Profile of Judge W. Matthew Stevenson
by Margaret Wood

Judge W. Matthew Stevenson, chief of the Fourth District Court of Appeal, was born in Key West and raised in Miami. His father, a retired Navy Chief, and mother, a homemaker, actively encouraged their children to obtain a good education. A former Navy JAG officer, Judge Stevenson is the first lawyer in his family.

Judge Stevenson’s interest in the law first developed while studying psychology and criminology at Florida State University. The chief judge explains, “I was impressed with how the courts played such a pivotal role and were so instrumental in the fight for equality and civil rights in this country. I was also impressed with the courage of those judges who adhered to the rule of law in protecting the rights of minorities even in areas where it was unpopular or even dangerous to do so.”

Judge Stevenson served as a law clerk to the Honorable Judge Joseph W. Hatchett on both the Florida Supreme Court and the United States Court of Appeals for the Fifth Circuit. From 1987 to 1990, Judge Stevenson mediated cases with Jim Chaplin’s Mediation, Inc., in Fort Lauderdale. Judge Stevenson was among the first wave of mediators in Florida to actively practice mediation on a full-time basis. Judge Stevenson describes the initial reaction of the legal community toward mediation as “skeptical.” Today, he remarks, “the widespread implementation of mediation programs throughout the State has changed the landscape of the trial courts. Now, we can hardly imagine trial courts without the availability of mediation.” Judge Stevenson believes mediation has benefited

See “Stevenson Profile,” page 2

Message from the Chair

Myths About Involvement in the Appellate Practice Section

by Susan W. Fox

If you are not currently an active member of the Appellate Practice Section, please review the following list to dispel any obstacles to more active participation:

1. It’s hard to get involved. Absolutely untrue, it is painless and easy. Just show up at any meeting – committee, executive council, whatever – stick out your hand and say “Hi, I want to be involved in the section.” We do the rest.

2. You have to be an established appellate “expert”. Totally false. We learn as we go and involvement in the section is a great way to build expertise. Younger section members as well as late converts

See “Chair’s Message,” page 4
the system overall, freeing trial court dockets and appellate court calendars for cases that can be resolved only by the courts.

Judge Stevenson notes that there is a privately-funded pilot appellate mediation program currently in place at the Fifth District Court of Appeal. A similar state-funded mediation program at the Fourth District Court of Appeal was discontinued because of lack of funds. Judge Stevenson is optimistic that appellate mediation can be of some use in reducing the courts' dockets and may be of benefit to the parties. He explains, "Appellate mediation can allow the parties to focus on the issues which are most important to them and often will enable them to negotiate a better outcome than that available by continuing the litigation.”

As Chief, Judge Stevenson is overseeing the Fourth DCA’s progress toward a “paperless” workplace. He believes e-filing will address the “inherent weaknesses” in paper-filing, such as its cumbersoness and the difficulty in indexing and retrieving documents quickly and efficiently. Judge Stevenson cautions that the courts should not get so caught up in the hype of this technological change that they lose sight of their core mission: deciding cases and correcting harmful error. He remarks, “Technology can be a useful tool if it is used to enhance the quality of the performance of the court’s core functions.”

Judge Stevenson describes the lawyers practicing before the Fourth District Court of Appeal as “highly competent and dedicated.” He attributes the good reputation of his court to the high quality of the bar, noting that “good lawyers make good judges.” To improve lawyering before the Fourth DCA, Judge Stevenson suggests attorneys remember to keep their appellate briefs short and, “as much as possible, cast the complex legal issues in a simple and straightforward manner.” He also recommends attorneys spend time polishing their “Summary of the Argument” section, noting it “is an often overlooked opportunity to gain a positive first impression of your position in the case.” Finally, Judge Stevenson urges lawyers to submit their case authority well in advance of oral argument. Lawyers should not deposit a mound of supplemental authority on the judges’ desks only a day or two before oral argument. During oral argument, attorneys should listen closely to the panel’s questions, and answer the questions that are asked.

In his free time, Judge Stevenson participates in amateur boxing as a certified referee and ringside judge. In addition to local boxing matches, Judge Stevenson has officiated in several amateur tournaments at the national level, some of which will serve as qualifying tournaments for the next United States Olympic boxing team. The boxing officials, including the mandatory ringside physician, are not paid a fee and volunteer their time. Judge Stevenson encourages youth participation in boxing, stating, “Amateur boxing is a safe sport which teaches young people many lessons in character development, self-confidence, respect for mind and body, and sportsmanship.” When he is not on the bench or in the ring, Judge Stevenson enjoys spending time with his wife, Dannette, a high school math teacher, and his children and grandchildren.

Endnotes
1 Margaret Wood is a law clerk for the Honorable Carole Y. Taylor of the Fourth District Court of Appeal. Ms. Wood is a 2005 graduate of the University of North Carolina School of Law.
Justice Quince Honored at the ABA Annual Meeting

by Alina Alonso¹

The American Bar Association honored five outstanding female lawyers, including Florida Supreme Court Justice Peggy A. Quince, with the Margaret Brent Women Lawyers of Achievement Award during its annual summer meeting held in Honolulu, Hawaii.

The award was established in 1991 by the ABA Commission on Women in the Profession to recognize exceptional female lawyers who have achieved professional excellence and have paved the way for other female lawyers. The award is named for the first female lawyer in the United States, who arrived in the Colonies in 1638 and was involved in over 120 cases during the course of eight years. In 1648, Ms. Brent demanded a “vote and voice” in the Maryland Assembly. The Governor of Maryland denied her request.

Previous winners of this prestigious award include former United States Supreme Court Associate Justice Sandra Day O’Connor; United States Supreme Court Associate Justice Ruth Bader Ginsburg; former Florida Supreme Court Justice, currently sitting on the Eleventh Circuit Court of Appeals Rosemary Barkett; and United States Senator Hillary Rodham Clinton.

Justice Quince, who is next in line to become the Chief Justice of the Florida Supreme Court, has had an impressive career in public service within the legal field. After graduating from the Catholic University of America School of Law in 1975, Justice Quince served as a hearing officer with the Rental Accommodations Office in Washington, D.C. She eventually practiced in Virginia, until 1978 when she moved to Florida. Two years later, she began her approximate 14-year tenure with the Attorney General’s Office where she eventually became the Tampa Bureau Chief.

In 1993, Governor Lawton Chiles appointed Justice Quince to the Second District Court of Appeal. With this appointment, she became the first African-American woman to serve on a Florida district court of appeal. Five years later, she was co-appointed to the Florida Supreme Court by Governor Chiles and Governor-elect Jeb Bush. This appointment also marked a significant accomplishment within Florida’s Judiciary, as she was the first African-American woman to serve on the Florida Supreme Court.

In addition to her duties at the Florida Supreme Court, Justice Quince is active within the Florida Bar’s Government Lawyers Section, Criminal Law Section and Equal Opportunity Section. She is also active within the Tallahassee Women Lawyers Association and the William H. Stafford American Inns of Court.

Justice Quince commented that “the Margaret Brent Award luncheon was an extraordinary event which gave me an opportunity to meet some of the women in this country who are making a difference. I was humbled to be honored in such an outstanding way.”²

Congratulations Justice Quince!

Endnotes
¹ Alina Alonso practices with the Appellate and Trial Support Practice Group of Carlton Fields, P.A. (Miami). She is also a former law clerk to the Chief Justice of the Florida Supreme Court, R. Fred Lewis.
² The other honorees were Ellen Godfrey Carson, Constance Slaughter-Harvey, Betty Roberts, and Joan C. Williams.

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Ethics Questions?
Call The Florida Bar’s ETHICS HOTLINE
1/800/235-8619
Chair's Message from page 1

can be our most enthusiastic contributors.

3. The fun jobs are already taken. No way. We have a variety of plum leadership assignments just waiting for the next unsuspecting, er, uh, underutilized member. Everything from planning events to writing for the Florida Bar Journal.

4. I don't know anybody. This is a gross misconception. You can hardly walk across the room without running into a former opposing counsel. Setting aside differences and making friends with a former opponent is one of life's most joyous and paradoxical experiences.

5. You have to associate with appellate judges. Actually, this is not a myth at all, this one is true. Many of them are former appellate lawyers, ergo, great people.

6. The committee meetings are early in the morning. Uh, well, that one's true. But we have to take the meeting slots the Bar gives us. And we try to make it worth your while. Free coffee. And for new volunteers who show up for the Midyear committee meetings in Miami in January, FREE PASTRIES, and a personal welcome from our hospitality committee.

7. There are no meetings in my hometown. We are working on eradicating that problem. We just had a successful outreach in Tallahassee attended by about 50 appellate lawyers and judges and are working on establishing a local outreach in central Florida. The section is linking up with existing local appellate groups in Tampa and south Florida. A local affiliate group recently formed in Sarasota. The section will help you start a local meeting or hook up with local appellate lawyers.

8. You don't “need” the Appellate Section. I totally disagree. I am not ashamed to admit that I find appellate practice stressful at times. Appeals involve conflict. Conflict causes stress. It’s as simple as that. Besides conflict, there is pressure. Deadlines plague our work days. Great weights hang in the balance of our efforts. Outcomes matter. The Section offers services to help appellate lawyers do a better job, but what helps me the most is that we find common ground and develop mutual respect for the work that we do despite the fact that our work brings us into conflict with each other.

Now that we have the fears out of the way, let's talk about the benefits. If you write for the section, either for The Record or the Florida Bar Journal, you can apply for free CLE credit (up to 25 credits toward certification). Same for CLE lecturing, and you get to attend the seminar for free. And don't forget about good fellowship, leadership opportunities, recognition, free coffee and judicial face time.

Seriously, we want to see YOU at our Midyear meeting. The Publications and CLE Committees will be meeting at 9:30 a.m. on January 18, 2007, at the Hyatt Regency Downtown Miami; the Executive Council meets at 2:00 p.m., with a FREE LUNCH at noon. See you there!

