The Newest Judge at the First DCA: L. Clayton Roberts

By Wendy S. Loquasto

On January 22, 2007, Judge L. Clayton “Clay” Roberts took the oath of office to become the newest member of the First District Court of Appeal. He did so with humility, mindful that his seat at the bench was made possible by the retirement of Judge Richard W. Ervin, III, whose 30-year career made him the longest serving judge at the First District. At his investiture on April 12, 2007, Judge Roberts publicly thanked Judge Ervin for his efforts in making his a smooth transition and for his service to the state, saying: “If I serve half as long as you did, and have half your wisdom, I will consider that I have had a successful career.”

Eight months later, Judge Roberts has settled into his position at the court. He works hard to fulfill the pledge he made at his investiture: To confront every case with an open mind so he can fully and fairly analyze the legal arguments; to be open to the considered view of his colleagues; and to decide each case on its record, according to the law, without fear or favor, regardless of the wealth, power or status of the parties before the court. He finds his colleagues, each of whom have excelled in their practices, to be helpful, hardworking and committed to reach the right result under the law. He stresses that when there is disagreement, it is always respectful and never personal.

Judge Roberts is the son of Mary Roberts, a secretary with the Leon County School District, and Larry Roberts, a retired Major in the U.S. Marine Corps. Although an eight-generation Floridian, he was born in North Carolina when his father was stationed there. The family returned to Tallahassee in time for him to attend Amos P. Godby High School. Following his father’s career path, he attended the United States Military Academy at West Point, graduating in 1987 with a military history major, and he was ready to become an Infantry Officer, when an automobile accident and resultant 13-week hospitalization changed his life. Returning to Tallahassee, Judge Roberts entered Florida State University College of Law, from which he graduated in 1991.

On the homefront, Judge Roberts is married to Trelles D’Alemberte, niece to Florida State University President Emeritus Sandy D’Alemberte. At his investiture, his esteemed uncle related the story of the couple’s engagement. He and Trelles had found themselves on the same plane flying from Atlanta to Tallahassee. As the two relatives deplaned, Sandy offered Trelles a ride into town. She responded that Clay would be there to meet her. As the two left the area where Tallahasseeans normally greet air travelers, with no sign of Clay, Sandy again inquired if Trelles needed a ride. She responded, quite sternly according to her uncle, “He better be here.”
and niece turned the corridor toward baggage claim and came upon Trelles’s swain. He had procured a table and two chairs and adorned it with a candle and chilled bottle of champagne. (These were pre-9/11 days.) As Trelles approached, Clay Roberts dropped to one knee and proposed marriage, and to everyone’s delight, Trelles said yes. In telling the story at the investiture, President D’Alemberte remarked that it showed Clay’s sense of tradition, imagination, and innovativeness, all of which will serve him well as a judge.

Trelles D’Alemberte, who has a Masters Degree in Sociology, is employed with the Institute for Intergovernmental Research. She does report writing, conference planning, and database management for the United States Department of Justice and Homeland Security. The couple have two children, Jackson, age 6, and Wilson, age 4.

An article about Judge Roberts would not be complete without some mention of the 2000 presidential election. As Governor Crist said during Judge Roberts’ investiture, as then Director of Division of Elections, Clay Roberts gained a “world-wide” reputation. When he took the job in October 1999, who would have guessed that he would be in the eye of a storm that resulted in an election recount that yielded the presidency to Governor George Bush by a mere 537 votes! As the Director, he was in his office as the networks called the election first for Vice President Gore, and then for Governor Bush, and he was there when the telephone circuits lit up at 4:00 a.m. when Florida was labeled “too close to call.” Twenty-four hours after entering his office on Election Day, he hurried home to grab a clean suit so he could meet the press that was beginning to descend on Tallahassee. Duty called – a trip to New York with his wife to celebrate their first wedding anniversary had to be canceled.

In 2003, Judge Roberts was reunited with Charlie Crist, who was then Attorney General. The two men had met when Judge Roberts was Staff Attorney for the Senate Committee on Executive Business, Ethics & Elections in 1995-97, and then Senator Crist was chair of that committee. As Governor Crist said during the Judge Roberts’ investiture, “Clay always made me look good.” As the state’s first Republican Attorney General, Charlie Crist turned to Clay Roberts again, and he made him Executive Deputy Attorney General, third in command after General Crist and Deputy Attorney General George LeMieux.

In 2006, Clay Roberts assumed the role of Deputy Attorney General, and it was from that position he was appointed to the First DCA on January 18, 2007. On that day, Judge Roberts and Sandy D’Alemberte were teaching a constitutional law class at FSU when Governor Crist and George LeMieux walked in, accompanied by Judge Roberts’ family. Governor Crist announced to the class, “I’m going to make your teacher a judge,” and so that moment in history, when the Governor Crist made his first judicial appointment, was witnessed by the next generation of lawyers.

In addition to his executive branch experience, Judge Roberts also has substantial experience in the legislative branch of government. In the late 1990s, he served as Staff Attorney for the Senate Committee on Executive Business, Ethics & Elections; Staff Director for the House Committee on Election Reform; and Council Attorney for the House Public Responsibility Council, and so he is well versed with how laws are made. When asked how that experience would shape his thoughts, he responded that it makes him skeptical of so-called legislative intent. He remarked that he frequently sees people citing the end-of-session bill analysis for legislative intent, but he considers such a document, written after the fact as a summary, to have little or no value. A staff analysis done before the committee and amendment processes occur may be more insightful as to legislative intent, but in the end he cautioned that there can be 160 different legislators’ intents, as well as the governor’s.

As for what he wants appellate attorneys to know about the court, Judge Roberts said that they are always going to read the briefs, they are always going to study the law clerks’ summaries, and they are going to read the record. He cautioned, however, that despite their best efforts, they will never know the case as well as the attorneys. And so, while they call it “oral argument,” he finds that the most effective attorneys are those who see themselves in the role of teacher. Passion has its place in advocacy, but a reasoned explanation of why your position is correct is the best approach.

In the words of Governor Crist, a governor gets to pick good people for great offices, and sometimes the governor gets to pick great people for great offices. For Governor Crist, Judge Clay Roberts is one of those great people.

Endnotes
1 Wendy S. Loquasto is a partner with Fox & Loquasto, P.A., a statewide appellate practice firm with offices in Tampa and Tallahassee. Upon graduating from Stetson University College of Law in 1988, she clerked for 15 years for The Honorable Richard W. Ervin, III, at the First District Court of Appeal. She is currently a member of the Executive Council of the Appellate Practice Section, Chair of the Section’s Tallahassee Outreach Program, a member of the Florida Bar Journal and Editorial Board, and immediate past President of the Florida Association for Women Lawyers.
The Chair’s Farewell Message - My Parting Shots
by Susan Fox

In the last Chair’s Message of the bar year, it is customary, obligatory even, to reflect and bask in one’s accomplishments. The Appellate Section did have a great year. We successfully completed everything discussed in my last Chair’s Message, and more. Thanks to all of you!

Okay. I’m done reflecting and basking.

Instead of prolonging the basking, I would like to devote the remainder of my moment in the spotlight to imparting some words of wisdom or rules to live by. Don’t expect profundity. Here goes.

1. A lawyer who is polite to the judges but rude to opposing counsel is faking being a nice person.
2. I saw a board certified appellate lawyer’s cell phone ring in oral argument. The lawyer apologized to the court and turned it off and resumed the argument. Then it went off again.
3. “With all due respect” is an insult.
4. Every time you read an opinion reversing a judgment, remember it’s because appellant’s counsel had the courage to take a stand against almost insurmountable odds.
5. You should never say opposing counsel’s argument is ludicrous unless you can already see the judges laughing. By that time, you would kill the moment anyway.
6. Never be afraid to advance a new argument or theory: a single person who was the laughingstock of his community built the Ark, whereas a team of respected professionals built the Titanic.
7. The facts of a case are like fine wine. They start out as grapes, and it’s up to you to stomp the heck out of them until they turn into something satisfying and compelling.
8. The strongest muscle is the tongue; the strongest weapon is the pen. Use both carefully.
9. If life was fair, John Lennon would be alive and all the Elvis impersonators would be dead.
10. Lawyers who want to share their ideology with the court almost always cry foul if you share yours.
11. Once I saw an appellate lawyer who ambitiously described the many subjects he hoped to cover during his oral argument. The presiding judge dryly asked him: “Will you be entertaining questions?”
12. If appellate lawyers keep on using more and more abbreviations in their briefs, pretty soon they will read like text messages. Such as: “lol ur rly rly dum.”
13. The secret of success at oral argument is sincerity. Once you can fake that, you’ve got it made.

14. Good judgment comes from bad experience, which often comes from bad judgment. Experience is something you don’t get until just after you needed it.
15. Timing has an awful lot to do with the outcome of any petition, including a rain dance.
16. At oral argument, you are there to find out what the judges are thinking. Generally speaking, you aren’t finding out when your mouth is moving.
17. Never attribute to malice that which is adequately explained by ignorance or stupidity.
18. Any legal problem can be overcome given enough time and money. Corollary: You are never given enough time or money.
19. At the heart of law is an essential tension between two seemingly contradictory attitudes - an openness to new ideas and adherence to precedent. The collective enterprise of creative thinking and skeptical thinking together keeps the law on track.

“Those are my principles. If you don’t like them I have others.”
--Groucho Marx

Thank you so much for the opportunity to serve as your chair. Please know that section meetings are a welcome place where your friends and colleagues await. See you in September!
“Pretend our country is being invaded by people who believe we have too many rights and they are demanding that we give up five of the protections guaranteed in the Bill of Rights,” says Chief Justice R. Fred Lewis. Alright, so we’re not really being invaded, but this is the introduction to “The Invaders,” one of the pre-planned educational activities that is part of the comprehensive Justice Teaching curriculum aimed at sparking an interest in students of all ages in civic education.

Since his appointment to the Florida Supreme Court in 1998, Chief Justice Lewis has consistently exhibited a genuine commitment to children and education. As part of the Florida Supreme Court’s Docent’s Program, each Justice’s chamber conducts educational tours of the Court for students visiting from cities throughout the State. During these tours, the students are given a general overview of Florida’s judiciary and historical information about the Court. Also during the tours, the students participate as attorneys and justices in mock argument sessions in the courtroom. Typically, the tours are conducted by each Justice’s law clerks, but, do not tell Chief Justice Lewis that he cannot participate. His former law clerks will tell you that it is not unusual for him to walk in mid-presentation with a huge smile and warm greeting for the children, and simply take over.

Over the course of the past years, Chief Justice Lewis has also taken the show on the road, so to speak, visiting Florida’s classrooms on a monthly basis and providing students with invaluable lessons in civic education. Perhaps as importantly, in visiting these schools, he has humanized the judiciary.

It was, therefore, no surprise that in 2006, he created Justice Teaching. This program was created with the ultimate goal of pairing a judge or attorney with every elementary, middle, and high school in the state of Florida. More specifically, this initiative aims to benefit students by promoting an understanding of Florida’s justice system and our laws, developing critical thinking abilities and problem solving skills, and demonstrating the effective interaction of our courts within the constitutional structure.

In advancing these important goals, Chief Justice Lewis has worked tirelessly with the executive director of the Florida Law Related Education, Inc., Annette Boyd Pitts, meeting with the superintendents of each school district and developing the appropriate curriculum for the program. Justice Teaching is further steered by a Select Committee, comprised of judges from each of Florida’s five appellate districts and twenty judicial circuits, as well as representatives of The Florida Bar and the Florida Association of District School Superintendents.

Chief Justice Lewis is hands-on-do-it-yourself about every aspect of Justice Teaching. During the Annual Meeting of The Florida Bar, Justice Lewis spent three hours one afternoon conducting a Justice Teaching training session for its volunteer attorneys and judges. It was there that Chief Justice Lewis explained “The Invaders” lesson. In this activity, the students are given a list of ten rights and are asked to select the five they “must have,” with the knowledge that they are giving up the remaining five rights. The children typically select the freedom of speech as a “must have” right. But, as Chief Justice Lewis explains, if they do not select freedom of the press or the right to peaceably assemble, the students learn that the value of the right to free speech diminishes because they cannot communicate their thoughts with others. As a result, this particular activity allows the children to analyze and evaluate the rights we enjoy and understand how they are each interrelated and indispensable.

