exception, the child must either (a) testify, or (b) be unavailable. If the child is unavailable, the statute also requires other corroborative evidence of the abuse or offense. Glendening argues the district court below erred in holding that introduction of the videotaped testimony of the child, taken pursuant to section 92.53, was sufficient to satisfy the requirement that the child testify in order to admit the child's hearsay statements. We reject this argument.

[3] Section 92.53(1) provides that when the requisites of the statute are met, the trial court may order "the videotaping *of the testimony* of the victim or witness ... which videotaped *testimony* is to be utilized at trial *in lieu of trial testimony in open court.*" (Emphasis added.) The statute clearly provides that videotaped testimony is the equivalent of testimony in open court. Moreover, the legislative intent in enacting section 92.53 was to spare children, to the extent constitutionally permissible, the trauma of testifying in open court.[1] The legislative intent would be defeated if section 92.53 did not have the effect of allowing the videotaped testimony of children meeting the requirements of the statute where the laws of the state refer to "testimony" or "testifying."

1. *See* ch. 85-53, Laws of Fla.: "WHEREAS, it is necessary that safeguards be instituted for the children of the State of Florida who are victimized to assure that their right to be free from emotional harm and trauma occasioned by judicial proceedings is protected by the court...."

[4] Application of section 92.53 to permit videotaping the child's testimony instead of requiring the child to testify in open court for purposes of admitting the child's out-of-court statements pursuant to section 90.803(23) does not violate the federal or Florida constitutional guarantee of the right of confrontation.[2] The defendant is permitted full cross-examination of the child, which is the functional purpose of the confrontation clause. *Kentucky v. Stincer*, 482 U.S. 730, 107 S.Ct. 2658, 2664, 96 L.Ed.2d 631 (1987). The jury is still able to see the witness as the testimony is given and "judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895). The fact that Glendening was required to view the child's testimony from behind a two-way mirror as it was videotaped does not change the conclusion.[3] In the present case, Glendening was accompanied by counsel behind the two-way mirror and was able to communicate with counsel questioning the child if the need arose. His opportunity to engage in full and effective cross-examination was not interfered with by his exclusion. *See, e.g., Stincer*, 107 S.Ct. at 2663-64 n. 9.

Furthermore, although the confrontation clause does reflect a *preference* for face-to-face confrontation at trial, *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980), the Supreme Court has recognized that

> competing interests, if "closely examined," *Chambers v. Mississippi*, 410 U.S., [284,] at 295, 93 S.Ct., [1038,] at 1045, [35 L.Ed.2d 297] may warrant dispensing with confrontation at trial. See *Mattox v. United States*, 156 U.S., [237,] at 243, 15 S.Ct. [337,] at 340 [, 39 L.Ed. 409] ("general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case"). Significantly, every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings.

Id. at 64, 100 S.Ct. at 2538. We agree with the First District Court of Appeal that "[w]eighing the competing interests in the balance ... the defendant's right to confront his accusers must give way to the State's interest in sparing child victims of sexual crimes the further trauma of in-court testimony." *Chambers v. State*, 504 So.2d 476, 477-78 (Fla. 1st DCA 1987). Our conclusion is not altered by the recent United States Supreme Court decision in *Coy v. Iowa*, — U.S. —, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988), which was issued subsequent to oral argument in the present case. Coy was charged with sexually assaulting two thirteen-year-old girls while they were camping out in the backyard of the house next door to him. Neither of the girls was able to describe their assailant's face. At trial, the girls were permitted to testify behind a large screen which enabled Coy to dimly perceive the witnesses but because of which the witnesses were completely unable to see Coy. *See* Iowa Code § 910A.14 (1987). The United States Supreme Court found that Coy's constitutional right to face-to-face confrontation was violated and reversed the judgment of the Iowa Supreme Court which had affirmed his convictions and sentences.

There are two reasons why the decision in *Coy* does not alter our conclusion. First, the present case is distinguishable from the

2. U.S. Const. amend. VI; art. 1, § 16, Fla. Const.

3. Section 92.53(4) provides that
> [t]he court may require the defendant to view the testimony from outside the presence of the child by means of a two-way mirror or another similar method that will ensure that the defendant can observe and hear the testimony of the child in person, but that the child cannot hear or see the defendant. The defendant and the attorney for the defendant may communicate by any appropriate private method.

scenario in *Coy*. In *Coy*, the Supreme Court recognized that "[i]t is true that we have in the past indicated that rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests." 108 S.Ct. at 2802. The majority opinion notes that any such exception to the right of face-to-face confrontation will only be allowed when necessary to further an important public policy. The majority then concludes that whatever exceptions may exist, the exception set forth in the Iowa statute could not be sustained by any conceivable exception. Iowa's argument that a necessity for an exception was established by the statute, which creates a legislatively imposed *presumption* of trauma, was rejected because the exception was not a firmly rooted exception and "there have been no individualized findings that these particular witnesses needed special protection." *Id.* at 2803.

In contrast to the statute at issue in *Coy*, section 92.53 requires an individual determination for each child witness that the use of videotaped testimony is necessary to prevent the child from suffering emotional or mental harm. In the present case, the trial court conducted a hearing on the issue of whether the child victim would suffer at least moderate emotional or mental harm if required to testify in open court. The child's mother and the child's guardian ad litem testified that the child had expressed a fear of seeing her father and described behavior of the child on various occasions to support their conclusions. In addition, Dr. Meyer, a pediatrician who had attempted to examine the child, and Ms. Shapiro, a social worker who works with sexually abused children, testified that based upon their experience with this particular child testifying in open court would be a terrifying experience, particularly if she were to be cross-examined with her father in the room. Both Dr. Meyer and Ms. Shapiro felt that examining the child by way of videotaping where she was not able to see her father would minimize her emotional trauma. Based upon this testimony, the trial judge concluded that there was a substantial likelihood that the victim would suffer at least moderate emotional or mental harm if required to testify in open court in the presence of the defendant. Thus, contrary to the facts in *Coy*, the present case involved "a case-specific finding of necessity." *Coy*, 108 S.Ct. at 2805 (O'Connor, J., concurring). Moreover, as noted previously, the protection of child witnesses from the trauma of testifying in open court in the presence of the defendant, when it is demonstrated that there is a substantial likelihood that such trauma would result, is a public policy of such importance as to justify a trial procedure that calls for something other than face-to-face confrontation. *See id.*

[5] Second, Justice Scalia recognized in the majority opinion in *Coy* that the United States Supreme Court has "recognized that other types of violations of the Confrontation Clause are subject to that harmless error analysis ... and [has] see[n] no reason why denial of face-to-face confrontation should not be treated the same." [4] 108 S.Ct. at 2803. We conclude that if the denial of face-to-face confrontation in the present case had been error, any error would have been harmless. When questioned, the child not only did not implicate the defendant in any wrongdoing, but specifically stated that he had not hurt her. Following this testimony by the child during examination by the state, defense counsel declined to conduct cross-examination of the child. Moreover, this exculpatory tape was presented to the jury by the defense during its case. Because the videotaped testimony was totally exculpatory, the admission of the testimony unquestionably did not contribute to the conviction and was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So.2d 1129, 1138 (Fla.1986).

4. Justice Scalia went on to note that "[a]n assessment of harmlessness cannot include consideration of whether the witness's testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence." *Coy v. Iowa*, — U.S. —, 108 S.Ct. 2798, 2803, 101 L.Ed.2d 857 (1988).

Accordingly, we conclude the district court below correctly held that introduction of the child's videotaped testimony, taken pursuant to section 92.53, satisfied the requirement of section 90.803(23)(a)(2) that the child either testify or be unavailable. *Accord State v. Sheppard*, 197 N.J.Super. 411, 484 A.2d 1330 (Law Div.1984) (Child victim would be permitted to testify through use of video equipment in prosecution of child's stepfather for sexual assault, despite resulting lack of eye contact between child witness and defendant where defendant, judge, jury, and spectators would see and hear the child clearly, adequate opportunity for cross-examination would be provided, and in view of trial court's finding of harm to the child if she was required to testify in open court.).

[6] Even if we had agreed with Glendening's argument that if the child testifies via videotape rather than in open court, the child's out-of-court statements could not be admitted without first imposing the additional safeguards under the *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), unavailable declarant scenario, it would be of no consequence in our review of the present case. The *Roberts* unavailable declarant scenario requires that if the declarant is unavailable, the hearsay must be marked with particularized guarantees of trustworthiness in order to be admissible. *Id.* at 65, 100 S.Ct. at 2538. Section 90.803(23) incorporates this requirement by requiring that there be other corroborative evidence of the abuse or offense if the child declarant is unavailable. We held in *Perez* that this requirement satisfied the *Roberts* standard for admission of hearsay statements by unavailable declarants. *Perez v. State*, 536 So.2d 206 (Fla.1988). In the present case, the abuse was corroborated by medical testimony and by two witnesses who testified that Glendening admitted to them that he committed the offenses.[5]

[7] We also reject Glendening's argument that the trial court erred in determining that the child was competent to testify. We have been referred by Glendening to portions of the transcript of the competency hearing which focus on the child's weakness as a witness. Other portions, however, tend to support the child's competency to testify. As this Court has previously held, it is "within the sound discretion of the trial judge to decide whether an infant of tender years has sufficient mental capacity and sense of moral obligation to be competent as a witness, and his ruling will not be disturbed unless a manifest abuse of discretion is shown." *Rutledge v. State*, 374 So.2d 975, 979 (Fla.1979), *cert. denied*, 446 U.S. 913, 100 S.Ct. 1844, 64 L.Ed.2d 267 (1980). Our examination of the record reveals no abuse of discretion on the part of the trial judge in permitting the child's testimony.[6]

The final issue involves the alleged improper admission of expert witness testimony. Rebecca Winkel, a coordinator for the

5. Glendening's argument that permitting videotaped testimony to be the equivalent of in-court testimony will make it easier for the state to introduce hearsay and decrease the likelihood that children will be produced for in-court testimony is without merit. The argument ignores the fact that by meeting the lower standard of demonstrating that testimony in open court will cause moderate emotional harm so that the child's testimony may be videotaped, the state is subjecting the child to cross-examination by the defense. In contrast, if the state meets the heavier burden of establishing that testimony will cause the child to suffer severe emotional harm, the defense may have no opportunity to cross-examine the child. In addition, the argument assumes that the trial court will always find that the child will suffer emotional harm if required to testify in open court. We decline to engage in such speculation.