Appellate Practice Section
Midyear Meeting

January 18, 2007
Miami Hyatt Regency Downtown

9:30 a.m. – 12:00 p.m. Committee Meetings
12:00 p.m. – 1:30 p.m. Luncheon
2:00 p.m. – 4:00 p.m. Executive Council
In 2005, a total of 24,852 appeals were filed and 21,921 appeals were disposed of by order, opinion, or PCA in the five district courts of Florida. Why do I mention these statistics? I do so to concretely illustrate the volume of cases which the district courts, their judges, and their judicial staffs confront on an annual basis. Because the time in any calendar year is finite, it must be maximized and used efficiently by judges and their staffs to address such a large volume of cases. Appellate counsel can facilitate this process through careful preparation of briefs, refined oral arguments, and studied motion practice. Appellate also benefits from this arrangement, because in the relentless shuffle of so many cases, it helps to prepare an appeal in such a way that it flows easily through the system, with a minimum of friction, by including a complete record, by complying with motion and brief preparation rules and procedures, and by clearly and concisely advocating a client’s position. In this article, I offer appellate counsel a list of insights gained from my experience as an appellate law clerk, focusing on seemingly small or obvious details that often get overlooked and can cause an appeal to be slowed on its journey through a crowded appellate system.

1. Plan for an appeal before an appeal. It is crucially important to take steps during the litigation, or to so advise trial counsel, to ensure the optimal opportunity for success on appeal. First, as one of my law professors once told a class, “if it’s important enough to hold a hearing, it’s important enough to have a transcript.” In general, you may not need a transcript to appeal a summary judgment. However, you will need one if the trial court enters an order granting summary judgment “for the reasons stated on the record/at the hearing.” You should consider whether you have the necessary record both before filing an appeal and while considering the issues to be raised on appeal.

2. Carefully prepare the record. Preparation of the record does not only involve determining what documents must be included in order to sufficiently demonstrate error on appeal. Preparation of the record also includes insuring that the documents included are complete and legible. Orders to obtain documents or better copies of documents can slow an appeal. So, when preparing the record, double check to make certain that the twenty-page contract that is central to your appeal is not obscured by a watermark or missing its most critical page.

3. Be vigilant about motion practice. Both pre-disposition and post-disposition motions can significantly hinder the progress of a case on appeal if not carefully prepared and filed. Be selective in the filing of pre-disposition motions, because the volume of motions filed in a case impacts the progress of that case to an appellate docket. File only crucially important motions (including motions to dismiss that may forego the need for an appeal) and avoid repeated motions raising matters that are best left for the merits panel to resolve. Avoid filing motions with inductive against opposing counsel, the litigants, or the trial court that will only frustrate the motion panel and are unlikely to result in any meaningful progress toward the resolution of your appeal. As for post-disposition motions, pay close attention to the procedural requirements for the filing of motions. For example, motions for rehearing should not raise new issues or simply rehash arguments already briefed and presented.

4. Pay attention to detail when preparing briefs. There are many pitfalls in the preparation of briefs that can impede the efficient resolution of cases on appeal. Avoid facts sections that give a play-by-play of the proceedings below, as this technique fails to clearly and concisely illustrate the case; instead draft a facts section that tells a story and excludes facts that are irrelevant or unnecessary for understanding the case on appeal. Double check record citations to insure that judges and judicial staff can easily locate the documents to which you refer in your brief; this is especially critical in cases with large records and multiple types of record (record volumes, supplemental records, transcripts, appendices, exhibits, etc.). In addition, confirm that authorities have not been cited without accompanying legal discussion or application to the facts of your case, as such citations can cause judges and judicial staff to become lost in a sea of cases, grasping at straws regarding their applicability, rather than remaining focused on the heart of your argument. Reread your brief to insure that your stated issues and the arguments contained within the analysis section are in harmony. This point requires particular care, because you may not be raising the issue that you think you are raising (for example, if you state a meritorious issue but provide no related argument, the issue may be continued, next page
deemed to be insufficiently raised). Likewise, when discussing your carefully-framed issues, be organized, thorough, and concise so that the nature of your argument is apparent on the face of your brief and does not require flipping between pages (or even divination) to ascertain. Finally, carefully proofread your entire brief. You may find anything from a long, convoluted sentence which could threaten the court’s understanding of your argument, to a duplicated or missing page or paragraph which may muddle your key point on appeal, or even an otherwise benign (and even humorous) typographical error that could set the court off task. For example, a discussion of “miner” children could pertain to either a divorce or labor law case depending on the correct spelling.

5. Focus on citing the jurisdictional basis for the appeal and the standard of review for all issues raised on appeal. Citing the jurisdictional basis for the appeal and the standard of review for all issues on appeal is of vital importance in streamlining the review of an appeal (not to mention that including the standard of review is required by rule). Failure to cite the jurisdictional basis or the standard of review may cause judges and judicial staff to become bogged down in searching Westlaw for a basis or standard that fits the precise circumstances of an appeal. Not only does this slow down the march of an appeal, but it may also result in unforeseen consequences, such as having an unexpected standard of review applied to your appeal, especially if it presents novel or unique issues.

6. Locate and cite cases from your district for all points on appeal. Not only when citing the standard of review, but also when citing other general legal principles and, of course, controlling authority, it is important to cite cases from the district in which you are appearing. Although the standards for motions to suppress may be the same in all districts, each district likely has a slightly different conception of the standards and some favored cases to use when discussing suppression. Citing to cases from the relevant district increases the familiarity of judges and judicial staff with the points you raise and avoids another fishing expedition to determine the precise formulation of the law that applies to an appeal.

7. Double check all citations in briefs and motions. Citations should not only be KeyCited to insure that they continue to be “good law.” Citations should also be checked to insure that the case name matches the reporter information, or it may become unclear whether you are citing the named case or whatever case appears on the cited page. This is especially important when you are citing a case with a common name, such as Smith v. State. If the particular case you are discussing is not a notable case or cited for a unique point of law, it may be nearly impossible to determine just which of the approximately 3,300 Florida cases named Smith v. State currently reported on Westlaw you would like judges and judicial staff to consider when reading your brief.

8. Be alert when filing motions for appellate attorney’s fees. Motions for appellate attorney’s fees must meet certain procedural and practical requirements. Verify that your motion for appellate attorney’s fees states the basis on which fees are requested, whether it is a contract or a statute. Additionally, consider whether the documents necessary to support your motion for appellate attorneys’ fees have been included in the record. This is especially important in cases where the underlying documentation is not routinely included in the record, such as when appellate attorney’s fees are requested based on a proposal for settlement that may have been served on the opposing party but not filed with the trial court. Taking these steps can avoid the need for later supplementation of the record and slowing of your appeal and will minimize the risk that the fees motion will be denied on procedural grounds.

9. Use oral argument wisely. Oral argument is an opportunity to make the best impression about your appeal, to concisely demonstrate the reasons why you should prevail on appeal, and to address the panel’s most pressing questions. Determine ahead of time which of your arguments have the greatest potential to be meritorious and discuss the key points related to those arguments. If a judge’s question takes you off your intended track, go off track. It is likely the question reveals something about the judge’s thinking on a particular issue, and you are wise to try and convince the judge that your view of the issue is correct. Remember that oral argument is a platform, but not a stage. Tactics that may impress a jury at trial are likely to distract
the panel from the central focus of your appeal and diminish the limited, precious time you are given to make your argument. Avoid distracting and disrespectful conduct at the podium. Both judges and judicial staff are watching your case in the courtroom or over a closed-circuit network and shouting, rustling papers in front of the microphone, or constantly stepping away from the podium to gather papers undermines their ability to pay close attention to your arguments on appeal, thus placing their comprehension of especially complex legal and factual issues at risk.

10. Timely file notices of change of name, firm name, or address. It is important to file notices of changes in contact information for a variety of reasons. First, communication between the court and counsel may be slowed by out-of-date contact information, which could be an especially perilous problem if an order needs to be called-out for immediate action. Second, when preparing court documents, it is necessary to know the precise name of the parties, firms, and attorneys involved in an appeal. Therefore, failure to update contact information can require orders requesting clarification of such information, which can detract from the smooth flow of your case through the court. Third, if court documents are not prepared correctly, a Westlaw correction letter may become necessary. In the zeal of convincingly presenting arguments for your client on appeal and the time pressures resulting from deadlines and busy practices, it is understandable that these details sometimes get overlooked during the course of an appeal. However, emphasizing “detail” in your practice will not only allow your appeal to move quickly and smoothly through the appellate system and increase the efficiency of the district courts for all attorneys, parties, and cases, it will also benefit your practice. You are likely to please and impress judges, clients, judicial staff, and colleagues with your polished advocacy, and this can only enhance your reputation and increase your chances of success as an appellate practitioner. As such, your accomplishments in your career will be a result of your painstaking attention to detail which will prove beneficial to all involved in the district courts of Florida.

“Thoroughness characterizes all successful men. Genius is the art of taking infinite pains. All great achievement has been characterized by extreme care, infinite painstaking, even to the minutest detail.”

— Elbert Hubbard

Endnotes:
1 Kristi L. Bergemann is a Senior Staff Attorney at the Fourth District Court of Appeal in West Palm Beach. She has served as a law clerk for The Honorable Bobby W. Gunther since March 2003. Kristi graduated magna cum laude from Stetson University College of Law in December 2002 and obtained a Certificate of Concentration in International Law. In addition to the Florida Bar Appellate Practice Section Publications Committee, Kristi is active in the American Bar Association Young Lawyers’ Division Government, Military, and Public Sector Lawyers Committee as a Vice-Chair, the Florida Bar Journal/News Editorial Board, and the Palm Beach County Bar Association Appellate Practice Committee.

Apprendi in Florida: Jury Findings on Sentencing Factors and Elements, Retroactivity, and Harmless Error in Non-Death Penalty Cases

by Mike Giel

When arguing criminal appeals, it is important to examine sentencing procedures as well as the conduct of the trials themselves. This is especially true since the U.S. Supreme Court decided Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004). These decisions, which Justice Sandra Day O’Connor characterized as “watershed” and “earthquake” rulings, held that enhancements resulting in a sentence beyond the statutory maximum must be found by the jury and proven beyond a reasonable doubt. Most attorneys handling criminal appeals are familiar with Apprendi’s central holding: enhancements resulting in a sentence beyond the statutory maximum must be found by the jury beyond a reasonable doubt, unless the facts are related to a defendant’s prior convictions or are admitted by the defendant. Blakely reinforced the Apprendi rule by clarifying the definition of “statutory maximum.” Before Blakely, most courts held that impermissible factfinding increasing a sentence beyond the “statutory maximum” was unconstitutional only if the sentence exceeded the maximum allowed for the degree of the crime, i.e., thirty years for a first-degree felony. Blakely held that, under a guidelines sentencing scheme, any sentence that impermissibly exceeded the maximum sentence under the guidelines was unconstitutional.

