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The Dynamics of Child Sexual Abuse Prosecution: Two Florida Case Studies

Robert J. Levy*

Criminal justice scholars agree that the process cannot adequately be captured simply by reporting guilty pleas, jury acquittals and convictions. Rather, one must imagine a giant cornucopia, the large end representing the huge mass of unreported and uncleared crimes, the small end representing the small number of convicted felons sentenced to prison. Between these terminal points can be found all those criminals the police decide not to arrest or refer for prosecution, all those cases prosecutors decide not to prosecute, the cases prosecutors decide to dismiss (or "nolle prosequi," often referred to as "nol pros") after they have been filed, prosecutions judges dismiss for lack of probable cause or because the prosecutor violated some legislatively or constitutionally required practice, and the negotiated guilty pleas prosecutors and defense counsel arrange (usually with accompanying sentences).¹

Nor is it sufficient simply to catalogue the numbers in the categories of criminal justice outcomes between unreported crimes and prison sentences. Understanding the criminal process requires knowledge of the policy and strategic decisions prosecutors make when deciding whether to file charges,² the stresses defense counsel undergo in dealing with clients charged with serious crimes, the pressures involved for prosecutors deciding whether to plea bargain and what sentence to offer for a plea, and the difficulties defense counsel face (with some likelihood of later client recriminations) deciding whether to recommend that a specific offer should be accepted. Above all, one must appreciate the enormous tension trials impose on both prosecutors and defense counsel as, minute by minute, they make crucial tactical decisions which might influence or even determine the jury's verdict. Even after a plea or a jury verdict of guilt, difficult tactical and penal policy issues remain—for prosecutors, defense counsel and judges: what sentence is proper for the offense? should the defendant appeal? what evidentiary or tactical mistakes by the prosecutor or the trial judge compel or justify another trial for a convicted defendant? This aspect of criminal justice, what might be called the "trial practice" process, for obvious reasons has seldom been studied systematically. Yet, in-depth examination of individual cases, while lacking empirical generalizability, can provide insights into the issues, especially into the tactical choices prosecutors and defense counsel must make quickly and under fire, and the sometimes painful choices defendants must make (whether to plead guilty, whether a

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¹ The literature describing the scope of the process and examining each of these possible outcomes is vast. See generally Richard S. Frase and Robert A. Weidner, Criminal Justice System, 1 Encyclopedia of Crime and Justice 371–93 (2d ed. 2001).

sentence offer by the prosecutor should be accepted, whether to testify—among many others). Then there are the social and individualized justice concerns about sentencing—concerns that are difficult in gross but excruciating in the sympathetic prism of an individual’s (even a criminal individual’s) life. To explore some of the legal policy as well as the trial and appellate advocacy issues, this essay reports in detail the facts (to the extent they are known) and the outcomes of two recent Florida child sexual abuse prosecutions: the appeal of Mark Lee Gibson’s conviction; and the originating events and pre-trial and post-conviction stages of the prosecution of Ramon Garcia. The Garcia case may not be representative of the 101 convictions for capital sexual battery in Dade County during 1996; nor is the Gibson case.


4 This essay is taken from my larger empirical study of child sexual abuse prosecution practice in two judicial districts in Florida and one in North Carolina. The larger study, as well as this essay, were funded by a generous grant from the Smith-Richardson Foundation. Another aspect of the larger study is reported in Levy, supra note 2. Because descriptions of the Garcia case include facts taken from the prosecutor’s file, names have been changed to insure confidentiality. See infra note 69.

Florida, and Dade County (Miami) specifically, have been in the child sexual abuse prosecution spotlight for more than fifteen years, with widespread media coverage, a host of editorial criticisms, and attacks on Janet Reno, then the Dade County “State Attorney” (the elected chief prosecutor) and later United States Attorney General. Three notorious criminal prosecutions were widely publicized. Francisco Fuster, proprietor with his wife of an unlicensed baby-sitting service, the Country Walk school, was prosecuted for sexually abusing clients of the service. Fuster’s wife pleaded guilty and testified against him; Fuster later claimed that his wife had been held in jail, naked and incommunicado and under extremely coercive circumstances, until she confessed. Later, after being deported, Mrs. Fuster recanted but refused to return to the United States to testify. Fuster’s subsequent appeals and habeas corpus motions were all denied. See, e.g., Fuster v. State, 664 So. 2d 18 (Fla. Dist. Ct. App. 1995). In 1984, Harold Snowden, a decorated Miami policeman whose wife ran a baby-sitting service from their home, was prosecuted after he “sat in” for his wife on one occasion and one of the parents (whose parenting he had criticized) complained that Snowden had sexually abused that parent’s child. Several children, “encouraged” by therapists to “disclose,” testified that they had been abused, but Snowden was acquitted. A second trial, respecting a different victim, resulted in a hung jury; finally, a jury convicted Snowden of abusing still a third victim despite the fact that the first child victim had recanted his allegations (a fact about which the trial judge refused to permit testimony). Snowden’s direct appeals were all unsuccessful; but, after eleven years in prison, his conviction was reversed and he was freed by the United States Court of Appeals for the Eleventh Circuit. See Snowden v. Singletary, 135 F.3d 732 (11th Cir. 1998). See also Dorothy Rabinowitz, The Pursuit of Justice in Dade County, WALL ST. J., Oct. 28, 1996, at A18; Editorial, “Nightmare’s End,” WALL ST. J., Nov. 25, 1998, at A18 (prosecutors announce Snowden will not be re-prosecuted). In 1989, Robert Finje, a fourteen-year-old church day care worker, was tried as an adult for sexually abusing a three-year-old. After extensive pre-trial proceedings and a three and a half month trial (financed for the defendant, at a cost of more than $500,000, by the church’s insurance company), the boy was acquitted. See The Bobby Finje Case, WALL ST. J., Oct. 28, 1996, at A18, col 1.

5 Many more prosecutions, which resulted in convictions for some lesser included offenses, contained capital sexual battery counts when initiated. See infra text accompanying notes 108–13. I have records for only a sample of the 1996 Dade County prosecutions and have no trial transcript or other records of capital sexual battery appeals. One additional caveat: the Gibson case discussion is based on the opinions, supplemented by telephone conversations with the prosecutor and public
case necessarily representative of the more than 70 capital sexual battery appeals from convictions decided by Florida appellate courts between 1998 and 2002. The *Gibson* case was chosen for discussion here because it was the most recent decision reported when the legal doctrine research phase of the larger study began; the *Garcia* case was chosen because, while conducting case file research for the larger study, I was invited by the prosecutor to attend the hearing on the defendant’s motion for post-conviction relief, and the case file contained more detail and transcribed depositions and hearings than any of the cases selected randomly for the larger study. Yet these cases merit intensive scrutiny. They illustrate dramatically the high stakes tactical decisions such cases force on prosecutors and defense lawyers and the high stakes risks they pose for defendants. The *Gibson* case shows how rules of evidence can influence jury behavior; the *Garcia* case shows how pre-trial lawyering, as well as rules of evidence and prosecutorial practices, constrain or enhance
defender and review of a small sample of the trial transcript. Discussion of the *Garcia* case and its legal strategies is based on documents in the file of the prosecutor (supplemented by only one interview). Inappropriate inferences may have been drawn about the trial strategies of the prosecutor or defense counsel. Needless to say, persistent efforts have been made to avoid errors.

6 See infra text following note 113.

7 There is a "generalizability" risk other than the nature of the sample worth discussing. As the title of this article indicates, the subject is the crime of child sexual abuse and the dynamics of its prosecution may be different than that of others. Actual data are hard to come by, needless to say. But there is continuing and heated controversy (perhaps true of most subjects of criminal prosecution) as to whether prosecutors fail to prosecute too many cases and whether sentences are, in general, too light or too heavy. In the cognate field of statutory rape, for example, some advocates criticize prosecutors for failure to prosecute enough adults who have sexual intercourse with minors (see, e.g., SHARON G. ELSTEIN and NOY DAVIS, AMERICAN BAR ASS’N CENTER ON CHILDREN AND THE LAW, SEXUAL RELATIONSHIPS BETWEEN ADULT MALES AND YOUNG TEEN GIRLS: EXPLORING THE LEGAL AND SOCIAL RESPONSES 25, 30 (1997)), while others criticize prosecutors for ignoring the wishes of victims in deciding whether to prosecute (see, e.g., Rigel Oliveri, Statutory Rape Law and Enforcement in the Wake of Welfare Reform, 52 STAN. L. REV. 463, 484 (2000)). See generally, Levy, supra note 2, at 18–28. Prosecutors tend to explain failures to prosecute marginal cases by citing to weak evidence, to witnesses who are not credible or fail to cooperate (see FRANK D. CANNAVALE, WITNESS COOPERATION xv (1976)), or to those judges who are unduly sympathetic to defendants (see Levy, supra note 2, at 15 n.9); defense attorneys tend to attribute vindictiveness and uncontrolled prosecutorial and correctional passion to prosecutors. Anecdotal information suggests that rates of prosecution and conviction of child sexual abuse crimes as well as severity of sentences vary from state to state and from community to community. For example, I was told by a prosecutor in a mountainous area of a rural state: "We prosecute only cases we consider ‘no-brainers’ and still we lose more than fifty percent of our trials. And it’s because in most of our juries there’s somebody who’s thinking something like ‘there but for the grace of God go I or somebody close to me.’" To whatever extent “public opinion” can be considered a surrogate for data on these issues, it seems likely that rates of prosecution and conviction, as well as sentence severity should all have increased in recent decades. See PHILLIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 16 (1998): "After the mid-1970s, public opinion moved in the opposite direction [from the ‘Liberal Era, 1958-76’], with renewed perceptions of alleged threats to women and especially children." Jenkins describes American attitudes toward molesters and molestation as having varied, in an irregular tidal fashion, influenced by a variety of broader community attitudes toward freedom of sexual expression, therapy and therapists, family and religious values, influencing and being influenced by pressure group advocacy and media treatment of the issues.
defendants' chances of being acquitted by a jury. The two cases illustrate both the value, and the terrible dangers, of aggressive criminal defense tactics. The *Gibson* case indicates how dangerous it is for lawyers and their criminal clients to rely on appellate review of jury findings of guilt. Both cases indicate how freedom of tactical choice for criminal defendants can produce unpleasant consequences. These cases, like many criminal prosecutions, because of their fascinating and complex individuality, seem to remain impenetrable mysteries of human motivation and behavior, in part the product of indeterminate tactical choices.

Above all else, the *Gibson* and *Garcia* cases with all their idiosyncrasies prove how useful to prosecutors and how coercive to defendants are "mandatory minimums." Sentences that threaten defendants with life in prison if they "roll the dice," opting for trial rather than the prosecutor's plea offer of a lesser (but not necessarily insignificant) penalty, play a powerful, often decisive, role in determining defendants' realistic options. At the same time, mandatory minimums, in the hands of prosecutors willing to bargain, can produce idiosyncratic variations in the outcomes of prosecutions and in the sentences of defendants charged with similar criminal behavior. Prior to trial in the *Gibson* case, the prosecutor offered the defendant a plea to "attempted capital sexual battery" with a sentence of fifteen years in prison followed by an equal period of probation; 8 Gibson refused the pre-trial offer as well as a post-trial offer of twenty-five years if he waived his right to appeal. Gibson is in prison for life. Garcia, on the other hand, accused of a crime with the same penalty, agreed to plead guilty in exchange for a "credit for time served" probationary sentence of only the forty-two days he had spent in jail prior to a bail hearing, plus a number of conditions of probation. 9 This is not to suggest that the charges against Gibson and Garcia were identical, or even that the evidence against each was equally likely to produce a conviction after trial. 10 Nevertheless, whether a bargained plea induced, or, at least, encouraged by draconian penalties if the defendant goes to trial should be considered "voluntary" would be an issue worth serious exploration—if the Supreme Court of the United States had not obviated the issue by rejecting such claims out of hand. 11 But the coercive influence on both Gibson and Garcia of the penalty for the crime of "capital sexual

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8 See infra text accompanying note 60.
9 See infra notes 107–12 and accompanying text.
10 See infra note 121–26 and accompanying text.
11 See Corbitt v. New Jersey, 439 U.S. 212 (1978) (murder prosecution; bargain to avoid death penalty approved); Brady v. United States, 397 U.S. 742 (1970) (murder prosecution; bargain approved); Santobello v. New York, 404 U.S. 257 (1971) (prosecutor promised not to recommend sentence as part of plea bargaining; case remanded for further proceedings when prosecutor made recommendations anyway). The standard description of a voluntary plea was stated in Shelton v. United States, 246 F.2d 571 (5th Cir. 1957) (reversed on confession of error on other grounds, 356 U.S. 26 (1958)): "[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor or his own counsel, must stand, unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g., bribes)." See generally Yale Kamisar, et al., Modern Criminal Procedure 1232–89 (10th ed. 2002).
battery—a crime which produces revulsion even among incarcerated criminals\textsuperscript{12} as well as the ordinary citizens who populate juries—cannot be ignored.

I. THE STATUTE

Prosecutions of child sexual abusers in Florida arise under one or another subsection of two felony statutes. The more important but less frequently utilized crime is known as “capital sexual battery” because it imposes as a penalty a mandatory sentence of life without parole. The statute punishes any person older than eighteen who engages in “oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object,” if the victim is a “person less than twelve years of age.”\textsuperscript{13} The “capital” designation persists because the statute appears to permit the death penalty for the crime. Following \textit{Furman v. Georgia}\textsuperscript{14} and \textit{Coker v. Georgia},\textsuperscript{15} the Florida Supreme Court held that the death sentence is a grossly disproportionate and excessive punishment for sexual battery of a child.\textsuperscript{16} Despite the invalidation, “the Florida Legislature never changed the wording of the sexual battery statute. Thus, upon reading the statute today it would appear that the death penalty could be imposed for those convicted of capital sexual battery.”\textsuperscript{17} Intent upon conveying a harsh message:

effective October 1, 1995, the legislature amended section 775.082(1), Florida Statutes (1995), so that all capital felonies not resulting in the death penalty are subject to a mandatory sentence of


\textsuperscript{13} FLA. STAT. ANN. §§ 794.011(1)(h), (2) (West 1992). The definition section of the statute reads in full: “‘Sexual battery’ means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose.” \textit{Id.} Although some of the earlier Florida appellate decisions seemed to confuse the legislative language, recent cases have fairly uniformly construed the statute to be satisfied by the touching of (“union with”) a female victim’s vagina or anus by a male’s penis, but to require penetration of the vagina or anus digitally or by some other object. See, \textit{e.g.}, \textit{Palazzolo v. State}, 754 So. 2d 731 (Fla. Dist. Ct. App. 2000); \textit{Richards v. State}, 738 So. 2d 415 (Fla. Dist. Ct. App. 1999). Resolving a long-standing disagreement among intermediate appellate decisions, the Florida Supreme Court ruled, in \textit{Welsh v. State}, 850 So. 2d 467 (Fla. 2003), that for prosecutions initiated prior to statutory amendments in 1999, “lewd, lascivious, or indecent assault,” prohibited by FLA. STAT. ANN. § 794.011 (West 1997), is not a “lesser included offense” of capital sexual battery. In 1999, the legislature had deleted from § 794.011 the phrase “without committing the crime of sexual battery,” thus allowing defendants to have juries charged that they might be convicted of the lesser offense.

\textsuperscript{14} 408 U.S. 238 (1972).

\textsuperscript{15} 433 U.S. 584 (1977).

\textsuperscript{16} Buford v. State, 403 So. 2d 943 (Fla. 1981). Actually, the conclusion was dictum because the death sentence, imposed on the defendant by the judge, despite a jury recommendation of life in prison, was affirmed because the defendant had murdered the child after committing sexual battery. \textit{Id.} at 951, 954.

\textsuperscript{17} Gibson v. State, 721 So. 2d 363, 367 n.2 (Fla. Dist. Ct. App. 1998).
life without possibility of parole. Thus, all capital felonies are now punishable either by death[,] by execution or by imprisonment until death.\(^{18}\)

The “capital” label, even if it does not portend the death penalty, nonetheless significantly influences the criminal process: a mandatory life sentence without possibility of parole could well be seen even by innocent defendants and their counsel as so severe as to compel a plea bargain for some lesser penalty to avoid the vagaries of a jury verdict; a defendant charged with a capital offense in Florida is not entitled to bail except under very special, and court-created, circumstances,\(^{19}\) a situation which adds substantially to the pressure on defendants to plea bargain; as mentioned above, the nature of the offense and the severity of the penalty can affect the lawyers, judges, and even, occasionally, the jury.

II. THE GIBSON APPEAL

Consider the circumstances of Mark Lee Gibson, a twenty-three-year-old, who appealed his conviction of capital sexual battery to Florida’s Second District Court of Appeal in 1998.\(^{20}\)

Gibson was arrested when his eight-year-old stepdaughter, after watching a television program involving a sexual molestation, told her mother that “‘daddy’ had touched her butt.” Although Gibson admitted to his wife that he had “messed with” the girl, Gibson was not arrested until a few days later when the girl’s grandmother was told about the incident. The deputy sheriff read Gibson his *Miranda* rights,\(^{21}\) explaining that the warning is “a lot of legal garbage but it basically comes down to the point that you don’t have to talk to me if you don’t want to.” In response to the deputy’s question, Gibson confessed to the charged physical behavior—that on several occasions and in a number of locales he had had sexual experiences with his stepdaughter: his penis came in contact with her vagina and there were a variety of other sexual contacts between the two.\(^{22}\) Gibson’s convic-


\(^{19}\) *See infra* note 72.

