Florida Case Law Update For Law Enforcement Legal Advisors (2014)

Several Cases of Interest To Florida Police Attorneys Over The Past Year

As Presented To
The Florida Association of Police Attorneys

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Many cases announced in the past year were not included in this summary. The cases that have been included were selected to sample of ongoing issues and developments in Florida criminal law. This summary is not a complete review of every opinion of interest to Florida law enforcement issued in the last 12 months.

Do not rely on these summaries for a full understanding of the case reported. Citations have been provided to assist in locating and reading the full case.

Florida Cases Of Interest To Police Attorneys

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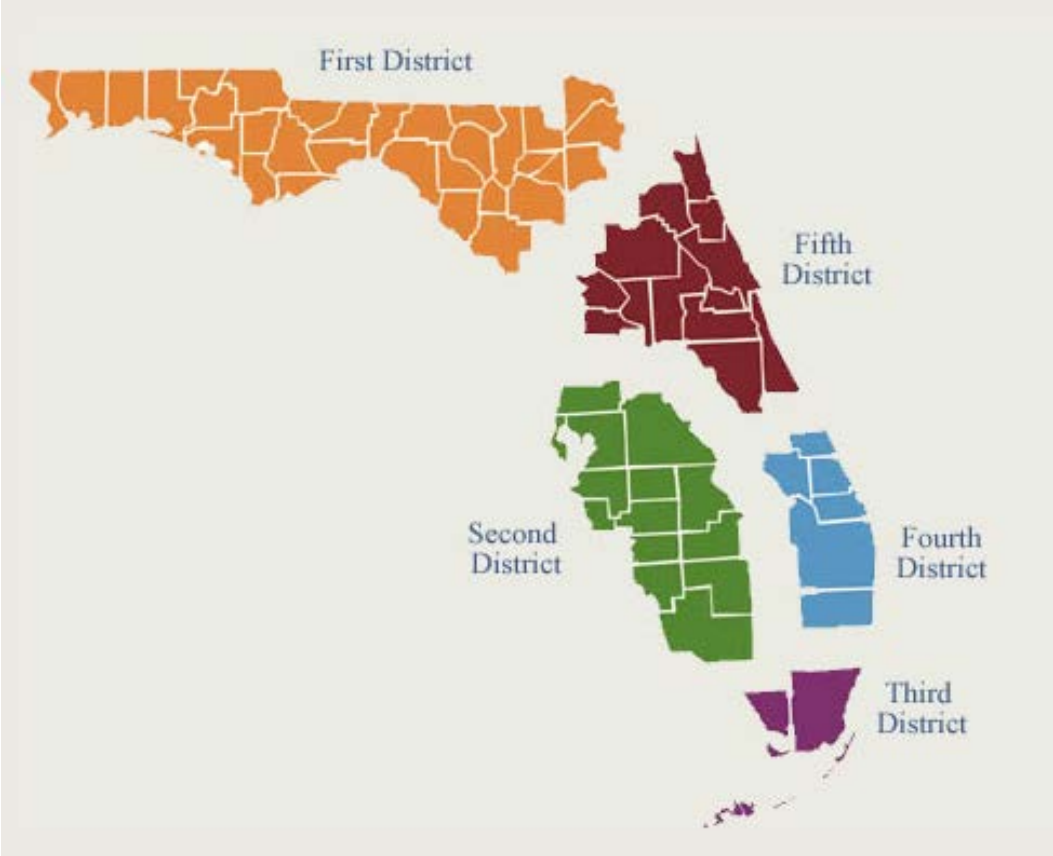

Florida Cases Of Interest To Police Attorneys
Michael Ramage -- October 2, 2014

REMEMBER! These are summaries of a representative selection of cases issued over the last year. It is not an exhaustive compilation of "every" case that may be of interest to law enforcement agency legal advisers and officers. ***Do not rely solely upon the summary of any case. Read the actual opinion.***

Selected Opinions Of The U.S. SUPREME COURT:

Riley v. California, 573 U.S. __ 134 S.Ct. 2473 (June 25, 2014)
Search Incident Arrest: Cell Phones

The police may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested.

This decision involved a pair of cases in which both defendants were arrested and cell phones were seized. In both cases, officers examined electronic data on the phones without a warrant as a search incident to arrest. The Court held that "officers must generally secure a warrant before conducting such a search." The Court noted that "the interest in protecting officer safety does not justify dispensing with the warrant requirement across the board." In this regard it added however that "[t]o the extent dangers to arresting officers may be implicated in a particular way in a particular case, they are better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for exigent circumstances."

Next, the Court rejected the argument that preventing the destruction of evidence justified the search. However, the Court left open the possibility of some warrantless activities: "[t]o the extent that law enforcement still has specific concerns about the potential loss of evidence in a particular case, there remain more targeted ways to address those concerns. If the police are truly confronted with a 'now or never' situation—for example, circumstances suggesting that a defendant's phone will be the target of an imminent remote-wipe attempt—they may be able to rely on exigent circumstances to search the phone immediately" (quotation omitted). Alternatively, the Court noted, "if officers happen to seize a phone in an unlocked state, they may be able to disable a phone's automatic-lock feature in order to prevent the phone from locking and encrypting data." The Court noted that such a procedure would be assessed under case law allowing reasonable steps to secure a scene to preserve evidence while procuring a warrant

The Court expressed concerns that modern cell phones are far more than just phones and contain highly personal information within them, much of which is indistinguishable from and more private than what one might have in one's purse or wallet. The issue is further complicated by the reality that much of what is viewed on a cell phone is not stored on the device itself, but rather in "the cloud." Concluding, the Court noted: "Privacy comes at a cost. Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." In closing, the Court noted that even though the search incident to arrest does not apply to cell phones, other exceptions may still justify a warrantless search of a particular phone, such as exigent circumstances.

Navarette v. California, 572 U.S. __ , 134 S.Ct. 1692 (April 22, 2014)
Basis For Traffic Stop Relying On "911" Call Information

The Court held in this "close case" that an officer had reasonable suspicion to make a vehicle stop based on a 911 call. After a 911 caller reported that a truck had run her off the road, a police officer located the truck the caller identified and executed a traffic stop. As officers approached the truck, they smelled marijuana. A search of the truck bed revealed 30 pounds of marijuana. The defendants moved to suppress the evidence, arguing that the traffic stop violated the Fourth Amendment because the officer lacked reasonable suspicion of criminal activity. Even assuming that the 911 call was anonymous, the Court found that it bore adequate indicia of reliability for the officer to credit the caller's account that the truck ran her off the road. The Court explained: "By reporting that she had been run off the road by a specific vehicle—a silver Ford F-150 pickup, license plate 8D94925—the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. That basis of knowledge lends significant support to the tip's reliability." The Court noted that in this respect, the case contrasted with Florida v. J. L.,529 U. S. 266 (2000), where the tip provided no basis for concluding that the

tipster had actually seen the gun reportedly possessed by the defendant. It continued: "A driver's claim that another vehicle ran her off the road, however, necessarily implies that the informant knows the other car was driven dangerously." The Court noted evidence suggesting that the caller reported the incident soon after it occurred and stated, "That sort of contemporaneous report has long been treated as especially reliable." Again contrasting the case to J.L., the Court noted that in J.L., there was no indication that the tip was contemporaneous with the observation of criminal activity or made under the stress of excitement caused by a startling event. The Court determined that another indicator of veracity is the caller's use of the 911 system, which allows calls to be recorded and law enforcement to verify information about the caller. Thus, "a reasonable officer could conclude that a false tipster would think twice before using such a system and a caller's use of the 911 system is therefore one of the relevant circumstances that, taken together, justified the officer's reliance on the information reported in the 911 call." But the Court cautioned, "None of this is to suggest that tips in 911 calls are per se reliable." The Court went on, noting that a reliable tip will justify an investigative stop only if it creates reasonable suspicion that criminal activity is afoot. It then determined that the caller's report of being run off the roadway created reasonable suspicion of an ongoing crime such as drunk driving.

Fernandez v. California, 571 U.S. __ 134 S.Ct. 1126 (Feb. 25, 2014)
Removed Co-Occupant's Objection To Other Occupant's Consent To Search Does Not Invalidate The Consent.

Consent to search a home by an abused woman who lived there was valid when the consent was given after her male partner, who objected, was arrested and removed from the premises by the police. Cases firmly establish that police officers may search jointly occupied premises if one of the occupants consents. In Georgia v. Randolph, 547 U. S. 103 (2006), the Court recognized a narrow exception to this rule, holding that the consent of one occupant is insufficient when another occupant is present and objects to the search. In this case, the Court held that *Randolph* does not apply when the objecting occupant is absent when another occupant consents. The Court emphasized that *Randolph* applies only when the objecting occupant is physically present.

Here, the defendant was not present when the consent was given. The Court rejected the defendant's argument that *Randolph* controls because his absence should not matter since he was absent only because the police had taken him away. It also rejected his argument that it was sufficient that he objected to the search while he was still present. Such an objection, the defendant argued should remain in effect until the objecting party no longer wishes to keep the police out of his home. The Court determined both arguments to be unsound.

NOTE: *For a summary of every U.S. Supreme Court opinion related to criminal law from 1991 to present, check out the UNC School of Government's summary site at:* *http://www.sog.unc.edu/node/489*

Individual opinions may be found at the USSC website: http://www.supremecourtus.gov/

11th Court of Appeals Cases:

Wife's General Consent To Search Home Computer Trumps Husband's Earlier Limited Consent When He Was Present And Did Not Object To Her Consent

Charles Marvin Watkins agreed to assist law enforcement in a murder investigation after the body of a seven-year-old girl, with whom he was acquainted, was found in a landfill. When questioned by an investigating officer, he admitted to having downloaded and viewed child pornography. A detective then asked Mr. Watkins for permission to search his computers for information relevant to the murder investigation. After being assured that the officer was not searching for his child pornography but only for clues to the girl's murder from sites she had visited on the computers while visiting his home, Mr. Watkins agreed to a search. Later at the home, in the presence of Watkins, his wife provided written consent to a general search of the computers. Evidence of child pornography from the search was subsequently used to charge Mr. Watkins under 18 U.S.C. § 2252 for receipt of child pornography by computer over the internet.

The seven-year-old girl, was murdered after she disappeared while walking home from school. She frequently had played with Mr. Watkins's grandchildren and other children at his home. Following her disappearance, Mr. Watkins was questioned by several local law enforcement officers as well as agents from the Federal Bureau of

Investigation ("FBI"), being told they were solely interested in the homicide investigation. Watkins cooperated, indicating he would do anything to assist finding the perpetrator. During that questioning Watkins suggested possible predators and indicated he knew them from his Lime Wire activity and admitted he had viewed child pornography about 100 times on his computer. Watkins told the detective that the questioning was difficult for him because "some things ... might put [him] in a bad light," but that he had "to be honest" with the detective. Watkins stated that he was "more concerned" about the homicide. The detective replied, "[t]hat is why we are here. We are not interested in ... what's on the computer unless there is something on the computer...." The detective did not finish his sentence because Watkins interrupted, saying, "[i]f it's relevant, you know."

Detective Sharman then asked Watkins for access to the three computers in his home because they "may hold something about this, and they may not, you know." Watkins agreed to help the detective with "whatever [he] need[ed]" from the computers. The detective then stated: "What I want to do is just get—just get a consent to look and see what—now you told me a couple of programs [Mr. Watkins's computers] got, and just see if anyone has been trying to pe[ek] in there or talk in there, if these people on the other end are who they say they are. I am not worried about your files and all that kind of stuff. That's what you—I've got my own private stuff on my computer, you know what I am saying?"

Watkins relied affirmatively. The detective later asked to introduce Mr. Watkins to his "computer guy," so that investigators could examine the programs on his computer. Mr. Watkins subsequently read and signed a voluntary consent form authorizing a full search of his computers. Parts of the form were read aloud to Mr. Watkins, although the paragraph stating that he had been advised of his right to refuse consent and that he gave consent freely and voluntarily was not read aloud.

Investigators and an evidence technician went to Mr. Watkins's home where they met Mrs. Watkins, explained that Mr. Watkins had signed a form consenting to a search of the computers in the home and asked for her consent to search the computers as well. She agreed, although she later claimed that she did so with the understanding that the search was limited to the murder investigation and the websites the children had visited. After Mrs. Watkins had consented verbally to a search of the computers, Mr. Watkins arrived. The couple spoke for a few minutes. Mrs. Watkins testified that Mr. Watkins had informed his wife that the officers were searching the computers only for information related to the children and the murder investigation.

Mrs. Watkins, the detective and Mr. Watkins then sat at a table together. The detective read aloud to Mrs. Watkins a form consenting to a complete search of the computers; Mrs. Watkins also read and signed the form. This consent form was identical to the one Mr. Watkins had signed at the sheriff's office. Mr. Watkins did not register any objection or reservation while officers sought and obtained Mrs. Watkins's consent to an unlimited search. Mr. Watkins then led investigators to the computers in the home, and the technician removed them. Department of Homeland Security, U.S. Immigration and Customs Enforcement Special Agent James Greenmun performed a forensic analysis of an imaged copy of the hard drive on Mr. Watkins's personal computer. He discovered child pornography files that had been deleted. The Government then initiated a child pornography case against Mr. Watkins. Mr. Watkins subsequently withdrew his consent to the search of his computers, but Agent MacDonald obtained a search warrant for Mr. Watkins's computer.

Watkins moved to suppress the child porn evidence. The magistrate concluded that the search had exceeded the scope of Mr. Watkins's consent but that it was within the scope of Mrs. Watkins's consent. With respect to Mrs. Watkins's consent, the magistrate judge credited Detective Eckert's testimony over Mrs. Watkins's testimony about the scope of her consent. The magistrate judge found Mrs. Watkins less credible than the detective because her assertions were "unclear and inconsistent." He also noted Mrs. Watkins's interest in the outcome of the case due to her love for her husband. The district court ultimately adopted the finding in the Report and Recommendation that she had consented to an unlimited search of the computers. The district court noted that neither Mrs. Watkins nor the officers had stated the object of the search or otherwise expressed any limitations to it. The district court also rejected Mr. Watkins's argument that the search was invalid under Georgia v. Randolph 547 U.S. 103 (2006) because he had not consented to the search even if Mrs. Watkins had. The district court concluded that Mr. Watkins had "not actually express[ed] a refusal to consent to an unlimited search of the computers" as *Randolph* required; instead, "he consented to the detective's request for a search that was implicitly limited ... to certain content of the computers." Watkins was found guilty after a bench trial, sentenced to 60 months, and he appealed.

As to Mr. Watkins' consent, the 11th CA stated, "Watkins consented in writing to an unlimited search of the computers, but that consent followed repeated assurances by Detective Sharman that officers were interested in the computers only for the ongoing murder investigation." It accepted the District Court's determination that Mr.

Watkins' consent was limited. All parties agreed Mrs. Watkins had the authority to consent to a search of the computer. The Court noted that the record reflects that the officers followed a formal process in seeking Mrs. Watkins's *independent* consent to a full search of the computers. "Detective Eckert first sought and obtained verbal consent from Mrs. Watkins to search the computers. After Mr. Watkins arrived, Detective Eckert read the consent form aloud to Mrs. Watkins while all three were together at a table. Mrs. Watkins also read the form herself before signing it. Even accepting Mrs. Watkins's various assertions at face value—which the district court declined to do because of its assessment of her credibility—she consented to the search. Moreover, the district court's finding that Mrs. Watkins gave unlimited consent to a search of the computers was not clear error." The formality of the process made crystal clear that her consent was independent of his and was for a full search of the computers. Mr. Watkins sat through the entire formal process conducted by Detective Eckert to obtain Mrs. Watkins's full, independent consent. There was no indication that, during the process, Mr. Watkins interposed any objection or suggested to his wife at any time that the consent documents were in any way limited by another understanding. As noted by the Court, "(Watkins') silence and acquiescence hardly qualify as the type of objection required by *Randolph.* He was not, by any stretch of the phrase, 'at the door and object[ing]' within the meaning of *Randolph*.…To obtain the protections of *Randolph,* a defendant, while present with his cotenant, must object to the search. Mr. Watkins's actions fall well outside *Randolph's* conception of an objection." Watkins' district court case was affirmed.

U.S. v. Watkins, ---F.3d---, (USCA 11. Docket # 12-12549 7/28/14)

Deputies' Observation Of Firearms In Master Bedroom Closet During Search For Drugs Provided Basis For Plain View Seizure In Light Of Recognition The Resident Was Convicted Felon

A Palm Beach County Deputy made three purchases of oxycodone from a 17 year old. Purchases were made outside the teen's house where he lived with his mother, and on one occasion the teen had to go into the house to obtain the drugs to sell. Jack Folk also lived at the house. The Deputy was familiar with Folk, who had been a member of a local gang, the "Safe Boys." The Deputy knew Folk to be a convicted felon. A warrant was obtained that authorized a search of the house for financial records, electronic media, items used in packaging and producing the drugs and items of identification.

During the initial SWAT team entry and protective sweep, a SWAT member observed in a bedroom closet two firearms, and reported it to the deputy. In that bedroom were pictures of the mother and Folk, and empty Oxycodone pill containers, in the names of Folk and the mother. In the master bedroom closet, the two guns first noted, a rifle and a shotgun were located by the deputy. The deputy indicated he assumed they were Folk's because they appeared to him to be "more hunting, sport-type weapons." The weapons themselves were not illegal, but the deputy knew Folk was prohibited from possessing firearms as a convicted felon. The firearms were seized. Folk was convicted of illegal firearm possession and sentenced to 180 months in prison. He appealed the failure to suppress the guns, claiming they were not part of the warrant nor were they seizable under the "plain view" doctrine. The trial court upheld the seizures by finding that weapons were within the warrant's language authorizing seizure of drug-related items. The judge did not consider the "plain view" argument.

The DCA did not accept the drugs connection to the firearms as a basis for seizure under the warrant. It noted that the sales by the teen never involved possession of a weapon, and that the deputy himself characterized the guns as hunting or sportsman types of weapons. The teen's limited sales were not the large-scale drug trafficking where it is reasonable to assume guns will be present. However, the DCA indicated it ultimately did not have to address the issue of whether the language authorized the guns because the guns were legally seized under the plain view doctrine. The officer was legally in the place when the guns were first observed during the protective sweep and then again during the actual search for drug evidence. The incriminating nature of the two guns was readily apparent to the deputy because he knew Folks' background as a felon. The master bedroom closet was a place where oxycodone pills could be found, particularly since empty oxycodone and other drug pill bottles were found in the master bedroom itself. The pictures of Folk connected him to the bedroom. There was no error in denying Folks' motion to suppress.

U.S. v. Folk, 754 F.3d 905 (USCA 11, 6/12/14)

Qualified Immunity Denied To Officers Who Slammed Handcuffed Arrestee To Pavement

Oberist Saunders filed a 42 USC § 1983 action in the U.S. District Court, Middle District of Florida, alleging that his head was "slammed" against the pavement with "extreme force" after he had been handcuffed and was lying

prone on the ground, and that such force was excessive. The District Court found the defendants, an agent of FDLE and two agents of the Orlando Metropolitan Bureau of Investigation were entitled to qualified immunity. Saunders appealed, and the 11th CA reversed the dismissal, finding Saunders stated a valid 4th Amendment claim for excessive force, noting that "We have repeatedly ruled that a police officer violates the Fourth Amendment, and is denied qualified immunity, if he or she uses gratuitous and excessive force against a suspect who is under control, not resisting and obeying commands." (See, e.g. Priester v. City of Riviera Beach, Florida, 208 F.3d 919 (11th Cir. 2000), Slicker v. Jackson, 215 F.3d 1225 (11th Cir. 2000) and Lee v. Ferraro, 284 F.3e 1188 (11th Cir. 2002).

The alleged facts: Saunders met a couple of individuals at a gas station in Orland to sell them oxycodone pills. The individuals were an undercover officer and an informant. After the transaction was completed in the undercover agent's car (Saunders was in front passenger seat), three agents surrounded the car with guns drawn. MBI Agent Matthews ordered Saunders to place his hands on the car's windshield and not move. Saunders complied. MBI Agent Kilian then jerked Saunders out of the vehicle and pushed him down on the hot pavement in order to handcuff him. Saunders alleges he was held down against the hove pavement on his stomach for a long period of time even though he was not resisting or attempting to flee. He told the agents he was "getting burnt" and held his head up off the pavement. One of the agents then allegedly "slammed" Saunders' face onto the pavement "with extreme force." He did not see which of the three agents struck him. When he was brought to his feet, "blood was pouring out of his mouth (and) face from the impact against the pavement" and he had lacerations, injuries to his teeth and taw, damage to his left eardrum, and alleged emotional distress due to his head striking the pavement. These facts were reviewed by the 11th CA in the light most favorable to Saunders.

The District Court granted qualified immunity, noting "the use of force during an arrest is not clearly unlawful if an arresting officer is faced with an uncooperative suspect or if an officer perceives resistance in a volatile situation." The court characterized Saunders' lifting of his head off the pavement as a refusal to cooperate and/or resisting arrest. The 11th CA says the DC erred. Applying a 4th Amendment "reasonable officer" balancing test, the Court considered several factors: the severity of the offense, whether the suspect was posing an immediate threat, and whether he was actively resisting arrest or attempting to flee. Additional factors considered included the need for application of force and the relationship between the need and amount of force used, and finally, the extent of injuries inflicted. The Court found that Saunders had sufficiently alleged a gratuitous use of force and his action should not have been dismissed. It rejected at this stage, the officers' defense that the force used was *de minimus,* noting the injuries alleged by Saunders were not *de minimus.* "If these allegations are true, and we must assume that they are at this stage of the case, (the force used) was unnecessary, disproportionate, and constitutionally excessive." The Court also refused to accept as facially true the arrest reports that apparently omitted any indication of the actions Saunders alleged occurred. In so doing, it rejected FDLE Agent Duke's assertion that he was not involved in the actual pavement slam-down. The case was remanded for further proceedings in the District Court.

Saunders v. Duke, Matthews, Kilian, --F.3d.--, (USCA 11, No. 12-11401, 9/8/14)

FLORIDA SUPREME COURT CASES:

Circumstantial DNA and Fingerprint Evidence Placing Defendant In Murder Victim's Car Was Insufficient To Prove First Degree Murder

Dausch was convicted in 2011 of first-degree murder of Adrian Mobley on 7/15/87, and aggravated battery as a lesser included offense of sexual battery. He was sentenced to death on the murder and ten years imprisonment on the battery. For fifteen years after Mobley's murder that case was "cold." Ultimately DNA evidence led investigators to Dausch.

Mobley's body was found in Sumter County on 7/15/87. He was hogtied with a sheet and severely beaten. He was clothed but his wallet and car were missing. Several hours later Mobley's car was spotted near Interstate 65 in Whitehouse, Tennessee. An eyewitness saw a man who generally resembled Dausch abandon the car and walk to toward the Interstate. The eyewitness called local police and reported what he saw. The car was quickly tied to the murder victim. It was seized and processed for evidence. Prints were lifted from the exterior and from

a cigarette lighter wrapper found in the car. At the time there were no known fingerprints for comparison. Anal swabs taken during the autopsy of Mobley revealed the presence of semen.

Fifteen years later, FDLE utilized grant funds to work cold cases, and obtained the anal swabs from the Sumter County Sheriff's Office. The swabs and other pieces of evidence that might have DNA were also forwarded to Fairfax Identity Laboratories in Virginia. The anal swabs produced a mixture of DNA, as did cigarette butts. The DNA profile data was entered by FDLE into the national DNA Database and information identified Dausch as a possible suspect.

Buccal swabs, fingerprints and hair samples were obtained from Dausch, who was then living in Indianapolis, Indiana. Investigators were provided a picture postcard from Flagler Beach, Florida that Dausch had mailed to the mother of Dausch's daughter on July 8, 1987. An examiner concluded the handwriting on the card was probably Dausch's.

