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John F. Yetter
Florida State University College of Law

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DISCOVERY DEPOSITIONS IN FLORIDA CRIMINAL PROCEEDINGS: SHOULD THEY SURVIVE?

JOHN F. YETTER*

Pursuant to a Concurrent Resolution of the 1988 Florida Legislature, the Supreme Court of Florida created a commission which is presently studying the use of depositions by the defense in criminal prosecutions. In this Article, Dean Yetter, a member of that commission, traces the history of criminal defense depositions in Florida, explores the arguments which shaped last session's legislative debate, and identifies available options for reform.

Florida is one of a small minority of states which permit the defense to take discovery depositions in criminal prosecutions.¹ The 1988 Florida Legislature considered proposed legislation which would have abolished discovery depositions in criminal prosecutions. In the end it settled for a Concurrent Resolution asking the Supreme Court of Florida to address the issue of discovery depositions.² The Concurrent Resolution called upon the supreme court to appoint a commission comprised of representatives from the law enforcement community, the prosecution, public and private criminal defense counsel, victims' rights organizations, the judiciary, The Florida Bar, and the legislature. The proposed commission would consider various problems with discovery depositions and report its findings and recommendations to the supreme

* Roberts Professor of Criminal Law and Associate Dean for Academic Affairs, Florida State University College of Law. B.S., B.A., 1963, Lehigh University; J.D., 1967, Duquesne University School of Law; LL.M., 1968, Yale Law School. The author has been appointed to the Criminal Discovery Commission by the Supreme Court of Florida. The author also serves on the Criminal Procedure Rules Committee, and is Chairman of the Criminal Law Section of the Florida Bar. This Article reflects the author's own views and not those of the Commission.


² Discovery depositions are not available in federal criminal prosecutions. See Fed. R. Crim. P. 15-16.

court. The court, in turn, was urged to issue an opinion by April 1, 1989, adopting appropriate changes in the discovery deposition rule.3

On July 7, 1988, the supreme court appointed a fourteen-member Criminal Discovery Commission (Commission) to perform the mission specified in the Concurrent Resolution. At the time of this writing the Commission is meeting to hear testimony, and its report to the court is due February 1, 1989.4

3. The text of the Concurrent Resolution reads as follows:

Be It Resolved by the House of Representatives of the State of Florida, the Senate Concurring:

That the Legislature urges the Supreme Court to give due consideration to the petition submitted by the State Attorneys of Florida and institute the changes in Rule 3.220(d), Florida Rules of Criminal Procedure, necessary to solve any problems that exist in the misuse of the rule. The court is requested to appoint, by July 1, 1988, a Commission on Criminal Discovery to consider various issues related to the use of discovery depositions in criminal proceedings. The Supreme Court is urged to include a balanced representation of law enforcement, prosecution, public and private criminal defense counsel, victims rights organizations, the judiciary, The Florida Bar, and the Legislature in the appointment of members to the commission.

The Legislature requests the commission to consider:
(1) Protection for victims and other witnesses.
(2) Limiting depositions to only essential witnesses.
(3) Prohibiting the defendant from attending the deposition unless good cause is shown.
(4) Use of technological advances to reduce costs and scheduling problems.
(5) Potential savings of public funds and the time of law enforcement, witnesses, prosecutors, defense counsel and court personnel that may be derived by employing alternative discovery techniques.
(6) Any other appropriate issues.

The commission is requested to report its findings and recommendations to the Supreme Court by February 1, 1989, and the court is requested to issue an opinion adopting the appropriate changes to Rule 3.220(d), Florida Rules of Criminal Procedure, by April 1, 1989.

Id.

4. The Florida Supreme Court's administrative order appointing the Commission reads as follows:

The legislature . . . has requested this Court to appoint a Commission on Criminal Discovery to consider various issues related to the use of discovery depositions in criminal proceedings, and has requested the Commission to report its findings and recommendations to this Court by February 1, 1989.

Accordingly, the Court hereby creates as a committee of the Florida Supreme Court, a Criminal Discovery Commission, and appoints the following to the Commission: Ed Austin, State Attorney; Walter Beckham, Esquire; Gerald Bennett, Professor, University of Florida; Patricia Cocalis, Circuit Judge; Al Datz, Esquire; Dan Hurley, Circuit Judge; Don Middlebrooks, Esquire; Stanley Morris, Circuit Judge; Chandler R. Muller, Esquire; Richard C. Parker, Esquire; Parker Thomson, Esquire; Sylvia Walbolt, Esquire; John Yetter, Professor, Florida State University; Jim York, Esquire.

Judge Stanley Morris will chair the Commission and Judge Dan Hurley will serve as Vice Chairperson.

Staff for the Commission will be supplied by the Office of State Court Administrator. The Legislature provided no funds for the work of the Commission. Reasonable and
The purpose of this Article is to review the history of discovery depositions in criminal cases in Florida, to describe the deliberations and arguments in the 1988 Florida Legislature, and to discuss some of the available options for reform.

I. HISTORICAL DEBATE ABOUT CRIMINAL DISCOVERY DEPOSITIONS

A debate arose during the 1960's about whether discovery by the accused in criminal cases should be expanded. The principal arguments against broad criminal discovery had been summarized by Chief Justice Vanderbilt of the New Jersey Supreme Court in State v. Tune. He wrote that broad discovery would facilitate perjured testimony, would lead to bribery and the intimidation of witnesses, and would be a "One-way Street" favoring the accused, because the privilege against self-incrimination protected defendants from reciprocal disclosures. Chief Justice Vanderbilt also wrote that the favorable experience with broad discovery in England could not be duplicated in the United States, since the English were a more law-abiding society.