\(^{20}\) Gibson v. State, 721 So. 2d 363 (Fla. Dist. Ct. App. 1998). All facts in the text are taken from this opinion.


\(^{22}\) “Okay. So, your penis has actually touched her vaginal area? I’m not saying up inside, but it’s touched the lips of her vaginal area?” *Gibson*, 721 So. 2d at 364. The confession included admissions to similar sexual contacts, the defendant’s hand touching the victim’s vagina and bottom and the victim’s hand touching the defendant’s penis, in judicial districts other than Tampa (Hills-
tion, when he opted for a trial, was predictable: the child was the first and, according to the appellate court, a credible witness. A printed version of Gibson’s confession was read to the jury; medical testimony explained that Gibson’s “union with” the girl’s vagina rather than penetration was “consistent with” the absence of traumatic injury to her vagina as well as the intact nature of her hymen. Beyond the evidence, many Florida criminal defense attorneys believe that capital sexual battery defendants have little chance of acquittal by a jury no matter how weak the prosecutor’s case.

There were at least colorable procedural, substantive and constitutional reasons for reversing Gibson’s conviction on appeal. In the first place, the trial judge denied a request for continuance on the verge of trial although the public defender had just assigned a new lawyer to Gibson’s case:

The original information in this case charged Mr. Gibson with three counts of capital sexual battery based on penile penetration, and oral union. The information included a fourth count of lewd and lascivious conduct based on Mr. Gibson’s request to have the child touch his penis. On the Friday before trial in June 1997, the State amended the information to allege two counts of capital sexual battery, dropping the charge of oral union. The amended information included three counts of lewd and lascivious conduct, adding charges based on improper contact with the victim’s buttocks and fondling the victim’s vagina. It is clear that the State was not adding any new incidents to the information, but was merely attempting to reconfigure the charges arising out of the events as reported in January.

On Monday, immediately preceding trial, Mr. Gibson moved for a continuance. Although he was concerned with the amendment to the information, he was primarily concerned that the public defender had unilaterally assigned a new assistant public defender to defend his capital felony charges only one working day before the trial. The trial court denied the continuance, maintaining that the policy decision of the public defender’s office was not the court’s concern.25

23 For discussion of such testimony, see infra note 83.
24 For the statutory basis for “union with” liability, see supra note 13. The victim testified with conviction that the defendant’s penis had penetrated her vagina “halfway” “two or three times” and that it hurt “sometimes.” The expert testimony might have (but apparently did not) caused a problem by suggesting that the prosecutor may have been unwilling to rely on the victim’s penetration testimony. Transcript of Trial Testimony, State of Florida v. Gibson, June 9, 1997, p. 52 (copy on file with the University of Minnesota Law Library) [hereinafter cited as Transcript of Trial Testimony].
25 Gibson, 721 So. 2d at 365. As to lewd and lascivious conduct as a “lesser included offense,” see supra note 13. For additional information about the continuance issue and the dispute to which it led in a hearing on Gibson’s motion for post-conviction relief, see infra note 48 and infra notes 49–50 and accompanying text.
The court of appeals affirmed—agreeing with the trial judge that the public defender had been assigned to represent Gibson, not any particular lawyer, and the defender office’s internal assignment practices were not sufficient cause for a continuance, even on the verge of trial.26 It is true that after jury selection Gibson’s original lawyer aided in his representation,27 there was no evidence from the transcript alone that Gibson’s defense had been mishandled,28 and, in any event, it was settled law that issues of ineffective assistance of the newly assigned lawyer could be examined only by motion for post-conviction relief rather than by appeal.29 Yet everyone agrees that lawyers play a vital role in protecting defendants, especially in complex or difficult cases, and an unprepared lawyer cannot fulfill the role;30 that Gibson’s conviction involved a most serious sentence, one the court of appeals itself described as “death by imprisonment;”31 and that the prosecutor, the jury, and even the court of appeals panel apparently had some concern as to the propriety of imposing such a penalty on Gibson.32 Many lawyers believe that judicial manipulation of evidentiary, procedural, even constitutional precedent is influenced by the specific facts of the cases and by judges’ assessments of the defendant’s guilt. Given the circumstances (and especially the information the appellate opinion reported about the trial’s ending), such lawyers might well be surprised that the court of appeals judges were unwilling to cut Gibson some slack. The panel could have

26 Id. at 366.
27 Id. at 365.
28 But see infra notes 48 and 50.
29 Gibson, 721 So. 2d at 365-66. See Cox v. State, 354 So. 2d 957 (Fla. Dist. Ct. App. 1978). United States Supreme Court precedent was also cited. See also United States v. Cronic, 466 U.S. 648 (1984) (last minute substitution of trial counsel does not automatically render assistance ineffective). In the Cronic case, the defendant claimed that counsel was young and inexperienced and given only twenty-five days to prepare, that the charges were grave and serious and witnesses were not easily accessible. Yet these facts alone did not constitute per se ineffective assistance of counsel in the absence of a showing of actual ineffectiveness. See also infra note 30.

The court of appeals also rejected Gibson’s claim that he had not knowingly and voluntarily waived his Miranda rights—although the deputy had characterized the decision as “legal garbage” and despite the fact that he had not been warned that the crime carried a mandatory minimum sentence of life imprisonment without possibility of parole. Gibson, 721 So. 2d at 364. Gibson’s lawyer did not file a motion to suppress his confession and failed to object to its introduction into evidence. In the post-conviction relief proceeding, see infra notes 48 and 50, both of Gibson’s trial lawyers testified that no objection had been made to admissibility of his confessions because there was no good faith basis for such an objection. See Transcript of Proceeding on Motion for Post-Conviction Relief, in State v. Gibson, June 8, 2000, pp. 67, 160-63 (on file with author) [hereinafter cited as Post-Conviction Relief Transcript]. Gibson’s claim that his waiver was invalid was legally incorrect. Gibson, 721 So. 2d 363. A defendant’s failure to object to a confession under most circumstances waives even constitutional objections to its admissibility. See, e.g., Ferguson v. State, 692 So. 2d 930 (Fla. Dist. Ct. App. 1997) (in capital cases United States Supreme Court requires express waivers and record showing that waiver was knowingly and intelligently made; Florida capital sexual battery is capital in name only and therefore judge has no obligation to inquire of defendant as to waiver):

Gibson, 721 So. 2d at 368 n.14.
32 See infra notes 37–39 and accompanying text.
ordered a new trial on some narrow basis such as denial of defense counsel’s request for additional trial preparation time,\(^{33}\) so that Gibson could at least have revisited his decision not to accept “an unusual post-verdict proposal from the State that he plead guilty to a lesser included offense and waive his appellate rights in exchange for a sentence” of twenty-five years,\(^{34}\) less than life without parole, to be sure, but still onerous.\(^{35}\)

Gibson’s most substantial claim was that a mandatory sentence of life without the possibility of parole for a defendant with no prior convictions, even one convicted of sexual union with a child, constitutes either “cruel or unusual punishment” under Article I, Section 17 of the Florida Constitution, or “cruel and unusual punishment” within the meaning of the Eighth and Fourteenth Amendments to the United States Constitution.\(^{36}\) Here Gibson garnered more sympathy from the jury that convicted him, and, to some limited extent perhaps, even from the prosecutor. As the jury was leaving the courtroom, the prosecutor was overheard agreeing with the judge that the penalty for Gibson’s crime was life without the possibility of parole. The jury returned to the courtroom and a most unusual exchange ensued:

One of the jurors, not the foreperson, made a passionate speech, explaining that the jury concluded that something bad had happened in the child’s home, but that the misconduct was not entirely Mr. Gibson’s fault. Near the end of his speech, the juror said:

We feel the defendant deserves to be punished. I heard you say something about a life sentence. He doesn’t deserve a life sentence. I hope it is not a mandatory life sentence. If I would have known that, I don’t think I would have voted guilty for it. If I were King, I would take this child and put it with a different family altogether and hope that she had a great life. This is not to disparage your son [apparently addressing the defendant’s mother] or Mrs. Gibson. It’s just a very sad situation, and we’re all very concerned for the welfare of the child.

\(^{33}\) See infra note 48.

\(^{34}\) Gibson, 721 So. 2d at 366.

\(^{35}\) A court more sympathetic to the defendant’s correctional plight might also have found the deputy’s Miranda warning inadequate and therefore a sufficient procedural hook on which to hang a new trial. Florida appellate court rulings on Miranda issues have not been noticeably consistent. Compare State v. Kobielnik, 765 So. 2d 241 (Fla. Dist. Ct. App. 2000) (statements made by defendant while in police custody were involuntary and should have been suppressed), with State v. Koltery, 659 So. 2d 1224 (Fla. Dist. Ct. App. 1995) (question about defendant’s presence at mental health center which enlisted inculpatory statement that “I’m not crazy just because I f---d a little girl,” was not custodial interrogation designed to elicit confessions which would require Miranda warning) and State v. Orlando Vocal Feroben, 677 So. 2d 980 (Fla. Dist. Ct. App. 1996) (defendant’s admission after Miranda warning and during informal interrogation but prior to elicited formal and taped statement was admissible even though defendant retracted admission during formal statement).

\(^{36}\) U.S. CONST. amends. VIII and XIV, § 1; FLA. CONST. art. I, § 17. The possibility that the Florida and the federal norm imposed on the state differs is explored in note 44 infra.
Then the juror turned to the other jurors and said: "Does anybody have anything they may want to add, or did I sum it up pretty well?"
The court reporter then placed in the transcript the comment, "Juro rs indicating affirmatively."

The trial court imposed the mandatory life sentence at a later hearing, after Mr. Gibson had rejected an unusual post-verdict proposal from the State that he plead guilty to some offense and waive his appellate rights in exchange for a sentence of imprisonment with the possibility of release after 25 years.\textsuperscript{37}

Even the court of appeals, rejecting Gibson’s constitutional claim, expressed some reservation about the mandatory minimum: "Although the issue is close and this extreme penalty may cause some intrafamilial crimes to go unreported, we conclude that the penalty is not cruel or unusual."\textsuperscript{38} The opinion ended with a similar rhetorical flourish:

Thus, there is a possibility this inflexible mandatory penalty of life imprisonment may result in fewer convictions for this type of sexual predation than a more flexible penalty. As a result, this more severe punishment may ultimately prove to be a lesser deterrent than a more flexible penalty. These concerns, however, are matters for consideration by the legislature and do not affect this court’s constitutional analysis.\textsuperscript{39}

To decide the Eighth Amendment issue, the court of appeals applied the objective criteria found in United States Supreme Court opinions: "(i) the gravity of the offense and the harshness of the penalty, (ii) the sentences imposed on other

\textsuperscript{37} Gibson, 721 So. 2d at 365–66. That the jurors were left in ignorance of the sentence for the crime was in accord with settled Florida law. See Dailey v. State, 501 So. 2d 15 (Fla. Dist. Ct. App. 1986) (prosecution for capital sexual battery; jury instructions on maximum and minimum sentences requested by defendant properly refused since offense no longer punishable by death). See also infra note 102 and accompanying text. In light of the condition that Gibson waive his appellate rights, it is possible that the prosecutor’s offer was occasioned by concern that one of the issues or all of them together—denial of a continuance, the Eighth Amendment claim, the jury’s recorded objection to the mandatory sentence—might be sufficient for reversal of the conviction on appeal. Gibson’s refusal to accept the post-trial “deal” could have been based on his judgment as to his chances of getting the conviction reversed. If these speculations are accurate, both the prosecutor and Gibson’s lawyers were mistaken. (Of course, the public defenders had some reputational stake in Gibson’s decision—if the appellate court were to decide that the representation was constitutionally ineffective.) The prosecutor remembers that the public defender testified at Gibson’s sentencing hearing that he had urged Gibson to accept the post-trial offer. See interview with Michael Sinacore, Esquire, Assistant State Attorney, dated September 17, 2003 (on file in the University of Minnesota Law Library). In fact, Post-Conviction Relief Transcript, pp.27, 149, indicates only that both of Gibson’s lawyers encouraged him to accept the prosecutor’s last pre-trial plea offer. Gibson’s appeal and motion for post-conviction relief were handled by a subsequently hired private lawyer.

\textsuperscript{38} Gibson, 721 So. 2d at 367.

\textsuperscript{39} Id. at 370.
criminals in the same jurisdiction, and (iii) the sentences imposed for commission of the same crime in other jurisdictions.”

40 Id. at 368. The major interpretations of the Amendment when the Gibson case was decided were Harmelin v. Michigan, 501 U.S. 957 (1991); Solem v. Helm, 463 U.S. 277 (1983); and Rummel v. Estelle, 445 U.S. 263 (1980). The Constitutional environment was not unambiguous. In Rummel, the defendant was sentenced to life under a recidivist statute for three petty felonies (for which the defendant obtained, successively, $80 worth of goods and services, $28.36, and $120.75); a majority held the statute constitutional with the comment that “one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant imprisonment in a state penitentiary, the length of the sentences actually imposed is purely a matter of legislative prerogative.” 445 U.S. at 274. Three years later, in Solem, a bare majority held unconstitutional under a “proportionality” interpretation of the Eighth Amendment (incorporated into the Fourteenth Amendment and applied against the States, of course) the life imprisonment without possibility of parole of Solem, a South Dakota recidivist, for successive offenses that included three convictions of third degree burglary, one of obtaining money by false pretenses, one of grand larceny, one of driving while intoxicated and one of writing a “no account” check with intent to defraud. 463 U.S. at 291-92. Harmelin was convicted of possessing 672 grams of cocaine and was sentenced to a mandatory term of life in prison without possibility of parole. Harmelin, 501 U.S. 957. A balkanized Court upheld the sentence despite the fact that the defendant was a first offender. Justices Scalia and Rehnquist held that the history of the Eighth Amendment proved that “proportionality” evaluation of criminal statutes was not contemplated, that Solem was incorrectly decided, and that “we have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further.” Id. at 996. Justices Kennedy, O’Connor and Souter concurred, finding that the Eighth Amendment encompasses “a narrow proportionality principle” whose “precise contours are unclear,” but that several principles—“the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors”—dictate that the Amendment “does not require strict proportionality between crime and sentence.” Id. at 998–1000. The concurrence then concluded that because of the amount of cocaine the defendant possessed and the danger to individuals and the society of illegal drugs, the defendant’s sentence, although harsh, was not unconstitutionally disproportionate. The four dissenting Justices were equally fractured. Justice White’s dissenting opinion, which Justices Blackmun and Stevens joined, disagreed with Justice Scalia’s historical and policy analyses and held that the statute as applied violated the Eighth Amendment. Id. at 1009–27. More recently, in a federal habeas corpus proceeding, Andrade v. Lockyer, 270 F.3d 743 (9th Cir. 2001), challenging California’s Career Criminal Punishment Act, known as the “Three Strikes Law,” which when charged makes a third offense punishable by life imprisonment with no possibility of parole for twenty-five years, a 2-1 majority of a Ninth Circuit panel held the statute unconstitutional. The defendant’s prior convictions were for petty theft of merchandise worth approximately $150, charges elevated to felonies by the prosecutor. The prosecution which triggered the defendant’s two consecutive life sentences was for two additional petty thefts of nine videotapes from two K-Mart stores. The court of appeals decision was reversed in Lockyer v. Andrade, 538 U.S. 63 (2003); a 5-4 majority held that the constitutionality of the state statute did not have to be decided since habeas corpus should not have been granted because a federal statute bars such grants unless the state decision (Andrade’s conviction) “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States”—and under the cases described above “our cases exhibit a lack of clarity regarding what factors may indicate gross disproportionality.” Lockyer, 538 U.S. at 71. A companion case, Ewing v. California, 538 U.S. 11 (2003) was a direct appeal from a sentence of 25 years to life for a defendant, charged with stealing three golf clubs, who had a lengthy record and frequent imprisonments. Justice O’Connor, writing only for herself, the Chief Justice and Justice Kennedy, followed Justice Kennedy’s plurality opinion in Harmelin and found that because of Ewing’s lengthy record and frequent incarcerations, his sentence was not the kind of grossly disproportionate sentence the
Using these measures, the court of appeals deemed it appropriate to give "broad deference to the substantive penological policies announced by the state legislature."41 "Child sexual predation is a serious concern. . . . Even when it leaves no physical scars, it can create emotional damage that lasts a lifetime. There is evidence that victims of abuse become abusers and that this crime can transmit its injuries across generations."42 Moreover, there is need for a harsh penalty, and "there is little question that Florida has a history of imposing lengthy prison sentences for many offenses."43 Finally, although Florida imposes a more severe penalty for child sexual abuse than do its neighboring states, all states provide extensive penalties.43 The court of appeals acknowledged that the Florida Constitution contains its own "cruel or unusual punishment" provision, and the provision requires "proportionality review."44 Suppose the court of appeals had been more

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Eighth Amendment prohibits. Justices Scalia and Thomas found no disproportionality principle in the Amendment; four Justices dissented, including Justice Souter, who had joined the majority in *Harmelin*. For more information about Florida's and other states' constitutional norms as to excessive punishment, see infra note 44.

41 *Gibson*, 721 So. 2d at 370.