The buccal swabs were compared to the DNA evidence samples. DNA from the cigarette butts found in the abandoned car revealed matches at all thirteen loci, with a frequency of occurrence of that DNA profile being approximately one in two hundred and thirty trillion Caucasians, one in two point three quadrillion African Americans and one in eight hundred and seventy trillion Southeaster Hispanics. Anal swab comparisons indicated the frequency at which you would expect someone to contribute to the mixture of DNA would be one in 46 Caucasians, one in a hundred and thirty-nine African-Americans, and one in a hundred and fifteen Southeaster Hispanics. These ratios were revised upon subsequent retesting to 1:290; 1:790 and 1:500. Semen stains on the sheet used to tie Mobley's hands and feet indicated Dausch was not the source of those stains. DNA analysis of Mobley's fingernail scrapings also excluded Dausch. Fingerprints on the cigarette lighter wrapper matched Dausch's. Palm prints on the driver's side door and above the read driver's side door matched Dausch's. No prints of Dausch were found in the driver's immediate area. Dausch's prints were not on other items in the car. A print on Mobley's wallet was not Dausch's.

Dausch's trial had been set for April of 2011. On the eve of jury selection Dausch attempted to commit suicide, using strips of bed linen tied around his neck in his Sumter County Jail cell. The state relied on this event as evidence of Dausch's consciousness of guilt. At trial, Dausch's defense was that he hitchhiked a ride with the person who had actually stolen Mobley's car. Dausch's former brother-in-law testified that he, Dausch and other family members traveled from Indiana to Florida in an RV and vacationed at Flagler Beach and Tampa. They left Flagler Beach and traveled north on Interstate 95 until they headed west on Interstate 10. Dausch, who was anxious to return to Indiana, parted from the group at an I-10 rest stop.

The Florida Supreme Court noted that "where a conviction is based wholly upon circumstantial evidence, a special standard of review applies…(requiring) that the circumstances lead to a reasonable and moral certainty that the accused and no one else committed the offense charged." The Court indicated there was competent substantial evidence placing Dausch inside Mobley's vehicle, and that this creates a suspicion of guilt. However, suspicion is not proof. It summarized the state's case as linking Dausch to the car, but not to Mobley's murder. While some DNA evidence suggested Dausch as the probable contributor, significantly, Dausch was excluded as the contributor to the semen stains on the sheet used to bind up Mobley's hands and feet, and from the Mobley fingernail scrapings. While the state suggested the passing of time resulted in DNA evidence related to the anal swabs not being as conclusive as some DNA matches, the court had to consider the sufficiency of all the evidence. It found that viewed in its entirety, the record lacks competent substantial evidence to support the jury's verdict. While not taking lightly the results of its determination the Court indicated its comprehensive review of the case showed the evidence is insufficient to conclude beyond a reasonable doubt that Dausch was the person responsible for murdering Mobley. His conviction was reversed with instructions to the trial court to enter a judgment of acquittal. CJ Polston dissented, finding Dausch should be granted a new trial, not a judgment of acquittal.

Dausch v. State, 141 So.3d 513, (Fla. SC12-1161, 6/12/14)

Dropping Stolen Goods While Being Chased By Security Officer After Leaving The Store Does Not Entitle Defendant To "Abandonment" Jury Instruction

The Florida Supreme Court resolved an asserted conflict between Rockmore v. State, 114 So.3d 958 (Fla. 5th DCA 2012) and Peterson v. State, 24 So.3d 686 (Fla. 2nd DCA 2009) by approving Rockmore's conviction and the 5th DCA's opinion, but left the Peterson case in place, since the facts of the cases were not the same.

Rockmore was charged with robbery with a firearm. The issue under dispute was whether Rockmore's actions during the chase elevated the shoplifting theft to robbery. According to the Wal-Mart security agent, Rockmore stole a package of t-shirts and a package of socks and was chased by the agent across several parking lots. The guard caught Rockmore and pulled on his jacket, during which the shirts fell to the ground. Rockmore told the security officer, "There's your merchandise…I'm not going to come with you, I'm not." He then headed off, with the security guard following him because he still had the socks. Rockmore went to a parked car with a man and woman inside. Before entering the car, he turned to the security officer, lifted his shirt, revealing a firearm tucked in his waistband, and said, "Let it go, let it be, you don't want none." The security officer backed off, scared by Rockmore's threat. Rockmore's version was that the socks fell out while he was running, that he got hot and took off his jacket while fleeing, also throwing the shirts down. He told the guard, "Look, give me a break, man. You got your S*** back." He claimed he had no merchandise with him when he got to the car and denied having or threatening the guard with a weapon. Police recovered the jacket and shirts at the scene. The socks were never recovered.

After the state rested, Rockmore moved for a JOA on the robbery. He claimed he abandoned the merchandise before any alleged threatening of the guard. He argued the chain of events had been broken. The trial court denied the motion. Before the case went to the jury, Rockmore sought a special jury instruction on abandonment similar to the instruction provided in the Peterson case. In Peterson, the 2nd DCA ruled that a defendant who transferred all stolen merchandise to a shopping basket that he abandoned before shoving his way out of the store was entitled to a special "abandonment" jury instruction. The instruction was given after being modified by the court to stress the abandonment must be voluntary and the victim aware of the abandonment to establish the defense. Rockmore was convicted of robbery with a firearm and as a prison release offender, sentenced to life. He appealed to the 5th DCA. The 5th DCA rejected his argument that the trial court erred in denying the JOA and that the jury instruction was wrongly modified. In a lengthy discussion, the Supreme Court agreed with the 5th DCA that neither of Rockmore's arguments warranted reversal. The abandonment of property defense is available when the thief abandons the property and breaks the chain between the taking and the use of force. Competent, substantial evidence supports the conclusion Rockmore failed to abandon the property before threatening the use of force. The 5th DCA's affirmation of Rockmore's conviction was approved, and because of the determination of the differences in facts between Rockmore and Peterson, the Peterson case ruling was unmodified.

Rockmore v. State, 140 So.3d 979 (Fla. Sup. Ct. SC12-577, 6/5/2014)

No Discovery Violation In Not Providing Inmate A Transcript Of Interview When No Transcript Had Been Prepared Previously

In confirming the death sentence imposed on a defendant who represented himself at trial, the Florida Supreme Court addressed numerous issues. One issue was a claim by the appellant, Darious Wilcox, that he had been denied full discovery when the state refused to create a transcript of a DVD-copied interview. What was said in that interview became important when Wilcox attempted to impeach the testimony on cross examination of the person interviewed. The trial court told him he could only impeach the witness by the witness's own words, and Wilcox claimed he did not know what the witness had said in the earlier recorded interview because he did not have access to a DVD player in jail. On appeal, he claims the refusal to transcribe that interview denied him full discovery.

The Court said the state complied with Florida Rule of Criminal Procedure 3.220(b)(1)(a) by providing a copy of the recording. Those rules do not require the state to produce something that is not in its possession. The state had chosen not to transcribe the statement and others due to the extensive costs in doing so. Wilcox had refused appointed counsel and did not delay his trial. As a result, any surprise or adverse results derived from not reviewing the DVD interview were caused by Wilcox himself. The Court found that no discovery violation had occurred and that the trial court had not abused its discretion in refusing to order the state to transcribe the interview.

Wilcox v. State, 143 So.3d 359 (Fla. 5/8/14; SC11-1017)

Florida Supreme Court Rules Establish Expedited Seal or Expunge For Human Trafficking Victim

In response to legislation, the Court issued an amendment to Florida Rules of Criminal Procedure Rule 3.692, Petition to Seal or Expunge, and Rule 3.989 (Affidavit, Petition and Order to Expunge or Seal Forms) effective immediately upon issuance (4/24/2014).. An FDLE Certificate of Eligibility is not required for such seal or expunge actions. Language was added to Rule 3.989(g) to state "a conviction expunged under this section is

deemed to have been vacated due to a substantive defect in the underlying criminal proceedings." (The opinion revises earlier-published rule language issued 12/31/2013).

In Re: Amendments To The Florida Rules Of Criminal Procedure, 137 So.3d 1015, (Fla. SC 13-2066, 4/24/14)

Inconsistency Between Color Of Vehicle And Color Indicated On Motor Vehicle Registration Records Does Not Provide Reasonable Suspicion To Support Stop

Reviewing the 1st DCA's opinion in Teamer v. State, 108 So.3d 664 (Fla. 1st DCA 2013) and its certified conflict with Aders v. State, 67 So.3d 368 (Fla. 4th DCA 2011), the Florida Supreme Court approved Teamer and disapproved Aders.

An Escambia County Deputy Sheriff observed Teamer driving **a bright green** Chevrolet, a short time later he saw the car and Teamer again and "ran" the numbers on the plate. The deputy said he did such "runs" routinely while on patrol. The info came back indicating registration to a **blue** Chevrolet. No information regarding the model Chevy was in the database. Solely upon the color inconsistency, the deputy stopped Teamer. Interviewing the occupants, the deputy learned the car had recently been painted. However, there was also a strong odor of marijuana emanating from the car. The deputy decided to search Teamer, the passenger and the car. Marijuana and crack cocaine, plus $1100 were seized.

The DCA noted that failure to update a vehicle registration to reflect a new color of the vehicle is not a specific violation of Florida law. Thus is reviewed the facts to determine what degree of suspicion attaches to this noncriminal act. Finding that the sole basis for the stop was one completely noncriminal fact, not several incidents of innocent activity combining under a totality of circumstances to arouse a reasonable suspicion, the court equated the deputy's actions to being based on a "hunch. It also rejected the state's argument that the deputy was acting in good faith reliance on Aders. The evidence was properly suppressed and the case was remanded for Teamer to be discharged.

State v. Teamer, --So.3d—(Fla. SC13-318, 7/3/14)

FLORIDA DISTRICT COURT OF APPEALS CASES:

Anonymous Tip That Student Had Gun In Back Pack Justified Search Of Pack

Gregory Williams, an officer with the Miami-Dade County Schools Police Department, received a telephone call from the Department's Gun Bounty Program that a student at Northwestern High School identified as K.P., "was possibly in possession of a firearm." Officer Williams then checked a public school's database and confirmed that K.P., then fifteen years old, was a student at Northwestern. Williams notified the assistant principal and school security of the information he had received. Because of the upcoming class change and lunch break, they decided that it would be best not to approach K.P. until after his lunch break was over and he was in his next classroom. After K.P. was in his next class, the assistant principal and two security officers went to K.P.'s classroom, took possession of his backpack, and escorted K.P., without discussion, to the principal's conference room. Upon entering the conference room, the backpack was handed to Officer Williams who immediately opened it and found a loaded .380 caliber semi-automatic handgun. The trial court refused to suppress the evidence and the 3rd DCA agreed.

In upholding the search, the DCA acknowledged that anonymous tips may be less reliable than other investigative leads, citing the 2000 U.S. Supreme Court case, *Florida v. J.L.*, 529 U.S. 266. Generally, a search based upon an anonymous tip must be independently corroborated by the police to establish a level of comfort regarding the reliability of the information in the tip. While the Court in J.L. refused to make an automatic firearm exception to its rule, it did indicate that a search may be justified under the Fourth Amendment based upon an anonymous tip reflecting less reliability than the tip in *J.L.* if the tip concerned a greater danger than possession of a firearm on a public street. In addition, the Court in *J.L.* explained that the level of reliability that it established for an anonymous tip was not necessarily intended to apply in schools: "Nor do we hold that public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as airports and schools, cannot conduct protective searches."

In 1985, the Supreme Court outlined the requisites for a school search in New Jersey v. T.L.O, indicating "reasonable suspicion" rather than probable cause would apply to school searches. Such searches must be reasonable in their inception and reasonable in their execution. The DCA also noted that the Supreme Court was mindful of school gun violence in its T.L.O. opinion. While in the case at hand K.P. had an expectation of privacy in the contents of his school bag on school property, being in a school setting tempered that expectation. Public safety officials at a school may well conduct searches on the basis of information not sufficient to justify the search elsewhere. The search was conducted reasonably, in a private area of the school, affording recognition that the contents of K.P.'s book bag were entitled to some recognition of privacy. Balancing the severity of the need to protect the school environment from violence against K.P.'s privacy interests, the DCA found the officer was not acting on a mere hunch, but an anonymous tip with an indicia of reliability, including the name of the student and the school he attended, and that actions occurred promptly before the tip became stale. The reduced expectation of privacy, the moderate intrusiveness of the search, the gravity of the threat being addressed and the reduced standard for school searches resulted in the determination that the search was legal and the evidence was properly admitted.

K.P. v. State. 129 So.3d 1121, Fla. 3rd DCA (12/26/2013)

"Lewd" and "Lascivious" Discussed In Context Of Request To Minor To Take A Nude Photo Of Herself In Presence Of Adult Requestor

Andrews, an approximately 50 year old male was at an adult party that coincided with a "sleepover" of juveniles in the same house. The location of the party and sleepover was at the house of a friend of J.M., a sixteen year old female. The house was across the street from the home of J.M. After the friend's mother passed out in her bedroom, Andrews called J.M. into the bathroom adjoining the bedroom, shut and locked the door and related to J.M. that she was "fine", and that her mother was "gorgeous." J.M. was "uncomfortable" with Andrews' comments, and they both exited the bathroom. A short time later, Andrews asked J.M. to return to the bathroom. Fearing she'd be sent home from the sleepover and party if she did not comply, she entered the bathroom again. J.M. testified that she did not seek specifics or resist because she felt "he would have the chance to either rape me or kill me."

Alone with J.M. in the bathroom, Andrews asked her to take a "selfie" in the nude, "right there" in exchange for $250. During this encounter, Andrews was looking J.M. "up and down" and rubbing his leg. J.M. indicated she did not have her cell phone with her, and Andrews told her to go get it. J.M. left the bathroom, and went home across the street to report the incident to her mother. Her mom called police and Andrews was charged with Solicitation of a Child Under The Age of Sixteen To Commit A Lewd Or Lascivious Act. (F.S. 800.04(6)(a) and (b)). He was convicted and appealed to the 1st DCA.

On appeal, Andrews argued that taking a nude photograph, particularly if the photographer is also the subject, need not be a lewd or lascivious act. He argued that merely requesting a nude photo is neither lewd nor lascivious. He asserted that the state would have to prove the photo requested included a lewd exposure of the genitals. The DCA acknowledged that the Legislature has not defined the terms "lewd" and "lascivious." However the Court indicated the terms have the same meaning in the context of the offense, in that they refer to "an unlawful indulgence in lust, eager for sexual indulgence." (Citing Chesebrough v. State, 255 So.2d 675 (Fla. 1971).) The Court also noted that lewdness may be satisfied by the defendant's intent, and is an issue of fact to be resolved on a case-by-case basis. The Court accepted the premise that not all nude photos, even those of minors, are lewd and lascivious, and may be protected under the First Amendment, citing Osborne v. Ohio, 495 U.S. 103 (1990) and Schmitt v. State, 590 So.2d 404 (Fla. 1991). However, the facts of Andrews' encounter with J.M. were sufficient to support the conviction. J.M. testified that Andrews spoke "a whole bunch of stuff" to her in their first bathroom encounter that she felt should have been directed "to a grown woman." She also noted she saw a knife in the back pocket of his pants. His behavior when he sought the photo (looking her "up and down" and rubbing his leg) was also found to support a finding of lewd and lascivious intent behind seeking the photo. "…(T)he jury was entitled to conclude, based on the evidence adduced, that Mr. Andrews had more than photography in mind."

Andrews v. State, 130 So.3d 788 (Fla.1st DCA, 2/4/14)

Court Improperly Shifted Jury's Focus To Victim's Right Of Self-Defense

Mann appealed his conviction for attempted second degree murder with a weapon and aggravated battery with a deadly weapon. The victim, Travis Wills, was stabbed three times with a knife by Mann.

The facts: According to Wills, he was drinking coffee on his porch around 5 AM when Mann passed by walking on the sidewalk. Mann attempted to call Wills' wife's cat. Eventually the cat moved to Mann and, according to Wills, Mann "hammer fisted the cat in the back of the head and pinned it to the ground." Wills then physically confronted Mann, who, according to Wills, stabbed Wills with a knife. Mann's version was different. He indicated he reached down to pet the cat who rolled over, exposing its belly to Mann. Mann said he began to scratch the cat's belly, and the cat grabbed his hand with its claws, nipped Mann, and was lifted up as Mann withdrew his hand. As he was walking away, Mann said Wills hit him in the back of the head with what felt like a baseball bat, knocking him to his knees. Wills then grabbed Mann's backpack, and hit Mann in the face with a large coffee travel mug. The mug hit Mann's eye, splashed coffee ("with a strong vanilla smell") in his eye and that he used a small paring knife in self-defense, stabbing him several times. He then went to nearby Eola Park because he feared Wills would return with a gun.

Mann's conviction was reversed, and the 5th DCA remanded for a new trial because the jury was read a modified self-defense instruction regarding Wills' right to self-defense. The Court noted that self-defense is a defense to be raised by the defendant, not the victim, and that by allowing the instruction (constructed to indicate defense of the cat was defense of property) to change the focus from the defendant's right of self-defense to the victim's was inappropriate. Another instruction made it clear that Mann was not justified in self-defense if he provoked Wills' force in the first place and that Mann's use of deadly force was not justified if he had been committing animal cruelty on the cat. The impermissible instruction had the effect of creating a presumption of provocation, and could have led the jury to believe that Wills' right to use non-deadly force precluded Mann's right to use deadly force.

Mann v. State,135 So.3d 450, (Fla. 5th DCA, 5D12-1478, 3/21/14)

Dicta: Interrogatories Are Not Authorized For Criminal Discovery

The 5th DCA was petitioned to review a trial court's refusal to authorize deposition of Category "A" witnesses in a criminal case. The trial court authorized interrogatories instead. Ultimately the DCA dismissed the Petition for Writ of Certiorari by finding the trial court's order was not a material departure from the law causing harm irremediable on plenary appeal, but in reaching that conclusion it made an observation in dicta that "… it was error for the court to require use of a discovery device not recognized by the Rules of Criminal Procedure as a condition of taking discovery depositions…." The Court noted, "We assume that the rules of criminal procedure do not offer the panoply of alternative discovery devices found in the civil rules in order to simplify and streamline the discovery process because criminal cases are governed by constitutional time constraints." The Court suggested the trial court reconsider its order to require interrogatories.

Moore v. State, 135 So.3d 462, (Fla. 5th DCA, 5D13-2555, 3/21/14)

"Use of Computer" Offense Does Not Merge With "Traveling" Offense; Conflict Certified; Responding To Craigslist Ad For Sex That Appeared To Have Been Placed By Minor Is Not Entrapment.

Cantrell sought reversal of his conviction of traveling to meet a believed minor for unlawful sexual activity (F.S. 847.0135(4)(b)) and unlawful use of a computer service to solicit a believed minor to engage in unlawful sexual activity (F.S. 847.0135(3)(b) claiming he was entrapped and that conviction of both offenses constitutes a double jeopardy violation. The 1st DCA affirmed his convictions.

As part of a sting, Tallahassee police placed an ad in the local Craigslist under "casual encounters" reading in part, *"Hot fresh Latina Lookn 4 1 Niter—w4m (woman for man)—NE Tally…want exactly what is says…after we forget we met…."* The prompted an online chat beginning around 10 PM, with the officer (aka "Latina") and Cantrell. The officer indicated she was 15 years old. Numerous exchanges occurred over the next several hours, with Cantrell agreeing to come to the Latina's house for her first sexual encounter, with him bringing condoms, while Latina's parents were out of town. Cantrell was arrested as he showed up at the house at around 4 AM. At trial, Cantrell claimed he was entrapped because the officer misrepresented her age and Craigslist requires persons to certify they are at least 18 years of age to access the site where the ad appeared. He argues entrapment as a matter of law because it is lawful for adults to arrange consensual sex, and the officer induced him to violate the law by pretending to be under 18. The DCA noted that a "mere invitation under false pretenses is not synonymous with inducement" and rejected the entrapment claim. Relying on State v. Murphy, 124 So.3d 323 (Fla.1st DCA, 2013), the DCA rejected the double jeopardy argument that the two offenses merge, again certifying conflict with the 4th DCA's Hartley v. State, 2014WL 50713, (fl. 4th DCA 2014).

Cantrell v. State, 132 So.3d 931 (Fla. 1st DCA, 1D12-4952, 2/21/2014)

Separate Convictions for Soliciting and Traveling In The Course Of One Criminal Transaction Violate Double Jeopardy

The defendant responded to a Craigslist ad posted by an undercover police officer posing as a single mother nudist "looking for family fun." He made arrangements to have sex with the "mother's" fictitious 10 year old daughter. He was arrested when he arrived at a prearranged meeting place. He pled guilty to (1) use of computer services or devices to solicit consent of a parent or legal guardian; and (2) traveling to meet a minor after using computer services or devices to solicit consent of a parent or legal guardian.

The 2nd DCA held that the soliciting offense was subsumed by the traveling offense, and that conviction for both violates Double Jeopardy. Conducting a Blockburger[1] analysis under F.S. 775.12(4), the court reviewed whether the soliciting offense contains an element that is not found in the traveling offense. It found that the soliciting offense does not contain an element not found in the traveling offense. It affirmed conviction and sentence for the traveling offense but vacated conviction and sentence for the soliciting offense. It certified conflict with Murphy v. State, 124 So.3d at 330-31, which held that the legislature explicitly stated intent to allow separate convictions.

Shelley v. State, 134 So.3d 1138, (Fla. 2nd DCA, 2D13-1941, 3/19/14)

Failure To Disclose FDLE Lab Report Indicating Evidence Did Not Contain Drugs Is Brady Violation

Defendant Danny King pled and was convicted of trafficking in methamphetamine, more than 200 grams, and was sentenced to a fifteen year mandatory minimum. In a post-conviction motion filed more than two years after his judgment and sentence became final, he alleges discovery of new evidence giving rise to a Brady[2] violation.

The State had made a verbal representation that the liquid which "was consistent in appearance with methamphetamine oil…weighing 284, 14, 288 and 14 grams" had "tested positive" for over 200 grams of meth. In reality, the FDLE analysis on the liquid stated, "No drugs per Florida Statute 893, were identified." The FDLE analysis was not made available in discovery. It surfaced only after the defendant's family secured it via the Public Records Law in February, 2013. The trial court held that the claim was untimely as the report could have been uncovered by the defense in due diligence prior to trial. The State indicated the analyst had been named in discovery. The Court noted, however, that "a defendant's knowledge of a discovery request does not mean that he or she did not act with due diligence once defendant actually aware of exculpatory evidence." There was sufficient suggestion of a Brady violation to warrant further inquiry. The conviction was reversed and remanded for the trial court to have an evidentiary hearing.

King v. State, --So.3d--, (Fla. 1st DCA, 1D13-4192, 3/24/14 (corrected opinion))

20 Second Delay Between Loud Speaker Announcement And Battering Ram Entry Was Reasonable

Hernando County Sheriff's Office deputies went to the appellants' home at around Noon to execute a search warrant. They used one of the patrol vehicle's loud speakers to announce, "Sheriff's Office, search warrant." Once at the front door of the residence, a deputy knocked loudly and yelled, "Policia, Policia." After waiting 5 to 10 seconds, he again knocked and announced law enforcement presence.

When no one answered, deputies used a battering ram to enter. At least 20 seconds elapsed from the initial loudspeaker announcement and the entry. The deputies indicated they knew the premises was an indoor grow house and that there was no concern about destruction of evidence. The sole issue was whether the minimum of 20 seconds between the knock/announce and entry was reasonable. The 5th DCA concluded it was. The warrant was executed mid-day. Prior to the execution, the appellants had been observed walking around the property. The officers' presence was announced numerous times. When the appellants did not answer the door, it was reasonable to presume they were denying the officers entry. The appellants' convictions were affirmed.

Mendez-Jorge and Rodriguez-Cabrera v. State, 135 So.3d 464 (Fla. 5th DCA, 5D13-2714 and 2716, 3/21/14)

[1] Blockburger v. United States, 284 U.S. 299 (1932)
[2] Brady v. Maryland, 373 U.S. (1963).

Interplay Between Public Records Law Requirement To Redact Information And Right Of Convicted Person To View Evidence. Question Certified.

