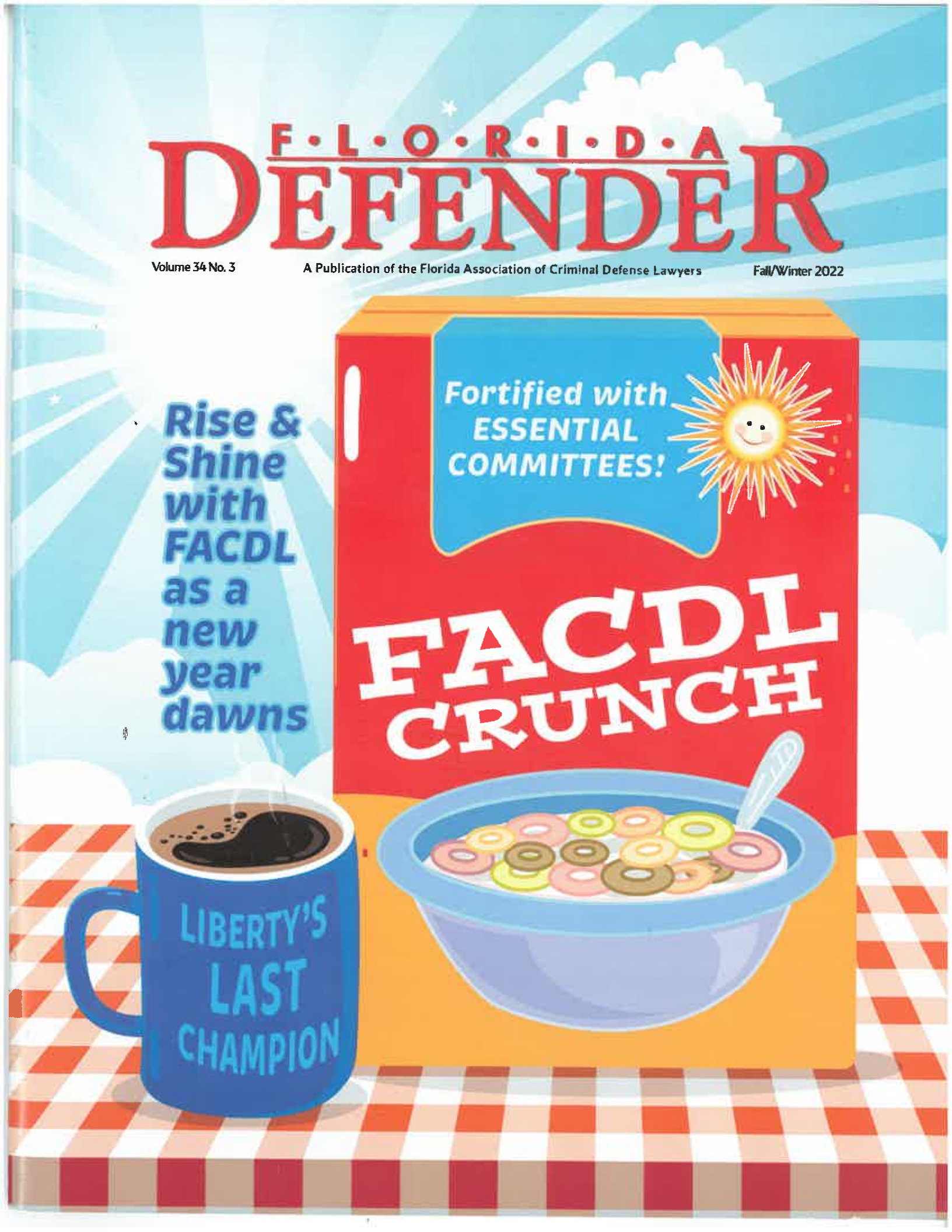
F·L·O·R·I·D·A DEFENDER

Volume 34 No. 3 A Publication of the Florida Association of Criminal Defense Lawyers Fall/Winter 2022



Uff's Preservation Points

by Michael Ufferman

I write this column in honor of **Jim Miller**, who was both a friend and mentor to me. Beginning in 2005, Jim wrote a series of columns for *The Defender* dealing with preservation of error — using the acronym "Nine Lives." Jim entitled the first column:

> *Giving Nine Lives to a Busy and Overworked Trial Lawyer: 9 Ways to Preserve the Record on Appeal or, "When you come to a fork in the road, take it."*

In his three columns, Jim discussed the following "Nine Lives":

❶
NEVER GO TO TRIAL UNPREPARED:

Know the law — Use the collective wisdom and experience of your office.

❷
IN CONTEXT:

A contemporaneous objection is made at or about the time of the event, so that the trial court can correct error in context. It does not have to be an instantaneous or simultaneous objection.

❸
NAME THE PREJUDICE:

Blood on the tracks — You must be able to show some type of real prejudice with each objection. Otherwise, why bother to object?

❹
EXCLUDE PREJUDICIAL EVIDENCE:

Section 90.403, Florida Statutes — You must use 90.403 as much as possible in light of expanded view of relevance and diminished scope of constitutional and fundamental error.

❺
LET THE COURT KNOW WHY:

Proffer = time = prejudice = power — You can proffer anything! Proffer will establish prejudice and give you more control.