42 *Id.* at 368. For some evidence that these conclusions are controversial, disputed within the social science community and not universally accepted as true, see Robert J. Levy, *Discretionary Prosecution of Child Sexual Abusers: Adolescent Victims*, 17 BAR ILAN LAW STUDIES 7, 50 n. 122 (2002); Phillip Jenkins, Moral Panic: Changing Concepts of the Child Molester in America 16 (1998) (calling belief about life-long damage "a new and unassailable social orthodoxy").

43 *Id.* at 369.

44 *Id.* at 367. In *Hale v. State*, 630 So. 2d 521 (Fla. 1993) the Florida Supreme Court confirmed that "proportionality" review is appropriate under the Florida Constitution, but that there was no need to delineate the precise contours of the "arguably . . . broader [Florida] constitutional" provision in this case because a concurrent sentence of two ten to twenty-five year terms for a drug dealer was clearly not disproportionate to the crime. The court also reaffirmed its commitment to the proposition in *Leftwich v. State*, 589 So. 2d 385, 386 (Fla. Dist. Ct. App. 1991), that "[t]he length of the sentence actually imposed is generally said to be a matter of legislative prerogative." As the *Gibson* opinion indicates, subsequent cases continued to emphasize the United State Supreme Court decisions and to make no noticeable use of the "and/or" distinction between the state and federal punishment clauses. See supra note 31.

In *Jones v. State*, 701 So. 2d 76 (1997) (4-3 decision), the Florida Supreme Court decided that capital punishment by electrocution is not a violation of the Eighth Amendment or Florida's "cruel or unusual punishment" constitutional prohibition. The litigation, filed by a person sentenced to death, was occasioned by the most recent electrocution during which flames were observed near the headpiece of the electric chair and smoke emanated from under the headpiece. Apparently concerned and energized by hints in the dissenting opinions, the legislature promulgated an amendment to the Constitution which added to Section 17, the Excessive Punishment provision, the following language: "The death penalty is an authorized punishment for capital crimes designated by the Legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the legislature, and a change in any method of execution may be applied retroactively." After the amendment was enacted in the general election of 1998, the Florida Supreme Court, in another 4-3 decision, declared the provision invalid because the ballot summary did not state the
sympathetic to Gibson’s plight because he was a first offender and because the jury claimed it would have decided the case differently had it known the impending penalty; and suppose the court of appeals had concluded that because Florida had adopted an arguably broader constitutional provision, under all the circumstances, the legislature’s mandatory minimum “death by imprisonment” was cruel or unusual as applied to Gibson. Is it possible that the court of appeals decision would have been reversed by the Florida Supreme Court? Perhaps. Four years later, the trial court’s denial of Gibson’s motion for post-conviction relief based on ineffective assistance of counsel was affirmed by a severely divided three judge panel of the court of appeals. The opinion for the court concluded that because Gibson had not shown he was prejudiced by his representation, defense counsel’s performance did not have to be reviewed specifically. Gibson was not in fact prejudiced: the victim testified; Gibson confessed to law enforcement authorities; at the post-conviction hearing, both counsel testified that they were prepared for trial; and cross-examining the victim with broad, open-ended questions, which allowed her to testify to uncharged offenses, was a justified tactical decision designed to confuse the witness. The concurring judge voted to deny relief, al-

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45 See supra note 44.


47 See infra notes 52–53.

48 Gibson, 855 So. 2d at 1160. As is probably true of most appellate opinions, the judge’s summary of the facts was partial and misleading. Both Gibson’s newly assigned and his original public defender testified repeatedly during a hearing that lasted two days and included more than 300 pages of transcript that they were both prepared for trial, that they had met with Gibson several times (for about three hours on two occasions), that the newly assigned public defender had been present at the pre-trial depositions of the prosecution’s witnesses, and that the two lawyers worked as a team throughout the trial. See, e.g., Post-Conviction Relief Transcript, supra note 29, at pp. 9, 28, 83, 121, 123, 130–33. The newly assigned attorney claimed that his motion for a continuance at the
though "several points raised by the dissent are troubling..." Nonetheless, the concurring opinion pointed out that both defense attorneys "were highly experienced criminal defense lawyers" facing a "weak defense case because of [Gibson's] confession," they had discussed and agreed on a difficult trial strategy, and the strategy's "success or failure is not the standard by which counsel's performance must be measured." The Chief Judge dissented:

I am aware that at the evidentiary hearing on the post-conviction motion, both attorneys testified that they were prepared for trial. This testimony differed significantly from the representations made to the court at the time of trial, when the continuance was requested and the court was informed that through reassignment neither attorney was prepared to represent the defendant on these most serious charges. I come to my position on this court with some experience in the courtroom as an attorney and a trial judge. This background beginning of the trial (see the discussion in the dissenting judge's opinion, in the text accompanying note 50 infra) was occasioned because as the jury was about to be chosen Gibson handed him a list of witnesses his mother wanted called—and when Gibson later told the judge that he did not want them called the judge announced that there was no need for a continuance. Id. at 12–15. But when presented by the prosecutor with the trial transcript, which indicated that the lawyer had requested a continuance with the statement that he had met the defendant for the first time in court that morning, the lawyer indicated that the transcript was "not factually accurate." Rather, responding to the prosecutor's question, the lawyer indicated that he did not remember saying that he had never met Gibson before that morning. Id. at 14. As to the judge's conclusion that Gibson was not prejudiced by counsel's cross-examination with broad, open-ended questions, the matter is also much more complex than the opinion acknowledged. Although the cross-examination of the victim gave her an opportunity to tell the jury about the additional, uncharged sexual abuse, its purpose was to show, according to Gibson's lawyer, that in her deposition the victim appeared confused about where the abuse occurred. The cross-examination might, therefore, allow a judgment of acquittal because there would be no "corpus delicti" (no acts of abuse in Hillsborough County, the locus of the prosecution). In addition, the child's confusion could be combined with testimony planned to show that the child's mother (who initially did not believe her daughter's story) had as a girl falsely accused her own stepfather of sexual abuse, and that she had persuaded Gibson to confess as consideration for reuniting the family. Id. at 20–24, 40–42, 144–45. Both lawyers testified that their strategy was planned and that the possible benefits of the strategy outweighed its risks. Id. at 93–95, 182. The difficulty with the defense lawyers' contentions was that in direct testimony the victim had already testified that at least some of the abuse had occurred in Hillsborough County. See Transcript of Trial Testimony, supra note 24, at 66. Moreover, in response to one of Gibson's counsel's questions to the victim about geographic location of the abuse (which, ambiguously, could have appeared to the victim to be asking about type of abuse—"Did he do anything else to you...touch you in any way at someplace other than the bed?"), the victim answered, "Well, he - licked my vagina." The questions continued: "Q. 'With his mouth?' A. 'Yes, sir.' Q. 'With his tongue, you mean?' A. 'Yes, sir.' Q. 'Where did he do that?' A. 'I can't remember.'" Id. at 69. The results of the cross-examination, eliciting abuse episodes which had been redacted from the confession (Post-Conviction Relief Transcript, supra note 29, at 87–88), could have disposed the jury to convict Gibson of the behavior charged. On the other hand, the tactic may have succeeded, this judge's opinion noted, because the jury acquitted Gibson of one of the counts of capital sexual battery and one of the counts of lewd and lascivious conduct. Gibson, 835 So. 2d at 1160. Gibson's lawyer claimed that the acquittals were the product of the victim's "waffling" as to the location of the abuse. Post-Conviction Relief Transcript, supra note 29, at 85.

49 Gibson, 835 So. 2d at 1161–62 (Silberman, J., concurring).
leads me to the conclusion that the attorney reassigned to another division, with no more responsibility for Gibson's case, did not prepare for trial. I accept the newly assigned public defender's earlier representations to the trial court that he was not prepared for trial. Although the record reflects that both attorneys appeared and tried the case, I am unable to see how doubling the number of unprepared attorneys provided effective assistance of counsel.

The jury's reaction to this verdict convinces me that the evidence was not so overwhelming that we can conclude that Gibson was not prejudiced by ineffective representation.

Substantive as well as procedural criminal law doctrines added greatly to the pressure imposed on Gibson, as they impose on all Florida child sexual abuse defendants seeking post-conviction relief. Claims of denial of effective assistance of counsel are extremely difficult to sustain, whatever the behavior of the defendant's lawyer. They must be raised by post-conviction motion, after a substantive appeal has been unsuccessful, when the defendant has usually been imprisoned for a lengthy period. The ineffectiveness criteria for ordering a new trial, taken directly from United States Supreme Court precedents, are broad and indeterminate and require a showing of actual prejudice (e.g., that the trial would have come out differently), a showing that is, at best, very difficult to make. The broad criteria

50 Id. at 1163 (Blue, C.J., dissenting). The lawyer assigned to Gibson just prior to the trial testified at the post-conviction hearing that he had tried eighteen capital sexual abuse cases in the year prior to Gibson's trial and obtained acquittals in sixteen of them—all but the two (including Gibson's) in which the defendant had signed a confession. Post-Conviction Relief Transcript, supra note 29, at 90. It is difficult to rely on feelings or hunches based on reading a transcript; nonetheless, the transcript conveys the impression that Gibson's lawyers had a substantial investment in the post-conviction proceedings in avoiding any stigma that their representation had been inadequate. See also supra note 48.

51 See, e.g., Rhue v. State, 693 So. 2d 567 (Fla. Dist. Ct. App. 1996) (defense counsel's failure to object to testimony supporting credibility of child victim constituted ineffective assistance of counsel and case remanded for new trial; conviction had been affirmed on direct appeal, 541 So. 2d 1181 (Fla. Dist. Ct. App. 1989)); trial court denial of motion for post-conviction hearing reversed, 603 So. 2d 613 (1992); when new trial ordered, defendant had been in prison for seven years). Gibson was incarcerated in January and convicted in June, 1997; his conviction was affirmed in October, 2002, he had been in prison for almost five years.

52 See Bowman v. State, 748 So. 2d 1082 (Fla. Dist. Ct. App. 2000). The prejudice test followed in Florida and most other states was formulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984): "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." In Bowman, the Florida Court of Appeal held that counsel's failure to present the defendant's alibi evidence did not prejudice his case.

53 See, e.g., Fannin v. State, 645 So. 2d 1052 (Fla. Dist. Ct. App. 1994) (motion for post-conviction relief on grounds of ineffective assistance of counsel denied; although defense counsel failed to object to expert's testimony as to a "pedophile profile," testimony now inadmissible by virtue of Florida Supreme Court decision in 1993, case was tried in 1990, and, in 1991, five of
allow appellate judges substantial discretion to deny an effectiveness claim if they believe the defendant was guilty, whatever his attorney's lapses of proper advocacy. In addition, there is some basis for suspecting that, at least with respect to the right to effective counsel issues, Florida trial and appellate judges, and perhaps even some defense lawyers, may not be very favorably disposed to capital sexual battery defendants. Liberal use of the "harmless error" doctrine—denying a new

eleven Court of Appeal judges, in the decision reversed by the Supreme Court, held that such testimony was admissible; under the circumstances, counsel's failure to object to the testimony was not unreasonable. But see Gonzalez v. State, 851 So. 2d 859 (Fla. Dist. Ct. App. 2003) (trial court decision that defendant was not denied effective assistance reversed; state had obtained pre-trial order prohibiting any witness from testifying concerning prior sexual abuse of victims by someone other than defendant; defendant's lawyer failed to object to prosecutor's closing argument that victims would not have known about or been able to describe sexual acts but for defendant's acts with them).

54 See, e.g., Bowman, 748 So. 2d at 1085 (although the Strickland prejudice test is not always easy to apply, "considering the totality of the evidence and the substantial amount of corroborating evidence and the unaffected evidence, we conclude that appellant has failed to carry his burden of showing prejudice"); Perry v. State, 718 So. 2d 1258 (Fla. Dist. Ct. App. 1998) (prior bad acts testimony not a feature of the trial but only incidental, and, therefore, admitting such testimony was not fundamental; conviction affirmed). Cf. Rhue, 693 So. 2d 567 (defendant denied effective assistance of counsel because of failure to object to testimony by expert and by victim's mother, grandmother and great-grandmother, that victim was telling the truth; victim's credibility was pivotal issue in the case and substantiating evidence was thin and disputed; "given the significance of the issue [of the victim's credibility], we must conclude that, but for trial counsel's omissions, the outcome of the proceeding would have been different").

55 See Washington v. State, 687 So. 2d 279, 280 (Fla. Dist. Ct. App. 1997) (conviction reversed although defendant's lawyer failed to object when prosecutor in closing argument compared defense to "big lie" as practiced by Joseph Goebbels, propaganda minister back at the time of Adolph Hitler, because, in the context of this case, the prosecutor was apparently trying to bolster a difficult case which came down to a credibility contest between defendant and his stepdaughter victim); Pippin v. State, 626 So. 2d 1091, 1092 (Fla. Dist. Ct. App. 1993) (trial court's summary denial of motion for post-conviction relief on ground of ineffective assistance reversed on several grounds; "we would be remiss in failing to note that appellant's trial counsel... was reprimanded repeatedly for his incompetent handling of matters in this court... [and therefore] the trial judge should closely scrutinize the adequacy of his representation in the trial of this case"); Tucker v. State, 754 So. 2d 89, 93 n.7 (Fla. Dist. Ct. App. 2000) (defendant's complaint that court-appointed counsel assumed he was guilty and would not present evidence defendant claimed would prove his innocence did not establish ineffective assistance; "it is of no small import that Tucker had, on at least one prior occasion, claimed dissatisfaction with another appointed public defender. Such tactics are often employed by defendants to stall the inevitable"); Moore v. State, 693 So. 2d 571 (Fla. Dist. Ct. App. 1997) (post-conviction relief granted on appeal for ineffective assistance; eleven-year-old stepdaughter recanted claims of abuse in a deposition three months after making them, claiming that she had been angry with defendant for being too strict with her; mother told police that girl denied the charges and was accused by police of attempting to change the girl's testimony; counsel refused defendant's numerous requests that counsel meet with the girl and her mother; trial judge denied relief because defendant's guilty plea colloquy established that plea was freely and voluntarily entered and counsel was not ineffective simply because he discontinued investigation after defendant decided to plead guilty); Lee v. State, 677 So. 2d 312, 313 (Fla. Dist. Ct. App. 1996) (denial of post-conviction relief for ineffective assistance reversed because trial judge denied evidentiary hearing although trial counsel had informed defendant "he had no speedy trial rights, refused repeated requests to file motions asserting speedy trial rights even after the 175-day speedy trial window closed, and waived the right to speedy trial without appellant's consent... [when]
trial unless the defendant's conviction record contained a fundamental error—increases appellate court discretion even as it keeps in prison defendants whose trials may have been tainted. Yet the many plea bargains that seem to have been at least influenced by the life sentence "hammer" have produced no substantial judicial concern.

Should Gibson have been convicted and sentenced to prison for life? The twelve jurors and two trial judges as well as five of the six appellate judges who considered the facts and the nature of the trial thought he was guilty and fairly convicted. Only one of the six appellate judges thought he should have had a new trial. Was his sentence too harsh, under all the circumstances? Only twelve jurors are on the record on that issue—and their assessment is irrelevant. Gibson will be in prison for life. What is the problem here? Were prosecutors too quick to proceed to trial, considering the harshness of the penalty, or were they too recalcitrant to offer a plea bargain with a sensible (e.g., less onerous than incarceration for fifteen years) penalty for Gibson's behavior? Yet Gibson was surely guilty and, at least from the evidence provided by the appellate opinions written about his case, there was no reason to believe that Gibson's behavior was the product of some condition (alcoholism, mental disease or defect, etc.) that might dispose a jury or a sentencing judge, even if doing so were legally permissible, to opt for sentencing leniency. Were Gibson's public defenders constitutionally ineffective, or perhaps the record on appeal does not refute" the allegations). See also supra notes 50–54.

Admission of similar fact evidence (where defendant's behavior with persons other than the victim is presented to the jury to show a "common plan" or some similar conclusion under the Florida version of Federal Rule of Evidence § 404(a)) has been a common subject of appeals from capital sexual battery convictions and a common reason for their reversal. See, e.g., Griffith v. State, 723 So. 2d 860 (Fla. Dist. Ct. App. 1998); Land v. State, 730 So. 2d 856 (Fla. Dist. Ct. App. 1999). But see Pedry v. State, 718 So. 2d 1258 (Fla. Dist. Ct. App. 1998) (prosecutor did not make similar fact evidence a feature of the case). In the Gibson post-conviction relief proceeding, the trial judge found that whether or not the introduction of similar fact evidence by the prosecution is reversible error, it is not ineffective assistance of counsel for the defendant's attorney to introduce such evidence. See supra note 48.

See infra text accompanying notes 72–73. But see Gibson, 835 So. 2d 1159, 1161 (2002) (Blue, C.J. dissenting).

The prosecutor made a written pre-trial plea offer, one the prosecutor believes Gibson's public defenders urged Gibson to accept, of conviction of attempted capital sexual battery with a sentence of fifteen years in prison followed by fifteen years of probation with standard behavioral conditions. See letter from Michael Sinacore, Esquire, to Robert J. Levy, dated September 20, 2003 (on file in the University of Minnesota Law Library). See also Post-Conviction Relief Transcript, supra note 29, at 27, 149. Gibson's initially appointed lawyer remembered that there was a first plea offer of twenty to twenty-five years (because of the possibility of charges in other judicial districts, see supra note 48) that was refused. Id. at 197. In Tampa at the time Gibson was prosecuted, and in some other Florida judicial districts, plea bargaining was limited to a written submission by prosecutors to defense counsel on the eve of trial of a reduced sentence offer on a "take it or leave it" basis. For a summary of the standard probation conditions in Florida at the time, see infra notes 105–13 and accompanying text.