Lawrence Ingram appealed a trial court's refusal to compel production of non-redacted records related to his conviction of sexual battery of a child. In agreeing with Ingram that the trial court departed from the essential requirements of the law by not treating his motion for production as a request for mandamus and holding a hearing, the 5th DCA discussed how there is a conflict between the public records law and the obligation to provide a defendant access to evidence used against him.

Ingram made a public records request to the State Attorney's Office, seeking mirror images of the computer hard drive seized during the investigation, as well as copies of the recorded interview of the victim (a minor) and her mother. He acknowledged he had to pay the costs related to his request. The State Attorney's Office responded that any information identifying the child victim had to be redacted and that it did not have the capacity to redact such information from what was requested, but would make the materials available to any entity having such capacity identified by the requestor (Ingram), at requestor's expense. Ingram responded that he did not believe the victim-identify exemption applied in a case where he had been convicted of sexual battery of the victim and provided a statutory cite supporting his argument. Without addressing the statute cited, the SAO responded by again requiring Ingram to come up with an entity that could do the redacting. Ingram then filed the petition to compel production of the records, but the trial court denied it without a hearing.

"State Attorney's position 'strains credulity'" The DCA rejected the position of the State Attorney that the requestor had to find someone to do the redaction, noting the statute says the custodian of the records "shall" redact records. (F.S. 119.07(1)(d)). The court said it "strains credulity" that the State does not have resources to redact video or audio cassettes, DVD's and reports. The court found it curious that the SAO was trying to protect the identity of the victim, but was willing to turn unredacted material over to a third party of the requestor's choosing.

The Exemption Of Minor Sex Victim Does Not Apply To The Defendant Even After Convicted. The DCA indicated some of the materials sought must be redacted before being disclosed. However, the court noted that materials identifying a minor victim of a sexual offense are not to be disclosed under the public records law to others not assisting in the investigation and prosecution of the offense or "to any other person *other than the defendant…."* (F.S. 119.071(2)(j)2.b.) Ingram maintained he is "the defendant." The SAO argued he once was "the defendant" but is now "a convicted felon." The Court noted the SAO provided no support for its assertion then observed that many Court Rules and forms use "defendant" to refer to persons who are convicted felons. In the absence of a contrary definition related to "defendant" in the public records law, the Court rejected the SAO's interpretation and found that Ingram is in fact, "the defendant" in the matter related to his conviction.

Having Access Via Discovery Does Not Limit Access Under Public Records Law. The Court acknowledged that Ingram may have had access to the sought material during criminal discovery. However, this did not negate his right to access under the Public Records Law. The DCA noted the trial court may conduct an in camera review of the mirror image to assure nothing that should be redacted has been left unredacted. With regard to any videotaped interview with the minor victim, the DCA indicated "an unredacted copy must be provided to the defendant or his attorney." All other material must be redacted as per the public records exemptions.

Question Certified To Supreme Court: "Does Florida's Public Records Act…require a state agency to provide a convicted, incarcerated inmate with an unredacted copy of the videotaped statement of the minor victim…?"

Ingram v. State, ---So.3d ---, (Fla. 5th DCA, 5D13-1519, 2/21/2014)

Information From Pot-Smoking Juvenile Regarding His Supplier Coupled With On-Scene Observations Did Not Constitute Probable Cause

An officer encountered a juvenile smoking marijuana the day before the appellant's arrest. To avoid being arrested, the juvenile provided the officer with information regarding his supplier. He said the supplier's name was "Gary," and described him as a black male. He provided the officer's with "Gary's" cell phone number. After five cell calls, "Gary" agreed to meet at a street corner and sell his marijuana. He told the officer he'd be at the intersection with his cousin in a short time. Within a short time, the officer observed two black males walking down the street toward the pre-arranged intersection. It was 1AM and no others were on the street. One of the two raised his hand in greeting and the officer guessed that man to be "Gary." He said, "I got your money" and one of the two men said, "F--- your money" and the two turned to walk away.

When the officer identified himself, the two men ran away in opposite directions. The appellant was apprehended, and searched. A baggie of marijuana and 39 empty baggies were found on the man in a search incident arrest. The cell phone the officer had been calling to set up the transaction was also on the man. Hughes, the appellant, pled nolo to possession with intent to sell and possession of drug paraphernalia after his motion to suppress was denied. The trial court indicated the totality of the circumstances amounted to probable cause to arrest Hughes, but the 1st DCA disagreed. Only a cell call and a general description of the dealer as being a "black man" led the officer to conclude that one of the two men approaching him was "Gary." The juvenile had not previously provided information and was not there to point out "Gary." The officer had no prior indication that Hughes was engaged in drug trafficking. On cross, the officer could not remember which man raised his hand and he simply "guessed" Hughes was "Gary." The Court also noted that the transaction was not in a "high crime area" nor was there an indication that the officer ordered the men to stop running when they turned and fled. It did not find the facts to match cases where flight provided probable cause. (The dissent argued there was at least reasonable suspicion to detain.) Conviction reversed and remanded for discharge.

Hughes v. State, 132 So.3d 933, (Fla. 1st DCA, 1D13-1174, 2/21/14)

Driving Down Deserted Street At 3:30 AM Without Headlights On For About 10 Seconds Approved As Basis For Traffic Stop On A Pretext. Subsequent Seizure Of Cocaine Approved.

The DCA provided instruction on Whren traffic stops through this opinion. Around 3 AM an officer observed Proctor commit a series of moving infractions before driving down the wrong side of a street to park in a grassy lot across from a house known for drug sales and arrests. The officer had intended to stop Proctor and issue tickets, but decided not to do so based on the history of the house. As the officer watched, someone from the house approached Proctor's car. Over a short period of time the person walked back into the house and to Proctor's car several times, but the officer did not see a crime occur. However, based on the history of the house, the officer believed a drug transaction had occurred. Proctor drove from the house, driving about ½ block down the deserted street before turning on his headlights. A short time later, the officer stopped Proctor with intent to issue tickets for the driving violations observed before he stopped at the house and the driving without headlights violation. As the officer approached Proctor and illuminated Proctor's face with a flashlight, he observed what appeared to be a rock of crack cocaine on Proctor's lower lip. After Proctor refused to spit out what he was chewing, the officer forced him to do so (pressure to the upper jawbone). The item spit out field-tested to be cocaine. Proctor was arrested for possession of cocaine, and was given verbal warnings about his driving violations.

Proctor moved to suppress the cocaine. The trial court ruled that the three traffic violations prior to Proctor stopping at the house were not proximate cause for the actual stop. It further ruled that nothing happening at the house supported probable cause to stop the vehicle. The sole issue was whether the officer's observation of Proctor driving a short distance prior to turning on his headlights provided a basis to stop Proctor's car at about 3:30 AM that night. Relying on Payne v. State, 654 So.2d 1252 (Fla. 2nd DCA 1995), the trial court suppressed the cocaine, indicating driving without headlights for about 10 seconds did not provide a basis for the stop.

The 5th DCA reversed the trial court. It agreed that Holland v State, 696 So.2d 757 (Fla. 1997) which recognized the U.S. Supreme Court's holding in Whren v. United States, 517 U.S. 806 (1996) had overruled the principles found in Payne. It noted the officer's subjective purpose in making the stop was not relevant and that the officer's actions were based on more than a mere hunch. The officer had probable cause to believe Proctor had committed a traffic offense so his traffic stop was reasonable. The discovery of the cocaine was a reasonable result of that stop and the motion to suppress should not have been granted. The case was reversed and remanded for further proceedings consistent with the ruling. In a footnote, the DCA discussed other arguments unsuccessfully raised by Proctor in his attempt to save the trial court's suppression ruling, all of which can be used to instruct officers on Whren factors and traffic stop justification.

State v. Proctor, --So.3d—(Fla. 5th DCA, 5D12-3206, 2/21/14)

Baby Sitter's Choice To Call Child's Mom Instead of 911 When Infant Suffered Respiratory Distress Was Not So Negligent As To Support Willful and Negligent Basis For "Child Neglect Without Causing Great Bodily Harm" (F.S. 827.03(2)(c)).

After a 15 month old fell from her crib, Burns, the adult baby sitter, instructed the infant's 10 year old brother to go next door and call the infant's mother and report the situation. The mother had left the sitter with her four

children while she went to pay an overdue phone bill. The mother arrived, and finding the infant's breathing "off," she called 911. Burns was charged with Child Neglect Without Causing Great Bodily Harm and with Child Abuse. He was acquitted on the abuse charge, and moved for a judgment of acquittal on the Neglect charge, arguing the state failed to establish a prima facie case because his choice of whom to call did not demonstrate the level of willfulness and neglect contemplated by the statute. The 1st DCA agreed with Burns. While his failure to call 911 might be a failure to use ordinary care, it was not so extreme as to become criminal in nature. Conviction on the neglect charge was reversed.

Burns v. State, 132 So.3d 1238, (Fla. 1st DCA, 1D-13-4134, 2/28/14)

No Due Process Violation In Failure To Inform Non-Custodial Subject At Police Station Of Arrival of Attorney Who Requested To Speak To Defendant. Question Certified.

Linda McAdams and Ryan Andrews were reported missing by their families. A Pasco Sheriff's detective entered Linda's home, and based on evidence seen in the home, elevated the investigation to a major crimes case. A major crimes detectives contacted Mike McAdams at his parent's home in Hernando County where he was living, and obtained his written consent to search Linda's residence. Mike no longer lived there, but consent was sought since he was listed as a co-owner of the premises.

After completion of the consent search of Linda's home, Mike was visited at his parent's home in Hernando County and asked to voluntarily accompany detectives to the Hernando Sheriff's Office to meet with the lead detectives from the Pasco Sheriff's Office. He agreed, and provided an interview lasting about 2 ½ hours. The interview was videotaped. During the interview, Mike confessed to killing Linda and Ryan. At that point, Mike was advised of his Miranda rights. He waived those rights, and took detectives to the site where he had buried the two bodies, where he had left Ryan's car, and where he had disposed of the gun he used in the murders.

During the interview, an attorney hired by Mike's parents arrived at the Sheriff's Office and asked that the interview be terminated and that he be allowed to speak to Mike. He was not granted access to Mike and Mike was not told he was there. The interview was not terminated. Only after Mike had taken detectives to the site of the bodies did they inform him of the defense attorney.

While Mike argued that the trial court should have suppressed evidence initially found in Linda's home by the Pasco deputy, the DCA affirmed the trial court's finding that the initial entry to her house was based on exigent circumstances. The DCA also affirmed that the subsequent search was done with Mike's valid consent.

Mike moved to suppress the confessions and evidence obtained by reason of his confession, claiming first that he was in custody the entire time, making the confession obtained without being advised of Miranda rights illegal. Second, he claimed that evidence obtained after the defense attorney arrived should be suppressed because the failure to advise him of the attorney's presence was a Due Process violation under article 1 Section 9 of the Florida Constitution. Analyzing the circumstances of the interview using the test articulated in Ramirez v. State, 739 So.2d 568 (Fla. 1999)[3] after viewing the videotaped interrogation and reading the trial court's application of the same test, the DCA agreed with the trial court that the interrogation was non-custodial to the point that Mike confessed.

Turning to the issue of whether there was a due process violation by not informing Mike that the attorney had arrived, the DCA distinguished this case from the facts in Haliburton v. State, 514 So.2d 1088 (Fla. 1987). In Haliburton, police failed to inform a defendant that a lawyer hired to represent him had arrived at the police station and wished to speak to him. The Florida Supreme Court found a Due Process violation under article 1 Section 9 of the Florida Constitution. In contrast, the DCA noted in the case at hand that Haliburton dealt with a *custodial interview* after Miranda's had been waived. The DCA was unaware of any case where the same principle had extended to a non-custodial interview. It limited this distinction up to the point where Mike confessed, and was given his Miranda rights. While the state argued Haliburton involved officers ignoring two court orders to grant access versus no such situation in the present case, the DCA concluded that any evidence obtained after Mike was read his Miranda rights and until they informed him of the attorney trying to see him was collected in violation of Mike's due process rights and should be suppressed.

[3] The Ramirez factors examine 1) the manner in which the subject was invited to interrogation; 2) the purpose, place, and manner of the interrogation; 3) the extent to which the subject is confronted with evidence of his own guilt; and 4) whether the subject was informed he was free to leave.

The Court certified the question whether a subject involved in a voluntary lengthy interview has a due process right to be informed that a lawyer obtained by his parents is presently seeking to speak to him. In light of finding that some substantial evidence should have been suppressed, the case was reversed and remanded for a new trial.

McAdams v. State, 137 So.3d 401 (Fla. 2nd DCA, 2D11-3158, 2/26/14)

Cannot Routinely Order Driver Out Of Car For "Officer Safety."

One month after he pled guilty to robbery and was placed on probation, Santiago was behind the steering wheel of a car parked at the end of a dead-end street at 2 AM. He had a female in the car with him. Police were called by an anonymous caller because the car was periodically flashing its headlights. Responding officers found the key was in the ignition so the radio could play, but the engine was not running. One officer went to the passenger side of the car while the other engaged in a chat with Santiago on the driver's side. This officer smelled alcohol from Santiago's breath during the encounter. Santiago indicated he had earlier consumed a couple of beers and could provide only a vague explanation of why he was parked at the location.

Santiago was ordered out of his vehicle. A small bag with cocaine in it slipped from Santiago's lap onto the ground. The car was searched and a small straw was located. The female indicated the cocaine was Santiago's. He was arrested and charged with possession of cocaine and drug paraphernalia. The trial court refused to suppress discovery of the coke and the straw, finding that interaction with the police was consensual and that the officers had reasonable suspicion to detain Santiago for questioning by ordering him out of the car. The court also indicated that "officer safety" concerns supported ordering his from his car due to the lateness of the hour, the vague explanation of why he was parked where he was, and the smell of alcohol on Santiago's breath. Santiago appealed.

The 4th DCA reversed, finding that the suppression motion should have been granted. The DCA indicated the encounter with Santiago initially began as a consensual encounter. However, citing Popple v. State, 626 So.2d 185 (Fla. 1993) if found that ordering someone from a vehicle converted the consensual encounter into a detention requiring as a minimum reasonable suspicion. The DCA then reviewed the totality of the circumstances of this encounter to see if the officers had a particularized and objective basis for the detention.

As to the "vague" explanation for being at the end of the dead-end street, the DCA found that the defendant's explanation ("We are just hanging out.") which to the officer sounded "a little suspicious" did not give rise to a specific criminal suspicion. Santiago also indicated he lived nearby, pointing to a residence mid-way down the street. The couple was observed listening to music as the officers arrived. The officers did not articulate any facts suggesting that Santiago was doing anything other than "hanging out" as he had indicated.

Citing Popple, the DCA indicated an officer cannot convert a consensual encounter into an investigatory stop by ordering someone out of a parked car unless he has reasonable suspicion that a crime has occurred, is occurring, or is about to occur. The facts developed at the suppression hearing did not support any such reasonable suspicion, nor any basis to support an objective finding that the officer or the public was in danger. The area was not high crime. Santiago made no furtive motions. Instead, the officer characterized the request that Santiago exit his car as part of the officer's routine procedure. The trial court's finding that the request to exit the car was justified by officer safety concerns was not supported by competent, substantial evidence. The last possible basis for ordering Santiago out of the car, that he was possibly under the influence of alcohol was likewise found not to be supported by the facts. The officer indicated at the suppression hearing that Santiago's admission of having earlier drunk a couple of beers and the smell of alcohol alone did not create a suspicion that Santiago was impaired or illegally in physical control of the car. The officer had also told Santiago as he told him to exit the car that if he showed him a valid driver license or ID he'd be free to drive or walk away. It was only after the bag of coke fell into open view that the officer's intent toward Santiago changed. The DCA made a finding that by the officer's own testimony, Santiago was free to leave until the moment the coke fell out, so there was no basis for a "detention" of Santiago until that very moment. The cocaine and straw were illegally discovered, fruit of the poisoned tree of the unsupported detention of Santiago. As there were other allegations of probation violation including failure to timely report and driving without a license, the matter was remanded for further proceedings and reconsideration of whether what remains in support of the probation violation warrants the originally-imposed ten-year prison sanction.

Santiago v. State, 133 So.3d 1159 (Fla.4th DCA, 4D12-2773, 2/26/14)

Defendant Telling Person Under The Age of 16 To "Let Me" Perform A Sexual Act On Her Was Sufficient To Justify Conviction Of Committing Lewd And Lascivious Conduct By Solicitation (F.S. 800.04(6)).

The value of this case is that the 1st DCA distinguished the language used by the defendant which supported a conviction with language in Randall v. State, 919 So.2d 695 (Fla. 4th DCA 2006) which was found not to do so. In Randall, the defendant successfully argued his language that he "wanted" to perform sexual acts on a minor was merely an expression of desire, not a solicitation. In contrast, Cleveland asked his minor victim to "Let me" perform certain acts. This clearly was a solicitation and was more than a statement of desire. Cleveland's conviction was affirmed, but case was reversed in part and remanded for other reasons.

Cleveland, Jr. v. State, 135 So.3d 425 (Fla. 3rd DCA, 1D12-5228, 3/4/14, on motion for rehearing.)

Offender Required To Register As Sexual Offender In Another State Must Register If In Florida Even If Same Conviction In Florida Would Not Have Required Registration.

Fox pled guilty to failing to register as a sexual offender and was sentenced to two years, ten months and 29 days in state prison. He sought to set aside the plea as not intelligently entered into because the Michigan conviction which provided the basis for the Florida requirement that he register was for an offense that does not require registration under Florida law had it occurred in this state.

The 2nd DCA rejected Fox's argument. Fox was a "sexual offender" under F.S. 943.0435(1)(a)(1)(b) because he had been designated a sexual offender in another state. Were he to return to Michigan, he remains under an obligation to register for a total of 25 years under the Michigan Sexual Offenders Registration Act. As held by the 5th DCA in Moore v. State, 992 So.2d 862 (Fla. 5th DCA 2008) being required to register as a sexual offender in another state brings one under Florida's registration obligations. Fox's conviction was upheld.

Fox v. State, 137 So.3d 1048 (Fla. 2nd DCA, 2D13-3609, 2/26/14)

Parent's Disclosure To Adult Daughter That Lawsuit Had Been "Won" Violated Settlement Non-Disclosure Obligation, And Voided Obligation To Pay A Portion Of Payments Under The Agreement

Gulliver Schools, Inc. appealed a trial court's order to enforce payment of the full settlement amount to Patrick Snay. Gulliver maintained that Snay violated the non-disclosure provision of the settlement.

When Gulliver did not renew Snay's contract as the school's headmaster, he sued claiming age discrimination and retaliation under Florida's Civil Rights Act. The parties entered into a settlement, providing for payment of $10,000 in back pay to Snay, payment of $80,000 as "1099" and payment of $60,000 to Snay's attorneys. The agreement had a detailed confidentiality section, with an indication that if Snay or his wife breached the agreement, the $80,000 payment would be disgorged. Operative language is quoted in full in the opinion, but included language that the plaintiff (Snay) shall not "…either directly or indirectly disclose, discuss, or communicate to any entity or person (other than his spouse and attorneys)…any information whatsoever regarding the existence or terms…" of the agreement.

The agreement was signed November 3, 2011. On November 7, Gulliver notified Snay that he had breached the agreement as demonstrated by a Facebook posting by Snay's college-age daughter: "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT."

Snay had the ability to unilaterally revoke the agreement within seven days of its signing. Even after notification of the breach, he did not revoke the agreement.[4] The Facebook comment was posted to about 1200 of the daughter's Facebook "friends." On November 15, Gulliver indicated it was not paying the $80,000. The trial court in June of 2012 ruled that any disclosure to Snay's daughter did not constitute a breach of the confidentiality provision. The DCA disagreed and reversed the trial court order to Gulliver to pay the $80,000. The clear and unambiguous language of the nondisclosure clause was that the existence and details of the settlement were not to be disclosed to anyone other than Snay's spouse and his attorneys. Snay admitted he told his daughter the matter was settled and he was happy with the results. This was an admission of breaching the provision. The fact that Snay needed to tell his daughter something did not mitigate the breach. No such

[4] While Snay maintained he never told his daughter, and did not promise her a European vacation, the DCA did not change its analysis.

desire was raised during the negotiations over the term of the agreement. In the DCA's words, "…before the ink was dry on the agreement…Snay…did what he promised not to do…." The DCA then noted that Snay's daughter did exactly what the non-disclosure was designed to prevent: advertising to the community that Snay had been successful in his age discrimination and retaliation case against Gulliver. The trial court's order to pay the $80,000 was reversed. The daughter did not take a European vacation.

Gulliver Schools, Inc. and School Management Systems, Inc. v. Patrick Snay, 137 So.3d 1045 (Fla. 3rd DCA, 3D13-1952, 2/26/14).

Repeated Observation Of Juvenile On Bike During Daylight Hours Where Burglary Had Been Reported Days Earlier Did Not Provide Reasonable Suspicion; Ordering Juvenile To Get Off Bike And Sit On Curb Was Not A Consensual Encounter.

Around 9:00 AM an officer was patrolling an area where a burglary had been reported several days earlier. The officer spotted A.L., a juvenile, riding his bicycle and inquired why he was riding in the area. A.L. indicated he had been visiting a friend, but was unable to indicate where the friend lived. The officer told A.L. there had been several burglaries in the area and he should stay away if he had no legitimate reason to be in the area. The defendant said he would, and rode away. About 20 minutes later the officer again saw A.L. on his bike in the same area. The officer pulled her car over and A.L. stopped his bike. This time A.L. indicated he had gone to a friend's house to retrieve his wallet.

The officer told A.L. to get off his bike and sit on the curb. After giving the same wallet explanation, A.L. was "assisted" to a standing position by the officer. As A.L. was adjusting his pants, a gun fell. He was arrested for carrying a concealed firearm. At trial, the court found the officer did not have reasonable suspicion of criminal activity to justify a stop of A.L., but characterized the second encounter as consensual. The trial court denied A.L.'s motion to suppress the firearm.

The 4th DCA agreed there was no reasonable suspicion, but then found that the encounter was not consensual. A key to finding an encounter to be consensual and voluntary is that the citizen may either voluntarily comply with the officer's request or choose to ignore them. An encounter is not consensual when an officer "makes an official show of authority from which a reasonable person would conclude that he or she is not free to end the encounter and depart." (Smith v. State, 95 So.3d 966, 968 (Fla. 1st DCA 2012). Since the officer ordered A.L. off his bike and told him to sit on the curb, the encounter was a stop, requiring reasonable suspicion. Since there was no suspicion, the evidence should have been suppressed. A.L. had pled no contest, reserving his right to appeal. The DCA remanded for handling in light of the fact the gun should have been suppressed.

A.L. v. State, 133 So.3d 1239, (Fla. 4th DCA, 4D12-3818, 3/19/14)

"Totality of Circumstances" Test Met By Affidavit For Search Warrant. Trial Court Inappropriately Applied Rigid Two-Prong Test To Confidential Informant's Information.

Significant evidence was seized upon execution of a search warrant of Silvestre and Candi Loredo's home on April 7, 2011. Candi Loredo was charged with possession of methamphetamine with intent to sell within 1000 feet of a church, possession of drug paraphernalia, and actual or constructive possession of a structure used for trafficking, sale or manufacture of controlled substances. Before trial, the Court suppressed all evidence seized pursuant to warrant and statements derived from that evidence. The state appealed.

The warrant's affidavit contained information from two confidential informants. The first informant indicated receipt of information in February, 2011 that meth was being used and sold at Loredo's home. The informant indicated (s)he had made numerous hand-to-hand meth buys, but did not identify the home as the locations of the sales. The warrant affiant indicated he had known this informant for two months and that the informant had "provided information on multiple narcotics investigations." The affiant indicated the informant had identified Silvestre as the seller.

This source also indicated Silvestre was selling three to four pounds of meth from the house every two weeks. The source had seen a one pound bag of meth at the residence at about 60 days prior.

On March 29, 2011, the second confidential source told the affiant (s)he had been selling meth for Silvestre for about three months. Details to the sales were provided. Within two days before speaking to the affiant the source had observed three to four pounds of meth at the residence, and the day before, Silvestre had contacted the source regarding a new shipment of meth. An attempted sale was tried, but Silvestre never appeared at the designated location. The affidavit indicated Silvestre was at home and that family activities had hindered Silvestre from conducting the sale. Nothing in the affidavit indicated the second informant's veracity or that the affiant had any personal knowledge regarding the second source's reliability.