Blakely errors have become increasingly uncommon in Florida in the wake of the 1998 adoption of the Criminal Punishment Code, but allegations of Apprendi error persist. This article summarizes Apprendi’s application to Florida cases and examines the two exceptions to the rule that juries, rather than judges, must find the facts permitting enhanced sentences. It continues by discussing the debate regarding Apprendi’s retroactive effect, noting two pending decisions in the United States and Florida Supreme Courts that may resolve the question. Finally, it highlights the recent decision in Washington v. Recuenco, 126 S. Ct. 2546 (2006), which held that Blakely continued, next page
error may be deemed harmless.

I. **Apprendi** and **Blakely** hold that enhancements resulting in a sentence beyond the statutory maximum must be submitted to the jury and proven beyond a reasonable doubt.

**Apprendi** found New Jersey’s hate crime enhancement statute unconstitutional because it permitted a judge’s finding by a preponderance of the evidence of impermissible motive, a sentencing factor rather than an element of the offense, which allowed first-degree sentencing for a second-degree conviction. 530 U.S. at 491-92. The Court held that it was “unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed[,] … such facts must be established by proof beyond a reasonable doubt.” 530 U.S. at 490 (citations omitted). A defendant is entitled to the jury’s determination beyond a reasonable doubt that he is guilty of every element of the crime with which he is charged. 1d. at 477. “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 1d. at 490.

Initially, courts determining whether **Apprendi** error occurred often interpreted “statutory maximum” to mean the maximum sentence permissible for the degree of crime committed -- say, fifteen years for a second-degree felony. In **Blakely**, the Supreme Court rejected this approach. Blakely had accepted a plea offer for second-degree kidnapping involving domestic violence and use of a firearm, rather than the charged offense of first-degree kidnapping. 542 U.S. at 298-99. His guilty plea admitted the second-degree kidnapping elements and domestic violence and firearm allegations, but no other relevant facts. 542 U.S. at 299. By statute, the maximum sentence for second-degree kidnapping was ten years; however, the standard guideline maximum for second-degree kidnapping with a firearm was 53 months. 1d. Nevertheless, state law permitted the trial court to impose an upward departure sentence, and the court found Blakely had acted with deliberate cruelty and imposed an enhanced, 90-month sentence. 1d. at 298-99.

The **Blakely** Court rejected the State’s argument that the relevant statutory maximum was ten years:

> “[T]he “statutory maximum” for **Apprendi** purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In other words, the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.”

**Id.** at 303-04 (citations omitted and emphasis in original). A defendant could waive **Apprendi** rights: “When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding.” **Id.** at 310. But Blakely had done neither.

Though **Blakely**’s clarification of “statutory maximum” was significant, **Blakely** violations have become increasingly uncommon in Florida because the Criminal Punishment Code applies to all felony offenses, except capital felonies, committed after October 1, 1998. § 921.002, Fla. Stat. Under the Code, the sentencing judge may impose a sentence up to the statutory maximum without making any factual findings. See **Williams v. State**, 907 So. 2d 1224, 1225 (Fla. 5th DCA 2005).

As a result, … Florida no longer has a true guidelines scheme. By making the statutory maximum the upper bound on any guidelines sentence, as the Florida Legislature did for all crimes committed after October 1, 1998, Florida has moved from a guidelines system to what might be called a scheme of discretionary minimums. The guidelines establish only the minimum sentence, not a range, but the minimum is discretionary because the judge may still depart downward.⁶ **Blakely** violations periodically occur.⁶ But **Apprendi** violations are more common, resulting from the improper assessment of points that result in sentences exceeding statutory maximums. See, e.g., **Moss v. State**, 925 So. 2d 1131 (Fla. 2d DCA 2006) (holding that, as a result of the improper imposition of penetration victim injury points, the sentence exceeded the statutory maximum of 15 years). In **Arrowood v. State**, 843 So. 2d 940, 941-42 (Fla. 1st DCA 2003), the court noted that the victim injury points imposed on three counts were justified by the jury’s verdicts. Nevertheless, the court reversed for resentencing because the trial court found moderate victim injury on one count, which resulted in a greater sentence than that which would have been available if the court had only imposed slight victim injury points:

In Florida, for purposes of determining a constitutional violation under **Apprendi**, the relevant statutory maximum is found in section 775.082. The statutory maximum penalty for DUI manslaughter … is a term of imprisonment not exceeding thirty years. … Because the jury only found that there was damage to the person and there was no finding as to the severity …, and because the 18 points at issue … allow for a sentence beyond the statutory maximum, we conclude that appellant is entitled to relief under **Apprendi**.

**Arrowood**, 843 So. 2d at 942 (citations and internal quotation marks omitted); see also **Amos v. State**, 833 So. 2d 841, 843 (Fla. 4th DCA 2002) (holding sentence enhancement for discharge of a firearm causing great bodily harm violated **Apprendi** because the jury did not find great bodily harm, and defendant was sentenced to 25 years rather than the statutory maximum of 15 years). Counsel considering whether error occurred should scrutinize the basis for any enhanced sentence, especially victim injury points; however, counsel should remember that, under **Apprendi**, some facts need not be found by the jury.

See “**Apprendi in Florida**,” page 20
Building the Perfect Record
by Jack R. Reiter

It goes without saying that nothing in life is perfect. But for an anticipated appeal, few things are more critical than perfecting a record that will serve as the platform upon which the appellate argument is constructed. Like the failure to preserve error through the timely objection to evidence, an incomplete record can be fatal to an otherwise compelling argument. And while appellate practitioners are aware of this fundamental prerequisite to appellate review, preservation and preparation of the record occurs primarily at the trial level, often before an appellate counsel is involved. Accordingly, it is critical for all practitioners, whether working primarily at the trial or appellate levels, to remain cognizant of the fundamental requirement that the parties not only preserve matters for review, but also document the presentation of argument and evidence to the trial judge. This will enable the appellate court to have a complete picture of the events which transpired at the trial level to determine whether error occurred.

Of course, the first step to building the record is appropriately preserving matters for review through timely objections and presentation of evidence. But this column is not about the threshold requirement that a litigant preserve error, but about making sure that the appellate court knows that a matter has been preserved through the preparation and presentation of the record in a tangible form for the appellate court’s examination. If there is no concrete method for demonstrating that trial counsel preserved a matter for review through an objection or by presenting certain evidence to the trial judge, then the appellate court will not be able to adequately examine a claim of alleged error and this will often preclude an appellant, who bears the burden of advancing the record, from demonstrating reversible error. Accordingly, appellate counsel should consistently remind trial counsel to be cognizant of the possibility that a hearing will generate an appealable order and, in anticipation thereof, lay the foundation for providing the appellate court with the lens through which it can examine what actually happened before the trial court.

Of course, this means that when attending a hearing on a case-dispositive motion or one that may generate an immediately reviewable non-final order, appellate counsel should remind trial lawyers that a court reporter and transcript of proceedings may be necessary to demonstrate the preservation of a specific argument and to highlight the reasoning of the trial judge. If a decision is based upon either factual determinations or conflicting testimony, the failure to construct a tangible record of events which the appellate court can examine may have dire consequences for an appellant because of the extraordinary deference afforded to certain trial court decisions. Both appellate and trial practitioners should be familiar with Applegate v. The Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979). As the court explained in that oft-cited decision, the absence of a record on appeal demonstrating a basis for reversal will almost automatically result in affirmance of the trial court’s conclusion when the trial court’s conclusion is based on disputed facts. As the Court explained, affirming a decision issued following a non-jury trial without a court reporter:

When there are issues of fact the appellant necessarily asks the reviewing court to draw conclusions about the evidence. Without a record of the trial proceedings, the appellate court cannot properly resolve the underlying factual issues so as to conclude that the trial court’s judgment is not supported by the evidence or by an alternative theory. Without knowing the factual context, neither can an appellate court reasonably conclude that the trial judge so misconceived the law as to require reversal.

Id. at 1152.

Furthermore, a trial court decision, particularly when based upon hearing testimony or resolution of disputed fact issues, is clothed with a presumption of correctness, so the appellant bears the burden of demonstrating error and must also establish that the issue was appropriately preserved at the trial level. Thus, if an appellant advances an argument that requires examination of factual evidence, but fails to include the evidence in the record, the appellate court will not find reversible error. Also, when resolution of a matter is necessarily based upon factual findings or conflicting testimony, the appellate court will likely presume that any findings of fact implicit within a ruling were appropriately considered and decided by the trial court. Similarly, if there is no record of witness testimony or of evidentiary rulings, a judgment which is not fundamentally erroneous on its face will be affirmed.

In those circumstances where no transcript was prepared, however, we can advise trial counsel that all is not necessarily lost. Pursuant to Florida Rule of Appellate Procedure 9.200(b)(4), an appellant has the ability to recreate the events occurring during the hearing by preparing a statement of the evidence or of the proceedings from the best available means. The appellee then has ten days from service of the statement to object to it or serve proposed amendments. Thereafter, the statement is submitted to the trial judge for settlement and approval, and the statement will become part of the record. While not a perfect substitute for a transcript, this provides a method for transmitting necessary information to the appellate court.

Of course, when a hearing involves only legal argument by counsel, rather than presentation of facts, the transcript is not an absolute requirement. As the Third District Court of Appeal explained, comparing a hearing on disputed fact issues with a summary judgment proceeding:

It is the burden of the appel- continued, next page
lant to bring up a proper record for consideration of the issues presented on appeal. Where the appeal is from a summary judgment, the appellant must bring up the summary judgment record, that is, the motion, supporting and opposing papers, and other matters of record which were pertinent to the summary judgment motion. Those are the portions of the record essential to a determination whether summary judgment was properly entered. However, the hearing on the motion for summary judgment consists of the legal argument of counsel, not the taking of evidence. Consequently, it is not necessary to procure a transcript of the summary judgment hearing, although it is permissible and often helpful to do so.

Seal Products v. Mansfield, 705 So. 2d 973, 975 (Fla. 3d DCA 1998) (internal citations omitted).

But even if certain proceedings, such as a hearing on a summary judgment motion that resolve purely legal matters, can be evaluated on appeal without a hearing transcript, when it comes to building the perfect record, trial counsel should be reminded that simple things should not be taken for granted. Even if the appellate court does not need to have a transcript of a hearing, it must have access to pertinent documents or deposition transcripts which the trial court considered in reaching a decision. Thus, parties should file any relevant deposition transcripts or exhibits before the hearing if possible.

