ISSUE BOOKLET

2010 Florida High School

Appellate Program

A collaborative project of

The Florida Law Related Education Association, Inc.

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Case materials authored by
Janeia Daniels, Florida State University College of Law

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FLORIDA HIGH SCHOOL
APPELLATE COMPETITION
2010 REGISTRATION FORM

_____ Yes, we would like to submit a brief for the Appellate Competition. Teams are limited to two students per brief. Briefs must be received in Tallahassee by March 29th, 2010.

I. Student's Name: _____

School:_____

Address: _____

City: _____ State: _____ Zip: _____

E-mail: _____ Phone: _____ Fax: _____

II. Student's Name: _____

School:_____

Address: _____

City: _____ State: _____ Zip: _____

E-mail: _____ Phone: _____ Fax: _____

III. Teacher's Name: _____

School:_____

Address: _____

City: _____ State: _____ Zip: _____

E-mail: _____ Phone: _____ Fax: _____

IV. Attorney Coach's Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Firm Name: _____

E-mail: _____ Phone: _____ Fax: _____

Brief submitted on behalf of: (Check One)

Appellant/Petitioner or Appellee/Respondent

Return 3 copies of this form and 3 copies of the brief to the address listed below.

The Florida Law Related Education Association, Inc.
2874 Remington Green Circle, Suite A
Tallahassee, Florida 32308
Phone: (850) 386-8223
Fax: (850) 386-8292

Rules and Guidelines

Introduction

An appeal from a trial court to an appellate court normally involves two components: a written brief and an oral argument. In this exercise, you will prepare a brief which will serve as the basis of an oral argument. The top brief writers in each Appellate District will compete in oral arguments at the district level, with the district finalists having the opportunity to argue before appellate court judges in each District Court of Appeal. The winner of each district will proceed in the competition to the state level, with the statewide finalists having the opportunity to argue before the justices of the Florida Supreme Court in Tallahassee on May 17-18th, 2010, expenses to be covered. In determining which side you choose, you should read and analyze the cases cited in the case materials.

A. Rule 1: Teams

1. Each team must consist of two students.

2. Each team will submit only one brief for either the petitioner or respondent.

3. Teams will need to prepare oral arguments for the party they wrote a brief supporting.

4. Teams may use attorney coaches and teachers as advisors to guide them through the process of preparing the brief and oral arguments; however, the writing of the briefs must be the sole work of the students. Attorneys and teachers are strictly prohibited from writing any portion of the brief.

5. Team Roster

   Team rosters should be completed and submitted to the competition coordinator before the date of the competition. At registration, teams will be identified only by code.

6. Roll Call

   Before a round of competition begins, the students should submit their roll call sheets, found in the packet, to the judges. No information identifying the team, beyond the students' names and team code, should appear on the form.

Rules and Guidelines

B. Rule 2: The Packet

1. Students should assume the moot court packet is complete and factual. Briefs which challenge the validity of issues beyond the scope of the issues questioned in the moot court packet will not be entertained. Students should not reference information contained in the mock trial materials unless so stated in the moot court packet. The moot court and mock trial packets are not interchangeable.

2. Students may only utilize the case law referenced in the moot court packet. Any deviation is a rules violation.

3. Students may not construct additional facts not found in the moot court packet specifically. Any information utilized that cannot be fairly inferred from the moot court information packet will be considered beyond the scope, and therefore, a rules violation. Students cannot cite information from the mock trial materials if not explicitly found in the moot court packet.

C. Rule 3: Competition Format

1. This competition is composed of two phases: (1) the brief-writing phase; and (2) the oral argument phase.

D. Rule 4: The Brief

1. Three copies of the students' brief must be submitted to The Florida Law Related Education Association by March 29, 2010.

2. Each brief should follow the format of the enclosed brief outline. Failure to adhere to the format may lead to disqualification. The entire brief must be no longer than 15 pages, letter-sized 8 ½" x 11." Format the text by allowing one-inch margins. All briefs must be typed and double-spaced. The type style should be Times New Roman 12 point font and each paragraph should be indented. Page numbers should appear centered at the bottom of each page. A cover page should identify "Brief for Petitioner" or "Brief for Respondent" and list the participants' names, school, address, telephone numbers, and email addresses.