In 1963, United States Supreme Court Justice William Brennan delivered an important lecture, later printed as a law review article, arguing for more liberal discovery for the accused. Justice Brennan said that under the prevailing limited discovery rules the prosecution enjoyed an unfair trial advantage—the scales of justice were not "evenly balanced." Brennan thought this was particularly disadvantageous to court-appointed counsel who had neither the time nor the resources for careful preparation. He specifically addressed the arguments raised by Chief Justice Vanderbilt in State v. Tune. He doubted whether fair discovery would stimulate perjury and said such a view cast unfair aspersions on the defense bar. Judicial protective orders, Brennan wrote, would be adequate to guard against witness intimidation. He did not

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2. Id. at 285.
3. Id. at 286-87.
4. Id. at 291.
6. Id. at 209-11, 98 A.2d at 884-85.
7. Id. at 219, 98 A.2d at 889.
8. Brennan, supra note 8, at 292.
believe that the privilege against self-incrimination would unfairly protect the defense from reciprocal disclosures; instead, he noted that police investigators have ample opportunity to collect evidence after the offense, including the ability to interrogate the suspect incommunicado.  

Finally, Brennan observed that even if Americans were less law-abiding than the English, Canadians were certainly not remarkably different from Americans, and Canada allows for liberal discovery to the defense.

Justice Brennan conceded that broadened discovery would undoubtedly increase the likelihood of the problems envisioned by Chief Justice Vanderbilt. Nevertheless, he believed that strong judicial supervision would be an adequate safeguard against abuses, and that "[t]he gain to the public interest in the pure and just administration of the criminal law is well worth the risks."  

As a result of this debate, throughout the 1960's and 1970's defendants generally were afforded more liberal discovery in criminal prosecutions. Discovery depositions, however, were not favored by the majority. In 1970, the American Bar Association (ABA) rejected the proposition that depositions should be available as a matter of right in all criminal cases. Instead, the ABA's Minimum Standards on Criminal Justice, reflecting the majority view, contained the following statement:

That the defendant should have the right to take depositions in a criminal case for discovery purposes was seriously considered by the Advisory Committee but was rejected by a majority as a minimum standard. Although such a right is granted in civil cases in many jurisdictions, there are different considerations in the criminal process. First, there is no inherent limitation of cost on the conduct of unnecessary depositions, because in many cases the costs of the defense must be borne by the state; and it would be manifestly unfair to grant the right only to defendants who are able to finance their own defense. Second, if stated as a right, the need to take depositions might be construed as part of the adequacy of representation required by the constitutional right to counsel. Third, the imposition on civilian witnesses may discourage their coming forward in criminal cases. And, finally, underlying the importance of these considerations is the belief that depositions in addition to the disclosures otherwise required by these standards will not be necessary in most criminal cases. Under its responsibilities in bringing a criminal case, the prosecution will

14. *Id.* at 292-93.
15. *Id.* at 293.
16. *Id.* at 295.
ordinarily possess written statements or transcripts of testimony of potential witnesses of such completeness that additional interrogation by the defense attorney, prior to trial, will be of only marginal value in most cases. Moreover, anything of which the prosecution has knowledge, in addition to the statements, which may tend to negate guilt of the accused must also be disclosed.\footnote{17}

On the other hand, the 1975 Uniform Rules of Criminal Procedure did provide for discovery depositions as of right.\footnote{18} The commentary to the rule offered the following rationale:

Making the opportunity to take depositions generally available seems especially justifiable in light of these Rules' eliminating preliminary hearings where the defendant is not in custody. . . . Depositions provide much greater flexibility in scheduling than do preliminary hearings, and cost less because they do not require the presence of a judicial officer or the use of a courtroom. Further, since they will normally occur at a later point in the proceedings than would the preliminary hearings, the parties will be more likely to dispense with them if they find that they can obtain sufficient information by such means as interviewing the witnesses or examining their statements. The parties are unlikely to resort to the use of depositions unless they think it is necessary and [protective orders are] available to prevent abuse. The greater availability of information made possible by depositions will increase the likelihood of dispositions short of trial.\footnote{19}

\footnote{17.\textit{Standards Relating to Discovery and Procedure Before Trial} 87-88 (1970).}{18. The text of Rule 431 reads as follows:}

\textbf{[Depositions.]}\footnote{19. \textit{Id.} commentary at 131.}

(a) \textbf{When taken.} At any time after the defendant has appeared, any party may take the testimony of any person by deposition, except:

(1) The defendant may not be deposed unless he consents and his lawyer, if he has one, is present or his presence is waived;

(2) A discovery deposition may be taken after the time set by the court only with leave of court;

(3) A deposition to perpetuate testimony may be taken only with leave of court, which shall be granted upon motion of any party if it appears that the deponent may be able to give material testimony but may be unable to attend a trial or hearing; and

(4) Upon motion of a party or of the deponent and upon a showing that the taking of the deposition does or will unreasonably annoy, embarrass, or oppress the deponent or a party, the court in which the prosecution is pending or the court of the [district] where the deposition is being taken may order that the deposition not be taken or continued or may limit the scope and manner of its taking. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make the motion.

Attendance of witnesses and production of documentary evidence and objects may be compelled by subpoena under Rule 731.

In 1978 the ABA modified its position by liberalizing discovery through "open file" disclosures and by partially rejecting the more critical analysis of discovery depositions it espoused in 1970. However, the ABA's revision continued to exclude discovery depositions as a matter of right.