6. Furthermore, Glendening's argument that the child must be testimonially competent in order for the child's out-of-court statements to be admitted has been rejected by this Court in *Perez v. State*, 536 So.2d 206 (Fla.1988). In *Perez*, we held that the requirement of section 90.803(23) "that the trial court find that the time, content, and circumstances of the statement provide sufficient safeguards of reliability furnishes a sufficient guarantee of trustworthiness of the hearsay statement" to satisfy the requirements of *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). At 211. In the present case, when an objection to the admission of a hearsay statement was made, the trial court properly made findings, outside the presence of the jury, that the out-of-court statements were reliable.

child protection team, was recognized by the trial court as an expert in the area of interviewing children regarding the subject of child abuse. During direct examination, the prosecutor asked: "Mrs. Winkel, based upon your interview with Jennifer did you reach any opinion within a reasonable degree of professional certainty as to whether or not she had been sexually abused?" Defense counsel objected to the question on the basis that the question called for an opinion on the ultimate issue in the case and on the basis that the witness was not competent to make the conclusion. The objection to the question was overruled, with the understanding that the question was limited to the specific act alleged, anal penetration, and limited to the doll interview. The question was rephrased as follows: "Based upon your interview with Jennifer, her marking the charts, have you reached any opinion within a reasonable degree of professional certainty as to whether or not Jennifer Glendening's anus was penetrated by a penis?" In response to the question, Mrs. Winkel stated that she had. When questioned what that opinion was, Mrs. Winkel stated that it was her opinion "that Jennifer has been sexually abused by her father." Glendening contends he was prejudiced by the improper admission of this expert opinion.

The trial court correctly overruled the defense objection to the question. Rebecca Winkel was recognized, without objection by the defense, as an expert in conducting interviews with children regarding suspected sexual abuse. A trial court has broad discretion in determining the range of subjects on which an expert witness may be allowed to testify and unless there is a clear showing of error, its decision will not be disturbed on appeal. *Johnson v. State*, 393 So.2d 1069, 1072 (Fla.1980), *cert. denied*, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981). The trial court did not abuse its discretion in determining that an opinion as to whether the child was sexually abused was within the province of the expert witness.

[8] A qualified expert may express an opinion as to whether a child has been the victim of sexual abuse. Sections 90.702 and 90.703, Florida Statutes (1985), deal with admissibility of expert testimony and opinions.

> 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, the opinion is admissible only if it can be applied to evidence at trial.
>
> 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.

These two sections are subject, however, to the limitations of section 90.403, Florida Statutes (1985), which provides in relevant part:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

Accordingly, the evidence code sets forth four requirements to be met in order to admit an expert opinion: (1) the opinion evidence must help the trier of fact; (2) the witness must be qualified as an expert; (3) the opinion must be capable of being applied to evidence at trial; and (4) the probative value of the opinion must not be substantially outweighed by the danger of unfair prejudice. *See Kruse v. State*, 483 So.2d 1383 (Fla. 4th DCA 1986).

Testimony in the form of an opinion by Mrs. Winkel would be helpful to the jury in view of the age of the victim. The child's age made it likely that her inexperience in sexual matters would make it difficult for her to describe what happened. The opinion of a witness such as Mrs. Winkel, recognized as an expert in interviewing suspected young victims of sexual abuse, provided the jury more information from which to decide whether the child had actually been a victim of sexual abuse. Mrs. Winkel's opinion testimony could be applied by the jury to the medical evidence to connect the findings of the medical examination to the cause. The probative value of the opinion that the child was sexually abused was not substantially outweighed by any unfair prejudice. The jury was able to hear a tape recording of the interview which formed the basis of Mrs. Winkel's opinion and heard defense arguments challenging the interview technique. The jury was properly left free to determine whether to accept the opinion and if so, what weight it should be given. *See Kruse. See also Bloodworth v. State*, 504 So.2d 495, 497 (Fla. 1st DCA 1987) (trial court did not err in allowing expert to express opinion that the victim had engaged in recent non-consensual intercourse).

[9, 10] We agree with Glendening that it was improper for the expert witness to testify that it was her opinion that the child's father was the person who committed the sexual offense. An opinion as to the guilt or innocence of an accused is not admissible. *See Lambrix v. State*, 494 So. 2d 1143 (Fla.1986); *Spradley v. State*, 442 So.2d 1039 (Fla. 2d DCA 1983). Although section 90.703 would appear to permit such an opinion, such testimony is precluded on the basis of section 90.403. Any probative value such an opinion may possess is clearly outweighed by the danger of unfair prejudice. This error does not, however, require reversal. Except in cases of fundamental error, an issue will not be considered for the first time on appeal. *Steinhorst v. State*, 412 So.2d 332 (Fla.1982). Defense counsel neither objected to the answer nor moved to strike it and the error is not of a fundamental nature. Accordingly, the issue is not properly preserved for appeal because the question was proper and the improper reply was not contemplated by the question and was not the subject of a motion to strike.

[11] Glendening also argues that Dr. Kent, a psychologist, was improperly allowed to vouch for the credibility of a witness by stating that in his expert opinion the child's allegation, as conveyed by Mrs. Winkel, was based upon independent recall rather than improper prompting. Defense counsel's objection, however, was on the basis that the question was irrelevant, not that the question called for improper vouching for the credibility of the hearsay declarant. In order for an argument to be cognizable on appeal, it must be the specific contention asserted as the legal ground for the objection below. *Steinhorst.* Accordingly, this issue is also not properly preserved for appeal.

In summary, we conclude the district court below correctly held that section 90.803(23) is constitutional and was properly applied in the present case. Accordingly, we approve the decision of the district court below.

It is so ordered.

McDONALD, SHAW, BARKETT and KOGAN, JJ., concur.

OVERTON, J., concurs in result only.

GRIMES, J., did not participate in this case.

Juan BANDA, Appellant,

v.

STATE of Florida, Appellee.

No. 69102.

Supreme Court of Florida.

Dec. 8, 1988.

Certiorari Denied March 20, 1989.
See 109 S.Ct. 1548.

Defendant was convicted in the Circuit Court, Pinellas County, James R. Case, J., of first-degree murder, and was sentenced to death. Defendant appealed. The Supreme Court held that evidence concerning defendant's reasons for killing victim was insufficient to establish that murder was committed without pretense of moral or

served on March 19. Additionally, we note that by pretrial order the discovery cutoff date was set at March 24, 1980, the day on which appellant's amended offer of judgment was hand-served on appellee. Unfortunately, as we pointed out in our original opinion, service on March 24, nine days before trial, was ineffective under rule 1.442, Florida Rules of Civil Procedure, which requires that offers of judgment be made more than ten days before trial. We do believe, however, that the issues affecting the validity of appellant's March 24 offer of judgment are of great public importance in view of current legislative and judicial emphasis on use of the offer-of-judgment procedure as an effective means for settling disputes and reducing litigation, and therefore certify to the Supreme Court the following questions of great public importance:

1. WHETHER AN AMENDED OFFER OF JUDGMENT RELATES BACK TO THE DATE OF SERVICE OF THE ORIGINAL OFFER OF JUDGMENT FOR PURPOSES OF THE TIME REQUIREMENTS IN RULE 1.442, FLORIDA RULES OF CIVIL PROCEDURE?
2. WHETHER, WHEN THE ELEVENTH DAY BEFORE TRIAL FALLS ON A SATURDAY, HAND DELIVERY OF AN OFFER OF JUDGMENT ON THE FOLLOWING MONDAY IS EFFECTIVE UNDER RULE 1.442, FLORIDA RULES OF CIVIL PROCEDURE?
3. WHETHER AN OFFER OF JUDGMENT HAND-SERVED ON THE NINTH DAY BEFORE TRIAL IS VALID WHERE THE PARTIES HAVE AGREED BY PRETRIAL ORDER THAT THE DISCOVERY CUTOFF DATE SHALL BE THE NINTH DAY BEFORE TRIAL?
4. WHETHER AN OFFER OF JUDGMENT REMAINS VALID AND OUTSTANDING AFTER A NEW TRIAL HAS BEEN GRANTED?

Appellant also points out that we erroneously stated in our opinion that the trial court's verdict form and instructions to the jury were submitted to the jury "with the acquiescence of the parties." The record reflects that the jury verdict form submitted to the jury was prepared by the court. Appellant's counsel repeatedly sought clarification of the effect of the verdict form and acquiesced in use of the form and the instructions to the jury after he received what he considered a satisfactory explanation of their intended meaning and effect. We do not construe these requests for clarification as an objection to the allocation of fault covered by the instructions and the verdict. We reaffirm our holding that the verdict rendered by the jury was applied by the court in "an eminently sensible" manner that was fair to both sides.

Appellee's motion for rehearing of our order denying attorney's fees to appellee is denied because the petition for attorney's fees filed in this court fails to state "the ground upon which recovery is sought" pursuant to rule 9.400(b), Florida Rules of Appellate Procedure. Such statement of grounds was of particular importance since appellant contests appellee's construction of the contractual right to fees.

ERVIN and ZEHMER, JJ., concur.

BOOTH, C.J., concurring in part and dissenting in part.

BOOTH, C.J., concurring in part and dissenting in part:

I respectfully dissent from certification, since the termination of this litigation[1] should not be further prolonged.

1. First trial was in March of 1980, based on dispute going back to 1978. *See Cheek v. McGowan Electric Supply Company*, 404 So.2d 834 (Fla. 1st DCA 1981).

Frank KRUSE, Appellant,

v.

STATE of Florida, Appellee.

No. 83-2364.

District Court of Appeal of Florida, Fourth District.

Feb. 5, 1986.

Rehearing and Rehearing En Banc Denied March 26, 1986.

