00-03: A Review of Selected Cases Of Interest To Florida Law Enforcement (Opinions Issued 10/99 - 9/00)

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Florida Supreme Court Opinions:

1) Attempted second-degree murder

The crime of attempted second-degree murder does exist in Florida, the Florida Supreme Court held. By a narrow 4-3 margin, the justices rejected the appeal of Darnell Brown, who was convicted of attempted second-degree murder and argued on appeal that this crime is a nonexistent offense. The majority disagreed, citing the court's 1999 holding in Brady vs. State.

[Brown vs. State, 2000 Lexis 1977 (10/05/00)]

2) Non-disclosure of changed testimony

Nondisclosure of the fact that a witness changes testimony constitutes a discovery violation requiring a Richardson hearing, the Florida Supreme Court said. Bernard Evans was convicted of second-degree murder and unlawful possession of a firearm while engaged in a criminal offense. Evans contended, and the DCA agreed, that the trial court failed to conduct a proper Richardson hearing upon being advised that Sylvia Green, a key witness, had changed her testimony. The DCA also determined that when the trial court did finally conduct a Richardson hearing, it was legally inadequate. The DCA found that the state's discovery violation in Evans' case was "substantial and undeniably had a negative effect on defense counsel's ability to properly prepare for trial." The DCA's conclusion was in direct conflict with the Supreme Court's 1984 decision in Bush vs. State, in which the court held that a prosecutor's failure to inform the defense of a change in a witness' testimony was not a discovery violation and did not require either a mistrial or a Richardson inquiry. The Supreme Court approved the DCA's decision in Evans and clarified its statements in Bush regarding the nondisclosure of changed testimony.

"We determine that the State committed a discovery violation in this case by withholding from the defense the fact that Green had changed her original police statement to such an extent that she transformed from a witness who 'didn't see anything' into an eyewitness - indeed, apparently the only eyewitness - to the shooting," Justice Lewis wrote for the 5-2 court majority. "(T)he State's failure in this case to disclose ... the transformation of Green into an eyewitness was harmful because we cannot say beyond a reasonable doubt that the defense was not procedurally prejudiced by the violation."

[State vs. Evans, 2000 Lexis 1981 (10/05/00)]

3) Contributing to delinquency of minor

The Florida statute on contributing to the delinquency of a minor is not unconstitutionally vague even though the prohibited conduct or standard of conduct is not clearly defined, the Florida Supreme Court said. "...Nevertheless, while section 827.04(1)(a) may not be a paradigm of legislative drafting, well settled principles of statutory construction adequately respond to the alleged vagueness challenge," Justice Lewis wrote for the court.

[State vs. Fuchs, 25 FLW S680 (9/14/00)]

4) Validity of adopted "death penalty" constitutional amendment

The Florida Supreme Court invalidated a death penalty constitutional amendment approved by the voters in 1998, saying the ballot summary and language approved by the Legislature failed to let voters know specifically what they were voting on. The court, by a 4-3 majority, rejected the Secretary of State's argument that the voters' approval of the amendment "cleansed" the amendment of any defects. The amendment revised article I, section 17 of the Florida Constitution dealing with excessive punishments, changing the way in which "cruel and unusual punishment" is viewed and preventing a death sentence from being reversed just because a method of execution may be invalidated. The court said the amendment "flies under false colors" by potentially misleading voters into believing they were promoting the basic rights of all Florida citizens, and said the ballot title and summary "give no hint of the radical change in state constitutional law that the text actually foments." Justice Shaw, writing for Justices Harding, Anstead and Pariente, explained, "... While any successive legislature is free to question the wisdom of the Founding Fathers and propose the striking of ... (any) basic right enumerated in the Declaration of Rights, that legislature must do so plainly, in clear and certain terms... (V)oters were not told on the ballot that the amendment will nullify the Cruel or Unusual Punishment Clause, an integral part of the Declaration of Rights since our state's birth. Voters thus were not permitted to cast a ballot with eyes wide open on this issue."

Chief Justice Wells and Justices Lewis and Quince wrote separate dissents. The Chief Justice expressed a "fundamental difference" with the majority over whether the court has the power to strike from the Constitution an amendment that the Legislature proposed and the voters approved based on the ballot summary and language: "If the Legislature misled the voters, I conclude that the remedy is at the ballot box - not in the Court. There is simply no constitutional authority for a judicial veto of a legislatively proposed amendment, just as there is no gubernatorial veto. ... I do not find in article V, which is the article of the Constitution which provides to the Court its power, any basis to conclude that the people have given to the Court the power to intercede between the people and their elected representatives when the Legislature proposes amending the Constitution by the constitutionally required supermajority."

[Armstrong vs. Harris, 25 FLW S656 (9/7/00)]

5) Admissibility of blood alcohol test report - "business record"

A blood alcohol test report that is offered as proof to establish an element of a criminal offense is admissible as a business record through the testimony of the hospital's record custodian, the Florida Supreme Court said.

James Baber challenged his DUI manslaughter conviction, arguing that his blood alcohol report was inadmissible without testimony from the laboratory technician who performed the test and testimony establishing the chain of custody. The Supreme Court concluded that its 1994 decision in Love vs. Garcia applies in criminal cases, and therefore the report was properly admitted as a business record through the testimony of the hospital's records custodian. The Court warned that defendants must be given a full and fair opportunity to contest the relevancy of such records before they are submitted into evidence.

[Baber vs. State, 25 FLW S639 (8/31/00)]

6) Broad definition adopted for RICO "enterprises"

Adopting a broad definition of what constitutes a Racketeering Influenced and Corrupt Organizations (RICO) enterprise, the Florida Supreme Court held that the state needs only to establish the existence of an ongoing organization that functions as a continuing unit. The justices rejected a defendant's argument for a more narrow definition requiring that the organization have an existence separate and independent from the pattern of racketeering in which it engages and a high degree of internal "structure," criteria previously utilized by Florida DCA's in cases such as Boyd v. State. The evidence used to establish the pattern of racketeering element of the Racketeering Influenced and Corrupt Organizations statute may also be the one used to establish the enterprise element, the court noted. "(R)equiring proof of an ascertainable structure would practically result in many instances in the State having to rely on a codefendant or an inside informant from within the criminal organization in order to prove its case. Without such direct evidence it would become extremely difficult, if not impossible, for the State to successfully prosecute members of a criminal enterprise under the narrow definition of enterprise," the court said.

[Gross vs. State, 25 FLW S555 (7/14/00)]

7) Constitutionality of statute re: driving without license

The Florida Supreme Court affirmed the constitutionality of the Florida law creating a third-degree felony when a person is convicted for the third time for driving with a canceled, suspended or revoked driver's license or driving privilege (DWLCSR). The court rejected the appeals of 12 separate drivers who claimed the law constituted an improper delegation of legislative power. The defendants alleged that, by allowing a court to withhold an adjudication of guilt, the Legislature had given the judiciary the authority to determine whether a third or subsequent offense would constitute a misdemeanor or a felony. "(I)t is clear that the Legislature intended that a 'conviction' for the purposes of (the statute) include both adjudicated DWLCSR offenses and DWLCSR offenses in which adjudication is withheld," the unanimous court held.

[Raulerson, et al., vs. State, 25 FLW S542 (7/13/00)]

8) Judge's role in plea bargaining - over state's objection

A sentence is not per se invalid where the trial court, over the state's objection, advises a defendant regarding the sentence that would be imposed pursuant to a plea of guilty and then accepts the defendant's subsequent plea, the Florida Supreme Court said.
In approving the 4th DCA's decision in State v. Warner, the justices reversed the 5th DCA's State v. Gitto decision, which held that a trial court has no authority to plea bargain with a defendant over the state's objection and no authority to sentence a defendant in reliance on such a plea. "A judge's preliminary evaluation of the case is not binding, since additional facts may emerge prior to sentencing which properly inform the judge's sentencing discretion. If the judge later determines that the sentence to be imposed must exceed the preliminary evaluation, then the defendant who has pleaded guilty or nolo contendere in reliance upon the judge's preliminary sentencing evaluation has an absolute right to withdraw the plea. However, a defendant who pleads guilty with knowledge of the sentence which is imposed agrees that the sentence is proportionate to both the offense and the offender," the court said.

[State vs. Warner, 762 So.2d 507 (Fla. 6/22/00)]

9) Unlawful stop to determine license status

When an officer unlawfully stops a motorist solely to determine whether he or she is driving with a suspended license, the officer's post-stop observation of the defendant behind the wheel must be suppressed, the Florida Supreme Court held.

The Defendant was stopped by a Palm Beach County police officer for the sole purpose of checking Perkins' driver's license. After it was discovered that the operator's license was suspended, he was arrested and charged with driving with a suspended license. The state conceded that the officer did not see Perkins commit any traffic violations or any other activity justifying a stop. In a footnote the Court observed, "When viewed in the context of driving with a suspended license, the observations by a police officer of a defendant following an unlawful stop can hardly be described as incidental to the criminal investigation."

[State vs. Perkins, 760 So.2d 85 (Fla. 4/27/00)]

10) Constitutionality of statute providing international jurisdiction

Florida's prosecutorial reach can extend into international waters to prevent a crime from going unpunished, the Florida Supreme Court said in upholding a portion of Florida's "special maritime criminal jurisdiction" statute. Matthew Stepansky, an American citizen, was charged with the burglary and sexual battery of a 13-year-old American citizen on board a cruise ship approximately 100 nautical miles off the Florida coast. Stepansky was charged in Brevard County, from which the cruise ship departed. Moving to dismiss the charges, he argued that Florida lacked jurisdiction because the crime occurred outside the state's territorial jurisdiction and because the prosecution was precluded by the Supremacy Clause of the U.S. Constitution. In a 5-2 ruling, the Supreme Court disagreed.
"Because neither the United States, any other state, nor the flag state has attempted to prosecute these crimes, Florida may prosecute Stepansky for burglary and attempted sexual battery in accordance with Florida's narrowly drawn statutory scheme. In this case, if the State were precluded from prosecuting Stepansky, this crime would go unpunished. We find that the prosecution by the State of Florida under these narrow circumstances is a reasonable application of the effects doctrine," the court said.