Like “The Invaders,” each of the lesson plans has its own important objectives. The training sessions are used to familiarize the volunteers with the lesson plans and teaching methods. All materials are available online, e.g., power point presentations, lesson plans, etc. With the wealth of resources available through Justice Teaching, minimal preparation is required. “As little as an average of 1.5 hours per month will provide the students and the Justice teaching lawyer or judge with a life-changing experience,” comments Chief Justice Lewis.

Sound interesting? It is. If you have already registered as a volunteer, thank you and please make it a point to get in touch with the contact person at your school and encourage your peers to register. Currently, all schools in twenty-four cities have been paired with legal professionals. But, some counties still need coverage in one to two schools, and Lee and Pinellas Counties have approximately 40 schools without any coverage. If you have not yet registered, please consider doing so. As lawyers and judges, we are privileged in our knowledge of the law. It is our responsibility as a legal community to share that privilege with the children of our state.

JUSTICE TEACHING
For information regarding registration, school placement, and curriculum, please visit: www.justiceteaching.org or email justiceteaching@flcourts.org or call (850) 414-6106

Endnotes
1. Alina Alonso is a shareholder in the Appellate and Trial Support Practice Group at Carlton Fields’ Miami office. From 1999-2001, she was Chief Justice R. Fred Lewis’ law clerk.
The Riddle of Harmless Error in Florida: Reversal Required Despite Overwhelming Evidence of Guilt
by Roy D. Wasson

A. Introduction and Overview:
Major trials are rarely (if ever) error-free, but many errors are inconsequential; and few would argue that “harmless error” should be grounds for reversal after a hard-fought verdict. However, many lawyers and judges mistakenly believe that, in order for error to be harmful, the court must conclude that the guilty verdict would have been unlikely (or at least less likely) in the absence of the error. There is, however, no need for a court to find any likelihood that the jury would have acquitted the defendant—nor even the possibility of a not guilty verdict in the absence of the error—for reversal to be required under the harmless error standard adopted by the Florida Supreme Court in the 1986 decision in State v. DiGuilio, and frequently reaffirmed in subsequent cases.

The DiGuilio standard, borrowed from the United States Supreme Court’s test for harmless error in Chapman v. California, is that trial court errors require reversal unless the court finds the absence of any reasonable possibility that a given error contributed to the guilty verdict. The harmful error test, as set forth in Chapman and its progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

DiGuilio, supra, at 1135.

For error to harmfully “contribute” to the verdict under the DiGuilio standard does not mean that the verdict likely would have been different, but-for the error. Nor may error be deemed harmless, even where the appellate court finds that, “in a trial that occurred without the error, a guilty verdict would surely have been rendered” due to the overwhelming weight of other evidence untainted by error.

Instead, the error must be analyzed to determine whether it, “contributed to” the jury’s deliberative process in rendering the guilty verdict. Unless the court can conclude beyond a reasonable doubt that the erroneous matter was rejected or disregarded by all of the members of the jury in reaching their verdict, the error “contributed to” the verdict, and is harmful.

In DiGuilio, citing former California Supreme Court Chief Justice Roger Traynor’s “perceptive essay” on the subject entitled THE RIDDLE OF HARMLESS ERROR, the Court rejected the “overwhelming evidence” test and other formulations of the test for harmless error which it and other appellate courts had previously used: “The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test.”

Error should not be deemed harmless under the DiGuilio/Chapman standard simply under the analysis that a guilty verdict would doubtless have occurred, even without the error. Error may well have “contributed” to the verdict even if the evidence, apart from the error, was sufficiently strong to make conviction seem likely even in the absence of the error.

Prosecutors still frequently argue, and appellate courts sometimes apply, an incorrect test for harmful error under which affirmance of convictions results, even though error is shown, where there is “overwhelming evidence of guilt.” Another incorrect test sometimes employed results in affirmance where “there is no reasonable possibility that the outcome of . . . [the] trial would have been different.” As will be demonstrated, trial error can be—and often is—harmful, even though there is, apart from the error, overwhelming evidence of guilt. Further, as will be shown, error may well be harmful even without the court accepting the possibility that the outcome of the trial would have been different, in the absence of the error.

Incorrect harmful error tests have resulted in improper affirmances and have caused the reviewing courts to weigh evidence rather than apply the law to the facts. A harmless error approach which permits the court to find the defendant guilty based on an assumed state of affairs—assuming what the record would be like after removing the fruit of the trial error—intrudes on the Sixth Amendment right to have the jury decide the issue of guilt beyond a reasonable doubt. “That must be so, because to hypothesize a guilty verdict that was never in fact rendered [under the assumed state of affairs of removing the erroneous matter from the trial]—no matter how inescapable the [non-erroneous] findings to support that verdict might be—would violate the jury trial guarantee.”

B. Harmless Error Statutes Do Not Alter DiGuilio Test:
Although there are harmless error statutes on the books that purport to define harmful errors, those statutory definitions are not controlling. Florida enacted its first harmless error statute in 1911, which has been codified and re-enacted in the same form to the present time. That statute provides as follows:

No judgment shall be set aside or reversed, or new trial granted by any court of the State of Florida in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or exclusion of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case, it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.

Chapter 6223, Laws of Florida (now codified at §59.041, Fla. Stat.).

In 1939, the Florida Legislature enacted another harmless error statute which reads: When judgment not to be reversed or modified—No judgment shall be reversed unless the appellate court is of the
opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

Chapter 19554, section 309, Laws of Florida (codified at §924.33, Fla. Stat.).

This latter statute possesses three important differences from §59.041. First, section 59.041 applied only to errors in jury instructions, admission or exclusion of evidence and “matter[s] of pleading and procedure.” Section 924.33 applied to all sorts of errors.

Second, the latter statute stated that error would not be presumptively harmful. Section 59.041 did not address the issue of whether harm would or would not be presumed.

Third, section 924.33 expressed the standard for reversibility in a somewhat different manner than did section 59.041. The earlier statute required an appellant to demonstrate that error resulted in a “miscarriage of justice.” Section 924.33 required for reversal a showing that the error “injuriously affected the substantial rights” of the appellant.

In 1996, the Florida Legislature enacted Florida Statute section 924.051, entitled “Terms and Conditions of Appeals and Collateral Review in Criminal Cases.” That statute addresses a variety of aspects of the appellate and post-conviction proceedings under Florida law, including purporting to establish standards for harmful error.

Subsection (3) of that harmful error statute provides as follows:

An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.

The statute further defines “prejudicial error” as “an error in the trial court that harmfully affected the judgment or sentence.”

This most recent harmful error statute also purports to place the burden on the defendant to establish harmfulness. A portion of the statute provides as follows: “In a direct appeal or a collateral proceeding, the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court.”

The effectiveness and effect of the foregoing statutes has been decided by cases construing DiGuilio’s harmful error standard. The Florida Supreme Court has held in cases after DiGuilio that the Florida Legislature does not have the power to declare the standard for finding harmfulness of error, for that power resides in the Court.

In a criminal case, the enactment of a harmful error statute only has the effect of preventing the courts from utilizing a per se rule of reversibility when faced with non-constitutional error.

In Lee v. State, the Court reaffirmed the DiGuilio standard for harmful error and held that the standard applied even in cases in which the error did not reach the level of harmfulness defined in the harmful error statutes. Specifically, the Court approved the First District’s reversal of a conviction affected by error which could not be said to amount to a miscarriage of justice. The admission of the inadmissible evidence in Lee could not have met the “miscarriage of justice” standard for harmfulness under one of the statutes, because “the permissible evidence of Lee’s guilt was overwhelming, if not conclusive.”

The Lee Court made it clear that the Legislature’s attempts at defining what error would be harmless are ineffective as outside its permissible authority. The Court held:

We have previously recognized that the authority of the legislature to enact harmless error statutes is unquestioned. State v. DiGuilio, 491 So. 2d 1129, 1134 (Fla. 1986). The Court retains the authority, however, to determine when an error is harmless and the analysis to be used in making the determination.

Lee, supra, at 137, n.1 (emphasis added).

The Court in Lee quoted with approval from former Chief Justice Traynor’s dissenting opinion in People v. Ross, 429 P.2d 606(Cal. 1967), rev’d, 391 U.S. 470 (1968) previously cited in DiGuilio to explain that the applicable harmless error standard will require reversal where error contributed to the verdict, even though the same verdict would almost certainly have been reached upon only the admissible evidence in the case.

The Florida Supreme Court thus squarely rejected the position that error is not harmful unless the outcome of the trial would have been different, absent the error. Even if the other evidence almost surely would have resulted in a conviction, a guilty verdict must be reversed where error contributed to the verdict.

Later decisions of the Florida Supreme Court have continued to reaffirm the DiGuilio/Chapman standard. One very important case did so in the context of rejecting the proposition that §924.051(7), Fla. Stat. (1996) altered the standard for determining harmfulness of error contained in DiGuilio. See Goodwin v. State. “In Goodwin v. State.” In Goodwin, the Court was called upon to determine whether section 924.051(7) abrogated the DiGuilio harmless error test in cases involving nonconstitutional error.
In rejecting the statutory shifting of the burden to demonstrate harm onto the defendant, the “Court held that the provision did not alter the obligation of the appellate courts to independently review both constitutional and nonconstitutional errors for harmless under the DiGuilio standard.” The Goodwin Court held that the burden-shifting language of the statute merely codified prior law “that the defendant bears the burden of demonstrating that an error occurred in the trial court, which was preserved by proper objection.”

C. Effect on the Verdict Need Not Be “Substantial” To Be Harmful:
In 2003, the Florida Supreme Court rejected the proposition that the effect on a verdict from error need be “substantial” in order for the error to be harmful and reversible. The issue arose in Knowles v. State, in which the Court reversed the Second District Court of Appeal’s use of a harmless error standard under which a conviction tainted by error was affirmed because “the error did not substantially influence the jury’s verdict.”

The Second District had used that standard as a result of misreading the Supreme Court’s Goodwin decision. The Second District took out of context the following language from Goodwin which the Florida Supreme Court had quoted from a decision of the United States Supreme Court in O’Neal v. McAninch: “Do I, the judge, think that the error substantially influenced the jury’s decision?” The quote from O’Neal was not used by the Supreme Court in Goodwin to convey the degree of harm from error which must be found to support a finding of harmfulness in a direct appeal. Instead, the first portion of that quote (“do I as a judge think”) was meant to illustrate the United States Supreme Court’s rejection of the notion that a “burden” of demonstrating harmfulness could be allocated to the defendant. The second part of the quote from Goodwin (about whether the error substantially influenced the jury’s decision) reflects the standard different in a post-conviction proceeding for determining whether error was harmful.

The Court in Knowles reaffirmed the DiGuilio standard as follows: We reaffirm that Goodwin did not alter the test of harmless error and that the DiGuilio standard remains the benchmark of harmless error analysis. “The question is whether there is a reasonable possibility that the error affected the verdict,” DiGuilio, 491 So. 2d at 1139, not whether the error substantially influenced the jury’s verdict. “If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.” Id.

The DiGuilio standard has been continually reaffirmed by the Supreme Court. The issue then is what is meant by error which has “contributed to the verdict?”

D. Error Can Contribute to Verdict Without Altering the Verdict:
The Florida Supreme Court’s standard for finding that error is harmful under DiGuilio does not require any finding that the verdict would likely have been different, but-for the error. This is a difficult area which requires some analysis, so it is somewhat understandable that the courts have lost sight of the meaning of the standard. One might ask: “If the defendant still would have been convicted without the inadmissible evidence (or other error), how can it be said that the error contributed to or affected the verdict?”

The answer is that error will “contribute” to a verdict, when the evidence (or the improper argument or faulty jury instruction) placed before the jury as a result of that error was likely considered by the jury in reaching the guilty verdict, and placed on the side of the scales of justice tipping them toward a conviction. The mere fact that the jury still would have returned a guilty verdict, in the absence of the error, does not render error harmless. Here, the focus is not on whether the jury got the case right, but rather on whether the court is convinced that the tainted evidence did not affect the verdict.