Moreover, if a trial judge considers unfiled evidence during a hearing, trial counsel should make it part of the official record by filing the document with the court either during or after the hearing. Pursuant to Florida Rule of Civil Procedure 1.080(e), “filing” is defined to include both the traditional method of filing with the court clerk, but also authorizes a trial judge to accept documents for filing. As set forth in the rule, a trial judge who accepts documents for filing should note the date that such documents were filed and transmit them to the clerk in order to make them part of the official court file. Accordingly, a litigant who presents documents during a hearing which the trial judge considers in reaching a decision should either file the documents with the Clerk of Court afterward or expressly request the trial court to consider the documents as filed and transmit them to the Clerk.

Although the failure to file a specific document may not defeat its inclusion in the record when a transcript reflects the trial court’s consideration thereof, trial counsel should be reminded to specifically refer to the documents during the proceeding. In Poteat v. Guardianship of Poteat, 771 So. 2d 569, 573 (Fla. 4th DCA 2000), the Court explained that unfiled documents or deposition transcripts considered by the trial court are an appropriate subject of a motion to supplement a record on appeal. As the Fourth District explained, documents are sometimes “considered” by the trial court but, through inadvertence, are not filed before entry of final judgment.

The appropriate preparation and presentation of the record is critical, but as many cases have observed, is sometimes overlooked. Practitioners should remember not only to preserve an issue for appeal, but to provide the appellate court with the information necessary to facilitate the appellate court’s review and consideration by filing and presenting transcripts and pertinent documents to establish a perfect record.

Endnotes
1 Jack R. Reiter is a partner with the law firm of Adorno & Yoss LLP, where he Chairs the Appellate Practice Department. He is Board Certified in Appellate Practice and is AV rated by Martindale-Hubbell. He served as Chair of the Florida Bar Appellate Court Rules Committee in 2005-2006, and is the current Editor of The Record. He is also a member of the Appellate Practice Certification Committee. Mr. Reiter has lectured and published on preservation of error, review of non-final orders, common law writs, administrative appeals, and additional topics relating to appellate practice and procedure.
2 See Chisholm v. Chisholm, 538 So. 2d 961, 962 (Fla. 3d DCA 1989) (explaining that appellant has the burden of presenting the record on appeal to the appellate court); Fla. R. App. P. 9.200(e).
4 Id.
5 Phenion Dev. Gp., Inc v. Love, 940 So. 2d 179 (Fla. 5th DCA 2006). (Further, because we were not provided with a transcript of the relevant hearing, we must presume that the trial court’s decision was based upon a correct balancing of interests.”).
6 In re Guardianship of Read, 555 So. 2d 869, 871 (Fla. 2d DCA 1989); Ahmed v. Travelers Indem. Co., 516 So. 2d 40 (Fla. 3d DCA 1987).
Professionalism and the Appellate Practitioner
by Richard Valuntas

The bench and bar have long emphasized the need for a higher level of professionalism among attorneys. The importance of professionalism is evidenced by the inclusion of the phrase “Promoting Professionalism” in the Florida Bar’s slogan. Although the practice of appellate law is often less contentious than trial practice, the need for professionalism among appellate attorneys remains paramount.

Appellate attorneys, like all other legal practitioners, must consistently maintain professional conduct regarding the rules of procedure. One area where unprofessional conduct is commonplace is the use of supplemental authority. Florida Rule of Appellate Procedure 9.225 permits a party to file a notice of supplemental authority “before a decision has been rendered to call attention to decisions, rules, statutes, or other authorities that are significant to the issues raised and that have been discovered after the last brief served in the cause.” The purpose of Rule 9.225 is to permit a litigant to bring to the court’s attention cases of real significance to the issues raised which were not cited in the briefs, not to permit a litigant to submit what amounts to an additional brief under the guise of “supplemental authorities.” Unfortunately, a recent opinion indicates that some attorneys continue to utilize Rule 9.225 in order to file an “extra brief.”

Another form of unprofessional conduct involving Rule 9.225 is “procedural” in nature. Although the plain language of Rule 9.225 permits a party to file a notice of supplemental authority “before a decision has been rendered,” it is ordinarily unprofessional to do so the day before an oral argument. In Ogden Allied Servs., the First District acknowledged the impropriety of such a practice because it “places the opposing party at a disadvantage. He or she must divert attention from preparation for the argument to read the submission and determine what type of response, if any, is appropriate.” Despite case law specifically denouncing such conduct, attorneys sometimes file notices of supplemental authority the day before an oral argument. Waiting until the day before oral argument to provide a court with supplemental authority appears “to ambush an opponent by deliberately withholding significant case citations until just before oral argument.”

These “procedural” issues involving Rule 9.225 occur in cases before various appellate courts throughout Florida. However, resolution of issues involving “late-filed” notices of supplemental authority may be particularly vexing for an appellate court. For example, if a court denies a motion to strike a late-filed notice of supplemental authority, it appears the court is tacitly endorsing such improper conduct. On the other hand, a court may reasonably deny a motion to strike a late-filed notice of supplemental authority because the court cannot simply ignore binding authority when deciding a case. In any event, it is clear that filing a notice of supplemental authority the day before oral argument is unprofessional and fundamentally unfair to opposing counsel. Opposing counsel cannot reasonably be expected to ignore everything else in her personal and professional life the night before an oral argument in order “to read the submission and determine what type of response, if any, is appropriate.”

A reasonable solution to this “procedural” matter is for appellate attorneys to file any notice of supplemental authority in an oral argument case at least one week before the argument is scheduled. Such a practice affords opposing counsel a reasonable amount of time “to read the submission and determine what type of response, if any, is appropriate.” The soundness of this practice is supported by the fact that courts in some jurisdictions require supplemental authority to be filed a week prior to oral argument. In addition, filing a notice of supplemental authority a week or more before oral argument usually provides the court, and its judicial law clerks, adequate time to review the authority prior to the argument. Of course there may be exceptions to this practice when a relevant case is decided less than one week before oral argument, but such occurrences would probably be rare. Although it appears that an appellate rule requiring notices of supplemental authority to be filed at least one week before oral argument would resolve this problem, a better method would be to avoid conduct that may be interpreted as “gamesmanship.”

Another area of appellate practice which may give rise to unprofessional conduct involves supplementing the record on appeal. Rule 9.200(f) specifically provides for supplementation of the record on appeal when there is an error in the record or it is otherwise incomplete. The purpose of an appeal is to consider errors made by the trial judge, and it is not the

See “Professionalism,” page 18

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Steven Brannock entertaining guests.

Steven Brannock entertaining guests.

Susan Fox on the guitar.

Harvey Sepler, Valeria Hendricks, and Matt Conigliaro
Inaugural Eleventh Circuit Appellate Practice Institute Premieres to a Full House
by Valeria Hendricks

The Appellate Practice Section of the Florida Bar co-hosted the first Eleventh Circuit Appellate Practice Institute in Atlanta on October 26-27, 2006. The seminar’s program delivered its packed audience a unique look into the practices of the Eleventh Circuit judges, law clerks, and clerk’s office. The attendees listened to presentations featuring ten judges of the Eleventh Circuit, including Judge Gerald B. Tjoflat, Judge Peter T. Fay, Judge Charles R. Wilson (and his law clerks), and Judge Stanley Marcus, all of Florida. Additionally, Thomas K. Kahn, Clerk of the Eleventh Circuit, and his staff updated the attendees on the recent local rule changes, offered information and statistics of interest to Eleventh Circuit practitioners, and provided the “Top 10 Tips for Eleventh Circuit Bar Members.” Appellate practitioners from Georgia and Alabama, as well as Florida practitioners Sylvia Walbolt, Bruce Rogow, Matt Conigliaro, John S. Mills, and Tom Hall, Clerk of the Florida Supreme Court, added to the seminar’s successful panel presentations.

The seminar opened with keynote speaker, the Honorable Clarence Thomas, on his first official visit to the court since his assignment earlier this year as circuit justice for the Eleventh Circuit. On the bench Justice Thomas is known for listening to advocates rather than questioning their arguments, but he gave the seminar’s participants a rare opportunity to ask him about some of the Supreme Court’s procedures and his views on effective appellate advocacy.

Justice Thomas explained that while the current “fashion” of the judiciary is “aggressive” questioning of the advocates, he finds such “fashion” to be more argumentative than necessary to assist the Court in deciding the appeal. Instead, Justice Thomas believes that oral argument is more effective if judges listen to the advocates rather than engage in debate.

Justice Thomas told the seminar that his “pet peeves” in oral argument are: flamboyance, advocates not knowing their case or understanding precedents cited, advocates explaining their own opinions rather than case law or the record, and advocates who are dishonest.

When asked about effective appellate advocacy, Justice Thomas acknowledged that the briefs are most important, especially if clearly and concisely written. He advised the attendees not to stand up a bad argument with string citations, and to remember that an advocate’s credibility is crucial.

Justice Thomas even gave the audience a rare glimpse into the justices of the Supreme Court when he related that none of them had heard of Anna Nicole Smith when the Court heard her case involving the probate exception issue. Even after he finished his question and answer session, Justice Thomas spent some time meeting the attendees and posing for photographs before leaving.

The seminar also provided several opportunities for the attendees to mingle with each other and with the Eleventh Circuit judges and staff. While most attorneys were from Georgia, Alabama and Florida, attorneys from Chicago, New York, Texas and elsewhere also participated.

By the end of the seminar, the sponsors were already discussing plans for the next Eleventh Circuit Appellate Practice Institute. Not only does the program offer a rare exchange with the judges on the Eleventh Circuit and other appellate practitioners from other jurisdiction, it also provided Florida attorneys with 11.5 hours of CLE credit.

Endnotes
1 Valeria Hendricks, a partner in Davis & Harmon, P.A. in Tampa, is certified by the Florida Bar in appellate practice. She graduated with honors from Florida State University College of Law in 1984, and prior to entering private practice, was a staff attorney for The Honorable Chris W. Altenbernd, Second District Court of Appeal.