Plea bargaining, until recently largely ignored by commentators, has become in recent decades a significant and controversial topic of academic scholarship and debate. See Y. KAMISAR ET. AL., CASES AND MATERIALS ON MODERN CRIMINAL PROCEDURE 1274-1332 (10th ed. 2002). In Gibson's case, the judge's role might well have been minimal because, when the judge became ac-
only unwise, in failing to persuade him to accept the pre-trial offer of fifteen years
in prison in exchange for a guilty plea, or in allowing him to turn down the prose-
cutor's post-trial offer of twenty-five years? 60 Seldom will enough evidence of the
factual and legal circumstances surrounding a defense attorney's advice to his cli-
ent exist to allow judicial exploration of its adequacy. Even if constitutional and
state appellate doctrine were more restrictive, giving much less tactical and trial
practice decisional discretion to defense attorneys than they do,61 it would be very
difficult for judges to second guess judgments made by defense attorneys under the
pressures created by an existing indictment, much less those made in the cauldron
of a criminal trial. In any event, rejection of both the prosecutor's pre-trial and
post-trial sentence offers was apparently the defendant's decision rather than his
lawyers' advice.62 And, even if the issues were somehow legally relevant, the fact

60 See supra notes 48 and 50 and infra note 62.
61 But see the appellate court reversals of convictions in Gonzalez, supra note 53; Rhue, supra
51; and Washington, Moore and Lee, supra note 55.
62 I have been told by experienced Florida public defenders that, given Florida post-conviction
relief doctrine (see supra notes 51-55), no responsible defense counsel would urge a defendant
who had confessed and been convicted by a jury to rely on either a direct appeal or a post-
conviction proceeding for relief from a capital sexual battery life sentence. The same informants
claim that, despite their advice, many defendants indulge the fantasy that if their convictions are
that Gibson’s lawyers were willing to testify at the post-conviction relief hearing that they had in fact been prepared, even though they told the trial judge the opposite when the case was called for trial, suggests that any post-conviction judicial examination of pre-trial and trial decision-making and advice by defendant’s counsel is likely to be summary, affected by judgments about the defendant’s guilt, and inconclusive.

What about the Florida legislature’s choice of a mandatory minimum sentence of life in prison without the possibility of parole for Gibson’s offense? There is surely widespread criticism of mandatory minimums. But the Florida legislature chose the death penalty for the offense Gibson admitted committing, the Florida legislature refused to take off the books a death sentence the state’s supreme court declared unconstitutional, and the Florida legislature authorized modification of “or” to “and” in the state’s constitutional criminal penalty limitation clause, apparently because of a fear that the Supreme Court might use the former phrase to limit some onerous sentences, such a legislature might not consider too harsh an “LWOP” sentence for Gibson’s crime and the public would probably approve as well. Gibson’s may be one of those situations that seem inappropriate, if not unjust, but must be accepted because it is the price of a system that, in general, accomplishes its purposes. It may well be that a rational legislator might conclude, as do many criminal law scholars, that certainty of punishment deters more crime, and more efficiently, than does increasing severity of punishment. But legislators seem, in general, to be more worried about getting reelected (and, therefore, what use an opponent might make of any vote they cast) than the fine points of criminal justice policy. Who cares if public abhorrence of child sexual abuse and abusers might decline if the sentence for the crime were reduced? What difference does it make to legislators whether sexual batteries might increase, whether the social and financial costs of incarceration might decrease, if the sentence for the crime were reduced to something less than death by imprisonment? Looking closely enough at a significant social problem and a severe criminal law response to it leaves as many

reversed on procedural grounds they will be set free. See also supra notes 48 and 50.
64 See supra note 44.
65 Id.
66 Id.
67 For a brilliant and engaging examination of the extant research, the issues underlying deterrence policies, and delineation of a research agenda to throw additional light on the issues, see FRANKLIN E. ZIMRING AND GORDON J. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 194–209 (1973). The authors’ sophisticated analysis is too complex to reduce to a footnote and makes the statement in the text just short of simplistic.
questions about political processes as about criminal justice issues.

III. THE Garcia CASE

In January, 1995, when a call to the police initiated the case, Ramon Garcia was fifty-years-old and had lived with Ms. Estelle Perez and her ten and eight-year-old daughters of a prior marriage for five years. The girls’ father was in prison. Garcia’s own daughter, born to Ms. Perez, was a little over two-years-old. Mr. Garcia was unemployed, according to the police report, and had one prior conviction, with three counts: battery on a police officer, resisting an officer with violence, and “loitering” and “prowling.”

On January 7, at 7:00 A.M., a Metro-Dade detective referred to the department’s sexual battery investigators Ms. Perez’s call complaining that Garcia had sexually molested her oldest daughter, Elena:

the victim’s mother informed him that the victim had been going through mood swings and feelings of depression for several months, and when she would ask the victim what was wrong with her, she would always respond by saying, “Nothing, I can’t tell you.” The victim’s mother stated that after a long conversation with her, on this morning, 01-07-95, which began at approximately 12:00 a.m., the victim disclosed to her that the subject molested her on several occasions. The victim further stated to her mother that between the months of September and November of 1994, the subject touched her breasts and vaginal area over her clothing. The victim also stated that the subject penetrated her anally with his penis.

The victim then stated that the last incident took place at the new apartment. She stated that she was looking at herself in the mirror when the subject grabbed her from behind, removed her pants and panties and forced penile to anal sex against her will.

The detective reported that Elena had not previously told her mother or any family member: “No, I didn’t tell anyone because Ramon told me that if I did, he would kill my mother.”

Within an hour and a half, the investigating detective had met with Ms. Perez and Elena and interviewed Elena alone; the detective immediately arranged an appointment for Elena with the Rape Treatment Center and set in motion a search

69 All records for the Garcia case, including police reports, deposition and hearing transcripts, and other documents are on file with the University of Minnesota Law Library and were copied with the permission of the Dade County Attorney’s Criminal File Center. Garcia’s prior convictions were mentioned only once after the police report (called the “A-Form”), in the probable cause bail hearing. Whether it played some role in the plea bargain calculations of the defense lawyer or prosecutor could not be determined from the file kept by the prosecutor.

70 The Rape Treatment Center, a specialized agency of the University of Miami Medical School (Jackson Medical Center) does forensic investigations and provides medical and psychological treatment to adult and child victims of sexual abuse.
for the defendant which culminated some ten days later (after a private lawyer arranged the defendant’s voluntary surrender) in a police station interview. When the detective discovered that Garcia’s attorney had instructed him not to answer questions, Garcia was arrested and jailed.

A second interview with the victim provided additional information: the assault had taken place in November while the victim was helping the defendant move some of the family’s possessions to a new apartment and shortly after the victim asked the defendant to buy her a new backpack. The victim explained that during the assault, “while his penis was in me, it began to sting a little.” Ramon had bought the backpack for her on the way home. Earlier assaults, involving fondling her breasts and vagina over her clothing but no penetration, occurred earlier in the family’s old apartment. The victim explained again her failure to disclose the assault earlier: “Ramon told me that if I did he would kill my mother,” and “If you tell your mom I kill both of you.”

Two days later, Elena told the Rape Treatment Center interviewer, according to handwritten notes on the Center form, “My stepfather has been having a sexual relationship with me. He put his penis in my rectum more than 3 times, less than 10 times, last time in November. He touched me also in my breasts and my privates.” On the form’s genitals sketch, an arrow indicated that the hymenal opening was 12 millimeters horizontally and 10 millimeters vertically; checked boxes indicated that there were no old or fresh tears in the hymen, no vaginal secretion or D/C, and no assessment of the cervix. A written note described a rectal examination: “no lesions, but decreased anal sphincter tone” (a remark that sparked considerable controversy later).

The next day, January 10, Elena was seen in the Children’s Center. The Center is an interviewing and counseling adjunct to the Capital Sexual Battery Unit, an autonomous subdivision of the office of the State Attorney (the elected criminal prosecutor for the judicial district), and shares Unit offices. The Forensic Child Specialist repeated the previous day’s findings (“No old or fresh tears to hymen; 12 mm by 10 mm opening; decreased anal sphincter tone”). Elena’s mother told the interviewer: since the November move to the new apartment Ramon had not been living with the family, “but he visits almost every day to see his daughter;” Elena told Estelle, her mother, that when Ramon took down her pants and put his penis in her rectum, “he was moving up and down and it hurt her a lot;” “other times Ramon did similar things to Elena at their old house but not as bad as the time when they were moving;” “the other times Ramon would rub his penis on her buttocks and only put it in her rectum a little way;” Ramon told Elena that “if she told anyone he would kill her and her mother;” Elena “has been sad and crying a lot since this past October which she attributed to not having her father around;” Ramon has a gun and “has threatened to kill [Estelle] if he sees her with another

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71 The assistant state attorney wrote several comments on the A-Form emphasizing the defendant’s threats; the victim’s comment that “me and my sisters are afraid of Ramon because he has a very bad temper” and “when the subject gets upset, he screams which causes the family to become frightened” elicited the hand-written note “D violent.”
man;” “she moved out of her house after Elena told her what Ramon did to her and they have been staying with different family members.”

Elena’s interview was videotaped. The interviewer’s dictation read, in part:

She was wearing a shirt and Bermuda shorts. He pulled down her Bermuda’s then he opened his pants and put his penis in her rectum. He pulled her panties down when he did that to her. After he did that he was just normal, as if nothing ever happened and she was “kind of dumb.”

[At the old house] when he did not pull her pants down he would stand and go up and down with his penis on her rectum but he did not put it “in, in, in.” The worst time was the day they moved because her mom was not there and he took advantage. . . . When he put his penis in her rectum it felt “weird” and “bad.” She did not see his penis but she saw him pull down his pants. His penis felt “kind of soft” and “nasty.” Nothing came out of it and it felt “kind of dry.”

Elena said at her old house Ramon did that to her more than 3 times. He did not pull down her pants, take his pants down or have his penis out any of those times. She thought that he took his penis out another time but that time he did not stick it “as in.” She was at her old house when he did that. No one saw that happen. I asked her how many times he actually put his penis in her rectum and she said 2 times. The first time it happened she was around 9 years old. She was 10 years old the last time it happened when she was moving to her new house.

Thus, three separate descriptions of Elena’s charges were prepared: the detective’s probable cause statement (the A-Form), the Rape Treatment Center doctor’s form with notations (including the “decreased anal sphincter tone” observation), and the Children’s Center dictation.

A four-count information (three counts of lewd and lascivious assault and one of capital sexual battery) was filed and a preliminary bail (“Arthur”) hearing, twice postponed, was held before Judge Sosa on February 28, 1995.72 Since defendants incarcerated at the time of trial are more likely both to be convicted and to be sentenced to incarceration,73 and since defendants facing life in prison without possi-
bility of parole will certainly be interested in a plea bargain for a lighter sentence,\textsuperscript{74} the stakes in Garcia's *Arthur* hearing were high. Yet the hearing was short, the thirty-six page transcript considerably shorter than the subsequent deposition of the Rape Treatment Center examining doctor. An interpreter was appointed because Garcia spoke no English. The interpreter and witnesses were sworn and the prosecutor invoked the procedural rule requiring sequestration of witnesses. The State's first and only witness was the investigating detective. A member of the police force for six years, assigned to sexual crime investigations for sixteen months, he had investigated some eighty sexual assault complaints. A hearsay objection to questions about the victim's statements was overruled: "hearsay is admissible for the purpose of the *Arthur* hearing." The detective's testimony included the following statements: When Elena reported the assault to him she was very calm. "At the beginning she was nervous and then she relaxed and disclosed to me what actually transpired." Elena "said, 'He put his thing in my rear end,'" correctly explained her terms as Ramon's penis and her rectum, and "said it stung when he put it inside of her rectum." Elena also described Ramon's other assaults and her reasons for failing to disclose them. Ms. Perez, interviewed through Elena because she spoke only broken English, disclosed that she was terrified of the defendant. The A-Form was admitted into evidence. The detective had not attended the Rape Treatment Center examination, nor had he spoken to the examining physician. The detective had watched the videotaped Children's Center interview on a monitor. Although Garcia's lawyer\textsuperscript{75} expressed disappointment that she had not been able to make arrangements to have the interview videotape introduced into the *Arthur* hearing record, the Children's Center report was admitted without objection.\textsuperscript{76} Questioned about other victim contacts, the detective testified that another officer told him that Ms. Perez called to express her fear of the defendant; Ms. Perez also told the other officer "that she had taken the victim to the Rape Treatment Center and she was examined and evidence was found substantiating her allegations. . . ." Ms. Perez vacated her residence because of fear of the defendant. Finally, Garcia was identified in the court room.

\textsuperscript{74} The majority of a randomly selected sample of 1996 Dade County capital sexual battery charges terminated in pleas to some lesser offense—usually some form of lewd, lascivious, or indecent assault. See supra note 13.

\textsuperscript{75} Garcia was represented by a public defender who associated with another lawyer fluent in Spanish. The second lawyer conducted the *Arthur* hearing; some of the depositions were conducted by both—before Garcia changed lawyers. See infra note 98 and accompanying text.

\textsuperscript{76} The Children's Center Report, as it appeared in the Unit's case file, included a copy of the Rape Treatment Center form with the remark about decreased anal sphincter tone that became the subject of controversy later in the hearing and thereafter. The hearing transcript suggests, see the cross-examination which follows this note, that the form was introduced into evidence as attached to the Children's Center Report. Garcia's lawyer cross-examined the detective about the report. See infra note 77 and accompanying text. Prior to the *Arthur* hearing, on December 20, 1995, the Rape Treatment Center examining doctor signed an affidavit that his report had been prepared contemporaneously with and as a part of his examination of Elena and the results of his examination were incorporated into the report. There was no indication that the affidavit was included in the *Arthur* hearing record.
On cross-examination of the detective, the following colloquy occurred:

Q. Now, are you aware that the result of the Rape Treatment-Center, exhibit A, examination indicates that there were no lesions or tears to the rectum?
A. I was made aware that the doctor's examination revealed evidence corroborating the victim's allegations.77
Q. Evidence corroborating the victim's allegations?
A. Yes.
Q. Were you aware that there were no lesions found to the rectum?
A. Yes.
Q. Were you aware that there were no healed tears or scars to the rectum?
A. No.
Q. Were you aware there was no physical injury of any sort indicating that there had been penetration by an adult to a ten-year old child?
A. No, I was just informed by the Rape Treatment nurse and by [the policeman contacted by Ms. Perez] that the Rape Treatment Center report did corroborate the victim's allegations.
Q. Actually, the Rape Treatment Report only—the only thing it says is that it showed a decreased anal sphincter tone, nothing else?
A. Right.
Q. And nothing which you would expect to find in a case where there was actual anal penetration by an adult on a ten-year old child. Would you expect to find some sort of injuries or—
A. Well, I am not [a] doctor, so that is not my profession.
Q. Well, in your experience as a sexual battery—
A. Yes.
Q.—detective, would you expect to find some sort of more serious injuries or visible injuries?
A. As a sexual battery detective we work in connection with the doctor at the Rape Treatment Center and once they tell us that a—what they find in their evidence is it corroborates the victim's allegations, then that is what I go on. I don't question the doctor.
Q. Actually you never spoke to the doctor?
A. Absolutely.
Q. You did not?
A. I did not.
Q. Okay.

77 Notice the non-responsive answer. Instead of asking the judge to instruct the witness to answer, defense counsel simply takes note of the nature of the answer and persists.
Garcia’s lawyer asked the detective if he knew that, prior to the allegations, in her daughter’s presence, Estelle had threatened to call the police, if necessary, to get the defendant out of her life. The prosecutor’s relevance objection was overruled: the mother and the daughter might have a motive to fabricate the charge. The detective denied knowledge of the threat. Nor was the detective aware of “any problems this family had been having,” or of “any incident while they were together where the police had to be called out there for any allegations of any type of physical violence or abuse.” The State rested.

The defense presented only one witness, Garcia’s brother’s daughter. She had known the defendant all her life, and had known Ms. Perez since her uncle began a relationship with her some five or six years previously. The niece testified that she heard Ms. Perez say in front of Elena and the witness’s mother, “she didn’t know how to get [the defendant] out of her life. Like, she didn’t know what to do, she had to find something to get him out of her life.” The judge admitted this testimony as relevant to Ms. Perez’s and Elena’s motive. But the judge would not allow testimony about the defendant’s non-violent nature. Cross-examination elicited the fact that the witness had never lived with the defendant and his family and that she was confused as to the timing of the overheard conversation.

The judge allowed oral argument. The prosecutor stated:

[F]rom the Rape Treatment Center report made by the doctor, in his affidavit he notes that she had decreased sphincter muscle tone, that being consistent with anal penetration. From her statement that she gave to the police officer, and when the victim was interviewed at the Children’s Center, she was able to give details as to when and how this happened, explained how he was able to put his penis inside of her rectum. She was even able to describe how it felt. If, in fact, she had been making all this up, how would she know how to describe how it felt, unless, in fact, it happened. And she did feel this discomfort.

The prosecutor cited the girl’s fear for her mother’s safety to explain her failure to disclose earlier.