If the evidence which should have been excluded was likely to have been considered by the jury, and if that inadmissible evidence would have tended to support a conviction, then the error must be found to have contributed to the verdict, even if a conviction would have been assured without that evidence. Errors which form building blocks in the wall of the guilty verdict contribute to that verdict, even if the wall would remain standing, were the erroneous blocks to be removed.

Wigmore recognizes that there is a difference between the standard—that the error “contributed to the judgment”—and the standard which assesses the “likelihood that the original factfinder would have reached the conclusion it originally did in the absence of any error.” Tiller’s revision to Wigmore’s treatise notes that “it may be possible to say that an erroneously-admitted piece of evidence materially contributed to the factfinder’s belief about a certain matter without having to say that the jury probably would have reached a different conclusion in the absence of the erroneously admitted evidence.”

Similarly, other “commentators view the ‘contribute’ test as quite different from the ‘overwhelming’ test.” An error certainly may “contribute” to a verdict, even though there is overwhelming evidence which would result in the same verdict, absent the error. It is not a but-for test of harmfulness. If any juror could have considered the evidence (or argument or instruction) which resulted from an error in support of reaching the decision to vote guilty, then the error contributed to the verdict, even if that juror’s guilty vote could have been based on other evidence as well. Only if an error was so unrelated to the jury’s work that it could not have been considered by any juror to support the verdict, can that error be said to have not contributed to the verdict.

An error involving such a minuscule or extraneous matter that it would not have even entered into the deliberative process is not harmful. On the other hand, if erroneously-admitted evidence (or pertinent jury instructions, or prosecutor comments, or other errors) were of a character from which we could expect them to be considered by the jury as supporting the verdict, those errors must be said to “contribute” to the verdict, even if the verdict—like a brick wall made of many good bricks and a few bad ones—would still stand (albeit with holes), once the defective bricks which went into it were removed.

This definition of “contributed” to the verdict is supported by the writers. “When, for example, evidence is wrongly admitted, the evidence must have been so nugatory or farfetched that no juror could have possibly relied on it to permit a finding that its introduction was harmless.” There is no need for the court to inquire whether the guilty verdict was different, as a result of the error, than it would have been without the error; merely that the error played some part in—or contributed to—the verdict.

Nothing in the Chapman harmless error standard adopted by the Florida
Editor’s Column – The Appellate Lawyer’s Role In Maintaining Judicial Independence And Accountability – Flip Sides Of The Same Coin

By Jack R. Reiter

In this issue, you will read about the Second Annual Appellate Justice Conference, a symposium comprised of judges and attorneys from around the State of Florida who met to discuss the principles of judicial independence and accountability – two topics that typically generate both discussion and debate. During the symposium, some wondered whether the two concepts coexisted, were inherently inconsistent, or complemented each other.

I believe that the concepts of independence and accountability are actually intertwined and inseparable -- one does not, and cannot, exist without the other. This is because only when people feel that their leaders are accountable – whether the leaders serve within the executive, legislative or judicial branches of government – can we sustain a society where each branch respects the independence of the other while recognizing those instances where the roles necessarily overlap.

“Under the express separation of powers provision in our state constitution, the judiciary is a coequal branch of the Florida government vested with the sole authority to exercise the judicial power, and ‘the legislature cannot, short of constitutional amendment, reallocate the balance of power expressly delineated in the constitution among the three coequal branches.’”1 But while the Constitution serves as the fundamental source of judicial authority, the judicial branch’s most powerful force comes from the respect bestowed upon it and the fundamental commitment by both the executive and legislative branches of government and the general population to a system of checks and balances.

To remain true to the Constitution and the separation of powers, judicial independence – a judiciary free from encroachment or control by other branches of government or outside influences, applying the law regardless of, and sometimes contrary to, political sentiment -- is clearly desirable and consistent with our system of government. Perhaps one way to preserve judicial independence and stave off efforts to encroach upon it is to foster judicial accountability and to nurture a mutuality of respect between the advocates and the decision-makers. As a practical matter, in any political system that exists based upon the consent of the governed, judicial independence is enhanced when the public understands that the judicial branch of government remains accountable to the people, who in turn will place even greater faith in judges to make decisions based on the law within a sphere of independence.

But what is accountability? Simply defined, to be accountable means to be subject to the obligation to explain when called upon to do so.2 This definition, however, is not always applicable in the judicial context. On the one hand, we have the benefit of an open judicial system, including courtrooms that are open to the press and public, along with written orders and opinions to explain decision-making and establish continuity within the law. But on the other hand, individuals outside the legal profession may only hear snippets of judicial wisdom that a news medium reports, which necessarily limits the scope of information that is readily accessible to the population. So if one equates accountability to accessibility, it is little wonder that many outside the legal realm (and some within it) may harbor cynicism about the system as a whole and feel a lack of accountability, which in turn may lead to attempts to encroach upon the independence of our judiciary.

Perhaps one way to enhance the concepts of both accountability and independence is to foster a mutuality of respect among the members of our legal system. In one sense, attorneys serve as the sole conduit between the general public and judges. This gives rise to the significant responsibility by lawyers to advance the core values of professionalism and enhance the perception of Judges and the legal profession as a whole. Therefore, as an advocate, it is critical to zealously advance a legal argument without attacking the decision-makers or the decision-making process. Of course, as appellate practitioners, we are constantly challenging the decisions of lower courts or perhaps attempting to convince a judicial body that a prior decision must be revisited and overturned. But all practitioners have a responsibility to challenge such decisions without attacking the decision-maker or the process itself – even when sorely disappointed with a particular outcome.

Furthermore, comments about judges or the judicial system when addressing both successful and adverse outcomes can either encourage or undermine feelings of respect and satisfaction with the legal system as a whole. I believe that it is at that moment that enhancing the sanctity of the process is most critical to maintain respect for the system, which in turn may further a sense of accountability and from that a continuing commitment to judicial independence.

Endnotes

1 Jack R. Reiter is Board Certified in Appellate Practice and AV-rated by Martindale-Hubbell. In addition to serving as Editor of The Record, he Chairs the Appellate Department at the law firm of Adorno & Yoss LLP, served as the Chair of the Florida Bar Appellate Court Rules Committee from June 2005 – June 2006, and is a current member of the Appellate Practice Certification Committee. Reiter has published and lectured on appellate topics such as preservation of error, non-final appeals, and common law writs. He graduated from the University of Florida with High Honors and is a member of the Order of the Coif.


http://reference.com/browse/accountabl
The Second Annual Appellate Justice Conference
By Siobhan H. Shea

The second annual Florida Appellate Justice Conference convened in Orlando in June 2007, in conjunction with the Florida Bar’s Annual Meeting. The theme for the 2007 Florida Appellate Justice Conference was Balancing Judicial Independence and Accountability.

Keynote speaker Professor Stephen B. Burbank, the David Berger Professor for the Administration of Justice at the University of Pennsylvania and a visiting professor at Harvard Law School, spoke on Judicial Independence: What Does It Mean And How Has It Evolved? Professor Burbank discussed judicial independence and judicial accountability in balancing government branches. In the political arena judges are often held accountable as “policy agents.” Burbank opined this is an unfair and dangerous situation, primarily because of its impact on judicial independence. Professor Burbank offered that judicial independence and judicial accountability appear to be different sides of the same coin. But if judicial independence is derailed by contemporary politics we are truly in the red, having bankrupted the public support of the court. Professor Burbank stressed the importance of the public’s perception of the courts. He offered that in the current climate judges risk being perceived like a “special interest group” a perspective which would deteriorate the rich tradition of judicial independence existing separate and distinct from any political mechanism. Interestingly, the term judicial independence stimulated conversation about the semantics of this issue. Conference participants, later expounded on Burbank’s concepts, exploring different interpretations of the phrase “judicial independence” as modal independence or essential independence. Participants sought to clarify whether the professor was using the term independence as a “behavior” or a “thought” or a “product” i.e. an opinion. The consensus in the discussion groups was that perhaps the professor’s use of the phrase “judicial independence” was a combination of behavior, thought and product, which contributed to the difficulty in truly understanding the many permutations of judicial accountability and independence.

Following the panel presentation, a presentation designed to be thought-provoking was made by Nova Southeastern University Law Center Professor Bruce Rogow, and former Florida Supreme Court Chief Justice Arthur J. England, Jr., of Greenberg Traurig, P.A. Professor Rogow challenged the notion that there is any such thing as judicial “independence.” He pointed out the ways in which jurists are identified for selection, and influenced, by his or her background and heritage, and in decision-making by the Constitutions, laws, and rules which control legal decision-making. He observed that no one attains the bench, either by election or appointment, without having been characterized to some degree (and possibly “pigeon-holed”) both by the media and by either the appointing authority or the voters.

Former Justice England posed the question of whether in Florida there is true judicial “accountability,” either in terms of compelling adherence to “the law” and ethical conduct. Using statistics compiled from Florida’s public records, Justice England noted the paucity of judicial decisions which are reversed, by pointing out that relatively few bench or jury trials are overturned by the district courts of appeal, and that a relatively miniscule number of district court decisions are even reviewed by the Florida Supreme Court. As regards judicial misconduct, he noted the relatively small number of instances in which judges have been removed from office - whether by the Supreme Court on recommendation from the Judicial Qualifications Commission, by impeachment, or by removal from the trial bench by the voters - and the relatively few instances in which alleged misconduct has retarded advancement in judicial careers.

Both Professor Rogow and Justice England offered a point to their counterpoint, however. They suggested that, despite the seeming absence of true judicial independence or demonstrable accountability, both essential features of the judicial branch of Florida’s government are institutionalized in its judicial system, and fully operational. Both are accepted by jurists as inherent in the nature of judicial office, and are manifest in the quality and durability of Florida’s bench.

A panel of distinguished appellate jurists and lawyers spoke on Contem-

See “Justice Conference” page 20

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A termination of parental rights (TPR) proceeding begins when the Department of Children and Family Services (DCFS), the guardian ad litem, or any other person having knowledge of the facts of the case, or is informed of the facts and believes they are true, files a petition with the trial court. Fla. Stat. 39.802(1). Any party to a TPR proceeding has standing to appeal the trial court’s order. Fla. R. App. P. 9.146 governs appeal proceedings in TPR cases. Appealing the order does not automatically stay the trial court’s decision. However, an order of adoption will be suspended pending appeal. App. R. Pro. 9.146.

The standard of review in a case where the trial court terminates parental rights is whether the judgment is supported by substantial and competent evidence. An appellate court may reverse the trial court’s order denying a petition to terminate parental rights when the denial is not supported by competent substantial evidence and is not in the best interests of the children.

When analyzing the merits of appealing a TPR order or the denial of a TPR order, it is important to look to the recent statutory changes which govern the manifest best interests of the child. However, before analyzing the manifest best interests of the child, it is necessary to discuss the variety of situations in which TPR may occur. Florida law provides that the grounds for TPR may be established under a variety of different circumstances. Fla. Stat. 39.806. Establishing a single ground alone is a sufficient to terminate parental rights. Fla. Stat. 39.806 establishes the grounds upon which a parent’s rights can be terminated. “There is a two step process inherent in the statutory scheme for termination of parental rights, pursuant to

Chapter 39. First, the trial court must find by clear and convincing evidence that one of the grounds set forth in Fla. Stat. 39.806 has been established. Second, the trial court shall consider the manifest best interests of the child by evaluation of all relevant factors, including those set out in Fla. Stat. 38.810.”

Florida Statute section 39.806 identifies various grounds for TPR. Once one of the statutory grounds is established, it is necessary for the court to look at the manifest best interest of the child in deciding whether to grant or deny the petition terminating the parental rights. Determining the manifest best interests of the child requires consideration of all relevant factors including but not limited to the following:

1. Any suitable permanent custody arrangement with a relative of the child. However, the availability of a nonadoptive placement with a relative may not receive greater consideration than any other factor weighing on the manifest best interest of the child and may not be considered as a factor weighing against termination of parental rights. If a child has been in a stable or preadoptive placement for not less than 6 months, the availability of a different placement, including a placement with a relative, may not be considered as a ground to deny the termination of parental rights.