Appellate Court Rules Committee Update
by Steven L. Brannock

One problem with getting more experienced (“old”) is my memory of the rules is sometimes as they used to be instead of the way they read today. To help all of us, both experienced and novice practitioners alike, stay atop the latest version of the rules, I offer this brief update from your Appellate Court Rules Committee (ACRC) containing a preview of significant rule changes that may be coming our way. I emphasize “your” committee, because the ACRC remains very responsive to the concerns of appellate practitioners and judges. Anyone that discovers a troublesome ambiguity in the rules or believes that an amendment or clarification of the rules is necessary, need only submit a letter outlining the issues to the chair of the ACRC, currently Edward M. Mullins of Miami. The proposal will be forwarded immediately to the appropriate subcommittee. Many of the rule changes we have debated since I have joined the Committee have been initiated by a letter from an appellate practitioner.

Here are the amendments recently presented to the Florida Supreme Court:

Two-Year Cycle Amendments
The Florida Supreme Court recently changed from a two-year to a three-year reporting cycle, with the ACRC’s reporting period moving from 2006 to 2008. A number of rule amendments were already in the works, however, and the Court granted leave for the
ACRC to file those amendments out of cycle in February, 2006. The Committee’s Report containing the text of the proposed rules and the reasons behind those changes appears on the Supreme Court’s website under “Proposed Rules.” The most significant of those pending amendments include:

9.120(d) – Jurisdictional Briefs Always Required. The ACRC recommends that jurisdictional briefs be required even in those cases where the district court certifies a question of great public importance or a conflict. The rule addresses the Supreme Court’s increasing tendency to discharge jurisdiction in such cases, often after briefing and argument on the merits. The rule will require the parties and the Court to focus early in the proceeding on whether the Court should exercise its discretionary review to accept jurisdiction. In other words, the Court will no longer automatically proceed to merits briefing when a case has been certified.

9.130(a)(3)(C)(ii) – Appeals in Garnishment Cases. The ACRC proposes a rule permitting an interlocutory appeal from orders dissolving or refusing to resolve a writ of garnishment. The rule is designed to resolve a conflict among the districts on the appealability of such orders.

9.130(a)(3)(C)(iii) – Appeals in Dependency Cases. The ACRC proposes an amendment to allow an immediate appeal in dependency and termination of parental rights cases of a non-final order determining the right to child custody. Currently, there is confusion over the appropriate avenue of appellate review with some of these orders being reviewed by certiorari and others by direct appeal. The proposed rule would clarify that there is an immediate right to an interlocutory appeal from such orders.

9.200(a)(2) – Record in Dependency and Termination Cases. The ACRC recommends amending Rule 9.200(a)(2) to provide that original orders and judgments remain with the trial court in dependency and termination of parental rights cases, just as they are in family law appeals (with copies going to the appellate court with the record). This amendment will assist the lower tribunal as it continues to exercise jurisdiction during the pendency of the appeal.

9.200(b)(2) – Electronic Transcripts. The electronic age is gaining on us. The ACRC recommends that Rule 9.200(b)(2) be amended to require court reporters to submit an electronic copy of the transcript along with the paper copy. Of course, as discussed in more detail below, this is merely a hint of changes to come once Florida appellate courts move to routine electronic filing of papers and briefs.

9.210(a)(5) – More Pages in Cross- Appeals. More pages are coming your way if you are the appellee/cross-appellant. The ACRC recommends that the page limits for answer/initial briefs be increased from 50 to 85 pages. The intent is to facilitate a balanced presentation by equalizing the number of pages available to both an appellant and a cross-appellant.

9.300(d)(10) – Motions to Request Tolling no Longer Necessary. Haven’t you always wondered why you needed to file that motion to toll time along with your motions in the Florida Supreme Court? Actually, no one remembers for sure why that requirement was imposed, but all agree that it adds unnecessary paperwork. Accordingly, the ACRC has recommended an amendment that would give motions in the Florida Supreme Court the same tolling effect as motions in the District Court of Appeal. Requests to Toll time will no longer be necessary if this rule passes.

9.370(c) – Amicus Briefs in Writ Proceedings. The rules were not clear as to whether amicus briefs were permitted in extraordinary writ proceedings. The ACRC recommends that the Rule be amended to clarify that amicus briefs may be filed in extraordinary writ proceedings and to set the time for service of such briefs.

Miscellaneous Changes - The ACRC also proposes amendments to Rule 9.130(a)(5); Rule 9.146(b); Rule 9.180(e); Rule 9.180(f)(5)(A); Rule 9.180(g)(3)(A) and Rule 9.180(g)(3)(D). Please see the Committee’s report on the Supreme Court’s website for further discussion of these more technical amendments.

Amendment to Rule 9.110(n) Concerning Appeals in Proceedings Seeking Waiver of Parental Notice in Termination of Pregnancy Decisions Involving Minors - In response to a request by the Florida Supreme Court, the ACRC provided comments and proposed amendments to new Rule 9.110(n) concerning appeals of waiver decisions in termination of pregnancy proceedings in which a minor seeks waiver of parental notice before termination of pregnancy. The Committee’s comments have been submitted to the Court which were argued to the Florida Supreme Court on March 8, 2006. The Court adopted amendments to Rule 9.110(n) adopted on July 6, 2006. In re Amendments to the Rules of Juvenile Procedure and The Rules of Appellate Procedure, 934 So. 2d 438 (Fla. 2006). The most significant change adopted by the Court is that the petitioner may request leave to file a brief or to request oral argument in the district court.

Amendments Considered and Approved by the ACRC to be Submitted in the 2008 Reporting Cycle

Since the submission of the ACRC’s report, the ACRC has considered and recommended the following Amendments to the Appellate Rules, all of which will be considered by the Supreme Court in the 2008 reporting cycle.

9.130(a)(3)(C)(iii) – Appeals from Awards of Immediate Monetary Relief. Rule 9.130(a)(3)(C)(iii) currently provides an interlocutory appeal in cases that determine “the right to immediate monetary relief or child custody in family law matters. The rule contains a classic grammatical ambiguity - the right to immediate monetary relief modified by and thus limited to family law matters? Courts have reached different conclusions on the issue. The ACRC proposes to clarify the rule to make clear that the right to appeal granted by 9.130(a)(3)(C)(iii) is only in family law, juvenile dependency, and termination of parental rights matters.

9.130(a)(5) – Motions for Rehearing Do Not Toll Time in 1.540 Cases. The ACRC moved to eliminate a potential procedural trap. Because of the unique nature of a Rule 1.540 proceeding, it was not entirely clear whether a motion for rehearing from an order in such a case should toll the time for an appeal. Although all of the District Courts to consider the issue have decided that rehearing motions in Rule 1.540 cases do not toll time, the ACRC thought it wise to eliminate any uncertainty, and thus eliminate a procedural trap for the unwary. Rule 9.130(a)(5) as amended would specifically state that rehearing motions in Rule 1.540 cases do not toll the time for filing a notice of appeal.

9.130(a)(3)(C)(iv) – Interlocuto- continued, next page
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ry Appeal in Insurance Appraisal Cases. Existing Rule 9.130(a)(3)(C)(iv) provides an interlocutory appeal from an order that determines the entitlement of a party to arbitration. Orders in insurance cases requiring an appraisal are similar in nature to arbitrations, but the rule is unclear whether orders determining the entitlement to such insurance appraisals are appealable. The ACRC proposes to add insurance appraisals to subsection (iv) making it clear that there is the right to an interlocutory appeal from orders determining entitlement to such appraisals.

9.430 – Proceedings by Indigents. Recent statutory changes require updating to Rule 9.430 concerning proceedings by indigents. The ACRC’s proposal adds references to the new application form adopted by the Supreme Court, clarifies distinctions in procedure between appeals and original proceedings, and requires partial payments to be collected by the clerk of the lower tribunal, not the District Court Clerk.

9.210(a)(5) – Certificates Don’t Count in Your Page Limits. Most of us assume that certificates of service and compliance do not count toward the page limits for a brief, but the existing rule is not entirely clear. Responding to our compulsive inner nature, the ACRC has proposed an amendment to clarify the page count. Breathe easy; if the rule passes, you’ll get the extra page, your certificates will not count.

Rule 9.310(b)(2) – Automatic Stays in APA Proceedings. There is a conflict between existing Rule 9.310(b)(2) which provides for an automatic stay when a governmental official or body files an appeal and Section 120.68, Fla. Stat., which states that the filing of an appeal does not itself stay enforcement of the agency decision. The ACRC proposes to amend 9.310(b)(2) to conform the rule to the statute. The amendment would provide that there is no automatic stay in administrative actions pursuant to the Administrative Procedure Act. Stays can still be granted, but pursuant to the traditional discretion of the administrative body and the reviewing court.

Rule 9.140 – Scrivener’s Errors. The ACRC has also taken action to correct two separate scrivener’s errors in Rule 9.140 where cross-references were listed incorrectly.

Pending Issues on the Agenda at Future Meetings of the ACRC Rule 9.510 – Advisory Opinions to Attorney General. The Supreme Court has sua sponte proposed a new Rule 9.510 governing advisory opinions to the attorney general. The General Rules Subcommittee to the ACRC is examining the new rule and will make recommendations concerning potential amendments to the ACRC.

Rule 9.210 – One Attorney, One Brief. The Florida Appellate Rules are not clear on briefing in cases where there are more than one party with aligned interests in an appeal. Does each party get to file a brief? Does the other side then get multiple replies? The General Rules Subcommittee will be considering whether to adopt the Eleventh Circuit’s solution, the so-called one attorney, one brief rule. Under the rule, multiple parties represented by a single attorney must file a single brief.

Rule 9.330(d) – Limiting Rehearings in Review Proceedings from PCA’s. The Supreme Court has made abundantly clear that it will not entertain discretionary review petitions from PCA’s but the petitions still keep coming. Not only that, when they are dismissed, rehearing motions follow. The Supreme Court has asked the ACRC to propose an amendment to the appellate rules to prohibit motions for rehearing from orders dismissing attempts to invoke the court’s jurisdiction to review PCA decisions.


Electronic Filing. Electronic filing is coming sooner, rather than later. As a result, the ACRC has formed a special subcommittee chaired by John Crabtree to consider what amendments to the rules will be necessary to accommodate electronic filing. Guess which rule which has generated the most discussion so far: Should lawyers continue to get the extra five days’ mail time when briefs are served via e-mail? Other proposed amendments are listed in the report of the special subcommittee which is available from the Florida Bar.