Defendant was convicted in the Circuit Court, St. Lucie County, Royce R. Lewis, J., of lewd, lascivious, or indecent assault upon a child and he appealed. The District Court of Appeal, Anstead, J., held that: (1) expert testimony that victim suffered from posttraumatic stress syndrome was properly admitted; (2) testimony did not invade the province of the jury; but (3) it was reversible error to permit State to cross-examine character witness as to his knowledge of other specific arrests and accusations against the defendant for the same type of crime; and (4) it was reversible error not to poll the jury to determine their exposure to prejudicial and inaccurate media reports.

Reversed and remanded.

Dell, J., filed an opinion concurring in part and dissenting in part.

1. Criminal Law ⇐469

Provision of the Evidence Code, West's F.S.A. § 90.702, dealing with testimony by experts requires that such opinion evidence be helpful to trier of fact, that witness be qualified as an expert, and that opinion evidence can be applied to evidence offered at trial; evidence must also have a probative value outweighing its danger of unfair prejudice. West's F.S.A. § 90.403.

2. Criminal Law ⇐469

Expert's testimony on posttraumatic stress syndrome was admissible in trial for lewd, lascivious, or indecent assault upon a child in which there was no demonstrable physical evidence of an assault and defendant denied the allegations. West's F.S.A. § 90.702.

3. Criminal Law ⇐479

Testimony of physician which outlined her formal training and experience and her licensing as a physician in two states with a specialty in child and adolescent psychiatry established her qualifications to render an opinion on whether victim of alleged sexual assault was suffering from posttraumatic stress syndrome. West's F.S.A. § 90.702.

4. Criminal Law ⇐486(10)

Expert's testimony that victim suffered from posttraumatic stress syndrome was predicated upon and tended to explain evidence offered at trial concerning the victim's change in behavior after the alleged sexual assault. West's F.S.A. § 90.702.

5. Criminal Law ⇐474

Testimony of expert that victim of alleged sexual assault suffered from posttraumatic stress syndrome had probative value outweighing its potential for prejudice. West's F.S.A. § 90.403.

6. Criminal Law ⇐470

Expert's testimony that victim of alleged sexual assault suffered from posttraumatic stress syndrome did not improperly invade the province of the jury, which was called upon to determine whether the alleged assault actually occurred.

7. Criminal Law ⇐469

Expert testimony may not be offered to directly vouch for the credibility of a witness.

8. Criminal Law ⇐1170½(1)
Witnesses ⇐274(2)

It was error, and error was reversible, to permit State to cross-examine defendant's character witness as to his knowledge of other specific arrests and accusations against the defendant for the same type of crime.

9. Criminal Law ⇐874, 1175

It was reversible error for trial court to refuse to poll the jury to determine their

exposure to two admittedly prejudicial and inaccurate media reports which were published midtrial and referred to other charges pending against the defendant.

Gwendolyn Spivey, Tallahassee, for appellant.

Jim Smith, Atty. Gen., Tallahassee, and Richard G. Bartmon, Asst. Atty. Gen., West Palm Beach, for appellee.

ANSTEAD, Judge.

This is an appeal by Frank Kruse from his convictions and sentences on two counts of lewd, lascivious, or indecent assault upon a child. We reverse and remand for a new trial because we believe errors were committed at trial that cannot be deemed harmless.

It is initially contended that the trial court erred by admitting the opinion testimony of Dr. Donna Holland, an expert in child and adolescent psychiatry, that the child-victim was suffering from a condition known as Post Traumatic Stress Syndrome. It is agreed by the parties that there was no demonstrable physical evidence of an assault on the alleged victim and that Kruse, who denied the allegations, and the victim were the only direct witnesses on the issue of whether an assault occurred. The child was seven years of age at the time of the alleged assault. Dr. Holland was allowed to describe the condition known as Post Traumatic Stress Syndrome and to correlate her observations of the victim's behavior with commonly observed behavior patterns of other Syndrome patients. She testified to the details of the victim's and the victim's parents' statements to her, including the victim's identification of Kruse as the assailant. This same information was revealed in testimony presented by the parents and victim at trial. Dr. Holland concluded that, in her opinion and based upon her psychiatric examination and the history of the child's behavior before and after the alleged assault, the child had suffered a sexual trauma.

[1] The Florida Evidence Code became effective in criminal cases in 1979. Sections 90.401 and 90.402, Florida Statutes (1983), set out a general relevancy standard for the admission of evidence. Sections 90.702 and 90.703 deal specifically with expert testimony:

> 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, the opinion is admissible only if it can be applied to evidence at trial.
>
> 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.

In addition, section 90.403 provides:

> 90.403 Exclusion on grounds of prejudice or confusion.—Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. This section shall not be construed to mean that evidence of the existence of available third-party benefits is inadmissible.

Section 90.702 contains three requirements: (1) that the opinion evidence be helpful to the trier of fact; (2) that the witness be qualified as an expert; and (3) that the opinion evidence can be applied to evidence offered at trial. These provisions embody a liberal policy on the admission of expert evidence, generally rendering such evidence admissible to the extent that it is helpful to the trier of fact. Section 90.403 adds a fourth test barring evidence that, although technically relevant, presents a substantial danger of unfair prejudice that outweighs its probative value.

In *Brown v. State*, 426 So.2d 76 (Fla. 1st DCA 1983), Judge Ervin discussed the evolution in Florida decisions, from a rigid test of admissibility of evidence relating to new scientific procedures, to the more generous relevancy standard contained in the evidence code. *Id.* at 85–90; *see also Fay v. Mincey*, 454 So.2d 587, 593–94 (Fla.2d DCA 1984), and *Hawthorne v. State*, 470 So.2d 770 (Fla. 1st DCA 1985) (Ervin, J., concurring in part and dissenting in part). The more rigid standard evolved from the decision in *Frye v. United States*, 293 Fed. 1013 (D.C.Cir.1923), which barred the admission of the results of a lie detector test because the test had not been generally accepted by the scientific community. Hence, the requirement of general acceptance was imposed. As Judge Ervin noted in his partial dissent in *Hawthorne*, the evidence code contains no reference to general acceptance in regard to the receipt of expert opinion evidence.

With some qualification, we believe the relevancy approach set out in the evidence code is the appropriate standard for determining the admissibility of expert testimony on child sexual abuse. The statutory relevancy standard also comports with the holdings of the Florida Supreme Court in the area of expert testimony. The court has stated that while trial courts have broad discretion in determining the range of subjects on which an expert may testify, such testimony should usually be received only where the disputed issue for which the evidence is offered, is beyond the ordinary understanding of the jury. *Johnson v. State*, 393 So.2d 1069, 1072 (Fla.1980). This view is consistent with the first requirement of section 90.702, that the opinion evidence be helpful to the trier of fact, as well as the provisions of section 90.403, that the danger of prejudice may outweigh the value of the evidence.

[2] The highest courts of other states have cited evidence code provisions similar to section 90.702 in support of the admissibility of expert testimony on child sexual abuse; *see State v. Myers*, 359 N.W.2d 604, 609 (Minn.1984); and *State v. Middleton*, 294 Or. 427, 657 P.2d 1215, 1219 (1983). In *Terry v. State*, 467 So.2d 761 (Fla. 4th DCA 1985), we cited the evidence code in support of our holding that evidence relating to battered women's syndrome was relevant to a defendant's claim of self defense in a prosecution for manslaughter. 467 So.2d at 764. In so holding, we noted that such evidence would be helpful to the jury in interpreting the circumstances surrounding the incident as they affected the reasonableness of the defendant's belief that she was in danger. *Id.* A similar rationale was employed by the Nevada Supreme Court when it held, in a factual context similar to this, that expert testimony on child sex abuse was admissible to explain the behavior of the victim after the incident. *Smith v. State*, 688 P.2d 326, 327 (Nev.1984). We do not believe the issue presented here is much different than that decided in *Terry*, and we conclude that the trial court did not err in ruling that the opinion evidence on the Post Traumatic Stress Syndrome met the requirements of the evidence code.

Initially, in view of the absence of physical evidence of assault and the age of the victim-witness, it appears that testimony about the syndrome would be helpful to the jury in providing more information from which to decide whether the child had been a victim of sexual abuse. The expert's testimony connected the alleged victim's change in behavior, which was described by the victim's parents, to the trauma of the sexual assault, which was described by the victim. Dr. Holland initially indicated, and then affirmed on cross-examination, that her opinion was predicated on the validity of the history given to her by the child and the parents. Accepting the validity of the testimony of the victim and the parents, she stated that the happening of the trauma would explain the change in behavior. Hence, the change of behavior could be utilized by the trier of fact as relevant evidence that the trauma did occur. While we also believe that jurors would have some ability to decide for themselves whether the child's behavioral changes may be related to the trauma, we do not believe that the implications are so easily understood as to bar the receipt of a psychiatric expert's analysis thereof. *Cf. Johnson v.*

State. Accordingly, in our view the first requirement of section 90.702, that of helpfulness to the trier of fact, was met here.

[3, 4] We also believe Dr. Holland's testimony, which outlined her formal training and experience, and her licensing as a physician in two states, with a specialty in child and adolescent psychiatry, established her qualifications to render an opinion, the second requirement of section 90.702. The third requirement, that of relating the opinion evidence to other evidence offered at trial, was met because Dr. Holland's opinion was predicated upon and intended to explain the evidence offered at trial of the victim's change in behavior and the victim's claim of trauma at the hands of the appellant.

[5] The fourth test for admissibility contained in the provisions of section 90.403 presents a more difficult issue: Is the probative value of Dr. Holland's testimony substantially outweighed by its potential prejudicial effect? We have already discussed to some extent the probative value of Dr. Holland's testimony in assessing its helpfulness as required by section 90.702. We must also examine its costs. We are aware, for example, of the danger that the trier of fact may place undue emphasis on evidence offered by an expert, simply because of the special gloss placed on that evidence by reason of the witness' status as an expert. A similar concern is that the jury may infer that the expert, simply by virtue of his appearance for one party, is vouching for the credibility of that party. These are dangers present in every case involving an expert and should perhaps be the subject of instructions to the jury. However, they are not themselves sufficient reasons to exclude opinion testimony. We have already noted that Dr. Holland predicated her opinion on the reliability of the history obtained. In other words, the diagnosis was dependent on the accuracy of the reports of the assault and the child's changes in behavior. The jury was left free, as it should have been, to determine the validity of those reports in accepting, rejecting and weighing the testimony of the parents, the child, and the expert.