2. The ability and disposition of the parent or parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under state law instead of medical care, and other material needs of the child. The capacity of the parent or parents to care for the child to the extent that the child’s safety, well-being, and physical, mental, and emotional health will not be endangered upon the child’s return home.

3. The present mental and physical health needs of the child and such future needs of the child to the extent that such future needs can be ascertained based on the present condition of the child.

4. The love, affection, and other emotional ties existing between the child and the child’s parent or parents, siblings, and other relatives, and the degree of harm to the child that would arise from the termination of parental rights and duties.

5. The likelihood of an older child remaining in long-term foster care upon termination of parental rights, due to emotional or behavioral problems or any special needs of the child.

6. The child’s ability to form a significant relationship with a parental substitute and the likelihood that the child will enter into a more stable and permanent family relationship as a result of permanent termination of parental rights and duties.

7. The length of time that the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

8. The depth of the relationship existing between the child and the present custodian.

9. The reasonable preferences and wishes of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.

10. The recommendations for the child provided by the child’s guardian ad litem or legal representative.

Fla. Stat. 39.810

It is important to note the change to Fla Stat. 39.810(1) which now provides:

Any suitable permanent custody arrangement with a relative of the child. However, the availability of a nonadoptive placement with a relative may not receive greater consideration than any other factor weighing on the manifest best interest of the child and may not be considered as a factor weighing
against termination of parental rights. If a child has been in a stable or preadoptive placement for not less than 6 months, the availability of a different placement, including a placement with a relative, may not be considered as a ground to deny the termination of parental rights.

Emphasis added. Fla. Stat. 39.810 was amended in July of 2006. The 2006 amendment by s. 26, ch. 2006-86, effective July 1, 2006, added the language beginning "However..." in (1), the relevant portion of the Senate Bill states:

Section 22 amends S 39.810 F.S., to provide that, in determining the manifest best interests of a child in the context of a termination of parental rights proceeding, the availability of a nonadoptive relative placement may not be considered as a factor weighing against the termination of parental rights and that, if a child has been in a stable or preadoptive placement for not less than six months, the availability of a different placement, including a placement with relative, may not be considered as a ground to deny the petition for termination of parental rights.

2006 Fla. ALS 86, *; 2006 Fla. Laws ch. 86; 2006 Fla. SB 1050

This is a significant change. Simply stated, the fact that relatives of the child can care for the child on a temporary or long term basis, is not a reason for the court to deny the petition for TPR. As the First District Court of Appeal held:

To prevail in a proceeding to terminate parental rights, the Department must prove the existence of a statutory ground and establish that termination would be in the manifest best interest of the child. Section 39.810, Florida Statutes (2006) provides that the court may consider a relative placement in determining whether termination is in the child’s best interest. However, the statute then qualifies this general point by stating that the availability of a “placement with a relative may not receive greater consideration than any other factor weighing on the manifest best interest of the child and may not be considered as a factor weighing against termination of parental rights.” By the text of this statute, the possibility of a relative placement is plainly not a reason to delay a decision to terminate paren-

tal rights if termination is otherwise in the manifest best interest of the child.


However, in addition to the two part analysis above, it is necessary to also review the “least restrictive means test.” Once the initial grounds for termination of parental rights are established, it must be demonstrated that termination of parental rights is the least restrictive means of protecting the child. C.M. v. Department of Children and Families, 953 So.2d 547 (Fla 1st DCA 2007) As parental rights are fundamental, termination of parental rights must be the least restrictive means of protecting the child. Padgett v. Dep’t of Health & Rehabilitative Servs., 577 So.2d 565, 571 (Fla 1991).

Other recent legislative changes regarding the best interest of the child include the area of modification of custody proceedings. Postdisposition Change of Custody, Fla. Stat. 39.522 was amended by the legislature in July 2006 to reflect additional criteria to for the court to consider when determining the best interest of the child in a modification of custody proceeding. The court now must consider the factor of the child's out of home residence, and how long the child has been in such a location when it determines the best interest the child.

1. A child who has been placed in the child’s own home under the protective supervision of an authorized agent of the department, in the home of a relative, in the home of a legal custodian, or in some other place may be brought before the court by the department or by any other interested person, upon the filing of a petition alleging a need for a change in the conditions of protective supervision or the placement. If the parents or other legal custodians deny the need for a change, the court shall hear all parties in person or by counsel, or both. Upon the admission of a need for a change or after such hearing, the court shall enter an order changing the placement, modifying the conditions of protective supervision, or continuing the conditions of protective supervision as ordered. The standard for changing custody of the child shall be the best interest of the child. When applying this standard, the court shall consider the continuity of the child’s placement in the same out-of-home residence as a factor when determining the best interests of the child. If the child is not placed in foster care, then the new placement for the child must meet the home study criteria and court approval pursuant to this chapter. (Emphasis added.) Fla. Stat. 39.522(1).

Although there is not as of yet, a great deal of case law regarding these recent legislative amendments, the changing criteria used to analyze the “best interests of the child” is sure to be an issue to watch, as these cases that determine the future of so many children in our state make their way through the Florida Courts.

Endnotes
1 Robin Bresky, of The Law Offices of Robin I. Bresky, specializes in civil and criminal appeals and assists litigation attorneys with motion support, including research and writing. She is the current President of the South Palm Beach County Florida Association of Women Lawyers, a Director on the Board of Directors of the South Palm Beach County Bar Association, and Appellate Co-Chair of the Palm Beach County Bar Association.
2 T.V. vs. Dept. of Children & Family Services, 905 So. 2d 945 (Fla. 3d DCA 2005)
3 Dep’t of Children & Families v. K.F., 916 So. 2d 948, 950 (Fla. 4th DCA 2005); see also State, Dep’t of Children & Family Servs. v. A.D., 904 So. 2d 480, 482 (Fla. 1st DCA 2005); Dep’t of Children & Families v. C.F., 788 So. 2d 988 (Fla. 3d DCA 1998), Dep’t Children & Families v. A.Q., 937 So. 2d 1156 (Fla. 3rd DCA 2006).
4 Rothbourn v. Dept. of Children & Families, 826 So. 2d 521, 523 (Fla. 4th DCA 2002); accord C.M. v. Dep’t of Children & Family Servs., 854 So. 2d 777, 779-80 (Fla. 4th DCA 2003), J.U. v. DCF, 888 So.2d 1046 (Fla. 4th DCA 2004).
5 Voluntary surrender of parental rights; abandonment; parent or parents engaging in conduct toward the child or other children which demonstrates continuing involvement of the parent-child relationship threatens the life, safety, well-being, physical, mental, or emotional health of the child notwithstanding any provision of services; parent’s incarceration for a substantial amount of time before the child turns 18, a career criminal or habitual violent felony offender, a sexual predator, convicted of first or second degree murder, sexual battery constituting a capital, life or first degree felony violation of Fla Stat.794.001; when a child has been adjudicated dependent and the child continues to be abused, neglected or abandoned and the parent or parents have failed to substantially comply with a case plan for twelve months after an adjudication of dependency or the child’s placement into shelter care; the parent has materially breached the case plan making it unlikely that he or she will be able to substantially comply before the case plan expires; the parent or parents engage in egregious conduct or had the opportunity and capability to prevent and knowingly fails to prevent egregious conduct which threatens the life, safety, emotional, or physical health of the child; when the parent or parents have subjected the child to aggravated child abuse, sexual battery, sexual abuse, or chronic abuse; when the parental rights of a sibling have been involuntarily terminated.
50 Years of the First DCA
By Wendy S. Loquasto

Tom Hall and I had the honor and pleasure of being part of the 50th anniversary celebration for the First District Court of Appeal held on Thursday, July 12, 2007, when we presented the court with a plaque from the Appellate Practice Section in celebration of the occasion.

The anniversary celebrations kicked off with an en banc ceremonial session of the court, for which Chief Judge Edwin B. Browning, Jr., presided. The First DCA’s past was aptly represented by a host of retired judges, including Tyrie A. Boyer, Robert P. Smith, Jr., Larry G. Smith, Winifred L. Wentworth, James E. Joanos, as well as widows of the late Ralph W. Nimmons, Jr., J. Klein Wigginton, and E.R. “Dick” Mills, Jr. The Honorable Charles Wells also attended, bringing with him the congratulations from the Florida Supreme Court, as was Chief Judge David M. Gersten of the Third District and Judge Robert J. Pleus, Jr., of the Fifth District, whose father was one of the first three judges appointed by Governor Collins to the Second DCA in 1957. Raymond Rhodes, the First District’s Clerk of Court for 30 years, took his seat of honor among the legal celebrities.

Bar and government dignitaries joined in the commemoration, including The Honorable Richard W. Ervin, III, who retired in December 2006 after an unsurpassed 30 years on the bench at the First District; Secretary of the Department of Children & Families Bob Butterworth, who, through his unprecedented four terms as Florida’s Attorney General, employed a cadre of attorneys who appeared before the court; and newly installed Florida Bar President Frank Angones, who continues the Bar’s commitment to preserving judicial independence.

Judge of Compensation Claims John Lazzara appeared on behalf of the Florida Workers’ Compensation Institute to convey its thanks and praise for court’s work in the workers’ compensation realm, for which the First DCA has had exclusive appellate jurisdiction since 1979.

Presenting as the keynote speaker was Dr. James M. Denham, Director of the Center for Florida History at Florida Southern College, an award-winning historian and author who specializes in Southern and Florida history. Against a background of economic, social, and political history, he unraveled the “often confusing and sometimes convoluted path to [the] creation” of the District Courts of Appeal in 1957. True to his promise, his comprehensive history included “heroes and villains (at least, sort of); regional warfare; farsighted vision and short term interest; backstabbing; problems galore; and more politics than you can shake a stick at.” He began with Florida’s first constitution, which prohibited the establishment of an independent appellate judiciary, instead calling for circuit court judges to sit as an appellate bench, and continued with the establishment of the Florida Supreme Court in 1851. Popular elections of the justices; poll taxes that excluded African Americans and poor whites from voting, thereby vesting electoral power in the affluent; control of governmental legislative power by the Panhandle and Pork Chop Gang in the face of tsunami-size growth of Florida’s population in central and south Florida in the 1920s and then again in the 1940s and 1950s; the corresponding increase in appeals from 125 dispositions in the mid-1940s to 1,825 filed appeals in 1955, which the six-member supreme court was simply unable to process in a timely manner. Enter Governors Dan McCarty again in the 1940s and 1950s; the corresponding increase in appeals from 125 dispositions in the mid-1940s to 1,825 filed appeals in 1955, which the six-member supreme court was simply unable to process in a timely manner. Enter Governors Dan McCarty and LeRoy Collins, who together with Florida Bar leaders Horner Fisher, Robert Plois, and William McRae, and the advice of Justice Thomas Elwyn, formed the Judicial Council of Florida in 1953 and pushed its agenda forward, culminating in the passage of a constitutional amendment in 1956 that created the First, Second, and Third District Courts of Appeal.

The celebration was capped off with banquet held at the University Center Club on Florida State University’s campus. Hank Cox, the immediate past president of The Florida Bar, emceed the event, commenting that three of the First District’s judges have come from his firm (Bedell, Dittmar, DeVault, Pilans & Coxe, P.A): Robert P. Smith, Jr., the late E. Earle Zehmer, and Peter D. Webster.

The keynote address was given by Diane Roberts, who is an eighth generation Floridian, Professor of English at Florida State University, author, political columnist for The St. Petersburg Times, and commentator for National Public Radio. Ms. Roberts’ most recent book, DREAM STATE: Eight Generations of Swamp Lawyers, Conquistadors, Confederate Daughters, Banana Republicans, and other Florida Wildlife, presents Florida’s history through her strange and varied politically prominent family in a hilarious fashion. She applied the same sense of humor and wit to her keynote address, which focused on judicial independence, by sprinkling gems of old-time Tallahassee wisdom and choice political morsels to the delight and laughter of those assembled, which included APS Chair Steve Brannock and immediate past Chair Susan Fox, as well as host of APS members.

All in all, the day’s events were a worthy tribute honoring this significant milestone in the history of the First DCA.