3. Pursuant to Rule 2, briefs may not include any case law beyond what is presented in the packet and may not include any manufactured or researched facts beyond what is found in the moot court packet specifically.

4. Legal citation is not required, but is encouraged. Information on legal citations can be found in the appendices of the packet.

E. Rule 5: The Oral Argument

1. Two students must participate for a team per round. Both students must speak and address one of the two questions in each round.

2. Each team is given 20 minutes to present their case, as outlined below:

Speaker	**Time Limit**
Petitioner	*15 minutes*
Attorney - Question 1	7 minutes 30 seconds
Attorney - Question 2	7 minutes 30 seconds
Respondent	*20 minutes*
Attorney - Question 1	10 minutes
Attorney - Question 2	10 minutes
Petitioner - Rebuttal	*5 minutes*

3. Rounds will start on time. If a team, or a portion of the team, fails to appear within ten minutes of the time indicated, the team will compete with an incomplete team. If no student from a team appears within that time limit, the team will be judged to have forfeited the round, and bye round scoring will apply to the other team.

4. Two students will present during any one round of competition. Each student will address one of the two questions presented in the brief. Both students must speak during the oral argument. If the second student does not speak during the course of the oral argument, that student will receive a score of zero (0).

5. No communication should occur between students participating in the round and other team members, coaches, or anyone else in the audience outside the bar. Any communication with anyone outside of the partner student during that round will constitute a rules violation.

6. Students should display dignity and respect to the judges, staff, and other competition personnel.

   Additionally, teams should respect each other. By the time of competition, everyone will have worked very hard to get into competition. Respect should extend to all competitors.

7. Dress should be professional, courtroom attire.

8. During oral arguments, students will be scored based on the criteria found on the score sheet in the packet.

9. Scores and winners will not be disclosed after a round, but verbal critiques will be given.

F. Rule 6: Videotaping/Photography

1. Cameras and recording devices are permitted in certain courtrooms; however, the use of such equipment may not be disruptive **and must be approved in advance of the competition by The Florida Law Related Education Association, Inc.**

2. When one team requests to videotape during a trial, the opposing team must be consulted and their permission granted prior to taping.

G. Rule 7: Viewing an Argument

1. Team members, alternates, attorney coaches, teacher coaches, and any other persons directly associated with a team, except those authorized by the State Advisory Committee, are not allowed to view other teams in competition so long as their team remains in the competition.

2. Judges should maintain order in the courtroom. If observers are disorderly, they will be asked to vacate the premises.

H. Rule 8: Decisions

1. All decisions of the judges are final.

I. Rule 9: Team Advancement

1. Teams will be scored on their written briefs and their oral argument presentations.

2. During the scoring of the written briefs, the panel of evaluators will give each brief a numerical score consistent with the score sheet located on the website. The scores from each of the judges in the panel will be added together to determine the top two to four briefs. The top two to four teams in each district will be given the opportunity to compete in the district competition.

3. During the oral argument competition, a panel of judges will score student performances in each round. The team that receives the higher score from that panel will be awarded that panel's ballot.

4. At the end of the competition, all the ballots will be calculated and the team with the highest number of ballots will advance to the state competition.

5. In the event of a tie, all teams' point scores will be calculated with the highest cumulative points winning. If that results in a tie, the teams' point averages will be found.

6. Briefs will be scored and a Best Brief awarded consistent with the practices outlined herein.

7. The state finals will incorporate one preliminary round and one final round of competition. The top two teams will be determined by the panel of DCA judges evaluating the preliminary rounds. These top two teams will meet in the final round of competition. The team receiving the most ballots in the final round will win the competition.

J. Rule 10: Effect of a Bye Round

1. A "bye" becomes necessary when an odd number of teams are present for the tournament. For the purpose of advancement and seeding, when a team draws a bye or wins by default, the winning team for that round will be given a win and the number of ballots and points equal to the average of all winning team's ballots and points of that same round.