[State vs. Stepansky, 761 So.2d 1027 (Fla. 4/20/00)]

11) Constitutionality of Death Penalty Reform Act of 2000

The Florida Supreme Court unanimously held that the new Death Penalty Reform Act of 2000 is an unconstitutional encroachment on the court's exclusive power to "adopt rules for the practice and procedure in all courts." Several death row inmates asked the court to review the law, which was adopted by the Legislature in special session earlier this year to reduce the length of death penalty appeals. The inmates argued that the Supreme Court, not the Legislature, has exclusive jurisdiction over appellate filing deadlines and other aspects of Florida court procedures.
The Supreme Court agreed, finding most of the new law unconstitutional. In place of the statute, the court proposed new rules 3.851 and 3.852, which it said are consistent with the Legislature's intent that postconviction actions in capital cases be "carried out in a manner that is fair, just, humane and that conform to constitutional requirements."

[Allen v. Butterworth, 756 So.2d 52 (Fla. 4/14/2000)]

12) Supreme Court review of PCAs

The Florida Supreme Court, expanding its own two-decades-old holding, said extraordinary writs may not be used to seek review of any appellate court decision issued without a written opinion.
The court extended its 1980 holding in Jenkins vs. State, which prevented review of per curiam affirmances (PCAs) when the basis for the review request was an alleged conflict between the PCA and another decision.

[Grate vs. State, 750 So.2d 625 (Fla 10/28/99)]

13) Possession of burglary tools - must prove intent to use

A defendant cannot be convicted of possession of burglary tools unless the state proves he intended to use the tools in a burglary or trespass, the Florida Supreme Court said. "As the statute provides, the unlawful tools contemplated are those intended to be used to facilitate the burglary and not things used to commit other crimes after the burglary is complete," the court said. "The statute does not encompass ... any item that may be used to commit some other offense once the burglary has been accomplished, even if that 'other offense' is the offense that the defendant intended to commit once he had accomplished the burglary."

[Calliar vs. State, 760So.2d 885 (Fla 12/2/99)]

14) Drunk drivers presumed negligent

The state does not need to prove that drunken drivers who cause fatal accidents were negligent, for the fact that they were drunk and caused an accident is enough to convict them of DUI manslaughter, the Florida Supreme Court said. "If the person's normal faculties are impaired, that person will act accordingly and almost certainly will have a greater chance of causing an accident. Thus, imposing an additional 'simple negligence' element would appear to accomplish little."

[State vs. Hubbard, 751 So.2d 552 (Fla. 12/16/99)]

15) State driver's license division status as law enforcement agency

The state Division of Driver Licenses is an essential component of Florida's law enforcement efforts, and therefore evidence found as a result of erroneous information provided by the division cannot be used in a criminal prosecution, the Florida Supreme Court held. The sharply divided court ruled 4-3 that the exclusionary rule applies to errors committed by the division. A sheriff's deputy found contraband when he searched Stanley Shadler after a computerized check of division records showed that Shadler's license had been suspended. A trial judge correctly ruled that the contraband could not be used as evidence because the error was made by a "law enforcement" agency - the division. The case hinged on whether the agency is to be considered a part of law enforcement or simply an administrative agency. The dissent concluded that the division "is quite unmistakably an administrative agency," and so the exclusionary rule should not apply. The majority, however, said the rule does apply and should prompt the division to be more accurate with its records. "Surely, the Department of Highway Safety, above all others, will consistently strive to see that no mistakes are made and that no citizen is wrongfully subjected to an arrest or search predicated upon a mistake. That is, after all, the net effect of our ruling, to recognize that the government had no right, because of a mistake by the Department of Highway Safety, to seize and search one of its citizens. In the end, the government is discouraged from making such mistakes, and is only deprived of what it had no right to in the first instance."

[Shadler vs. State of Florida, 761 So.2d 279 (Fla. 1/6/00)]

16) Public records request after death warrant

A death row inmate who comes under a death warrant has no legal right to demand public records from agencies from which he did not seek public records before the death warrant was signed, the Florida Supreme Court said. While under a death warrant, Terry Sims sent public records requests to a number of agencies and individuals. The state argued that Sims' requests for production of public

records was overbroad because he failed to demonstrate that he had "previously" requested public records from these agencies and individuals, as required by Florida Rule of Criminal Procedure 3.852(h)(3). The Supreme Court agreed, concluding that Sims was not entitled to seek public records from a large number of agencies when he had not previously requested records from them. "The language of section 119.19 and of rule 3.852 clearly provides for the production of public records after the governor has signed a death warrant. However, it is equally clear that this discovery tool is not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for post-conviction relief. To prevent such a fishing expedition, the statute and the rule provide for the production of public records from persons and agencies who were the recipients of a public records request at the time the defendant began his or her post-conviction odyssey," the unanimous court said in an unsigned opinion.

[Sims vs. State, 753 So.2d 66 (2/8/00)]

17) Public records - participation in discovery

Clarifying a year-old discovery rule, the Florida Supreme Court said criminal defendants are deemed to have participated in discovery only when they request law enforcement records that are nonexempt as a result of a codefendant's participation in discovery. The court last year amended Rule of Criminal Procedure 3.220(a), Notice of Discovery, to trigger a reciprocal discovery obligation for a defendant who files a public records request under chapter 119, F.S., for nonexempt law enforcement records relating to the defendant's pending prosecution. After reviewing the change, the court became concerned that it could be read to apply to requests for law enforcement records that are nonexempt under chapter 119 other than those that are nonexempt because of a codefendant's participation in discovery. The court therefore clarified the rule language to ensure that the rule does not affect requests for nonexempt law enforcement records other than those made nonexempt by a codefendant's participation in discovery.

[Henderson vs. State, 763 So.2d 274 (Fla. 2/10/00)]

Survey Of District Courts of Appeal Opinions:

1) Vehicular homicide bars leaving scene of accident prosecution [2]

A charge of vehicular homicide/leaving the scene of an accident involving death bars prosecution for the charges of leaving the scene of an accident involving injury causing death while driving with a suspended license, pursuant to the double jeopardy doctrine, the 2nd DCA concluded.
Terranton Hunt challenged two of his convictions arising out of an automobile accident. Hunt was convicted of vehicular homicide/leaving the scene of an accident involving death; causing death while driving with a suspended license; aggravated fleeing and eluding; resisting an officer with violence; leaving the scene of an accident involving injury; and possession of cocaine. Hunt argued for the first time on appeal that the charge of vehicular homicide/leaving the scene of an accident involving death bars his prosecution for the charges of leaving the scene of an accident involving injury and causing death while driving with a suspended license, based on double jeopardy. The DCA agreed. "Hunt cannot be convicted of vehicular homicide/leaving the scene of an accident involving death and leaving the scene of an accident involving injury (because)...Hunt left the scene of only one accident," the DCA said.

[Hunt vs. State, 2000 Fla. App.Lexis 12693 (10/4/00)]

2) Attempt to make "end run" on plea agreement [5]

A defendant cannot pull an "end run" around a sentence that is part of a quid pro quo plea bargain by later seeking an order of mitigation to have the term reduced, the 5th DCA said.

The state appealed an order modifying J. Patrick Swett's sentence, which was imposed when he agreed to plead guilty to second-degree murder in order to avoid the possible penalties of a first-degree murder conviction. As part of the agreement, Swett was to serve a longer sentence than his accomplice. Within 60 days of sentencing, Swett moved for modification due to mitigation, arguing that the plea agreement did not require him to waive his right to seek modification and that numerous mitigating factors existed to support mitigation. The trial court then reduced Swett's sentence, but the DCA reversed. "(T)he plea was part of a deal whereby the prosecutor reduced the murder charge to second degree murder in exchange for the plea. The sentence was part of a quid pro quo and the defendant cannot accept the benefit of the bargain without accepting its burden," the DCA said. "Moreover, to permit the evasion of negotiated pleas and sentences by utilization of a Rule 3.800 motion in mitigation would discourage the state from entering into plea bargains in the future."

[State vs. Swett, 2000 Fla. App. Lexis 13086 (10/06/00)]

3) Violation of probation [5]

When resentencing a defendant after a probation violation, a trial court must use the scoresheet that was prepared at the time the defendant was originally sentenced, the 5th DCA said. Paul Harris appealed the trial court's finding that he violated the terms of his probation and three consecutive sentences of five years incarceration. Harris made several arguments on appeal, but the DCA only found merit in his contention that an illegal sentence was imposed after he was found to have violated probation. "Review of the scoresheet used in sentencing Harris after he violated probation indicates that a new scoresheet was prepared. The new scoresheet incorrectly includes Harris' conviction for three counts of aggravated stalking (counts I, II, and III in the original sentencing). The original scoresheet did not contain these offenses because they were appropriately scored on a different scoresheet," the DCA said.

[Harris vs. State, 2000 Fla. App. Lexis 13094 (10/06/00)]

4) Blood alcohol test - order suppressing results [4]

The mere odor of alcohol on a unconscious motorist's breath at an accident scene is insufficient to provide reasonable cause for an officer to have a blood sample taken involuntarily, the 4th DCA said. Dissenting, Judge Farmer wrote, "As I see it, the issue in this case is whether defendant's permission for a blood test under the implied consent statute is effective and can be utilized by the state. If the consent is valid, the Fourth Amendment's probable cause requirement would be inapplicable. The validity of the consent would therefore depend on the requirements of the statute, not the Constitution. Ultimately the dispute comes down to whether the odor of alcohol on the driver's breath satisfies the statute's requirement for reasonable cause. I think it does."

[State vs. Kliphouse, 2000 Fla. App. Lexis 12347 (9/27/00)]

5) Constitutionality of Jimmy Ryce Act [5]

The Jimmy Ryce Act, which establishes procedures for the involuntary civil commitment of sexually violent predators, is not an unconstitutional violation of the ex post facto, double jeopardy, due process or equal protection clauses of the U.S. and Florida constitutions, the 5th DCA held. The court certified questions of the law's constitutionality to the Florida Supreme Court.