Garcia’s lawyer referred to the couple’s marital troubles and Estelle’s desire to be rid of the defendant; but she focused primarily on the absence of physical evidence:

I believe that the nature of this type of crime, of anal penetration of an adult to a child, would result in certainly much more evidence of damage or injury than what the Rape Treatment report indicates. It says in there that it was—the only thing consistent with it was that there was a loss of sphincter muscle tone. That could be consistent with a lot of other things. And it’s certainly no evidence of any lacerations, tears, scars, lacerations, all the types of injuries that you would expect to find with this type of penetration. As to the State’s argument that she knows how it felt because she described how it
felt, she basically said that it felt weird and bad. I believe that this type of penetration, this type of injury would have been very, very painful. There would have been some evidence of just pain and nothing of this was even said, nothing like that has been indicated in any way.

The judge decided the issue immediately from the bench: the Rape Treatment Center reported no lesions in the anal area; the record was “basically devoid of any type of corroborating evidence.” Although corroboration is unnecessary for conviction, and at trial the child’s hearsay statements might be admissible, the standard for bail hearing purposes is higher. Therefore, “proof is not evident, presumption not great.” Without mentioning the defendant’s priors, the judge set bond at $30,000, conditioned on the defendant’s house arrest in his brother’s house while wearing an ankle bracelet and avoiding any contact with any minor—including, of course, his daughter. Garcia’s brother’s modest equity in his home was pledged as security for the bail bond.

In light of the importance to both prosecutor and defense counsel of the outcome, the hearing’s brevity and limited testimony might seem surprising. The proof might have been deemed “evident and the presumption great” had the victim testified; however well a detective testifies, however disposed a judge may be to believe police officers, the victim adds verisimilitude to the courtroom drama. Yet the prosecutor may have feared putting pressure on the victim and undermining her utility: exposing inconsistencies in her “disclosures,” risking unnecessary psychological harm, and, perhaps, inducing a fear of testifying that might make a plea agreement harder to obtain. Why the prosecutor failed to introduce Elena’s interview tape is more difficult to understand. Garcia’s lawyer was sure to be able to review it eventually, and both the judge and Garcia’s lawyer might infer from the tape’s absence that Elena was not a “good” (e.g., credible) witness—that is, a detective’s repetitions of her disclosures might be more persuasive than her testimony. On the other hand, the videotape, as well as Garcia’s lawyer’s need to assess the victim’s credibility, might eventually be a lever to compel a jailed defendant to plea bargain. The prosecutor might have called the Rape Treatment Center doctor

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78 See infra note 95.
79 Experienced trial lawyers and judges would probably not be surprised. In many states, bail decisions (even in homicide cases) are based on a probation officer’s report (as to the likelihood that the defendant will appear for trial and as to the danger to the community the defendant would pose if released) and arguments of counsel. Constitutional doctrine in some states requires that bail be set in every case—but judges can effectively deny pre-trial release by setting a bail amount the defendant cannot possibly raise. See generally LAFAYE, supra note 59.
80 On discovery in criminal cases generally, see id. at 909–24. The authors report that the trend in the states “has been in the direction of consistently broadening the reach of defense discovery . . .” Id. at 914. The Florida rules are found in FLA. R. CRIM. P. § 3.220 (2002). On December 11, 1995, a judge granted defendant’s motion to obtain the videotape for counsel’s review. For some suggestion that discovery by defendant’s counsel in practice might not be as liberal as the formal rules allow, see infra note 81.
81 In a letter found in another Dade County prosecution file, the prosecutor informed the public defender that all witnesses and the victim were minors “so remember if you take their deposi-
to testify about “decreased anal sphincter tone.” (The prosecutor would not have been happy to have the doctor testify if his deposition had been taken prior to the Arthur hearing.)\textsuperscript{82} Without the doctor’s testimony, though, the prosecutor was on shaky ground arguing that the medical observation was “consistent with” forced anal intercourse: by 1996 many experienced defense counsel were familiar with and prepared to discount prosecution expert witness testimony (efforts, they believed, to obfuscate the absence of physical evidence) that a variety of behavioral symptoms are “consistent with” abuse.\textsuperscript{83} Or the prosecutor might have concluded, based on Judge Sosa’s past decisions, that the Arthur issue was a “slam dunk”—even though most trial lawyers know (and all trial lawyers should know) that even

\begin{itemize}
\item In many prosecutions during the 1980s, experts cited long laundry lists of behavioral symptoms—sometimes massed and described as an abused child syndrome to conclude that the victim’s behavior was consistent with the syndrome. A notorious example was criticized in \textit{Steward v. State}, 652 N.E.2d 490, 492 (Ind. 1995), where an expert witness testified: “[K]ids who have known incidents of sexual abuse exhibit certain traits or characteristics or behavior pattern.” An expert should look for the following types of behavior in the “characterization of sexual abuse: [a]nything for medical reasons, from bladder infections to abnormal medical problems, and more of the characteristics, the girls can be anything from promiscuous, they can be very timid, they can come in with very low esteem. Almost exclusively, that is going to be a major characteristic. Some of the different cues can range in areas from being really over timid to different kinds of touches and approaches, where you would approach them in different directions or from different manners or methods. You might even put your hand on their shoulder and that might freak them out or something.
\end{itemize}

The defendant’s conviction was affirmed. The Supreme Court of Florida put the quietus on this form of testimony in \textit{Hadden v. State}, 690 So. 2d 573 (Fla. 1997). See also Rosalyn Schultz, \textit{Better Lawyering: Tips for Attorneys, Evaluating Mental Health Testimony in Child Sexual Abuse Cases}, 17 ABA CHILD L. PRACTICE 1, 6 (March 1998): “There is no syndrome or psychological profile to differentiate sexually abused from nonabused children.”

The “consistent with” technique was not discovered by child sexual abuse experts. \textit{See Faust Rossi, \textit{Sacco and Vanzetti: Martyrs or Murderers?}, CORNELL LAW ALUMNI BULLETIN 7, 12–13 (July 2000)} (police expert studied ballistics of defendant’s gun in infamous 1920s murder case and told prosecutor that fatal bullet probably did not come from gun carried by either defendant; report not turned over to defense counsel; prosecutor arranged to have expert testify that the ballistics evidence “is consistent with being fired by [Sacco’s] pistol”—a statement literally correct but meaningless. Apparently the prosecutor got away with this ruse—and Sacco and Vanzetti were convicted and eventually executed.)
in court trials there are no "slam dunks."

Garcia's lawyers, on the other hand, had a dilemma. Obviously, it was dangerous to rely only on cross-examination and oral argument to raise doubts about the victim's lack of physical injury; but they had not yet examined the Rape Treatment Center doctor, and they would not want to allow opportunities to rehearse explanations for the lack of physical evidence. Yet, just as the prosecutor's "consistent with" endeavor was questionable without testimony about decreased anal sphincter tone, defense counsel's argument about observable physical injury could also have been summarily rejected. Moreover, defense counsel failed to make the most of holes in the victim's story. Elena's odd description of the details of the rape—that it felt "weird and bad"—and her failure to describe the attack as painful were barely mentioned; Elena's references to Ramon's penis ("kind of soft" and "kind of dry"), phrases whose descriptive inadequacy could have cast doubt on her credibility, were ignored. Garcia's lawyers' failure to review the videotape prior to the hearing (or to object to testimony about Elena's disclosures until the videotape was reviewed) was difficult to explain, unless a demand for the videotape entailed untoward strategic consequences. But defense counsel's responsibility was only to create some doubt for the fact-finder, less doubt than a "reasonable doubt." Perhaps, given time and other constraints, argument may have appeared to be (as it turned out to be in fact) sufficient to obtain Garcia's release on bond. Despite the caveats, the hearing transcript shows: (1) busy lawyers, prosecutors and defense counsel alike, do not always have or do not take the time to prepare fully for trials and hearings; (2) hindsight by trial critics is always easier than the decisions trial lawyers make under the tense conditions of adversarial contest.

The defendant's release from jail appeared to slow the pace of the prosecution. The next event recorded was Estelle Perez's deposition, conducted by both of Garcia's lawyers through an interpreter on May 16, 1995, ten weeks after the Ar-

84 The prosecutor's decision to rely for "proof evident" in this case only on the investigating detective's testimony was especially surprising since at least some professional staff members of the Unit believed judges to be biased against prosecutors in sex cases. Consider the attitudes of two Unit staff members. After preliminary hearings in a sexual battery case heard by two different judges, the prosecutor commented to the author about the competence of one of the judges: "Oh, yes, Judge 'A,' he's terrible, he takes the ACLU position in every case; in fact, they don't let him handle Arthur hearings any more." See supra note 72. On another occasion a staff lawyer complained to the author that judges generally, and especially Judge "B," are biased against prosecutors. Judge "B," who had that afternoon presided at the conviction of a defendant of capital sexual battery, "decided all the evidence issues against us. He's a liberal!" It is dangerous to draw inferences about prosecutorial decision-making from casual characterizations; but casual remarks do suggest mind sets consistent with scholarly studies of prosecutors' personalities and politics. See generally, PHILIP L. DUBOIS, FROM BALLOT TO BENCH 183 (1988).

85 See infra note 115–20 and accompanying text for an examination of the medical, doctrinal and tactical issues raised by the sphincter tone testimony.

86 See supra note 81.

87 A pro forma memorandum from the Chief Assistant of the Criminal Division, notified the prosecutor that an Arthur hearing had been scheduled and asked the prosecutor to inform the Assistant if she did not "expect to be ready by the assigned date." See supra note 69.
thur hearing. This deposition disclosed the following facts: Ms. Perez lived with Garcia for some time in 1989; she received some, but very little, child support from her previous husband; she never went to court or made any effort to prevent her husband from seeing his children; Ramon had "a very normal relationship" with her daughters; he never argued with the victim but he got along "very badly" with her younger sister; Ramon never physically assaulted the victim or her; they had "normal arguments, but very heavy, he would not hit me but he would push me, and shake me;" Ramon originally had helped pay for the rent and groceries but stopped before the incidents leading to his arrest. Ms. Perez admitted that some months after Garcia’s child was born she “broke up” with him and wanted him out of her home, and that she communicated this information to a number of members of her family and to her friends, including Ramon’s brother’s wife. She also acknowledged that on several occasions she threatened to call the police to remove Ramon from the house; she claimed that these threats were all occasioned by arguments with Ramon during which he threatened her physically. Much of the lengthy deposition (94 transcript pages) concerned Ramon’s lawyers’ effort to set up impeachment opportunities for Estelle’s trial testimony. She was closely questioned as to when she first became the recipient of welfare benefits (in 1991), whether and to what extent Ramon provided help with rental payments and support for her and for his child and/or for the family (only occasionally), why she committed welfare fraud by failing to tell welfare authorities that Ramon was living with her and providing support (because he threatened to kill her if she told), and whether and why, if she was so afraid of him, she was willing to leave the girls with Ramon alone (only on the street rather than at home) and to have him pick up her daughters at school (only occasionally).

The deposition of the Rape Treatment Center’s doctor was taken on June 7, 1995 and transcribed in October.88 Dr. Alejandro Gomez, a Jackson Hospital resident in Obstetrics and Gynecology, had moonlighted at the Center for two years. Dr. Gomez obtained his medical degree in 1976 in Bogota, Columbia, his home town. Before his move to the United States in 1985, he did “sex education” research and prepared a thesis on the need for pediatricians to obtain more training in how to interview molested children. For three years after immigrating, Gomez taught “medical subjects at the college level,” at the Miami Institute of Technology “in those places in which they inform people for ambulances” (apparently fire rescue students). It quickly appeared that Gomez’s testimony might easily be impeached if he were called to testify as an expert:

Q. During that time, you did not practice, because you hadn’t—you had to study for the boards?
A. Yes, study for the boards.
Q. And when did you, finally, do that?

88The transcript which follows and all the information about Dr. Gomez’s background and career reported here are taken from the deposition, which was found in the Garcia file. See supra note 69.
A. I passed my first one in '90—my second one in '91, and my third one in '91.

Q. When you say the first one, and the second one, my father is a doctor, I don’t remember what they were; what is the first set?
A. The first is the basic component, the second is what they call the medical clinical component, and the third one is integrated of everything, it was called at the time the Flex, it has changed, it is, now, less parts; part one, part two, and part three always harder.

Q. Over how many years you had to do this?
A. Over four years.

Q. With studying?
A. Failing and studying, failing, and studying, and I passed.

Q. How many times did you fail?
A. Six or seven.

Q. Did you have a problem with the language?
A. It was a problem at the beginning, it is a big problem, now.

Q. Did you speak English before you got here?
A. No, never.

Dr. Gomez passed the “basic tests” (apparently tests allowing him to practice medicine in the United States) in 1990, and, in 1993, applied for a four year residency in Obstetrics-Gynecology, since he no longer wanted to be a pediatrician; at the time of his deposition, Dr. Gomez still had two more years of residency to complete. He had received two months of training at the Rape Treatment Center before beginning to interview victims. His Center work was not supervised despite his status as a resident, but his responsibilities at the Center are “similar to what I was trained to do” in Columbia. He always interviewed victims alone and his report was prepared while he interviewed the victim. Asked whether he remembered Elena, Doctor Gomez answered, “some things, yes.” “For example, I could clarify that when I put digital, it wasn’t digital, it was his hands who touched her vagina, without finger penetration; that is not placed in the history, but I remember, exactly, that.” But he did not remember Elena’s face. Typical interview length “depends,” some children cooperate and others do not, some adults “answer your questions, so depends, but in general 30 minutes, in general.” Less time is taken with children: “most of the children as patients that have been sexually abused two months ago, one year ago, so we just need to ask the questions, and to do a quick physical examination.” (Later in the deposition Dr. Gomez stated that his interview of Elena lasted fifteen minutes.) Asked to describe his manner of asking questions, he responded, “Why were you brought here? And so on.” “Children of this age usually know why.” “I usually do some other questions that, usually, don’t have nothing to do with this. In order to relax, specially with children, my next direct question is, has somebody been touching you in your private parts, in your buttocks? Has somebody been kissing you, a person who really doesn’t need to do it, and usually, when they are four, five, or more, despite they don’t know why somebody brought them there, they tell me.” Dr. Gomez remembered none of the actual words Elena used other than what he had written on the form. This colloquy fol-
A. Then I asked her less than 20, less than ten, less than fifteen, I think that is important for medical, and psychological reasons, it is important to know if it has been three times or three years in a row.
Q. Why would that be important?
A. Because one of the examinations that we do is to confirm the anal sphincter tone. In this case, the anal sphincter tone is maintained, if the patient has had one or two episodes of penetration a long time ago, but if the patient has been penetrated several or many times, and the time from the last it is not too long, we can find a decreased anal sphincter tone, so it is important to know how many times, and when was the last time.
Q. And based upon what she said, that the last time it occurred was in November, it was three times, and less than ten times; that was—
A. Is that possible to find decreased anal sphincter tone? Yes, not always, I don't know if voluntary—
Q. Go ahead.
A. Not only a decreased anal sphincter tone by sexual abuse, another physical problem can produce that.
Q. Such as, what?
A. Diarrhea, extreme nervousness, that's why some people defecate, and urinate in front of fear.
Q. Anything else?
A. Those are the most frequent...
Q. And based upon her answers [to your questions], you concluded that it was the situation, where there was penetration?
A. Well, verbally, yes, verbally, yes.
Q. What about physically?
A. Physically, what I found was the decrease anal sphincter tone.
Q. Well, would that—
A. Its related with the possibility of anal penetration.
Q. With the possibility?
A. Well, yes.
Q. What else would you expect to find in a situation where there was actual penetration?
A. We never, never can say it was an actual penetration.
Q. You can't?
A. No, we were not there, at that time.

Dr. Gomez was not concerned about the lack of physical evidence of anal rape:

Q. . . . fresh tears, old tears, scars, you know, active bleeding, or no bleeding, is there anything like that, that you would find, where there has been actual penetration of a ten year old by a fifty years old man anal?
A. No, nothing specific.
Q. I mean, there won't be any tears?
A. No, I couldn't find any lesion.
Q. Did you expect to find any?
A. Sometimes you have lesions that give us a clue to sexual abuse; for example, venereal disease, certain venereal diseases cannot be transmitted, except by genital contact.
Q. . . . would you expect to find any type of scars or tears or any kind of injuries, physical?
A. . . . peri-anal area heals very quickly, in 1, 2, 3 days you cannot find anything.
Q. Any evidence whatsoever?
A. Probably, for me, as a physician, if it is just that area of our body, that heals quickly.
Q. If it was something that had just occurred, you would have expect to have some lesions, tears, lacerations?
A. No, not two months ago.
Q. Not if it just occurred yesterday, and they went to see you today?
A. Yes, sometimes, not always.
Q. The extent of injury, would it depend on the size of the child and the adult?
A. Yes.