Endnotes
1 Wendy S. Loquasto is a partner with Fox & Loquasto, P.A., a statewide appellate practice firm with offices in Tampa and Tallahassee. Upon graduating from Stetson University College of Law in 1988, she clerked for 15 years for The Honorable Richard W. Ervin, III, at the First District Court of Appeal. She is currently a member of the Executive Council of the Appellate Practice Section, Chair of the Section’s Tallahassee Outreach Program, a member of the Florida Bar Journal and Editorial Board, and immediate past President of the Florida Bar Association for Women Lawyers.
2 To see Dr. Denham’s history in full, visit the APS website at www.flabarappellate.org.
Dr. James M. Denham, Director of the Center for Florida History, Florida Southern College, presented a history of the First District Court of Appeal.

Chief Judge Edwin B. Browning, Jr., and Judge Edward T. Barfield.

Judge John Lazzarra speaks at the First District celebration.
By Edward Guedes

On July 1, 2007, the Third District Court of Appeal, along with the First and Second District Courts of Appeal, celebrated its fiftieth anniversary. In the five decades since Judges Charles A. Carroll, Mallory Horton, and Tillman Pearson took to the bench in a classroom at the University of Miami Law School and heard their first oral argument as Third District judges, the court has seen its membership grow from three judges to eleven. Thirty-one individuals have had the distinct honor to serve as judges on the court. During that time, one thing has not changed, however: the respect and admiration that appellate practitioners have for the institution of the court. It was that respect and admiration which more than two years ago led 23 attorneys representing the plaintiffs and defense bar, civil and criminal practices, public and private sectors, to gather as the Third DCA 50th Anniversary Committee and organize the court’s fiftieth anniversary celebration.

The celebration consisted of four related components. First, a professionally produced, 40-minute, PBS-style documentary that tracked the court’s history, as it paralleled the history of South Florida, and contained interviews of current and former Third District judges. The documentary recounted how the court came into existence and how it developed over the years and reminds viewers of the courageous stance the court has taken at critical junctures during its history. Every living Third District judge was interviewed for the documentary, including Tillman Pearson, one of the first three judges, who sadly passed away a few months after his interview was recorded. The full interviews of the judges will be archived at the Third District and be made available to lawyers, law students, new judges and members of the public who might have an interest in the history of the court.

The second component is a more detailed, written history of the court published by noted historian Arva Moore Parks. This coffee-table style book consists of numerous chapters authored by members of the court, appellate practitioners and former law clerks. The book provides a delightful insight to the personalities of the court, as well as a comprehensive review of the court’s creation and its history, operations and personnel. Replete with historic photographs from the court’s archives, including one taken moments before the court first convened, the book provides history buffs with a unique look back at this critically important institution.

The third component, a private reception and reunion for the court’s law clerks over the past fifty years, is scheduled for the fall. Few practitioners today will remember that the court’s first three law clerks were Richard Gale, Eugene Spellman (latter U.S. District Court Judge for the Southern District of Florida) and Kenneth L. Ryskamp, now Senior U.S. District Court Judge for the Southern District of Florida. The list of Third District clerks is a veritable “who’s who” of respected lawyers and judges in South Florida.

The fourth and final component, of course, was the banquet celebration held on June 22, 2007 at Parrot Jungle Island. In addition to serving as the culmination of the celebration, the banquet also provided the venue for the first public airing of the documentary. All guests received a hard-bound copy of the book and a DVD of the documentary as a memento of the evening.

Naturally, no aspect of the anticipated celebration would have been possible without the financial support of countless law firms and individual lawyers who have donated generously in support of this historic event. Many others, in addition to providing financial support, have contributed countless hours of their time and expertise to bring this celebration to fruition. Once again, the admiration and respect the South Florida legal community has for the Third District has been evident in its support for these tributes. The Third DCA 50th Anniversary Committee is indebted to all these individuals for their contributions, and eventually, when the celebration is concluded, the Committee, already a 501(c)(3) non-profit organization, will be converted into the Historical Society of the Third District Court of Appeal so that future generations may continue to appreciate the wonderful institution before which so many of us are privileged to practice.

Endnotes

1 Edward Guedes has concentrated his practice in the areas of appellate litigation, employment and labor law and land use law, and is Board Certified by The Florida Bar in the field of Appellate Practice and served as a co-chairperson of the committee responsible for commemorating the 50th Anniversary Celebration of Florida’s Third District Court of Appeal in 2007. Guedes also has extensive experience with the implementation and application of the American with Disabilities Act and Family and Medical Leave Act. Edward lectures frequently to local governmental employers and other attorneys in the fields of appeals and litigation support and employment and labor matters.
Third District Anniversary Committee Co-Chair Edward Guedes Hosted the Third District Anniversary Celebration

Current and former Judges of the Third District Court of Appeal

Jack R. Reiter presented a plaque on behalf of the Appellate Practice Section to Chief Judge David M. Gersten and immediate past Chief Judge Gerald B. Cope, Jr.

(from left to right) Judges Linda Ann Wells, Leslie B. Rothenberg, Barbara Lagoa, and Melvia B. Green

Photos by Jeff Morem
2007 Adkins Award and Pro Bono Award Winners
By Gwendolyn Powell Braswell

Each year, the Appellate Practice Section presents two prestigious awards – the Adkins Award and the Pro Bono Award – to members of the section who represent a commitment to appellate practice. The section created the Adkins Award in honor of Florida Supreme Court Justice James Adkins, who passed away in 1994. Justice Adkins served on the Supreme Court for eighteen years in the 1970s and 1980s, and he was the Chief Justice during the mid-1970s. The Section annually presents this award to a member of The Florida Bar who has significantly contributed to the field of appellate practice in Florida.

This year’s winners were Thomas D. Hall, who received the Adkins Award, and John R. Hamilton, recipient of the Pro Bono Award. The Section presented the awards at the Section’s Annual Dessert Reception, which was co-hosted with the Cuban American Bar Association.

Tom Hall exemplifies a commitment to enhancing appellate practice for lawyers throughout the State. Tom has served for nearly twenty years at three of Florida’s appellate courts. He is currently the Clerk of the Court at the Florida Supreme Court, a position to which he was appointed in May of 2000. Prior to appointment as Clerk, Tom was the Chief Staff Attorney at the First District Court of Appeal for ten years. Before that, he was in private practice for eight years in Miami, Florida, handling complex commercial litigation at the trial and appellate levels. Immediately after graduating from the University of Miami School of Law, Tom was a law clerk to the Honorable Daniel S. Pearson at the Third District Court of Appeal. He has taught at two Florida law schools and other legal institutions.

From 1985 to 2000, Tom served on the Florida Appellate Rules Committee, which advises the Florida Supreme Court on proposed amendments to Florida’s Rules of Appellate Procedure. He now serves as the Florida Supreme Court’s unofficial liaison to that committee. In fact, Tom has served on virtually every Florida Supreme Court committee in existence over the past seventeen years that involved Florida’s appellate courts. He is currently the Clerk of the Court at the Florida Supreme Court, a position to which he was appointed in May of 2000. Prior to appointment as Clerk, Tom was the Chief Staff Attorney at the First District Court of Appeal for ten years. Before that, he was in private practice for eight years in Miami, Florida, handling complex commercial litigation at the trial and appellate levels. Immediately after graduating from the University of Miami School of Law, Tom was a law clerk to the Honorable Daniel S. Pearson at the Third District Court of Appeal. He has taught at two Florida law schools and other legal institutions.

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Immediate Past Chair Susan Fox presents the Pro Bono award to John R. Hamilton
Special Award to Tracy Carlin

By Rebecca Bowen Creed

This year’s annual dessert reception marked the occasion for honoring yet another outstanding member of the Appellate Practice Section. On behalf of the Section, Steve Brannock presented Tracy S. Carlin with a special award honoring her many years of diligent service. Board-certified by The Florida Bar in Appellate Practice since 1998, Tracy has long been an active Section member. She served as a member of The Florida Bar Appellate Section’s Civil Appellate Practice Committee for many years. In 2003, she was elected to a three-year term on the Section’s Executive Council. She joined the Section’s CLE Committee that same year, serving as its chair from 2004 until 2005.

Tracy has also served by appointment on The Florida Bar’s Appellate Practice Certification Committee and the Standing Subcommittee on CLE. She was honored as the pro bono attorney of the year for the Fourth Judicial Circuit’s Guardian Ad Litem Program in 1995; in 1996, she was named the pro bono attorney of the year by both the Fourth Judicial Circuit and the State of Florida Guardian Ad Litem Programs. She served as the inaugural chair of the Jacksonville Bar Association’s Appellate Practice Section, and has frequently lectured on preservation of error and other appellate-related topics at seminars throughout the state.

Tracy retired from her active appellate practice with Mills & Carlin, P.A. (now known as Mills & Creed, P.A.) on January 1, 2007, to fulfill her lifelong dream of an early retirement. She and her husband, John Kremer, will move to Wyoming this summer, where she plans not only to play golf, hike, fish, and cross-country ski, but also to begin her second career – composing music and lyrics for guitar. To assist Tracy in her endeavors, the Section also presented her with a book on songwriting, personally inscribed by many of the Section members. Tracy will be greatly missed by appellate practitioners and trial lawyers alike.

Endnotes
1 Gwendolyn Powell Braswell is a board certified appellate attorney residing in Sarasota, Florida. She is an active participant in the legal community. Ms. Braswell is a member of the Board of Directors of the Sarasota County Bar Association, the Appellate Court Rules Committee of The Florida Bar, and the Executive Council of the Appellate Practice Section of The Florida Bar. Ms. Braswell currently chairs the Appellate Practice Section of the Sarasota County Bar Association. She is a master of the Judge John M. Scheb American Inn of Court. She is also licensed to practice law in Georgia and the District of Columbia.
2 This year’s Annual Dessert Reception featured Cuban music and desserts with a Cuban flare.
Appellate Practice Section Hosts Annual Discussion with Florida Supreme Court

By: Barbara Anne Eagan

The Appellate Practice Section hosted yet another enlightening discussion with our Supreme Court justices during the 2007 Annual Florida Bar Conference, in Orlando. Following the final round of the Robert Orsek Memorial Moot Court Competition, Chief Justice Fred Lewis, Justice Barbara Pariente, Justice Raul Cantero, Justice Peggy Quince, and Justice Charles Wells, entertained a variety of questions from section members and others. As one could predict, this was an informative and interesting presentation.

To begin the discourse, outgoing Executive Council President, Susan Fox, thanked the Court for their presence at the event and invited audience members to the podium. Thus opening the door for our Chair-elect, Steve Brannock, to ask whether the Court would consider permitting amici to appear at the jurisdictional briefing stage in discretionary appeals. The consensus among the Justices appeared to be that this would be wholly unnecessary since the actual parties (presumably) are capable of describing for the Court where jurisdiction lies. Several justices emphasized that the true amicus role is, as “friend of the Court,” to fill in the blank with a specialized brand of expertise. The Court noted that the current trend for amicus to argue in support of a party is not helpful and invites the initial concept.

Ms. Fox then returned to the podium to make a plug for the Section’s soon to be published Pro Se Appellate Handbook. In response to Ms. Fox’s queries concerning the effect of pro se appeals upon the Court, Justice Quince acknowledged that numerous handwritten, hard-to-read, poorly drafted motions for habeas and mandamus petitions drain significant Court resources. Justice Quince questioned how the handbook would aid in curtailing this flow. As Fox explained, the handbook would provide assurance that pro se parties have some understanding of the rules and process. Thus, potentially curtailing frivolous filings. Justice Pariente noted that pro se post-conviction relief filings have “sky rocketed.” She expressed hope that the Handbook will aid in improving the quality of such filings and assist in making them manageable.

Participant questions then turned to specifics of appellate practice before the Court. The justices were asked how best to face the daunting task of appearing before a “hot” panel of seven, with only a limited time to present argument. Chief Justice Lewis acknowledged that this could be daunting! Justice Lewis noted he often tries to control the other justices’ questioning in addition to permitting the oralist a few extra minutes in circumstances where questioning is particularly vigorous. Still, the justices emphasized the importance for attorneys to answer all questions, directly, before segueing back to what the attorney deems important. Justice Pariente noted oralists should practice their argument thoroughly by anticipating and accounting for potential questions in their time planning. Finally, Justice Lewis invited the audience to provide the Court with suggestions for improving the process.