[Westerheide vs. State, 2000 Fla. App. Lexis 12598 (9/29/00)]

6) Reasonable suspicion to order vehicle occupants to exit car [1]

Whether an officer has a founded suspicion of criminal activity justifying a seizure must be determined by the totality of the circumstances, the 1st DCA said. The state appealed a trial court's order granting Robert Gandy's motion to suppress cocaine retrieved from his vehicle during an investigatory stop in conjunction with a drug surveillance operation. Gandy contended, and the trial court agreed, that the officers lacked reasonable suspicion to conduct an investigatory stop. The state appealed, arguing that the trial court's conclusion of law that the officers lacked reasonable suspicion for the investigatory stop was inconsistent with the findings of fact. The DCA agreed and reversed, concluding that the totality of the facts and circumstances combined to provide the officers with reasonable suspicion to ask Gandy and his passenger to exit their vehicle.

[State vs. Gandy, 2000Fla. App. Lexis 12269 (9/25/00)]

7) Impact of prior no contest plea on sentence [2]

A no contest plea followed by withheld adjudication and completed probation does not count as a "conviction" under Florida Rule of Criminal Procedure 3.704(d)(6), the 2nd DCA said. Marcus Freeman was convicted of two felonies, and objected to the scoring of two prior felonies for which he had entered pleas of no contest with adjudication withheld. The trial court orally ruled that it not only would exclude prior cases without adjudication arising from no contest pleas, but also cases arising from guilty pleas. The state appealed the trial court's ruling, but the DCA - aligning itself with the 1st DCA - said the trial court properly excluded the prior felonies from Freeman's sentencing scoresheet. The DCA did say the trial court should not have excluded three prior misdemeanors to which Freeman had entered guilty pleas and adjudication had been withheld. However, the DCA concluded the error would not have changed Freeman's sentence.

[State vs. Freeman, 2000 Fla. App. Lexis 12240 (9/22/00)]

8) Voluntariness of confession - officer's implied promise [2]

A defendant's confession is rendered involuntary if it is based on an implied promise made by a police officer, the 2nd DCA said. Paula Albritton appealed her judgment and sentence for abuse of a dead body, contending that statements she made to police should have been suppressed because they were made involuntarily. In a case the DCA called "peculiar and somewhat macabre," Albritton, a funeral home director, was accused of mutilating a corpse by severing a hand and tossing it in a river, and placing dolls with notes pinned to them inside the victim's chest cavity. Albritton alleged that her statements to police were induced by a promise that she would not be subjected to prosecution if the acts performed on the victim's body were part of a religious ritual. The DCA concluded that the trial court erred in denying Albritton's motion to suppress. "Whatever her ulterior motive for the confession, it was clearly induced by the detective's assurance that if there were a religious motive behind the mutilation, Ms. Albritton would not be prosecuted," the DCA said.

[Albritton vs. State, 2000 Fla. App. Lexis 11874 (9/20/00)]

9) Lawsuit against sheriff's deputies - probable cause [5]

If an officer conducting an investigation is reasonably convinced that a person has committed a felony, the officer will not be held liable if information given by a witness subsequently proves untrue, the 5th DCA said. A couple appealed a summary judgment against them in their lawsuit against the Orange County deputies who arrested the woman for threatening a neighbor with a gun. Deputies arrived at the couple's residence after receiving two phone calls. The first call reported that the woman, Rosemary Thomas, had threatened the neighbor with a gun. The second call reported that the neighbor, Ruben Almonte, had assaulted Thomas and her husband. Thomas contended that the disputed over whether she pointed a gun at Almonte should preclude summary judgment on the issue of probable cause for arrest. "We believe her ultimate guilt or innocence is irrelevant to the right, even the obligation, of the police to make an arrest in this case," the DCA said. "Here the officers knew, because it was admitted by all, that Almonte was arguing with Mr. Thomas when Rosemary approached them with a gun in her hand. The officers knew that after Rosemary came upon the scene with the gun that Almonte left and reported to the police the aggravated assault. The fact that the officers believed Almonte when he said that Rosemary pointed the gun at him instead of believing Rosemary's statement that she kept the gun at her side gave the officer probable cause to believe that a crime was committed and that Rosemary committed it."

[Thomas vs. Beary, 2000 Fla. App. Lexis 12254 (9/22/00)]

10) Child abuse - mental injury [4]

Florida's child abuse statute making it a felony to commit an intentional act that could reasonably be expected to result in "mental injury" to a child is not facially invalid under the overbreadth doctrine, the 4th DCA said. Francis Dufresne, a public school teacher who works with autistic children, was charged with five counts of child abuse involving different children in violation of section 827.03, F.S. Dufresne filed a motion to dismiss, arguing that the statute was unconstitutionally overbroad because it applied to speech protected by the First Amendment and was constitutionally vague because mental injury was not defined. The state conceded that there was no evidence of any physical injury caused by Dufresne, but said the teacher could be convicted of felony child abuse for humiliating a child. The court ruled that "mental injury" as used in the statute is unconstitutionally vague and affirmed the dismissal of the information against Dufresne, but said its opinion does not preclude prosecution under section 827.03 for conduct that causes physical injuries.

[State vs. Dufresne, 2000 Fla. App. Lexis 11696 (9/13/00)]

11) Culpability of unmasked accomplice [5]

An unmasked accomplice who knowingly participates in a crime conducted by masked associates can be found guilty of enhanced offenses just as if he had been wearing a mask, the 5th DCA held. Gary Wright was convicted of robbery with a mask and attempted carjacking with a mask, even though he remained unmasked in his vehicle while two associates wore masks to rob another motorist. Wright contended that since he remained unmasked in his vehicle, his actions could not be reclassified under the provisions of section 775.0845, F.S., which provides for enhanced penalties when a mask is worn during the commission of a crime. The DCA disagreed, although it expressed enough uncertainty to certify the question to the Florida Supreme Court.

[Wright vs. State, 25 FLW S639 (9/8/00)]

12) Tampering with potential juror [1]

The law against jury tampering applies the same to actions involving prospective jurors as it does to those who have already been selected for service on a jury the 1st DCA said. The DCA rejected the argument of a criminal drug defendant who saw a former high school girlfriend's name on a list of prospective jurors and urged her to lie about knowing him and vote for acquittal. The woman said she felt threatened by the defendant and went to authorities, who charged the defendant with jury tampering. On appeal, he argued that he could not be convicted of threatening a juror because the woman never served as a juror in his case. "Our system of justice is impaired by a threat to a potential juror in the same way that it is impaired by a threat to a juror who is seated on a jury panel. In either case, the party making the threat is attempting to gain an unfair advantage by obstructing the process," the DCA said. "If we were to adopt the defendant's view of the statute, an unscrupulous person could threaten all of the citizens on the jury venire with impunity as long as the threats ceased at some point before a jury is selected. Justice would be obstructed and a tainted jury would be seated, yet there would be no recourse."

[Nobles vs. State, 25 FLW D2101 (8/30/00)]

13) Possession of cocaine - illegal stop [2]

An officer who was stationed 100 yards away from a known drug location but did not observe an exchange of money or drugs did not have a well-founded suspicion to conduct a traffic stop, the 2nd DCA said. Halley Williams challenged his conviction for possession of cocaine. An officer observed Williams stop in front of an apartment complex and saw five people run to the driver's side of the vehicle waving their arms. When Williams drove off, the officer followed and stopped the vehicle based on what he had observed. Williams agreed to a search of his vehicle, and the officer found two pieces of crack cocaine under the emergency brake. Williams contended that the initial stop was illegal, and so the cocaine should not have been admitted into evidence. The DCA agreed, concluding that the cocaine should have be suppressed because the officer lacked a founded suspicion of criminal activity to stop the vehicle.

[Williams vs. State, 25 FLW D2124 (8/30/00)]

14) Lawbreaker's liability for own negligence [5]

Citizens who are injured as a result of their own criminal misconduct while trying to elude law enforcement authorities cannot bring a negligence action against the officers or the law enforcement agency, the 5th DCA said. Deciding an issue of first impression, the DCA ruled against the estate of a teenager who was killed while trying to avoid an Orange County Sheriff's Deputy who was pursuing him. The teenager ran several red lights and stop signs and had been speeding. The deputy initially chased the vehicle, but told dispatchers he was breaking off the pursuit because of the risk to others. However, the deputy actually continued to follow the vehicle, and the teenager's estate argued that this created a zone of risk that led to the fatal accident, which also killed a motorcyclist. The deputy was fired for failing to follow his agency's pursuit policy, but the DCA said the estate's suit against the Sheriff's Office cannot stand.

Common sense and all rational notions of public policy dictate that a violator fleeing law enforcement who injures himself as a result of his own criminal misconduct should not be able to bring an action for negligence against the law enforcement officer trying to detain him, or against his employer," the DCA said. "In short, while both the pursuer and the pursued create a zone of risk for innocent third parties in a motor vehicle chase and thereby owe them a duty of care, the deputy did not create a zone of risk to Bryant by pursuing him for his violation of the law, nor did he cause Bryant any harm. Bryant had the absolute duty to stop, and any injuries incurred by him because he failed to do so were caused solely by himself."

[Bryant vs. Beary, 25 FLW D2083 (8/31/00)]

15) Union eligibility for sheriff's staff [5]

Reversing itself, the 5th DCA blocked the Public Employees Relations Commission from holding a hearing to determine whether certain employees are managerial and thus ineligible for union protection. The DCA on June 30 allowed PERC to proceed with a hearing on narrow issues, even as it granted a writ of prohibition stopping other proceedings. The DCA also certified to the Florida Supreme Court the question of whether sheriff's deputies - and potentially many other government employees - are categorically excluded from having collective bargaining rights under Chapter 447, F.S., in the wake of the justices' January ruling in Service Employees International vs. PERC. In that case, the court appeared to eliminate the distinction between appointed positions and regular employees. In its June opinion, the DCA allowed the hearing to go forward, but limited it to issues relating to whether the persons in the proposed bargaining unit are or are not managerial level employees. On a motion for rehearing, the DCA stayed the PERC proceedings to enable the parties to seek Supreme Court review.

