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Davis v. State, 276 So. 2d 846 (Fla. 2d Dist. Ct. App. 1973), *aff'd*, No. 43,874 (Fla., Feb. 15, 1974)

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former's "unavailability at trial and proffering the testimony of other agents may raise evidentiary problems or pose issues of prosecutorial misconduct with respect to the informer's disappearance."⁵⁷ The American Bar Association Project on Minimum Standards for Criminal Justice, while approving the consent exception,⁵⁸ voiced a similar warning that "serious abuses" might result:

Where [electronic surveillance techniques] are employed, for example, to avoid having to place an informant on the stand whose full testimony might establish a defense of entrapment . . . a court might quite properly limit their use to corroboration.⁵⁹

The court's decision in *Tollett* eliminates speculation over whether testimony by the absent party could have aided the defendant; thus the decision avoids problems of "fairness" of the proceeding. It provides a practical solution to the problem of consensual interceptions while balancing the sometimes competing interests of protecting privacy and catching criminals.

Criminal Law—EVIDENCE—PRIOR CRIME EVIDENCE ADMISSIBLE ONLY WHEN RELEVANT TO CRIME CHARGED—*Davis v. State*, 276 So. 2d 846 (Fla. 2d Dist. Ct. App. 1973), *aff'd*, No. 43,874 (Fla., Feb. 15, 1974).

After a jury trial Cullen Davis was convicted of robbery and sentenced to ten years in prison. At the trial an employee of a cleaning establishment testified that the defendant and another man had robbed her of five dollars at gunpoint on December 27, 1971. The state then proffered further testimony of a separate and independent armed robbery; that testimony was admitted over defense counsel's objection. The testimony consisted of two eyewitness accounts of an armed robbery of a food store on December 22, 1971, which had been perpetrated by a lone man wearing a woman's bikini pants

Also, another government agent overheard and testified about a conversation between the informer and the defendant, thereby preventing the defense from using the informer to "controvert, explain or amplify" the agent's report. *Id.* at 63, 64.

57. 401 U.S. at 754; *cf.* *Lopez v. United States*, 373 U.S. 427, 445 (1963) (concurring opinion of Warren, C. J.), discussed in note 19 *supra*.

58. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO ELECTRONIC SURVEILLANCE § 4.1 (Approved Draft 1971).

59. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO ELECTRONIC SURVEILLANCE §§ 4.1, 4.2, COMMENTARY, at 127-28 (Tent. Draft 1968). The commentary calls this "an extrinsic abuse of an evidence gathering technique not otherwise intrinsically objectionable," *id.* at 128, thus making it similar to both the *Tollett* hearsay exception and the *Roviaro* fundamental fairness principle.

over his head and concealing his hands with a blue sock and a kitchen towel. Neither witness could clearly identify the robber because his face was hidden; both believed the robber to be Davis because of "his build, his manner of being, and his voice,"¹ with which they were familiar from Davis' previous visits to the store. On appeal, the district court reversed and remanded, finding prejudicial error in the admission of the evidence of the food store robbery. Denying a rehearing, the court emphasized the necessity for avoiding "overprosecution" by careful application of the rule in *Williams v. State*.² The Florida Supreme Court affirmed this decision.³

The *Davis* decision is representative of numerous cases decided since *Williams* that illustrate the apparent confusion of trial courts regarding what evidence of prior crimes should be admitted in a criminal prosecution.⁴ The case invites consideration of guidelines that might be utilized to alleviate such confusion.

Florida, like all United States jurisdictions,⁵ has long applied some form of the prior crime evidence rule, a unique feature of Anglo-American jurisprudence.⁶ Basically, the rule prohibits admission of evidence of prior crimes if its sole purpose is to demonstrate the defendant's bad character or propensity for crime.⁷ Such evi-

1. 276 So. 2d at 847.

2. 110 So. 2d 654 (Fla. 1959). The defendant, convicted of rape, had waited in a car parked at a shopping center and had attacked the victim when she returned to her car. At trial, evidence was admitted of a previous incident in which the defendant had entered another parked car at the same shopping center and had attempted to molest the returning driver. The supreme court affirmed the conviction, finding the collateral crime directly relevant to the crime charged as showing identity and a distinct pattern. The court held that all evidence relevant to a material issue was admissible, as long as the sole purpose was not merely to show bad character or criminal propensity. See also Note, *Admissibility of Evidence of Prior Criminal Acts in a Criminal Prosecution*, 13 U. FLA. L. REV. 372 (1960).