Another danger is that the opinion evidence may be unreliable. In this regard, we reaffirm what we view to be a fundamental requirement that the party seeking to introduce expert testimony first establish that the subject can support an expert opinion with a reasonable degree of reliability. Expert testimony in areas that are not sufficiently developed to support an expert opinion can present the kind of danger that section 90.403 was designed to prevent. While there is no requirement to demonstrate general acceptance, we believe that, without some indicia of reliability, opinion evidence on a particular subject could hardly be helpful to a jury as required by section 90.702. We note the concern raised by other state courts regarding the scientific validity of using the results of research on various stress disorders as the basis for expert cause-effect testimony in a criminal justice context. For example, courts considering the admissibility of testimony on rape trauma syndrome involving an adult victim in a prosecution for rape have questioned whether the syndrome is actually relied upon by the medical community to establish that a rape had in fact occurred; *see People v. Bledsoe*, 36 Cal.3d 236, 203 Cal.Rptr. 450, 459–60, 681 P.2d 291, 300–01 (1984); *State v. Saldana*, 324 N.W.2d 227, 229–30 (Minn.1982). Here, Dr. Holland testified to the widespread use among psychiatrists of the Post Traumatic Stress Syndrome as a descriptive term to identify the psychological problems and pattern of behavior of a child who has suffered a traumatic experience, such as a sexual assault. Her testimony established that the syndrome was actually used to diagnose and treat patients. We believe her unrebutted testimony sufficiently established the reliability of the method of diagnosing the syndrome and its use in the medical community to permit the expression of an opinion under the statutory relevance standard.

It is also contended that Dr. Holland's testimony that the victim had suffered a sexual assault or been abused invaded the

province of the jury. In *Farley v. State*, 324 So.2d 662 (Fla. 4th DCA 1975), *cert. denied*, 336 So.2d 1184 (Fla.1976), an appeal from a conviction for rape, we held that the trial court erred in admitting the opinion testimony of a physician expert that the alleged victim had been raped. Our opinion was predicated upon the view that an expert may not state an opinion that a criminal violation had occurred or that the defendant was guilty of such violation. 324 So.2d at 663; *see also Spradley v. State*, 442 So.2d 1039, 1043 (Fla. 2d DCA 1983). While an expert may testify to matters within his or her expertise, "it is not the function of an expert witness to draw legal conclusions." *Palm Beach County v. Town of Palm Beach*, 426 So.2d 1063, 1070 (Fla. 4th DCA 1983). However, in *Farley*, we were careful to note that in *North v. State*, 65 So.2d 77, 87 (Fla.1952), the following opinion had been allowed:

> "Because of the multiplicity, nature and distribution of various wounds on this body, I concluded that they were most consistent with the person having been assaulted, principally by blunt force, and that the method of assault is most consistent with strangulation." *Id.* at 87.

Farley v. State, 324 So.2d at 663.

[6] Initially, we observe that no objection was made to the particular question and answer that is now challenged as invading the province of the jury. In any case, however, when considered in the context of her entire testimony, we believe Dr. Holland's opinions were consistent with those permitted in *North* and distinguishable from those found objectionable in *Farley*. The *North* view is also consistent with the provisions of section 90.703 of the evidence code, which provides that expert testimony is not rendered inadmissible merely because it includes an ultimate issue to be decided by the trier of fact.[1] The Third District has held that section 90.703 permits an expert to testify in a prosecution for rape that the victim's injuries were consistent with forced sexual intercourse. *Ferradas v. State*, 434 So.2d 24 (Fla. 3d DCA 1983). In this case, the jury obviously had to decide the factual issue of whether the victim was actually subjected to a sexual assault, an issue similar to that involved in *North* and *Ferradas*. We also note that this view is not novel, since medical experts have traditionally been allowed to testify on numerous issues ultimately to be decided by the jury. For example, in Florida, when insanity is raised as a defense, the issues are (1) the individual's ability at the time of the incident to distinguish right from wrong; and (2) his ability to understand the wrongness of the act committed. *Gurganus v. State*, 451 So.2d 817, 820 (Fla.1984). Experts are routinely called to testify regarding the defendant's sanity in precisely these terms, *see Johnson v. State*, 408 So.2d 813 (Fla. 3d DCA 1982).

In our view, the opinion of Dr. Holland in this case, was more in the nature of a medical opinion that trauma was responsible for the child's behavioral problems, than a legal conclusion that a criminal act had occurred. As in *Ferradas*, the gist of Dr. Holland's testimony was that the victim's reported behavioral changes were consistent with her report of sex abuse. Based upon all the considerations discussed above, we cannot say that the probative value of the opinion evidence on the Post Traumatic Stress Syndrome offered here was so substantially outweighed by the danger of undue prejudice as to bar its admission under section 90.403.

[7] By our holding, however, we by no means recede from the position that expert

1. Even prior to the enactment of the evidence code, experts in civil cases were allowed to offer opinions as to ultimate facts in issue; *see Buchman v. Seaboard Coast Line Railroad Company*, 381 So.2d 229 (Fla.1980) ("human factors" expert in negligence case); *see also School Board of Broward County v. Surette*, 394 So.2d 147 (Fla. 4th DCA 1981) ("safety engineer" testified to dangerous condition of school bus stop). Such testimony is permissible so long as the trier of fact is not directed to arrive at a conclusion which it should be free to determine from the facts presented. *Town of Palm Beach v. Palm Beach County*, 460 So.2d 879, 882 (Fla. 1985).

testimony may not be offered to directly vouch for the credibility of a witness. A concern which underlied our decision in *Farley* was that the expert testimony in that case would be construed as a direct comment on the credibility of a witness, the alleged victim. At one point in the trial, Dr. Holland indirectly testified to the child's credibility when she stated that she believed the child was able to tell fantasy from reality. One could infer from this statement that the expert was of the opinion that the child was truthful in relating her account of the sexual assault. However, no objection to this statement was raised at trial and as such the objection must be considered waived. *Witt v. State*, 388 So.2d 1 (Fla. 4th DCA 1980); *DeLuca v. State*, 384 So.2d 212, 213 (Fla. 4th DCA 1980). In our view direct testimony on the credibility of witnesses is inherently unreliable. We have already discussed some problems relating to a juror's treatment of expert testimony. Some bolstering of a party's credibility cannot be helped. For instance, it is not impermissible for a physician to relate a party's complaints and history and then offer an opinion predicated in part on that information. Part of the reason that opinion is allowed is because the factual predicate upon which it is based, usually provided by the testimony of the party, is itself directly subject to the jury's scrutiny. However, as with the opinion of so-called "lie detector" experts, we have consistently rejected scientific or expert determinations of credibility. *Knight v. State*, 97 So.2d 115, 119 (Fla.1957); *Goldstein v. State*, 447 So.2d 903, 905 (Fla. 4th DCA 1984); *Rodriguez v. State*, 413 So.2d 1303, 1305 (Fla. 3d DCA 1982); *Holliday v. State*, 389 So.2d 679, 680 (Fla. 3d DCA 1980). We caution trial courts to be careful that such opinions are not put before juries, including the one that may be impaneled to try this case again.

[8] Notwithstanding our disagreement with appellant as to the admission of testimony on the Post Traumatic Stress Syndrome, we agree that other errors occurred that mandate reversal. First, we agree that the court erred by allowing the state to cross-examine the appellant's character witness as to his knowledge of other specific arrests and accusations against appellant for the same type of crime. The rule is clear that the state may only rebut testimony on reputation for good moral character, by reputation testimony as to bad moral character, not by cross-examination about prior arrests or specific bad acts. *Dixon v. State*, 426 So.2d 1258 (Fla. 2d DCA 1983); *Michaels v. State*, 429 So.2d 338 (Fla. 2d DCA 1983); §§ 90.404(1)(a), 90.405, Fla. Stat. (1983). Here the state was allowed, through the guise of impeaching a character witness, to inform the jury that the appellant had been accused of other specific child sexual abuse crimes, evidence that is admitted to be irrelevant and inadmissible on the present charges, and of such a nature that we could hardly hold harmless.

[9] We also agree that it was reversible error for the trial court to refuse to poll the jury to determine their exposure to two admittedly prejudicial and inaccurate media reports, published mid-trial and also referring to other charges pending against the appellant. This question was addressed in *Robinson v. State*, 438 So.2d 8 (Fla. 5th DCA), *petition for rev. denied*, 438 So.2d 834 (Fla.1983), wherein it was held that a new trial was required where the trial court failed to take any action to determine whether the jurors had been exposed to and prejudiced by certain newspaper articles published after jury selection and relating to the appellant's trial. We agree with the holding in *Robinson* requiring a new trial as applied to the facts here.

In view of our resolution of the issues discussed above, it is unnecessary to address the other points on appeal. Accordingly, for the reasons set out above we reverse and remand for a new trial.

HURLEY, J., concurs.

DELL, J., concurs in part and dissents in part.

DELL, Judge, concurring in part and dissenting in part:

I agree that this case must be reversed and remanded for a new trial because the trial court admitted testimony concerning other criminal charges against appellant and failed to poll the jury regarding media articles related to those charges. I write this special concurrence to express my concern regarding the expert testimony of Dr. Holland. While I agree that testimony from a qualified expert witness may be introduced in a child abuse case to explain changes in a child's behavior and to relate such changes to the issue of whether that child has been subjected to child abuse, such testimony must be scrupulously limited to this narrow area of the witness's expertise.

Dr. Holland first related the child's history which included the child's accusation that appellant had sexually abused her. Dr. Holland further testified that in her opinion the child had been sexually assaulted and abused. This testimony, coupled with the history given by the child, established not only that a sexual assault had occurred, but that appellant had committed the crime.