Despite this last admission, Dr. Gomez's answers were equivocal, arguably inconsistent, and confused:

Q. Would you expect to find, if it is something that just occurred, would you expect any bleeding?
A. After two months, no.
Q. If it was fresh, right away, would you expect to find bleeding?
A. Yes, once again, it depends on the offender, if he is an adult, is a boy, depends on the victim. If it is an adult or a boy, and depends on the act.
Q. In this situation, the girl being 10 years old, and this being a man, you are saying it doesn't surprise you that, even if there was full penetration, that there would be no physical signs of it, other than the loss of anal sphincter tone?
A. No, because the patient have had this kind of activity before, several times, the last time probably, consented, he was not violent, she was not trying to go away.
Q. Did you ask her about that?
A. No, I don't ask.
Q. She was threatened verbally. Do you know if there was any physical force or violence involved?
A. No, she denied that. He restrained her. Usually, that doesn't happened with the children. The children develop what has been called child-specially, in these children, what has been called child's sexual abuse accommodation abuse, which is, the children they first keep things like a secret, then they are ashamed that this happened, they feel guilty, and they accommodate and rationalize, this hap-
pened, this is the guy who pays the bill, he is the friend of my mother, and all those things.89

Dr. Gomez acknowledged that he had not asked Elena specifically whether she meant “penetration” when she used the words “put his penis in my rectum;” but he was satisfied that there had been penetration. He did not remember whether he had asked Elena if the assault hurt. As to resistance, Elena said, “I tried to move.” Gomez related the explanation he used to elicit Elena’s denial of ejaculation: “when the man has been moving, sometimes they expel, they put out a fluid, like a milk, that is sticky, probably she knew from before.” If Elena indicated that ejaculation occurred on prior occasions he should have reported the information on the form, “but I didn’t.” Again on the subject of decreased anal sphincter tone:

Q. How did you determine that?
A. It is a subjective—it is a subjective test. We know what is the pressure of the anal sphincter tone. One of our regular examination is to do a rectal examination. We know more or less how much reactivity stands the anal sphincter tone has. When the anal has been penetrated many times in sexual abuse or sexual relationships, the sphincter loses its tone, so the entrance of the finger is more easy. Q. Is that—can you quantify that in any way?
A. No.
Q. Is there any way to measure it?
A. No.
Q. Is that a situation where it is a really bad anal sphincter tone, as opposed to just a little bit looser than normal?
A. Well, in many occasions, when the abuse has been chronical, and has been up to recent time, but most important, chronic, we don’t need to put the finger, you can see the whole.
Q. So there are varying degrees?
A. Yes. I can say mild decrease of anal sphincter tone, probably, it was not severely decreased. If I find something like that, I put it. But when it is clearly anal sphincter tone, you just put severe anal sphincter tone.
Q. When do you put severe?
A. When just recently had had anal sex or when for a long time they have had anal sex. It was not normal for sure, it was not severe for

89 Dr. Gomez conflated two concepts familiar to and often used by prosecution expert witnesses in child sexual abuse cases. The first, the “Child Sexual Abuse Accommodation Syndrome,” is a heuristic collection of symptoms often used to explain failures initially to report or recantations of abuse allegations during legal proceedings. See Roland Summit, The Child Sexual Abuse Accommodation Syndrome, 7 CHILD ABUSE & NEGLECT 177 (1983). The syndrome entailed enough logical difficulties to persuade some appellate courts to hold “Summit-Accommodation-Syndrome” testimony inadmissible. See Robert J. Levy, Using “Scientific” Testimony to Prove Child Sexual Abuse, 23 FAM. L.Q. 383, 393-94 (1989). Dr. Gomez may have been referring to a so-called “child sexual abuse syndrome,” testimony that after the Garcia case the Florida Supreme Court ruled inadmissible. See Hadden v. State, 690 So. 2d 573, 578–79 (Fla. 1997). See also supra note 53.
Sure; severe for me is just to see an opening in the anus, I don't need to place a finger, because it is opened already.

Q. But when you do the examination, can you distinguish between less and more anal sphincter tone?
A. Yes....
Q. And you said earlier, this can be due to other situations, such as diarrheas or nervousness?
A. Yes, extremely anxiety.
Q. Would being 10 years old and being examined at the Rape Treatment Center be a situation where you would expect somebody to be nervous?
A. Yes, I was talking to her about that, when I find that the patient is very anxious, I put it, because I know that affect.
Q. The tone?
A. The reliability of the sphincter tone.

After Dr. Gomez added that pregnancy might also relax the sphincter, the deposition continued:

Q. Based on your interview, do you reach a conclusion, as to whether or not there is, or there has been or there is evidence of abuse?
A. Well, because the only complain, I am not saying that this child is not lying, that is my concept, my personal concept.
Q. No, because you are saying—
A. This child talks about just that fact, that specific sexual relationship, and that's it.
Q. But do you question them about other areas, to find out their level of knowledge of their, you know, possibly, showing signs of problems or things in other areas?
A. No, usually, they—
Q. Reveal themselves?
A. They reveal themselves in other ways.
Q. Such as what?
A. The way in which they talk about sex....
Q. For example, if the child is very shy, isn't willing to take off their clothes, what would that indicate?
A. That can indicate many things. Shame, because of all the things that have been happening. A very conservative education from the parents.
Q. It can indicate exposure to sexual activity or lack of knowledge from the parents, either way, it can be interpreted?
A. I cannot tell you fever is a cold, if you tell me fever and headache is a cold, I cannot tell you that fever and headache, and pain in the throat, I cannot tell you that.... It is the whole thing. It is the way in which they behave, the way they talk, the words they use, how ashamed they are, how much support they need from the parents, the adults. My finding is my physical examination, the answers to my
questions, the answer to the same question placed in different ways, it is not easy.

Dr. Gomez denied that sexual abuse diagnosis is an art and admitted that he was not trained in psychology, but he had “read some.” Asked whether he had ever made a negative finding where the only evidence was decreased anal sphincter tone, Gomez responded, “No.” Given another chance to “conceive of a situation” like Elena’s in which abuse might not have occurred, Dr. Gomez responded:

Yes. For example, we have a woman that was paraplegic disabled, and I found decreased anal sphincter tone, and she reports the history of sexual abuse, you can conclude the decreased anal sphincter tone, because of the sexual abuse, but, also, because the lack of innervation [sic] that she had in her medulla, so in that case, I cannot say this decreased sphincter tone is because of the sexual abuse.... If I don’t see the person very nervous or a clear history of tear or diarrhea or chronic diarrhea or paraplegic, that was another cause, yes, I concluded that was abuse.

On that note, the deposition ended.90

Six months later, in December, just as Garcia was changing lawyers, the prosecutor prepared a motion for an “in limine” (“at the threshold”—in effect, before the matter arises) order authorizing the Rape Treatment Center report’s admissibility at trial without Dr. Gomez’s testimony. The motion asserted that the report was either a business record or a public record, both of which are treated as exceptions to Florida’s hearsay exclusion rule. The motion also sought permission for the medical director of the Center to testify “from such report and render an appropriate opinion.” Dr. Gomez had to be replaced, the motion stated, because he was no longer a Center employee. The motion rehearsed the pertinent evidentiary rules and contended that the substitution would not violate the defendant’s Constitutional Confrontation rights.91

90 Readers unfamiliar with trial and deposition transcripts may be surprised to discover so many misunderstandings between counsel and witness, repetitions of inquiries, as well as non sequiturs. This transcript is not atypical. Nor is it unusual for a deponent’s counsel, unhappy with the path the deposition seems to be taking, to seek to disrupt that path with some evidentiary objection either to alert the witness to danger or to throw the questioner off stride. Counsel could instruct the deponent not to answer a question; in such a case, the deposing lawyer could ask the judge to order the answer. Judicial interventions are inconvenient and unusual: depositions are usually taken in counsel’s office, trips to the courthouse are not welcomed by lawyers, and judges do not like to be bothered.

91 The copy of this motion in the Unit’s file was hand-marked “deferred 12/11/95,” the very date on which the trial judge ordered that Garcia’s lawyer be provided a copy of the victim’s Children Center videotaped statement. Whether the two events were connected in some fashion is unknown. The file documents indicate that a hearing on the State’s motion to substitute was scheduled for March 14, 1996 but contain no information as to the result. The substitution motion was apparently filed with a group of “boiler plate” motions used whenever the prosecutor believes the case is headed for trial. See infra note 100-03 and accompanying text.
The prosecutor's effort to replace Dr. Gomez made sense. Based on his deposition performance, it was unlikely that Dr. Gomez's testimony at trial might have been helpful and it might have hurt the State's case. Dr. Gomez's difficulty with English might not have harmed his credibility. But he had very serious disabilities: his failures to pass American medical boards; his switch in careers and lack of American training in the field about which he would have been testifying; the briefness of his examination of Elena and failure to ask her pertinent and important questions; his inability to quantify or objectify his physical findings in any fashion; the relationship of varying levels of sphincter tone to the likelihood that anal rape had occurred; his confusion of concepts familiar to child sexual abuse experts; and the common sense intuition many jurors might have (the same intuition the

92 Dr. Gomez's pediatrics "trade union card," even from a foreign medical school, would probably have given him more protection from cross-examination than would a residency in Ob-Gyn. Obstetricians are not commonly experts on anal sphincter tone, especially the tone of a child claiming that she was anally raped.

93 At trial, a good defense lawyer would cross-examine Dr. Gomez as to his understanding of concepts such as the "Child Sexual Abuse Accommodation Syndrome." See supra note 89. But such "red herring" theories were successfully used for a long time by prosecution expert witnesses and accepted by appellate courts affirming convictions; thus, many defense lawyers might not take advantage of Dr. Gomez's confusion to impeach him. See Levy, supra note 2; Fannin v. State, 645 So. 2d 1082 (Fla. Dist. Ct. App. 1994) (counsel not ineffective despite failure to object to expert's "pedophile profile" testimony because, at the time of trial, the Florida Supreme Court had not yet declared such testimony inadmissible). Whether the Confrontation Clause of the United States Constitution's Sixth Amendment might deny consideration of Dr. Gomez's report as evidence without his accompanying testimony presents a somewhat murky evidentiary and Constitutional issue. Cf Delaware v. Fensterer, 474 U.S. 15, 20–21 (1985) (not unconstitutional to allow expert to testify as to removal of hairs from murder weapon even though expert could not remember which of three possible grounds was basis for his conclusion). Of course, the problem is more difficult when the defendant cannot cross-examine the expert at all as to the basis for the expert's conclusion. The prosecutor's brief claimed that "numerous decisions support the admission of expert reports through a substitute examiner as an exception to the hearsay rule and consistent with the defendant's constitutional rights. State v. Moosman, 794 P.2d 474 (Utah 1990);... Capehart v. State, 583 So. 2d 1009 (Fla. 1991)." See supra note 69. Confrontation Clause concerns would have been minimized because defense counsel was able to cross-examine Dr. Gomez in deposition. The substitute expert proposed by the prosecutor would give an opinion as to whether Elena had been raped based on the factual findings in Dr. Gomez's report—and the report would be admissible as the basis for the substitute expert's opinion. The defendant's lawyer could then rebut the testimony by cross-examining the substitute expert witness as to the basis for her conclusion—asking, for example, whether anal rape can be inferred from decreased anal sphincter tone or if it is reasonable to rely on a medical examiner with Dr. Gomez's record and accomplishments. (The cross-examination might proceed along these lines: "Doctor, would you be willing to rely on a finding of decreased tone if you knew the finding was made by a person with no medical training? By a person who had flunked out of medical school? By a person with a foreign medical degree who had flunked American medical boards seven times?") Procedure experts say that defense counsel could use Dr. Gomez's deposition to cross-examine the substitute about her reliance on Dr. Gomez's examination findings. The defendant's lawyer could also present a medical expert either to dispute the inference of anal rape from decreased anal sphincter tone or to dispute the accuracy of Doctor Gomez's findings. Such cross-examination might well severely damage both Dr. Gomez's report as well as his credibility—but a jury might believe it anyway! On confrontation issues, see generally LAFAVE, supra note 59, at § 24.3.
Arthur hearing judge apparently had) that anal rape of a ten-year-old girl by a mature adult would have physical consequences graver than decreased anal sphincter tone. In July, Garcia’s lawyer took the victim’s deposition. Cross-examining a child is always difficult. The child’s statements concerning the events are admissible at trial, along with other hearsay statements, if they are found to be reliable and the child is “unavailable.”

Elena’s deposition contained few surprises. Elena gave her age, the schools she had attended, and the addresses of homes she had lived in with her mother and

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94 Garcia’s lawyer told the author that he knew about the Unit rule about victim depositions, supra note 81, but could not remember whether he had received a warning when the deposition was scheduled.
95 The Florida legislature followed a national trend in making special provision for the admissibility at trial of out of court statements of abused children which would otherwise be deemed inadmissible hearsay. The route chosen in Florida was to amend its version of Federal Rule of Evidence 807, the so-called general hearsay exception, to make such statements admissible under special circumstances. See FLA. STAT. ANN. § 90.803(23) (West 1999). The statute authorizes the admissibility of an “out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, . . . or any offense involving an unlawful sexual act, . . . unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness. . . .” Id. The trial judge must find “in a hearing conducted outside the presence of the jury” (1) “that the time, content, and circumstances of the statement provide sufficient safeguards of reliability,” and (2) the child testifies or the child is “unavailable as a witness” and there is “other corroborative evidence of the abuse or offense.” Id. The legislature specified that “unavailability” includes a finding that testifying at the trial would result in a “substantial likelihood of severe emotional or mental harm” to the child. See Perez v. State, 536 So. 2d 206, 210 (Fla. 1988). The United States Supreme Court has held that statutes like Florida’s do not violate the Confrontation Clause. See Maryland v. Craig, 497 U.S. 836 (1990). See generally Robert P. Mosteller, Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment, 67 N.C.L. REV. 257 (1989); Lynne Celander DeSarbo, The Danger of Value-Laden Investigations in Child Sexual Abuse Cases: Are Defendants’ Constitutional Rights Violated When Mental Health Professionals Offer Testimony Based on Children’s Hearsay Statements and Behaviors?, 2 U. PA. J. CONST. L. 276 (1999). The Florida Supreme Court has upheld the Florida statute. State v. Townsend, 635 So. 2d 949 (Fla. 1994). The Florida appellate decisions have been sympathetic to the goals of the statute and have interpreted its terms broadly, while insisting that trial judges (who seem to have had difficulty with the statute’s procedural requirements) adhere strictly to its terms. See, e.g., id. (an incompetent witness is “unavailable” within the meaning of the statute). See also Pinder v. State, 604 So. 2d 848, 849 (Fla. Dist. Ct. App. 1992) (child’s hearsay statements should not have been admitted because prosecutor did not inform defendant that child had recanted critical portion of statement); Allison v. State, 661 So. 2d 889, 892 (Fla. Dist. Ct. App. 1995) (although child may have been victimized by observation of assault against another child, statement inadmissible because not by a “victim” within meaning of hearsay statute); Spoerri v. State, 561 So. 2d 606 (Fla. Dist. Ct. App. 1990) (hearsay statements inadmissible because trial judge failed to make findings required by statute); Moore v. State, 658 So. 2d 600, 601 (Fla. Dist. Ct. App. 1995) (hearsay statement inadmissible where trial judge’s findings simply mirrored statutory language rather than making case specific findings); Feller v. State, 637 So. 2d 911 (Fla. 1994) (child’s hearsay statements inadmissible despite trial judge’s finding that statements were reliable because judge did not indicate what circumstances relied on but instead indicated that conclusion was based on “personal experience” and intuition).
96 Elena’s deposition can be found in the documents on file with the University of Minnesota Law Library. See supra note 69.
two sisters. Garcia’s attorney tried unsuccessfully to have Elena say that she had been prepared for the deposition by either her mother or the prosecutor; she admitted that the defendant was her mother’s boyfriend, immediately retracted the statement since “I don’t know because I never asked my mother,” and finally acknowledged that her mother and Ramon “had a boyfriend-girlfriend relationship.” She reported that her mother and the defendant fought often and in every argument “he would scream, throw things, break doors;” the arguments frightened her and her sisters and “they would get in the closet, and start crying.” Asked if the defendant ever threatened her mother, Elena answered, “He didn’t do it, he said, that he was going to kill her, that he was going to make her disappear.” She acknowledged that she did not like the defendant when he and her mother were fighting; but she had liked him when the defendant was sleeping in the same room with her mother. The defendant never hit her or her sisters—and he loved his daughter very much, more than he loved Elena and her younger sister. Elena never told her mother she wanted the defendant to leave the house, but her sister did so “all the time.” Her mother also wanted Ramon out of the house, even before Elena told her what Ramon did; Ramon wanted to be with his daughter and that is what they argued about. Pursuing the impeachment effort begun with Ms. Perez, Garcia’s attorney asked Elena whether Garcia helped to support the family; Elena denied that he helped financially. Asked how she knew that Ramon gave her mother no money, Elena answered:

Because she would tell me that, I would ask her, mom, how did you get—and because I asked her the same question, how did you get the money, and she would tell me that’s none of my business, that I am not supposed to know, and then I asked her, well, then, because I wouldn’t ask her, like can I—like—because I was like real scared that one day, like she didn’t have money to pay, and then she told me not to worry that we were going to have it, and I didn’t ask her anything else.

Elena’s deposition did raise some flags for Garcia’s lawyers—although the issues were ephemeral and might not have been useful at trial. Elena testified that the assault “hurt,” although she didn’t scream “because when I was scared, my voice didn’t come out . . .” Elena claimed that although she did not bleed after the attack,

but two days, three days later, I had, I bled, but my mom thought it was my period, but it wasn’t it, she wasn’t sure, so she asked my grandma, the one that’s here, she called her and my grandma said she wasn’t sure that I might be, if it was a lot, it might be it, but it wasn’t, it was not as much as your period.