K. Rule 11: Eligibility

1. All students on a team must be enrolled in the same public or private school in the district for which they are competing.

2. Students must be enrolled in a Florida high school in order to be eligible.

Note: All questions should be submitted in writing to ABPflreaED@aol.com

Sources of Legal Research

The cases you will be using as your source of research and for purposes of citing to the Court as authority are included in the case materials.

You may also read articles and cases from other jurisdictions to get ideas and arguments for your brief, but any other cases may only be used to get ideas or to enhance your understanding of the legal issues. They may not be cited as authority in this contest. Your Attorney Coach may wish to suggest reading material. While you are encouraged to explore other sources, there is no requirement that you do so.

Information on research using primary and secondary sources is enclosed in the Appendices for your review.

Additionally, you can utilize on-line research through a variety of sources. You should be able to find most of the cited cases at **www.findlaw.com**, under Laws: Cases and Codes. From the Findlaw "Cases and Codes" page, scroll down and click on the U.S. Supreme Court link and pull all cases with (i.e. 123 U.S. 456). For all Circuit Court cases a ___F.2d, F.3d or F.Supp., click on the applicable Circuit Court link. For example, *Doe v. v. Dept. of Pub. Safety*, 271 F.3d 38, 60 (2d Cir. 2001) would be found under the **Second Circuit**.

Remember that in preparing your brief, you can only use the cases cited in these materials. You can research other cases but you should only use cases cited in these materials in preparing your briefs and arguments.

Relevant Case Authority

In developing brief and oral arguments, student competitors may utilize any authority cited in this fact pattern, including federal and state case law (and various authorities cited therein), federal and state constitutional provisions, federal and state statutes, and law review or journal articles. Students should be careful to explore the authorities independently as opposed to relying solely on the context in which they are presented in the fact pattern.

Format of the Brief

Each brief should follow the format of the enclosed brief outline. Failure to adhere to the format may lead to disqualification. The entire brief must be no longer than 15 pages, letter-sized 8 ½" x 11." Format the text by allowing one-inch margins. All briefs must be typed and double-spaced. The type style should be Times New Roman 12 point font and each paragraph should be indented. Page numbers should appear centered at the bottom of each page. A cover page should identify "Brief for Petitioner" or "Brief for Respondent" and list the participants' names, school, addresses, telephone numbers, and email addresses.

Do not be overly concerned with legal citation; mistakes will not hurt your score. You may even choose not to use legal citation, so long as you make it clear what case you are referencing.

If you do try to use legal citation, here are some pointers - you may want to use the ***Blue Book, a Uniform System of Citation,*** (18th ed., 2005), which should be available at any local law library for reference. However, you may simply follow the form of citation used in the sample brief.

When first citing a U.S. Supreme Court case, you should cite to the U.S. Reporter. For example, on page 6 of the sample brief, the petitioner cites to "*Jones v. United States*, 463 U.S. 354, 364 (1983)." The number 463 is the volume number, "U.S." stands for the U.S. Reporter, the books in which the Supreme Court cases are published, 354 is the first page of the cited case, and 364 is the exact page in the case upon which either the quoted language or the referenced portion of the case appears. *All subsequent cites* to the same case, immediately following that full cite, should be "*See id*." cites. However, if the referenced portion of the case is on a different page, your cite should appear as "*See id.* at _____" (that specific page on which the quote or reference is located).

If a case has been previously cited but not immediately previously cited, then a shortened cite form should be used. For example, in the sample brief, *Jones v. United States*, is cited on page 6, followed by a "*See id*." cite. Then on page 7, the *United States v. Ward* case is cited in its entirety. The petitioner then must again cite to *Jones v. United States*. If the petition were to use a "*See id*." cite there would be confusion because the reader would assume that the petitioner was referring to the *Ward* case, the immediately preceding case. Therefore, the petitioner abbreviated the case name and simply lists the volume number of the U.S. Reporter, 463 and only the specific page in the case on which the reference appears after the word "at." If the petitioner went on to cite to the *Jones* case again, he or she could once again use a simple "*See id*. at _____" cite.