Stays without Bond – Topic of Hot Discussion, but no Action Taken - Perhaps the most interesting discussion at the September meeting of the ACRC in Tampa concerned whether amendments to 9.310(b) and (c) were necessary in light of new Section 45.045, Florida Statutes. 9.310(b) provides an automatic stay of a money judgment upon the posting of a bond meeting the requirements of the rules. A long running topic of discussion at the ACRC has been whether 9.310(b) and (c) should be amended to give a trial judge discretion, under appropriate and narrow circumstances, to grant a stay of a money judgment without posting a bond, which is the practice in federal court. The Second and Third Districts have reached opposite conclusions on whether a trial judge has any discretion to waive or reduce the bond in granting a stay of a money judgment. Compare Platt v. Russe, 921 So. 2d 5 (Fla. 2d DCA 2004) (a trial court may have narrow discretion to dispense with or reduce the bond) with Campbell v. Jones, 648 So. 2d 208 (Fla. 3d DCA 1994) (holding that a trial judge has no such discretion).

The ACRC revisited the issue in light of Section 45.045, Fla. Stat., which grants the trial judge the discretion to reduce or dispense with the bond and sets a $50 million upper limit for the amount of supersedeas bonds. The debate raised interesting questions about whether Section 45.045 was an unconstitutional intrusion into the Court’s rulemaking powers and whether the ACRC should propose an amendment eliminating the conflict between the statute and the rule. Both sides of the debate generated scholarly memoranda discussing the constitutional and jurisprudential issues at stake.

Ultimately, the ACRC voted to take no action. Apparently, the issue of the constitutionality of the statute is winding its way through the courts and many members of the ACRC thought it best for the Supreme Court to address the rule in the context of a particular case, instead of in a rulemaking proceeding. Other members were disinclined to revisit the issue of discretion in stays of money judgment, the ACRC having narrowly rejected two previous attempts to amend the rule to provide for limited discretion.

As one can see, the ACRC deals with a broad range of interesting and sometimes controversial issues. Nothing
Recent Amendments to Florida Rules of Appellate Procedure

By Henry G. Gyden

On October 26, 2006, the Supreme Court of Florida adopted several amendments to the Rules of Appellate Procedure proposed by the Florida Appellate Court Rules Committee. See In re: Amendments to the Florida Rules of Appellate Procedure (Out of Cycle). — 3.1 Fla.L. Weekly S732 (Fla. Oct. 26, 2006). These amendments will become effective on January 1, 2007. This article briefly discusses some of the more significant changes.

Florida Rule of Appellate Procedure 9.120(d) currently does not allow parties to file jurisdictional briefs when they seek to invoke the discretionary jurisdiction of the Supreme Court to review district court decisions certifying a direct conflict with another district court or a question of great public importance. This means that in such cases parties cannot submit briefs explaining why the Court has and should exercise jurisdiction to review the case. Based on the recommendations of the Florida Appellate Court Rules Committee, the Supreme Court amended rule 9.120(d) to allow parties to file jurisdictional briefs in cases in which the district court certifies a direct conflict with another district court, concluding that such briefing will assist the Court in determining whether jurisdiction exists. The Supreme Court, however, did not adopt this same amendment for cases in which a question is certified to be of great public importance. Parties will continue to be barred from submitting jurisdictional briefs in such cases.

Florida Rule of Appellate Procedure 9.200 was amended in two respects. First, subsection (a)(2) was amended to provide that, in dependency and termination of parental rights cases and cases involving families and children in need of services, the original orders and judgments shall remain with the clerk of the lower tribunal, and the clerk shall transmit copies to the district court for appellate review. This amendment recognizes that in such cases the trial court continues to exercise jurisdiction during the pendency of the appeal and needs access to the original court file.

The second amendment to rule 9.200 relates to subsection (b)(2), which governs the preparation of transcripts of the proceedings. Rule 9.200(b)(2) currently requires court reporters to file and serve a paper copy of the transcripts with the clerk of the lower tribunal and the designated parties. The Supreme Court amended subsection (b)(2) to require that court reporters also file and serve electronic copies of the designated transcripts.

Florida Rule of Appellate Procedure 9.210(a)(5) outlines the page limits for appellate briefs. Typically, a party filing a cross-appeal must include the issues and argument for the cross-appeal in their answer brief, which is limited to 50 pages. This means that a cross-appellant, unless granted leave by the court, will be allowed fewer pages to present its cross-appeal issues and argument than an appellant is allowed in the initial brief. In order to facilitate a balanced presentation of the arguments of both parties, rule 9.210(a)(5) was amended to allow a party who has filed a cross-appeal to submit an answer brief not to exceed 85 pages, which gives the appellee/cross-appellant an additional 35 pages to present their argument.

Florida Rule of Appellate Procedure 9.300 was amended to eliminate the Supreme Court tolling exception in subsection (d)(10). The Supreme Court, unlike the district courts of appeal, currently does not allow the service of a motion to automatically toll the briefing schedule. Instead, a party seeking to have its motion toll the time for filing a brief must file a separate motion requesting that relief. Rule 9.300(d)(10) has now been deleted, meaning that the service of a motion in the Supreme Court, other than those listed in rule 9.300(d), will automatically toll the time for filing a brief.

Florida Rule of Appellate Procedure 9.370, which addresses the time for filing an amicus brief, was amended to clarify that the due date for the amicus brief runs from the service of the brief, petition, or response, and not from the filing of such documents.

The Supreme Court adopted a few other minor changes to the rules governing criminal appeals, workers’ compensation appeals, and termination of parental rights appeals. Practitioners should review the opinion issued by the Supreme Court for those changes.

Endnotes

1 Steven L. Brannock coordinates appellate work in Holland & Knight’s central Florida offices. Board Certified in appellate practice by the Florida Bar, his experience includes litigating appellate matters in all five Florida District Courts of Appeal, the Florida Supreme Court, five federal circuit courts of appeal, and the United States Supreme Court. Mr. Brannock is active in the Appellate Section of the Florida Bar serving as its Vice Chair. He is also Secretary of the Florida Appellate Rules Committee and served as immediate past chair of the Civil Rules Subcommittee of the Rules Committee.

2 The Florida Supreme Court issued In Re: Amendments to the Florida Rules of Appellate Procedure (out of cycle) 3.1 Fla.L. Weekly S732 (Fla. Oct. 26, 2006), prior to the publication of this article. The amendments which the Florida Supreme Court pass are identified in Henry G. Gyden’s article, which immediately follows this one.

1 Henry G. Gyden is a member of the appellate practice group at Carlton Fields, P.A., where he handles federal and state appeals in all areas including tort, products liability, commercial, constitutional and employment discrimination cases. He is member of the Florida Bar’s Appellate Court Rules Committee and a member of the Executive Council of the Florida Bar’s Appellate Practice Section. Mr. Gyden is also the Co-Chair of the Hillsborough County Bar Association’s Appellate Practice Section.

2 The proposed Amendments are set forth in Steve Brannock’s preceding article in this issue.
practice of appellate courts to receive new evidence on appeal. Nevertheless, recent opinions reveal that appellate attorneys persistently attempt to supplement the record on appeal with documents that were never presented to the trial court.18

Every practitioner should remember that “appellate review is confined to the record on appeal.”19 Furthermore, “[a]n appeal has never been an evidentiary proceeding; it is a proceeding to review a judgment or order of a lower tribunal based upon the record made before the lower tribunal. An appellate court will not consider evidence that was not presented to the lower tribunal because the function of the appellate court is to determine whether the lower tribunal committed error based on the issues and evidence before it.”20 Despite the clarity of the law on this point, some attorneys move to supplement the record on appeal with items never considered by the trial court.21 Fortunately, the appellate courts generally reject any attempt to circumvent the cardinal rule of appellate practice and procedure that “an appellate court will not consider evidence that was not presented to the lower tribunal.”22

Attempting to supplement the record with documents that were never presented to the trial court, or otherwise made a part of the record below, is unprofessional.23 It is axiomatic that an appellate court may not consider matters outside the record, and the First District Court of Appeal previously stated “there is no excuse for an attorney to attempt to bring such matters [which are outside the record] before the court.”24 Therefore, all appellate practitioners should refrain from bringing matters outside the record on appeal before an appellate court.25 Attempting to supplement the record with documents never presented to the trial court cannot be condoned, and the appellate courts should vigilantly guard against such practices.

“The law, as a profession, carries with it not only competency requirements but also ethical and professional requirements. As a result, lawyers have an obligation not only to present legally correct arguments but also to present them in a professional manner. Unfortunately, too many lawyers are forgetting their obligation of professionalism.”26 Professionalism “is not what a lawyer must do or must not do. It is a higher calling of what a lawyer should do to serve a client and the public.”27 Along with the Florida Bar, which vigorously promotes professionalism, every attorney has an independent responsibility to advocate professionalism across every area of practice to continuously enhance this noble profession.

Endnotes

1 Richard Valuntas, a Florida Bar board certified criminal appellate attorney, is an Assistant Attorney General in the Florida Attorney General’s West Palm Beach Valuntas office. Mr. Valuntas works in the Criminal Appeals Division and represents the State of Florida in appellate litigation in state and federal courts. He received his JD magna cum laude from the Florida State University College of Law and also received his BS of Criminal Justice. Mr. Valuntas has also obtained an MS in Criminology from FSU and a Master’s in Public Administration from Florida Atlantic University.


3 Pedron v. Pedron, 788 So. 2d 1138, 1139 n.1 (Fla. 5th DCA 2001)(documents appellant attached to the reply brief cannot be considered by the appellate court); Brown & Williamson Tobacco Corp. v. Young, 690 So. 2d 1377 (Fla. 1st DCA 1997); Altchiler v. Florida Dep’t of Prof’l Regulation, 442 So. 2d 349, 350 (Fla. 1st DCA 1983) (“That an appellate court may not consider matters outside the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court.”); State v. Cecarelli, 8 Fl. L. Weekly Supp. 355 (Fla. 9th Cir. Ct. 2001)(striking documents filed with the court because they did not constitute supplemental authority under Florida Rule of Appellate Procedure 9.225).

4 Brown & Williamson Tobacco Corp. v. Young, 690 So. 2d 1377 (Fla. 1st DCA 1997).

5 Cleveland v. State, 887 So. 2d 362, 364 (Fla. 5th DCA 2004) (“It appears to us that the State through its ‘supplemental authorities’ is attempting to file an additional brief.”).