[Williams vs. Coastal Florida Police Benevolent Association, Inc., 25 FLW D2051 (8/25/00)]

16) Victim injury points - male vs. female [2]

A defendant's constitutional rights are not violated by a sentencing scheme that assesses a male defendant 80 victim injury points but a female defendant 40 victim injury points, each for engaging in sexual intercourse with a victim under the age of 16, the 2nd DCA said. James Green contended that his equal protection rights were violated because the sentencing guidelines provisions in sections 921.011(7) and 921.0014(1)(a), F.S., which govern the scoring of victim injury points, treat male defendants differently than female defendants by assessing a greater number of points for penetration. Green also contended that these statutes are unconstitutionally vague because they have been applied in an arbitrary manner. Affirming Green's conviction, the DCA concluded that the statutes apply equally to both males and females. "Our interpretation of these statutes is buttressed by the fact that section 921.011(7)(b) provides that penetration points are to be scored 'regardless of whether there is evidence of any physical injury.' We read this provision to be a recognition that a person who is the victim of 'sexual contact that includes sexual penetration' but who has suffered no physical injury has still been injured. Thus, the injury contemplated is one of psychological or emotional injury that must be taken into account in the imposition of sentence. Green's interpretation of these statutes, which contemplates that the female defendant does not receive victim injury points for penetration, would require us to conclude that her male victim suffered no psychological or emotional injury," the DCA said.

[Green vs. State, 25 FLW D 2038 (8/25/00)]

17) Motion to suppress - fresh pursuit [4]

Officers who immediately respond to a "be on the lookout" alert and look continuously for the suspects before apprehending them minutes later in properly engaged in "fresh pursuit," the 4th DCA stated. The defendant argued that the DCA's recent decision in State vs. Greer compelled the finding that Pompano Beach police officers were not in fresh pursuit when they arrested, searched and seized him within the Fort Lauderdale city limits. The officers were responding to a BOLO specifying that an armed robbery had occurred and that the perpetrators were four black males in a white four-door older model Cadillac, a description that matched the vehicle in which Porter was riding. Affirming, the DCA said the Pompano Beach police officers were engaged in a fresh pursuit when they arrested

Porter. "(T)here is no logical reason why the pursuit should not be deemed a 'fresh pursuit' when the officers responded without unnecessary delay to the BOLO and, in continuous and uninterrupted fashion, sought and apprehended the occupants of the white Cadillac within a matter of minutes. This is not an instance where the robbery was committed in another jurisdiction and these officers took it upon themselves to make an arrest outside their jurisdiction; nor is this an instance where there was an extended time lapse between the commission of the robbery, the issuance of a BOLO and the apprehension of the perpetrators," the DCA said.

[Porter vs. State, 25 FLW D2001 (8/23/00)]

18) Motion to suppress - inventory search [5]

An officer cannot conduct an inventory search of a vehicle once he has determined he should release the driver and not impound the vehicle, the 5th DCA said. Casselberry Police Officer Michael McBurney made a valid traffic stop of a pickup truck in which Bryant was a passenger. After determining that he should release the driver and truck, Officer McBurney took Bryant to the police station on the outstanding warrant, and brought Bryant's golf bag with him even though Bryant asked that it be left with his companions. Bryant argued on appeal that the search of his golf bag could not have been justified as an inventory search because the inventory search of the truck pursuant to the initial impoundment ended once the officer released the driver. Once the impoundment ended, Bryant argued, the bag should not have been brought to the station with him. The DCA agreed and granted Bryant's motion to suppress. "When McBurney refused to turn over the bag to Bryant's companions but instead brought the bag to the station for a search, he seized the bag without any appropriate exception to the Fourth Amendment's warrant requirement. Any suggestion that the seizure and subsequent search was reasonable based on McBurney's good faith intent to protect Bryant's property is undercut by the testimony that McBurney told Bryant specifically that he was going to have to search the bag," the DCA said.

[Bryant vs. State, 2000 Fla. App. Lexis 10881 (8/25/00)]

19) Workers' comp applies to officer on lunch break [1]

A law enforcement officer who is injured on his way to lunch is entitled to workers' compensation if his department considers him on duty even while he is on his lunch break, the 1st DCA said.
The DCA reversed the determination of a judge of compensation claims, who concluded that the officer - a 25-year veteran of the Largo Police Department - was not discharging his primary law enforcement responsibilities at the time he was injured. Evidence from the officer's superiors showed that the department authorizes a half hour for lunch, but that officers must keep their radios on throughout their lunch break and be ready to respond immediately if needed. The DCA said that distinguishes this case from ones where an employee is clearly off duty and therefore not eligible for benefits. "(T)he officer was never considered to be off duty because the accident occurred during regular working hours while the officer was on call," the DCA said.

[Klyse vs. City of Largo, et al., 25 FLW D1936 (8/16/00)]

20) Inventory searches must be by standardized procedure [2]

A law enforcement officer must adhere to standardized procedures when impounding a vehicle and conducting an inventory search, the 2nd DCA said. The defendant contended that the police conducted an illegal, warrantless search that did not follow standard Tampa Police Department procedures for

such a search, leading to the discovery of cocaine. The state disagreed, arguing that the police conducted a lawful search incident to Patty's arrest or incident to the impoundment of the vehicle. "Although the officers may have had good reasons to impound the vehicle, there is no evidence demonstrating that they adhered to standardized procedures when they impounded the vehicle and conducted the search. Admittedly, when police take custody of a vehicle, they may conduct a 'reasonable' inventory search of that vehicle, as an exception to the warrant requirement of the Fourth Amendment. However, such an impoundment and inventory search must be conducted according to standardized criteria," the DCA said.

[Patty vs. State, 25 FLW D1966 (8/18/00)]

21) State must pay costs of "executive assignment" cases [3]

The state, rather than any county, must bear the costs associated with cases where a prosecutor from one circuit receives an executive assignment to handle a case in another circuit, the 3rd DCA said. The DCA noted that the Florida Supreme Court in 1998 held that counties are not responsible for court-related costs unless the Legislature has explicitly mandated that the county pay, and the DCA itself ruled in March that costs incurred by the Statewide Prosecutor are to be borne by the state. "(A)bsent clear statutory language to the contrary, the State is responsible for the costs it incurs in prosecuting a case," the DCA said.

[State vs. Garcia and Gonzalez, 25 FLW D1925 (8/16/00)]

22) Florida Civil Rights Act - sovereign immunity [3]

Public employees do not enjoy sovereign immunity protection from lawsuits under Florida's Civil Rights Act when those actions are brought in state court, the 3rd DCA held. The DCA said various statutory provisions, when read together, evidence legislative intent that civil actions for damages under the act may be pursued against the state and its agencies or subdivisions. The court reversed the dismissal of an action against Eleventh Circuit Public Defender Bennett Brummer, who was sued by a middle-aged black woman who claimed she was illegally fired so she could be replaced by a young Hispanic woman. The court said federal orders finding sovereign immunity do not apply because they involved Eleventh Amendment issues that do not apply to cases in state courts. "If the legislature had not intended that civil actions for damages be prosecuted in such a manner, there would be no reason for the inclusion of such public entities within the definition of employer," the DCA said. "We further conclude that these statutory provisions are sufficiently clear and unequivocal to constitute a waiver of sovereign immunity in connection with actions under Florida's Civil Rights Act."

[Jones vs. Brummer, 25 FLW D1923 (8/16/00)]

23) Aggravated manslaughter - elderly or disabled person [5]

A man who shared a house with his elderly, infirm mother and was "entrusted" with the responsibility for seeing that she was cared for in a proper and humane manner can be held criminally liable for her death, the 5th DCA said. Lee Peterson appealed his conviction for aggravated manslaughter of an elderly or disabled person, in connection with the death of his 82-year-old mother. Peterson and his mother, who suffered from Alzheimer's disease, jointly owned the home they shared for 19 years, and Peterson's brother James also shared the home. Because Lee Peterson worked extremely long hours,

he and James agreed that James would bear the responsibility of meeting their mother's physical cleaning, feeding, bed-changing, and similar needs. After the mother died, both brothers were convicted of aggravated manslaughter of an elderly or disabled person. On appeal, Lee argued that he bears no criminal liability because he never assumed any of her actual physical care and was therefore not a "caregiver" as defined in the statute. taking. The DCA disagreed, concluding that Lee Paterson had a legal duty to make reasonable efforts to protect his mother from the neglect she suffered under the "care" of James. "'Caregiver' logically encompasses more than just the person or persons who do the actual physical work of caring for an elderly or disabled adult. It also reaches those who in fact are 'entrusted' with the responsibility for seeing that an elderly or disabled adult is being cared for in a proper and humane manner," the DCA said. "Mrs. Peterson was a completely helpless, disabled elderly person, in the custody of her two sons. ... They agreed between themselves that James would do the actual work of caring for her. That did not excuse Lee from the duty of overseeing James' care."

[Peterson vs. State, 25 FLW D1974 (8/18/00)]

24) Possession of cocaine - motion to suppress [2]

A three-day surveillance of a suspected drug dealer's home does not, by itself, provide an officer with a founded suspicion to stop a visitor when the officer did not see the visitor come in contact with anyone at the home, the 2nd DCA said. "Law enforcement lacked a founded suspicion, let alone probable cause, to stop Ramsey because (the officer) did not observe any transaction between Ramsey and the man at the house," the DCA said. "(The officer's) observations of Ramsey's activities failed to provide him with the founded suspicion necessary to direct the stop of Ramsey."

[Ramsey vs. State, 25 FLW D1918 (8/11/00)]

25) Constructive possession of cocaine [2]

A defendant who was observed during a traffic stop kicking a cigar tube containing cocaine under the edge of the car cannot be convicted of either actual or constructive possession of cocaine, the 2nd DCA said. Jermaine Woods challenged his conviction for possession of cocaine, contending that the state failed to prove constructive possession because the cigar tube fell from the car, rather than from Woods' person, and the car was in the joint possession of more than one person. The state admitted that it did not offer proof that Woods had actual knowledge of the presence of the cocaine, but said it offered proof of incriminating statements and other circumstances from which an inference could be made that Woods knew of the cocaine's presence. The DCA disagreed. "Because the evidence presented at trial was insufficient to establish that Woods had constructive possession of cocaine, we reverse his conviction and remand this case to the trial court with directions to dismiss the charge," the DCA held.