The affidavit stated law enforcement conducted surveillance of the residence for two weeks and observed a high volume of traffic to the residence, with visitors staying five to ten minutes before leaving. The behavior was indicated to be consistent with affiant's training and understanding of the activity consistent with the sale of narcotics.

The 2nd DCA found that in suppressing the seized evidence, the trial court inappropriately utilized the two-prong test of Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969). Utilizing the current test set forth in Illinois v. Gates, 462 U.S. 213 (1983), the DCA found under the totality of the circumstances the affidavit provided sufficient corroborating evidence to establish probable cause to believe contraband would be found at the Loredo residence on April 4, 2011. The order suppressing the evidence was reversed, and the case remanded for further proceedings.

Florida v. Loredo, 129 So.3d. 1188 (Fla. 2nd DCA, 2D12-3650, 1/17/2014)

Consent Not Coerced By "Show Of Authority"

On November 30, 2005, Detective Orenstein received an anonymous tip that marijuana was being grown at a private residence located at 7621 S.W. 136th Avenue, Miami-Dade County, Florida. A background check on Ojeda—who Orenstein had been investigating as a suspect in the grow house business and who Orenstein apparently knew or learned either owned, resided at, or otherwise was associated with the residence—revealed Ojeda's prior felony and misdemeanor offenses. Armed with this information, Orenstein, along with three other detectives, one sergeant, and two uniformed officers, went to Ojeda's residence at 7:45 a.m. that morning. Orenstein and one other detective went to the front door. Two uniformed officers were standing on the sidewalk at the front of the residence, about twenty to thirty feet from the front door, their marked police cars parked behind them at the side of the road. The officers and their vehicles were visible to anyone who chose to look out of the residence. The other three detectives were deployed around the sides of the house, prepared to stop any fleeing suspects.

Ojeda, who had just gotten out of bed, responded to Detective Orenstein's knock on the front door. According to Orenstein, when Ojeda opened the door, Orenstein explained the purpose of his visit, in response to which Ojeda replied, "Come on inside." As Detective Orenstein and his colleague at the door entered the house, the three detectives emerged from the sides of the house and also entered. All five detectives were dressed in plain clothes, covered by a vest with the word "Police" across the front, and a badge and identification hanging around their necks. No guns were drawn, and no insistent statements or threats were uttered by any detective. Once inside the house, Orenstein read Ojeda the Miranda warnings and asked Ojeda whether he understood them. Ojeda responded in the affirmative and, according to Orenstein, was "willing to cooperate with me with whatever I asked." Thereupon, Orenstein asked whether Ojeda would consent to a search. Ojeda agreed and signed a consent form to search the house, adding, "Come, I'm going to show you around the house." As the detectives were going through the house, Orenstein additionally asked for consent to search the vehicles in the driveway. According to Orenstein, Ojeda responded, "Yes, sure," which response was confirmed by the execution of yet another consent form. Ojeda ultimately led the detectives into the garage, where they encountered a marijuana hydroponics grow operation. Ojeda claimed he recently had moved back into the house, after having leased it to someone, and found the garage in this condition. He could neither produce the name of the lessee or a lease, nor had he called the police regarding his find. Ojeda did not appear scared, under the influence of any narcotics, to have any mental issues, or to have issues of understanding during the encounter. Orenstein described Ojeda's demeanor as "confident that whatever he was going to tell me about a tenant being in the house," would be credible. There was no evidence of odor detection before the door to the garage was opened.

The trial court granted the motion to suppress on the ground that the consent to search the premises was unlawfully procured through an overwhelming show of police authority, exacerbated by an unnecessary administration of Miranda warnings, and that Orenstein's testimony was not credible.

The 3rd DCA reversed the trial court. Ojeda was a mature person in his 30's. There was no indication he was intoxicated. He signed a consent form in English after being offered the form in English or Spanish. As a convicted felon, there was a presumption he knew his rights. Next, even though Miranda rights were not required, depending on the circumstance, an unneeded administration of Miranda warnings can be more protective of an individual's rights than intimidating in nature. (See: Caldwell v. State, 41 So. 3d 188 (Fla. 2010).) Additionally, Ojeda was not deprived of any convenience or sequestered for an undue length of time prior to signing the consent and signed additional consents as the search progressed. The 7:45 AM arrival of police was of no significance, with the DCA noting most people are up and preparing to go to work at that time. ("Ojeda he has no greater constitutional right to sleep in than anyone else.") Even though there were five officers in the house and two uniformed officers outside, the DCA found no overwhelming show of force.

Regarding the trial court's finding that Orenstein lacked credibility, the court stated, "The record in this case does not reveal any evidence that the testimony of Orenstein met any of the criteria by which it could have been discounted by the trial judge, and the trial judge cites no such evidence." The suppression order was reversed.

A second case involving Ojeda and another search by Orenstein resulted in the same trial court's suppression order in the second case also being reversed. Orenstein went to a neighbor's house looking for Ojeda while another officer was seeking an arrest warrant for him. Ojeda answered the door and a strong odor of marijuana was noted by Orenstein. Evidence was seen and seized during a protective sweep. A second, unlawful "sweep" occurred and more evidence was secured. Using both observations, a warrant was obtained. The DCA noted that upon smelling the marijuana, Orenstein had the basis upon which to secure a search warrant, and that evidence discovered illegally during the second sweep would have inevitably been discovered had Orenstein stopped after the first sweep and obtained his warrant. The DCA provides an extensive discussion of searches that develop from threshold encounters at residences.

State v. Ojeda, --So.3d—(Fla. 3rd DCA, 3D08-1079 & 1077, (substituted opinion) 7/23/14) 2014 WL 3733750

"Knock And Talk" Occurred Via Illegal Entry Onto Defendant's Premises

The defendant was charged with manufacturing cannabis. He sought to suppress evidence, claiming that the seizure was the result of an illegal, warrantless search. The home was located on a large piece of property that had a few acres that were cleared. The property was surrounded by a barbed-wire fence, had a chain-link push gate at the entry to the dirt driveway, and had "no trespassing" signs posted at the entry to the driveway. The police traveled to the defendant's address to do a "knock and talk" after receiving an anonymous tip that the property owner might be growing cannabis. The police drove down the dirt driveway through the open gate, parked their car near the home, exited the car, walked about forty yards to the front porch, and knocked on the front door.

Hamilton, the owner of the property (not the defendant) testified at the suppression hearing that a six-foot-high chain-link gate blocks the entrance to the driveway and a barbed-wire fence surrounds the property. The mailbox is located twelve feet outside of the gate. Several "no trespassing" signs are posted on a pole beside the place where the gate shuts. Hamilton testified that he does not generally have members of the public come onto his property, and no salesmen or solicitors had ever entered his property. He shuts the gate when there is no one home, but when there is someone home, the gate is open most of the time. He said that, when friends come over, the gate is open, if he knows that they are coming. UPS packages are usually delivered by leaving them at the gate post, even when the gate is open. However, if a signature is required for delivery, the delivery service drives to the house. He testified that if a postal worker has a package, the worker comes on the property and honks the horn to get someone's attention.

The defendant then testified. He stated that he has lived on the property off and on for ten years. He corroborated the fact that the property is completely surrounded by barbed-wire fencing and that there is a gate at the entrance to the driveway. Also, there are "no trespassing" signs on a post at the entry to the driveway. He said that they "very, very seldom" receive visitors at the house and they never receive solicitors. He stated that the power company employees must enter the property to read the meter. The knock and talk resulted in the eventual seizure of cannabis. The police admitted that they did not have consent to enter the property and they did not have a warrant. They also did not see anything in plain view that was illegal.

After conducting a hearing, the trial court denied the suppression motion, indicating, "I think the officers did have the right to drive up there, regardless if they walked, drove, drove within 25 feet, 50 to 75 feet or 30 yards away or walked up, they had the right to be there." The defendant then entered a plea of *nolo contendere,* reserving the right to appeal the trial court's dispositive suppression ruling. The 5th DCA reversed the trial court.

It noted the defendant had manifested a *subjective* expectation of privacy in the premises, so the issue was whether that expectation was *reasonable.* The DCA discussed two cases. In Powell v. State, 120 So. 3d 577 (Fla. 1st DCA 2013), the issue was "whether police officers entering the property…and peering into a window of their mobile home late at night after receiving an anonymous tip an hour earlier that marijuana plants were inside was a search that violated the Fourth Amendment." The Powell defendants argued that the officers' viewing of the marijuana plants by standing at and looking through the front window of their home constituted an illegal search. The First District agreed. In the opinion, the court set forth a summary of the law applicable to constitutional limitations placed on police conduct at a person's home and addressed the circumstances surrounding knock and talks: The existence and extent of a license that would permit a "knock and talk" depends on the circumstances; homeowners who post "No Trespassing" or "No Soliciting" signs effectively negate a license to enter the posted property. (Relying upon F.S. 810.09, Florida's trespass statute.) In Nieminski v. State, 60 So. 3d 521 (Fla. 2d DCA 2011), the issue was whether deputies could enter acreage completely surrounded by a six-foot chain-link fence in order to conduct a knock and talk. There, the driveway had a closed, but unlocked, gate and there were no signs posted. Two deputies entered the property through the gate so that they could conduct the knock and talk. The Second District explained that the defendant had the initial burden to establish that he had a reasonable expectation that ordinary citizens would not occasionally enter the property through the closed but unlocked gate to knock on his front door. Id. The DCA held that the defendant failed to sustain his burden of proof because the "property was not posted and did not have any other signs that might discourage a person from entering for the purpose of knocking on the front door."

Here, the 5th DCA noted that the posting of the signs and the fencing of the entire property, including a push gate at the entrance to the driveway, exhibited the defendant's actual, subjective expectation of privacy, and it concluded that society is prepared to recognize same as being reasonable. Neither the fact that the gate was open, nor that occasional friends or service providers come onto the property, negate that expectation of privacy. Order denying suppression was reversed and court was ordered to discharge the defendant.

Bainter v. State, 135 So.3d 517, (Fla. 5th DCA 5D13-602, 3/28/14)

If Victim Makes No Attempt To Replace Items Stolen In Burglary, Value Of The Items Taken Had To Be Proven Via Evidence Of Market Value At Time Of Offense Beyond A Reasonable Doubt

Masonett was convicted of burglary of a dwelling, possession of burglary tools and grand theft from a dwelling. At trial the only evidence presented as to value of the stolen items was the victim's testimony that the items taken were: perfume (given to victim prior to the burglary), a DVD player that was a gift to her son, a camera that originally cost $149; a bag for her son's oxygen equipment, and two cell phones that originally cost $59 each but were old and had already been upgraded. The victim had made no attempt to replace any of the items.

The defense moved for judgment of acquittal as to the grand theft, noting that the state had failed to establish value beyond a reasonable doubt. Grand Theft From A Dwelling requires proof that the stolen property was valued at least $100 but less than $300. "Value" is defined at F.S. 812.012(10(a)1 as "the market value of the property at the time and place of the offense or, if such cannot be satisfactorily ascertained the cost of replacement or the property within a reasonable time after the offense." In this case, the State had to establish "the market value of the property at the time and place of the offense."

While the victim was competent to testify as to value, the "market value" has to be determined considering original cost, manner of use, general condition and quality and depreciation since its original purchase or construction. The 4th DCA noted that "purchase price alone is generally insufficient to establish the value of (electronics) in theft cases." (Lucky v. State, 25 So.3d 176, 180 (Fla. 4th DCA 2010). The state had presented no evidence as to the original cost of the DVD player, the perfume, or the oxygen equipment bag. There was no indication of when these items were purchased or their condition or quality. Accordingly, the DCA deemed the value of the items was not established beyond a reasonable doubt, and reversed the conviction for grand theft, remanding the case for entry of judgment for second-degree petit theft.

Masonett v. State, 137 So.3d 587 (Fla. 4th DCA, 4D12-2318, 4/30/14)

F.S 316.123(2) Requirement To Stop "At" A Stop Line Justified Traffic Stop Of Vehicle That Stopped At Stop Sign With Most Of Front Tire And Whole Hood Beyond Stop Bar

Daniels was a passenger in a car that stopped at a stop sign with its whole hood and "most" of the front tires beyond the "stop bar" painted on the roadway. The deputy smelled marijuana as he approached the car. When backup arrived, all passengers, including Daniels, were searched and cocaine was found on Daniels. At trial, Daniels moved to suppress the cocaine, claiming that as a matter of law, there was no violation of F.S. 316(2)(a). He argued the car was stopped "at" the line because the front tires were on the line, leaving the rest of the vehicle behind the stop bar. The trial court agreed and granted the motion to suppress. The state appealed.

On appeal the 5th DCA noted the statute was designed to protect pedestrians crossing the street and vehicles crossing the intersection. The Court noted it had previously held that when a vehicle "pulled beyond or ahead of the stop line" a traffic infraction occurs, and a valid traffic stop may result. See: State v. Robinson, 756 So.2d 249 (Fla. 5th DCA 2000). However, no court had interpreted "at" and the law does not define the term. Daniels argued that the dictionary definition of "at" included "on or near." The DCA rejected Daniels' argument. "A stop line protects other motorists and pedestrians only if a vehicle stops when its front bumper reaches that line. This is particularly true because vehicles vary greatly in length…otherwise, a big rig truck would not violate the statute even if its midsection is straddling the stop line and its tractor is protruding into the intersection." The trial court's grant of the motion to suppress was reversed and the case remanded.

State v. Daniels, --So.3d—(Fla. 5th DCA, 5D13-2352, 5/16/14)

Pills Found In After-Market Pill Box That Were Not Immediately Identified As Contraband Were Illegally Seized By Officer Who Took Them To Patrol Car To Research Their Nature On "Drugs.Com"

Melva Gay was a passenger in a car stopped for failing to come to a complete stop at a stop sign. After the officer decided not to issue a citation, the officer asked the driver to step out of the vehicle and asked if he could search the vehicle for illegal narcotics. The driver consented to the search. The officer then asked Gay to step out. She exited the car but left her purse inside it.

Beginning the search, the officer immediately noted a "faint odor" of marijuana in the passenger compartment. He searched the passenger area, including Gay's purse. Inside Gay's purse was a small metal pill container; a type commonly sold at drugstores. He removed the pills and box and returned to his patrol car to try to identify the pills via the "Drug.com" website. After verifying that some of the pills were methylphenidate ("Ritalin") and tramadol, the officer returned to Gay and read her the Miranda rights. He then began questioning her about the pills. At the motion to suppress, the officer testified he did not initially know what the pills were and that although he knew the purse was Gay's he did not seek her consent to search the purse or to search the pill box found therein. He also indicated that when he discovered the pill box and pills, Gay was not free to leave. No marijuana was found in the car. The trial court denied Gay's motion to suppress and Gay pled no contest to possession of five methylphenidate pills (a controlled substance), possession of a prescription drug without a prescription (tramidol) and possession of drug paraphernalia (the pill box), reserving the right to appeal the ruling on the suppression motion.

The 2nd DCA reversed and remanded. The initial traffic stop became consensual when the officer decided not to cite the driver. At this point, the encounter with Gay became consensual as well. However, it became an investigatory detention when the officer discovered the pill pox and removed it from the car and took it to his patrol vehicle for investigation. The detention should have been upon well founded, articulable suspicion of criminal activity. It was only upon the officer's return after identifying the drugs on Drug.com that the officer inquired of Gay if she knew what the pills were and whether she had a prescription for them. "After-the-fact discovery of contraband does not render the (initial) seizure legal." Crawford v. State, 980 So.2d 521, 525 (Fla. 2nd DCA 2007).

To justify as a "plain view" seizure, it must be immediately apparent to the officer that the seized object constitutes evidence of a crime. (E.g. M.L. v State, 47 So.3d 911, 912 (Fla. 3rd DCA 2010). In Gay's case, the illegal nature of the possession of the pills nor the type of pills was known to the officer at the time he took the out of the stopped vehicle. He did not know if any of the pills were a controlled substance or needed a prescription until he did his Drug.com research in his patrol car. The DCA noted that the presence of pills in an aftermarket container is equally consistent with noncriminal activity as with criminal activity. The initial investigatory detention

and seizure of the pills and pill box was unauthorized; the officer lacked reasonable suspicion of criminal activity and probably cause to seize the evidence. The motion to suppress should have been granted.

Gay v. State, 138 So.3d 1106 (Fla. 2nd DCA, 2D13-1706, 5/14/14)

Defendant Selling Drugs At Street Corner While Holding His Two-Year-Old Child In Arms Is Guilty Of Child Neglect Not Causing Great Bodily Harm

Over the course of twenty to twenty-five minutes, a detective observed Thompson engage in six hand-to-hand narcotic sales with a two-year-old child in his arms. Thompson was convicted by a jury of Child Neglect Not Causing Great Bodily Harm. He appealed, claiming the evidence did not support such a conviction.

The 3rd DCA affirmed the conviction. The willful exposure of the child to multiple drug transactions could reasonably be expected to result in serious physical injury of a substantial risk of death to the child. Drug "rip-offs" are common and "usually involve violence with a firearm resulting in death or injury" (quoting Reyes v. State, 581 So.2d 932, 934 (Fla. 3rd DCA 1991). The court cited several out of state cases coming to the same conclusion. Thompson knew or should have known that routinely selling illegal drugs in the presence of his child created a substantial risk of serious injury from the dangers inherent in the illicit drug trade.

Thompson v. State, 139 So.3d 377, (Fla. 3rd DCA, 3D12-1979, 5/14/14)

Use of E-FORCSE Records To Rebut Defendant's Claim Of Having An Rx For Methadone Improper Use of Hearsay Resulting In Reversal

Hardy was convicted of unlawful possession of Methadone after pills were located during a traffic stop. The defendant told police the pills belonged to his girlfriend, Chelsea Edwards, and that she had a prescription for them.

At trial, Edwards testified that she lived with Hardy and shared the car, to which they shared only one set of car keys on which there was a small pill bottle containing a few doses of her medications, Xanax and Methadone. She produced a prescription for the Xanax, but was unable to produce an Rx for the Methadone. She claimed "Doctor Findley" had prescribed the pills two months earlier. The Methadone had been secured by a pharmacy that had since closed. The state had previously tried to limit Edwards' mention of a Methadone prescription since no copy of it had been provided in discovery, but the trial court allowed the testimony, indicating it was up to the jury to decide whether it believed Edwards.

On rebuttal, the state proffered the testimony of a Jacksonville Sheriff's Office detective who was a specialist in prescription drug fraud investigations. She stated she had examined the state's data compilation known as the Electronic-Florida Online Reporting of Controlled Substance Evaluation Program (a/k/a E-FORCSE), maintained by the Florida Department of Health, and that there was no entry of a prescription for Methadone being provided to Edwards by Dr. Findley. The prosecutor argued that this absence refuted Edwards' assertion of having a prescription two months earlier.

The defense objected to the detective's testimony and admission of the database on the ground that is was hearsay. It argued the database info could not be admitted under the public records exception and that is was not admissible as a business record because the detective was not the custodian of the record. The trial court agreed to these arguments but ultimately admitted the data as a "market report" or "commercial publication." (F.S. 90.803(17)[5]). The defense objected to introduction on this basis as well.

The jury found Edwards not guilty of the Xanax possession but guilty on the four counts of possession of Methadone. The DCA determined the E-FORCSE database does not qualify as a "market report" or "commercial publication" for several reasons "not the least of which is that it does not fall within the definition in the text of the statute." The E-FORCSE is not "published." Access to the database is limited to authorized employees of the Department of Health and to certain law enforcement officers who have been expressly authorized by DOH to use it.

[5] F.S. 90.802(17): "Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations if, in the opinion of the court, the sources of information and method of preparation were such as to justify their admission."

The DCA noted the detective could have used the database as an investigative tool, not as proof of the facts it revealed. It could provide the basis for further investigation that reveals facts. It is one thing to say the information in the database creates a founded suspicion that justifies an investigation versus saying it is proof of a fact. But it was used as a proof of fact in the instant case. Its admission was not harmless error since the defendant's sole defense was that his girlfriend owned the drugs and had a prescription. The DCA noted it could not guess whether the jury would believe Edwards' assertion of having a prescription. The conviction was reversed and the case remanded for a new trial. Justice Rowe dissented, making a good (but losing) argument apply common sense and focusing on the legislative purpose in creating and authorizing use of the E-FORCSE.

Hardy v. State, 140 So.3d 1016, (Fla. 1st DCA, 1D13-0698, 5/14/14)

Defendant Lacked Standing To Challenge Seizure Of Cell Phones From Defendant's Residence After Giving Consent For Officers To Enter Residence And After Disclaiming Any Ownership Of The Phones

Fosmire was charged with two counts of lewd or lascivious exhibition, four counts of sexual performance by a child, and one count of child abuse. The evidence was obtained by reason of a search of Fosmire's home and material found in a Sony tablet and three cell phones located in the house. Fosmire filed a motion to suppress.

Evidence established that on April 28, 2012, police responded to a domestic violence call placed by Fosmire against Evans, her live-in boyfriend and father of her child. While in the house on that call, police recovered property stolen by Evans. Fosmire invited the officers into the house and gave permission to search for stolen property. She was cooperative the entire time police were in her home. She signed a written statement stating, "The police got here (and) I gave him permission to search my house for stolen property." Stolen fishing property was located, and in the same room they found the electronics. Police say Fosmire gave them permission to look for serial numbers on the electronics to discern if they had been reported stolen.

When picking up the Sony tablet to get the serial number, the home screen activated and became visible. The screen showed a photo of the stolen fishing equipment. The officer claims Fosmire approved looking for more pictures of the stolen property. During this search, photos of Fosmire, Evans and their nude child were located. The officer deemed the photos as being what he considered child pornography. The police collected the tablet, two cell phones Fosmire claimed belonged to Evans, and Fosmire's cell phone. The phones were off and were not reviewed until a search warrant was obtained 19 days later. The evidence resulting in charges were obtained from the Sony tablet and the two phones belonging to Evans. Evans was separately charged. In the suppression hearing in that case, Fosmire contradicted the officer's testimony. She testified that no consent to search was provided regarding the tablet. She claimed she had bought it as a gift for Evans and did not know how to use it. She claimed the officers were alone in the room where the stolen fishing equipment was located when they searched the tablet and that they told her "word for word" what to write in the written statement giving permission to search. In Fosmire's case, the court took judicial notice of the testimony in Evans' motion to suppress. It denied her motion to suppress regarding the Sony tablet but granted suppression of evidence found in all three phones. The court indicated Fosmire's consent was to search for stolen property, and that she consented to searching the tablet. The court found all of this property was within her authority to consent. She had apparent authority regarding the tablet, which was not password protected and in plain view in the vicinity of stolen fishing equipment. However, it found the seizure of the phones was without legal justification.

On appeal, the state argued Fosmire lacked standing because she disclaimed ownership of the two phones. (The trial court did not address this argument, raised late in the process, but nevertheless the issue was "preserved for appeal.") The trial court found that the police had a lawful right to be inside Fosmire's residence, that Fosmire had invited the police into her home, gave consent to search for stolen fishing equipment property, to run serial numbers on the electronics that could have potentially been stolen, and to look at the Sony tablet. Also it was undisputed that Fosmire disclaimed any ownership of two of the three cell phones. The DCA held Fosmire lacked standing to challenge the seizure of Evans' two cell phones, reversing the portion of the trial court's order suppressing Evans' two cell phones.

Training Notes: *Remind officers to document any and all disclaimers of ownership over seized and/or searched property. The disclaimer may quickly end an attempt to suppress evidence obtained by the officers' efforts. Your experienced detectives may have to remind novice prosecutors dealing with residential searches that before arguing legal issues in a motion to suppress, the movant must have standing in that which was searched and seized.*

State v. Fosmire, 135 So.3d 1153, (Fla. 1st DCA, 1D13-1532, 4/22/14)

Defendant's DNA On Gun Stolen In Burglary Not Enough To Overcome Defendant's Hypothesis That True Burglar Placed Gun In His Apartment

A jury found Karl Finley guilty of being a felon in possession of a firearm or ammunition and Finley appealed his judgment and sentence. He argued that the trial court erred in denying his motion for judgment of acquittal because the State failed to provide sufficient evidence to deny the motion.