3. *Davis v. State*, No. 43,874 (Fla., Feb. 15, 1974).

4. See, e.g., *Nathey v. State*, 275 So. 2d 589, 590 (Fla. 1st Dist. Ct. App. 1973) (Rawls, J., dissenting); *Machara v. State*, 272 So. 2d 870 (Fla. 4th Dist. Ct. App. 1973); *Simmons v. Wainwright*, 271 So. 2d 464 (Fla. 1st Dist. Ct. App. 1973); *Hirsch v. State*, 268 So. 2d 441, 443 (Fla. 1st Dist. Ct. App. 1972) (Rawls, J., dissenting); *Clark v. State*, 266 So. 2d 687 (Fla. 1st Dist. Ct. App. 1972) (Rawls, J., dissenting); *Franklin v. State*, 229 So. 2d 892 (Fla. 3d. Dist. Ct. App. 1970); *Licht v. State*, 148 So. 2d 295 (Fla. 3d Dist. Ct. App. 1963); *Hooper v. State*, 115 So. 2d 769 (Fla. 3d Dist. Ct. App. 1959).

5. See C. McCORMICK, EVIDENCE § 190, at 447-48 (2d ed. 1972); Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 766 (1961).

6. See Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954 (1933); Note, *Procedural Protections of the Criminal Defendant—A Re-evaluation of the Privilege Against Self-incrimination and the Rule Excluding Evidence of Propensity to Commit Crime*, 78 HARV. L. REV. 426, 435 (1964). See also *People v. Shae*, 41 N.E. 505, 511 (N.Y. 1895); Slough & Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325 & n.1 (1956).

7. 1 B. JONES, EVIDENCE § 165 (5th ed. 1958); C. McCORMICK, EVIDENCE § 190 (2d

dence may be highly prejudicial:⁸ the defendant must effectively stand trial for crimes with which he was not charged in the indictment.⁹

Unlike some states,¹⁰ Florida has not yet codified the rule in statutory form, relying entirely upon case law to articulate its requirements.¹¹ The most frequently cited case is *Williams*, in which the Florida Supreme Court traced the development of the prior crime evidence rule in Florida from the original English rule of general admissibility—excluding only bad character or propensity evidence¹²—to the modern rule of exclusion, prohibiting all evidence of prior crimes unless it can be subsumed under one of numerous exceptions to the rule.¹³ Under the modern rule such evidence is admissible only if the defendant raises the issue of his character,¹⁴ or if the prosecution can demonstrate that it tends to prove intent,¹⁵ an

ed. 1972); 1 J. WIGMORE, EVIDENCE §§ 193-94 (3d ed. 1940). *But see* Carter, *The Admissibility of Evidence of Similar Facts*, 70 LAW Q. REV. 214, 227 (1954): "It is submitted that there is no single rule which renders inadmissible any type of propensity evidence in all cases."

8. *See* *Michelson v. United States*, 335 U.S. 469, 475-76 (1948); 1 J. WIGMORE, EVIDENCE § 194, at 650 (3d ed. 1940); E. BORCHARD, CONVICTING THE INNOCENT 158-64 (1932) (example of an innocent defendant convicted partly because of introduction of his criminal record at trial); Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763 (1961).

9. *See* U.S. Const. amend. V; FLA. CONST. art. I, § 16; *United States v. Mitchell*, 2 U.S. (2 Dall.) 348, 357 (1795); 1 J. WIGMORE, EVIDENCE § 194, at 650 (3d ed. 1940).

10. *E.g.*, LA. REV. STAT. ANN. §§ 15:445, 446 (1967); OHIO REV. CODE ANN. § 2945.59 (Anderson 1954).

11. PROPOSED FLORIDA EVIDENCE CODE rule 90:404(2) (Preliminary Working Draft 1973), sets forth the prior crime evidence rule in essentially the same wording as PROPOSED FEDERAL RULES OF EVIDENCE 404 (rev. 1971). Following the Florida rule is a discussion comparing 90:404(2) with existing Florida case law. The proposed evidence code is expected to come before the Florida Legislature at its next session.