[Woods vs. State, 25 FLW D1919 (8/11/00)]

26) Statements while in police custody by reason of promise [2]

A defendant's statements are not voluntary if they are made in conjunction with an expressed or implied promises made by law enforcement officers, the 2nd DCA said. The state appealed an order suppressing statements made by Brian Kobielnik while he was in police custody on a charge of capital sexual battery. Kobielnik said his statements were not voluntarily made and he trial court correctly suppressed them, and the DCA agreed. "The trial court found that the officers made express and implied promises of help to Mr. Kobielnik, fabricated evidence to obtain a confession, and deluded him as to the severity of the charge he was facing. Based on these factual findings, which are supported

by the record, the trial court properly found that Mr. Kobielnik's statements were not voluntary," the DCA said.

[State vs. Kobielnik, 25 FLW D1846 (8/4/00)]

27) Battery against school employee - no transferred intent [2]

A public school student who took a swing at a fellow student but accidentally struck a school employee should not have been convicted of the felony charge of battery on a school board employee, the 2nd DCA said. The incident occurred during a schoolyard fight, and witnesses agreed that a youth identified only as B.L.L. was attempting to hit another student when he unintentionally hit the school employee. Even though the state argued that the doctrine of transferred intent supported the more serious charge, the DCA ordered the charge reduced to simple battery because the youth only intended to hit a student, not a school employee. Simple battery is a first-degree misdemeanor, but the offense is upgraded to a third-degree felony when the offender has reason to know the victim is a school employee.

"Because B.L.L. intended to hit a fellow student, the trial court could adjudicate B.L.L. of simple battery only," the DCA said.

[B.L.L. vs. State, 25 FLW D1852 (8/4/00)]

28) Possession of firearm - convicted felon [3]

A convicted felon is not permitted to possess a firearm at home or his place of business, the 3rd DCA stated. The defendant argued that section 790.25, F.S., allows a Floridian to possess a firearm at his place of business, and statutory language says this provision should be construed liberally. However, the DCA noted, section 790.23, F.S., prohibits convicted felons from possessing firearms. "Section 790.23 is intended to protect the public from persons, who, because of their past conduct, have demonstrated they are unfit to be trusted with dangerous instruments such as firearms. The evil contemplated by section 790.23 is clearly the prevention of the possession and the use of firearms by convicted felons," the DCA said. "Anderson's claim that a violation of section 790.23 requires actual 'use' is mere semantics, violates all common sense and frustrates the declared public policy to keep weapons out of the hands of criminals."

[State vs. Anderson, 25 FLW D1862 (8/9/00)]

29) Indirect criminal contempt: prosecutor vs. public defender fight [4]

An attorney may be held in indirect criminal contempt for actions that foreseeably could disrupt court proceedings even if the actions take place outside the courtroom, the 4th DCA said.

Finding no Florida case directly on point, the DCA cited an Illinois case in concluding that the requisite intent for indirect criminal contempt can be inferred from the actions of the contemnor where it is foreseeable under the circumstances that the conduct would lead to action that would disrupt court proceedings. The DCA affirmed a contempt citation against a Broward County assistant state attorney who got into a fight with the assistant public defender in a case they were trying. The altercation took place in a courthouse hallway in the presence of at least one of the jurors on the case.

[Milian vs. State, 25 FLW D1868 (8/9/00)]

30) No withdrawal of state court plea because of assigned prison [3]

A defendant who enters a plea to state charges for a sentence to be served concurrently with a federal sentence cannot withdraw his plea just because he didn't get to serve the sentences in a federal facility, the 3rd DCA said. "(D)efense counsel correctly advised defendant that the judge could not specify where the sentence would be served. The trial judge did all that he could to have defendant transferred to federal custody, but he did not have the power to require it," the DCA said. "The (defense attorney's) statement that it was 'likely' that the defendant would be placed in a federal facility falls well short of being a promise or explicit condition that the sentence be served in a federal penitentiary."

[Stevens vs. State, 25 FLW D1852 (8/2/00)]

31) Drug tests - hospital's duty of care [3]

A health care provider who contracts to perform drug tests and other physical exams on police officers undertakes a special duty and can be held liable for errors that result from an incorrect report of test results, the 3rd DCA said. The DCA reinstated a lawsuit brought by a 15-year Metro-Dade police officer who was fired following a physical exam when the hospital that conducted the exam reported it found traces of cocaine in her urine. Officer Emma Ragsdale sued Mount Sinai Medical Center, which had a contract with the county to provide physical exams of police officers. The officer claimed, in part, that Mt. Sinai negligently failed to secure her urine samples and then reported a false positive result, leading to her termination. The DCA agreed with the trial court's dismissal of the negligent misrepresentation claim, but reversed the summary judgment granted for Mt. Sinai on the negligence count, saying the hospital undertook a "special duty" under the contract to exercise ordinary care. "It was reasonably foreseeable that Ragsdale would be harmed if Mount Sinai negligently reported test results to the County. It is a virtual certainty that Ragsdale would be discharged as a police officer in the event of a positive drug test result. Thus, Ragsdale is a foreseeable plaintiff and Mount Sinai owes a duty to her," the DCA said.

[Ragsdale vs. Mt. Sinai Medical Center of Miami, 25 FLW D1832 (8/2/00)]

32) Multiple reasons for guard's termination [5]

The firing of a jail guard should be upheld if the guard committed any of the violations she was charged with, even if some of the accusations against her were not adequately proved, the 5th DCA said. The court upheld the firing of an Orange County Corrections Department sergeant who was accused of using excessive force in handling an inmate and then filing a false report about the incident and advising a subordinate not to file a report. The trial court determined that the county had failed to adequately prove the charges related to the reports, but concluded that the county did prove the use of excessive force. The issue before the DCA was whether a termination based on multiple reasons, any one of which was adequate for termination, must be reversed when one or more of the reasons were found not to have been adequately proved but at least one reason was proved. "(The sergeant) questions whether she would have been terminated had the County found her guilty only of using excessive force. We believe the better policy, consistent with ... the high expectation that those in control of our penal institutions will exercise their extreme authority reasonably, is that when the order of termination does not indicate that the termination was only justified because of multiple violations, the termination should be upheld if any valid reason is supported by the record," the DCA said.

[Eckler vs. Orange County, 763 So.2d 545 (5DCA 7/28/00)]

33) Moving from search scene does not withdraw consent [3]

A defendant who signs an unconditional consent to search his room does not later withdraw that consent merely by complaining that he was told he could be present during the search, the 3rd DCA said. The court affirmed the convictions of Frank Carter stemming from the rape of a woman at a gym in the apartment complex in which he lived with his parents. When witness information led police to Carter's home, he signed a written consent to a search of his room, and then asked if he could be present during the search. Officers agreed, but later moved Carter to a police car when he became angry and began screaming at the witness who identified him. Carter complained that officers broke their promise to let him be present during the search, which found evidence directly related to the crime. The DCA rejected Carter's claim that his complaints constituted an effective withdrawal of his consent to search. "When the police officers decided to conduct the search without the defendant being present, the defendant complained that the police had broken their promise - but defendant never in words or substance told the police to stay out of his room or otherwise conveyed the idea that he was revoking his consent. The question of accompanying the officer was raised by the defendant only after he had given his consent. Since the initial consent was unconditional, and the defendant did not later revoke that consent, it follows that the motion to suppress evidence was properly denied," the DCA said.

[Carter vs. State, 762 So.2d 1024 (3DCA 7/19/00)]

34) Obstruction - yelling out "He's a cop" to end undercover buy [4]

A person whose speech identifies an undercover police officer and frustrates the officer's attempt to make a drug buy is not guilty of obstructing the officer in the lawful performance of a legal duty, the 4th DCA held. The court ruled in favor of a defendant identified only as J.V., who was charged with obstructing an officer after he yelled out to a drug suspect "don't sell anything to that man ... he's a cop." The DCA cited several cases in which people who were not a part of the criminal activity warned others away from undercover officers and had their convictions reversed. Under such circumstances, the DCA said, the person does not commit a crime by warning others.

[J.V. vs. State,763 So.2d 511 (4DCA 7/19/00)]

35) Qualified immunity - alleged violation of state rights [5]

A city manager and police chief sued by a fired police captain are not entitled to qualified immunity because the claim that they violated state constitutional rights is not an actionable tort and therefore the affirmative immunity defense cannot apply, the 5th DCA said. While ruling against the City of Indian Harbour Beach officials, the DCA strongly suggested that the two officials can prevail by filing a motion to dismiss for failure to state a cause of action. The fired police captain claimed his firing was retaliatory and said the firing violated his due process and free speech rights under the Florida Constitution. City Manager Jacqueline Burns and Police Chief Fred Fernez moved for summary judgment based on qualified immunity, but the DCA said that defense is not available where the plaintiff sues on state constitutional grounds. "The problem created by the instant case is that the purported claim asserted by the plaintiff below against ... Fernez and Burns is not an actionable tort. That being so, can Fernez and Burns have immunity, an affirmative defense, where there is no recognized tort to be immune from? Is there any available affirmative defense to a non-viable claim other than a simple motion to dismiss for failure to state a cause of action? If the answer to this

question is no, and we believe that it is, then we must decline to exercise certiorari review of an abstract concept. Rather, this case should await disposition by the trial court in response to a proper motion by the petitioners," the DCA said.

[Fernez and Burns vs. Calabrese,760 So.2d 1144 (5DCA 7/7/00)]

36) Weight threshold for drug trafficking - total weight of pill [2]

Applying a significant drug trafficking decision by the Florida Supreme Court, the 2nd DCA concluded that trafficking in oxycodone should be determined by the total weight of pills containing the drug, not just the weight of the oxycodone itself. The DCA acknowledged that its decision conflicts directly with an April ruling by the 5th DCA in Travis vs. State. Both courts were attempting to apply the Supreme Court's 1999 holding in Hayes vs. State, which dealt with how to determine whether prescription tablets containing hydrocodone as well as a noncontrolled substance met the statutory threshold for trafficking. The DCA noted that hydrocodone is listed on both Schedule II and Schedule III, but oxycodone is only a Schedule II drug and therefore should be treated differently. "Various prescriptions drugs ... containing a mixture of oxycodone, which is listed only on Schedule II, and a noncontrolled substance (usually acetaminophen) are to be measured by their aggregate weight in determining whether a trafficking amount is present," the DCA said.