II. THE HISTORICAL TREND IN FLORIDA

The first comprehensive rules of criminal procedure in Florida were promulgated by the supreme court effective January 1, 1968. Previously, various statutes governed criminal procedure in Florida, but they were silent as to discovery depositions. The 1968 rules, however, provided for discovery depositions, though not as a matter of general right. Rather, the defense was required to request and obtain a court order, issued only upon a showing that the testimony of the person to be deposed was material, relevant, or of assistance in the preparation of the defense, and that the witness would not cooperate in giving a voluntary, signed, written statement to the defendant or his attorney.

Hence, the 1968 Florida rule incorporated a compromise position that the defendant should have the same ability that the state would have to take testimony under oath from non-cooperating witnesses. However,

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20. The 1978 commentary reads as follows:

21. See id. § 11.
25. See id. Section 27.04, Florida Statutes, provides that the state attorney may summon witnesses to testify under oath. Section 914.04 authorizes a witness compelled to testify under the former provision to receive "use and derivative use" immunity. Id.
if witnesses were willing to "cooperate" with defense counsel, no deposition right existed. In 1972, the supreme court promulgated a thorough revision of the 1968 rules. The amendments to the discovery rule relied heavily on the ABA Standards regarding disclosure to the defense. However, the supreme court's amendments departed from the ABA Standards by providing for depositions as a matter of right and without court order. Regarding this important change, the 1972 committee notes state, in awkward terms, only the following:

Not recommended by [ABA] Standards. Previously permitted under Florida Criminal Procedure Rule 3.220(f) except for change limiting the place of taking the deposition and eliminating requirement that witness refuse to give voluntary signed statement.

Thus, discovery depositions as a matter of right entered the law of Florida Criminal Procedure without much officially reported debate.

The 1972 discovery deposition provision has remained essentially unchanged, with the exception of two amendments made in 1986 in response to a petition filed by the state attorneys. One change prohibited the taking of more than one deposition of the same witness in multi-defendant or consolidated cases absent consent of the parties or court order. The second change limited transcription of depositions at public expense to situations where deponents were shown to be material witnesses or where other good cause was shown.

III. Passage of the 1988 Concurrent Resolution

The move to abolish discovery depositions during the 1988 session had significant legislative support. Senator Robert Johnson proposed

26. See Fla. R. Crim. P. 1.220(f) (1968). Curiously, I uncovered no case law construing the term "cooperate" under the 1968 rule. One would have thought this to be a controversial question.

27. In re Florida Rules of Criminal Procedure, 272 So. 2d 65 (Fla. 1972), modified, In re Florida Rules of Criminal Procedure, 272 So. 2d 513 (Fla. 1973). Prior to this revision the discovery deposition rule, then numbered 1.220(f), was amended once, merely to place parentheses around the following phrase: "other than a confidential informer who will not be a witness at the trial[.]" In Re Florida Rules of Criminal Procedure, 211 So. 2d 203, 205 (Fla. 1968).

28. Rules of Criminal Procedure, 272 So. 2d at 107. Some of those who served on the Florida Supreme Court's Rules Committee have said the deposition rule was amended at the instance of the trial court judges who claimed that under the 1968 rule they were regularly granting motions for depositions. The trial court judges, therefore, believed the court order requirement had become surplusage and that the rule should be amended to reflect reality: i.e., depositions were being granted as a matter of right.

29. Id. at 110.


31. Id.

32. Id.

an abolition statute in the Senate which was approved by both the Judiciary-Criminal Committee and the Judiciary-Civil Committee with only one dissent.\textsuperscript{34} Representative John Renke\textsuperscript{35} proposed in the House the same legislation which had passed through the Crimes, Penalties and Prosecutions Subcommittee of the Criminal Justice Committee by a 5-0 vote.\textsuperscript{36} The House Criminal Justice Committee, however, rejected the abolition proposal in favor of the Concurrent Resolution, which was ultimately passed by both legislative chambers.\textsuperscript{37}

Under the Florida Constitution, the Supreme Court of Florida has exclusive jurisdiction to enact rules of procedure.\textsuperscript{38} The legislature has no constitutional authority to enact procedural legislation, but may repeal rules of procedure by a two-thirds vote of each chamber.\textsuperscript{39} Some observers speculated that the abolition proposals never had a realistic chance of passing both chambers by the required two-thirds vote and were designed to “send a message” to the supreme court.

If so, the content of the message was unclear. Undoubtedly many proponents of abolition, including some legislators, favored total repeal. However, as reflected in the committee debates, legislators and even some advocates of repeal were seeking substantial changes in the deposition process, but not its complete elimination. Even if the abolition proposals never had a realistic chance of passage, they generated considerable concern at the committee and subcommittee levels. These meetings were well attended and extensive testimony was given by victims’ rights representatives, state attorneys, public defenders, and the private defense bar.

The Concurrent Resolution does nothing more than request the supreme court to consider problems relating to discovery depositions, which it had been asked to do only three years before. In 1985 the state attorneys of Florida filed a petition with the supreme court requesting the appointment of a commission to study discovery depositions.\textsuperscript{40} The supreme court instead referred the state attorneys’ petition to the Crimi-

\bibitem{34} FLA. LEGIS., HISTORY OF LEGISLATION, 1988 REGULAR SESSION, HISTORY OF SENATE BILLS at 64, SB 291. Senator Peter Weinstein, Dem., Tamarac, cast the sole dissenting vote in both committees.
\bibitem{35} Repub., New Port Richey.
\bibitem{36} FLA. LEGIS., HISTORY OF LEGISLATION, 1988 REGULAR SESSION, HISTORY OF HOUSE BILLS at 240, HB 1106.
\bibitem{37} \textit{Id}.
\bibitem{38} FLA. CONST. art. V, § 2.
\bibitem{39} FLA. CONST. art. V, § 2(a).
\bibitem{40} \textit{In re} Emergency Amendments to Rules of Criminal Procedure, 498 So. 2d 875 (Fla. 1986).
nal Procedure Rules Committee (Committee), which recommended two relatively minor amendments subsequently adopted by the court.