12. 110 So. 2d at 658. In his thorough study of the history and development of the exclusion of prior crime evidence rule, Justice Stone calls this formulation the original English rule, which prevailed in America until about 1840, then gave way to the so-called "spurious rule," one of exclusion with many exceptions. Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 990 (1938).

13. 110 So. 2d at 661. For compilations of exceptions, see *Spencer v. Texas*, 385 U.S. 554, 560-61 (1967) (listing cases); C. McCORMICK, EVIDENCE §§ 190-91 (2d ed. 1972); Slough & Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 326 (1956).

14. *E.g.*, *Coston v. State*, 190 So. 520 (Fla. 1939). This rule was judicially adopted in Florida as early as 1886 in *Mann v. State*, 22 Fla. 600 (1886). *See also* 13 FLA. JUR. EVIDENCE § 152 (1957). Impeachment of a defendant's character after he has put it in issue is beyond the scope of this comment. Different considerations are involved, since the defendant has initial control over the introduction of the character issue. *Cf.* Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 775-78 nn. 68-91 (1961).

15. *E.g.*, *Simring v. State*, 77 So. 2d 833 (Fla. 1955).

element of the crime,¹⁶ identity,¹⁷ malice,¹⁸ motive¹⁹ or a system of criminal activity.²⁰ By 1959, the year *Williams* was decided, the exceptions had grown so numerous that the rule had in effect again become one of general admissibility.²¹

The *Davis* court applied the following language from *Williams* as the rule:

"[E]vidence revealing other crimes is admissible if it casts light upon the character of the act under investigation by showing motive, intent, absence of mistake, common scheme, identity or a system or general pattern of criminality so that the evidence of the prior offenses would have a relevant or a material bearing on some essential aspect of the offense being tried."²²

Although it stresses relevancy, the excerpt from the *Williams* case is still phrased in terms of the old exceptions. The manner in which trial courts apply these exceptions to test relevancy appears to create confusion and reversible error. The language of *Williams* focused on by the *Davis* court in its denial of rehearing might prove helpful in guiding lower courts: " 'The question to be decided is not whether the evidence tends to point to another crime but rather whether it is relevant to the crime charged.' "²³

The temptation to the trial judge to admit evidence of prior crimes that falls neatly into one of the categories established by *stare decisis* could lead to admission of prejudicial evidence that is

16. *E.g.*, *Kennedy v. State*, 191 So. 193 (Fla. 1939).

17. *E.g.*, *Talley v. State*, 36 So. 2d 201 (Fla. 1948).

18. *E.g.*, *Lindsey v. United States*, 227 F.2d 113 (5th Cir. 1955), *cert. denied*, 350 U.S. 1008 (1956) (applying Florida law).

19. *E.g.*, *Zalla v. State*, 61 So. 2d 649 (Fla. 1952).

20. *E.g.*, *Winstead v. State*, 91 So. 2d 809 (Fla. 1956).

21. 110 So. 2d at 659. It is questionable whether the rule as implemented is as broad as the original English rule, phrased as it is in terms of the exceptions. The court in *Williams* apparently intended the broad rule to apply, under which any truly relevant evidence should be admitted. Some cases seem to create little difficulty for the trial courts in applying that rule. *See, e.g.*, *Ashley v. State*, 265 So. 2d 685 (Fla. 1972); *Baker v. State*, 241 So. 2d 683 (Fla. 1970); *Hawkins v. State*, 206 So. 2d 5 (Fla. 1968). Yet, as evidenced by the cases reversed on appeal, other trial courts fall into error by using the exceptions as the sole parameters of relevancy, without further inquiry. *See, e.g.*, *Machara v. State*, 272 So. 2d 870 (Fla. 4th Dist. Ct. App. 1973); *Simmons v. Wainwright*, 271 So. 2d 464 (Fla. 1st Dist. Ct. App. 1973).

22. 276 So. 2d at 847, *quoting from Williams v. State*, 110 So. 2d 654, 662 (Fla. 1959).