> Such an opinion is not permissible; *Gibbs v. State*, 193 So.2d 460 (2d DCA Fla. 1967):
>
> "The opinion of a witness as to the guilt or innocence of an accused person is not admissible in evidence." *Id.* at 463.

Farley v. State, 324 So.2d 662, 663–64 (Fla. 4th DCA 1975), *cert. denied*, 336 So.2d 1184 (Fla.1976).

Contrary to the majority opinion, I find no support in *North v. State*, 65 So.2d 77 (Fla.1952), for the admission of Dr. Holland's testimony. The court in *North* permitted the testimony quoted by the majority because:

> This question did not call for an answer from Dr. Mills as to whether or not there was a felonious assault *or who made the assault.*

65 So.2d at 87 (emphasis supplied).

Another problem occurred when Dr. Holland expressed her opinion that the child was not indulging in fantasies. Such testimony did not constitute mere bolstering of the child's testimony. Rather, it constituted a clear statement on the credibility of the child. The credibility of a witness is a question for the jury. *See Farley v. State.* In this case, Dr. Holland's testimony left nothing for the jury to decide.

I am not sure what the majority opinion will permit upon retrial, but if it can be interpreted to mean that such testimony may be admitted under the guise of an expert medical opinion, I must respectfully dissent.

John LOUGHAN, Appellant,

v.

SLUTZ SEIBERLING TIRE AND SENTRY CLAIMS SERVICE, Appellee.

No. BF–418.

District Court of Appeal of Florida, First District.

March 11, 1986.

Employee who sustained compensable head injury brought workers' compensation claims for reimbursement of medical expenses relating to back injury and shoulder condition. Deputy Commissioner Joseph F. Hand entered order denying claims, and employee appealed. The District Court of Appeal, McCord, Guyte P., Jr. (Ret.), Associate Judge held that: (1) finding that employee's shoulder condition was not causally connected to work-related accident was unsupported by competent substantial evidence, and (2) refusal to excuse employee's late filing of claim for reimbursement of medical expenses relating to back injury was not abuse of deputy's discretion.

Affirmed in part; reversed in part and remanded with directions.

In conclusion, because in this case we cannot ascertain whether the hearings officer properly followed the regulations relevant to the inquiry before her, the order is VACATED and the cause is REMANDED to the hearings officer for further consideration of the evidence according to the applicable regulations and consistent with this opinion.

JOANOS and BARFIELD, JJ., concur.

Ira W. THOMPSON, Appellant,

v.

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, Appellee.

No. 88-482.

District Court of Appeal of Florida, First District.

Oct. 19, 1988.

State employee petitioned for attorney fees under Equal Access to Justice Act. The Division of Administrative Hearings, Stephen F. Dean, Hearing Officer, denied petition, and appeal was taken. The District Court of Appeal, Zehmer, J., held that state employee involved in regulatory proceeding to determine his eligibility for continued employment was not "small business party," within meaning of Equal Access to Justice Act, and thus could not recover attorney fees and costs upon successful challenge to determination that he was ineligible for continued employment.

Affirmed.

States ⇐215

State employee involved in regulatory proceeding to determine his eligibility for continued employment was not "small business party," within meaning of Equal Access to Justice Act, and thus could not recover attorney fees and costs upon successful challenge to determination that he was ineligible for continued employment. West's F.S.A. § 57.111(3)(d, e), (4)(a).

Harry L. Witte of Patterson and Traynham, Tallahassee, for appellant.

John R. Perry, Asst. Dist. Legal Counsel, Tallahassee, for appellee.

ZEHMER, Judge.

Ira W. Thompson appeals a final order of the Division of Administrative Hearings denying his petition for attorney's fees filed pursuant to § 57.111, Florida Statutes (1987), the Florida Equal Access to Justice Act. We reject Thompson's contention that a state employee involved in a regulatory proceeding to determine his eligibility for continued employment is entitled to the protection of this act, and affirm.

This action originated in December 1986, when officials of Florida State Hospital determined that, by reason of the proscriptions in section 394.457(6), Florida Statutes (1987), Thompson was ineligible for continued employment in the position of Unit Treatment and Rehabilitation Director of Unit 27 of the Florida State Hospital because of his 1974 conviction for possession of cocaine. A formal hearing was held, at which time Thompson presented evidence of his rehabilitation and full pardon for this conviction. It was determined that Thompson's position of director was not a "caretaker" position within the meaning of section 393.0655, so the Department of Health and Rehabilitative Services was ordered to reinstate Thompson.

Thompson then filed a petition for attorney's fees pursuant to section 57.111. Thompson alleged that he became "a 'prevailing small business party' in [DOAH Case No. 87-0290C] on November 24, 1987, when HRS entered a final order [sustaining his] position." Thompson contended he was a sole proprietor of an unincorporated business within the meaning of the act "because the action initiated against him

by the Agency involved his livelihood, and involved the Agency's determination, in its regulatory capacity pursuant to Chapter 393, Florida Statutes, that the Respondent did not meet the requirements necessary to engage in his profession." Thompson also contended that the Agency's actions were "substantially unjustified in law and in fact, and [that] no circumstances exist[ed] that would make the requested award unjust." The hearing officer denied the petition for attorney's fees, finding that Thompson did not meet the criteria outlined in § 57.111(3)(d) to be considered a "small business party."

Section 57.111, Fla.Stat. (1987), provides for an award of attorney's fees from the state to a "small business party" under certain circumstances in order to "diminish the deterrent effect of seeking review of, or defending against, governmental action." This section states in part:

(3)(d) The term "small business party" means:

1.a. A sole proprietor of an unincorporated business, including a professional practice, whose principal office is in this state, who is domiciled in this state, and whose business or professional practice has, at the time the action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more than $2 million, including both personal and business investments;

* * * * * *

(e) A proceeding is "substantially justified" if it had a reasonable basis in law and fact at the time it was initiated by a state agency.

(4)(a) Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust.

In this case, the hearing officer correctly found that Thompson did not fall within the statutory definition of "small business party." There is no evidence to support Thompson's contention that he is the sole proprietor of an unincorporated business, nor does he fit within the definition of partnership or corporation. Rather, the evidence shows that Thompson is a state employee employed on a salaried basis by the Florida State Hospital. By definition, the Florida Equal Access to Justice Act does not apply to individual employees such as Thompson. If the legislature had intended the act to apply to individual employees it could have said so.

We recognize the apparent unfairness in permitting the limited class of persons falling within the definition of "small business party" to recover attorney fees and costs while excluding other persons such as employees of private and governmental entities who are forced to litigate with state agencies. However, Thompson makes no attack on the constitutional validity of the statute; and whether to extend the act's protection beyond the limitations presently imposed by the statute is a matter for legislative, not judicial, action.

AFFIRMED.

ERVIN and WENTWORTH, JJ., concur.

Tommie Lee ANDREWS, Appellant,

v.

STATE of Florida, Appellee.

No. 87-2166.

District Court of Appeal of Florida, Fifth District.

Oct. 20, 1988.

Rehearing Denied Nov. 22, 1988.

Defendant was convicted in the Circuit Court, Orange County, Rom W. Powell, J.,

of aggravated battery, sexual battery, and armed burglary of a dwelling. Defendant appealed. The District Court of Appeal, Orfinger, J., held that: (1) "genetic fingerprint" evidence was admissible, and (2) charges of aggravated battery and sexual battery arose from discrete acts committed during one transaction and separate convictions and punishments were thus appropriate.

Affirmed.

1. **Criminal Law** ⇐388(1)

Where a form of scientific expertise has no established "track record" in litigation, courts may look to a variety of factors that may bear on reliability of evidence, including novelty of new technique, i.e., its relationship to more established modes of scientific analysis; existence of specialized literature dealing with technique; qualifications and professional stature of expert witnesses, and nonjudicial uses to which scientific technique are put.

2. **Criminal Law** ⇐388(2)

"Genetic fingerprint" evidence, by which strands of coding found in genetic molecule of deoxyribonucleic acid (DNA) are compared for purpose of identifying perpetrator of crime was admissible, evidence derived from DNA print identification appeared based on proven scientific principles, there was testimony that the evidence had been used to exonerate those suspected of criminal activity, and test was administered in conformity with accepted scientific procedure so as to ensure to greatest degree possible a reliable result.

3. **Criminal Law** ⇐726

Prosecutor's comment that no evidence had been presented which provided innocent explanation was proper response to defendant's argument that there was innocent explanation for defendant's fingerprints found on victim's window screen.

4. **Criminal Law** ⇐29(12), 984(6)

Charges of aggravated battery and sexual battery arose from discrete acts committed during one transaction; therefore, separate convictions and punishments were appropriate.

James B. Gibson, Public Defender and Kenneth Witts, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee and Kellie A. Nielan, Asst. Atty. Gen., Daytona Beach, for appellee.

Andre A. Moenssens, Kilmarnock, Va., for amicus curiae, Lifecodes Corp.

ORFINGER, Judge.

The issue in this case concerns the admissibility of "genetic fingerprint" evidence, by which strands of coding found in the genetic molecule of deoxyribonucleic acid (DNA) are compared for the purpose of identifying the perpetrator of a crime. The trial court admitted the evidence, and the jury convicted defendant of aggravated battery, sexual battery and armed burglary of a dwelling. Defendant also contends that his motion for mistrial should have been granted because of an improper comment by the prosecutor, and that he could not be convicted for both aggravated battery and sexual battery arising from the same incident. We conclude that the evidence was properly admitted and that defendant's other issues are without merit, and we affirm.

In the early morning hours of February 21, 1987, the victim was awakened when someone jumped on top of her and held what felt like a straight edge razor to her neck. The intruder, who the victim could only identify at trial as a strong, black male, held his hand over her mouth, told her to keep quiet and threatened to kill her if she saw his face. The victim struggled with the intruder and for her efforts was cut on her face, neck, legs and feet.