Again, it is not necessary that you follow the exact legal citation form used in the sample brief. Do the best you can. We are more concerned with the arguments you choose to make.

You will note that on the cover page of the sample brief, in the lower right hand corner, the petitioner's attorney has only identified himself or herself as counsel for petitioner.

You should include your full name, followed by the names and address of your high school, telephone numbers, and email addresses where you can be reached both at school and home.

Brief should conform to the following outline:

I. Cover Page

II. Table of Authorities

III. Opinion Below

IV. Constitutional and Policy Provisions Involved

V. Questions Presented

VI. Statement of the Case

VII. Summary of the Arguments

VIII. Argument

a. Question I

b. Question II

IX. Conclusion

Sections of the Brief

Cover Page

Follow the guidelines and see sample cover page.

Table of Authorities

- List cases you used in your arguments to support your position.
- List relevant constitutional and policy provisions.

Opinion Below

Include a short statement of the proceedings in the lower court/court below and the ruling or judgment of the trial court which is being appealed from.

Constitutional and Policy Provisions Involved

Spell out the relevant provisions in the U.S. Constitution and policy provisions involved in the case from either the perspective of the petitioner or respondent.

Questions Presented

Recite the two constitutional questions or issues on appeal before this Court.

Statement of the Case

This will encompass a statement of the important issues and facts before the Court from either Petitioner's or Respondent's perspective. This section should incorporate (1) a concise (one or two sentences if possible) introductory explanation of the general nature of the case as a lead-in to the brief; (2) a short statement of the proceedings in the court below and the ruling or judgment of the trial court which is being appealed from; (3) a concise statement of the issues before the Court on appeal from the Petitioner's or Respondent's perspective; and (4) a concise statement of the important facts. This section should be presented in a light favorable to your side and contentions in your case.

Summary of Argument

Include three or four paragraphs highlighting a summary of your arguments supporting either the Petitioner's or Respondent's position. Essentially this is a short synopsis of your arguments which will follow. See below.

Arguments

This portion of the brief should discuss your position on the facts, arguments, and legal authorities (statutes and case law) which support your position on the questions presented. If the case law is favorable to your side, show how the prior cases are applicable to the facts or analysis of that case from the present case. You may wish to select the cases which most strongly support your arguments.

Conclusion

This part is a short summary of your answers to the issues on appeal (the questions presented) and should consist of only a few sentences. It is a very concise statement of why you want the appellate court to agree with you. The conclusion should also state what specific relief is being requested.

Submitting a Brief

Briefs should be submitted in the required format to The Florida Law Related Education Association, Inc. and should be **received by March 29, 2010**. The winning brief writers will be notified for dates of the local oral arguments.

Submit all briefs to the following address.

The Florida Law Related Education Association, Inc.
2874 Remington Green Circle, Suite A
Tallahassee, Florida 32308
850-386-8223
Fax 850-386-8292

IN THE DISTRICT COURT OF APPEAL SIXTH DISTRICT,
STATE OF FLORIDA

CHRIS BYRD,	)	
	)	
Appellant,	)	CASE NO.: 6D08-3137
	)	Lower Case No.: 2009 CA
v.	)	1122
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____/	)	

Opinion filed December 10, 2009.
An appeal from the Circuit Court for Crist County.
Lindsay B. Smart, Judge.

BARAMA, Judge.

Chris Byrd, defendant below, was charged and convicted by a jury of his peers of contributing to the delinquency of a minor child, Len Knievel, and violating of section 856.015, *Florida Statutes*, governing open house parties. He now appeals that conviction, raising issues concerning an evidentiary ruling during trial and a pre-trial ruling on the State's motion in limine involving the same evidentiary matter. For the reasons stated below, we affirm.

I. Facts and Procedural History

On May 16, 2009, Defendant threw a high school graduation party at his residence for his eighteen-year-old son, Puck. Seventeen-year-old Len Knievel was one of approximately 100 to 150 students who attended the party. Ten to 15 adults were invited to the party as well. Defendant purchased a variety of beverages for the students, including soda pop and energy drinks, as well as alcoholic beverages for the adults in attendance, and placed them in separate coolers in the backyard. A sign stating "Beer, adults only" was taped to the top of the cooler containing the adult beverages, and a basket for keys was placed on a table near the front door to deter attendees who had drank too much from driving.