❻
INSIST ON RENEWING OBJECTIONS:

A simple rule: always renew objections and never rely upon fundamental error.

❼
EXPECT TO WIN:

What to do if and when the court sustains your objection — Motions for mistrial, to strike and disregard, cautionary instructions.

❽
VOCALIZE:

More is more — "When in doubt, spit it out!" — make as many objections/points as you feel are appropriate for each issue. On appeal you can only subtract arguments raised at trial, you cannot add them.

❾
STAND UP TO THE PETTY TYRANT

Approaching the bench; speaking objections; Section 90.104(2), Florida Statutes.

James T. Miller, "Nine Ways to Preserve the Record on Appeal," *Florida Defender* (Winter 2005 & Spring and Summer 2006). I am writing "Uff's Preservation Points" in Jim's memory. Like Jim, I am hopeful that these tips will help make you a more effective trial lawyer and will ensure that — should you finish in second place at trial — you have preserved all issues for appeal.

Many of my preservation points will be familiar to you. But as you can see in the caselaw examples that I will cite, criminal lawyers in this state are still failing to properly preserve claims for appeal — and appellate judges are all-too-happy to avoid reaching the merits of a claim if they can instead conclude that the claim was not properly preserved.

My first column focuses on preserving issues during closing arguments. What I am about to say seems axiomatic, but it nevertheless bears repeating. If the prosecutor makes an improper closing argument, you must immediately and contemporaneously object. You cannot wait until there is a break in the proceedings, or wait until the prosecutor concludes the argument, or wait until the jury retires to deliberate. And please don't use the excuse that "I don't like to object or interrupt the prosecutor because I don't want to appear to be rude to the jury." If you fail to object, the issue will NOT be preserved. You must get over the fear of objecting. Remember the quote of the Greek playwright Euripides as you rise out of your chair to object: "It is better to die on your feet than live on your knees!"

An attorney's failure to timely object during closing arguments was recently addressed by the First District Court of Appeal in *Smith v. State*, 333 So. 3d 255, 258-259 (Fla. 1st DCA 2022), where the court stated the following:

> During closing arguments, the State made a few remarks that sparked objections. Following the State's initial argument,

Smith moved for a mistrial, arguing the State improperly bolstered the victims' testimony. Smith's counsel explained why the motion came at the end of the State's argument: "I tactically, intentionally waited until Ms. Scott was finished with her very, very well said closing argument," and "tactically, I wanted a record, you know, so there – we now have a cumulative record… I don't believe in, in interrupting counsel in closing arguments." The court treated the motion as a contemporaneous objection and denied it.

Then during the State's rebuttal, the prosecutor told the jury:

> This defendant does not have to prove his innocence. I am not asserting that to you at all. But when you have this kind of evidence put against you, two children saying these sort of things, swearing to these things the way they have, then, yes, *if you believe them, that shifts to him*. If you believe these children, then you find him guilty. *He has not proven that he did not do this*, if you believe them.

Again, Smith's counsel waited to object—this time until after the jury had retired to deliberate. Counsel explained why he waited: "I make it a point not to interrupt counsel during closing, unless it's absolutely necessary. So I just ask that my objection be considered timely." The court agreed that the State's comments on the burden of proof were improper, and even looked to counsel for an objection during the rebuttal. But this time, the court declined to treat counsel's objection as contemporaneous.

(Emphasis added). Although the First District agreed that the prosecutor's comments improperly shifted the burden of proof, the court concluded that defense counsel failed to preserve the issue for appeal because there was no contemporaneous objection (and because counsel refused the trial court's offer of a curative instruction):

> [W]hile counsel's second objection was aimed at some of the same comments Smith contests on appeal, the objection was too late. Because the jury had retired to deliberate, the objection… failed to preserve Smith's arguments on comments the State made during rebuttal.
>
> • • •
>
> …Here, Smith had a chance to object—the trial court even expected him to. But counsel chose to wait until after the jury left for deliberations to move for a new trial.
>
> • • •
>
> Although the prosecutor's statements were improper, Smith has no right to relief because he invited the error. Under the invited-error doctrine, a party may not make or invite error at trial and then take advantage of the error on appeal. Because the trial court offered Smith a curative instruction in response to the State's mischaracterization of the burden of proof and Smith refused, that error was invited and does not warrant reversal.

Smith, 333 So. 3d at 259-261 (cleaned up).

Please don't make the same mistake that was made in Smith. If the prosecutor makes an improper closing argument, you MUST immediately object in order to preserve the claim for appeal.

One final point: what happens if the judge sustains the objection? To preserve the claim for appeal, you must also move for a mistrial. See *Companioni v. City of Tampa*, 51 So. 3d 452 (Fla. 2010) ("[W]hen a party objects to instances of attorney misconduct during trial, and the objection is sustained, the party must also timely move for a mistrial in order to preserve the issue for [appeal].").

Good luck—and please remember to timely object! Do not accept the mythology that preservation of the record on appeal is somehow incompatible with your strategy. A good trial strategy goes hand-in-hand with preserving the record on appeal.

MICHAEL UFFERMAn is a board-certified criminal appellate lawyer and a past president and a life member of FACDL. He is the author of the Florida Criminal Practice and Procedure treatise, 2022 ed. (Vol. 22, Florida Practice Series).