In its report to the supreme court which accompanied its proposed amendments, the Committee stated that a subcommittee had considered and rejected various other proposals which consequently never were submitted to the full Committee for consideration. One proposed amendment would have forbidden the use of discovery depositions at trial for impeachment. Another would have limited depositions to people named in the charging document, people designated by the prosecutor as eyewitnesses, or law enforcement officers with primary investigative authority. The two amendments which were submitted to and adopted by the full Committee, and ultimately adopted by the supreme court—limiting both multiple depositions of the same witness and the transcription of depositions at public expense—obviously were rather mild in comparison. This is not surprising given the general view of the Committee:

The discussion within the Criminal Procedure Rules Committee was on two levels. First, there was majority agreement that Rule 3.220 was functioning well and not in need of major revision. Second, the perception of the Supreme Court, the elected State Attorneys and the public (represented by the legislature), may be different, and that the committee should work to propose the minimum revisions necessary to remedy the perceived problems.

The Concurrent Resolution reflects a serious difference of opinion between the 1988 Legislature and the 1986 Criminal Procedure Rules Committee. The Committee as a whole perceived no systemic problems with depositions. Although it recognized and dealt with the significant costs accrued in transcribing immaterial depositions, the Committee wholly failed to consider those costs incurred by the diversion of police

41. Id. The supreme court dealt with this petition as prescribed by Florida Rule of Judicial Administration 2.130—Procedure for Amending Rules, which specifies that rule amendment proposals should be submitted to the Criminal Procedure Rules Committee. This committee is appointed by the President of The Florida Bar and consists of state attorneys, public defenders, private defense counsel, judges and law professors. FLA. R. JUD. ADMIN. 2.130(4).
44. Id. at 3. Currently, discovery depositions may not be used as substantive evidence in a criminal trial. State v. James, 402 So. 2d 1169 (Fla. 1981). It is interesting to note, however, that under the terms of the hearsay exception for former testimony, discovery depositions would seem to be admissible. See FLA. STAT. § 90.804(2)(a) (1987).
46. Id. at 4 (emphasis added).
resources. The only attention the Committee gave to witness harassment was the recommended prohibition against multiple depositions of the same witness.

The Concurrent Resolution clearly reflects a sentiment within the Legislature that the amendments proposed by the Criminal Procedure Rules Committee and adopted by the court in 1986 are inadequate to deal with the perceived problems in discovery depositions. Additionally, the Concurrent Resolution suggests that the necessary drastic revision, if not abolition, of the discovery deposition process must come from some group other than the Criminal Procedure Rules Committee.

IV. THE ARGUMENTS FOR AND AGAINST REPEAL

The advocates for repealing discovery depositions were the elected state attorneys, the Florida Department of Law Enforcement (FDLE), local law enforcement agencies, and victims' rights representatives. In support of their proposal to abolish discovery depositions, these groups focused principally on two features of the current system: the significant costs of discovery depositions and the use of depositions to harass witnesses. The FDLE stated that depositions consume more than 750,000 law enforcement man-hours per year (enough man-hours to staff a police agency approximately the size of the Orlando, Florida, Police Department). The FDLE contended as well that, by conservative estimates, "over $35.6 million in state and local funds are expended annually by law enforcement, prosecutors, and public defenders for their participation in criminal discovery depositions." The FDLE estimated these figures based on responses to surveys mailed to law enforcement agencies, leading those favoring retention of depositions to question the accuracy of the figures. Whatever the real figures are, it seems clear that law enforcement officers spend considerable time in depositions, a costly diversion of their efforts from other law enforcement responsibilities.

47. See id.
48. Id. at 2.
49. The membership of the Criminal Procedure Rules Committee has changed considerably since the 1986 amendments to Rule 3.220. Present Committee membership includes 17 prosecutors, 13 defense counsel, and 12 judges and law professors. The Chairman of the Committee is Professor Gerald Bennett from the University of Florida College of Law.
51. Id. at 19-20.
53. Much police enforcement activity is at night. Depositions are scheduled during the day. Hence, many police depositions occur during off-duty hours. The standard police officers' collective bargaining agreement requires a minimum of two hours overtime for any off-duty court appearance.
The supporters of depositions vigorously countered the cost argument by asserting that the actual cost of depositions is quite low, ranging from $39.57 per case in Dade County to $6.34 per case in Escambia County. These figures, however, include only the costs of witness fees, court reporters, and transcriptions—not the salaries of prosecutors, public defenders, and, most importantly, police officers who attend depositions. The supporters of depositions also argued that abolition of discovery depositions would lead to an increased number of trials. The costs incurred due to the additional trials, they argued, would outweigh any savings obtained by abolishing depositions.

In support of their argument that criminal depositions are often used to harass victims and witnesses, the abolitionists presented extensive testimony chronicling such abuse. Supporters of depositions responded that these instances, if they occurred, were insufficiently commonplace to warrant abolishing all criminal depositions. Supporters also pointed out that the existing rule provides for judicial protective orders when necessary to curb abuse.

One argument not seriously pressed by the abolitionists was that depositions confer an undeserved advantage upon the defense, as the Constitution gives no right to discovery depositions to the accused. The only discovery constitutionally mandated in criminal cases is the accused’s due process right to disclosure by the prosecution of evidence or information favorable to the accused on the issues of guilt or punishment. The opportunity for full discovery of the state’s case by compelled testimony prior to trial confers significant advantages on the defense. Discovery affords the accused the ability to develop the contours of the defense strategy and, perhaps more importantly, to gather impeachment material. These advantages undoubtedly contribute, to some extent, to trial outcomes beneficial to the defense, and may even bestow a certain leverage on the accused in plea bargaining. A legislature bent on the efficient prosecution of criminals should respond warmly to an argument that defendants should not enjoy these advantages.