23. 276 So. 2d at 849, *quoting from Williams v. State*, 110 So. 2d 654, 663 (Fla. 1959).

not relevant.²⁴ The stress in *Williams* was placed on *relevancy*, which the trial judge was mandated to consider carefully and cautiously.²⁵

24. See notes 8 & 21 *supra*. One author states: "Relevance is primarily a matter of logic and experience rather than of law. But the law prescribes a minimum quantum of probative value for evidence before it will regard it as relevant." Carter, *The Admissibility of Evidence of Similar Facts*, 70 LAW Q. REV. 214, 217 (1954). Cf. *Wadsworth v. State*, 201 So. 2d 836, 838 (Fla. 4th Dist. Ct. App. 1967). An exceptionally cogent analysis of relevancy appears in Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385 (1952). Trautman suggests a dual test for determining relevancy that resolves many apparently conflicting opinions. First, logical relevancy is evaluated to ascertain whether some connection exists between the prior crime evidence and a material fact in issue, similar to those set forth under exceptions to the old rule of exclusion. The second step weighs the probative value of the prior crime evidence against policy reasons for its exclusion—undue prejudice; surprise to the defendant, who must defend against a charge of which he lacked notice; confusion of issues; unnecessary consumption of the court's time. *Id.* at 393. This dual test is probably the one the Florida Supreme Court intended in *Williams*. But as Trautman notes, application of this test is delicate and difficult, making it far easier for the trial court to rely solely on precedent. The resulting danger is that the relevancy test is effectively dispensed with, along with the necessity of determining on a case-by-case basis whether "disproportionate policy risks" exist.

Reasoning along similar lines, another author proposed that the prosecutor be required to work out the chain of inference from the collateral crime to the crime charged. Lacy, *Admissibility of Evidence of Crimes Not Charged in the Indictment*, 31 ORE. L. REV. 267, 285-86 (1952). In addition to revealing irrelevant evidence, this could aid in clarifying the prosecution's case, for the prosecution often "offers such evidence partly, perhaps largely, for its prejudicial value, and partly because of a vague intuition that it has some bearing on the case." *Id.* at 286. He supports his skeptical view of trial courts' adequacies in the area by citing Tyree, *Annual Survey of New Jersey Law—Evidence*, 6 RUTGERS L. REV. 290 (1951), wherein every relevant decision studied merely applied precedent, without any indication that the principles behind the precedent had been examined. Lacy, *supra* at 296 n.100.

The definition of relevancy has been stretched especially thin to admit evidence of prior sexual offenses in prosecutions for sex crimes. "[C]ourts have lost all feeling for tradition and the meaning of prejudice when applying rules of exclusion in prosecutions for sex offenses. A strong line of authorities today holds that evidence of other crimes is admissible for the purpose of showing a degenerate disposition, a lustful disposition, or an inclination to commit sexual offenses." Slough & Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 333 (1956). Thus, evidence with the sole function of influencing the jury by depicting the defendant's bad character is admitted. See *Nathey v. State*, 275 So. 2d 589 (Fla. 1st Dist. Ct. App. 1973) (Rawls, J., dissenting); *Clark v. State*, 266 So. 2d 687 (Fla. 1st Dist. Ct. App. 1972) (Rawls, J., dissenting) (*per curiam* decisions affirming convictions of rape and incest). The justification for admitting such evidence apparently is a general belief that sex offenders have a high recidivism rate and that past offenses thus make the commission of the charged offense more likely. A Federal Bureau of Investigation report does not bear this out, listing rapists as nineteenth on a recidivism list of twenty-five different crimes. Slough & Schwinn, *The Sexual Psychopath*, 19 KAN. CITY L. REV. 131, 137 n.19 (1951).

25. 110 So. 2d at 663. Further scrutiny by the judge might include as part of the relevancy test that only *like* crimes, against the *same general class* of persons, at about the *same time* should be admissible under the old list of exceptions. This would eliminate very remote or totally different crimes. See, e.g., *Talley v. State*, 36 So. 2d 201, 205 (Fla. 1948).

In *Davis* the court of appeal, in contrast to the trial court, conducted a careful examination of relevancy. The district court found no justification for admitting the evidence of the food store robbery. Since the testimony did not tend to prove intent, common scheme, general pattern of criminal behavior or any other exception under the old rule, it was "utterly irrelevant to any issue involved in the crime charged."²⁶ The prosecutor's contention that the evidence tended to show identity was considered a "gross misconception of the law."²⁷ The admission of this evidence by the trial court provides a clear example of how blind application of exceptions to the general rule of exclusion can lead to error. The bare statement of a recognized exception apparently satisfied the trial court, without any further consideration of how this evidence could show identity.²⁸ Admission of the food store robbery testimony resulted only in suggesting to the jury that the defendant had a propensity for crime, the one purpose clearly forbidden by the rule.