[Eagle vs. State, 25 FLW D1638 (7/7/00)]

37) Improper impeachment of witness - eliciting prison address [4]

A trial judge erred by allowing the state to ask a defense witness where he lived because the answer - a correctional institution - may have improperly undermined the witness' credibility, the 4th DCA said. The defense witness gave testimony that directly contradicted the testimony of the arresting officer in a drug and resisting arrest case. The judge allowed the prosecutor to elicit testimony from the witness, Albert Flowers, that he resided at the South Florida Reception Center, and the prosecutor reminded jurors of that fact during her closing argument.

[Roper vs. State, 763 So.2d 487 (4DCA 7/12/00)]

38) Intent to sell drugs not established by 16 rocks of cocaine [5]

The fact that a defendant was arrested in an apartment with 16 rocks of cocaine is not sufficient, by itself, to establish that he intended to sell the cocaine, the 5th DCA held. The court reversed Reshard Smith's conviction of possession with intent to sell and ordered that the conviction be reduced to possession only. The DCA noted that the arresting officers were only able to testify that it was their personal practice to arrest suspects for intent to sell when the suspect had more than one cocaine rock. "(T)he only circumstantial evidence used to convict Smith of the intent to sell was simply the number of rocks found on Smith and in the apartment where he was pursued," the DCA said. "There was no evidence presented in the instant case that Smith possessed the cocaine for anything other than his own use."

[Smith vs. State, 762 So.2d 577 (5DCA 7/14/00)]

39) Tampa juvenile curfew ordinance [2]

A juvenile curfew ordinance enacted by the City of Tampa is constitutional and should be subject to heightened scrutiny, the 2nd DCA said. In December 1996, a juvenile identified only as J.P. was charged with violating the Tampa juvenile curfew ordinance. J.P. contended that the ordinance should be declared unconstitutional. Affirming, the DCA said the City of Tampa could rely on the curfew experiences of other cities when enacting its ordinance. Tampa's curfew ordinance is substantially related to an important government interest, the DCA concluded, and imposes penalties that are consistent with state law. The DCA cited its ruling in May upholding a Pinellas Park curfew ordinance.

[J.P., a child vs. State, 25 FLW D1513 (6/23/00)]

40) Illegal confinement -unannounced jailing for contempt [2]

A trial court violated a man's due process rights when, without advance notice, it jailed him for contempt over his failure to pay child support when the man showed up in court for a hearing on an unrelated motion, the 2nd DCA said. The DCA said David Bresch should have been notified in advance that he was facing an allegation of civil contempt. Bresch came to court for a hearing on his motion to modify a domestic violence injunction, but the trial court - acting on its own motion - determined that he was behind in child support payments and ordered Bresch jailed until he paid $1,000 to his wife. Bresch contended that the trial court failed to make a proper finding that the had the ability to pay the purge amount and so the incarceration was illegal. The DCA agreed.

[Bresch vs. State, 761 So.2d 449 (2DCA 6/2/00)]

41) Discarding bag when approached by cops not abandonment [3]

It was "perfectly reasonable" for a man to discard the brown paper bag he was holding as he was approached by a group of armed police officers in order to keep the officers from thinking he had a weapon, the 3rd DCA said. The DCA granted Hopia Bryan's motion to suppress marijuana found in the bag, reversing the trial judge's conclusion that Bryan had abandoned the bag when he tossed it aside. Bryan was approached by officers who mistakenly thought he was a suspect they sought. He was ordered to freeze and immediately pulled his hands out of his pocket and threw a brown paper bag onto the ground. Even though officers quickly realized that Bryan was not the man they sought, Bryan was handcuffed and the bag was searched. The state contended that Bryan's act of throwing the bag amounted to voluntary abandonment because the officer ordered Bryan to freeze and did not specifically order him to take his hand out of his pocket. The DCA disagreed, concluding that when property is discarded by an individual approached in this manner, it is not "abandoned" as the term is used in search and seizure law. "(T)he evidence against Bryan was obtained, not through a voluntary abandonment, but rather as the result of an illegal seizure by the police," the DCA said.

[Bryan vs. State, 760 So.2d 246 (3DCA 5/31/00)]

42) Blacks driving car in certain area isn't reasonable suspicion [3]

An officer's bare suspicion or hunch that three young African-American males driving in a certain area in a late model car must have stolen the vehicle is not enough to provide reasonable suspicion to justify a stop, the 3rd DCA said. A juvenile defendant appealed his adjudication of delinquency. The officer acknowledged that the driver was not violating any traffic laws and a tag check revealed that the vehicle had not been reported stolen. The officer said there was nothing about the vehicle that

would have indicated it was stolen, and the defendant contended that the officer lacked reasonable suspicion to support a stop. The DCA agreed. "(T)he officer's observations were insufficient to provide him with a reasonable suspicion to justify a stop; he operated merely on a hunch, a bare suspicion," the DCA said in reversing the adjudication.

[G.D. vs. State, 760 So.2d 252 (3DCA 5/31/00)]

43) Motion to suppress - impermissible promise [3]

A police detective's statement to a defendant that his cases "could be" consolidated does not rise to the level of an impermissible promise in return for a confession, the 3rd DCA said. "While it may be hair-splitting, the detective testified he told the defendant that the defendant's cases 'could be,' not 'would be,' consolidated in one group. The detective elsewhere testified that this was explained as being a 'possibility.' This does not rise to the level of being an impermissible promise in return for a confession," the DCA said.

[State vs. Bobo, 760 So.2d 261 (3DCA 6/7/00)]

44) Parental authority to search minor's room [4]

A non-resident father's consent to search his minor son's room, after he was informed by police that his son was selling drugs and weapons, overrides the son's objection to the search by virtue of his parental authority, the 4th DCA said. The state appealed a trial courts order granting the son's motion to suppress. The juvenile was arrested after officers observed him selling cannabis. During the arrest, the boy's father drove up and, after being informed of his son's illegal activities, consented to a search of the son's bedroom. The youth objected, arguing that his father did not live with him and his mother and had no authority to be in the home. However, the court noted that the father owned the home and had a key, which he used to let the officers in, and the boy's mother was home at the time did not object to the search. Reversing the suppression order, the DCA concluded that the non-resident father, by virtue of his ownership and authority to enter the home, could consent to a search of the home. The court said the search of the boy's bedroom over his objection was valid based on the father's consent.

[State vs. S.B., 758 So.2d 1253 (4DCA 5/31/00)]

45) Probable cause - anonymous tip & one trash pull [4]

Police had probable cause to search a house after one trash pull revealed evidence consistent with an anonymous tip that cocaine was being sold in small clear plastic baggies tied with green twisties, the 4th DCA said. The defendant contended that one trash pull revealing contraband, performed based on an anonymous tip, was not probable cause for a search of her home. Baker relied on Raulerson vs. State, in which the 4th DCA held that there was no probable cause based on one trash pull made pursuant to an anonymous tip. The DCA said Baker's case is distinguishable from Raulerson, in part because of the specific nature of the information provided by the anonymous tip. "(T)he items found in the trash pull, clear baggies and green twisty ties, were consistent with specific information from the caller that this was how appellant was packaging cocaine for sale. There was, accordingly, probable cause," the DCA said.

[Baker vs. State, 762 So.2d 977 (4DCA 5/31/00)]

46) Attorney's fees for "prevailing party" in dropped forfeiture case [5]

A citizen may be entitled to attorney's fees as the "prevailing" party where a government agency drops a civil forfeiture action, the 5th DCA held. In addition, the court said, the citizen may be entitled to an award of interest on cash that is held by the seizing agency when it could otherwise be placed in an income-producing account. The court ruled in a case where the Orange County sheriff voluntarily dismissed forfeiture proceedings over more than $8,000 found in a woman's luggage during a traffic stop. The DCA said that in this particular case the woman is not entitled to attorney's fees, but rejected the sheriff's argument that no fees can be awarded where the case never reaches the trail stage. "There is no precedent on this point, but we think the obvious intent of the Legislature in passing this law was to make claimants of wrongfully seized property whole, by requiring the seizing agency which brought a baseless forfeiture proceeding to compensate the owner of the property for reasonably expended attorney's fees and costs necessary to regain the property seized. Many cases end before the trial, but preparation for trial is necessary and it requires time and effort be expended by counsel. It would be contrary to the remedial intent of the statute to give it the limited reading suggested by the Sheriff," the DCA said.

[Gay vs. Beary, 758 So.2d 1242 (5DCA 5/26/00)]

47) Armed robbery with a firearm - starter pistol must expel object [3]

To get an armed robbery conviction based on use of a starter pistol, the state must present evidence that the gun is capable of expelling an object, the 3rd DCA said. DeAngelo Evans appealed his convictions for armed robbery with a firearm, arguing that the trial court should have granted his motion for acquittal because the state failed to prove that he used a firearm during the alleged robbery. The DCA noted that the state did not present any evidence that the starter gun expelled a projectile when it was test-fired or pistol could readily be converted to expel a projectile. "The only evidence that the State presented on the issue of whether the starter pistol was a 'firearm' as defined by section 790.011(6) was that when the police officer test-fired the starter pistol, it made a loud 'pop' sound. The only inference that can be drawn from this testimony was that the starter pistol did exactly what it was designed to do, make a loud noise. Because the State's evidence was legally insufficient to establish that the starter pistol was a 'firearm,' we reverse," the DCA said.

[Evans vs. State, 758 So.2d 1282 (3DCA 6/14/00)]

48) Court order required for release of mental health records [4]

Despite the broad power of the Attorney General's Office to issue investigative subpoenas regarding Medicaid fraud, the agency still must show good cause and obtain court approval for the release of mental health treatment records, the 4th DCA concluded. In the course of a Medicaid fraud investigation, the agency sought mental health treatment records related to 25 patients treated by an outpatient youth services mental health program. Because some of the 25 youths also received substance abuse treatment, the hospital said it could not produce any medical records for those patients without a court order. The Attorney General's Office agreed that substance abuse records required a court order, but maintained that it was entitled to the mental health treatment records for those youths without a court order. The trial court disagreed, and the DCA affirmed.