6 Altchiler v. Florida Dep’t of Prof’l Regulation, 442 So. 2d 349, 350 (Fla. 1st DCA 1983).

7 Florida Bar CLE § 10 (Fla. Bar CLE 5th ed. 2003)(“Oral argument by ‘ambush’ with new case law will not be tolerated by the court.”)

8 See, e.g., Cincinnati Bell Tel. Co. v. Public Util. Commn., 741 N.E.2d 535 (Ohio 2001)(striking notice of supplemental authority because Supreme Court Rule IX(8) requires such notice to be filed no fewer than seven days before oral argument); Ca. R. Ct., 1st App. Dist. Ct. IOPP § 20 (2005)(“If you wish to submit additional authorities not cited in their briefs, they must do so within a prescribed time before oral argument.”).

9 Global Heir & Asset Locators v. First NLC Fin. Servs., 31 Fla. L. Weekly D 1503 (Fla. 4th DCA May 31, 2006)(appellant attached to brief stricken because it contained matters outside the record on appeal); Poteat v. Guardianship of Poteat, 771 So. 2d 569, 573 (Fla. 4th DCA 2000)(counsel filed motion to supplement the record the day before oral argument with items not submitted to the trial court; filing such a motion was “highly unprofessional” and the motion was stricken by the district court); Hillsborough County Board of County Commissioners v. Darsey, 814 So. 2d 134 (Fla. 1st DCA 1998)(“An appellate court will not consider evidence that was not presented to the lower tribunal because the function of the appellate court is to determine whether the lower tribunal committed error based on the issues and evidence before it.”). Altchiler, 442 So. 2d at 350.

10 Global Heir & Asset Locators, 31 Fla. L. Weekly D 1503; Poteat, 771 So. 2d at 573.

11 Thornber v. City of Fort Walton Beach, 534 So. 2d 754, 755 (Fla. 1st DCA 1988).

12 Weidner v. State, 701 So. 2d 562, 565 (Fla. 2d DCA 1997), quashed on other grounds, 732 So. 2d 1044 (Fla. 1999).

13 See Global Heir, 31 Fla. L. Weekly D 1503; Poteat, 771 So. 2d 573.

14 Global Heir, 31 Fla. L. Weekly D 1503; Poteat, 771 So. 2d at 573.

15 Thornber, 534 So. 2d at 755.

16 Appellate attorneys should also refrain from the increasingly common practice of filing a motion to supplement the record on appeal in order to secure a de facto extension of time to serve a brief.

17 Weidner v. State, 701 So. 2d 562, 565 (Fla. 2d DCA 1997), quashed on other grounds, 732 So. 2d 1044 (Fla. 1999).

CAL – Six Years Old and Going Strong

by Robert E. Biasotti

For years, the American Bar Association had a number of groups that were of particular interest to appellate attorneys, such as the Section of Litigation’s Appellate Practice Committee and the Tort Trial and Insurance Practice Section’s Appellate Advocacy Committee. The ABA also had a special group for members of the bench—the Appellate Judges Conference. But none of these groups provided for any significant interaction between the appellate bench and bar.

Hence, in 2000, a group of appellate judges and lawyers came together to form “CAL”—ABA Judicial Division Appellate Judge’s Conference of Appellate Lawyers. CAL was the first (and as far as I know the only) national appellate bench and bar group in the country. Conceived in a spirit of collegiality, CAL’s mission was to foster a creative dialogue among appellate lawyers and appellate judges—both federal and state—with the purpose of improving appellate advocacy. In the six years since its formation, CAL has sponsored and developed continuing legal education programs and publications designed for the needs of appellate lawyers, promoted recognition of the practice of appellate law as a specialty, and examined and fostered discussions and proposals for the improvement of the appellate courts across the country.

CAL had its first meeting in New York City in early October 2001 (less than a month after 9/11). Chief Judge Judith Kaye of the New York Court of Appeals addressed more than seventy five chief appellate judges and eighty appellate lawyers on the impact or terrorism on the court systems. Since then, CAL has co-sponsored annual educational meetings with the Appellate Judge’s Conference in Reno (2002), Providence (2003), Dallas (2004), and San Francisco (2005). Membership in CAL has grown to about 500 appellate lawyers from across the country.

In 2004, the Appellate Judges’ Conference—CAL’s parent group—formed a 501(c)(3) nonprofit corporation, called the “Appellate Judge’s Education Institute,” with a goal to enhance appellate education programs. Under an agreement with the ABA, the AJEI will undertake fund-raising to finance appellate education programs for appellate judges and for CAL. The headquarters of the program is the Dedman School of Law at Southern Methodist University in Dallas.

At the upcoming meeting in November 2006, which is being held in conjunction with the AJEI at SMU, several exciting presentations are planned: Justice Sandra Day O’Connor, Chief Judge Danny Boggs from the Sixth Circuit, and Senator John Cornyn from Texas will speak on separation of powers issues; Chief Judge Philip Espinosa from the Arizona Court of Appeals, Dennis Haserot from National Data Support, and Henry Gyden from Carlson Fields will speak on “Taking Appeals Electronic”; and Kenneth Starr, Drew Days, and Dean John Attanasi from SMU will discuss and review the current Supreme Court. The luncheon keynote speaker will be Harriet Myers.

I have found past meetings to be equally fascinating, with topics and events that are both interesting and informative. For example, at the meeting in Providence, the Rhode Island Supreme Court sponsored a reception for CAL at its historic courthouse. In Reno, I participated in a discussion breakout group with judges from the West Virginia, Indiana, and Nevada appellate courts, and with appellate attorneys from Texas, Connecticut, Minnesota, and Washington, D.C. Each participant was a skilled appellate practitioner or judge, with experiences that were similar in many ways, but different in others. The opportunity to meet and share thoughts and experiences with appellate judges and lawyers from across the country presented a learning experience that I found to be truly unique.

Although these continuing education programs are an important part of CAL’s mission, they are by no means CAL’s only activity. CAL has several very active committees: a Pro Bono committee, a Speaker’s Bureau, an Awards Committee (which periodically presents four awards: Distinguished Lifetime Achievement, Distinguished Appellate Jurist, Distinguished Appellate Advocate, and Distinguished Service to CAL); an Appellate Rules committee; a Website Committee, and a Publications Committee. A description of the mission and accomplishments of each of these committees is posted on CAL’s website.

One additional benefit of membership in CAL is a group subscription to The Journal of Appellate Practice and Process, the only law school faculty-edited publication on the subject. The Journal provides a forum for creative thought and dialogue regarding the ways in which appellate courts operate and influence the development of law in the United States. Each issue of The Journal goes to every state and federal appellate judge in the country, together with subscribing appellate lawyers, academics, and law libraries.

If you would like further information about CAL, please visit its webpage at http://www.abanet.org/jd/aaj/cal/home.html.

Robert E. Biasotti is a shareholder with Carlson Fields, P.A. in St. Petersburg, Florida, and was a member of the Executive Board of the ABA Judicial Division Appellate Judge’s Conference of Appellate Lawyers from 2004-06.

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II. Exceptions to the rule: Under Apprendi, juries are not required to find facts relating to defendants' final convictions or facts that have been admitted by defendants.

A. Prior Convictions.

The prior conviction exception to Apprendi is relatively simple. Apprendi held that judicial fact-finding of prior convictions did not unconstitutionally infringe defendants' rights to trials by jury:

[T]here is a vast difference between accepting the validity of a prior … conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.

530 U.S. at 496.7

Accordingly, the rule in Apprendi and Blakely does not apply to habitual offender or prison releasee reoffender sentences.8 Sheffield v. State, 903 So. 2d 1009, 1010 (Fla. 4th DCA 2005); Tillman v. State, 900 So. 2d 633, 634 (Fla. 2d DCA 2005). The statutorily required factual findings that relate to a defendant's prior convictions need not be found by the jury.9 Nor do Apprendi and Blakely require the jury to make findings related to facts that are "directly derivative of a prior conviction," such as whether the defendant was convicted or pardoned, when he was convicted, or when he was released from imprisonment.10 On a related note, the First District has held that "an appellant's prior juvenile dispositions are valid as prior criminal convictions because Florida's juvenile procedures are constitutionally sound."11

B. Facts Admitted by Defendant.

Where the defendant admits the facts upon which the enhancement is based, there generally is no Apprendi violation. See Hindenach v. State, 807 So. 2d 739, 743-44 (Fla. 4th DCA 2002) (holding defendant waives his Apprendi right to have the jury make the finding of serious injury where he pleads nolo contendere and admits he seriously injured the victim); Labadie v. State, 840 So. 2d 332, 333-34 (Fla. 5th DCA 2003) (concluding no resentencing under Apprendi is required where defendant, inter alia, negotiates a plea and downward departure sentence in which he admits the amount of drugs trafficked in, and waives his right to a jury trial and to appeal a departure sentence); see also Lewis v. State, 911 So. 2d 238, 240 (Fla. 3d DCA 2005) (stating in dicta that defendant's agreement to upward departure sentence under a plea agreement entered into knowingly, voluntarily, and intelligently would remove sentence from the scope of Blakely). However, defense counsel's statements at trial may not constitute an admission by appellant sufficient to remedy the jury's failure to make the finding that would justify a departure sentence. Donohue v. State, 925 So. 2d 1163, 1165-66 (Fla. 4th DCA 2006).

III. The Florida District Courts split on whether Apprendi can be applied retroactively.

Though the Florida Supreme Court has held defendants are not entitled to Apprendi relief if their convictions and sentences became final before Apprendi,12 two other situations implicating retroactivity have caused a split among the District Courts of Appeal. First, a defendant's conviction and sentence may have become final before Apprendi, but resentencing occurred after Apprendi. Alternatively, the defendant's conviction and sentence may have become final after Apprendi, but before Blakely. While the U.S. and Florida Supreme Courts may resolve these scenarios shortly,13 only the First District concludes that Apprendi relief is appropriate.

The Florida Supreme Court in Hughes v. State, 901 So. 2d 837 (Fla. 2005), held that Apprendi was not retroactive. Apprendi announced a procedural rule that did not affect the determination of guilt. 901 So. 2d at 841-42. Hughes noted that the United States Supreme Court had rejected retroactive application of Duncan v. Louisiana, 391 U.S. 145 (1968), which had held that the Sixth Amendment right to jury trial applied to the States through the Fourteenth Amendment. 901 So. 2d at 842 (citing DeStefano v. Woods, 392 U.S. 631 (1968)). Similarly, the Supreme Court held the rule in Ring v. Arizona, 536 U.S. 584 (2002), which applied Apprendi to death penalty factors, was not retroactive. Id. at 845 (citing Schriro v. Summerlin, 542 U.S. 348 (2004)). If Duncan and Ring did not require retroactive application, neither could Apprendi. The Florida Supreme Court noted no federal or state court had held that Apprendi applied retroactively. Id. at 846-47.