Implicit in the *Davis* decision is the requirement that the probative value of admitted evidence outweigh the possibility of prejudicing the jury.²⁹ To measure prejudice, the district court looked beyond the evidence itself to the manner in which it was presented to the jury. Whatever immeasurable prejudice against the defendant was aroused by the admitted prior crime evidence, it apparently was compounded by the method of presentation. The testimony of the witnesses to the food store robbery consumed twenty-five pages of the transcript, compared with only thirteen pages of testimony by

26. 276 So. 2d at 849.

27. *Id.* On appeal to the supreme court, the prosecution contended that the failure to object to the prior crime testimony in the defense brief constituted waiver. This argument was rejected because, as a so-called *Anders* appeal, the scope of the district court's review was not limited to matters raised by defendant's state-appointed counsel. See *Anders v. California*, 386 U.S. 738 (1967). See also note 43 *infra*.

The court further found that objection to the prior crime testimony had been raised sufficiently at trial, citing *Franklin v. State*, 229 So. 2d 892 (Fla. 3d Dist. Ct. App. 1970), for a restatement of the *Williams* rule. The cited language from *Franklin* first places the burden on the defense to object to admission of the evidence, then requires the prosecution to show that the evidence is relevant if it is to be admitted. The prosecution in *Davis* failed to meet this burden. See notes 45-47 and accompanying text *infra*, suggesting that proposed guidelines could alter this burden.

28. One author has traced the thought process that leads courts to err in applying the exceptions as the sole test for relevancy: "[T]he prosecution offers to put in such evidence to show [e.g.] intent. Hence the evidence is admissible. Obviously what has happened here is that the meaning of 'to show intent' has changed from 'relevant to show intent' to 'for the purpose of showing intent.'" Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 1007 (1938).

29. 276 So. 2d at 848. For sources discussing jury prejudice, see note 8 *supra*.

the eyewitness to the crime charged.³⁰ While volume of testimony alone is not necessarily prejudicial,³¹ the food store robbery “transcended the bounds of relevancy to the charge being tried” and became a “feature” of the trial instead of an “incident.”³² The opinion does not indicate whether an instruction was requested or given limiting to the determination of identity the jury’s consideration of the prior crime evidence. In view of the total irrelevancy of the testimony, and the questionable effectiveness of jury instructions,³³ it is doubtful that such a charge—if one had been made—would have altered the result on appeal.³⁴

The *Davis* court noted with dismay the “flood of avoidable appeals” that stem from similar overprosecution in cases that would otherwise result in unassailable convictions.³⁵ However, both the district court and the supreme court stopped short of proposing any specific guidelines to alleviate the problem, merely suggesting that a close re-reading of *Williams* could serve to clarify the law.³⁶

A recent Fourth District Court of Appeal dissenting opinion went further, advocating judicial adoption of limiting guidelines. In *Thomasson v. State*,³⁷ Judge Walden dissented from a per curiam

30. 276 So. 2d at 848.

31. See *Green v. State*, 228 So. 2d 397, 399 (Fla. 2d Dist. Ct. App. 1969).

32. *Williams v. State*, 117 So. 2d 473, 475 (Fla. 1960).

33. C. McCORMICK, EVIDENCE § 53, at 121-23 (2d ed. 1972); J. WIGMORE, EVIDENCE § 988, at 920 (3d. ed. 1940). Judge Learned Hand characterized limiting instructions as “the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody’s else [sic].” *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir.), cert. denied, 285 U.S. 556 (1932).

Many defense attorneys prefer no instructions at all, feeling that they can only aggravate the effect of such evidence on the jury. See *United States v. Tramaglino*, 197 F.2d 928, 932 n.2 (2d Cir. 1952). Jury studies show that jurors failed to segregate evidence of a prior record introduced for impeachment and used it instead as an indication that the defendant “was a bad man and hence was more likely than not guilty of the charged crime.” Letter from Dale W. Broader, Associate Professor, The University of Nebraska College of Law, to the *Yale Law Journal*, March 14, 1960, on file in Yale Law Library, cited in Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 777 n.89 (1961). Cf. *Krulewitch v. United States*, 336 U.S. 440, 453 (1949), wherein Justice Jackson, concurring, called the notion that prejudicial effects can be overcome by jury instructions “unmitigated fiction.” See also H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 178-79 (1966).