54. CRIMINAL JUSTICE IN THE SUNSHINE, supra note 52, at 10.
55. See id.
56. Id. at 15-19.
57. Id.
58. See DISCOVERING THE INJUSTICE, supra note 50.
59. CRIMINAL JUSTICE IN THE SUNSHINE, supra note 52, at 19-22.
61. It is a well-known reality to trial lawyers that each additional time a witness recounts events, the chances improve that some inconsistencies will be found, even if on relatively insignificant details. Defense lawyers encountering a particularly strong prosecution case often resort to emphasizing these inconsistencies to convince the jury that a reasonable doubt exists.
One can only speculate as to why this consideration was not the centerpiece of the abolitionist argument. Perhaps the prime movers for abolition were the police organizations and victims' rights representatives, and not the elected state attorneys, who may have assumed a leadership role primarily for political purposes. Law enforcement interests and victims' rights organizations naturally would emphasize diversion of police resources and harassment. It must be remembered, however, that it was the elected state attorneys who in 1985 began the attack on depositions by petitioning the supreme court for changes in the rule.\textsuperscript{62}

The legislative battle may be viewed as a struggle to occupy the high moral plane. Abolitionists may have intentionally avoided an argument which would have raised questions of essential fairness to the defendant or the symmetry between the civil and criminal systems. It is easier to focus on the outrageous abuses than on the difficult jurisprudential issue of where the balance of advantage should lie in criminal prosecutions.

It may be simply that depositions do not affect outcomes as much as one may think. This, if true, would appear to strengthen the abolition argument. Why suffer the needless costs of depositions if they do not affect the balance of advantage?\textsuperscript{63}

On the other side, advocates of depositions might have argued that depositions \textit{do} confer a substantial advantage on the accused, but that it is one defendants ought to have in a fair system of justice. That contention, however, comes perilously close to an implication that some guilty parties are receiving less than their just deserts because Florida allows discovery depositions. It would be preposterous to believe that depositions benefit only the innocent, and it is unlikely that the Legislature would embrace an argument asking for procedural advantages for the criminally accused.

In sum, there were good reasons for both sides to avoid the issue of whether, as a matter of public policy or essential justice, defendants in Florida ought to have the deposition power as a matter of right. In any event, the contesting sides focused their legislative arguments on the costs and alleged harassment, and not on public policy or fairness.

\textsuperscript{62} Rules Committee Response, \textit{supra} note 43, at 1.

\textsuperscript{63} I was unable to obtain data on acquittal rates in Florida prior to 1978. Data provided by the Florida State Courts Administrator for 1978-1987 reveal that felony jury trial acquittals have \textit{drastically decreased} on a percentage basis from 1978 to 1987. In 1978, 82,069 total felony dispositions included 904, or 1.1\%, jury trial acquittals. In 1987, 196,707 total felony dispositions included 1337, or 0.7\%, jury trial acquittals. State Courts Administrator, Table of Felony Dispositions by Type (Oct., 1988) (on file with the State Courts Administrator, Florida Supreme Court). This suggests that discovery depositions, which were available at all times within this period, may not be a very significant factor in acquittals, or at least that other variables are strongly operative.
V. Analysis of the Primary Legislative Arguments Behind the Abolition Movement

Since the Legislature saw fit to address only two primary issues regarding the use of discovery depositions in criminal cases—the cost of depositions and the potential for harassment of witnesses—it is appropriate to analyze those issues in greater detail.

A. Reflections on the Cost Arguments in the Statistical Void

The contending sides made many assertions about the respective costs and savings to the system attributable to discovery depositions, yet neither side offered much persuasive supporting evidence. Hence it would have been impossible for the Legislature to make an informed decision on this basis.

As mentioned above, the FDLE report suggested a $36.5 million figure for lost police man-hours based on estimates received from law enforcement agencies. Although there appears to be a significant loss involved here, the actual magnitude is unknown. Raw numbers which look quite large can become quite small when expressed as a percentage of a total budget.

The supporters of depositions countered the cost argument with the claim that discovery depositions actually save money by facilitating pleas, thereby avoiding the expense of a trial in many cases. They also argued that without the right to depositions, the defense would force discovery in other pre-trial hearings on various motions, requiring the same attendance not only by police officers, but also by judges, court personnel, lawyers and other witnesses. So, to the extent that real discovery was lost, trial costs would increase. To the extent that discovery shifted to other proceedings, costs would increase as well.

The claims by either side are not intuitively obvious and are not supported by empirical evidence. The overwhelming majority of jurisdictions do not provide discovery depositions and do not experience crippling trial rates. The supporters of depositions relied on a study done by Professor David B. Griswold, who obtained data from the National Center for State Courts showing statistics on criminal depositions

64. Discovering the Injustice, supra note 50, at 19-22. Although police agencies should be able to report expenditures accurately for overtime payments to police officers for court appearances, many do not break this figure down for the type of court appearance: i.e., a deposition, a pre-trial hearing, or a trial. Further, on-duty court appearances, and the actual time lost thereby, would not appear as an additional budget expenditure.