A downstairs neighbor to Finley in the apartment building called police because he heard someone walking in Finley's apartment and then saw a man he did not recognize carrying items and dropping change in the parking lot. Traveling to the call, an officer saw the car described by the witness and pulled the suspect over. He left the suspect with other officers and went to Finley's apartment. The neighbor identified the suspect as the man he had seen leaving Finley's apartment.

Arriving at the apartment, the officer noticed a strong smell of bleach which had been poured all over the apartment. The officer found a handgun lying on a box spring left exposed by an overturned mattress. The gun and its magazine was swabbed for DNA testing and dusted for fingerprints. No prints were found, but DNA lifted matched Finley's DNA.

The forensic witnesses indicated at trial that the DNA from the gun and magazine was only tested against Finley. The samples were not tested against the subject's DNA, even though there was a second individual's DNA found on the gun and magazine. On cross exam, the forensic witness admitted that there can be a secondary transfer of DNA, whereby DNA can be transferred from one object to another so that one's DNA may be detected on both objects without the DNA contributor ever having touched the second object. At the end of the state's case in chief, Finley moved for JOA and the court denied the motion.

The 4th DCA agreed with Finley's assertion that the trial court erred in denying the motion for JOA. The standards for reviewing whether the State provided enough evidence to survive a motion for JOA are different when the state's case is entirely circumstantial, as it was in this case. On appeal the state argued that DNA evidence is direct evidence, citing Van Poyck v. State, 908 So.2d 326, 328 (Fla. 2005). The 4th DCA indicated that the Van Poyck rule is not a bright line rule, but rather depends on what the DNA testing and evidence is being used to prove. In this case, DNA evidence was used to prove that Finley "possessed" the weapon, either actually or constructively. However, the state's witness could not testify when the DNA was put on the gun, and more significantly, that secondary transfer of DNA is possible. DNA present on the mattress before it was overturned could have transferred to the box handgun and magazine. Since additional inferences are necessary to support conviction (i.e. that Finley's DNA was put on the gun and magazine by him and put under the mattress by him) in order to sustain a possession conclusion, the DNA evidence in this case was circumstantial. In circumstantial cases, the state must introduce competent evidence inconsistent with the Defendant's theory of events. Finley's theory was that the handgun was brought by the burglar to his apartment. It was uncontroverted that the burglar was the last person in Finley's apartment before police arrived. The state did not put the burglar on the stand to deny possession of the gun. There was testimony that a second person's DNA was on the gun and magazine. The state's witness could not testify whether Finley's DNA was found on the magazine or the gun generally. The state offered no evidence as to when or how the DNA came to be on the gun and magazine. Judgment and sentence were reversed and the case remanded with instructions to the trial court to grant Finley's motion for judgment of acquittal.

Finley v. State, 139 So.3d 940 (Fla. 4th DCA, 4D12-4168, 5/28/14)

Trial Court's Order Mandating Disclosure Of Investigative Operational Plan Invalidated Because Sheriff Not Given Opportunity To Demonstrate Why Sensitive Law Enforcement Information In The Plan Should Be Exempt From Disclosure From Defense Attorneys

Orange County Sheriff Demings petitioned the 5th DCA for a writ of certiorari, seeking to quash a trial court's order directing the State to produce a copy of the Sheriff office's child pornography and child exploitation investigative plan used in an undercover operation known as Operation Spider Web ("the Plan"). A defendant, Andrew Brendmoen, sought to compel production of the plan by motion filed in his criminal trial. The state was noticed, but the Sheriff's office was not. The prosecutor indicated the Sheriff had consistently opposed disclosure of the plan, but the trial court proceeded without the Sheriff. When the Sheriff learned that the court

had ordered disclosure, he sought a rehearing. The trial court held a "hearing" on the Sheriff's motion allowing him to briefly raise points for appellate purposes but informing the parties it had already made up its mind and would not entertain new argument, evidence, and would not alter its previously prepared order. That order acknowledged the Sheriff had standing to file a motion for rehearing but the Sheriff "failed to establish that the Plan contains such (exempt active criminal intelligent information and surveillance techniques, procedures or personnel) information.

On appeal the Sheriff argued the Plan does contain sensitive and exempt information. He alleged the Plan will be used for future operations, and that the Plan contains information regarding:

- Whether personnel will wear ballistic equipment or how they will be dressed;
- The types of weapons to be worn or located on scene;
- Location of personnel participating in the take down or arrest team and where the arrest will be attempted;
- How the arrest will occur if it does not occur at the undercover house;
- Whether surveillance cameras will be used at the undercover house;
- The staging and towing locations and location of support personnel;
- Whether marked or unmarked vehicles will be utilized;
- Types of electronic evidence that may be searched;
- Type(s) of computer program(s) or tools that will be used to extract electronic evidence;
- Who will be assigned various search functions and who will apply for search warrants; and
- Information that may jeopardize the safety of law enforcement personnel who effectuate arrests in similar ongoing and future operations.

The defendant alleges any exemptions under Chapter 119 are irrelevant, as he is entitled to the information under Florida Rule of Criminal Procedure 3.220(f). The DCA noted (citing cases for its findings) that the defendant must show materiality to obtain the material, meaning it is reasonably calculated to lead to admissible evidence. The mere possibility that information may be helpful to the defense in its own investigation does not establish materiality. The burden to demonstrate materiality is on the defendant.

Because the trial court did not review the Plan in camera and did not give the Sheriff a meaningful opportunity to be heard, the DCA could not agree or disagree with the Sheriff's assertions, but did agree the Sheriff is entitled to a meaningful hearing. Once the trial court acknowledged the Sheriff had standing to object, it should have provided him that meaningful hearing. When public records exemptions are asserted, the subject document should be reviewed in camera by the trial judge for inspection. This gives the judge the opportunity to determine whether the document is or is not subject to public records disclosure. The trial court's original order to disclose the Plan to the defense was quashed and the case remanded for an appropriate hearing before a new judge.

Demings v. Brendmoen, --So.3d—(Fla. 5th DCA, 5D13-3364, 4/17/14)

Officers Investigating Domestic Battery At Apartment Who Heard Moaning As They Approached Were Justified In Belief That Another Victim Of The Obviously Violent Disturbance Might Be Inside The Defendant's Apartment. Fact That Officers Had Been Advised Before Arrival That Victim And Her Mother Were At The Hospital Does Not Negate Reasonable Possibility That Another Was In Distress Behind Door To The Apartment

This case reviewed whether the responding officers had a reasonable basis to justify a warrantless entry into the apartment based on the exigency of believing someone might be injured inside. While checking the apartment out via a warrantless entry, cannabis and drug paraphernalia was observed, which then became the basis of a search warrant by which the drugs and paraphernalia were seized.

A sheriff's deputy went to Shillingford's apartment to investigate a domestic battery call regarding Shillingford and his live-in girlfriend. Prior to arriving, the deputy was advised the victim was at a nearby hospital. Upon arrival, the deputy saw a trail of blood starting at the base of a staircase and leading to Shillingford's apartment. There was blood on the apartment door. The deputy heard "moaning sounds of distress" coming from within the apartment. He thought the sounds were made by a male.

Shllingford barely opened the door when the deputy knocked on it. He appeared to have just emerged from the shower. He insisted "everything was fine." He told the deputy he was the only person in the apartment, but denied making any moaning sounds. When questioned about the blood trail, he again indicated everything was "fine." The deputy asked him to step outside, and he complied. He opened the door only enough to step out, denying the deputy and opportunity to view the apartment interior. Shilingford was arrested for domestic battery, and handcuffed. Deputies then entered the apartment to assure no one within the apartment was in distress. They looked only in areas a person might be found. While walking through the apartment, they observed cannabis and paraphernalia in plain view. The evidence was seized by reason of a subsequently obtained search warrant.

The trial court concluded the deputies did not have a reasonable belief that someone in the apartment was in distress because they knew the victim as already at the hospital, and the moaning ceased when the deputy knocked on the door. It granted the motion to suppress the drugs and paraphernalia. The State appealed. The 5th DCA reached a contrary conclusion. Viewing the matter as a reasonable officer at the site, rather than utilizing 20/20 vision hindsight, the actions of the deputies were reasonable. The report that the victim was at the hospital did not negate the possibility of another person being in the apartment in distress. The deputies saw the blood trail and heard the moaning. The behavior of Shillingford to keep the deputies from seeing inside the apartment and insistence that "everything was fine" even in face of evidence to the contrary buttressed the inference that someone behind the door might be in distress. A limited search of the premises was reasonable.

Judge Torpy concurred but raised an interesting second basis for why the motion to suppress should not have been granted. In Herring v. United States, 555 U.S. 135, 144 (2009) the U.S. Supreme Court indicated the purpose of the exclusionary rule is to address conduct of police sufficiently deliberate that exclusion can meaningfully deter it. It serves to deter *deliberate, reckless, or grossly negligent conduct.* (Emphasis in Torpy's concurrence). "Even assuming a violation of the Fourth Amendment here, nothing in the police conduct rises to the level where exclusion of the evidence can be justified under this standard."

State v. Shillingford, 136 So.3d 1242, (Fla. 5th DCA, 5D13-3427, 4/17/14)

Essential Element Of Robbery (Intent To Steal) Not Established

This case involves a spat between juveniles. C.B.B. who was 14 at the time was charged with delinquency for the robbery of another middle-schooler's (O.A.) bike. C.B.B. acted with two other juveniles, Z.M.B. and D.C.C. After an earlier incident at a in which C.B.B. spat water on C.B.B., O.A. was riding his bike home. The three boys approached him and Z.M.B. grabbed his bike's handlebars and twisted them, causing O.A. to fall off. C.B.B. ran up and hit O.A. in the back of the head. O.A. stood and ran away to his grandmother's house. On direct exam, O.A. said D.C.C. took his bike. On cross exam, the defense asked if it was true that he abandoned the bike and ran away, to which O.A. answered, "Yes sir." O.A. also indicated he did not see anybody take his bike and that he thought the incident was based on the spitting incident. He indicated that he did not think there was a plan to take his bike, but that it just sort of happened. ("So, the taking of your bike was something separate from this fight, wasn't it?" "Yes, ma'am.") Z.M.B. testified the motivation for the fight was retaliation for the spitting incident, not to take O.A.'s bike. At the close of the state's case, C.B.B. moved for judgment of dismissal, arguing the state failed to establish a prima facie case of robbery. The trial court denied the motion. The 1st DCA concluded the evidence showed that the force used by the defendant against the victim was not in furtherance of a plan to take the bicycle.

There was no evidence that C.B.B. had any intent to rob the bike. Even if C.B.B. thought D.C.C. or Z.M.B. was going to take O.A.'s bike, mere knowledge that an offense is being committed is not the same as participation with criminal intent, and mere presence at the scene is not sufficient to establish participation. (See: Colins v. State, 438 So.2d 1036, 1038 (Fla. 2nd DCA 1983). Finding the state failed to carry its burden, the DCA found the trial court erred in denying the motion for a judgment of dismissal and the disposition order was reversed.

Note: In July, the DCA also reversed D.C.C. delinquency finding arising out of the same incident. (D.C.C. v. State, --So.3d—(Fla. 1st DCA, 1D13-5422, 7/14/14). Z.M.B.'s case had also been reversed (Z.M.B. v. State, --So.3d—(Fla. 1st DCA, 1D13-5318, 5/27/14).

C.B.B. v. State, 135 So.3d 1139 (Fla. 1st DCA, 1D13-5263, 4/16/14)

Evidence Insufficient To Charge Sexual Offender With "Failure To Report" (F.S. 943.0435(9))

Michael Eveland, Jr. was charged with failure of a sexual offender to report (F.S. 943.0435(9)). He filed a motion to dismiss the information, arguing he was indigent and unable to pay the fee, and that the statute is

unconstitutional if its criminal sanction is applied to an indigent individual. The trial court denied his motion, Eveland entered a guilty plea, reserving the right to appeal the denial of the motion.

His appeal raised two points. First, that the trial court evidence established he was indigent and unable to pay the fee. He also argued that applying the statute to an indigent is unconstitutional. The 2nd DCA found merit with his first claim and reversed for further proceedings, which will likely resolve his second claim.

Under F.S. 943.0435 each time an offender permanently or temporarily changes his address, he must, within 48 hours report in person to the sheriff's office to register the new address, be photographed and have his fingerprints taken. Within 48 hours of reporting to the sheriff, the offender must report in person to a driver's license office of the Florida DHSMV to obtain or renew a driver's license or identification card showing the new address (F.S. 943.0435(3)) paying whatever costs are assessed by DHSMV in renewing or issuing the license or card. There is no provision for waivers or discounts to indigents. Failure to comply with the statute is a third degree felony.

The information charged Eveland committed a violation of the statute between October 1 and November 30 of 2012. He was charged with the offense in late December. The facts established at the trial show that Eveland was released from jail on 10/4/2012. He was on probation for another offense. He was homeless for about 48 hours after his release, at which time he received a referral from a homeless assistance organization. On 10/11/12 he registered with the sheriff and presented himself to a DHSMV office. He had insufficient documentation required for a Florida ID card, and could not pay the DHSMV fee. He was not issued a card. Instead he was issued a letter indicating he had reported to DHSMV but could not be issued the card. Eveland showed this letter to his probation officer and believed he had complied with the law. The letter did not make him in compliance with the requirements of the statute, however.

When asked why he could not receive a card on 10/11/12, Eveland said he had no money, having last worked in January, 2012 as a day-laborer, and that he was receiving no help from friends or family. He indicated he had been seeking work, missing out on a job that opened on November 20 or 21. At the end of November, Eveland's father provided him the $35 needed to obtain a DHSMV issued Florida identification card. However, before he could obtain the card, he was admitted to the Tampa General Hospital for five days. He was released on a Saturday, and was unable to get to the DHSMV before he was arrested on December 4, 2012.

The trial court acknowledged it could not imprison or incarcerate a person who cannot pay for a criminal penalty, but that Eveland indicated he had worked in the past, that his father did provide funds to him, and that he had not shown that he had made reasonable efforts to pay but could not do so through no fault of his own. It denied the motion to dismiss.

The DCA indicated the evidence was deficient that Eveland committed the crime during the time stated in the Information: October and November, 2012. It noted Eveland reported his change of address to the sheriff's office on 10/11/12, and that his DHSMV obligation was to be fulfilled by 10/13/12. It was this 48 hour period in which his ability to pay must be determined. His work in January, 2012 and his father's gift in late November were irrelevant to the crucial 48 hour period. Having relied on irrelevant facts and applying the wrong statutory standard, the trial court's denial of the motion was to be revisited. The DCA indicated that if the evidence of record is the only evidence available to the trial court, it is unlikely that the court can find Eveland had the ability to pay the cost of the DHSMV identification card during the 48 hour period. Upon such a finding, the trial court will have to assess the constitutionality of attempting to impose a criminal sanction upon an insolvent defendant. Case was remanded with instructions to the trial court.

Eveland v. State, --So.3d--, (Fla. 2nd DCA, 2D13-1395, 7/2/14)

5-Year R.I.C.O. Statute Of Limitations Runs Against Defendant Not Charged With Conspiracy From Date Of That Defendant's Last Predicate Act In Which (S)he Personally Participated

Erkia Reyan was charged with a single count of racketeering (F.S. 895.03(3)) based on her involvement with the Wackenhut Corporation for the purposes of falsifying payrolls to continue providing security services to the Miami-Dade Transit system. The Information contained 840 individual predicate acts comprised of organized scheme to defraud (F.S. 817.034) and Grand Theft (F.S. 812.014). The predicate acts were alleged to have occurred between 10/1/2002 and 9/30/2005, with the state alleging each defendant participated in at least two incidents of racketeering activity. None of the 840 predicate acts named individual defendants but named the Enterprise (Wackenhut) generally.

Significantly, the Information did NOT charge the defendants with conspiracy to commit RICO in Count 1, nor did it allege the defendants conspired to commit the underlying predicate acts. In contrast, Count 2 alleged that one of the co-defendants engaged in a conspiracy with uncharged co-conspirators. Reyan was NOT charged in Count 2.

The affidavit in support of the charge indicated Reyan began working for Wackenhut in 1998 as a secretary and project manager, with payroll duties. She generated invoices that would be submitted to the County for payment. The affidavit indicated Reyan was present when it was revealed security officers were leaving their jobs early but submitting for working a full shift. Over time, 309 fraudulent invoices were submitted, resulting in a minimum overbilling of $39,655.74.

Reyan argued her substantive RICO prosecution was barred by the 5-year statute of limitations. The last predicate act attributable to her in the charging document occurred 12/28/2003, almost seven years before the Information was filed on 9/24/2010. Her defense team countered the state's argument that the SOL should run from the last act of all those charged, by indicating Reyan had not been charged with conspiracy. Both sides stipulated that the last communication Reyan had with her replacement after she resigned on 5/21/2004 was in June, 2004.

The trial court granted the motion to dismiss. The state appealed to the 3rd DCA. The issue was framed as whether, in a substantive Florida RICO prosecution, the SOL begins to run from the date of the last predicate act in which the defendant personally participated or the date of the last predicate act committed by the enterprise as a whole. The DCA analyzed O'Malley v. Mounts, 590 So.2d 437 (Fla. 4th DCA 1991) in which similar SOL issues were addressed, and resolved the current case in favor of Reyan. It noted that while the state can establish a substantive RICO charge by proving conspiracy to commit the underlying predicate acts of racketeering activity, this did not equate to charging conspiracy to commit RICO. Conspiracy to commit RICO is not agreeing to commit the predicate acts, it is an agreement to participate in the affairs of the criminal enterprise through a pattern of racketeering activity. The essence of a RICO conspiracy is an agreement "to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity and not merely to commit each of the predicate crimes to demonstrate a pattern of racketeering activity." See; U.S. v. Elliott, 571 F.2d 880, 902 (5th Cir. 1978).

To extend the SOL on the predicate acts to one not charged with RICO conspiracy would blur the distinction between a substantive RICO violation and RICO conspiracy. Several co-defendants of Reyan were charged with RICO conspiracy in count two, by Reyan was not. The efforts to save Reyan's substantive RICO charge by tying it to the conspirators' acts fails. The trial court's dismissal of Reyan's RICO charge was affirmed.

State v. Reyan, --So.3d—(Fla. 3rd DCA, 3D12-2468, 6/18/14)

Error To Allow Evidence Of Discovery Of Handgun In Proximity Of Cocaine; Defendant's Circumstantial Evidence Of Possession Of the Cocaine Presented Jury Question

Tolbert was convicted of possession of cocaine and appealed, claiming the trial court should not have allowed testimony regarding a firearm found in proximity of the cocaine, and that the circumstantial evidence at trial failed to establish his constructive possession of the drugs. He prevailed on the former, and lost on the latter, but is getting a new trial.

Police executed a warrant at Tolbert's house when no one was home. They discovered cocaine in a trash bag that was concealed beneath kitchen garbage. Inside the bag containing the cocaine was mail addressed to Tolbert and a handgun. Testimony was admitted over defense objection regarding the discovery of the gun. The Second DCA found this to be error. "In order for evidence of a firearm to be admissible as relevant in a criminal trial, 'the State must show a sufficient link between the weapon and the crime.'" (Quoting Agatheas v. State, 77So. 3d 1232 (Fla. 2011) which quoted in part Jackson v. State, 25 So.3d 518 (Fla. 2009). The state in the instant case failed to present evidence linking the handgun to the drug trafficking charge, so evidence related to the firearm was irrelevant, and the trial court abused its discretion by admitting such evidence over defense objection. The DCA indicated the error was not harmless.

Tolbert also argued that the trial court should have granted his motion for judgment of acquittal because the state's circumstantial evidence failed to prove his constructive possession of the drugs. To prove constructive

possession, the state must prove the defendant had knowledge of the presence of the drugs and that the defendant had dominion and control over them.

At trial, Tolbert asserted he stayed at the house only sporadically and that others frequent stayed there. He claimed there had been a large party at the house the weekend before the search. Such evidence could show Tolbert lacked exclusive possession. However, the DCA noted that Tolbert in a post-Miranda statement told police he lived in the house; and he did not mention he stayed only sporadically or that others lived there. Further, at trial Tolbert did not account for why his personal mail was in the bag with the coke. Noting that a jury may infer knowledge and dominion and control in jointly occupied premises when contraband is found in the proximity of personal property owned or controlled by the defendant (See: Jackson v. State, 995 So.2d 535 (Fla. 2d DCA 2008)), the DCA concluded the evidence was sufficient to submit the issue to the jury and the motion for acquittal was properly denied. Case was remanded for a new trial on the basis of the error in admitting testimony regarding the gun.

Tolbert v. State, --So.3d—(Fla. 2nd DCA, 2D12-3224, 6/18/14).

Failure To Present Competent Evidence Of Value Of Damage Means Defendant Can Be Convicted Only of 2nd Degree Misdemeanor Criminal Mischief

The state established that the defendant committed criminal mischief, but failed to present evidence of the value of the damage for which he was responsible. When the value is not established, the conviction can only be for criminal mischief causing damage of less than $200, a second degree misdemeanor.

Thomas, Jr. v. State, 139 So.3d 506 (Fla. 1st DCA, 1D13-2994, 6/9/14)

Evidence Failed To Establish Juvenile Committee Petit Theft

A theft occurred at a park where victims were playing basketball. They had placed their wallets and cell phones next to the basketball hoop. When the basketball went out of bounds one of the victims chased after it. Turning around he saw A.B. and A.B.'s juvenile friend running from the area where the phones and wallets had been placed. The wallets and phones were gone.

At the non-jury delinquency trial a police officer indicated she questioned A.B. about the theft two weeks after the incident. Prior to receiving Miranda warnings, A.B. spontaneously said, "I can't believe I am going down for this alone." Post-Miranda he told the officer he went to the park to play basketball. He indicated he ran blindly, leaving his own shoes behind because he saw his friend running. ("When I run, you run.") He did not know why they were running, but jumped a fence and got into a car belonging to A.B.'s brother.

The defense moved for dismissal, claiming the circumstantial evidence failed to establish theft by A.B. The court found the state failed to establish the value of the stolen cell phones and reduced the charge to petit theft. It found A.B. guilty of two counts of petit theft, adjudicated him delinquent and placed him on probation. The 4th DCA, noting that mere knowledge that an offense is being committed, mere presence at the scene, and even a display of questionable behavior after the fact are not, alone, sufficient to establish participation. (See: T.W. v. State, 98 So.3d 238 (Fla. 4th DCA 2012). Statements made to law enforcement that are ambiguous and susceptible to innocent explanation as well as being indicative of criminal knowledge must be resolved in favor of the accused Fiske v. State, 366 So.2d 423, 424 (Fla. 1978). The DCA noted there was no real evidence that the juvenile stole the items or assisted in doing so. The state proved A.B. was in the area when the theft occurred, was seen running from where the crime occurred and said "I can't believe I am going down for this alone." These factors did not prove a crime. Case was reversed and remanded for dismissal.

A.B. v. State, 141 So.3d 647 (Fla. 4th DCA, 4D13-1729, 6/18/14)

Defense Failed To Establish Grounds To Cause Disclosure Of Identity of Confidential Informant

After the trial court ordered the state to disclose the identity of three confidential informants, the State petitioned for a writ of certiorari to stop the disclosure, arguing the trial court departed from the essential requirements of the law, and that disclosure would result in irreparable harm with no remedy on appeal. The 5th DCA agreed and quashed the trial court's order.

Ocala Police were investigating the defendant (Sharmark Powell) and others of drug trafficking large quantities of drugs in Marion and Citrus Counties. Using in part information provided by three confidential informants, an

affidavit for a wire was filed to intercept communications on one of the suspect's telephones (Target Telephone One, used by Todd Williams, a roommate of the defendant.)