34. Cf. *State v. Knowles*, 498 P.2d 40 (Kan. 1972) (holding that giving limiting instructions not of sufficient benefit that its absence is prejudicial error); 12 WASHBURN L.J. 111 (1972).

35. 276 So. 2d at 848.

36. No. 43,874 at 8-9; 276 So. 2d at 848. Under FLA. CONST. art. V, § 3, procedural court rules are the special province of the supreme court. Since guidelines governing the method of determining the admissibility of prior crime evidence are essentially procedural, they would be beyond the scope of both the proposed evidence code and legislative action.

37. 277 So. 2d 299 (Fla. 4th Dist. Ct. App. 1973).

opinion affirming the conviction of a defendant on the charge of uttering a forged check, where evidence of three other allegedly forged checks had been admitted at trial. The only apparent connection between the defendant and the checks was the fact that his fingerprints were on them, with the prosecution offering neither explanation of how or when his prints were left there nor evidence that the defendant had done anything but touch the checks. Deploping the increasingly liberal application of the *Williams* rule in undermining the rights of the accused, Judge Walden suggested imposition of "explicit safeguards," citing as exemplary the following measures recently adopted by the Louisiana Supreme Court:

"When the State intends to offer evidence of other criminal offenses under the exceptions outlined in R.S. 15:445 and 446:

(1) The State shall within a reasonable time before trial furnish in writing to the defendant a statement of the acts or offenses it intends to offer, describing same with the general particularity required of an indictment or information. No such notice is required as to evidence of offenses which are a part of the *res gestae*, or convictions used to impeach defendant's testimony.

(2) In the written statement the State shall specify the exception to the general exclusionary rule upon which it relies for the admissibility of the evidence of other acts or offenses.

(3) Prerequisite to the admissibility of the evidence is a showing by the State that the evidence of other crimes is not merely repetitive and cumulative, is not a subterfuge for depicting the defendant's bad character or his propensity for bad behavior, and that it serves the actual purpose for which it is offered.

(4) When the evidence is admitted before the jury, the court, if requested by defense counsel, shall charge the jury as to the limited purpose for which the evidence is received and is to be considered.

(5) Moreover, the final charge to the jury shall contain a charge of the limited purpose for which the evidence was received, and the court shall at this time advise the jury that the defendant cannot be convicted for any charge other than the one named in the indictment or one responsive thereto."³⁸

The first provision would remedy notice difficulties by apprising the defendant of the prior crime evidence to be used against him

38. *Id.* at 300, quoting from *State v. Prieur*, 277 So. 2d 126, 130 (La. 1973). Rules for admissibility of prior crime evidence in Louisiana are codified in LA. REV. STAT. ANN. §§ 15:445-46 (1967).

at trial.³⁹ Notice is particularly necessary when unprosecuted actions or prosecutions resulting in acquittals are involved, since a defendant could not be expected to prepare an explanation for all his past actions. The requirement of notice is rightly dispensed with when evidence of offenses is clearly within the defendant's knowledge as part of the *res gestae*, or when the defendant controls the admissibility of prior convictions by putting his character in issue.⁴⁰ The Minnesota Supreme Court, which adopted a similar rule in 1965, added the exception that no notice need be given of previous prosecutions.⁴¹ This would seem to conflict with the intent of the rule—to prepare the defendant to meet otherwise unexpected accusations. While rules of discovery, such as Florida Rule of Criminal Procedure 3.220 (1973), may have sufficiently broad scope to permit the defendant to determine on his own initiative what crimes are to be introduced,⁴² there is no assurance that the defendant will always, or even usually, retain counsel diligent enough to do this.⁴³ The providing of notice appears a light enough burden for the state to bear.⁴⁴ In fact, the

39. See note 9 *supra*, citing constitutional requirements of notice. Technically, specific notice is required only for the crimes actually being prosecuted; the effect of admission of some prior crime evidence, however, is to allow the jury to try the defendant on the basis of all crimes that he has ever committed. See, e.g., *Nathey v. State*, 275 So. 2d 589, 590 (Fla. 1st Dist. Ct. App. 1973) (Rawls, J., dissenting). Judge Rawls concluded that "prosecution officials indicted a defendant for a specified crime and tried and convicted him for his proclivity to commit heinous offenses of every type and nature during his adult lifetime." *Accord*, *Simmons v. Wainwright*, 271 So. 2d 464 (Fla. 1st Dist. Ct. App. 1973). See Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1175-76 & n.83 (1960), for instances of relaxation of the requirement of punishment only for the crime charged.

