

# **SEX CRIMES/CHILD ABUSE CASE LAW UPDATES FOR OCTOBER 2011**

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Berlin v. State, 2011 WL 4905760 (Fla.App. 1 Dist.):

Defendant's convictions and sentences for two counts of sexual battery and one count of lewd and lascivious molestation violated double jeopardy, and thus conviction and sentence for lewd and lascivious molestation would be vacated; sexual battery and lewd or lascivious molestation constituted the same offense for double jeopardy purposes, and all three counts arose out of only two criminal acts of touching or penetration committed within a single criminal episode.

Davis v. State, 2011 WL 4809847 (Fla.App. 1 Dist.)

Defendant pled guilty to sexually abusing 13-year-old victim and then tried to take her deposition in preparation of sentencing. The State filed a protective order, claiming that the defendant did not have a right to take depositions once he had pled. The court ruled with the State. The Appellate court ruled that defendants have a right to take depositions at any critical stage.

Trial court erred by failing to exercise its discretion, through conducting a balancing test, when evaluating whether to allow defendant to depose victim in preparation for sentencing on charge of sexual conduct, but this error was harmless, given that issue of consent was fully addressed in victim's police statement and defendant's testimony at sentencing hearing; court should have evaluated State's motion for a protective order by weighing possibility that deposition would uncover evidence pertinent to sentencing against such factors as victim's young age and emotional state, and court should have considered defendant's ability to obtain evidence regarding consent from other sources, and it was difficult to see how deposing victim would have revealed new information concerning issue of consent.

Defendants have a right to conduct discovery at any critical stage of a criminal proceeding, and court should treat discovery disputes at any such stage in the same manner as those brought at trial.

Parker v. State, 36 Fla. L. Weekly D2145 (2d DCA 2011):

Photographs depicting lewd exhibition of an adult female's genitals with a child's head superimposed on an adult female body, and no child engaged in sexual conduct or in simulated sexual conduct, did not constitute child pornography, and as such, defendant could not be convicted of possession of child pornography.

The depicted sexual conduct must be that of a child in order to be convicted of possessing child pornography.

Williams v. State, 2011 WL 4949931 (Fla.App. 3 Dist.)

Florida Rule of Criminal Procedure 3.040, which extends a deadline where the deadline falls on a Saturday, Sunday, or legal holiday, is not applicable to the reporting requirements set forth in section 954.0435(14)(b), as the reporting requirement does not require a computation of time, but instead requires the defendant to “reregister each year during the month of the sexual offender’s birthday and every third month thereafter.”

Wilson v. State, 2011 WL 5061349 (Fla.App. 4 Dist.)

The state violated the collateral-matter rule by impeaching testimony of defendant on cross examination that she was not angry at a witness by recalling the witness to testify that defendant yelled obscenities at her during a recess at a trial for child abuse; whether defendant yelled obscenities at the witness was not evidence tending to prove or disprove a material fact in the case and, thus, was not relevant to the crime charged and did not serve to discredit defendant by establishing bias, corruption, or lack of competency, and defendant did not open the door to the line of questioning, given that the first question posed to defendant about the incident with the witness was asked by the state on cross examination.

If a party cross examines a witness concerning a collateral matter, the cross examiner must take the answer and is bound by it and may not subsequently impeach the witness by introducing extrinsic evidence to contradict the witness on that point; an exception exists, however, where the collateral extrinsic evidence sought to be introduced concerns matters testified to by the witness on direct examination, as the witness is said to have opened the door.