The intruder then forced vaginal intercourse with the victim, following which he stole her purse containing about $40, and then left the house. A physical examination made after the attack was reported to the police revealed the presence of semen in the victim's vagina. A crime lab analyst testified that both the victim and appellant

were blood type O but that appellant like a majority of the population is a secretor (secretes his blood type in his saliva and other body fluids) while the victim was not. Blood type O was found in the vaginal swabs taken from the victim though the analyst conceded that while this result could have come from the semen found in the victim's vagina, it also could have come from the victim's blood picked up by the swab. The analyst concluded that appellant was included in the population (which he stated constituted 65% of the male population) that could be the source of the semen.

A crime scene technician testified that on the morning following the crime one of the windows of the victim's house was open, and the screen was missing. The victim had testified that this window had been broken previously and was held together with wire from a coat hanger. A screen was found on the ground and fingerprints were lifted from it. A fingerprint expert testified that two of the prints lifted from the screen matched appellant's right index and middle finger.

Over objection, the state presented DNA print identification evidence linking appellant to the crime. The DNA test compared the appellant's DNA structure as found in his blood with the DNA structure of the victim's blood and the DNA found in the vaginal swab, taken from the victim shortly after the attack. The test was conducted by Lifecodes Corp., a corporation specializing in DNA identity testing. Dr. Baird of Lifecodes testified to a match between the DNA in appellant's blood and the DNA from the vaginal swab, stating that the percentage of the population which would have the DNA bands indicated by the samples would be 0.0000012%. In other words, the chance that the DNA strands found in appellant's blood would be duplicated in some other person's cells was 1 in 839,914,540.

We have found no other appellate decision addressing the admissibility of DNA identification evidence in criminal cases. Although appellant primarily attacks the methods used by Lifecodes as opposed to the admissibility of DNA evidence in general, the novelty of the question requires, in our opinion, that we address both issues.

(A) ADMISSIBILITY OF A NEW SCIENTIFIC TECHNIQUE—STANDARD

We begin by confessing some uncertainty as to the standard applicable in this state governing admissibility into evidence of a new scientific technique. In the seminal case of *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), which involved the question of admissibility of lie detector test results, the court, in holding that expert testimony relating to novel scientific evidence must satisfy a special foundational requirement not applicable to other types of expert testimony, declared:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in the twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field to which it belongs.* [Emphasis in original].

293 F. at 1014.

One leading commentator has summarized *Frye* as requiring courts to determine: (1) the status, in the appropriate scientific community, of the scientific principle underlying the proffered novel evidence; (2) the technique applying the scientific principle; and (3) the application of the technique on the particular occasion. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States A Half Century Later*, 80 Columbia Law Rev. 1197, 1201 (1980). *Frye* is still applied in a number of jurisdictions, *compare Cobey v. State*, 73 Md.App. 233, 533 A.2d 944 (1987) (state failed to establish that chromosome variant analysis was generally accepted as reliable in relevant scientific community) *with People v. Reilly*, 196 Cal.App.3d 1127, 242 Cal.Rptr. 496 (1987) (sufficient showing

made that electrophoretic typing of dried bloodstains had found general acceptance or consensus in scientific community to warrant its introduction), though it has of late come in for criticism by a number of judges and commentators as being too inflexible [1] as well as inconsistent with modern evidence codes. *See, e.g., United States v. Downing,* 753 F.2d 1224 (3d Cir. 1985); *Brown v. State,* 426 So.2d 76, 87–89 (Fla. 1st DCA 1983); Giannelli, *supra.* One judge has suggested that the *Frye* standard should be rejected as a precondition to the admissibility of evidence relating to novel scientific techniques. *Hawthorne v. State,* 470 So.2d 770, 783 (Fla. 1st DCA 1985) (Ervin, C.J., concurring and dissenting in part).

In *Brown v. State,* 426 So.2d 76 (Fla. 1st DCA 1983) Judge Ervin exhaustively reviewed the law in Florida on the applicability of the *Frye* test, concluding that it was unclear whether that test had been accepted by the Florida courts. His review of *Kaminski v. State,* 63 So.2d 339 (Fla.1952), *Coppolino v. State,* 223 So.2d 68 (Fla. 2d DCA 1968), *appeal dismissed,* 234 So.2d 120 (Fla.1969), *cert. denied,* 399 U.S. 927, 90 S.Ct. 2242, 26 L.Ed.2d 794 (1970), and *Jent v. State,* 408 So.2d 1024 (Fla.1981) led him to conclude that the *Frye* test had not been adopted. He added, however that

> More recently the Florida Supreme Court cited *Coppolino* as supporting its view that "[a] court should admit evidence of scientific tests and experiments only if the reliability of the results are widely recognized and accepted among scientists." *Stevens v. State,* 419 So.2d 1058, 1063 (Fla.1982). Superficially, it would seem that the above statement embraces the *Frye* rule, yet the court's reliance upon *Coppolino* undercuts that interpretation. Additionally, the statement made in the same paragraph that "[t]he admissibility of a test or experiment lies within the discretion of the trial judge ..." is contrary to *Frye* since a strict adherence to *Frye* would severely curtail trial court discretion. The latter quoted statement is, moreover, consistent with the court's earlier opinion in *Jent.*

426 So.2d at 87.

In *Jent v. State,* 408 So.2d 1024 (Fla. 1981), the question raised was the admissibility of hair analysis testimony. In rejecting the defense claim that evidence regarding hair analysis was not sufficiently reliable or exact to be allowed into evidence, the court stated:

> As a general rule, the problem presented to a trial court is whether scientific tests are so unreliable and scientifically unacceptable that admission of those test results constitutes error. *Coppolino v. State,* 223 So.2d 68 (Fla. 2d DCA 1968), *cert. denied,* 399 U.S. 927, 90 S.Ct. 2242, 26 L.Ed.2d 794 (1970).... A trial court has wide discretion concerning the admissibility of evidence, and, in the absence of an abuse of discretion, a ruling regarding admissibility will not be disturbed.

408 So.2d at 1029. The evidence was held to be admissible despite the testimony that, although the unknown hair found at the scene of the crime was microscopically the same as the defendant's it could not be positively identified as having come from the defendant. The court noted that "[d]etermining what weight to accord this testimony was within the jury's province...."

In *Bundy v. State,* 455 So.2d 330 (Fla. 1984) [*Bundy I*] the court extensively reviewed case law pertaining to the admissibility of hypnotically aided testimony, but declined to decide which test was applicable, finding that the specific testimony involved was admissible because "... this is simply not a case of hynotically refreshed recall testimony." *Id.* at 341. The court then addressed the admissibility of expert testimony on bite mark comparison evidence. Without specifically referencing *Frye,* the court held such testimony to be admissible and explained:

1. For instance, as Professor Giannelli points out, rigid application of *Frye* would require a court to await the passage of time until such time as the new technique has been developed to the point that it has become "generally accepted." This creates a "cultural lag" during the technique's development, resulting in the exclusion of evidence which could be completely reliable. Giannelli, *supra* at 1223, nn. 201 and 202.

> The trial court found that the science of odontology, which is based on the discovery that the characteristics of individual human dentition are highly unique, is generally recognized by scientists in the relevant fields and therefore is an acceptable foundation for the admissibility of expert opinions into evidence. The court in effect ruled that since the profferred [sic] evidence met this criterion the details of the comparison techniques were matters of credibility and weight of the evidence for the jury to determine ...
>
> * * * * * *
>
> As the trial court found, the basis for the comparison testimony—that the science of odontology makes such comparison possible due to the significant uniqueness of individual dental characteristics —has been adequately established. Appellant does not contest this supposition. Forensic odontological identification techniques are merely an application of this established science to a particular problem. *People v. Marx* [54 Cal.App.3d 100, 126 Cal.Rptr. 350 (1975)]. The technique is similar to hair comparison evidence, which is admissible even though it does not result in identifications of absolute certainty as fingerprints do. *Jent v. State,* 408 So.2d 1024 (Fla.1981), *cert. denied,* 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982); *Peek v. State,* 395 So.2d 492 (Fla.1980), *cert. denied,* 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981). Its probative value to the case is for the trier of fact to determine.
>
> The trial court also found that the comparison techniques actually used in this case were reliable enough to allow the experts to present their materials and their conclusions to the jury. Bundy has presented no basis for finding that the trial judge abused his discretion in doing so.

455 So.2d at 348–49.

In *Bundy v. State,* 471 So.2d 9 (Fla.1985) [*Bundy II*], the court directly confronted the question of the admissibility of hypnotically aided testimony. While referring to *Frye,* 471 So.2d at 13, the court never specifically declared that it was adopting the *Frye* standard. However, in holding that the testimony was per se inadmissible in criminal trials "because of its basic unreliability," the court drew on language in opinions from jurisdictions that apply *Frye.*[2] *See also Mills v. State,* 476 So.2d 172 (Fla.1985) (results of neutron activation analysis gunshot residue test held admissible with court noting test "has attained sufficient standing among scientists to be accepted as reliable evidence in the courts").

In *Kruse v. State,* 483 So.2d 1383 (Fla. 4th DCA 1986) where the state sought introduction of expert testimony that the child/victim was suffering from a condition known as Post Traumatic Stress Syndrome, the Fourth District employed the relevancy

2. The court declared:

> We are swayed by the opinions of the courts of other jurisdictions that have held that the concerns surrounding the reliability of hypnosis warrant a holding that this mechanism, like polygraph and truth serum results, has not been proven sufficiently reliable by experts in the field to justify its validity as competent evidence in a criminal trial. Nor can we agree that employing safeguards has been shown to insure that hypnotically recalled testimony is reliable at the present time. The Michigan Supreme Court recently joined the growing number of jurisdictions that hold that the testimony of a witness whose memory has been refreshed through hypnosis is inadmissible. We feel that court's conclusion in *People v. Gonzales,* 415 Mich. 615, 329 N.W. 2d 743 (1982), aptly describes our view on this issue: The court stated:
>
> Hypnosis has not received sufficient general acceptance in the scientific community to give reasonable assurance that the results produced under even the best of circumstances will be sufficiently reliable to outweigh the risks of abuse and prejudice.
>
> ... [U]ntil hypnosis gains general acceptance in the fields of medicine and psychiatry as a method by which memories are accurately improved without undue danger of distortion, delusion, or fantasy and until the barriers which hypnosis raises to effective cross-examination are somehow overcome, the testimony of witnesses which has been tainted by hypnosis must be excluded in criminal cases.