The Justices became most animated when questioned concerning their pet peeves regarding oral argument. Several exhibited consternation over attorneys’ failure to answer questions forthrightly (or to even respond to questions). Furthermore, the justices cautioned attorneys to be very familiar with the record prior to an argument. They emphasized attorneys should exercise honesty in their arguments; including, the occasional concession necessary when faced with hypotheticals by the Court. Justice Quince noted this especially holds true for counsel for the State, who often carries a higher burden. Finally, the Court emphasized attorneys should always be prepared to respond to questions regarding jurisdiction in discretionary appeals. The Justices also acknowledged that only a limited number of certified question cases are accepted (40%); and, stressed that just because a district court certifies a conflict does not mean an actual conflict exists. In sum, attorneys should be well prepared to address jurisdiction. Along this line, the Court encouraged the judges of the district courts of appeal to explain in their opinions why they have certified conflict.

In closing, questioning revolved around the Court’s role as a disciplinarian. Specifically, the questions concerned the high penalties which have been imposed -- despite recommendations that are more lenient. The various responding justices, including Justice Pariente, stressed the importance of setting the bar very high for judges and attorneys. They emphasized the Court strive to adhere to consistency in disciplinary action. Thus, the higher levels of discipline they impose may arise from the fact that the JQC and Bar Referees are not as familiar with precedent. Justice Cantero said the Court is extremely frustrated regarding unprofessional behavior perpetrated by attorneys upon their fellow members of the bar. The final questioner asked the Court to consider holding oral arguments in locations other than Tallahassee. Justice Pariente recognized that this had been “under consideration” for some time. It is unlikely, however, due to the logistics of transporting the Court and their staff. Moreover, the Court would have to postpone argument until enough cases are accepted from another jurisdiction.

The Section is deeply grateful to members of the Court for taking the time to share their insights with us. If you have never attended one of these events – make it a must do for next year!

Endnotes

1 Barbara A. Eagan is Florida Bar Board Certified in Appellate Practice and a former Vice-Chair of the Appellate Court Rules Committee. She serves on the Executive Council of the Appellate Practice Section and is a shareholder with Broussard, Cullen DeGailler & Eagan, Orlando.
Making the Most of Moot Court
By Harvey J. Sepler

Last month, four law students had the opportunity to argue a case before the Florida Supreme Court -- something that will elude the majority of lawyers in this state.

But the real story is not just those four, superb students. The story is the 28 students, representing all of the law schools in this state, who worked for months to submit appellate briefs and argue their cases before attorneys and judges (circuit and district court of appeal) as part of the Young Lawyers Section's Orseck Moot Court Competition held during The Florida Bar's Annual Meeting.

This year's problem presented two issues: 1) does a police dog sniff in the shared, but semi-private hallway of an apartment building, in order to detect the presence of drugs inside one of the apartments, constitute a Fourth Amendment search and 2) is an out-of-court statement by the defendant's now-unavailable 4-year old son's babysitter that the defendant's car (Sudafed can be used to manufacture the drug), 2 (an anonymous (and not terribly detailed) tip by the defendant's 4-year old son's babysitter that the defendant was manufacturing crystal meth in her apartment and 3) the results of a drug-sniffing police dog alert for the presence of drugs inside the apartment.

The first question asked whether a defendant has a legitimate expectation of privacy in the smell of drugs emanating from inside an apartment and detectable from the outside only through the highly sensitive nose of a police-trained dog? Were the officers and the police dog in a place they had the authority to be when the dog alerted to the presence of drugs? Does this expectation of privacy take on added dimension when police use a specially trained dog to detect something that they could not otherwise detect? Did the state establish probable cause to support the issuance of a search warrant of the defendant's apartment?

The second question asked whether Crawford v. Washington, 541 U.S. 36 (2004) applies to the first issue. The Court held that a statement by the defendant's now-unavailable 4-year old son's babysitter that the defendant has a crystal meth lab at home was inadmissible because of the circumstances of eliciting and taping it, the motivations of the babysitter who orchestrated the taping and the unavailability of the child into the analysis. It also required the students to fully understand how Crawford changed the reliability test for out-of-court hearsay.

The final round was held before the Supreme Court in conjunction with the Appellate Section's annual "Discussion With The Court." The four students who competed were Rick Lasseter and Valerie Linnen (Florida Coastal Law School) and Natalie Hagan and Gavin Stewart (Stetson Law School). The Florida Coastal team won the final round and the two students shared the Best Oralist Award. The team also won Best Brief (it was written by Rick Marshall). Joseph Kenny wrote the Stetson brief.

The Appellate Practice Section congratulates everyone participating in this fine moot court competition.

Endnotes
1 Harvey J. Sepler has been an Assistant Public Defender, Appellate Division (Miami) for more than 20 years. He has litigated over 1000 civil and criminal appeals to all levels of court, including the United States Supreme Court. He is a.v. rated and a Fellow in the American Academy of Appellate Lawyers. For the past 15 years, he has taught all of the appellate offerings at the University of Miami School of Law and regularly coaches their National and State Moot Court Teams.

Appellate Practice Section and Cuban American Bar Association Host Annual Dessert Reception
By Ceci Berman

When the sun went down at the Annual Florida Bar Convention, the Appellate Practice Section came out in force for a fun-filled night that was both enjoyable and historic. Partnering for the first time with the Cuban American Bar Association ("CABA"), the Appellate Section’s yearly dessert reception this year took on a Cuban flair with authentic drinks, costumes and, of course, desserts.

And what a festive party it was! Cigar rollers created their smokes, and revelers shook their maracas. Dashing men sported guayaberas and traditional woven hats and the beautiful ladies wore festive flowers in their hair and on their dresses.

Judges, lawyers, spouses, and kids mixed at the event. Everyone had a great time. More than one judge or justice was spotted in a guayabera or fedora carrying a mojito or cigar!

Of course, the real star of the show was the dessert. Suffice it to say that one could find everything from chocolate fondue with fruit to "tres leches" (three milks), sinful pina colada tortes and a rum raisin delicacy that was gone before this author even reached the end of the dessert line!

After a day of meetings, the cappuccino and espresso bar was another welcome treat. However, if coffee was too tame, the bar provided refreshing mojitos to quench thirsty attendees. Finally, for the serious portion of the event, the Appellate Section presented its annual awards to well-deserved recipients. CABA also recognized incoming Florida Bar president Frank Angones. All in all -- que bueno!

Endnotes
1 Ceci Culpepper Berman is an appellate attorney with Fowler White Boggs Banker P.A. She received her J.D. from the Georgetown University Law Center and her B.A., with honors, from the University of Florida. She is AV rated by Martindale-Hubbell, and her appellate practice centers on both state and federal civil appeals.

Judge Chris W. Altenbernd Second District Court of Appeal and President of the Florida Conference of District Court of Appeal Judges, distinguishes the role of a judge from that of a politician, except in the Greek sense of the politician. He cares deeply about the people of the state of Florida. He is judicially accountable in the sense that he is part of the three branch structure and has a very clear role that he fulfills. He is accountable but looks first to the law in terms of any notion of accountability. Judge Altenbernd suggested in general, the judiciary’s role is to protect the political and constitutional rights of people and to maintain the common law, in particular. Judges cannot cater to special interests. That disrupts a fundamental balance. When one thinks of a politician, they have notions of a person they can lobby for a result. People cannot lobby Judge Altenbernd. Judicial independence and judicial accountability are worthwhile concepts to wrestle with and be mindful of. But judges know, inherently, what to pay attention to – it is the law. The law will benefit from an exploration of this topic, perhaps. The bottom line is that Judges need freedom to make their decisions based on the facts of a particular case, the appropriate rule or statute and case law – that’s it. Judge Altenbernd said it is unfortunate there is this notion that judges are politicians and can be pressured. It puts an element in the mix that invites entities like special interest groups to find ways to attempt to influence and predict how a judge will determine a case. When asked again about being a politician (from a fellow panel mate) Judge Altenbernd reiterated that he, personally, was not a politician and that it is not in the best interest of the judiciary to be perceived as politicians. He suggested that it sets up the wrong analysis of any court’s decisions -- politics can skew and diminish opinions – and such a lens that is far afield from the mission of the judiciary to take a dispassionate, reasoned look at each case before it and determine the outcome based on the law and evidence before the court.

Then President of the Florida Bar, Henry M. Coxe, III spoke about the dangers of jurisdiction stripping – attempts to transfer rule making power from Supreme Court of Florida to the Florida Legislature. President Coxe indicated that he recently debated several issues including this one before federalist society members at a law school. That was a nice change of pace, being Bar president one becomes used to the spontaneous debate. People actually ask him all sorts of personal and professional questions. These include questions on his religious beliefs. And, more predictably, “How do you explain that no appellate judge has ever been removed?” Turning to rule making transfer proposals, he often sees those advocating a change in rule making authority to be focused on isolated issues, such as the death penalty. Coxe noted that from a political standpoint the impetus for these movements might be to garner political support based on red button issues likely to attract publicity. As a lawyer and President of the Bar, Coxe reiterated that rule making authority is properly within the province of the Supreme Court. He noted that throughout the years, different issues get people’s attention, the bills to strip the Court of rule making authority stall, or never make it to their respective committees. The Bar however remains vigilant and very active. Part of the issue is that things are done differently in Federal Court in terms of the rules but there are many differences between state and federal court.

Paul R. Regensdorf an appellate lawyer with Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A. in Fort Lauderdale, spoke about the pressures on the judiciary from multiple sources exerting the public will. For example, he queried, what is the effect of judicial evaluations? How many of these are ever filled out quried Regensdorf? This is a difficult time to be a judge, noted Regensdorf. Everyone has a recorder and a cell phone camera, often attempting to capture portions of what judges say or do, out of context. Regensdorf also discussed with Professor Burbank the concept of Jail for Judges. The panel and the audience all responded and there was a small discussion. It was suggested that the Jail for Judges effort is a reaction to an interesting judicial anxiety. The consensus was that it is important that the Bar assist the public in understanding what mechanisms are already in place to address any concerns about alleged misconduct. The members of the room recognized that often public access to documents creates issues. There was agreement that, certainly public access is a good thing, but because court documents are often voluminous and difficult, public opinion is often upset by the smoke and not the fire.

At a breakout session, Appellate Justice Conference participants evaluated a number of factors in judicial independence and accountability. They explored the role that relationships within courts, and between the court and media and the public can affect judicial decision making. The dialogue was collegial and frank, as individuals and reporters gave feedback to the group as a whole. Afterwards, the entire conference met with members of the Appellate Practice Section and the bar, for a reception sponsored by the Appellate Practice Section, to continue the discussions and share the dialogue with non-participants.

The 2007 AJC Steering Committee was composed of four members of the DCA Conference and four Appellate Practice Section members. The DCA judge members were Judge Patricia J. Kelly, Judge David Monaco, and Judge Peter Webster. The Appellate Practice Section members who served on the steering committee were Cele Humphries, Chair, Steve Brannock, Gwendolyn Braswell, and Siobhan Shea. Judge Charles J. Kahn, who chaired the committee, last year, participated ex officio.

Endnotes
1 Siobhan H. Shea is the current Chair-Elect of the Appellate Practice Section and former Chair of the Florida Bar Appellate Court Rules Committee. Also contributing to this article were Justice Arthur England, former Chief Justice of the Florida Supreme Court, and Jo Ann Palchak, a staff attorney for Judge Darryl C. Casanueva at the Second District Court of Appeal.
HARMLESS ERROR
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court in DiGuilio indicates that error will be deemed harmless where the admissible evidence is so strong that the jury not would have acquitted the accused, absent the error. To the contrary, the Chapman Court focused on whether the error might have played any part in the guilty verdict, not whether other evidence would have produced the same verdict; the Supreme Court held: “We prefer the approach of this Court in deciding what was harmless error in our recent case of Fahy v. Connecticut . . . : ‘The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.’”