The three CI's were not aware of each other's cooperation with police. All had personal knowledge of Williams' and Powell's drug activities. Source one referred to Powell as Williams' "right hand man" and indicated Powell lived with Williams, dealing drugs in lieu of rent. CI Source Two was alleged to have completed a controlled buy from Williams and Powell in August, 2012. The third CI provided similar information. The wire application was granted, and ultimately Powell and 16 of his confederates were charged with various crimes.

Defendant Powell sought the names of the CI's claiming he was denied his 6th Amendment right of confrontation, and alleging the lead agent had used "unreliable and seemingly fabricated evidence provided by these three information" to create probable cause for the wiretap.

At argument on the motion, Powell acknowledged that two of the three CI's were "not necessarily material witnesses" but that CI Source Two was, since it was indicated this source had purchased drugs from Powell and Williams. The state countered that all three were not material, and that they would not be used at trial. The state also noted the motion was not sworn. The trial court granted the motion to disclose the identities without conducting an in camera hearing, finding that the constitutional rights of the accused could be substantially infringed by non-disclosure.

The 5th DCA noted that "snitching is dangerous work" and that CI's "often put their lives on the line when cooperating with law enforcement" meaning the need for confidentiality is of key importance. It noted the privilege of nondisclosure is based on sound public policy. It also noted the privilege is not absolute, and must yield when the CI is to be produced at trial or a hearing or when failure to disclose the identity infringes the constitutional rights of the defendant. The second prong consists of two components, either of which—if satisfied—prompts disclosure. First, the privilege must yield where the informant's identity is relevant and helpful to the defense of the accused; and second if must yield where the identity is essential to a fair determination of the cause at issue. The burden is upon the defense to establish the requisites for disclosure.

Noting that Powell asserted that disclosure should be compelled to preserve his constitutional rights because the CI's identities are essential to proving his defense of an illegally-obtained wiretap, and that CI Two was a material witness (i.e. alleged to have bought drugs from Powell and Williams), the identities should be disclosed. The DCA noted, however, that bare, unsubstantiated allegations by counsel are insufficient. The absence of sworn allegations of a legally cognizable defense means a trial court has no authority to order disclosure. (See, e.g. State v. Titus, 70 So.3d 763 (Fla. 4th DCA 2011), State v. Davila, 570 So.2d 1035 (Fla. 2nd DCA 1990), and State v. Zamora, 534 So.2d 864 (Fla. 3rd DCA 1988).

The DCA indicated that Powell failed to provide sworn evidence of a legally cognizable defense and thereby failed to carry his burden to prompt consideration of whether disclosure was necessary. The Court also noted a wide range of authority holding that an informant need not be indentified merely to verify probable cause for a warrant, citing numerous cases. It characterized Powell's entire argument for disclosure as resting on "his suspicion, unsupported by any sworn evidence, that the wiretap was fraudulent…." His argument was rejected by the DCA, which found that more than bare allegations is needed. The trial court's order requiring disclosure was held to have departed from the essential requirements of the law. The state's petition was granted, and the trial court order quashed.

State v. Powell, 140 So.3d 1126, (Fla. 5th DCA, 5D13-2820, 6/20/14)

Although Department Of Corrections Was A Nonparty To Trial Court Proceeding, It Was Entitled To Obtain Certiorari Review Because It Was Adversely Affected By The Trial Court's Order

The facts of this case are less important than the principal articulated by the First DCA in its review. A trial court order withheld adjudication of Charles D. Williams, but sentenced him as a youthful offender to 30 months prison for each of thirteen felonies, running concurrently, with incarceration as a condition of probation of five years. The Department of Corrections filed a petition for writ of certiorari to quash the trial court's order as being illegal. Because the sentence is illegal and the State properly conceded error, the DCA granted the petition of DC.

In order to grant a petition for certiorari, DC must establish: (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case that (3) cannot be corrected on post-judgment appeal. (See: Citizens Prop. Ins. Corp. v. San Perdido Ass'n, Inc., 104 So.3d 344 (Fla. 2012).) The DCA noted

the pertinent statute (F.S. 958.04(2)) does not authorize the type of sentence imposed, and because adjudication was withheld, assignment to prison was a departure from established law. (See: Dep't of Corr. V. State, 113 So. 3d 950 (Fla. 5th DCA 2013). The Court also noted that Williams' sentence of 30 months (912.5 days) was 150% more than the statutory authorized 364 days placement in incarceration, another departure from the essential requirements of law.

The DC argued that as a non-party, it cannot appeal the trial court's order even though it adversely affected its interest (i.e., being forced to pay the costs of Williams' incarceration rather than the county jail or other detention center.) "A person need not necessarily be a party to a proceeding in order to obtain certiorari review if he has sufficient interest in the subject matter of the order." (Quoting from State ex rel. Boyles v. Fla. Parole & Probation Commission, 436 So.2d 207 (Fla. 1st DCA 1983). Finding the DC's monetary interest was sufficient and that DC had no other mechanism for appellate review, the DC's petition for cert was granted and the case remanded back to the trial court for further proceedings consistent with the DCA's opinion.

Fla. Dept. of Corrections v. Charles Williams and State of Florida, --So.3d—(Fla. 1st DCA, 1D13-4606, 6/23/14)

Officer's Assistance In Department of Children and Families (DCF) Intervention Was Not Being Engaged In Lawful Performance Of Officer's Duties. Juvenile's Push Of Officer Was Not Assault On Law Enforcement Officer

Three uniformed officers received a dispatch to assist a DCF investigation of a woman and her young child at her apartment. Upon arrival they were advised by the DCF investigator that she had found the juvenile was living with the woman and her child at the apartment. The woman told the investigator that she thought the juvenile was an adult and that she wanted the juvenile to leave. The officers summoned the juvenile's mother and directed her to come pick up her son. They took the juvenile outside to wait for the mother's arrival. They told him he was not to return to the apartment and that he was being turned over to his mother. The juvenile said he did not want to go with his mother and wanted to leave on his own. The officers told the juvenile he was not free to leave on his own and had to be turned over to an adult.
The mother arrived and advised the officers that the juvenile frequently ran away and she could not control him. The officers instructed the juvenile to get into his mother's car. He sat partially in the car then started arguing with one of the officers who was standing next to the car door. The juvenile continued to say he did not want to go with his mother. At that point, the nearby officer announced the juvenile was "going to jail for trespassing." This prompted the juvenile to become combative, and he took a fighting posture with clenched fists, saying he was not going anywhere and that he was going to punch the officer "in your s****." The officer responded by directing the juvenile to put his hands behind the back of his head, announcing he was under arrest, and then reaching for the juvenile's hand. The juvenile, with a clenched fist pushed the officer in the chest. The officer then took the juvenile into custody.

The state filed a petition for delinquency, charging assault on a law enforcement officer (F.S. 784.07(2)(a).) After the state rested, the juvenile moved for a judgment of dismissal, arguing the officer was not engaged in the legal execution of his duty and because a person has the right to resist any unlawful arrest. The defense argued the officers had completed their duty when the mother arrived and the juvenile was turned over to her. At that point if the juvenile wanted to walk off, the mother was responsible for how to respond. The juvenile was off the premises of the apartment and was no longer interfering with DCF's investigation in any manner. The defense argued that even though the juvenile was mouth and disrespectful of the officers, there was no basis for the charge.

The state responded that because the officers were assisting DCF and investigative a possible trespass, they were engaged in the lawful execution of their duties. The trial judge agreed and denied the defense motion (which was renewed at the end of the trial), found the juvenile guilty and adjudicated him delinquent. On appeal, the 4th DCA reversed and remanded.

Three main arguments were propounded by the state. First, that there was a real possibility the juvenile would return to the premises since he had not left. The DCA deemed this argument one of "possible later trespass" and noted there is no such crime. It noted the juvenile left the apartment when told to do so. Second, the state argued the officers had learned the under 18 juvenile was engaged in sexual relations with an adult, and with a suspicion of child abuse, had a duty to secure the child and release to a parent. The DCA noted the testimony at trial was devoid of any indication that the state was attempting to take the juvenile into custody as a dependent child; that the woman with whom he was living was not "in a position of familiar or custodial authority" over him;

and there was no evidence that the juvenile's mother was neglecting or had abandoned the boy. The third argument was that upon being told the boy was a frequent runaway, the state had a community care-taking function that warranted taking the boy into custody until he could be released into his mother's care. The DCA noted the record showed no evidence that the officers were taking him into custody as a runaway, and that the "community caretaker" function had been met because the juvenile and his mother had been reunited. At the time the officer announced the juvenile was going to jail for trespassing the mother had not requested the officers' assistance to prevent the juvenile from running away again. While the officer's intervention in the custodial affairs of the mother were well-intentioned, that intervention was premature and not based on a factual basis to support such intervention.

The juvenile pushed the officer, but he was not engaged in the lawful performance of his duty at the time of the assault. The trial judge should have reduced the offense to the lesser included offense of assault. The case was reversed and remanded with instructions to adjudicate the juvenile of assault and proceed accordingly.

D.J.D. v. State, --So.3d—(Fla. 4th DCA, 4D12-1242, 8/6/14)

Cell Phone Illegally Searched Incident Arrest. No Basis For "Inevitable Discovery" Theory Provided At Suppression Hearing.

The 3rd DCA followed established law (*Smallwood v. State*, 113 So.3d 724 (Fla. 2013) and *Riley v. California,* --U.S.---, 6/25/14)) and found that since there was no evidence that the cell phone in the subject case was going to be used to endanger the officer or resist arrest, or that evidence contained in the phone was going to be destroyed, a warrant should have been obtained to search the phone's contents and the search asserted to be justified as incident to arrest was illegal. The State invited the DCA to apply the inevitable discovery doctrine to justify admitting the evidence. However the DCA noted at the hearing that the state had not produced a preponderance of evidence demonstrating the police had probable cause to search the phone at the time it was seized. There was no showing the state could have obtained a warrant supported by probable cause. Accordingly, the inevitable discovery doctrine was inapplicable. The order denying the defendant's motion to suppress was reversed, but the DCA indicated the state could amend charges to include information obtained from the consent search of the defendant's wallet.

Viervens Saint-Hilaire v. State, --So.3d--, (Fla. 3rd DCA, 3D12-1730, 8/6/14)

Vehicle's Presence Behind Business That Had Experienced Several Burglaries Did Not Justify Stopping Vehicle After It Left The Premises; Illegal Stop Meant Officers Was Not Engaged In Lawful Execution Of Legal Duty

Late in the evening, two Haines City police officers noticed a car sitting with its parking lights on behind a business. The business was closed, but the gates to a fence around the business which were normally shut were open. The business owner had reported previously to police his business had experienced several burglaries. The officers saw people with flashlights walking between a dumpster and the bed of a pickup truck. After about ten minutes, they turned off their flashlights, entered their car and left the premises. The officers testified they had seen no illegal conduct. As the car left, one of the officers radioed a patrol car to stop the car to investigate the occupants' activities and to determine whether they had stolen anything.

The officer who made the stop added that the requesting officer told her that Thomas (the defendant) who was a passenger in the car was involved in drugs and another person in the car had been seen leaving a local drug house. The officer indicated she did not witness a traffic infraction before stopping the vehicle. Sometime during the encounter with an "uncooperative" Thomas, she attempted to arrest him, and when he pulled away, baggies were seen in his pants waistband. The baggies contained methamphetamine. After the trial court denied his motion to suppress, Thomas pleaded no contest to possession of meth and drug paraphernalia, and to resisting an officer without violence, reserving a right to appeal the dispositive motion to suppress evidence.

The 2nd DCA reversed the trial court's refusal to suppress. Mere presence in an area known for past criminal activity or near a closed business during late-night hours does not provide reasonable suspicion to justify stopping a car. The observing officers indicated they saw no violations of law by the people with the flashlights. The stopping officer observed no traffic infraction, simply stopping the car because the other officer directed her to do so. The discovery of the contraband was by reason of an illegal stop. That evidence was fruit of the poisonous tree for which none of the three exceptions did not apply. (No independent source that would have led to the evidence; no legitimate investigation that would have inevitably led to discovering the evidence; and no

attenuation between the illegal stop and the discovery of the evidence.) The two possession offenses were reversed.

As to the resisting offense, the patrol officer had no objective basis for detaining Thomas. Accordingly the officer was not engaged in the lawful execution of a legal duty at the time of the charged obstruction. That charge was also reversed. Case was remanded for discharge of Thomas.

Thomas v State, --So.3d.—(Fla. 2nd DCA, 2D13-488, 8/814)

Circumstantial Evidence In Backpack Containing Ammunition And Defendant's "Explanation" Of The Nature Of The Pills Were Sufficient To Establish Possession Charges

Ammunition was found in a backpack located in a hall closet of Melvin Davis's premises. Davis indicated a friend, "Boosie" asked to leave some property in the closet and that the pack was "Boosie's." However, a letter addressed to Davis was found in the pack. The 5th DCA found this was sufficient to prove the backpack was Davis's and to support a conviction of possession of ammunition by a convicted felon. At the same incident, hydrocodone pills were discovered. Davis volunteered the pills were "only pain pills." The DCA indicated this statement was sufficient to establish that Davis knew of their presence and what they were. The DCA indicated the jury was not in error to find Davis also guilty of illegal possession of the pills.

Davis' convictions were affirmed, but the sentence he originally received was deemed vindictive and the case remanded for resentencing before a different judge.

Davis v. State, --So.3d--, (Fla. 5th DCA, 5D12-4262, 8/8/14) Slip Copy, 2014 WL 3871263

Casino Security Guard's Observation Of Person Snorting Cocaine And Reporting Observation Immediately To Officer Created Reasonable Suspicion

On the night of the defendant's arrest, the officer was in uniform and armed while on patrol in a casino.

Officer's Account:
He received a dispatch that a security guard had observed a man snorting cocaine in one of the men's rooms. A couple of minutes later, the guard met the officer. The officer testified at the suppression hearing that he did not know the security guard's training or whether he knew what cocaine was or had ever seen it in his life. The guard identified the defendant to the officer as the man he'd seen snorting the cocaine. He accompanied the officer to the man. The officer tapped the defendant on the shoulder, identified himself, and in a casual tone asked, "Sir can I talk (to you) over here?" He was referring to an area to the side of the casino where not many people were standing. The defendant followed the officer to the area. He was not blocked in any way. He was not advised he was under arrest nor did the officer indicate he was detaining him or did the officer try to restrain the defendant's freedom of movement. The officer did candidly admit that "normal citizens in any situation would think they have to follow (him)." The officer indicated he was investigating an incident in the men's room. Before he could finish his statement, the defendant immediately responded something to the effect of "You got me. I have the stuff in my pocket." When the officer asked if he could see it, the defendant produced a baggie of cocaine and a straw out of his pocket. The defendant was charged with possession of cocaine.

Defendant's Account:
He was sitting at the end of a row of slot machines watching his girlfriend gamble. The officer and three security guards approached him and told him, "I need to talk to you over here," motioning to the side area. The officer told him, "I had a report of a suspicious incident and I need to ask you some questions…(Y)ou were observed with a baggie and straw over by the restroom and I need you to empty your pockets." The defendant followed the officer's instructions. The defendant testified that he did not hesitate to move to the area when asked because "I would have no reason not to. He's a police officer." He said if an officer asked him to do anything, he would do it and that he felt like he "needed to comply with the officer's request."

The defendant moved to suppress his statements, the cocaine and straw indicating they were obtained during an investigative stop not supported by reasonable suspicion. The circuit court granted the motion to suppress. The 4th DCA agreed with the state that the factors supported a reasonable suspicion. Law enforcement may conduct an investigatory stop based on a tip providing reasonable suspicion when that tip has been deemed sufficiently reliable based on either the surrounding circumstances or the nature of the information given in the tip itself. *Castella v. State,* 959 So.2d 1285 (Fla. 4th DCA 2007). The tip the officer received was sufficiently reliable to

conduct an investigatory stop of the defendant. The tip was received face-to-face. The security guard was a "citizen informant" not needing further investigation or corroboration. The defendant admitted his behavior before any question requiring Miranda warnings had been asked. Since the DCA had concluded reasonable suspicion supported the stop, it did not address the state's alternative position that the encounter was a consensual encounter not even needing reasonable suspicion. The trial court's suppression of the evidence was reversed and the case remanded.

State v. Hutz, --So.3d—(Fla. 4th DCA, 4D13-1726, 8/6/14)

No Due Process Violation In Testifying Regarding Incriminating Surveillance Video That Had Been Inadvertently Overwritten By Owner

Yero was convicted of grand theft third degree for stealing a woman's wallet in a restaurant. The victim was on vacation in Islamorada, Florida and hung her purse over the back of her chair at the restaurant. Inside her checkbook-type wallet was $2500 cash and several credit cards. Only one patron, Yero, approached the woman and her fiancé that evening. He stood between them for several minutes then left to buy the couple drinks, pay his tab and depart the restaurant. About 5 minutes after Yero left, the victim discovered her wallet was missing and a deputy arrived shortly thereafter. The victim, her fiancé, and the deputy viewed the restaurant's surveillance video which showed Yero approaching the couple without a bulge in his pocket, but after he had postured himself near the victim's purse, as he left a bulge matching the size and shape of the victim's wallet could be seen. The video showed Yero leaving the restaurant for a moment, then returning. When he returned the object causing the bulge was no longer visible and the bulge was gone. A search of the bar and restaurant did not produce the wallet or its contents.

Although the deputy directed the restaurant manager to save the video, the manager neglected to do so, and after five days, the video of Yero and the couple was over-written. The deputy, the victim and the fiancé were allowed at trial to testify as to what they saw on the video. Yero was convicted by the jury. He appealed, claiming he was denied his 6th Amendment right of confrontation and that due process was denied when the court allowed testimony about a video Yero could not view, and that the testimony should not have been allowed at trial.

The 3rd DCA rejected Yero's claims. First, the missing evidence was not "materially exculpatory" as is necessary for a potential denial of due process, citing *State v. Bennett* , 111 So.3d 943 (Fla. 2d DCA 2013). The testimony of the witnesses indicated the video was incriminating, not exculpatory. As to the alleged 6th Amendment violation, the court noted the right does not encompass physical evidence, so any claim of prejudice must be evaluated as to whether Due Process has been denied.

The court noted that at trial there was no specific objection to the three witnesses testifying as to what the video had portrayed. The best evidence rule, formalized at F.S. 90.954(1), allows an exception to the normal requirement of the original when "all originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith." There was no bad faith in the over-write of the video at the restaurant. Since the video was not exculpatory and since the failure to preserve the video was not by reason of bad faith, the DCA found that the trial court properly denied Yero's motions.

Yero v. State, 138 So.3d 1179 (Fla. 3d DCA, 5/21/14)

Two Juveniles "Sort Of Prowling" In A Controlled Access Apartment Complex Parking Lot Did Not Support Arrest For Loitering & Prowling

Police received a report of a possible burglary of a vehicle at an apartment complex. After entering the complex through the manned security gate, an officer patrolled the area. T.B. and another male were seen walking between two buildings. At the hearing the officer indicated they exhibited a "sort of prowling demeanor, kind of creeping slowly between two building, kind of looking around." The officer directed them to "stop for police." They did so. When questioned the boys admitted they had scaled a wall at the edge of the complex on their way home from a party since cutting through the complex was a shortcut. T.B. was frisked and a scarf and pliers were in his pants pocket. He was arrested for Loitering and Prowling (L&P). The state charged him with violating his probation by committing the offense of loitering and prowling. The judge found he had violated the probation by committing the L&P. T.B. appealed, claiming there was an insufficient basis to support the L&P conclusion which resulted in his probation violation.

The 4th DCA agreed with T.B. The court noted that factors must reasonably warrant a finding that a breach of peace was imminent or the public safety is threatened in order to support and L&P arrest. Merely failing to provide identification or a reasonable explanation for questioned activity is not, by itself, enough to support an L&P arrest. The court deemed T.B. and his friend's activities as nothing more than "vaguely suspicious" and not rising to a level to support a reasonable L&P arrest. The trial judge should have granted T.B.'s motion to dismiss the charge. Reversed and remanded.

T.B. v. State, --So.3d—(Fla. 4th DCA,4D12-3730; 4D12-3729, 6/18/2014)

Trial Court Could Not Order Money Found On Defendant When He Was Arrested Be Applied To Outstanding Fines and Court Costs Without Following Appropriate Procedure

Sanchez is serving a 69 month prison sentence for trafficking in illegal drugs. While that conviction was on appeal he filed a motion seeking the return of $1277 that was found in his pocket when he was arrested. The Manatee County Sheriff's Office responded to the motion, asking the court to apply the funds to Sanchez's court costs and fines in the trafficking case. The ruling was stayed until the appeal was resolved. When the appeal became final, Sanchez renewed his motion. The Manatee County Clerk of Court filed a response asking the money be applied to Sanchez's court obligations. Without holding a hearing on the matter, the court entered an order applying the funds to those obligations.

The 2nd DCA acknowledged that a trial court's jurisdiction over a criminal proceeding includes inherent authority over property seized or obtained in connection with the proceeding. This authority extends beyond the termination of prosecution, enabling a court to direct the return of the property to its rightful owner. When a defendant seeks return of seized property, the procedure set out in *Bolden v. State,* 875 So.2d 780 (Fla. 2d DCA 2004) must be followed. First, the court must decide if the defendant has filed a facially sufficient motion which alleges the property at issue is his personal property, not fruit of a crime and not being held as evidence. The motion must specifically identify the property at issue but need not establish proof of ownership in order to allege a facially sufficient claim for return of the property. If the motion is sufficient, the court may order the State to file a response. The court should then either deny the motion, attaching portions of the record that specifically refute the claim or hold an evidentiary hearing on the motion. To dispose of property that a defendant has sufficiently established as his own without holding a hearing denies the defendant due process. See: *Williams v. State,* 35 So.3d 142 (Fla. 2d DCA 2010).

In Sanchez's case, the court did not find his motion to be facially insufficient, and disposed of the property without giving Sanchez a hearing. The order denying Sanchez's motion was reversed and the matter remanded to be handled in a manner consistent with the procedure stated in the opinion.

Sanchez v. State, --So.3d--, (Fla. 2d DCA, 2D13-1777, 6/30/14)

Defendant's Appearance At Meeting Place (Restaurant) With A Box Of Candy For Undercover Detective's Fictitious Child And With Two Boxes Of Condoms Were Merely "Preparatory" And Not Overt Actions To Support Attempt

FDLE and local agencies engaged in a sting operation designed to "identify individuals who may be online seeking to sexually exploit children" in a manner to focus on adults seeking to be "sexual mentors" of children. A fictitious "Cindy" who was described to be 35 years old and single, with a ten year old daughter, "Sabrina" was developed. "Cindy" placed an ad in Craig's List, seeking to lure perpetrators to an undercover residence in Zolfo Springs for the purpose of engaging in sexual conduct with "Sabrina." ("Single Mom Looking for Family Fun…w4m…single mom with a 10yo daughter and we are both nudists…seeking family fun. Must be discreet and DD. Email if interested.") Within 15 minutes of the ad's posting, the Defendant, Mizner, responded to her ad. ("Hello cindy…how are you…I am interested…I like hanging out nude.") "Cindy" replied emphasizing "family fun" with "My daughter and I." Over the next 3 or 4 days, they communicated Mizner's primary focus on "Cindy" was expanded to include "Sabrina" and he agreed to become "Sabrina's" sexual mentor to teach her about sex.

Normally the meeting of those who respond to such ads is at the undercover house, but Mizner had no car and they made plans for an initial meeting on a Friday morning at a restaurant in Sarasota just off I-75. If all went well, "Cindy" would drive Mizner to her "home" 60 miles away in Zolfo Springs where they would spend time together until they could pick up "Sabrina" after school. They were to see if things went well, and if so, he was to stay with them over the weekend. Mizner as at the restaurant at 10:30 AM, when "Cindy" (an undercover Sarasota County Sheriff's Deputy) arrived. Mizner got into "Cindy's" car, asked for a hug and was arrested as officers moved in on him. To keep up the charade, "Cindy" was also "arrested." Mizner had in his possession at

the time of his arrest a box of candy for "Sabrina" and two boxes of condoms, which he had bought as directed by "Cindy" prior to their meeting.