471 So.2d at 18. *But see Rock v. Arkansas,* 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (per se exclusion of a criminal defendant's post-hypnotic testimony infringes impermissibly on the right of a defendant to testify on his or her own behalf).

approach based on our evidence code for determining the admissibility of such expert testimony. Noting that the "helpfulness" standard of section 90.702 [3] reflects a liberal policy in the admission of expert testimony, the court held:

> With some qualification, we believe the relevancy approach set out in the evidence code is the appropriate standard for determining the admissibility of expert testimony on child sexual abuse. The statutory relevancy standard also comports with the holdings of the Florida Supreme Court in the area of expert testimony. The court has stated that while trial courts have broad discretion in determining the range of subjects on which an expert may testify, such testimony should usually be received only where the disputed issue for which the evidence is offered, is beyond the ordinary understanding of the jury. *Johnson v. State*, 393 So.2d 1069, 1072 (Fla.1980). This view is consistent with the first requirement of section 90.702, that the opinion evidence be helpful to the trier of fact, as well as the provisions of section 90.403, that the danger of prejudice may outweigh the value of the evidence.

483 So.2d at 1385.

In an effort to ensure a degree of reliability of such evidence, the court went on to:

> reaffirm what we view to be a fundamental requirement that the party seeking to introduce expert testimony first establish that the subject can support an expert opinion with a reasonable degree of reliability. Expert testimony in areas that are not sufficiently developed to support an expert opinion can present the kind of danger that section 90.403 was designed to prevent. While there is no requirement to demonstrate general acceptance, we believe that, without some indicia of reliability, opinion evidence on a particular subject could hardly be helpful to a jury as required by section 90.702.

Id. at 1386.

This "relevancy approach" suggested by the First District in *Brown* and adopted by the Fourth District in *Kruse*,[4] has been referred to as the preferred approach and was substantially adopted by the federal Third Circuit in *United States v. Downing*, 753 F.2d 1224 (3d Cir.1985).[5] This approach recognizes relevancy as the linchpin of admissibility, while at the same time ensuring that only reliable scientific evidence will be admitted, and seems preferable to the "general acceptance" approach of *Frye* which is predicated on a "nose counting," *Downing*, 753 F.2d at 1238, and may result in the exclusion of reliable evi-

3. 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, the opinion is admissible only if it can be applied to evidence at trial.

4. In a recent case, *Correll v. State*, 523 So.2d 562 (Fla.1988), our supreme court was confronted with the question of admissibility of blood tests using the electrophoresis process, a method used to determine the presence of certain enzymes in the blood. The court, noting at the outset that such process *could hardly be characterized as novel* (a fact which distinguishes that case from the one before us), held the evidence to be admissible. We make note of this case, despite its factual differences, because the electrophoresis process is an important step in separating the DNA fragments.

5. *Downing* involved expert testimony on the accuracy of eyewitness identification *offered by the defendant*. At least one commentator has suggested that this may be a distinguishing factor and that "the additional threshold of acceptance in the scientific community as a joint requirement with a judicial determination of reliability seems warranted where the scientific evidence carrying so much weight with the trier of fact is admitted against the criminal defendant, as it usually is." Graham, *Handbook of Florida Evidence*, § 704.2, p. 552 (n. 18). Professor Graham suggests that because of the importance juries place on scientific tests, "the *Frye* test in its original general acceptance or preferably its liberalized substantial acceptance form, which serves to screen such tests to assure scientific reliability, should continue to be followed." *Id.* at § 704.2, p. 551. Conversely, Professor McCormick advocates admissibility based on logical relevancy and exclusion if probative value is substantially outweighed by prejudice, misleading the jury or consuming undue amounts of time. *McCormick on Evidence*, § 203 at p. 608 (3d ed. 1984).

dence. We believe this approach to be the one which should be followed in Florida.[6]

[1] In *Downing*, the Third Circuit, in applying a relevancy/reliability approach, declared that where, as here, a form of scientific expertise has no established "track record" in litigation, courts may look to a variety of factors that may bear on the reliability of the evidence. 753 F.2d at 1238. These include the novelty of the new technique, i.e., its relationship to more established modes of scientific analysis, the existence of a specialized literature dealing with the technique, the qualifications and professional stature of expert witnesses, and the nonjudicial uses to which the scientific technique are put. *Id.* at 1238–39, citing 3 J. Weinstein & M. Berger, *Weinstein's Evidence* § 702[03].

(B) THE TECHNIQUE AND TESTIMONY RELATING TO DNA PRINTING—

(1) *Witnesses:*

Several witnesses testified for the State concerning the test. Dr. David E. Housman, the holder of a bachelor's degree and a Ph.D in biology, of the Massachusetts Institute of Technology, is a professor of molecular genetics, which deals with the structure and function of the DNA molecule and has taught at several universities since 1973. He has engaged in DNA analysis for some eleven years. He has published approximately 120 papers on molecular genetics, most of which deal with DNA, and has served on advisory boards involving genetics for the National Institute of Health, the Heredity Disease Foundation, and the Tourette's Syndrome Foundation. Housman visited Lifecodes, Inc., the company which performed the instant test and examined the procedures of the company though he did not witness the instant test.

Allen Guisti is a forensic scientist employed by Lifecodes, Inc. and performed the DNA print identification tests here. He holds a Bachelor of Science degree from Yale University and has published several papers on genetics, one of which involved his own research on DNA analysis. He has performed the identification test about 200 times.

Dr. Michael Baird is the manager of forensic testing at Lifecodes. He received a doctorate in genetics from the University of Chicago in 1978. He worked as a research associate at both the University of Michigan and Columbia University in the field of blood diseases at the DNA level and joined Lifecodes at its inception in 1982. He has been the manager of forensic testing for the past year and one-half. He teaches graduate courses in DNA technology at New York Medical College and has published a number of articles on DNA testing.

(2) *Scientific Principles:*

Summarizing Dr. Housman's testimony, it appears that DNA print identification is predicated on several well accepted scientific principles. DNA, a molecule that carries the body's genetic information, is contained in every living organism in every cell which has a nucleus (nearly all the cells of the human body). The configuration of the DNA is different in every individual with the exception of identical twins. It is the same in all the particular person's cells, and its characteristics remain unchanged during the life of the individual. DNA is a very complicated molecule and to read the "information" contained therein one needs to perform certain chemical procedures. Dr. Housman stated that a procedure known as restriction fragment length polymorphism has been in existence for ten years and enables scientists to cut the strands at predetermined locations and compare the DNA structure of different individuals. The test involves treatment of the DNA molecule with an enzyme or reagent which recognizes differences in the sequences found in the DNA molecule. The discovery of the use of these reagents won Dr. Arber a Nobel Prize about ten years

6. The State correctly asserts that in this case the evidence would meet the *Frye* standard as well as the relevancy test. We have reviewed the authorities discussing the standards of admissibility to determine which of these will apply in this District, pending a definitive interpretation by our supreme court.

ago and according to Dr. Housman, is generally accepted in the scientific community. Indeed, Dr. Housman testified that DNA sequencing and comparison testing has been done for about ten years, is considered reliable, is performed by a number of laboratories around the world and is generally accepted in the scientific community. He stated also that the test and information received therefrom are routinely used in such areas as the diagnosis, treatment and study of genetically inherited diseases.[7]

We briefly summarize the test as described by Doctors Housman and Baird. The strand of DNA is cut at very precise points using the reagents which in effect "read" the order of the elements and cut precisely at the sequence they recognize. The next step is to identify by length the DNA fragments. This is done through gel electrophoresis which separates the different sized fragments of DNA. In this procedure, the cut DNA is put in a cell matrix composed of gel and a negative electric current applied. The DNA, which has a negative charge, runs toward the positive charge. The gel acts as a sieve in which the large fragments cannot move as fast as the smaller ones. Once the length of the DNA fragments is established, the DNA is transferred to a piece of nylon membrane. A radioactive probe is then added which identifies particular fragments that it is designed to recognize. The membrane is put next to X-ray film and the film is exposed by the radioactivity. The film is developed and the results reveal bands of DNA. Such bands or more accurately the pattern of such bands can then be compared to those obtained in tests of other specimens.[8]

(C) PROCEDURES IN THIS CASE:

The test here was performed by Lifecodes, Inc., a licensed clinical laboratory in the State of New York. The testimony revealed that Lifecodes was founded in 1982 as a research and development laboratory, specializing in DNA paternity and identity testing and began developing DNA probes. The company currently performs forensic and paternity testing as well as testing in diagnosing genetic-type diseases. The DNA test is essentially the same for all of these purposes, with the difference being in the probe that is used.

There was extensive testimony as to the precise methods used by Lifecodes in performing the instant test. Dr. Guisti testified about each step in the process and Dr. Housman, who reviewed Dr. Guisti's results testified that in his opinion the test was accurately and properly performed. There was also testimony that various controls were used in the testing process. For example, Dr. Baird testified that every reagent and enzyme purchased by Lifecodes is tested on known DNA samples. Similar tests are performed on the gel used in the electrophoresis process. Appellant contends that this test is unreliable, because the new gel is only tested to be certain that it works the way the old gel worked and that if the old gel worked improperly, that error would be carried over to the new batch. We find no merit in this contention. In addition to the foregoing tests, control samples containing known fragment sizes are loaded in the test to monitor the electrophoresis and assure an accurate result. The evidence reveals that if the gel is not properly prepared or if it is bad, the test will ordinarily not work rather than leading to an incorrect result. Indeed, if there were any voltage fluctuations or problem with the solutions ordinarily no result is received as opposed to an erroneous result. Use of control samples is also a check as they would also be affected by any error. The scientific testimony indicates acceptance of the testing procedures. The probative value of the evidence is for the jury.