There is another reason why there need be no showing that the verdict would be different, but for the error, in order to find that the error “contributed” to the verdict. Such a definition of “contributed” is compelled by the Florida Supreme Court’s decision in Knowles, supra, which made it clear that the appellant need not show that the verdict was “substantially” affected by the error. The Knowles Court held: “The question is whether there is a ‘reasonable possibility that the error affected the verdict,’ DiGuilio, 491 So.2d at 1139, not whether the error substantially influenced the jury’s verdict.”

If a guilty verdict would not have been rendered, but for an error, that verdict necessarily was “substantially influenced” by the error. It would be a logical impossibility for there to be a guilty verdict which would not stand in the absence of an error, but which was not “substantially influenced” by the error. Because, under Knowles and DiGuilio, error can be harmful, even though it did not “substantially influence” the verdict, it is a logical necessity that error can be harmful, even though the guilty verdict would be returned in the absence of that error.

The existence of other evidence which will support a guilty verdict, apart from the error (even overwhelming evidence), does not negate the fact that a relevant error “contributed” to the verdict and necessitates reversal.

E. Unsuitability of Other Harmless Error Standards:

The harmless error standards rejected by the courts in Chapman and DiGuilio are unsuitable in the criminal appeals process because those standards imper- missibly impose upon judges the evidence-weighing and fact-finding roles reserved for the jury. Affirmance of convictions and sentences in the face of errors which could have contributed to the verdict amounts to a denial of due process and the right to trial by jury.

Among the least satisfactory of the articulated standards for determining whether error is harmful has been referred to as the “correct result test.” That poor standard at best requires or permits appellate judges reviewing a cold record to weigh different evidence than that which was before the jury and make a factual finding of guilt they are unsuited to make. At worst the “correct result” test constitutes a violation of the defendant’s Sixth Amendment right to trial by jury.

Judges and legal scholars have roundly disapproved of a harmless error standard which requires or permits appellate courts to engage in fact-finding from a cold record.

The United States Supreme Court aptly summarized the reason why the test for harmless error cannot be “whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered,” as follows: “The Sixth Amendment requires more than appellate speculation about a hypothetical jury’s action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty [in a trial without the error].”

An appellate court’s difficult task of making a factual finding of guilt or innocence without considering the error would be practically compounded by its exposure to facts which were not put into evidence before the jury. This problem as follows:

This problem is compounded in harmless error cases by the obverse concern that the record may also, in a sense, preserve too much information. Because the record preserves both tainted and untainted evidence, and because this tainted evidence may be very probative of guilt, a judge trying to examine only the untainted evidence may face a very difficult task. Indeed, an assumption that appellate judges can conduct a fair second trial on the basis of “untainted evidence” is problematic in that it assumes that fine distinctions can be drawn between tainted and untainted evidence, when all of this evidence remains in the record as a coherent whole. Moreover, the isolation of bits, or even large portions, of evidence is an artificial manner in which to conduct a trial. Readiness to believe or disbelieve one piece of evidence may be greatly bolstered by the existence of other evidence. Cases based on circumstantial evidence rely on such networks of evidence. A second “trial” by an appellate court denies the defense and prosecution the chance to construct a compelling story for innocence or guilt based on the new, untainted body of evidence.

Additionally, any second decision about guilt will likely be influenced by the trial’s original outcome. In short, an appellate judgment of guilt supposedly based on an “independent” review of “untainted” evidence may be less independent and more tainted than most would suspect. Thus, for numerous reasons related to the nature of the appellate record, trial by appellate court is a dubious event.

Mitchell, supra note 50 at 1354-55 (emphasis added and footnotes deleted).

In addition to the difficulty caused by the appellate court’s exposure to the inadmissible (but wrongly admitted) evidence, the appellate court also will have access to other behind-the-scenes facts and information which never was introduced at all. The State may cross-appeal exclusion of bad character evidence or other circumstances may exist which inform the appellate court of more than a trier-of-fact should know in evaluating guilt.

And apart from the problem of denying the right to trial by jury when evidence-weighing harmless error approaches are

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used, such approaches have the effect of depriving “guilty” defendants of constitutional rights that all should enjoy—guilty and innocent alike—by affirming convictions in spite of constitutional violations where the evidence is weighty enough. The “right result” approach is unworkable and was correctly rejected by DiGuilio.

Nor is the “overwhelming evidence” test which the courts have continued to mistakenly employ a test which should be adopted. The Florida Supreme Court in DiGuilio quoted from a dissenting opinion by California Chief Justice Traynor which explained why the “overwhelming evidence” standard for harmful error was inadequate, as follows:

Chief Justice Traynor argues, and we agree, that harmless error analysis must not become a device whereby the appellate court substitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence. In a pertinent passage, Chief Justice Traynor points out:

Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution’s case may have played a substantial part in the jury’s deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.

Scholars have attempted to understand how courts can reject “overwhelming evidence” as a harmless error standard, but then hold that error did not “contribute” to a verdict because other evidence was “overwhelming.” Those writers have labeled that standard as a “hybrid” standard. This test purportedly balances the impact of the error against the weight of the untainted evidence. However, this test is largely the result of courts conferring, or confusing, the first two tests in their application of harmless error.

Endnotes
1 The author is board certified in appellate practice and a member of the Appellate Practice Certification Committee; he is a past chairman of The Florida Bar Appellate Practice Section and Amicus Curiae Committee of the Florida Justice Association. He has practiced civil and criminal appellate law in Miami since 1981. For the last twenty years he has been the principal at Wasson & Associates, Chartered.
2 See, e.g., Smith v. State, 762 So. 2d 969, 971 (Fla. 4th DCA 2000) (“from our own experience in reviewing convictions, criminal trials are rarely error-free”).
3 491 So. 2d 1129 (Fla. 1986).
4 See, e.g., Cuervo v. State, No. SC06-1156, 2007 Fla. LEXIS 1229 (July 12, 2007); Cardenas v. State, 887 So. 2d 384 (Fla. 2004); Knowles v. State, 848 So. 2d 1055 (Fla. 2003); Goodwin v. State, 751 So. 2d 537 (Fla. 1999); State v. Davis, 720 So. 2d 220 (Fla. 1998); Moore v. State, 701 So. 2d 545 (Fla. 1997); State v. Lee, 531 So. 2d 133 (Fla. 1988).
5 386 U.S. 18 (1967).
6 While the harmless error test places the burden on the State to prove beyond a reasonable doubt that the error did not contribute to the verdict or, alternatively, that there is no reasonable possibility that the error contributed to the conviction,” the characterization of the matter as a burden “does not prohibit an appellate court from applying the harmless error test on its own” when the State fails to make the argument.” Heuss v. State, 887 So. 2d 823, 824 (Fla. 1996).
7 See, e.g., Knowles v. State, 848 So. 2d 1055, 1058-59 (Fla. 2003) (reversing district court of appeal’s use of harmless error standard which erroneously included the requirement that the error “substantially influence the jury’s verdict”) (emphasis added).
8 See Sullivan v. Louisiana, 508 U.S. 275, 279 (1993) (emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.” Id. (cited in Cardenas v. State, 867 So. 2d 384, 388 & n4 (Fla. 2004), in which the Florida Supreme Court reaffirmed the DiGuilio standard).
9 Accepting the approach urged in the dissent by California Chief Justice Traynor in People v. Ross, 429 P.2d 606 (Cal. 1967) (Traynor, C.J., dissenting) the DiGuilio court stated that its test for harmless error would require reversal, even where the verdict would most likely have been the same in the absence of the error, such as where inadmissible evidence was admitted but other, admissible evidence introduced at trial was overwhelming. The Supreme Court rejected a but-for test of harmfulness as follows: “Chief Justice Traynor argues, and we agree, that harmless error analysis must not become a device whereby the appellate court substitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence.” DiGuilio, 491 So. 2d, at 1137.
10 See, e.g., Smith v. State, 762 So. 2d 969, 972 (Fla. 4th DCA 2000) (harmless error under Chapman/DiGuilio standard is that which the appellate court can conclude, beyond a reasonable doubt, had “no effect on the finder of fact”).
11 See Kordenbrock v. Scroggy, 919 F.2d 1091, 1097 (6th Cir. 1990) (en banc) (“The Court must entertain with an open mind the possibility that at least one member of the jury took the language of the [erroneously admitted] confession seriously and relied on the harshness of its description to tip the balance in favor of the death penalty”) (employing the Chapman harmless error test) (emphasis added).
13 DiGuilio, 491 So. 2d at 1139 (emphasis added).
14 As the U.S. Supreme Court has explained: “The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.” Sullivan v. Louisiana, 508 U.S. 275, 279 (1993) (emphasis in original).
15 See, e.g., Chavez v. State, 832 So. 2d 730, 754 (Fla. 2002) (“even assuming that suppression was appropriate, given the overwhelming evidence of Chavez’s guilt, the error in admitting his last confession would be
harmless” (emphasis added); Sempier v. State, 907 So. 2d 1277 (Fla. 5th DCA 2005) (“Generally, where there is overwhelming evidence of a defendant’s guilt, a prosecutor’s assertion that the defendant is guilty may be considered harmless”); LaFleur v. State, 855 So. 2d 1155, 1156 (Fla. 1st DCA 2003) (“[Our independent] review of the case and the record reveals overwhelming evidence of LaFleur’s guilt. Thus, even assuming any error occurred in the trial court’s exclusion of the victim’s statements, such error was harmless.”); Fuentes v. State, 727 So. 2d 275 (Fla. 3d DCA 1999) (“any such error is harmless in light of the defendant’s confession and the overwhelming evidence of guilt”); Stephens v. State, 559 So. 2d 687, 691 (Fla. 1st DCA 1990) (“the statement made by the appellant which was brought out during examination of Officer Rutherford was fairly susceptible of being interpreted by the jury as a comment of [sic] appellant’s right of silence, and ought not to have been allowed. However, the error was harmless given the overwhelming evidence of guilt established at trial.”), approved on other grounds, 572 So. 2d 1387 (Fla. 1990)

16 See, e.g., Jones v. State, 648 So. 2d 669 (Fla. 1994) (emphasis added).


18 Id. at 279.

19 Chapter 6223 Laws of Florida was later codified at § 54.01, Fla. Stat. That section was subsequently renumbered § 59.041, Fla. Stat. (hereinafter “§ 59.041”).

20 Section 1955 was codified in 1941 as section 924.33, Fla. Stat. (hereinafter “§ 924.33”)

21 But see State v. DiGuilio, 491 So. 2d 1129, 1133-34 (Fla. 1986) (“Section 924.33 differs from section 54.23 in two significant respects”).


23 Id. at 1134.


26 See State v. Lee, 531 So. 2d 133, 137 (Fla. 1988).

27 Id. at 137, n. 1.

28 Id. at 136.

29 Id. at 137, quoting from Ross, supra, at 621.

30 51 So. 2d 537(Fla. 1999).

31 Knowles v. State, 848 So. 2d 1055, 1057 (Fla. 2003).

32 Id. (citing Goodwin, 751 So. 2d at 544).

33 Goodwin, 751 So. 2d at 544.

34 848 So. 2d 1055, 1057 (Fla. 2003).

35 Knowles v. State, 800 So. 2d 259, 264 (Fla. 2d DCA 2001) (emphasis added).

36 See id.


38 Goodwin, 751 So. 2d at 545 (quoting O’Neal v. McAninch, 513 U.S. 432, 437, (1995)). Although not mentioned by the Second District in its Knowles decision as being an additional source of that court’s belief that Goodwin had altered the DiGuilio test for harmfulness, there was other language in Goodwin which could well have added to the confusion. For example, in outlining the historical development of the federal harmless error doctrine, the Goodwin Court noted the following pre-Chapman standard: “Thus, the test for reversal established in Kotteakos requires the appellate court to determine whether the error had a substantial influence” on the verdict, or whether the court is left with ‘grave doubt’ as to its influence.” Id. at 540 (emphasis added) (citing Kotteakos, supra, 328 U.S. at 764-65).