65. Criminal Justice in the Sunshine, supra note 52, at 10-19.

66. Id.
reported by various state court agencies. Based on this data, Professor Griswold attempted to show that jurisdictions with depositions enjoy a higher guilty plea rate than do those without. Unfortunately, gaps in the reporting system did not allow Professor Griswold to select a broad sample of jurisdictions without depositions, or to report on other jurisdictions with depositions regarding guilty plea rates in their courts of general felony jurisdiction. Further, many jurisdictions did not report any data, and as is typical with cross-jurisdictional studies of this type, there is doubt that the same criteria were used in the reporting.

More fundamentally, the guilty plea rate is a function of many variables, not the least of which are the docket backlogs in particular jurisdictions, the tendency of judges to impose harsher sentences after conviction by a jury, and prosecutorial policies on plea bargaining. Even if one had confidence in the underlying statistics, and the statistics were sufficiently complete to obtain broad samples for comparison, there remains the obvious problem that the plea rate may be determined by more significant variables than the presence or absence of depositions. A quick review of the National Center for State Courts data illustrates this well. Neither South Dakota nor Virginia has depositions. According to the figures, the misdemeanor plea rates in the two states are 98% and 55%, respectively. When rates differ so significantly, it is obvious that vast discrepancies in plea rates occur for reasons other than whether a state has criminal defense depositions. Any comparisons based on small samples are necessarily suspect.

The supporters of depositions also relied on data showing an average 77.5% plea rate in federal criminal prosecutions in Florida, in which there are no discovery depositions. The supporters of depositions made the following conclusion:

On average, 22% of the Federal cases in Florida went to trial during this period. In Broward County, only 7% of the felony cases went to trial. Without depositions, the percentage of trials in the State system

67. Griswold, Criminal Depositions in Florida: Retention or Repeal? (Feb. 1988) (draft available through author, Dep't. of Criminal Justice, Florida Atlantic University, Boca Raton, Fla.).
68. See supra note 1.
69. For courts of general felony jurisdiction, for example, Professor Griswold compared Florida with only Delaware, Michigan, Oklahoma, Pennsylvania, and Utah. Griswold, supra note 67, at 14.
70. See id.
71. Professor Griswold stated: "A further caveat is that we are examining two variable relationships which could be affected by one or more additional variables." Id. at 4.
72. See id. at 12-18.
73. Id. at 16.
74. Criminal Justice in the Sunshine, supra note 52, at 12.
would likely rise to the Federal level, and there would have been 1500 felony cases tried in Broward County alone—three times the number of cases tried in the entire Federal system in Florida during the same period. With 19 other State circuits also trying 22% of their cases, the sheer number of trials would have a crippling effect on our justice system, and it would eventually collapse under its own weight.\footnote{75}

Once again, this analysis assumes that the plea rate is solely, or primarily, a function of the availability of depositions to the accused. It would seem at least equally plausible that the lower plea rate in federal prosecutions could result from the different sentencing practices of judges coupled with an unwillingness of federal prosecutors to offer significant inducements in plea bargaining.

The proponents of depositions argued that if testimonial discovery were not provided by deposition there would be irresistible pressure to provide it elsewhere in the proceedings, such as in adversarial preliminary hearings or in hearings on motions to suppress or dismiss.\footnote{76} Undoubtedly there would be such efforts, but it is not clear that they would succeed. There is no constitutional right to an adversarial preliminary hearing to determine probable cause,\footnote{77} and Florida procedure provides such a hearing only in the limited case of the state’s failure to file formal charges within twenty-one days of arrest.\footnote{78}

A motion to dismiss on the ground that the facts do not establish a prima facie case must be accompanied by a sworn statement of the undisputed facts.\footnote{79} If the state traverses this motion (i.e., does not admit the facts as sworn to in the motion), the motion must be denied.\footnote{80} Thus, a hearing on such a motion involves only legal issues, and does not provide defense counsel the opportunity to examine state witnesses. A hearing on a motion to suppress evidence or a confession would provide only a limited opportunity to examine the officers involved, and it is unlikely that many groundless motions would be filed simply to obtain discovery. There would always have to be either a statement obtained or some evidence seized as a basis for such a motion, and in these circumstances a motion to suppress would probably be made anyway.

\footnote{75}{Id. at 13.}
\footnote{76}{Id. at 16-17.}
\footnote{77}{Gerstein v. Pugh, 420 U.S. 103 (1975).}
\footnote{78}{FLA. R. CRIM. P. 3.133(b).}
\footnote{79}{FLA. R. CRIM. P. 3.190(c)(4).}
\footnote{80}{FLA. R. CRIM. P. 3.190(d) (a motion to dismiss "shall be denied if the State files a traverse which with specificity denies under oath the material fact or facts alleged in the motion to dismiss"). For further discussion on how the state may traverse a motion to dismiss, see State v. Fadden, 466 So. 2d 1093 (Fla. 5th DCA 1985), where a state’s traverse was held proper when it created a "disputed factual issue ... as to some fact essential to the establishment of a legally sufficient affirmative defense." Id. at 1095.}
In sum, discovery depositions undoubtedly cause some, and perhaps a substantial, diversion of police resources from other law enforcement functions. However, the magnitude and significance of that diversion is unclear. It is equally unclear how the abolition of depositions would affect the rest of the system. Given the lack of significant empirical data, it would have been impossible for the legislature to have made an informed cost-based decision.

One significant cost-related argument not raised by the legislature was the effect abolition of depositions would have on public defenders. Although abolishing depositions might not drastically change the way a public defender’s office operates, it could force a reduction in the case-load for each public defender or a reduction in the quality of service. To maintain quality without reduced caseloads, the offices would be forced to hire more defenders and investigators, thus adding expenses to the system. 81 If nothing else, the ability to depose prosecution witnesses both simplifies and regularizes the process of discovery. With depositions, the vagaries and wiles of “discovery on the hoof” are avoided, time is conserved, and difficult judgment calls are bypassed. This “bureaucratization” of the process may be the principal contribution of depositions to the defense system, as opposed to, for instance, the conferring of any particular advantage in litigation. In any case, the legislature heard no evidence on comparative caseloads for public defenders in Florida and in other jurisdictions without depositions. Yet this would be the most significant and probable cost of abolishing depositions in criminal cases.