Defendant admonished a few of the students throughout the night that drinking alcohol was off-limits because they were underage. As the night grew later, Defendant and the other adults left the remaining students to party outside and moved the alcohol cooler and some of the food inside to the basement. Around 1 a.m. the following day, Knievel, being one of the last persons to leave the party, was involved in an automobile

accident, hitting a tree in a neighbor's yard not far from Defendant's house. His blood alcohol level was .16.

News of Knievel's accident and injuries spread fast, and upon hearing about it, Puck confronted his father, asking to speak to him in private. Puck told his father that he had witnessed Knievel pouring liquor and wine into an energy drink can encased in a koozie that he brought with him to the party. Crying, Puck admitted that he was afraid to say anything to Defendant or to Knievel because he did not want to appear "un-cool" at his own graduation party. Puck further stated that he was simply following Defendant's advice, as always, to attend to his own business and not get involved in counseling his peers, as that is the role of adults. Defendant consoled Puck, and responded that he was not upset with Puck. Defendant then told Puck that he recalled sensing the odor of alcohol emanating from Knievel's body in passing early during the party, but believed that Knievel had been drinking before arriving at the party.

The officer who responded to the scene questioned Defendant and Puck about what had happened at the party, as well as other attendees. The state eventually brought charges against Defendant alleging he hosted an open house party knowing that alcoholic beverages were in the possession of and being consumed by a minor and failed to take reasonable steps to prevent the consumption of alcoholic beverages by the minor.

Defendant made a pretrial motion in limine asserting a parent-child privilege with respect to any private communications between him and his son, Puck. After having heard arguments on both sides, the trial court denied the motion.

During trial, the State presented evidence that Defendant was aware that alcoholic beverages were available without restriction to everyone at the party, not just the adults. It also presented evidence that there were minors and several open and unopened cans of beer on the deck and inside the house, and that at least one of the minors smelled of alcohol. State proceeded to call Puck Byrd to the stand and question him about the details of the conversation he had with Defendant. Defense counsel objected to the questioning, but was overruled by the trial court each time. Defendant elected not to testify on his own behalf, but counsel submitted testimony at trial that the Defendant and Puck have always maintained a strong and enviable "father-son" relationship. Following a brief recess, the jury returned a verdict of guilty on both counts. The trial court sentenced Defendant to the maximum allowed under the law.

On appeal, Defendant asserts that the trial court erred in denying the motion in limine and in admitting the confidential communication during trial, thereby prejudicing his defense. We affirm.

II. Parent/Child Privilege

The Defendant argues that creation of a parent-child privilege promotes society's interest in preventing the admission of prejudicial evidence and is necessary to preserve and protect the family. Not only is forcing children to testify against their parents about privileged communications repugnant to our society, he argues, but it also will cause a breakdown of trust in the home, ultimately discouraging parent-child communications.

While we believe the preservation of family harmony and communication is a laudable social goal, and compelled incrimination of a close relative may be uncomfortable for the parties involved, such reasons alone do not necessarily require the creation of a communications privilege. Furthermore, any injury resulting from disclosure of a parent-child communication is "necessarily and substantially outweighed by the benefit to society of obtaining all relevant evidence in a criminal case." *In re Grand Jury*, 103 F.3d 1140, 1153 (3d Cir. 1997), *citing In re Inquest Proceedings*, 676 A.2d 790, 793 (Vt. 1996) (harm from disclosure of child's confidence does not outweigh "'the public interest in seeking the truth within the context of a criminal investigation'"), and *State v. Maxon*, 110 Wash. 2d 564 (1988) (the loss of relevant evidence outweighs any public policy favoring a parent-child privilege).