In his post-arrest interviews, Mizner indicated he had no intent to engage in sex with "Sabrina." He said "No way, I have a conscience. I have daughters." He characterized his meeting with "Cindy" as a type of "blind-date." He was 41 years old, having lived and worked in another state. He had just moved to Sarasota after a breakup with a woman who had shared a relationship with him for over fifteen years. Although not married, he had fathered two daughters with his former partner. He was unable to find employment in Sarasota and was living with a relative. He had no criminal convictions other than for DUI about ten years earlier, had no prior involvement with child pornography or pedophilia, and had begun to drink heavily by reason of his break-up. His instant messages and phone conversations with "Cindy" did not display a reluctance to become involved with "Sabrina" and explicitly mentioned sex conduct between Cindy, Sabrina and him. He was convicted at trial of (I) soliciting a parent to consent to sex with a minor; (II) traveling to meet a minor; (III) unlawful use of a two-way communications; and (IV) attempt to commit sexual battery by a person eighteen years of age or older upon a child less than twelve years of age.

The DCA deemed the purchase of the candy and condoms to be preparatory actions rather than over actions leading to the attempt. "Cindy" had made the meeting conditional. They were to meet at the restaurant, and if things went well, she would take him to Zolfo Springs. Either was free to "walk away" if things did not work out well. A decision by both was necessary before he would be introduced to "Sabrina." That meeting required a 60 mile drive. They would have to pick up Sabrina from school, have dinner and then move forward with the "sexual mentoring" if the meeting was satisfactory to all involved. The factors lacked a realistic expectation of imminent contact with the minor. Mizner's judgment of conviction on count IV (attempt) was reversed.

In accordance with other 2d DCA opinions, the court found that Counts I and III merged and separate convictions violated Double Jeopardy. The judgments and sentences on these two offenses were vacated. The final count (II), traveling to meet a minor, was affirmed.

Mizner v. State –So.3d—(Fla. 2d DCA, 2D13-1917, 7/30/14)

Officer's Testimony About What He Overheard When Defendant Was Speaking To A Psychotherapist In Hospital Waiting Room Properly Excluded From Trial

The defendant spoke to a psychotherapist at an emergency room during an examination in the presence of an officer who was guarding him. He had attempted to admit himself into the hospital after stabbing his dog to death. A deputy had responded and he had been arrested for felony cruelty to animal. He was interviewed by the therapist as part of the regimen to see if he was safe for transport to the jail. The deputy was present to guard the medical staff and to keep the defendant secure. During the interview the defendant said he was there because he had "stabbed my dog." The state sought to have the deputy testify about the comments made to the therapist. The 4th DCA characterized the issue as one of first impression in Florida and moved to resolve the question:

May a law enforcement officer testify about a conversation overheard between an arrestee he is guarding and the psychotherapist treating that person?

Although the general rule is that testimony of a third party who overhears confidential communications is admissible (*Proffitt v. State,* 315 So.2d 461 (Fla. 1975), the presence of a third party who witnesses a statement to a psychotherapist does not automatically waive the privilege. To determine whether the presence of a third party destroys the privilege, the court must consider the surrounding circumstances and why the third party was present. For example, persons required to provide mental health treatment may be present without destroying the privilege. In the case at hand, the presence of the deputy was necessary for the "transmission of the communication" (as mentioned in F.S. 90.503(1)(c)2) to occur. The deputy's presence during the mental health exam in the E.R. was not voluntary nor could the Defendant have an option to request a private interview with the therapist. To allow the deputy to testify would mean the defendant had to surrender his right against self-incrimination to obtain a necessary medical diagnosis and treatment. This would be unreasonable. The trial court's order excluding the Defendant's statements to his psychotherapist was affirmed.

State v. Topps, 142 So.3d 978 (Fla. 4th DCA, 4D13-3256, 7/30/14)

State Failed To Establish Church Was Regularly Meeting At Time Defendant Charged With Sale Of Oxycodone Within 1000 Feet Of A Church

Defendants Lemaster and Wilder were found guilty of selling oxycodone within 1000 feet of a church and possession of oxycodone. Lemaster and Wilder separately challenged their convictions. The 4th DCA reversed his "within 1000 feet" conviction because the state failed to show the church was "regularly conducting services" at the time of the behavior. The trial occurred in March, 2013. The pastor of the church testified that the church was currently having services on Sundays, Wednesdays and Thursdays. He produced a photo of the church in 2012 and testified that was the condition of the church as it was in November, 2011 when the sales occurred. The pastor failed to testify that services were regularly occurring in November, 2011. The DCA noted the proof by the state showed the church had regular services in 2013 and that it looked like the church in the photo in 2011, but was devoid of any indication of "regular services" when the sales occurred in November, 2011. The convictions for the "1000 feet" offense were reversed, but the defendants could be sentenced for simple sale of oxycodone.

Wilder v. State, --So.3d--, (Fla. 4th DCA, 4D13-1865, 7/30/14)
Lemaster v. State, -- So.3d--, (Fla. 4th DCA, 4D13-1727, 7/30/14)

Consensual Stop Became Detention When Deputy Placed Hands On Defendant's Chest To See If His Shirt Was Hot Or Cold And Whether He Had A High Heart Rate After A Robbery

On 12/22/10 the defendant entered a food mart wearing a bright-yellow knit face mask and carrying a black handgun. He demanded money that was placed in a bag that resembled a lady's purse. A witness across the street observed the robbery and called 911. He then followed the defendant as he left the store area. At one point the defendant turned around and yelled for the witness not to call the police, allowing the witness to get a good view of him. Police responded, but did not locate the defendant.

On 12/28/10 the defendant entered the same food mart wearing a black shirt and trousers, a face mask and gloves. Brandishing a firearm, he demanded money, which was placed in a bag the defendant placed on the counter. He left, going in the same direction as he had on 12/22. A deputy arrived, learned of the defendant's description and direction of travel and issued a BOLO. He began searching for the suspect. Seeing a male that matched the physical description but wearing different clothing, the deputy shined his searchlight on him. The person did not seem startled and did not take flight. The deputy continued on.

A second deputy was participating in a perimeter sweep in his marked patrol car with its emergency lights engaged. He saw the defendant, who looked over his shoulder at least twice as the police car approached. No one was walking in the area at the time. The deputy blocked the defendant's path, exited his car and said, "Hey, come over here; I'd like to talk with you." The defendant complied.

Upon making contact, the deputy placed his hands on the defendant's chest and back to see if his heartbeat was elevated and whether his shirt was hot or cold. The defendant said his cousin had dropped him off at home to get some money and he was walking back to a McDonald's to meet his cousin. Feeling he had reasonable suspicion to detain the subject, he placed the defendant in the back of his patrol car to await a show-up.[6] The first deputy arrived and recognized the defendant as the man he had spoken to a few minutes earlier. He questioned him without giving him Miranda warnings and then decided to return to where he first encountered him. Searching bushes in that area, the first deputy found a brown glove, a navy-blue hooded sweatshirt, a checkered purse, a firearm, a yellow mask, and shoes. The Defendant's DNA was found inside the mask and on the gun. Weeks later, a witness identified the defendant from a photo lineup. He was charged with the second robbery.

The defendant moved to suppress the evidence, claiming the encounter was not consensual as a person would not believe he was free to leave. He argued there was no suspicion to support a detention. The state countered that the encounter was consensual and even if it was not, the evidence was to be inevitably discovered. The motion was denied. Defendant was convicted at trial, sentenced to 15 years, with a 10 year minimum for use of the firearm, five consecutive years on aggravated assault with a 3-year minimum for possession of a firearm. He appealed.

[6] At the suppression hearing the deputy said he was not under arrest. The show-up did not result in a positive identification, but the defendant was arrested for curfew violation.

The 4th DCA found that the consensual encounter transformed into a detention when the deputy placed his hands on the defendant. The case was similar to Copeland v. State, 717 So.2d 83 (Fla. 1st DCA 1998) where the squeeze of a subject's pocket to determine what a bulge was (determined to be marijuana) transformed a consensual encounter to a detention without requisite suspicion. The DCA also dismissed the inevitable discovery argument, noting that the deputy would not have returned to search the bushes area had he not seen the defendant after he was detained by the second deputy. The DCA did indicated the trial court was correct in allowing evidence of the first robbery as "Williams Rule" evidence.

The admission of the Williams Rule evidence was affirmed, but denial of the motion to suppress was reversed. Remanded for proceedings consistent with the opinion.

Lewis v. State, --So.3d.—(Fla. 4th DCA, 4D12-4587, 7/23/14)

Smelling Odor of Marijuana On Juvenile Provided Officer Sufficient Probable Cause To Arrest and Search Him

A juvenile judge suppressed evidence seized from J.J. and the state appealed. The 4th DCA reversed the judge because the officer's detection of the odor of marijuana on J.J. generated probable cause to arrest and search. The officer observed a juvenile roll "either a cannabis filled cigar or a tobacco filled cigar" and then pass it around a small group, including J.J. who "handled" the cigar. As the officer approached the group she smelled a pungent smell of marijuana, especially emanating from J.J. When J.J. responded to the officer in a "disrespectful" and "confrontational" manner, the officer patted him down for safety and felt a large bulge she believed to be a quantity of marijuana.

The trial judge suppressed the marijuana on the theory that the search incident arrest preceded the arrest. Noting that a search incident an arrest must be either contemporaneous with or *prior to the actual arrest as long as probable cause for the arrest existed at the time of the search* (See: D.H. v State, 121 So.3d 76 (Fla. 3rd DCA 2013) citing Jenkins v. State, 978 So.2d 116 (Fla. 2008) the DCA found the officer's smell of marijuana provided probable cause to arrest J.J. and search him for contraband.

State v. J.J., --So.3d--, (Fla. 4th DCA, 4D13-4220, 7/23/14)

Use Of Deceased Victim's Suppression Hearing Testimony and Defendant's Rap Videos To Obtain Attempted-Murder Conviction Approved

The defendant appealed his conviction and sentence for attempt first-degree murder and other charges. The defendant and co-defendant shot at two people in a car while they were parked in a driveway, wounding victim one in the face and arm and injuring victim two by glass fragments caused by the shots. Several issues were raised in the case but of note, the 4th DCA approved use of victim one's testimony regarding a photo-lineup identification of the defendant given at a suppression hearing. In that hearing victim one gave a detailed account of the shooting. The motion to suppress was denied. Victim one was murdered four days after the suppression hearing. Despite defense arguments that it was being denied the right of cross-examination, the trial court admitted victim one's hearing testimony at trial, noting defense had ample cross-exam at the suppression hearing. In addition, rap videos of the defendant were admitted at trial and the DCA found no error since they were relevant to the commission of the crime. (See also: Faust v. State, 95 So.3d 421 (Fla. 4th DCA 2012). The admission of the testimony and rap videos was approved. However, because the trial court erroneously imposed concurrent mandatory sentences for possession and discharge of a firearm on two separate felonies, the case was remanded for corrected sentencing.

Wright v. State, --So.3d—(Fla. 4th DCA, 4D12-1124, 7/24/14)

Pain Clinic's Patients' Privacy Must Be Respected and Procedure Balancing Privacy Rights and Need To Address Criminal Activity Must Be Fashioned.
Order Sealing All Patient Records From State Attorney's Use Went Too Far.

This is a lengthy opinion, which should be reviewed by any agency legal advisor working on investigations of medical facilities when seizure of patient records is anticipated.

Medical records were seized prior to the filing of criminal proceedings pursuant to a search warrant during an investigation of persons allegedly operating an illegal pain management clinic. The trial court found the warrant should have articulated probable cause to seize each affected patient's record, and sealed the records. The 2nd DCA found the medical records were for patients who are not targets of the investigation and who have some statutory and constitutional right of privacy in those records, but that the there should be an approach that would allow the state to have limited access to those records for purposes of a criminal prosecution while assuring the access is essentially the least intrusive means of interference with the patients' rights of privacy.

In mid-2011, Pasco County Sheriff's Office investigated the Harbour Medical Group as an unlicensed pain-management clinic. Detectives observed the clinic from its parking lot, sent undercover officers into the clinic, and obtained information from nearby pharmacies. As noted in the affidavit for the search warrant, Dr. Crumbley at the clinic had written about 17,500 prescriptions for 1400 patients between November 1, 2009 and November 9, 2011. About 14,000 of those prescriptions were for "pain management clinic type medications." A warrant was obtained and executed in December of 2011. It authorized seizure of a broad array of business records at the clinic, including "patient medical records." At least 20 boxes of "patient files" were seized. Dr. Crumbley was criminally charged, including running a non-registered pain management clinic. The DCA noted that after the seizure of the medical records, the underlying statute was revised in a way that the patient records may have less relevance and that less information from those files may be needed for the state to prove its case under the statute as it existed prior to July 1, 2011. There remains, however, a need for access to and possible use of those records.

The DCA noted that both the Sheriff's deputies and the State Attorney's Office knew medical records required special handling, and that they were attempting to comply with procedures set out in State v. Rattray, 903 So.2d 1015 (Fla. 4th DCA 2005). A Memorandum of Law filed by the State in mid-April, 2012, indicated the patient records had not been reviewed yet, pending a privacy hearing set for April 30. The Memorandum indicated that 856 letters to patients notifying them of the seizure, warning them they might be possible targets of the investigation and notifying them of the privacy hearing set for April 30 had been sent. A few objections or responses to the letters were received. On April 30, at least two attorneys appeared for patients whose names were not fully disclosed. The only witness testifying was the deputy who signed the affidavit for the search warrant. He indicated that 208 of the 855 letters had been returned as undeliverable, including 8 patients who had died. Attempts to deliver to alternative addresses had been made ant that as of the hearing 116 letters were undeliverable. The DCA noted the deputy indicated that while the patients were not the focus of the investigation, if probable cause to believe they had committed a crime were to develop, they would be investigated. The deputy also indicated it had provided records to the Florida Department of Health's subpoena for records it was to use in its administrative proceedings. The record did not disclose what the Department of Health had received.

After the matter was shuffled between judges, Judge Linda Babb on the court's own motion entered an eight-page order requiring the Pasco Sheriff's Office to seal all seized patient medical records until further order of the court. The State Attorney's Office was ordered to notify all affected patience and deliver the original letters and objections received from all affected patients without retaining a copy. The record of the hearing in which the deputy testified was also ordered sealed. The trial judge's actions were based on its conclusion that the search warrant affidavit "lacked sufficient information about individual patients" so that there was no probable cause to seize the patient records. The judge indicated patient medical records can only be obtained by issuance of a subpoena in compliance with F.S. 456.057(7), choosing to follow the 2nd DCA's decision in Mullis v. State, 79 So.3d 747 (Fla. 2nd DCA, 2011). The judge also referred to the constitutional right of privacy found in Florida's Constitution at article I, section 23. The order provided no indication how the State might ever get access to the records that had been sealed.

The DCA found that the warrant did not require probable cause as to each patient. It noted the trial judge made mention of no probable cause "for the purpose of prosecuting patients." The DCA noted the records were sought for the purpose of prosecuting Dr. Crumbley, not individual patients. The DCA expressed concern that the prosecution of Dr. Crumbley not primarily be used to seek out and develop more significant cases against patients, but noted that concern should not defeat use of the records against Crumbley, but rather might serve as a basis for a motion to suppress filed by any patient ultimately prosecuted by reason of information in his or her medical files that were seized. The DCA compares and contrasts procedures and actions that are allowed under Mullis to Limbaugh v. State, 887 So.2d 387 (Fla. 4th DCA 2004). It found that the philosophy and procedures in State v. Rattray, 903 So.2d 1015 (Fla. 4th DCA 2005) which seek to assure third party patients' privacy rights need to balanced against the State's need to conduct criminal investigations should be applied. It noted that what was contained in the seized patient records, and what was necessary out of those records to support a

prosecution of Dr. Crumbley must be ascertained by the trial judge. "The court may conclude that it would be appropriate to appoint someone with a level of medical training as a special officer of the court to assist in the review of these records. It also noted that since undercover officers had been patients at the clinics, they presumably would have no objection to the use of the information in their patient files. It also suggested that law enforcement agencies might be ordered by the trial judge to contest any subpoena from other agencies for the affected records, requiring no such release absent a court order. Whether deputies violated privacy rights of third parties "is an issue that can be addressed in a civil court, and does not need to be addressed in this criminal case at this stage in the proceedings." The matter was remanded to the trial judge to proceed as directed.

State v. Crumbley, --So.3d—(Fla. 2nd DCA, 2D12-2882, 7/25/2014)

Online Communications and Match Of Online Photo To Driver Photo and Vehicle Registration Information Provided Sufficient Probable Cause To Support Arrest

A detective with the Citrus County Sheriff's Office was working as a "chat" person for a task force sting operation. On the first day, the detective posted a message on a dating website identifying herself the aunt of a 14 year old girl, stating they were interested in hanging out and having fun. "Big Blues 83" responded to the posting, sending communications that included what was represented to be a photo of him, and several sexually explicit email and instant messages. The "niece" asked if Big Blues 83 was coming over to her house, and they eventually settled upon having a first meeting at a Starbucks.

Police had matched the photo in Big Blues 83's email to a driver license photo, and had obtained vehicle description information based on that match. The photo and vehicle information was provided to the take-down team located near the Starbucks. When Big Blues 83 arrived at the Starbucks at the appointed time and in a vehicle registered to him, he was arrested.

The trial court suppressed all evidence seized after the arrest, concluding the arrest was premature and that there was no proof of any crime having been committed. It also found the state had failed to prove "Big Blues 83" was the defendant, James Cartner. The 5th DCA disagreed. It cited the online communications as probable cause that solicitation (F.S. 847.0135) had occurred with the use of a computer to solicit the under-age "niece" to commit an illegal sex act. The communications demonstrated that the defendant was the first person to explicitly mention sex between the parties. Further, the match of the DL photo to "Big Blues 83" was sufficient to provide probable cause to arrest Cartner.

State v. Cartner, --So.3d—(Fla. 5th DCA, 5D12-4442, 7/11/14)

Officer Who Detained Juvenile For Truancy Conducted Illegal Search When He Told Juvenile To Empty His Pockets

R.A.S. had been reported missing from school. A deputy was driving in the juvenile's neighborhood, looking for him. Finding him, the deputy asked R.A.S. to come over and talk to him. R.A.S. told the deputy he was on his way to school. The deputy offered to give him a ride and R.A.S. accepted. The deputy then stepped out of his car and told R.A.S. to empty his pockets. R.A.S. emptied all but his back pocket. The deputy asked if he could do a "weapons pat-down" and R.A.S. agreed. The deputy felt a "squishy bulge" in that back pocket. When the deputy asked what it was, R.A.S. pulled out a baggie of marijuana. The circuit court denied the motion to suppress on the theory that R.A.S. voluntarily produced the pot after the deputy simply asked what was in the pocket. The 2nd DCA held that this discovery had been tainted by the earlier illegal search and seizure in the encounter with the deputy.

Law enforcement may take a truant into custody. (F.S. 943.13). Truancy is not a crime and custodial detention of a truant is not an arrest. The DCA held that the exceptions for warrantless arrest searches do not apply to this type of custody. While an officer may conduct a pat-down for weapons before placing someone in his patrol car, it cannot be a full search. By directing R.A.S. to empty his pockets, the deputy performed an unauthorized full search. That earlier illegal search had tainted R.A.S.'s consent to the pat down and the evidence discovered was "fruit of the poisonous tree." Even though the officer could have patted R.A.S. for weapons at the outset, he did not feel anything that resembled a weapon in R.A.S.'s back pocket. The sole basis for a pat-down of a truant being taken into custody absent indicia of criminal behavior is officer safety. The "squishy bulge" was not a weapon. The deputy had no legal basis to continue asking R.A.S. about what was in his pocket. The denial of the motion to suppress was reversed and case remanded for dismissal.

R.A.S. v. State, 141 So.3d 687 (Fla. 2nd DCA, 2D12-4998, 6/25/14)

Officer Keeping Wallet and Identification Card Before Asking If He Could Search Subject Plus Not Telling Subject He Could Refuse Made Consent Involuntary

After completing an unrelated traffic stop, a deputy began a consensual encounter with Lane, an 18-year-old high school student who was walking on the sidewalk nearby. The deputy turned off his patrol car lights and asked to speak to Lane. Lane agreed, and agreed to show the deputy his identification card and wallet. The deputy set them on the hood of his patrol car. He then asked if he could search Lane for weapons, something the deputy indicated he did for officer safety when speaking to people in street encounters. The deputy felt, and retrieved some loose pills in Lane's pants pocket. Lane said a friend had given them to him when he complained about having a headache. He did not have a prescription for the pills which were hydrocodone. At the suppression hearing, Lane indicated he did not feel free to leave during the encounter and that he did not get his wallet and identification card returned to him until he was released from jail. The circuit court did not agree with Lane and denied his motion to suppress. Lane pled, and then appealed.

The 2nd DCA reversed the trial court, citing cases that indicated the retention of identification during the course of further interrogation or search is an important factor in determining whether a seizure has occurred. (See: Florida v. Royer, 460 U.S. 491 (1983)). The Court found the facts similar to those in Horne v. State,113 So.3d 158 (Fla. 2nd DCA, 2013) in which an officer asked for consent to search without returning Horne's license and in which the court found that failure to return the license to convert the consensual encounter into a seizure. For the same reasons, the DCA found Lane's consent to search was not voluntary. Reverse, remanded, with directions to discharge Lane.

Lane v. State, --So.3d—(Fla. 2nd DCA, 2D13-2656, 8/22/14)

Subject's Unsolicited Offer (While Cuffed, In Patrol Car) To Show Officers Where A Gun Was Located As Officers Were Searching For It Severed Any Causal Link Between The Evidence Discovered And Any Prior Unlawful Police Conduct

The 4th DCA characterized the issue in this case as one of first impression in the state. Pursuant to an open warrant on a charge unrelated to this case, Officer Seltzer arrested the defendant outside a motel efficiency apartment where he lived with his girlfriend and children. The defendant was a suspect in the murder and robberies at issue in the appeal. The officer searched the defendant's motel room and found ammunition. Backup officer Reynolds and Assistant Chief Smith then arrived.

At the suppression hearing Reynolds and Smith testified because Seltzer had died. They testified that Seltzer told them he had oral consent for the live-in girlfriend to conduct the first search. When he arrived, Smith told Reynolds to get written consent from the girlfriend to search the room again for a firearm. The written consent was obtained and the search was done by Smith and Seltzer.

Officer Reynolds was standing next to the patrol car in which the handcuffed defendant had been placed. The defendant express concern that his girlfriend would be arrested and the children would be placed in the custody of the Department of Children and Families. Officer Reynolds did not respond to his comments. Soon thereafter, the defendant made the unsolicited offer to "Show them where the gun is." Reynolds brought the defendant to the room, and the defendant directed the officers to a satchel containing the firearm and additional ammunition.

The trial court denied the motion to suppress, finding that the girlfriend had made a valid third-party consent. The defendant was convicted of first degree murder and this appeal followed. The DCA focused on the unsolicited offer by the defendant to show the location of the firearm as being the critical factor in the consideration of whether the evidence could be admitted. The state argued, and the DCA agreed, that this solicitation to assist broke any chain of arguable illegality regarding the first or second room search[7]. Citing cases from other states in support of its conclusion, the DCA held that under the totality of circumstances the defendant's unsolicited offer to show the police the location of the firearm severed the causal connections between any unlawful police conduct and discovery of the evidence. It also noted the defendant had the opportunity to refute or repudiate the girlfriend's consent to the second search but instead endorsed that consent by offering to assist in locating the gun. The defendant's concerns about his girlfriend and children had not been introduced or encouraged by the

[7] The defendant was arguing that since Seltzer was dead and could not testify, there was no evidence as to where the ammunition was found in the first search, and whether it was located in an area over which the girlfriend could have consented.

officers. The officers were under no obligation to assure the defendant his girlfriend would not be arrested. Even though the defendant was in handcuffs, there was no evidence of a coercive atmosphere to prompt the defendant's offer. The offer was not mere acquiescence to authority.