Elena acknowledged that she had been taken to a doctor who had given her a physical examination; the doctor “told me to come back up the next day to see if it was my period, then I didn’t have it, he said, that he didn’t know what it was, the
period is supposed to last three days, and that didn’t.” Estelle had mentioned the same events in her deposition—but she testified that the doctor had diagnosed the condition as an occasional menstrual event, uncommon, but not unheard of, among girls Elena’s age, and unlikely to reoccur.

Elena’s answers raised other issues as well. She testified that she asked Garcia for a book bag “after everything had happened,” and it was then that he “told me to convince him” before agreeing to the purchase. Related in this fashion, the book bag purchase looks less like either payment for an assault or a bribe for secrecy than it does as it was related to the investigating detective. Then there was Elena’s memory of “the second time he did it to me.” Her answer was unresponsive and rambling:

When I was with my mom, she was sleeping upstairs, and I came downstairs, and then—well, I was sitting down, and then I was thinking, because then after when I saw him—well—hold on—when I got there, I sat down, I was watching T.V., then that same day, when I went to—okay, my mom woke up like an hour after, and he hadn’t done anything to me, and then after my mom woke up, and she said she had to go out, she was going to leave me, she was going to leave my baby sister there, because she had to go to the supermarket, but then every time that she would go out and my baby sister would stay with him, he would tell me to stay, just in case my baby sister woke up.

Q. Your baby sister, being Sara?
A. Sara.... And when she—when I was in school, and my mom was—and my mom left to go somewhere, and she left Sara there, there I couldn’t stay, my mom would tell me then to stay, and so I would stay. Then I was cleaning up the fish tank outside, when we came back in, I took a bath, I put on my clothes—no, my sister, when we finished, my sister and my mom were already here, then my baby sister, and him were playing—okay in my room, where the toys were, so then, I went to get my clothes, so that I could take my bath, my sister wasn’t there, my mom wasn’t there, they were downstairs, my mom was cooking and my sister was helping her. . . .

A. He doesn’t take off his clothes or anything, because my baby sister was there, so then he comes up, and he doesn’t take off his clothes he like pushes himself like up to me, right? And then I was trying to move; every time he would do that, I would move, because I think what happened when he was going to put his hand, I called my sister, I go, J. , so she could come up, and he goes, oh, now comes the other one.97

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97 Are these the typically incoherent but persuasive phrases a child would use if traumatized by a crime as well as by the requirement that she relive it? Or are they the infantile non sequiturs of an untrustworthy child, the carefully planned if idiosyncratic meanderings of a clever liar (who had previously given a perfectly lucid and organized description of all the events associated with the alleged anal rape)?
A portentous event for Garcia's criminal case also occurred in December, on the very day Elena's videotaped Children's Center interview was released. For reasons unknown to his lawyers, Garcia fired them and paid $5,000 to a new lawyer. Garcia hired Mr. Graham "after meeting [him] at the courthouse," because Graham "told him that he would be able to convince the court to modify Garcia's bond and he would no longer have to wear [an electronic] monitoring device." "Graham entered his appearance . . . on December 19, 1995" and "as promised, filed a motion to modify bond;" but the trial judge "denied the motion and Garcia continued to wear the monitoring device." In March, 1996, Garcia sent two letters to Graham concerning his defense. The first provided a list "of all people that can verify my character and testify on my behalf." Typed in English, the letter describes the testimony each prospective witness could provide:

1. ______. He can verify that I was living permanently with the two little girls and their mother. This contradicts the statement that I was only a friend of their mother and did not live with them. PS. This man lives directly across the street from where we lived together for two years.

2. ______. She was raised by me as her stepfather for 19 years since she was 19 months old. She testifies that I never touched her or insinuated anything abnormal to her.

3. ______. She was raised by me as her stepfather [in the Dominican Republic] for 19 years since she was 06 months old. She testifies that I never touched her or insinuated anything abnormal about her. She can verify that on March 5, '95 she went to visit her half sister and Estelle had a man already living with her, less than one month. My daughter was told that her father is dead.

4. ______. She is willing to testify that Estelle was so disgusted with me that she was about to tell the little girl to stab me at night that nothing would happen to her. This was said a month prior to her accusation.

5. ______ [a Reverend]. Friend of Elena that knew the little girls and went to his church. He was also a neighbor who knew that we lived together for two years. At first he believed that I did it but after talking to me was convinced otherwise.

6. ______ [the Arthur hearing witness] and I have lived very closely

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98 The file contained two receipts for $2,500 each signed by the new lawyer's secretary. One of them was dated "12/17/1996," but the later year must have been a misprint. See supra note 69.

99 The quotations and those that follow in the text are taken from a third lawyer's Motion for Post-Conviction Relief, dated December 5, 1997, ten months after Garcia pled guilty. The motion was accompanied by a variety of documents described in the text following this note. In April, 1995, responding to a motion made by his first lawyers, a judge at "special term" had modified the house arrest provision of Garcia's bail conditions to authorize him to leave the house at set times (approved in advance each week by the "House Arrest Officer") "for the purpose of procuring employment and/or earning his living." See supra note 69.
for many years since she was a little girl. She is my niece and never was anything strange ever suggested.

The second letter, enclosing a tape, read as follows:

Enclosed is a tape of Estelle talking to her ex-husband threatening him with not seeing the girls if he did not give her money. The cassette is about 7 years old. She taped them with the possibility of using them against him in court and in sending him to jail like she promises in the tape. Even my voice is heard telling Estelle that Elena was too young to be saying so many lies. I found it among my belongings. I am sending it to you if you think it might be important. In the second conversation with her niece she talks about him not seeing the girls ever again!

On March 16, 1996, the date on which the motion to substitute for Doctor Gomez was filed, the prosecutor filed a number of motions "in limine" requesting orders: precluding reference to any "specific instance of prior consensual sexual activity between the victim and any person other than the defendant" and prohibiting "reputation evidence relating to the victim’s prior sexual conduct" or evidence "pertaining to the victim’s manner of dress at the time of the sexual assault;" precluding reference to the possible sentence that may be imposed upon conviction; precluding "reference to defendant’s lack of prior convictions;" and, most importantly, announcing the State’s intention to rely upon the victim’s hearsay statements in accordance with provisions of the Florida Evidence Code. The motion described the statements to the detective, to Dr. Gomez, and to the Children’s Center—and listed eighteen "indicia of reliability," including the following:

1. The mental, chronological and developmental age of the victim making the statements.
2. The competency of the victim making the statements.

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100 The motions mentioned in the following text can be found in the Garcia documents on file at the University of Minnesota Law Library. See supra note 69.

101 This motion was based on the Florida "rape shield" law, FLA. STAT. ANN. § 794.022 (West 1999).


103 Since Garcia in fact had a prior record, referring to it would have been useful for impeachment if he were to take the stand, and impeaching the defendant would obviously have been to the prosecutor’s advantage. It appears that Sexual Battery Unit prosecutors file a basket of boiler plate motions preceding trials as a matter of course.

104 The motion indicated that reliance for the statements’ admissibility would be placed first on “spontaneous statements or excited utterances” exceptions to the hearsay exclusion under FLA. STAT. ANN. §§ 90.803(1), (2) (West 2004), as well as on FLA. STAT. ANN. § 90.803(23) (West 2004), the general, catch-all reliability provision.
3. The time the statements were made and the disclosure of the criminal acts.

5. The repeated nature of the victim’s statements.

7. The similarities in the victim’s statements.

9. The victim’s lack of motive to fabricate statements.

10. The victim’s abilities to recount accurate details.

15. That the victim was rewarded not to disclose the acts of sexual abuse.

18. Other indicia of reliability which may become known to the State.

In July, 1996, following several trial continuances, Graham asked the court’s permission to withdraw as attorney of record: “differences have arisen between counsel and the defendant and there is no longer confidence that exist between them;” defendant “has not been able to meet his financial obligations and is not in communication with counsel.” The motion was denied. The 1997 post-conviction relief motion, based on Graham’s failure to provide Garcia effective assistance of counsel, described the impasse:

15. Graham began to ask Garcia for more money [in addition to the initial $5,000]. Garcia was unable to pay him any additional funds.

16. Garcia began having trouble communicating with Graham, who frequently sent others to cover court hearings and to meet with Garcia.

17. Graham informed Garcia that if he did not pay him the requested additional fees, he would be unable to continue working on the case and investigating possible defenses. In fact, Graham never contacted any of the witnesses Garcia provided to him. Had Graham contacted, investigated and prepared the defense witnesses for trial, Garcia would have proceeded to trial with a viable defense and would not have accepted the plea which required him to plead guilty to offenses he did not commit.

18. Graham filed a motion to withdraw from the case on July 16, 1996, alleging that Garcia had failed to pay part of his fee and that there was no communication between attorney and client. This Court did not permit Graham to withdraw.

19. Garcia was unable to pay any further fees and Graham advised him that he would have to plead guilty or proceed to trial without Graham being prepared. Graham’s staff advised Garcia that he was facing the likely possibility of thirty years in jail based on the state’s case and the lack of a viable defense. Upon Graham’s advice, Garcia attended an appointment with Dr. Melendez and informed Dr. Melendez that he had been advised by his attorney that he would have to admit his guilt to Dr. Melendez or the plea offer would fall through.

20. On February 4, 1997, Garcia signed the plea agreement under threat of proceeding to trial with an attorney who was unprepared, who had failed to investigate the case, who had failed to prepare a
Dr. Melendez, a Ph.D. psychologist who testified frequently for defendants and occasionally for the State in child sexual abuse prosecutions, enjoyed the respect of prosecutors, defense counsel and judges. Dr. Melendez apparently failed to file a report. The file did contain a letter, dated September 29, 1996, from Dr. Ramirez, also a Ph.D. psychologist, addressed to the trial judge and reporting a one hour interview of Garcia conducted pursuant to the judge’s order. Both psychologists, individual entrepreneurs, provided mental health services to sexual offenders as paid consultants to a treatment center which, in turn, contracted with county authorities to offer such services. Sexual Battery Unit files suggest that Dr. Ramirez was often chosen by prosecutors to furnish the judge an analysis of the defendant as an adjunct to plea bargaining. Dr. Ramirez’s interview lasted about an hour. The report provided a short personal history (including references to the occasion of Garcia’s first sexual experience, his divorces, the children he had fathered, and his past and present employment), contained some boiler plate paragraphs featured in each of Dr. Ramirez’s reports, found that “although at times he was cooperative, at other times he was argumentative,” and concluded that Garcia was not amenable to treatment because “of his complete denial of having engaged in any inappropriate sexual behavior. Because of his denial he would not benefit from treatment.”

On February 4, 1997, Garcia, his lawyer and the prosecutor signed a form guilty plea agreement to a reduced charge: one count of attempted sexual battery and two counts of lewd assault on a minor. The deal called for sex offender treatment by Dr. Melendez, a “CTS” sentence (“credit for time served”—some forty-two days between his arrest and the Arthur hearing), and ten years of supervision as a special condition of probation. Handwritten on the State’s copy of the agreement were the words “plea colloquy ordered,” “sex predator order signed,” “V/family in agmt,” and “original in court file.” The plea agreement was initialed by Garcia on each page. During the plea hearing, Graham assured the trial judge that he had gone over the agreement with Garcia in his office, that a court inter-
preter had reviewed each word with him that morning; Graham acknowledged that there was a factual basis for the plea. The judge waived the cost of probation supervision when Garcia explained that he took home $120 a week, but ordered him to pay $150 to the Rape Treatment Center and the cost of Dr. Melendez’s treatment. The judge signed an order adjudicating the defendant a sexual predator.

The agreement, consisting of thirty-one paragraphs, was identical to all plea documents found in the files of the Capital Sexual Battery Unit. The agreement, if enforced, would significantly limit Garcia’s freedom in a variety of ways for the ten years of his probationary status, would pose substantial risk that his probation would be revoked, and certainly would jeopardize any relationship Garcia might otherwise be able to maintain with his daughter. The agreement’s recitals included the following:

2. . . . In addition to any special condition of probation which may be imposed upon the Defendant as enumerated in the probation order, as a special condition of probation, the Defendant will enter, actively participate in and successfully complete the Mentally Disordered Sexual Offender Treatment Program of Melendez, Ph.D.

3. The Defendant shall participate in this Mentally Disordered Sexual Offender Treatment Program under the terms and conditions of the Program including, but not limited to, compliance with the rules, regulations and directives of the Program, regular reporting in person to the Program Representative or clinician, participation in counseling, and any other such requirements the staff shall impose, delete, or modify from time to time and hereby waives any claim of confidentiality regarding reports from the Program staff to participating community agencies or parties to this matter.

4. The Defendant waives any claim of privilege or confidentiality regarding any and all statements made to Program Representatives, Counselors, clinicians or participants in the Program or other individuals directly or indirectly associated with the program. Said waiver of privilege extends to matters related to the charges which formed the basis for the Defendant’s admission into the program as

108 Without rehearsing the allegations in open court, the judge commented: “The arrest form, information and conversations, discovery, et cetera, that we’ve all had certainly form a factual basis for this plea.” This quote and all information concerning Garcia’s plea mentioned in the text can be found in the documents on file with the University of Minnesota Law Library. See supra note 69.

109 Asked by the judge whether he had explained the sexual predator order, Graham said it was in the agreement. The prosecutor disagreed and provided a separate order the judge then signed. In his motion for post-conviction relief, Garcia argued that the sexual predator label, requiring publication of the defendant’s name and photograph, was never explained to him by Graham and that the agreement made no mention of the sexual predator label. The motion’s other allegations are described at supra note 105 and the accompanying text.

110 See supra note 106 and accompanying text.
well as to any records, progress notes, impressions and reports which may be generated as a result of the Defendant's participation in the Program. . . . Any and all such statements, reports, records, notes, etc., shall be admissible in any court of law, in any proceeding, without objection from the Defendant.

5. The Defendant's term of 10 years of probation shall not be terminated early and neither will the special terms of probation contained herein be modified without the express consent of the Assistant State Attorney, with consent of the victim and her family and the approval of the Court. . . .

7. The Defendant shall comply with the terms and conditions of the Program until discharged, terminated, or successfully completed. The decision to terminate or discharge shall be within the complete discretion of the supervising clinical psychologist, clinician or therapist. Said termination and discharge may be based upon the Defendant's lack of active participation in the program, failure to attend meetings, unsuitability or unamenability to treatment, violation of terms and conditions of the program or agreement, or any other basis deemed appropriate by the treating psychologist, clinician or therapist.

8. If, in the opinion of the clinical psychologist or clinician supervising the particular case, the Defendant's participation is not meeting with acceptable success, the Defendant may be terminated from the program, and the Defendant may be brought before the Court for a Probation Violation Hearing. . . .

10. The Defendant is aware that an arrest and/or conviction for any misdemeanor and/or felony during the pendency of this plea agreement, may result in his immediate termination from the program. . . .

14. The Defendant shall personally obtain permission from his Program Counselor, clinician, therapist and the Court's approval before temporarily leaving Dade County, Florida.

15. The Defendant shall not be out of the area and away from treatment obligations without the expressed written consent of the Program Counselor, clinician or therapist.

16. The Defendant shall pay for any treatment needs his victim may have as a result of the sexual abuse, provided the cost is fair and reasonable.

17. The Defendant shall have no alcohol or drug-related offenses, including traffic-related criminal offenses.
18. The Defendant shall not visit or have any contact in person, written, verbal or via a third party with the victim of his sexual abuse.

19. The Defendant shall not enter the victim's family property and/or residence where the victim resides.\textsuperscript{111}

20. The Defendant shall reside in a setting where there are no minors (under the age of 18), females or males. Any modification of this condition must first be approved by the Court. . . .

23. The Defendant shall not date, become involved with or live with any woman (man) who has minor children or has custody of minor children unless permission is granted by the Court after consultation with the program counselor, clinician or therapist. . . .

24. The Defendant shall have no unsupervised contact with minors.

25. The Defendant shall be gainfully employed full-time, actively seeking full-time employment or shall be enrolled in and attending classes.

26. The Defendant is prohibited from teaching in public and private schools. . . . The Defendant is prohibited from entering into any profession or job which would require him to wear a uniform.

27. The Defendant shall agree to polygraph examinations at his expense where necessary for good cause shown after all parties confer. . . .

30. The Defendant's probation officer shall prepare a written report every 90 days outlining the Defendant's progress and performance and file said report with the court with copies to the State Attorney and defense counsel.\textsuperscript{112}

31. The program counselor, clinician or therapist shall prepare a written report on a monthly basis outlining the Defendant's progress and performance. The report will be filed with the court with copies to the State Attorney, defense counsel and the Defendant's probation officer every 3 months. . . .\textsuperscript{113}

The motion for post-conviction relief was filed in December, 1997. The prosecutor's copy had hand-written comments in the margin of each paragraph,

\textsuperscript{111} Note that this paragraph and paragraphs 20 and 24 below, if enforced, would end any relationship Garcia may have had with his daughter.

\textsuperscript{112} No reports of any kind were found in the file when it was read during summer, 1997.

\textsuperscript{113} See supra note 69.
“not admissible testimony.” The motion was denied without opinion in August, 1998.