In Isaac v. State, 911 So. 2d 813 (Fla. 1st DCA 2005), the defendant's convictions and sentences were final before Apprendi, but resentencing occurred after Apprendi. 911 So. 2d at 814. The First District acknowledged that Apprendi is not retroactive, but held that, because Apprendi was decided before resentencing, it was binding. Id. at 814. The court also held that its previous rejection of the defendant's Apprendi claim rested on the court's incorrect understanding of statutory maximum, which Blakely corrected. As a result, the court applied Apprendi and Blakely retroactively. Chief Judge Kahn dissented, noting the Florida Supreme Court held that Apprendi was not retroactive. Id. at 815 (Kahn, C.J., dissenting). Hughes stated the issue as whether Apprendi applied to defendants whose convictions were final when it was decided, and the Florida Supreme Court had noted the long-standing policy that, when a conviction becomes final, the State acquires an interest in the conviction's finality. Id. The First District continues to follow Isaac. See, e.g., Fleming v. State, 31 Fla. L. Weekly D1112 (Fla. 1st DCA Apr. 21, 2006); Moline v. State, 31 Fla. L. Weekly D701 (Fla. 1st DCA Mar. 3, 2006).

However, the Third District in Galindez v. State, 910 So. 2d 284, 285 (Fla. 3d DCA 2005), agreed with Chief Judge Kahn and certified conflict with Isaac: "Apprendi and Blakely … cannot be applied to alter the effect of a jury verdict and conviction— as well as, in this case, a direct appeal— rendered prior to those decisions, notwithstanding that further resentencing proceedings are pending afterwards." The court noted that "that applying [Apprendi] doctrine … would amount simply to a pardon of the defendant for an act he confessed to committing because the rules of the game were deemed to have changed after it was over."
errors can be harmless.” Id. at 2551 (quoting Neder v. United States, 527 U.S. 1, 8 (1999)). “If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis.” Id. (quoting Neder, 527 U.S. at 8) (brackets in original). In Neder, the Court held that harmless-error analysis applied to instructional omission of a material element of the offense because “an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” Id. (quoting Neder, 527 U.S. at 9) (emphasis in original). Thus, the Court found Recuenco indistinguishable from Neder because “sentencing factors, like elements, … have to be tried to the jury and proved beyond a reasonable doubt.” Id. at 2552 (quoting Apprendi, 530 U.S. at 478). But “[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error.” Id. at 2553. In light of Recuenco, merely establishing that Apprendi error occurred may not be enough to entitle a defendant to relief; rather, counsel should be prepared to argue whether the error was harmless.

V. Conclusion
Apprendi’s central holding is simple: enhancements resulting in a sentence beyond the statutory maximum must be found by the jury beyond a reasonable doubt, unless the facts are related to a defendant’s prior convictions or are admitted by the defendant. The question of Apprendi’s retroactive application is also fairly straightforward; only the First District applies Blakely retroactively or applies Apprendi to resentencing proceedings. Recuenco recently resolved whether an Apprendi violation may be deemed harmless. Nevertheless, cases such as Burton and Galindez suggest that the United States and Florida Supreme Courts will continue to refine the contours of Apprendi, and its final effect on sentencing procedures remains to be determined.

Endnotes:
1 Mike Giel clerks for Judge Emerson R. Thompson, Jr. of Florida’s Fifth District Court of Appeal. He graduated in 2005 from the University of Chicago Law School, where he was a member of the Chicago Journal of International Law, and graduated cum laude from the University of South Florida in 2002.
3 By limiting its scope to state court appeals in which the defendant was not convicted, this article foregoes discussion of several noteworthy; related Supreme Court cases, including: Almendarez-Torres v. United States, 523 U.S. 242 (1998) (holding that, where penalty provision authorized increased sentence for recidivist, neither the Constitution nor statute required the factor to be charged in the indictment); Harris v. United States, 536 U.S. 554 (2002) (concluding that use of sentencing factor found by judge that increases statutory minimum sentence, but does not extend sentence beyond statutory maximum, does not violate Fifth or Sixth Amendments); Ring v. Arizona, 536 So. 2d 584 (2002) (applying Apprendi to require juries to find aggravating circumstances required to impose the death penalty); Schriro v. Summerlin, 542 U.S. 348 (2004) (holding Ring did not apply retroactively to cases already final on direct review); and United States v. Booker, 543 So. 2d 220 (2005) (applying Apprendi and Blakely to United States Sentencing Guidelines).
4 See, e.g., McCloud v. State, 803 So. 2d 821, 824-26 (Fla. 5th DCA 2001).
6 See, e.g., Richardson v. State, 915 So. 2d continued, next page
766, 767 (Fla. 2d DCA 2005) (reversing where trial court departed upward based on its finding defendant occupied a leadership role in the conspiracy; defendant did not stipulate to leadership role or judicial factfinding); Behl v. State, 898 So. 2d 217, 221 (Fla. 2d DCA 2005) (reversing sentences based on penetration points rather than contact points where defendant was sentenced under 1995 guidelines).

Thus, Apprendi did not overrule Entsey v. State, 383 So. 2d 219, 223 (Fla. 1980), which held “that the determination that a defendant could be sentenced as an habitual felony offender was independent of the question of guilt in the underlying substantive offense and did not require the full panoply of rights afforded a defendant in the trial of the offense.” Wright v. State, 780 So. 2d 216, 217 (Fla. 5th DCA 2001).

§775.082(9)(a), 775.084, Fla. Stat.

Mack v. State, 901 So. 2d 414, 414 (Fla. 3d DCA 2005); McBride v. State, 884 So. 2d 476, 477-78 (Fla. 4th DCA 2004) (citing United States v. Marseille, 377 F.3d 1249, 1258 n.14 (11th Cir. 2004)); Flyler v. State, 852 So. 2d 442, 443 (Fla. 5th DCA 2003); Robinson v. State, 784 So. 2d 1246, 1247 (Fla. 3d DCA 2001).

Florida Attorney’s Charitable Trust (ACT) is a 501(c)(3) disaster relief fund that offers Florida’s attorneys an avenue for making donations to victims of disasters, including members of The Florida Bar. ACT seeks to provide aid and assistance when a disaster has caused the disruption of legal processes and court systems or which result in reduced citizen access to the legal system and the pursuit of justice. ACT may also support other charitable organizations that assist in providing aid and other assistance to persons on a charitable basis. Please mail donations to Florida Attorney’s Charitable Trust, 651 East Jefferson St., Tallahassee, FL 32399-3200.

Lutton v. State, 934 So. 2d 7, 9-10 (Fla. 3d DCA 2006); Calloway v. State, 914 So. 2d 12, 14-15 (Fla. 2d DCA 2005); Garley v. State, 906 So. 2d 1264, 1265 (Fla. 4th DCA 2005); Tillman, 900 So. 2d at 633.


Hughes v. State, 901 So. 2d 837 (Fla. 2005).

See Galindez v. State, 925 So. 2d 1030 (Fla. 2006), and Burton v. Waddington, 126 S. Ct. 2592 (2006).

See, e.g., Hughes v. State, 933 So. 2d 1285, 1285 (Fla. 2d DCA 2006); Lester v. State, 923 So. 2d 596, 597 (Fla. 5th DCA 2006); Garcia v. State, 914 So. 2d 29, 30 (Fla. 4th DCA 2005).

“The legal issue now pending in this case is whether U.S. Supreme Court rulings that affect sentences apply to the re-sentencing hearing.” Gavel to Gavel: The Florida Supreme Court Oral Arguments Online, website by WFSU-TV, Tallahassee, available at http://wfsu.org/gavel2gavel/summary/05-1341.htm (last visited Oct. 6, 2006).

Notably, one of the few cases to consider such a situation and agree with the First District was People v. Johnson, 121 P.3d 285 (Colo. App. 2005). The Colorado Supreme Court unanimously reversed Johnson. People v. John- son, 2006 Colo. LEXIS 745 (Colo. Sept. 11, 2006).


Structural errors require automatic reversal and occur rarely. As the Supreme Court stated in Neder v. United States, 527 U.S. 1, 8 (1999) (citations truncated):

We have recognized that “most constitutional errors can be harmless.” [Arizona v. Fulminante, 499 U.S. 279, 306 (1991)]. “If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis.” Row v. Clark, 487 U.S. 570, 579 (1986). Indeed, we have found an error to be “structural,” and thus subject to automatic reversal, only in a “very limited class of cases.” Johnson v. United States, 520 U.S. 461, 468 (1997) (citing Gideon v. Wainwright, 372 U.S. 335 (1963) (complete denial of counsel); Toney v. Ohio, 273 U.S. 510 (1927) (biased trial judge); Vasquez v. Hillery, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); McKaskle v. Wiggins, 465 U.S. 168 (1984) (denial of self-representa- tion at trial); Waller v. Georgia, 467 U.S. 39 (1984) (denial of public trial); Sullivan v. Louisiana, 508 U.S. 275 (1993) (defective reasonable-doubt instruction)).

An incidental effect of Recenu is that it appears to validate courts’ rejection of the argument that, if an instruction omits an element, Apprendi error occurs. See Rosen v. State, 2006 Fla. App. LEXIS 14947, *14-20 (Fla. 5th DCA Sept. 8, 2006) (relying on Neder and Battle v. State, 911 So. 2d 85, 88-89 (Fla. 2005)); Perritte v. State, 912 So. 2d 332, 335 (Fla. 5th DCA 2005) (“Implicit in ... Apprendi is the notion that[,] before a sentence-increasing factual must be submitted to a jury and proven beyond a reasonable doubt, the fact must first be disputed.”). Compare State v. Surin, 29 Fla. L. Weekly D2661 (Fla. 3d DCA Nov. 24, 2004) (affirming order on basis of Apprendi), with Surin v. State, 920 So. 2d 1162 (Fla. 3d DCA 2006) (granting rehearing, withdrawing previous opinion, and reversing without any Apprendi discussion).
Appellate Practice Section

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