The radiographs of the victim's and appellant's blood and the vaginal smear were exhibited to the jury, the comparison was explained, and the radiographs were admitted into evidence. Dr. Baird concluded that to a reasonable degree of scientific certainty, appellant's DNA was present in the vaginal smear taken from the victim. The State's expert witnesses were skillfully and thoroughly cross-examined, but no expert witness testified for the defense.

(D) ADMISSIBILITY.

In applying the relevancy test, it seems clear that the DNA print results would be helpful to the jury. § 90.702, Fla.Stat. (1988). Each of the State's witnesses was accepted by the trial court as an eminently qualified expert in the field of molecular genetics.[9] The crucial question here is whether the probative value of the testimony and test is substantially outweighed by its potential prejudicial effect. In this regard, the indicia of reliability referred to in *Kruse* come into play.

As noted in *Downing*, under the relevancy approach where a form of scientific expertise has no established "track record" in litigation, courts may look to other factors which bear on the reliability of the evidence. 753 F.2d at 1238. One of these is the novelty of the technique, i.e., its relationship to more established modes of scientific analysis. DNA testing has been utilized for approximately ten years and is indicated by the evidence to be a reliable, well established procedure, performed in a number of laboratories around the world. Further, it has been used in the diagnosis, treatment and study of genetically inherited diseases. This extensive nonjudicial use of the test is evidence tending to show the

7. In the work entitled Scientific Evidence in Criminal Cases, Third Ed. (1986), the authors, Professors Moenssens, Inbau and Starrs comment thusly on the reliability studies and courtroom use of DNA evidence:

> c. Reliability Studies and Courtroom Use
> Unlike many advances in forensic sciences, which are developed by experts who are actively engaged in case work, and immediately applied by them to forensic experimentation and use, the DNA probe studies on semen and blood came out of a research laboratory whose scientists did not initially desire to apply the techniques to actual forensic investigations as soon as a working postulate and hypothesis had been formulated. Instead, they chose to subject the novel technique (explained here at greater length than some of the other techniques precisely because no other literature on it is as yet in print) to extensive experimentation and verification. As part of this research process, they have also invited independent scientists to follow their protocols, put the new techniques through its paces, and arrive at an impartial scientific assessment of the claims made by Lifecodes —a process of verification that ideally should always be followed by forensic scientists, but almost never is. The proponents of the techniques contend that the DNA testing establishes identity in rape and similar cases to a higher degree of certainty and with greater reliability and consistency than any other testing method currently available to forensic science and in paternity cases will provide a significant improvement over any current scientific test in establishing biological parentage and accurately identifying cases of innocent alleged parenthood. Their research to date appears to validate these claims. However, independent research is still going on to determine if the claims can be supported. As this chapter is being written, there are, as yet, no court decisions involving the use of DNA testing for the simple reason that its developers have refrained from seeking its evidentiary use until all testing is completed. With the body of knowledge and verification that is currently available, the test results undoubtedly could meet a standard of "verifiable certainty." Possibly, since the underlying genetic research has been done for several decades by the most prominent geneticists and immunologists, the test results could meet the "general acceptance test" of the venerable *Frye* decision. Because the developers of the probes and test protocols have not, as of this writing, chosen to offer the test as an evidentiary tool, no appellate courts have had the opportunity to decide the issue of admissibility. Without a doubt, if the independent verification that is expected to be well advanced even as this book is published confirms the claims of the originators, courts will leap to embrace the new technique as yet another source for scientific evidence of identity. [Footnote omitted].

Id. at 358–359.

8. For a more detailed description of the test, see Moenssens, et al., Scientific Evidence In Criminal Cases, Third Ed. (1986), pp. 356–358.

9. Appellant argues that these witnesses, particularly Dr. Baird, possess a built-in bias because their reputations and careers are built on DNA comparison work. Several courts have questioned whether a leading proponent of a particular technique could fairly and impartially testify concerning admission of the technique. *See, e.g., People v. Kelly*, 17 Cal.3d 24, 130 Cal.Rptr. 144, 549 P.2d 1240 (1976); *People v. Tobey*, 401 Mich. 141, 257 N.W.2d 537 (1977) (both cases involving voiceprints). Neither *Frye* nor our evidence code require impartiality. *See* Giannelli, *supra* at 1216. Further, the point would not appear substantial here given that unlike voiceprints, DNA comparison work has a number of uses in fields other than forensic medicine such as diagnosis and treatment of disease.

reliability of the technique. *Downing*, 753 F.2d at 1239.

Another factor is the existence of specialized literature dealing with the technique. The record reveals that a great many scientific works exist regarding DNA identification. According to Dr. Baird, Lifecodes maintains a file on all scientific journal articles and publications with regard to DNA testing and he was unaware of any that argue against the test's reliability.[10]

A further component of reliability is the frequency with which a technique leads to erroneous results. *Downing*, 753 F.2d at 1239. The court there noted:

> At one extreme, a technique that yields correct results less often than it yields erroneous one[s] is so unreliable that it is bound to be unhelpful to a finder of fact. Conversely, a very low rate of error strongly indicates a high degree of reliability. In addition to the rate of error, the court might examine the type of error generated by a technique.

Id.

The testimony here was that if there was something wrong with the process, it would ordinarily lead to no result being obtained rather than an erroneous result. Further control samples are employed throughout the process which permits errors, if any, to be discovered. These factors are further indicia of reliability. *See United States v. Williams*, 583 F.2d 1194 (2d Cir.1978) (court, in upholding admission of voiceprint evidence, emphasized that any shortcomings in scientific technique would result in inability to match two voice spectrograms rather than erroneous conclusion that the two spectra were generated by the same voice).

The frequency by which given DNA bands appear in the population is calculated by using an established statistical data base, employing a statistical formula known as the Hardy–Weinberg equilibria. This principle is used for determining other genetic characteristics such as blood type or Rh factors, dates back to the 1920's and has been generally accepted in the scientific community as being accurate for this calculation. Appellant contends that the data base of 710 samples is too small to be statistically significant. The only evidence in the case supports the statistical value of the randomly selected samples. The testimony reveals that as the data base expands, the probability numbers do not change statistically, and that The American Association of Blood Banks, in its book entitled *Probability of Inclusion in Paternity Testing* (1982) concludes that a data base of two to five hundred samples was found to provide adequate statistical results. Admittedly, the scientific evidence here, unlike that presented with fingerprint, footprint or bite mark evidence, is highly technical, incapable of observation and requires the jury to either accept or reject the scientist's conclusion that it can be done. While this factor requires courts to proceed with special caution, *cf. United States v. Ferri*, 778 F.2d 985 (3d Cir.1985) (expert testimony as to footprint evidence, unlike other scientific evidence is susceptible to examination by jury which factor limited potential prejudice), it does not of itself render the evidence unreliable.

[2] The trial court did not abuse its discretion in ruling the test results admissible in this case. In contrast to evidence derived from hypnosis, truth serum and polygraph, evidence derived from DNA print identification appears based on proven scientific principles. Indeed, there was testimony that such evidence has been used to exonerate those suspected of criminal activity. Given the evidence in this case that the test was administered in conformity with accepted scientific procedures so as to ensure to the greatest degree possible a reliable result, appellant has failed to show error on this point.

[3, 4] We find no merit in appellant's remaining points on appeal. The objected to comment by the prosecutor was in response to appellant's argument that there was an innocent explanation for appellant's fingerprints found on the window screen. The prosecutor commented in response that no evidence had been presented which provided an innocent explanation. Appellant's reliance on *Carawan v. State*, 515 So.2d 161 (Fla.1987) for the proposition that he could not be convicted on both the aggravated battery and the sexual battery charges is misplaced. *Carawan* specifically applied only to separate punishments arising from one *act*, not one *transaction*. The charges of aggravated battery and sexual battery arose from discrete acts committed during one transaction and separate convictions and punishment are appropriate here. *See Arnold v. State*, 514 So.2d 419 (Fla. 2d DCA 1987).

Finding no error, the convictions and sentences are

AFFIRMED.

DAUKSCH and DANIEL, JJ., concur.

Tommie Lee ANDREWS, Appellant,

v.

STATE of Florida, Appellee.

No. 88–320.

District Court of Appeal of Florida, Fifth District.

Nov. 10, 1988.

Appeal from the Circuit Court for Orange County; Rom W. Powell, Judge.

James B. Gibson, Public Defender and Kenneth Witts, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee and Kellie A. Nielan, Asst. Atty. Gen., Daytona Beach, for appellee.

ORFINGER, Judge.

Affirmed on the authority of *Andrews v. State*, 533 So.2d 841 (Fla. 5th DCA 1988). We write simply to note that in addition to the DNA identification evidence, the victim here identified appellant both at a photo line-up and at trial as the perpetrator.

AFFIRMED.

DAUKSCH and DANIEL, JJ., concur.

STATE of Florida, Appellant,

v.

Carol BOWEN, Appellee.

No. 88–544.

District Court of Appeal of Florida, Fifth District.

Oct. 20, 1988.

Defendant was convicted in the Circuit Court, Brevard County, John Dean Moxley, J., of DUI manslaughter, and State appealed sentence imposed. The District Court of Appeal, Orfinger, J., held that trial court improperly retroactively applied amended DUI statute as reason for downward departure sentence.

Vacated and remanded.

10. While no appellate court in this country has yet passed on the admissibility of DNA print identification in criminal cases, such evidence has been admitted in civil actions, *In the Matter of the Adoption of Baby Girl S*, 140 Misc.2d 299, 532 N.Y.S.2d 634 (N.Y.Surr.Ct.1988), (holding DNA evidence admissible in paternity action and noting that New York state trial court had recently authorized a DNA comparison test in criminal prosecution), and is admitted at trials in England. *See Cobey v. State*, 73 Md.App. 233, 533 A.2d 944, 950, n. 1 (1987). Further, at least one jurist, concurring in part and dissenting in part in a capital case wondered why the State had not done a DNA test which he said would have made the question of guilt or innocence far less murky. *State v. Apanovitch*, 33 Ohio St.3d 19, 514 N.E.2d 394, 406 (1987) (Brown, J., concurring in part, dissenting in part).