39 See Goodwin, 751 So. 2d at 545.

40 See id. at 546 (“Our construction of section 924.051(7), supra, is consistent with this principle that a different standard for determining whether an error harmfully affected the judgment applies on direct appeal than in postconviction proceedings”). See also generally, e.g., John H. Blume & Stephen P. Garvey, Harmless Error in Federal habeas Corpus After Brehm v. Abrahamson, 35 Wm. & Mary L. Rev. 163, 164 (Fall 1993) (“After Brehm, the venerable Chapman rule still applies to constitutional errors identified and reviewed on direct appeal, but an ostensibly ‘less onerous’ standard applies to constitutional errors identified and reviewed on federal habeas corpus. Under this standard, derived from Kotteakos v. United States, and once used only for nonconstitutional errors, a conviction tainted by constitutional error ‘requires reversal only if it had substantial and injurious effect or influence in determining the defendant’s guilt.'”)

41 848 So. 2d at 1058-59 (emphasis added).

42 As recently as July, 2007, the Florida Supreme Court held that the DiGuilio test for harmless error continues to control. See Cus- ervo v. State, No. SC06-1156; 2007 Fla. LEXIS 12229 (July 12, 2007).

43 Kamin, supra note 3, at 19 (emphasis added). All lawyers and judges know that legally irrelevant evidence—such as bad character or prior acts evidence—may still affect a verdict, even if the verdict is still sustainable. 44 Similarly, errors in jury instructions, improper argument, or other aspects of the trial may have involved matters which likely were considered by the jury in reaching its verdict, and thus “contributed” to the verdict, even if one could say that the same verdict otherwise would have been reached anyway.

45 Wigmore on Evidence, supra note 29, § 21 at 933.

46 Id., n. 24.

47 Linda E. Carter, Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied, 125, 135 (Fall 1993).

48 “The Chapman test requires an examination of whether the error in question possibly affected the decision of ‘at least one member of the jury.” Against Overwhelming Appellate Activism, Constraining Harmless Error Review, 82 Cal. L. Rev. 1335, 1338 (1994) (quoting Kordenbrock v. Scroggy, 919 F.2d 1091, 1097 (6th Cir. 1990) (en banc)) (“The Court must entertain with an open mind the possibility that at least one member of the jury took the language of the [erredly admitted] confession seriously and relied on the harshness of its description to tip the balance in favor of the death penalty” (emphasis added)).

49 While the entire verdict can be analogized as a brick wall, constructed by the jury as a whole, each juror’s vote of guilty is itself a wall constructed from those evidentiary bricks. One juror’s vote may have been decided upon, without consideration of the erroneous matter, while another juror included the erroneous matter as one of the elements or bricks in his or her vote to convict.


51 Chapman, supra, 386 U.S. at 23(emphasis added). “Might have contributed” is a far cry from “verdict would have been different,” or even “would likely have been different.”

52 See supra note 39, at 1059.

53 Id. (emphasis added).

54 See Charles Chapin, The Irony of Harmless Error, 51 Okla. L. Rev. 501 (Fall, 1998), in which Judge Chapin writes:

Traynor described in detail the arguments against an appellate court determinations of guilt. A quasi trial on appeal denies the accused of the right to a public trial. A trial court and jury see and hear the witnesses and observe their demeanor. Appellate judges only work from a cold record. “Worse still,” appellate court guilt determinations deprive an accused of his right to confront witnesses. Although the accused confronted the witnesses at trial, the appellate court cannot glean the impact of such live confrontation. “Worst of all” appellate court determinations of guilt deny the accused his constitutional right to trial by jury. It is not true appellate courts make their decisions whether the accused is guilty. All of these arguments are applicable to any test that seeks to determine harmless by reconsidering the evidence. Id. at 531 (footnotes deleted). Judge Chapin in his article disapproved of the “effect of the error on the verdict” test for harmful error, as well as the “consideration of the evidence of guilt” test because he saw that either of those formulations of the test as they were being applied inevitably leads the appellate court to a review [and weighing] of the evidence of guilt. Judge Chapin instead proposed, as a test “the effect of the error on the rights of the accused,” as opposed to the effect on the verdict. Judge Chapin and this author agree that the correct test for harmfulness should not involve weighing the evidence of guilt against the weight of the error, and agree that the courts have mistakenly been using the “contributed to/affect the verdict” standard to engage in evidence weighing.


56 A more unsatisfactory test than the “correct result test” to determine the harmless of an error. Under this test, appellate courts independently examined the result in the case in light of the admissible evidence. See 1 J. Wigmore, supra . . . § 21, at 930-31. If the court determined that the verdict was “correct,” in that it was supported by the untainted evidence, it affirmed the conviction. Id. at 440, n. 61.

57 The author does not suggest that appellate judges are any less capable—intellectually or emotionally or otherwise—of fairly finding 23
facts from evidence, as a theoretical proposition. The unsuitability of judges as fact-finders comes instead from the remoteness of the appellate courtroom from the live witnesses who testify and other events of a trial which have to be seen or personally experienced by the finder-of-fact. No one would suggest that a jury panel which was not present at trial could adequately reach a verdict in a serious case by poring over pages of lifeless transcribed testimony months or years after-the-fact.

One writer on the subject has observed: [The] trial record often fails to provide a complete picture of the evidence. The credibility of a witness may depend greatly on her demeanor, and the meaning of a piece of evidence may be quite unclear out of the total context of a trial. The opportunity to observe firsthand testimony and demonstrations, and the subtleties that accompany such evidence, places jurors and trial judges in a much better position than appellate judges to assess the facts. Review of an antisepctic record removes appellate judges from the emotion and intensity that may be crucial to understanding and weighing of testimony. It is impossible to capture in a transcript all of the characteristics of a witness that go to her credibility. Gregory Mitchell, Comment, Against “Overwhelming” Appellate Activism: Constraining Harmless Error Review, 82 Cal. L. Rev. 1335, 1353 (1994) (footnotes deleted).

58 “Courts and commentators criticized this test because it assumes that, as long as the jury reached the correct result, justice has been done, no matter how egregious the error, see R. Traynor, supra note 43, at 18, and because it allows the appellate court in a sense to usurp the function of the jury.” See United States v. Rubenstein, 151 F.2d 915, 922 (2d Cir.) (Frank, J., dissenting), cert. denied, 328 U.S. 766 (1945); R. Traynor, supra note 43, at 21.” McGovern, supra, at 440, n.62.


Concern over the institutional competency of the appellate courts also strongly counsels against the practice of focusing solely on the question of factual guilt. The very nature of the appellate function leaves judges of the courts of appeals poorly equipped to make such guilt determinations, as an appellate judge’s view of the trial is limited to the record, and, as any observer of the judicial process is aware, many events of trial pass without casting so much as a shadow upon the printed transcript. The appellate judge cannot watch the demeanor of witnesses, listen to the intonations of their voices, or engage in any of the countless other observations that inhere in an assessment of credibility. And, most importantly, an appellate panel cannot possibly know what a jury might have done if the case had been tried without error. Therefore, if there is any serious doubt as to this score, the case ought to be returned to the jury. Id. at 1193-94 (emphasis added and footnote deleted).

60 Id. at 279. See also, e.g., R.W. Rachal, Note, Recent Development: State v. Cage: Harmless Error Analysis in Louisiana After Fulminant, 66 Tulane L. Rev. 1086 (1992), where the author observes:

A reviewing court’s analysis of guilt implores concerns regarding the reviewing court’s intrusion into the jury’s province of determining guilt or innocence. . . . If a court merely decides what verdict the jury would have reached absent the error (a “correct result approach”), then the Sixth Amendment right to a trial by jury is, as a practical and theoretical matter, infringed upon. Id. at 1098 (emphasis added and footnotes deleted).

62 See Goldberg, supra, note 104. “When an appellate court tests for harmless error by reviewing the record to determine whether the remainder of the evidence is so overwhelming that the error did not contribute to the verdict, it sits as an appellate jury. . . . An appellate court defies common sense when it steps out of its traditional role as a reviewing court and attempts to operate as a primary factfinder.” Id. at 429.

63 See Tom Stacy & Kim Dayton, Rethinking Harmless Constitutional Error, 88 Colum. L. Rev. 79 at 127(“prevailing conceptions of outcome-oriented standards violate the sixth amendment right to a jury trial by inviting judges to make probabilistic judgments of a defendant’s guilt based on their own views of the weight and credibility of evidence”). One appellate judge who also is a scholar in this area is Oklahoma Court of Criminal Appeals Judge Charles Chapel. Judge Chapel wrote a law review article for his LLM thesis entitled The Irony of Harmless Error, 51 Okla. L. Rev. 501 (Fall, 1998), in which he was critical of post-Chapman federal decisions which, like some of the Florida cases discussed in this article, erroneously engage in evidence-weighing during harmless error analysis; Judge Chapel wrote:

It is not the purpose of appellate courts to determine guilt. However, as a direct result of the Supreme Court’s harmless error jurisprudence, appellate courts in the United States today are increasingly finding themselves in the position of analyzing the appeal record to determine whether the accused was proven guilty. This misplaced concentration on guilt raises serious concerns about whether appellate courts are fulfilling their systemic purposes and whether they are usurping the function of juries. Notwithstanding whether Sixth and Seventh Amendment rights are being violated in the application of the rule, appellate courts are not designed to develop facts and determine guilt. Appellate courts work from a cold record. They do not attempt to witness or observe, nor are they participants in the dynamics of the trial. Appellate courts simply cannot adequately afford litigants due process of law if they purport to function as fact finders. Id. at 515 (emphasis added and footnote deleted).

64 Sullivan v. Louisiana, 508 U.S. 275, 279 (1993). While the Supreme Court’s observations in Sullivan were made in the context of why the harmless error analysis would be inappropriate in the situation involving a constitutionally-deficient reasonable doubt instruction, there is no reason why a judge’s weighing of the evidence would be constitutionally permissible in another sort of harmless error case, in light of the Florida Supreme Court’s clear holding that the same standard applies to both constitutional and nonconstitutional errors. See Knowles v. State, 548 So. 2d 1055, 1057 (Fla. 2001).

65 Id. at 280. See also, e.g., Jana L. Torok, Comment, The Undoing of Old Chief: Harmless Error and Felon-in-Possession-of-Firearms Cases, 48 Kan. L. Rev. 431 (Jan. 2000):

The guilt-based approach is attractive to courts for several reasons. Since it results in few reversals, it satisfies the public demand for the conviction of perceived dangerous criminals, and it helps alleviate the growing burden on crowded judicial dockets. Furthermore, it takes an appealing practical approach: defendants, against whom the government has established fairly convincing evidence of guilt, are not granted reversals that are almost guaranteed to result in recollection later.

Attractive as this approach is, it overlooks the basic right of a defendant to receive a fair trial, as well as the right to have a jury, not an appellate judge, assess a defendant’s guilt or innocence. This approach also risks “emasculating” the beyond-a-reasonable-doubt evidentiary standard. By upholding convictions based on the overwhelming nature of the evidence, rather than considering whether the evidentiary error that occurred at trial “might have influenced the jury by creating the requisite doubt,” a court potentially allows a conviction to be upheld on a lower standard of proof than is required for conviction at trial. Id. at 455 (emphasis added and footnotes deleted).

66 This discussion applies with equal force to the effect of improper argument of counsel, the court’s knowledge of plea bargain discussions, and other knowledge which would support the belief by a judge that the defendant was guilty, but which would not support conviction by a jury in a second trial.

67 See Madison Lecture, supra, note 173, where Chief Judge Edwards wrote:

The most serious flaw in the guilt-based approach . . . is its tendency to undermine our most important legal principles. As the Harrrington dissenters warned, any analysis measuring the harmlessness of error according to the weight of the evidence that the prosecution stacks against a defendant erodes the individual rights and liberties that are presumed to exist in our system of justice. A focus on guilt shews the judicial assessment of harmlessness.

68 Id. at 1194 (footnote deleted).

69 DiGuilio, 491 So. 2d at 1136 (quoting People v. Ross, 429 P.2d 606, 621 (1967) (Traynor, C.J. dissenting)).


71 Id. (emphasis added).
The Second District Court of Appeal Historical Society is hosting a celebration dinner to commemorate the 50th anniversary of the Second District Court of Appeal.

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