Was Garcia innocent? Or, if he had been willing to “roll the dice,” would a jury have acquitted him? Or was he lucky to escape with a month in jail when, had he gone to trial, he would have been convicted by a jury disposed to “believe the child” and sentenced to life without possibility of parole? Did Garcia’s lawyer “cop a plea” for a defendant he knew to be guilty, or did he simply take the easy road because any additional legal work the judge’s order required of him would have been pro bono, and persuading the client to plead guilty was the least disadvantageous strategy? Is Garcia at risk as a patient in Dr. Melendez’s sex offender treatment program because sooner or later, if he continues to deny guilt, Dr. Melendez will have to report him to the judge as a probation violator?114 Was Elena lying to help her mother get rid of Garcia? Or is it too unlikely that a ten-year-old girl would make up such a story and stick by it through police, medical, and social agency interviews, as well as a lawyer’s adverse cross-examination in a deposition? How credible would jurors find Elena if her descriptions of the assault and the sensations she experienced failed to meet their common sense expectations of the physical consequences of anal rape?

Don’t expect definitive answers to these or a host of other questions about the Garcia case. The “real” facts of cases never tried (and many that were tried) are hard to come by.

A doctrinal issue requires attention—an issue that might not have been spotted by the lawyers or the judge. Is testimony about sphincter tone relevant? Recall that the capital sexual battery statute prohibits “oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object,” if the victim is a “person less than twelve years of age.”115 The crime’s elements are satisfied if a jury can find that Garcia’s penis was in “union with” Elena’s anus—and “union with” has been interpreted to mean simple contact.116 Penetration would not have to be proved and the Rape Treatment Center report (with its decreased anal sphincter tone finding as evidence of penetration) would not have to be introduced. The prosecutor, knowing that Dr. Gomez would be impeachable, could rely solely on Elena’s testimony at trial and her con-

114 Convicted sex offenders sentenced to probation on condition that they complete treatment successfully have had their probation revoked if they continue to refuse to admit guilt. The Florida cases point in opposite directions. See Diaz v. State, 629 So. 2d 261, 262 (Fla. Dist. Ct. App. 1993) (defendant’s probation cannot be revoked simply because he refused to admit guilt to counselor with whom he was ordered to attend counseling sessions; plea agreement did not contain clause specifically requiring admission); Archer v. State, 604 So. 2d 561, 563 (Fla. Dist. Ct. App. 1992) (probation revocation affirmed because defendant refused to acknowledge sexual problem in counseling sessions required by plea agreement; no mention of specific terms of agreement). Whether Garcia’s plea agreement, supra text preceding note 113, required admission of guilt with sufficient specificity to authorize revocation under the right circumstances is not clear. According to Garcia’s motion for post-conviction relief, he confessed (allegedly incorrectly and under pressure from his lawyer) to Dr. Melendez but denied guilt to Dr. Ramirez.

115 FLA. STAT. ANN. §§ 794.011(1)(h), (2) (West 2004).

116 See supra note 13.
consistent statements to the detective and the Children’s Center interviewer. Elena’s descriptions of penetration could be explained as terms a child might use to explain contact; in any event, the jury would not have to go beyond the meaning the statute gives to Elena’s statements. In this scenario, defense counsel would have no basis for impeaching Dr. Gomez—Elena’s sphincter tone is simply irrelevant.

The situation is very different if, for whatever reason, the prosecutor were to decide (as the prosecutor in the Garcia case apparently did) to prove penetration by having Dr. Gomez’s report explained by a less impeachable medical source. Then the crucial evidentiary issue in the case has to be confronted. What is known (or—perhaps more important in light of what occurs in trials—what can an effective medical expert persuade a jury to believe) about decreased anal sphincter tone? A responsible and objective pediatrician expert on sphincter tone would probably give testimony along the following lines: decreased anal sphincter tone may tell an examiner something about the likelihood that sodomy has occurred—but because the physical observation is difficult and impressionistic there are dangers of a mistaken diagnosis. It is certainly possible that a ten-year-old who was anally raped by an adult one month before the examination would show no sign of trauma from the experience—both because children heal quickly and because the physical impact of the rape on the child depends greatly on the amount of force used by the rapist and how much penetration of the anus actually occurred. Since children can describe as penetration a very limited entry into the buttocks only, physical damage to the anus—decreased sphincter tone or some other consequence—may simply not occur. But sphincter tone testimony may be suspect. Anal colposcopy (utilizing a device for magnifying, illuminating and photographing the ano-genital area), picturing hills, ridges and lesions, was used by pediatricians in criminal trials to prove sodomy when normative studies of children’s anuses had not been undertaken; when such studies were done, children who had not been abused turned out to exhibit just the hills, ridges and lesions which had been relied on to confirm sodomy.117 A notorious English scandal (which involved the conviction in one town of a number of innocent parents) tarred the use of such testimony.118 Many experts would not be willing to testify “to a reasonable medical certainty”119 that Elena was

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117 See John. McCann et al., Genital Findings in Pre-Pubertal Girls Selected for Non-Abuse: A Descriptive Study, 86 PEDIATRICS 428 (1990). See also Shireen Atabaki, M.D. & Jan E. Paradise, M.D., The Medical Evaluation of the Sexually Abused Child: Lessons from a Decade of Research, 104 PEDIATRICS 178, 180 (July 1999): “In published series in the late 1980s and early 1990s, a substantial proportion of sexually abused children, both boys and girls, were reported to have anatomic abnormalities of the external genitalia or perineum. Investigators suggested that findings such as . . . bumps, attenuation, and synechiae constituted physical evidence of the sexual abuse the children had experienced. . . . Taken together, data from McCann and colleagues [and others] demonstrate conclusively that small variations in the size, contour, and appearance of the external genitalia in girls who have not been sexually abused occur relatively frequently. . . . Accordingly, the presence of these anatomic variations should not be interpreted as evidence that sexually abusive physical contact has occurred.”


119 This phrase states the test most state courts have established to justify the admissibility in
the victim of sodomy based upon the unsupported statement in Dr. Gomez's report.  

Would a jury convict Garcia with the medical testimony the prosecutor could present? Neither the prosecutor nor defense counsel would be able to make a very accurate prediction of the outcome. But this is not the most likely litigation scenario. If the prosecutor prepared carefully and Garcia could afford the best defense, medical experts with fulsome *curricula vitae* would contradict each other as to the reliability of Dr. Gomez's observation and as to the inferences that should be drawn from it. Under such circumstances, the outcome would be unpredictable, especially since there was no corroboration of Elena's claims of abuse. But Garcia could not pay for the best defense. Even without the urging of his now free (but no doubt unhappy) lawyer, even without independent evidence of criminal behavior, Garcia could have seen the handwriting on the wall—"life in prison" was how it would read.

IV. ADDITIONAL OBSERVATIONS

Generalizations do not come easily—especially generalizations about such different criminal prosecutions, punishing different behaviors, with such different outcomes. In *Gibson*, the defendant admitted the offense, went to trial, turned evidence of a medical or other expert opinion.

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120 Consider the reflections on the Garcia case provided by a pediatrician with substantial experience consulting and testifying in child sexual abuse cases: "The Rape Treatment Center doctor's testimony, is problematic for several reasons. If he is being deposed as an expert medical examiner in child sexual abuse, based perhaps on his clinical experience more than on any formal training, he does not present his finding of decreased anal sphincter tone within any context of diagnostic certainty. He should explain exam findings that are normal or non-specific and what is suspicious or generally thought to be clear signs of abuse. Sphincter tone is a physiologic state and not primarily an altered anatomic one. There is some terminology that can be confusing. Determination of anal sphincter tone (presumably by gloved digital exam) vs. observation only of anal dilatation or contraction either by eye or with a magnifying instrument (colposcope) is not the same thing. Most medical examiners would not perform digital or instrument (anascope) exams routinely unless there is some clinical indication as bleeding or signs of acute blunt trauma as anal or rectal tears or possible internal injury. Maybe this is a regional preference or something that an OBGYN person would do. McCann's studies of a non-abused, pre-pubertal population did not involve rectal exams (as far as I know). He did show that anal dilatation was a common finding in almost all of the children studied, becoming more apparent as the exam time increased and was more likely with the presence of stool in the rectum. There is also the term 'anal laxity' which is used to describe conditions thought to be associated with chronic stretching of the sphincter, possibly from abuse, but not very common or well documented in the abuse literature. McCann also reported on anal findings in some young children following a known acute anal penetration episode but did not find anal dilatation; he commented that persistent anal dilatation is a finding more associated with chronic abuse. The Rape Treatment Center doctor implied that chronic anal penetration either by abuse or sexual relations causes permanent loss of anal sphincter tone. I don't think this is a well established finding in kids since most exams even with a good history of abuse or penetration are normal. I think that most pediatricians would be comfortable with the 'consistent with abuse' language in this case; anal laxity might be in the suspicious category, but it would not in my opinion rise to the 'diagnostic of abuse' level of certainty." Letter from Harvey S. Kaplan, M.D., dated September 11, 2000 (on file with the author).
down what appeared to be the prosecutor’s post-conviction, face-saving offer of a substantially diminished (but still harsh) penalty, and ended up contemplating the rest of his life in prison. In Garcia, the defendant denied guilt, seemed to have a fair chance to be acquitted, but avoided the risk of life in prison only by pleading guilty to a lesser included offense. Yet Garcia did not escape punishment (in addition to the few days he spent in jail when first arrested): he had to suffer (at least practical) termination of his relationship with his daughter and life-time public designation as a sexual predator; he was subsequently denied an opportunity to prove his innocence even though his guilty plea may have been the product of his lawyer’s desire to withdraw as well as the harshness of the penalty for his alleged behavior. Despite the differences, there may be lessons to be learned from the two cases considered together.

First, the cases dramatically show how vital to defendants, especially to defendants charged with an “LWOP” or some other harshly penalized crime, are the services of a good defense lawyer. But consider how difficult it would be adequately to protect Gibson’s interest in good legal representation in post-conviction proceedings—considering the “effectiveness” and “prejudice” factors judges take into account (both doctrinal and covert but real considerations). Judges are handicapped in assessing how effective Gibson’s (or any other defendant’s) lawyer’s representation was after a guilty plea or a jury conviction. A post-conviction motion judge would know only from a stale transcript and, even then, mostly, if not exclusively, from second-hand reports, the nature of Gibson’s behavior with his stepdaughter and how often it occurred; the judge could only surmise as to the impact of the behavior on the victim; the judge would not know the nature of the prosecutor’s pre-trial guilty plea offer to Gibson; the judge would not know in what fashion Gibson’s original or the substituted public defender “encouraged” Gibson to accept a deal offered by the prosecutor, or if Gibson himself insisted on going to trial despite advice that his confession would be admissible and his conviction highly probable; the post-conviction judge would not know what alternatives there may have been to the admittedly risky trial strategy the substituted lawyer chose, and what the chances were that those alternatives would have persuaded a jury, that jury, to acquit; any lawyer called to testify in a proceeding whose purpose is to prove his previous incompetence or malpractice would have some tendency to defend his previous judgments and tactics—even perhaps to color them slightly to his own advantage. In short, the quality of legal representation is difficult, if not impossible, to assess after the fact.

We know more about Garcia’s lawyers’ performances—and, at first glance, it seems clear that it was a mistake to hire Graham. His first lawyer got him Arthur bail, and undermined any utility Dr. Gomez might otherwise have had as a prose-

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121 But see supra note 37, indicating that in Gibson’s post-conviction relief proceeding, both of Gibson’s lawyers testified that they had encouraged him to accept the prosecutor’s plea offer. Moreover, experienced trial and appellate judges might well know what kinds of plea “discounts” local prosecutors typically offer.

122 See supra notes 48, 50, and 62.
cution witness if the case were to be tried. Graham persuaded (or by demanding additional money effectively coerced) Garcia to plead guilty—with the result that he will be labeled a sexual predator for life. Thus, good lawyers make a difference.

But wait a minute—Graham may have “succeeded” by being unprepared, perhaps, or because the judge compelled him to continue representing Garcia, since the prosecutor may have feared that, without much help from an unprepared and unenthusiastic Graham, Garcia’s post-conviction “denial of effective assistance” claim might be successful. Graham negotiated a plea agreement that allowed Garcia to “walk” with no additional jail time when going to trial might have gotten him life in prison and a predator label as well. Does “good lawyering” make a difference—when the punishment stakes are so high, the uncertainty of jury judgment so great, and the prediction of outcome so difficult? Perhaps over a run of cases—but the “proof is not evident, the presumption not great” in either Gibson’s or Garcia’s case.

The two cases, considered together, suggest that although prosecutions for serious felonies may not, strictly speaking, “have a life of their own,” their goals and pace and to a substantial degree their outcomes are effectively controlled by prosecutorial authority and are not very much constrained by appellate review. Of course, convictions are reversed—on almost any available basis if appellate judges are dubious about the defendant’s actual guilt, on the basis of a single error if the prosecutor or the judge makes a sufficiently egregious mistake. Yet lawyers’ skills are variable, time for pre-trial preparation is almost never as fulsome as necessary, hearings and trials are chaotic; despite universal, intense and continual second-guessing of trial tactics and trial events by prosecutors, defense counsel and defendants, almost nothing is predictable and it is usually impossible to determine what specific event or testimony, if any, determined the jury’s verdict. So do the Gibson and Garcia prosecutions teach us that a criminal trial truly involves “rolling the dice?” Few criminal trial lawyers, prosecutors or defense counsel would agree with that judgment—they would insist that, unless the facts control, lawyers are vital and more often than not outcome-determinative.

It is difficult to read these cases, to weigh seriously the wisdom of the tactical judgments of the prosecutors and the several defense counsel who represented Gibson and Garcia, without invoking or feeling the omnipotent influence of the “capital” penalty the legislature chose for the crime of child sexual abuse. Neither the opinions in Gibson nor the prosecutor’s file in Garcia prove it, but it seems to me that most decisions by both prosecutors and defense counsel were influenced, if not determined, by the “LWOP” “gorillas on their [more appropriately, their clients’] backs.” Gibson’s failure to accept a pre-trial offer was certainly in part a product of the prosecutor’s insistence that Gibson spend fifteen years in prison; it

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123 Similarly, Gibson’s lawyers’ claim that they were unprepared for trial (a claim they later denied, see supra note 48), combined with the jury’s “intervention,” may have succeeded in getting Gibson an “unusual” offer of a plea to a lesser included offense. But see supra note 62 (Florida lawyers claim that no defendant should be advised to rely on a post-conviction relief motion).

124 This is the test for Arthur case bail. See supra note 72.

125 See, e.g., the cases cited in supra notes 52–54.
could also have been a product of Gibson's belief in his innocence and that he would be acquitted despite a confession offered because he wanted his family reunited. But why should the prosecutor "deal" with (or offer a "reasonable" sentence to) a defendant who has confessed, when the down-side risks of going to trial seem minimal? And if the prosecutor, emboldened by the punishment's severity, holds out for a lengthy sentence in return for a plea (vide the Gibson prosecutor's offer of twenty-five years after he was embarrassed by the jury's revolt), what incentive is there for the defendant or his lawyer to plead guilty? Garcia may have been innocent (although no study of the file or interviews of the family is likely to provide a definitive answer), but many lawyers would advise him not to "roll the dice" when the risk of a guilty verdict carries such a huge price. Indeed, that the prosecutor agreed to a plea bargain with credit for only forty-two days of time served, although the prosecutor had vehemently opposed bail when the case was in its initial stages, leads one at least to wonder about the prosecutor's evaluation of the strength of his case; and if the case was not strong (probably because the prosecutor either wanted to protect the victim from the trauma of a trial or because the prosecutor thought that the jury would not find the victim a credible witness), the power of the statutory punishment to elicit a plea (turning the alleged perpetrator into a life-long pariah) is obvious.

A warning was issued at the beginning of this essay that the Gibson and Garcia cases might not be representative. Indeed, in-depth examination and evaluation of individual cases, unlike common law review analyses of bodies of legal doctrine, is both atypical and potentially misleading—precisely because its focus is so narrow. But as Gibson and Garcia clearly show, it is also misleading to evaluate the criminal justice doctrine divorced from the many excruciatingly difficult and often painful pretrial and trial tactical decisions defendants and their counsel (good or bad) are compelled to make, decisions which will often determine how doctrines apply to real people in the real world.

Studying these cases does lead to at least one incontestable proposition: no matter how much one knows about a criminal prosecution, at the core, it remains a mystery. The Gibson jury believed it had been uninformed and that full information, in this case, about the penalty for the conviction, would have changed the jury's determination of guilt. (Similarly, many juries are deprived of facts which might lead, or lead more easily, to conviction—because, for example, of evidence admissibility rules.) But the Gibson jury also knew nothing, or very little, about the events which led to Gibson's prosecution; the jury would have known only the facts to which an eight-year-old testified directly, or hearsay reports about the events to which the child's mother, her grandmother, some police investigator, or a therapist who had interviewed the child, would have testified. The jury would have known no more about Gibson's persona, his explanation of the circumstances surrounding the crime, his "remorse," the chances that he might (if not incarcerated) repair the damage caused by his behavior and be "rehabilitated," or the psychological damage, if any, Gibson's behavior caused the victim. In Garcia's case, no

\[126\] See supra note 22.
jury examined the factual dispute between the defendant and his wife, no fact finder considered the impact of his conviction on his daughter or the impact on Garcia himself of his life-long predator status. The unknowns are innumerable. To be sure, the fact that these cases remain in some sense mysteries hardly distinguishes them from most other criminal prosecutions, whether they terminate in a guilty plea or a conviction by judge or jury. Yet how little can be known, about the crime and the criminal, makes the case for any mandatory minimum sentence—much less a life sentence without the possibility of parole—even more dubious.