It is important to recognize that section 90.501, *Florida Statutes*, has been interpreted to abolish all common-law privileges existing in Florida and require the creation of privileges to be dependent upon legislative action or pursuant to the Supreme Court's rule-making power. *See* § 90.501, *Fla. Stat.* (2009); *Marshall v. Anderson*, 459 So. 2d 384, 387 (Fla. 3d DCA 1984). Florida courts have not recognized a parent-child privilege either at common law or in our rules of evidence. In fact, the majority of states and federal courts have refused to recognize such a privilege. *See, e.g., Note, Parent-Child Loyalty and Testimonial Privilege*, 100 Harv. L. Rev. 910-915 (1987) (identifying cases opposing the privilege). There simply is no legal basis, constitutional or otherwise, to support the recognition of a parent-child privilege in criminal cases. The closest match to a "family privilege" is the marital privilege, which has never been placed on constitutional footing. Likewise, there is no justification for extending the right of privacy to create a constitutional right against compelling a parent or child to divulge familial communications. *See generally Port v. Heard*, 764 F.2d 423, 430 (5th Cir. 1985).

Moreover, the "pursuit of truth in legal proceedings is a legitimate state end." *Id.* "As a rule, the courts are entitled to the benefit of every person's evidence and privileges, as 'exceptions to t[his] demand ... are not lightly created nor expansively construed for they are in derogation of the search for truth.' " *Id.*; *In re Grand Jury Subpoena (Santarelli)*, 740 F.2d 816 (11th Cir. 1984) (finding witness was properly held in contempt for refusing to testify against his father since there is no federal parent-child privilege).

As described in the dissent below, Defendant urges our approval of a parent-child privilege on the basis of two extra-jurisdictional trial court decisions recognizing such a privilege. *See People v. Fitzgerald*, 101 Misc.2d 712, 422 N.Y.S.2d 309 (Westchester County Ct. 1979); *In re Agosto*, 553 F. Supp. 1298, 1325 (D. Nev. 1983). For several reasons, we decline to follow these two isolated cases. First, *Agosto* has not been followed by the federal courts that have considered it. *See, e.g., In re Matthews*, 714 F.2d 223, 224 (2d Cir. 1983) (terming *Agosto* a "departur[e] from the traditional rule in federal courts that, other than the spousal privilege, there is no privilege that permits a person not to testify against family members") (citation omitted). Moreover, the *Agosto* court seemed to have retreated from the settled law of the Ninth Circuit, which acknowledges that there is no recognition of a general family privilege judicially or legislatively. *See*

United States v. Penn, 647 F.2d 876, 885 (9th Cir. 1980) ("There is no judicially or legislatively recognized general 'family' privilege."), *cert. denied*, 449 U.S. 903 (1980).

Likewise, no New York court has been obliged to follow *Fitzgerald*, which has since been limited by subsequent decisions. *See People v. Harrell*, 450 N.Y.S.2d 501, 504 (N.Y. App. Div. 1982) ("[C]ommunications between parent and child do not enjoy the protection of the Sixth Amendment, nor are they privileged either under common law or by statute."), *aff'd*, 449 N.E.2d 1263, 1264 (N.Y. 1983); *People v. Johnson*, 644 N.E.2d 1378, 1379 (N.Y. 1994). Because we can find no support for recognition of a parent-child privilege—statutorily, constitutionally, or in common law—we decline to create one under the circumstances of the present appeal. *See also Santarelli*, 740 F.2d at 817.

Despite Defendant's contention, the relationship between a child and a parent is not contingent upon the maintenance of full and complete confidentiality. As much as this court is not duty-bound to encourage children to share confidences with their parents, it is also not required to create an evidentiary rule that protects such confidences from disclosure. We find that the public's interest in securing and preserving valuable evidence in a criminal proceeding outweighs any intrusion into Defendant's family life resulting from the compelled testimony, and thus, does not implicate a constitutional liberty interest.

Thus, we decline Defendant's invitation to create a parent-child privilege that would permit Defendant or his child to refuse to disclose statements revealed to him in confidence by his son. To that end, we hold that the trial court properly denied the motion in limine on this ground and appropriately overruled the trial objection to the child's testimony.

AFFIRM.

GOURGE, J., CONCURS.

CLINT, CJ., DISSENTING.

I would hold that a right of family privacy protecting certain communications between parents and children is implicit in the Florida Constitution and protects the communication at issue in this case, contrary to the majority's position.