40. See note 14 *supra*. For critiques of impeachment by prior convictions as treated in the proposed Federal Rules of Evidence, see Spector, *Impeaching the Defendant by His Prior Convictions and The Proposed Federal Rules of Evidence: A Half Step Forward and Three Steps Backward*, 1 LOYOLA CHI. L.J. 247 (1970); Glick, *Impeachment by Prior Convictions: A Critique of Rule 6-09 of The Proposed Rules of Evidence for U.S. District Courts*, 6 CRIM. L. BULL. 330 (1970).

41. *State v. Spreigl*, 139 N.W.2d 167, 173 (Minn. 1965). Justice Gordon of the Wisconsin Supreme Court, going even further, would admit only prior convictions as the only procedure that could comply with the presumed innocence of the defendant. See *State v. Reynolds*, 137 N.W.2d 14, 19 (Wis. 1965) (Gordon, J., concurring); 51 MARQ. L. REV. 104, 109 (1967).

42. For a discussion of the more limited discovery available to a criminal defendant under the Federal Rules Of Criminal Procedure, see Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1180-81 & n.100, 1182-85 (1960), citing with approval former FLA. STAT. § 909.18 (1961), which is presently FLA. R. CRIM. P. 3.220 (1973).

43. In the *Davis* case, for example, the court reversed defendant's conviction virtually sua sponte, noting that neither the public defender's nor the State's brief was of any assistance on appeal, and that the performance of defense counsel amounted to no defense at all. 276 So. 2d at 847, 849.

44. *But see State v. Prieur*, 277 So. 2d 126, 134 (La. 1973) (Summers, J., dissenting),

guideline could be phrased with even greater particularity along the lines of the notice of alibi requirement in Florida Rule of Criminal Procedure 3.200 (1973).

The second requirement—specification of the applicable exception to the rule of exclusion—would contribute little to existing Florida law, except that it would place an affirmative burden on the prosecution to justify admissibility, instead of requiring justification for prior crime evidence only when the admissibility is challenged.

Requirement three could contribute significantly to curbing prosecutorial excesses. While requirement two would allow the prosecution simply to specify the applicable exception, number three requires the extra step that seems to be omitted in erroneous trial court determinations of admissibility—a close examination of relevancy. Under this rule, the trial judge could not merely take the prosecutor's word or rely upon *stare decisis*. The state would have to demonstrate clearly the relevancy of its evidence. Requiring the evidence to be "not merely repetitive or cumulative" could be most effective in excluding prior crime evidence where the issue claimed to be proved thereby can be shown by other, less prejudicial evidence.⁴⁵ In *Davis*, for example, the state had testimony concerning the crime charged from a woman who saw Davis on two occasions the day of the robbery, remembered his clothing exactly, observed him for several minutes and positively identified him as the robber.⁴⁶ Even if the collateral crime could have shown identity as the prosecution alleged, it would have been merely cumulative and thus excludable because of the possibility of unnecessarily prejudicing the jury.⁴⁷ Model Code of Evidence rule 303 embodies the same philosophy by attempting to reduce the mechanical approach of applying a list of exceptions, the result under Uniform Rule of Evidence 55.⁴⁸

criticizing this and the other four requirements for unduly hindering the prosecution, for placing the entire burden on the State with no corresponding duty placed on the defendant and for allowing defendant a pretrial examination of the prosecution's evidence, previously not permitted in Louisiana.

45. Cf. 276 So. 2d at 848-49. See also Note, *Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime*, 78 HARV. L. REV. 426, 435-51 (1964).

46. 276 So. 2d at 849.