[Butterworth vs. "X Hospital," 763 So.2d 467(4DCA 6/14/00)]

49) Driving with suspended license [2]

A defendant can be convicted of driving with a suspended or revoked license even if he never had a driver's license, the 2nd DCA said. The state argued that even though Carroll did not have a driver's license, he did have a "driving privilege" that had been revoked due to his status as a habitual traffic offender, and the revocation of this driving privilege was the equivalent of a revocation of a driver's license for the purposes of section 322.264 F.S. (1997). Affirming, the DCA said, "Given the interchangeable use of the terms in the statute, we must conclude that the legislature intended the terms 'driving privilege' and 'driver's license' to mean the same thing and to apply equally to either situation. Consequently, as applied to appellant, we must conclude that his lack of driver's license did not relieve him from conviction as a habitual traffic offender whose driver's license (driving privilege) had been revoked or suspended."

[Carroll vs. State, 761 So. 2d 417(2DCA 5/24/00)]

50) Consent to search- bus search by plainclothes officers [4]

Plain-clothed officers who individually identify themselves with neck badges and picture identification don't have to inform bus passengers that a search of their carry-on items is voluntary rather than mandatory, the 4th DCA said. Thomas Hemingway challenged the trial court's denial of his motion to suppress six pounds of cocaine found inside his carry-on bag. Hemingway contended that he did not specifically consent to the search of his carry-on bag by plain-clothed officers while he was a passenger on a Greyhound bus. Hemingway also argued that his consent was not voluntary because he felt he was not free to leave the bus and he was not advised that the search was voluntary. Affirming, the DCA held that Hemingway gave the officers consent to search his carry-on luggage. The fact that the officers did not inform him of his right to refuse consent is a factor to consider, but alone it does not render consent involuntary, the DCA said.

[Hemingway vs. State, 762 So. 2d 957(4DCA 5/24/00)]

51) Constructive possession of cocaine - furtive movement [5]

Police officers had prima facie evidence of cocaine possession where they found a small bottle containing the drug behind a box after observing the defendant put his closed hand behind the box and then bring the hand out empty, the 5th DCA said. The officers' suspicions were further supported by their having seen the defendant receive money from another man in exchange for a small object, the DCA noted. The court ruled against Jeffrey Ball, who was convicted of cocaine possession and resisting arrest with violence. Ball contended that the evidence presented at trial was insufficient to show a prima facie case of possession of cocaine because no one had actually seen him in possession of the cocaine, but the DCA rejected his argument based on non-exclusive constructive possession.

[Ball vs. State, 758 So.2d 1239 (5DCA 5/26/00)]

52) Motion to suppress - search and seizure [1]

It is illegal for an officer to ask an individual to exit a vehicle after issuing a citation simply because the officer is curious, the 1st DCA said. "An officer may ask a driver to exit his vehicle during a lawful traffic stop because police safety far outweighs the minimal intrusion on the driver. However, this does

not mean that an officer may ask a driver to exit the vehicle in every instance in which he may ask to speak to the driver," the DCA said. "Thus, while the initial traffic stop was lawful, (the officer's) request of appellant that he exit the vehicle, which was given after the issuance of the citation and without a reasonable suspicion of criminal activity or a reasonable belief that appellant was armed and dangerous, was illegal."

[Gilchrist vs. State, 757 So.2d 587 (5/10/00)]

53) Possession of child pornography-each photo may be a count [2]

A defendant can be charged and convicted for multiple counts of possession of child pornography based on several copies of the same photograph or computer image, the 2nd DCA said. Karl Crosby challenged his convictions for 68 counts of possession of child pornography. Crosby argued that it was error to charge and convict him of multiple counts of possession based on several copies of the same photograph or computer image. The DCA rejected this argument. "Based on the plain language of section 827.071(5) and because the legislature expressly intended that possession of each article be treated as a separate offense, Crosby was properly charged and convicted of multiple counts of possession of child pornography," the DCA said.

[Crosby vs. State, 757 So.2d 584 (2DCA 5/10/00)]

54) U.S. Coast Guard- authority to board vessel in domestic waters [2]

Members of the U.S. Coast Guard have plenary authority to stop and board vessels in waters over which the United States has jurisdiction in the absence of a reasonable suspicion of unlawful activity, the 2nd DCA said.

Livingston Saunders challenged the trial court's denial of his motion to suppress. Saunders was convicted of operating a vessel on the waters of the state while under the influence of alcohol. Saunders contended that Coast Guard Petty Officer Battle had no authority to stop and board his vessel unless the vessel was in international waters or was capable of venturing into international waters. Saunders conceded that the United States has jurisdiction over the waters his vessel was in, but argued that under the circumstances Battle had no authority to board his vessel in the absence of a reasonable suspicion of unlawful activity. The DCA concluded that the boarding in this case may be characterized as a "pure" Coast Guard boarding even though Battle was accompanied by a Fort Myers police officer, and that Battle was authorized to board appellant's vessel in waters over which the United States has jurisdiction even in the absence of a reasonable suspicion of unlawful activity. "The Fort Myers police unit did not direct the investigation, nor for that matter, did the Fort Myers police unit take any active part in the investigation except to take custody of appellant once he was arrested. The fact that a Fort Myers police officer also boarded appellant's vessel does not change the essential character of the boarding," the DCA said.

[Saunders vs. State, 758 So.2d 724 (2DCA 5/10/00)]

55) Racketeering - structure of "enterprise" [4]

The state is not required to prove, nor is the trial judge required to inform the jury, that a group must have an identifiable decision-making structure and a mechanism for controlling and directing its activities on an ongoing basis in order to establish the existence of an enterprise under the Florida RICO statute, the 5th DCA said. Domingo Bejerano appealed his convictions for racketeering, organized fraud, and insurance fraud. Bejerano contended that the trial court erred in failing to grant

his motion for judgment of acquittal on the RICO charge. Bejerano also argued that the state failed to prove sufficient evidence of an "enterprise," and the trial court erred in refusing to modify the standard jury instructions. The DCA disagreed. Relying on the 4th DCA's 1999 case of Gross vs. State, the DCA said it is not necessary for the trial judge to give the special instruction offered by the defense refining the definition of "enterprise." The DCA also concluded that the state offered substantial proof that an enterprise existed for RICO purposes. {The Florida Supreme Court subsequently has endorsed the philosophy expressed in this case.}

[Bejerano vs. State, 760 So.2d 218 (5DCA 5/12/00)]

56) Speedy trial - "unarrest" does not toll time [5]

An initial arrest starts the running of the speedy trial time, and there is no such thing as an "unarrest" for purposes of the speedy trial rule, the 5th DCA said. Andrew Williams appealed his conviction for delivery of cocaine. Williams participated in a police-conducted controlled buy of cocaine and was arrested as the seller. Following his arrest, Williams agreed to assist police in their drug enforcement operations as an informant. The police then "unarrested" Williams. After Williams served as an agent of the police for several weeks, he was again arrested for the same cocaine delivery for which he had been "unarrested" earlier. Williams filed a motion requiring the court to discharge him after the expiration of the speedy trial period. The state argued that Williams was "unavailable" for trial and thus was not entitled to the protection of the speedy trial rule, and said Williams should have been estopped to claim speedy trial protections because he was free following his unarrest. The DCA disagreed. "A defendant need not remain in custody to have the benefits of the speedy trial rule. The speedy trial rule specifically provides that a person charged with a crime is entitled to the benefits of the rule whether the person is in custody or is at liberty on bail or recognizance or other pre-trial release condition. If the state is concerned about speedy trial, it could merely obtain a waiver from the defendant as part of his substantial assistance agreement," the DCA said. "The speedy trial rule provides that the intent and effect of the rule shall not be avoided by the state by nolle prossing a crime and then prosecuting a new crime grounded on the same conduct or criminal episode. Just as the state cannot avoid the effect of the rule by the prosecutor's actions in nolle prossing a crime, the state should not be able to avoid the effect of the rule by the actions of the police in 'unarresting' the defendant."

[Williams vs. State, 757 So.2d 597 (5DCA 5/12/00)]

57) Sovereign immunity - negligence action against sheriff [3]

Because of sovereign immunity, a trial court correctly ruled against a couple who sued for injuries suffered when their car hit a Key deer at least two hours after the Sheriff's Office had been notified about the animal, the 3rd DCA said. The sheriff owed no special duty to the couple beyond his general duty owed to the public, and therefore summary judgment in favor of the sheriff was appropriate, the DCA said. Even though callers to 911 had been told the Sheriff's Office would respond appropriately to the deer's presence by the side of the road, the couple had not called 911 and therefore could not have relied on any assurances about how the Sheriff's Office would respond. The DCA agreed with the trial judge's conclusion that the sheriff never undertook a special duty to the couple. The DCA also rejected the couple's argument that the sheriff was civilly liable for failing to meet his statutory duty to remove the deer under the statewide livestock law. The DCA said the livestock law applies to domesticated animals that have strayed or escaped their owner, and not to game such as a wild Key deer.

[Dario vs. Roth, 756 So.2d 262 (3DCA 5/3/00)]

58) Interception of oral conversation - no expectation of privacy [3]

A person making an extortionate threat in a private business office has no expectation of privacy to justify holding his victim civilly liable for tape recording the threat, the 3rd DCA said. The DCA affirmed a summary judgment against Braulio Jatar, a Venezuelan attorney who was caught on tape extorting $250,000 from the owners of a Miami distribution company. The company owners taped the meeting, which was held in their office, because reports from their relatives in Venezuela indicated Jatar would attempt to extort them. Based on the tape recording, Jatar was convicted of extortion in Venezuela but has been a fugitive from that country. Nonetheless, he brought a civil action against the owners of the Miami company, claiming they violated section 934.03, F.S., which makes it illegal to tape a conversation without the prior consent of the parties. The trial court ruled against Jatar and the DCA agreed, noting that in the absence of a reasonable expectation of privacy, Jatar's oral communications were not protected under the statute. The DCA also certified the issue to the Florida Supreme Court.