Section 90.501, Florida Statutes, provides that the recognition of evidentiary privileges in Florida be "acknowledged by the Florida Evidence Code, statute, or the Constitution of the United States or of the State of Florida." § 90.501, *Fla. Stat.* (2009). The notion of confidentiality develops from the constitutional right to privacy, for the right to privacy is considered a fundamental right granted by Florida's Constitution under article I, section 23.

Article I, section 23, of the Florida Constitution is an independent, freestanding constitutional provision which declares the fundamental right to privacy. In enacting this provision, the citizens of Florida opted for more protection from governmental intrusion,

more so than that found in the United States Constitution. "Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the federal Constitution." *Winfield v. Division of Pari-Mutuel Wagering, Dept. of Business Regulation*, 477 So. 2d 544, 547 (Fla. 1985).

I acknowledge that the legitimacy of recognizing a parent-child privilege has been widely debated throughout American jurisprudence. Additionally, there has not been significant academic discussion of the parent-child privilege in this state. Nevertheless, I believe it is time that Florida courts recognize the utility of this form of privilege and the societal benefits that spring from it. Two cases that have explored this notion are advisory on this very issue.

The Nevada federal trial court in *In re Agosto*, 553 F. Supp. 1298, 1325 (D. Nev. 1983) involved a claim of privilege asserted by a son with respect to a criminal investigation of his father. In recognizing such a privilege, the federal district court found that the government's "important goal in presenting all relevant evidence before the court ... [does not] outweigh the family's interest in its integrity and inviolability, which springs from the rights of privacy inherent in the family relationship itself." *Agosto*, 553 F. Supp. at 1325. The court in *Agosto* broadly granted "a parent or child the right to claim such a privilege to protect communications made within an indissoluble family unit, bonded by blood, affection, loyalty and tradition." *Id.*

A New York court has concluded that protection for certain communications between parents and children, although not technically a statutory or common-law privilege like the generally accepted privileges for attorney-client and interspousal communications, flows directly from the United States and New York constitutions. *See People v. Fitzgerald*, 101 Misc.2d 712, 422 N.Y.S.2d 309 (Westchester County Ct. 1979; see also *People v. Doe (In re A and M)*, 403 N.Y.S.2d 375, 378 (N.Y. App. Div. 1978) (holding that confidential communications privilege fell within the constitutional protection of privacy).

In *Fitzgerald*, the court dealt with a claim of privilege asserted by a father with respect to allegedly incriminating statements made by his 23 year-old son. In recognizing the existence of this privilege, the court found that "[c]onfidential communications, by their very nature, in order to foster the ongoing confidential parent-child communications between parent and child, must remain confidential and private if the parties so desire, and be without the power of the state to inquire." *Fitzgerald*, 422 N.Y.S.2d at 312. The court thus found that the injury that would inure from disclosure of the communications outweighed the state's benefit in its disposal of litigation. *Id.*

Evidentiary privileges exist to protect every person's right to confide in certain people without fear that the government will compel disclosure of the information. They promote the idea that everyone has the right to confide in certain persons without fear of disclosure to outsiders. Considering the value that society and the courts place on the familial relationship, it stands to reason that private information shared between children and their parents should be protected by such a privilege.

The federal courts have applied Dean Wigmore's four criteria in determining whether to create an evidentiary privilege, and they are:

(a) the communications must originate in a confidence that they will not be disclosed;
(b) the element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
(c) the relation must be one which, in the opinion of the community, ought to be sedulously fostered; and
(d) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.

See 8 J. WIGMORE, EVIDENCE § 2192 (J. McNaughton rev. ed. 1961). These four criteria are met in the communications between Defendant and his son.