B. Reflections on the Harassment of Victims and Witnesses

Abolitionists argued strenuously to the legislature that depositions frequently, if not typically, are used to harass victims and witnesses, either to deter them from testifying at trial or at least to evaluate their ability to withstand strenuous cross-examination. 82 Supporters of depositions responded that such instances were aberrational, and that depositions often revealed facts demonstrating the innocence of the accused. 83

It is probably not possible to develop meaningful data relevant to the alleged harassment of witnesses. 84 There is one indication that victim/
witness harassment may not be the intransigent systemic problem portrayed by the abolitionists, however. Rule 3.220(a)(4), Florida Rules of Criminal Procedure, vests in courts the power to delay or restrict disclosures if there is "substantial risk to any person of physical harm, intimidation... or unnecessary annoyance or embarrassment resulting from such disclosure, which outweighs any usefulness of the disclosure to defense counsel." Nevertheless, there is no indication in reported decisions that the prosecution has attempted to use this rule to prevent the "harassment" in depositions of either victims or witnesses.

Arguably, before "harassment" has reached an intolerable level, there should be some indication that the process of judicial supervision has proved inadequate. To this end, the Miami Chamber of Commerce has made the following argument: "Motions for protective orders are seldom made by prosecutors because they are seldom granted by trial judges who, because of the language of the Rule, construe it liberally in favor of the right it was intended to secure." While this may or may not be true, appellate decisions show that the prosecution has not been loath to seek judicial review of pre-trial orders in other contexts. If trial judges have refused to protect victims and witnesses from harassment in the deposition process, one would expect some evidence of this in reported appellate decisions. Yet no such evidence exists.

Defining "harassment" is problematic as well. The inherent unpleasantness of testifying under oath may be considered "harassment" by some individuals. Just where legitimate discovery leaves off and "harassment" begins is a disputable line. For example, the FDLE points to incidents involving child victims of sexual battery. In this area, both discovery rules and recent legislation protect victims from harassment. It may be that the paucity of judicial protective orders is more a function of the aforementioned definitional problem than of the unwillingness of judges to protect against obvious abuse. If we are to have depositions, "unpleasantness" is an in-

86. Petition of The Greater Miami Chamber of Commerce, Inc. to Amend Florida Rule of Criminal Procedure 3.220(d), Case No. 71,901 at 15 (Fla. 1988) (on file with Clerk, Supreme Court of Florida).
87. See, e.g., State v. Smith, 260 So. 2d 489 (Fla. 1972) (review of a trial court's order that eyewitnesses submit to an eye examination).
88. Discovering the Injustice, supra note 50, at 16.
89. Section 914.16, Florida Statutes, grants judicial authority to set, by order, reasonable limits on the number of interviews a victim of child or sexual abuse must submit to for law enforcement or discovery purposes. Rule 3.220(a)(4), Florida Rules of Criminal Procedure, allows the court to "deny or partially restrict" depositions where "there is a substantial risk to any person of... intimidation... or embarrassment which outweighs any usefulness of the disclosure to defense counsel."
evitable cost. Available evidence suggests that the real argument of those favoring abolition may be founded more on the inherent unpleasantness of being deposed than on any demonstrated abuse.

VI. MODIFICATION PROBABLY LIES AHEAD

As of the time of this writing, the supreme court has complied with the Legislature's Concurrent Resolution and appointed the Commission on Criminal Discovery to study depositions. The Commission could recommend total abolition of discovery depositions, modifications to the process, or retention of the status quo. Retention of the status quo certainly would result in renewed efforts in the next legislative session to repeal discovery depositions. Given this reality, it seems unlikely that either the Commission will recommend or the supreme court will accept the status quo.

Abolition seems equally unlikely. Even the legislative debates revealed that many of the important participants disfavored abolition of discovery depositions. Although there was some legislative sentiment for complete repeal, the prevailing view was that discovery depositions should continue to be available on some basis in Florida criminal prosecutions. The statutory proposals to abolish depositions may have been considered vehicles to motivate reform by the supreme court.

Thus, modification is the next probable step. Two principle overlapping areas of modification appear likely: (1) changes to limit the harassment of witnesses and victims; and (2) changes to reduce the costs of depositions in terms of diverted police resources.

The Concurrent Resolution suggests barring the defendant from attending discovery depositions unless good cause is shown. Should such a measure be ultimately adopted, certain defense strategies would seem likely. For example, the defense would argue that the presence of the defendant is vital to assist in the questioning of witnesses and victims. If this fails to convince the judge, motions for multiple depositions of the same witness may result. In any event, such a provision would shift the burden from the prosecution to show cause to exclude the defendant, to the defense to show cause to include the defendant. Excluding the defendant from some or all depositions raises the issue of the defendant's constitutional right to confront the witnesses against him. Although the defendant cer-

90. See supra note 3.
certainly has a right to confront his accusers at trial, this right may not extend to discovery proceedings which are not constitutionally mandated. Since Florida could totally abolish discovery depositions without constitutional implication, it should be able to provide for them on a qualified basis.

Amending the rule to minimize the taking of unnecessary depositions, particularly of police witnesses, will prove a challenging task indeed. One possibility is to return to the rule which prevailed from 1968 to 1972, under which depositions could be taken only upon court order if the witness refused voluntarily to give a statement and the testimony was material. This approach is unattractive because of the judicial time involved. Many witnesses probably will not cooperate voluntarily with defense counsel, resulting in a multitude of motions requesting compelled depositions.