Henderson v. State, --SO.3d—(Fla. 4th DCA, 4D11-1533; 4D11-3737, 8/13/14)

Consent Of Relative Who Leased Apartment For Police To Search Subject's Bedroom Was Valid, But Did Not Extend To Subject's Jacket

Ancrum was staying with a relative in her three bedroom apartment. He had been there with the relative and her children for a couple of weeks. He provided some money for expenses but was not paying rent. The relative and the children had access to the bedroom Ancrum was staying in. Police arrived to arrest Ancrum. He was sleeping in the bedroom. The relative permitted police into the apartment and into the bedroom. Ancrum was pulled off the bed onto the floor, and arrested. After he was removed from the room, the relative consented to a search of the room. In the closet, a cigarette pack was on the floor. Officers retrieved it, searched it and found crack cocaine inside it. In a jacket on the bedroom floor officers found marijuana and paraphernalia. Ancrum was charged with possession of cocaine with intent to sell within 1000 feet of public housing, possession of cannabis and possession of paraphernalia. He was also charged with possession of a firearm with an altered serial number. The gun fell out of the bed as the officers arrested him. He did not challenge the seizure of the gun and it is not an issue in the appeal.

Ancrum moved to suppress, and the court denied his motion. He argued that his relative did not have authority to consent to a search of the bedroom he was occupying. The trial court held that the relative had authority to consent to a search of the bedroom, and that the cigarette pack was within the scope of the consent. The trial court found the jacket search was "incident arrest" and within the "wing span" of the defendant. On appeal, the 2nd DCA agreed that the relative could consent to the search of the bedroom since the defendant had taken no steps to exclude her or her children from the room. The DCA approved the search of the cigarette pack since it was on the floor of the closet and was not in clothing or other items uniquely possessed by the defendant. The cocaine was found to have properly been seized. However, the DCA disagreed that the jacket was legally searched incident arrest. It noted that the jacket was on the floor, but that there was no testimony that the jacket was within the "wing-span" of the defendant. He had been sleeping, and was dragged onto the floor. There was no indication the jacket was within his reach or subject to his possible attempt to hide or destroy evidence. The marijuana and paraphernalia should have been suppressed. The cocaine related, and the firearms convictions were affirmed. The cannabis and paraphernalia convictions were reversed.

Ancrum v. State, -- So.3d—(Fla. 2nd DCA, 2D13-5329, 9/3/14)

Error To Summarily Deny Facially Sufficient Motion For Return Of Property Without Either Conclusively Refuting Claim Or Holding Evidentiary Hearing

In this matter, the State conceded that because Robertus Oom's motion for return of property was facially sufficient, the trial court should have either conclusively refuted Oom's claim or held an evidentiary hearing. Agreeing with the State's concession, the 1st DCA cited several cases in support of this determination: Wilson v. State, 121 So.3d 1175 (Fla. 1st DCA 2013); Dawson v. State, 104 So.3d 1290 (Fla. 2nd DCA 2013) and West v. State, 35 So.3d 175 (Fla. 2nd DCA 2010). The trial court's order denying Oom's motion was reversed, and the trial court was directed to either refute or conduct the evidentiary hearing.

Ooms v. State, 138 So.3d 565 (Fla. 1st DCA, 1D13-3539, 5/5/14)

It Was Error To Grant Sheriff's *Ore Tenus* Motion For Entry Of Judgment Of Forfeiture Made At Defendant's Motion To Suppress As The Motion Was Not Properly Noticed For Hearing

Mostowicz was arrested for drug trafficking in August of 2010. $16,725 was seized in conjunction with the arrest. While the criminal cases in both state and federal court were pending, the Broward Sheriff's Office (BSO) initiated proceedings under the Florida Contraband Forfeiture Act (FCFA). The trial court found probable cause to seize the cash and maintain the FCFA action. Mostowicz responded by filing a motion to suppress his statements and evidence. According to the DCA opinion, it appears he was arguing that if his arrest was illegal and evidence derived from the arrest was suppressed, the BSO could not establish grounds for forfeiture by clear and convincing evidence.

At the hearing on the motion, the BSO made an *ore tenus* motion for entry of judgment of forfeiture. The trial court dismissed the motion to suppress as moot and granted the BSO's motion for entry of judgment of forfeiture. The 4th DCA held this was error because the motion was not properly noticed for hearing. The DCA also noted the Final Order of Forfeiture expressly relied on a plea agreement between Mostowicz and the federal government, in which he waived any rights to the confiscated funds. The DCA indicated that on remand the trial court should consider the federal government's potential claim to the cash, as this might preclude forfeiture of the funds to BSO. A concurring opinion pointed out that the plea agreement in federal court did not mention the State of Florida or BSO.

Mostowicz v. Israel (Broward Sheriff), 142 So.3d 976 (Fla. 4th DCA, 4D13-2055, 7/23/14)

Trial Court Lacks In Rem Jurisdiction Over Out-Of-State Bank Accounts And Out-Of-County Seized Automobiles For Purposes Of Florida Contraband Forfeiture Act

In March, 2013, the Seminole County Sheriff's Office seized 23 bank, investment and insurance accounts in other states, including New York, Oklahoma, Missouri, Iowa and Indiana. As reported by the 5th DCA, none of the accounts "were located in Florida." Four automobiles, two in Volusia County, one in Pinellas County, and one in Duval County were also seized by the Seminole County SO. At a requested adversarial preliminary hearing under the Florida Contraband Forfeiture Act (FCFA) the appellants sought return of their property, claiming there was no probable cause for seizure and that the trial court lacked in rem jurisdiction over the seized property. The trial court denied the motion.

The DCA reviewed the denial. It noted that a Florida trial court has no in rem jurisdiction over foreign property. In this case, because the bank accounts are located in foreign jurisdictions, the trial court does not have jurisdiction over the property in the forfeiture proceedings.[8] The DCA indicated a law enforcement agency cannot wrongfully seize personal property outside one county and bring it back to the trial county so the court can exercise in rem jurisdiction. The DCA ordered the trial court to grant the motion to return the property. The DCA also granted Appellants' motion for attorney's fees and remanded to the trial court to determine the amount. The issue of whether damages for not proceeding in good faith are due Appellants was remanded for further proceedings to determine whether such damages are due.[9]

Burns, Et. Al. v. State, --So.3d--, (Fla. 5th DCA, 5D13-1724, 8/1/2014)

Seizure of Vehicles Invalidated Because Even Though There Was Probable Cause To Believe Vehicles Were Acquired With Proceeds Of Violation of Gambling Laws, Such Violation Is Not *Per Se* A Violation Of Florida Contraband Forfeiture Act.

In early 2013 the state seized various assets owned by the defendants/appellants, including motor vehicles. Seizure was based on their alleged involvement with the Allied Veterans of the World criminal enterprise, which allegedly conducted an illegal gambling scheme throughout Florida involving operation of "internet sweepstakes cafes" that were alleged to be illegal gaming rooms.

In support of a forfeiture of assets under the Florida Contraband Forfeiture Act (FCFA) an adversarial hearing to establish whether there is probable cause to believe the property "was used, is being used, was attempted to be used, or was intended to be use" in violation of the FCFA (F.S. 932.703(2)(c)) is necessary. Among the statute's definitions of twelve types of "contraband" is "(a)n is "(a)n personal property…which was used, is being

[8] Editor's note: Unfortunately, the record and the appellate brief in this case failed to clarify that many of the seizures were made via service of warrants in Florida at branches of the involved banks that were sited within the trial court's jurisdiction. In some of the materials, the banks' corporate headquarters that were out of Florida were listed as the site where the "seizure" of funds occurred. As a result, the matter on appear was never clarified to show that for several seizures, branches of the bank within the circuit court's jurisdiction were where the warrants were actually served and from which funds were seized. This opinion is based on the facts presented in the record to the DCA, and several important factors were not preserved at hearing or on appeal that might have affected the outcome. I do not believe this appellate case can stand for the proposition that funds deposited in banks having their corporate headquarters outside Florida are "untouchable" for purposes of the FCFA. It still may be possible to establish a basis for in rem jurisdiction, if evidence and the record establish that the funds were seized from a Florida branch of a foreign bank. Arguably, any such funds are sited in Florida, not the bank's home corporate state. Even then, however, proof that the trial court has jurisdiction over the branch bank's site where the seizure occurred will be necessary.

[9] Editor's note: The matter was settled by the parties subsequent to the DCA opinion.

used, or was attempted to be used as an instrumentality in the commission of…any felon personal property…which was used, is being used, or was attempted to be used as an instrumentality in the commission of…any felony…or which is acquired by proceeds obtained as a result of any violation of the (FCFA)." F.S. 932.701(2)(a)5.

The 5th DCA indicated that the FCFA definition of "contraband" does not include proceeds acquired by any felony but rather only proceeds obtained as a result of a violation of the FCFA. It then found that there are five violations of the FCFA: (1) transporting contraband in a vessel, vehicle, or aircraft; (2) concealing or possession of contraband; (3) use of…vehicle…or other personal property or real property to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article; (4) concealing or possessing contraband article as instrumentality in commission or aiding or abetting a violation of the FCFA; or (5) acquiring real or personal property by the use of proceeds obtained in violation of the FCFA. (F.S. 932.702).

Citing Campbell v. Racetrack Bingo, Inc., 75 So. 3d 321, 323 (Fla. 1st DCA 2011) the 5th DCA found that the FCFA does not prohibit acquisition of property from proceeds from violation of gambling laws, nor does it subject such property to forfeiture. (See also Sheriff of Seminole County v. Oliver, 59 So. 3d 232, 234 (Fla. 5th DCA 2011), which held stolen checks could not be forfeited as traceable proceeds of a felony because they were not obtained as a violation of the FCFA.)[10]

The seizure of the vehicles was the sole basis of the reversal ordered by the DCA. The state failed to demonstrate the vehicles were instrumentalities or were acquired by proceeds obtained as a result of a violation of the FCFA. However, "Even if…they were acquired with proceeds of a violation of the gambling laws…(that) is not per se a violation of the FCFA" says the court, quoting Campbell, 75 So.3d at 323.

Waheed et al v. State, 134 So.3d 531 (Fla. 5th DCA, 5D13-1670, 3/7/14)

Evidence That Currency Is Not Forfeitable Since It Is Gambling Proceeds Falls Within Scope Of A Preliminary Adversarial Hearing

The procedures giving rise to the appeal in this case should be reviewed in the opinion itself. Sanchez ran two stop signs and was stopped. A smell of marijuana emanating from his car resulted in a search of the car during which a red paper shopping bag was seized containing $800 in loose cash along with "two blocks" of rubber-banded currency, each consisting of $5,000 in twenty-dollar bills. Believing the money to be proceeds from drug sales, the officer questioned Sanchez. Sanchez indicated he had won the money at the dog track, then changed

[10] F.S. 932.701 defines "contraband" in part as: Short title; definitions.—
(1) Sections 932.701-932.706 shall be known and may be cited as the "Florida Contraband Forfeiture Act."
(2) As used in the Florida Contraband Forfeiture Act:
(a) "Contraband article" means:
1. Any controlled substance as defined in chapter 893 or any substance, device, paraphernalia, or currency or other means of exchange that was used, was attempted to be used, or was intended to be used in violation of any provision of chapter 893, if the totality of the facts presented by the state is clearly sufficient to meet the state's burden of establishing probable cause to believe that a nexus exists between the article seized and the narcotics activity, whether or not the use of the contraband article can be traced to a specific narcotics transaction.
2. Any gambling paraphernalia, lottery tickets, money, currency, or other means of exchange which was used, was attempted, or intended to be used in violation of the gambling laws of the state.
3. Any equipment, liquid or solid, which was being used, is being used, was attempted to be used, or intended to be used in violation of the beverage or tobacco laws of the state.
4. Any motor fuel upon which the motor fuel tax has not been paid as required by law.
5. Any personal property, including, but not limited to, any vessel, aircraft, item, object, tool, substance, device, weapon, machine, vehicle of any kind, money, securities, books, records, research, negotiable instruments, or currency, which was used or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony, whether or not comprising an element of the felony, or which is acquired by proceeds obtained as a result of a violation of the Florida Contraband Forfeiture Act.
6. Any real property, including any right, title, leasehold, or other interest in the whole of any lot or tract of land, which was used, is being used, or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony, or which is acquired by proceeds obtained as a result of a violation of the Florida Contraband Forfeiture Act….
* * * *

his story and claimed he had won it playing poker at a friend's house. Since residential gambling is illegal, the officer seized the cash. An additional $365 was on Sanchez's person, found incident the arrest.

At hearing, Sanchez denied making any indication the money was from poker. He indicated he was a professional gambler and had won the money at the Palm Beach Kennel Club. For reasons indicated in the opinion, the trial court had a second hearing and after the City of West Palm Beach objected, the court refused to allow evidence of Sanchez's alleged "dog track winnings" to be admitted at the preliminary adversarial hearing. As a result, the evidence at hearing consisted mainly of unrebutted proof that the money was from illegal (poker) gambling. The 4th DCA indicated Sanchez should have been allowed to introduce his side of the story. The DCA indicated it made no sense to force the opposing party at an "adversarial" hearing to remain mute when he offers proof to rebut an agency's claim of a statutory violation. Sanchez's evidence of his professional gambling occupation, gambling receipts, racing programs, and testimony of Kennel Club employees fall within the scope of the adversarial hearing and should have been allowed as they were directly relevant to the question of whether the currency seized was the product of illegality at all. Remanded for a hearing consistent with holdings.

Sanchez v. City of West Palm Beach, --So.3d—(Fla. 4th DCA, 4D13-4819, 9/3/2014)

2nd DCA Specifically Rejects State v. Yoder, A 1986 Case That Suggested To Allow Medical Blood Test Showing Driver's Blood Alcohol Level Violates Law After Driver "Refused" Violates Double Jeopardy

Laws was involved in a motor vehicle accident and arrested for DUI. (His third offense in 10 years.) On a limited record presented it, the 2nd DCA found it undisputed that Laws refused taking a breath, blood or urine test. However, he was injured and was taken to the hospital. At the hospital, a blood test showed he had a serum blood alcohol level of "208." Laws moved to suppress any testimony based on the hospital blood test. The trial court denied his motion and Laws went to trial where he was convicted. The trial record was unclear whether the hospital blood test evidence was introduced in the trial or not, but defense exhibits suggested to the DCA that such testimony was introduced. The DCA noted that noting in sections F.S. 316.1932, .1933, or .1934 suggests that the commission of the misdemeanor of "refusing" requires suppression of relevant evidence in a criminal proceeding under F.S. 316.193. Laws argued to allow that evidence violates double jeopardy, relying on State v. Yoder, 18 Fla.Supp.2d 61. In Yoder, a defendant refused, was taken to a hospital, had his blood drawn in a manner not in compliance with F.S. 316.1932(1)(f) and the court granted his motion to suppress on the basis that to admit the evidence penalized the defendant twice for the same behavior. The DCA noted this line of reasoning had resulted in similar suppressions in nearly identical cases.

The DCA expressly disagreed with Yoder and its progeny and their position that the civil penalty that applies to a person's behavior after a traffic stop acts to bar a subsequent criminal prosecution for the earlier unlawful operation of a motor vehicle. Laws' conviction was affirmed.

Laws v. State, --So.3d—(Fla. 2nd DCA, 2D12-5955, 8/22/14)

End of DCA Summaries

Cases From Other Jurisdictions That Touch On Florida Issues:

Rhode Island Supreme Court Rules That Eyewitness Identification Photo Arrays Need Not Be Sequentially Presented To Witnesses

Over the last several Florida legislative sessions, the Innocence Project and others have advocated the mandatory use of sequential photo arrays administered by an investigator who has no knowledge of the case in which the photo array is being utilized. ("Blind administrator.") Florida law enforcement has opposed mandating this process, arguing in part that smaller agencies do not have enough available personnel to use "blind administrators", that there is no proof that sequential photo arrays are materially an improvement over the traditional "photo spread" array, and that a method of administering sequential arrays that has the administrator shuffled envelopes so that (s)he does not know which photo is being viewed by the witness helps assure the administrator cannot influence the viewing, thereby eliminating the need for a "blind administrator." Florida law enforcement guidelines for eyewitness identification photo procedures defers to each agency's chief administrator to establish his or her agency's policies and procedures.

The Supreme Court of Rhode Island recently considered whether there was a constitutional right to sequential photo arrays, and decided there was no such constitutional right. The primary consideration is the reliability of the identification itself, not the format's relative reliability with other possible procedures, the Court ruled. It also noted that the New Jersey Supreme Court reviewed hundreds of scientific studies on memory and eyewitness identification and concluded that "the science supporting one procedure over the other remains inconclusive." (See: State v. Henderson, 27 A.3d 872 (N.J. 2011).

State v. Gallop, 89 A.3d 795, (R.I., No. 2011-92-C.A., 5/2/14)
(Find Law hyperlink: http://caselaw.findlaw.com/ri-supreme-court/1665518.html)

7th Circuits Says Federal Prosecutors Could Prosecute Defendant Using State-Immunized Statement

The U.S. Court of Appeals for the Seventh Circuit has held that nothing stopped the federal government from convicting a defendant with statements about murder obtained from him via an immunity agreement with state authorities, who then turned around and asked the feds to use the statements to prosecute the defendant in federal court. The defense had argued that the state had made the federal government the state's agent when state prosecutors provided the feds with the defendant's compelled, immunized statements, and encouraged the feds to prosecute. The CA brushed aside the defendant's arguments that his due process had been denied by the actions of the prosecutors. The defendant also had an agreement with the feds to "cooperate with the United States…in its efforts to enforce federal law" but the Court said that statement given to the state authorities was not "pursuant to" the federal agreement. Federal prosecutors did not become state agents by receiving the statements and accepted the invitation to prosecute the defendant in federal court. Federal courts are divided as to whether the Fifth Amendment allows prosecutions based on an indictment that would not have been sought in the absence of statements compelled form the accused. The 7th C.A. permits it. The "silver platter doctrine" prohibition articulated in Elkins v. United States, 364 U.S. 206 (1960) did not apply. That case says federal agents cannot use evidence from a state search if that search would have violated federal law if conducted by federal investigators. The Court noted the statements had already been provided to the feds before the state prosecutors began urging a federal prosecution, meaning the "silver-platter" argument was missing the but-for causation link.

U.S. v. Bryant, 750 F.3d 642 (7th Cir., No. 13-1578, 4/17/14)

Massachusetts: Warrantless Entry Of Home Upon Belief Animal Inside Needs Aid Approved

The emergency-aid exception to the Fourth Amendment's warrant requirement allows law enforcement officers to render emergency assistance to animals, the Massachusetts Supreme Judicial Court has held. It was a question of first impression for the court. The case involved dogs, and the Court noted the species of the animal in need can make a difference. In the case police got a call from the defendant's neighbors saying two dogs in the defendant's fenced yard were dead and a third looked emaciated. Police peered over the fence and saw three

dogs leashed to the fence, two apparently frozen to death and the other in bad shape. After unsuccessfully trying to contact the residents, the officers removed the lock on the gate, entered the curtilage (back yard) without a warrant and gathered evidence used to charge the defendant with animal cruelty. The trial court suppressed the evidence but the state high court reversed. The need to protect "life" extends to the life of animals. The court noted it would be illogical to have statutes to prosecute animal cruelty and abuse while hindering the ability of police proactively to prevent injury. The search exception permits police in certain circumstances "to enter a home without a warrant when they have an objectively reasonable basis to believe that there may be (an animal) inside who is injured or in imminent danger of physical harm." A factor to consider is whether the animal's condition was caused by human abuse or neglect. Another factor to consider is the species of the animal and whether property was damaged in making the entry as well as whether police sought to obtain consent before making the entry.

Commonwealth v. Duncan, 7 N.E.3d 469 (Mass. SJC-11373, 4/11/14)

Note: My review of Florida cases produced only one similar holding. In Brinkley v. County of Flagler, *769 So.2d 468, 472 (Fla. 5th DCA, 2000) the apparent distress of a large number of dogs made it reasonable to conclude "that an urgent and immediate need for protective action was warranted," which justified a warrantless entry onto property by a deputy and animal cruelty investigator .*

10th Circuit Says Passenger In Car Cannot Raise Objection To Warrantless Installation of GPS Device On The Vehicle

In U.S. v. Jones, --U.S.--, (2012) the U.S. Supreme Court held that law enforcement officers' placement of a GPS device on a private vehicle qualifies as a search for purposes of the Fourth Amendment's warrant requirement. The 10th Circuit held that the Fourth Amendment does not protect the privacy interest of a non-owner passenger in an automobile to which a GPS device has been attached. A passenger's expectation of such privacy is not reasonable, finds the court. In the case, police in Kansas installed a GPS on a car suspected of being used in bank robberies without a warrant. The next day another robbery was committed and the GPS data linked the car to the robbery. The car was pulled over. The defendant was a passenger in the car. Evidence found in the car was used to convict him of Hobbs Act robbery and federal firearms offenses. Noting that in Rakas v. Illinois, 439 U.S. 128 (1978) the Supreme Court had decided that a non-owner passenger in a car lacks a reasonable expectation of privacy in the interior of the vehicle, it appeared to the 10th Circuit court that the passenger in the robbery car also lacked a sufficient 4th Amendment interest to challenge the search. The defense tried to argue the stop of the car was "fruit of the poisonous tree" of the illegal installation of the GPS. The Court disagreed. The unconstitutional behavior was the installation of the GPS, not the subsequent stop. Regardless, the court indicated "the poisonous tree was planted in someone else's orchard" not the defendant's. It contrasted cases where initial illegal stops gave rise to illegal searches. Here an initial illegal search (GPS installation) led to a stop. That illegal initial search might have violated the owner's rights, but not those of the passenger/defendant.

U.S. v. Davis, 750 F.3d 1186 (10th Cir. 13-3037, 5/7/14)

(End Of Case Summaries)

A note to law enforcement officers about the impact of any reported cases:

In most situations, a criminal law or criminal procedure related decision by the United States Supreme Court will impact Florida law enforcement. Your legal advisor will provide guidance when the U.S. Supreme Court has issued an opinion affecting you and your agency.

Unless overturned or modified by the U.S. Supreme Court, all decisions rendered by the Florida Supreme Court are mandatory or "binding authority" on all state courts in Florida. Such opinions often affect Florida law enforcement. Again, your legal advisor will provide guidance when such cases are issued.

A decision of a District Court of Appeal (DCA) is binding on all trial courts within the geographic boundaries of the DCA's jurisdiction. In general, the decision will be treated by trial courts as controlling throughout the State if no other DCA has given its opinion on that particular issue of law. See: Pardo v. State, 596 So. 2d 665, (Fla.,1992) and Walters v. State, 905 So. 2d 974, Fla. 1st DCA 2005). A DCA first looks to see whether it has issued an opinion on the issue, or a very similar issue. A decision within the same DCA is given great weight. If the DCA has not ruled on an issue, the DCA will look to the other Florida DCAs to see if there is an opinion that will assist it in reaching its decision. However, a DCA is not required to accept another DCA's opinion on an issue, and if two DCAs disagree, the matter is usually certified to the Florida Supreme Court as a "conflict" for final resolution. If the DCA in your area issues a case affecting law enforcement, your legal advisor will provide guidance.

Cases out of the 11th U.S. Court of Appeals may impact state and local officers in Florida. Your legal advisor will provide guidance regarding such cases.

Cases from other states and U.S. Court of Appeals other than the 11th CA have no binding effect on Florida law enforcement officers and agencies. With the wide use of the internet, the "grapevine" may reveal a case from "somewhere else" that discusses criminal law or procedure. Do not assume the case from "somewhere else" impacts your operations. Discuss it with your legal advisor.

Sometimes new binding court opinions may require a change in agency operational procedures, policy or training approaches. These are matters to be implemented by your employing agency after a careful review of the opinion and its impact. Any question you may have whether a court case requires you or your agency to change how it conducts its mission should be resolved by your agency legal advisor and your agency command.

If there is a case in this summary that concerns you, locate and read the entire case. Do not rely solely on the summary for a full understanding of the case itself. Discuss it with your legal advisor or supervisors.

Let your agency legal advisor assist you in determining whether, and to what extent, any new opinion affects you and your agency.

Michael Ramage, October, 2014