It would be difficult to think of a situation more natural and consistent with our concept of the parental role than that a child may rely on his parents for help and advice. It is clear what a detrimental effect on that relationship would be if the state could compel parents or children to disclose information given to them in the context of that confidential setting during judicial proceedings. *See generally United States v. Davis*, 768 F.2d 893 (7th Cir.), *cert. denied*, 106 S.Ct. 553 (1985) (stating that if the court were to find a privilege did exist, it would apply only in judicial proceedings). The alternatives to divulgence seems even worse, where the parties involved might risk prosecution for contempt or commission of perjury, which could seriously undermine public trust in our system of justice. It is hard to believe how such inherently unreliable testimony can further the state's interest in ascertaining the truth. *See State v. Luzanilla*, 880 P.2d 611, 615 (Ariz. 1994) ("[T]here is a strong possibility that the rivalries and loyalties inherent in all families may color a family member's testimony.") (quoting *United States v. Lang*, 904 F.2d 618, 623 (11th Cir. 1990)).

Similar policies underlie both the husband-wife and the parent-child communications privileges. Both relationships encompass aspects of mutual love, affection, and intimacy. Yet courts have consistently provided a significant degree of protection from coerced testimony in the husband-wife relationship. The Defendant maintains that while the husband-wife relationship is voluntary and capable of dissolution, the parent-child relationship is life-long, which supports that society's interest in protecting this blood relationship is perhaps even greater than society's interest in keeping the spousal relationship intact. Therefore, to protect one relationship but not the other is inconsistent because the two relationships are difficult to distinguish under the Wigmore test.

A family member's interest in confidentiality is most compelling in criminal proceedings because it is there that testifying against one another is most likely to cause irreparable damage to the parties' relationship. Recognition of a parent-child privilege would advance important public policy interests such as maintaining strong and trusting parent-child relationships; preserving the family; safeguarding against governmental

intrusion; and promoting the healthy psychological development of children. *See In re Grand Jury*, 103 F.3d 1140, 1146 (3rd Cir. 1997).

The information sought here was divulged by the son in the context of the familial setting. Not only do ethical and moral considerations mandate the recognition of such a parent-child privilege, but such flows from the constitutional right to privacy inherent in this type of relationship. Moreover, I believe that the interest of society in protecting and nurturing the parent-child relationship is of such great import that the state's interest in fact-finding must succumb. Thus, any injury to the parent-child relationship caused by compelling the disclosure of confidential communications is outweighed by the potential benefit afforded to society by obtaining all the facts relevant to a criminal case.

To this end, I would find that the trial court erred in admitting the confidential communication, and subject its ruling to an analysis for harmless error under the standard established by the Florida Supreme Court in *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986). The pertinent question in a harmless error analysis is not the sufficiency or quality of the remaining, properly admitted evidence; rather, it is "whether there is a reasonable possibility that the error affected the verdict." *Id.* at 1139.

In the present case, admission of the son's testimony regarding his conversation with Defendant cannot be deemed harmless. Two of the key issues at trial were whether Defendant knew that an alcoholic beverage was being consumed by a minor at his residence and failed to take reasonable steps to prevent the possession or consumption of the alcoholic beverage. In light of the underlying policy reasons supporting a parent-child privilege, I cannot say that the admission of this testimony did not reasonably affect the jury's guilty verdict. The trial court's error in admitting the statements was not harmless under the controlling precedent of *DiGuilio*.

In support of recognition of a parent-child privilege, I would reverse the Defendant's conviction and remand this case to the trial court for a new trial, excluding the confidential communications.

Supreme Court of Florida

Case No.: SC09-301
Lower Tribunal No.: 6D08-3137

CHRIS BYRD
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

ON CONSIDERATION of the PETITION FOR A WRIT OF CERTIORARI herein to the Supreme Court of Florida, No. 6D08-3137.

IT IS SO ORDERED by this Court that the said Petition be, and the same is hereby granted, in order that this Court may consider the following questions raised by the parties:

1. Whether article I, section 23, of the Florida Constitution embodies a "parent-child" privilege, which would prevent disclosure of confidential communications between a parent and a child in judicial proceedings when the parties to such communication assert such a privilege.

2. Whether Petitioner's interest in protecting his child's confidential communications outweighed the public interest in the criminal fact-finding process, and if so, whether Petitioner was prejudiced by the court's admission of the confidential communication during trial.

Dated: December 15, 2009.

/s/
Timothy Hall
Clerk, Supreme Court