47. See note 24 *supra*.

48. See generally 51 MARQ. L. REV. 105, 107 (1967). It has been suggested that a procedural rule such as rule three in the *Prieur* decision could contribute little to the existing case law that has sought to delineate the manner in which a trial judge should determine relevancy of prior crime evidence. See, e.g., *Williams v. State*, 110 So. 2d 654 (Fla. 1959); *Green v. State*, 190 So. 2d 42, 46 (Fla. 2d Dist. Ct. App. 1966). Accordingly, it would seem doubtful that a procedural rule could be phrased any more

While requirements four and five, providing for requested and mandatory jury instructions may clarify what evidence the jury is to disregard, the value of such instructions is doubtful. There is widespread distrust of the effectiveness of limiting instructions, even to the extent that some defense counsel would prefer to do without them altogether rather than call the jury's attention to prejudicial testimony.⁴⁹ By removing presently available grounds for objection and appeal without alleviating the damage to the defendant, these two provisions have a potential for more harm than good.⁵⁰

It should be noted, however, that the instruction is to be given at the time the evidence is admitted only at the request of defense counsel. If the fifth requirement were to include such a caveat, the potential for harm—if defense counsel believes such potential exists—could easily be removed by simply refraining from requesting the instruction both at the time the evidence is admitted and at the close of the trial. Compliance with the first three requirements at a pretrial hearing would greatly diminish the chance of prejudicing the jury with prior crime evidence. Under present procedures the jury is likely to be exposed to the prejudicial evidence even before a determination of admissibility has been made.⁵¹

Statutes and evidence codes are generally adequate for a statement of the rule on prior crime evidence, but do not seem to provide the detailed guidance that is apparently needed in application of the rules.⁵²

helpfully or applied with greater diligence than the common law guidelines. Interview with Charles W. Ehrhardt, Reporter to the Florida Law Revision Council, in Tallahassee, November 5, 1973.

On the other hand, since the relevancy test is not always applied, reformulation into a procedural rule might call more attention to the necessity for evaluating relevancy and place a greater burden on the prosecution to justify admission of prior crime evidence.

49. See note 33 *supra*.

50. See, e.g., *Roberson v. State*, 24 So. 474 (Fla. 1898); *Green v. State*, 228 So. 2d 397 (Fla. 2d Dist. Ct. App. 1969).

51. For examples of abuse of prior crime evidence by the prosecutor, particularly in opening statement and closing argument, see, e.g., *Simmons v. Wainwright*, 271 So. 2d 464, 465 (Fla. 1st Dist. Ct. App. 1973); *Clark v. State*, 266 So. 2d 687 (Fla. 1st Dist. Ct. App. 1972) (Rawls, J., dissenting). See also Note, *Other Crime Evidence at Trial: Of Balancing and Other Matters*, 70 *YALE L.J.* 763, 782-85 (1961) (suggesting complete transcription of the opening statement and closing argument as a curb against abuses, a stern reprimand from the bench and a statement to the jury that the offending allegation is false); *Berger v. United States*, 295 U.S. 78, 84-89 & n.* (1935) (citing adverse comment on the trial excesses of prosecutors).

52. The Louisiana Supreme Court, for example, felt that the statutory law governing prior crime evidence required supplementation with more specific procedures. See *State v. Prieur*, 277 So. 2d 126 (La. 1973). See also PROPOSED FEDERAL RULE OF EVIDENCE 404 (rev. 1971); MODEL CODE OF EVIDENCE rules 303-11 (1942); UNIFORM RULE OF EVIDENCE 55 (1953). Of these the most helpful phrasing of the prior evidence rule is rule

If problems such as those illustrated by *Davis* are to be avoided, judicial adoption of effective guidelines appears necessary. As one court has noted, "this being a matter of judgment, it is quite likely that courts would not always agree, and that some courts might see a logical connection where others could not."⁵³ The least that can be done to reduce inconsistency, and the subsequent infringement on the defendant's right to a fair trial, is to provide the trial judge with a more explicit framework upon which to base his determinations of relevance and admissibility.

303 of the Model Code of Evidence, with its heavy stress on relevance. But even that rule does not establish any concrete procedures for the trial court to follow; regulation of procedural matters is not a function of an evidence code. Indeed, in Florida only the supreme court can incorporate such guidelines into the rules of criminal procedure. See note 36 *supra*.

53. *State v. Lapage*, 57 N.H. 245, 295 (1876).