Another approach would be to allow depositions as of right of certain groups of witnesses. The difficult task here would be to define the groups involved. However groups are defined, it would be necessary to assume a good faith effort of the prosecution to designate those witnesses who qualify for deposition. One suggestion has been to limit depositions as of right to eyewitnesses and the principal investigating police officer. Another possibility, one which would provide for broader discovery, would be to allow depositions as of right of all anticipated prosecution witnesses, and of any people designated by the prosecution as having information which might be favorable to the accused on questions of guilt or punishment. A further modification would be to allow the prosecutor to designate trial witnesses who will give non-controversial or routine testimony—for example, a chain of custody witness—and to prohibit depositions of these trial witnesses as well, absent a court order upon a showing of good cause.

The assumption of this latter approach is that any witness who will testify for the prosecution on a material matter is significant enough to depose. Depositions are useful for discovery and impeachment, and these justifications would seem to warrant deposing trial witnesses. This approach would require some change in the other disclosures presently made by the prosecution, however. Under the current

94. A defendant is not entitled under the Constitution to be present during discovery proceedings, as long as the deponent testifies at trial and is available for cross-examination. State v. Dolen, 390 So. 2d 407, 409 (Fla. 5th DCA 1980).
rule the state must disclose only a list of people who may have information relevant to the offense.97 This list is not necessarily a witness list. In fact, the prosecutorial practice has been to make this list all-inclusive so that it does not indicate who the state witnesses will be or otherwise indicate their importance. Should the discovery deposition rule be modified in this fashion, it would require the prosecution to make good faith disclosure of their probable witnesses. Whatever adversarial advantage this confers on the defense, arguably it would result in significant savings in the taking of unnecessary depositions of witnesses who will not testify at trial.

VII. CONCLUSION

The 1988 Florida Legislature’s consideration of legislative proposals to repeal discovery depositions in criminal cases resulted in a Concurrent Resolution asking the Supreme Court of Florida to consider changing the discovery deposition process. Although many opponents of discovery depositions undoubtedly sought abolition, the principal legislative motivation was to stimulate reform by the supreme court. The nature of that reform remains to be seen. Abolition on the one hand, or retention of the status quo on the other, are both unlikely. Significant changes and restrictions on the deposition process can be anticipated. Most probably these will be directed to limiting the perceived harassment of witnesses and reducing the cost of unnecessary depositions.

ADDENDUM

Subsequent to the preparation of this Article, the Criminal Discovery Commission submitted its report to the Supreme Court of Florida. CRIMINAL DISCOVERY COMMISSION, REPORT OF THE FLORIDA SUPREME COURT'S COMMISSION ON CRIMINAL DISCOVERY (Feb. 1, 1989) (on file with State Courts Administrator, Supreme Court of Florida). The Commission's primary finding was that although discovery depositions are "not required as a matter of right under the federal or state constitutions, [they] make a unique and significant contribution to a fair and economically efficient determination of factual issues in the criminal process." Id. at 20. Criminal discovery depositions, the Commission concluded, "should be retained as part of Florida's Criminal Justice process and should not be abolished or significantly curtailed." Id. The Commission nevertheless identified problems with the current process—the excessive cost to law enforcement agencies, Id. at 20, and the "infrequent, although serious, instances of witness abuse," Id. at 21, and recommended changes designed to eliminate those problems.

With respect to reducing costs, the Commission focused on attempting to eliminate depositions perceived to be "unnecessary" or "non-productive." Id. at 75. The primary recommendation was to amend Rule 3.220 "to provide that a defendant does not have the right to depose all witnesses as a matter of course." Id. The defendant who elects to participate in discovery of any kind would be required to file a "Notice of Discovery." Id. at 75-76. The prosecution then would be required to furnish the defendant with a list of all persons having knowledge of the case, designating "those persons whose deposition is believed in good faith to be unnecessary" because their function was ministerial or they are not reasonably expected to be called to testify. Id. at 76. Depositions of these persons would not be allowed "until after a conference is held between the prosecutor and defense counsel and, in the event agreement is not reached, the prosecutor has had an opportunity to seek a protective order." Id. The Commission also recommended that existing witness coordination offices be more fully utilized, and that depositions of law enforcement officers be scheduled through those offices. Id. at 77. Finally, a police officer would be permitted, upon stipulation of counsel and consent of the witness, to make a telephone statement in lieu of giving a deposition. Id. at 78.

The most significant Commission recommendation relating to the protection of witnesses and victims involves the right of the defendant to attend a deposition. A defendant who intends to attend a deposition would be required to notify the prosecuting attorney, who could then object to the defendant's physical presence. Id. at 62. If the prosecuting attorney objects, the defendant could move for an order "permitting physical presence of the defendant upon a showing of good cause." Id. at 63. In ruling on such a motion, the court would consider "the need for the physical presence of the defendant to obtain effective discovery and the intimidating effect of the defendant's presence on the witness and the cost." Id. The court also would consider "alternative electronic or audio/visual means to protect the defendant's ability to participate in discovery without his physical presence." Id.

To provide protection for child victims and witnesses, the Commission recommended that "chief judges in circuits which have not already done so should enter an order restricting contact with child victims and witnesses to crimes" pursuant to section 92.55, Florida Statutes. Id. at 62. The Commission also recommended that "[a]ppropriate statutory or rule changes should be entered emphasizing the [existing] right and duty of the prosecuting attorney attending a deposition to protect the rights of the witness at that deposition." Id. at 63.