"Society is willing to recognize a reasonable expectation of privacy in conversations conducted in a private home. However, this recognition does not necessarily extend to conversations conducted in a business office. The reasonable expectation of privacy fails where, as here, the intent of the speaker does not justify such an expectation," the DCA said. "Jatar went to (the victim's) office with the intent to do him harm. Society is not prepared to recognize as reasonable an expectation of privacy in such activity."

[Jatar vs. Lamaletto, et al., 758 So.2d 1167 (3DCA 5/3/00)]

59) Due process required - termination of officer [5]

A public employer cannot fire a law enforcement officer without affording him a due process hearing at which he can confront the witnesses against him, the 5th DCA said. The DCA quashed a trial court order and ruled in favor of Bryan Park, a West Melbourne police officer who was fired after his supervisors concluded he lied about a fellow officer's use of a department telephone to call a "psychic hotline." A hearing officer weighed the credibility of the witnesses and determined that the city had not shown by a preponderance of the evidence that Park was fired for just cause. The trial court determined that the hearing officer should only have conducted an appeal-type hearing rather than reconsidering whether the city had just cause to fire Park, but the DCA reversed. "We quash the decision because it effectively denies Park due process," the DCA said. "(S)ince there had been only an internal investigation plus a recommendation from the chief to the city manager that Park be fired, and no pre-termination hearing during which Park could confront the witnesses against him, the circuit court decision denies Park the due process right to confront the witnesses against him."

[Park vs. City of West Melbourne, 25 FLW D1059 (4/28/00)]

60) Court must enter finding of sexual predator status [1]

If a defendant meets the statutory criteria for designation as a sexual predator, the trial court is required to enter such a finding, the 1st DCA said. The state appealed a trial judge's decision not to declare Timothy Curtin a sexual predator after Curtin pled guilty to the first-degree felony of sexual battery on a physically helpless victim. The state argued that because Curtin met the statutory criteria for designation as a sexual predator, the court was required to enter the finding. Curtin argued that under the legislative intent statement in section 775.21(3)(a)2, the sexual predator designation is limited to sex crimes against children and that he did not fall within that category. The DCA disagreed. "We find, contrary to respondent's argument, that there is no ambiguity in this section regarding the substantive criteria for a court's finding of an offender's status as a sexual predator. Section 775.21(4)(c) requires the court to make a finding of sexual predator status in the instant case

because respondent was convicted of committing a first degree felony violation of chapter 794 and the offense was committed on or after October 1, 1996," the DCA said.

[State vs. Curtin, 25 FLW D1049 (4/25/00)]

61) Civil rights lawsuit over inadequate training [2]

A plaintiff cannot successfully allege that his civil rights were violated by the inadequate training of public employees - in this case, sheriff's deputies - when other legal proceedings show the employees acted properly, the 2nd DCA said. Teddy Ryan Jr. was arrested and charged with kidnapping, aggravated assault and armed robbery after five victims picked him out of a photo lineup. Ryan was subsequently acquitted in a jury trial and sued the Charlotte County Sheriff's Office claiming his civil rights were violated. Ryan alleged that the sheriff fostered a custom or policy of underpaying, undertraining and undersupervising deputies, resulting in Ryan being arrested without probable cause. The DCA rejected the arguments, noting that Ryan's complaint itself points out that the arrest followed the photo identification by five victims and the issuance of an arrest warrant by a county judge. "Where the complaint itself reveals probable cause to arrest, there can be no cause of action for failure to train. This is because probable cause to arrest destroys any possible link between any alleged failure of appellee to properly train and supervise his deputies and any resulting harm to appellant for his arrest based on probable cause," The DCA said.

[Ryan vs. Worch, 25 FLW D1038 (4/26/00)]

62) Possession of crack cocaine in mouth - motion to suppress [4]

A police officer who relied on his years of law enforcement experience to be "reasonably sure" that defendant had crack cocaine in his mouth had probable cause to make an arrest, the 4th DCA said. The state appealed an order granting Randall Lafond's motion to suppress cocaine seized by Deputy Sheriff Bures and statements made by Lafond in connection with the offense. Bures testified that while on patrol he observed a white van parked in the rear of a closed paint store. After Bures pulled his cruiser behind the van, Lafond emerged from the passenger side of the van, approached the deputy and informed him that the driver of the van was in possession of cocaine. As the deputy searched Lafond, he noticed a small, square, white object in Lafond's mouth. "Deputy Bures not only suspected that the object was crack cocaine; he was 'reasonably sure' that is what it was. Moreover, he did not simply notice something in Lafond's mouth. He actually observed a white, square object which, based on his law enforcement experience, he recognized as crack cocaine. His candid testimony that the object could have been something else other than crack cocaine did not convert his belief to bare suspicion," the DCA said.

[State vs. Lafond, 757 So.2d 1234 (4DCA 4/26/00)]

63) Pocketknife at school is weapon on campus [4]

A student who brings a common pocketknife to school can be charged with possession of a weapon on school campus, even thought a different statute exempts pocketknives from the definition of weapons, the 4th DCA said. A South Florida middle school student was charged under section 790.115(2)(a), F.S., after he brought a knife with a three-and-one-half-inch blade to school. That statutes specifically prohibits knives, but the student argued that the common pocketknife exception in section 790.001(13), which defines "weapon," prevents him form being charged with the possession offense. The DCA disagreed. "A weapon is one thing, and a knife is another. If the legislature had intended to exclude common pocket knives form (the possession statute), it knew how to do so," the court said.

[A.B. vs. State, 757 So.2d 1241 (4DCA 4/26/00)]

64) Right to counsel may attach when surrendering on warrant [1]

A defendant who retains counsel before surrendering on an outstanding warrant has a right to counsel under the state Constitution from the moment she is taken into custody, the 1st DCA held. The DCA said a trial court correctly suppressed statements Sarah Stanley gave to investigators when the questioned her after Stanley's attorney expressly told them not to question her outside of his presence. The trial court agreed with Stanley's assertion that she had been questioned in violation of the Fifth and Sixth Amendments to the U.S. Constitution and sections 9 and 16 of article I of the Florida Constitution. The DCA certified to the Florida Supreme Court the question of whether counsel can invoke the client's right to have the attorney present during questioning. "Because the right to counsel guaranteed by article I, section 16 of the Florida Constitution had attached, Ms. Stanley having retained counsel prior to her arrest who was ready and willing to assist her, the authorities could not lawfully initiate an interview in the absence of the lawyer whom she had retained to represent her," the DCA said.

[State vs. Stanley, 754 So.2d 869 (1DCA 4/12/00)]

65) Fleeing & eluding law enforcement officer-must be high speed [1]

In order to convict a defendant of the felony charge of fleeing and eluding a law enforcement officer, the state must establish that the defendant caused the pursuing officer to engage in a "high-speed vehicle pursuit," the 1st DCA said. Jonathan Beree appealed his felony conviction and the DCA reversed, remanding for the trial court to enter a conviction on a misdemeanor fleeing and eluding charge. Trial evidence was insufficient to establish that Beree caused the pursuing officer to engage in a "high-speed vehicle pursuit" and so the felony charge could not be supported, the DCA concluded.

[Beree vs. State, 775 So.2d 783 (1DCA 4/12/00)]

66) Possession of firearm on school property - must be "rude, etc." [2]

In order for a juvenile to be found delinquent for possession of a firearm on school property, the state must prove that the gun was handled in a rude, careless, angry, or threatening manner, the 2nd DCA said. A juvenile identified in court records as M.C.M. appealed a trial court order adjudicating him delinquent for possession of a firearm on school property. M.C.M. said he had been hunting the previous night and had forgotten to remove the rifle from his car before he came to school. On appeal, he argued that the state did not prove the charged offense as a matter of law because it failed to show he exhibited the rifle in a "rude, careless, angry, or threatening manner." The state argued that the fact that the gun was loaded and brought to the school parking lot provided sufficient evidence that it was handled in a careless manner. Reversing the delinquency finding, the DCA said, ""(W)hether the gun was loaded does not prove or disprove how the gun was handled. While we cannot fathom why any student in these days and times would knowingly drive onto school property in a vehicle containing a firearm, the State failed to present sufficient evidence that M.C.M. violated that portion of section 790.115 which addresses exhibiting a firearm in a rude, careless, angry, or threatening manner."

[M.C.M. vs. State, 754 So.2s 844 (2DCA 4/7/00)]

67) Self-incrimination privilege during civil discovery [5]

A litigant can assert his Fifth Amendment privilege against self-incrimination during discovery when he has reasonable grounds to believe a response would be used to link him to a crime, the 5th DCA said. The court quashed a discovery order that would have compelled James O'Neal Jr. to respond to interrogatories in aid of execution of a judgment, despite O'Neal's assertion of his Fifth Amendment right. O'Neal is the target of an ongoing federal fraud investigation, and the interrogatories were prepared by a bank seeking information about his assets and income. The trial court ordered O'Neal to answer the interrogatories, but the DCA disagreed. "If compelled to answer these interrogatories, the petitioner would find himself on the horns of a dilemma. If he does not truthfully answer the interrogatories to protect himself from the fraud investigation, the petitioner could be subject to a charge of perjury. On the other hand, if he divulges the information he could help, aid and assist the potential federal prosecution. Therefore, the order compelling the petitioner to answer the interrogatories is quashed," the DCA said.

[O'Neal vs. Sun Bank, N.A., 754 So.2d 170 (5DCA 3/31/00)]

68) "Summons to be sent" does not start "speedy trial" [5]

A defendant who receives a traffic citation indicating "summons to be sent" is not taken into custody at that point for purposes of the speedy trial rule, the 5th DCA said. Carole E. Fothergill was charged by information with failure to stop at an accident resulting in injuries, a third-degree felony. The accident occurred on November 12, 1996. Six days later, Fothergill was issued a Florida Uniform Traffic Citation. In the space headed "court information," the trooper wrote "summons to be sent." Fothergill was not taken into custody or arrested. In March 1998, some 16 months later, an information was filed charging Fothergill with a felony. Fothergill moved for discharge on speedy trial grounds, contending that more than 175 days had elapsed since the issuance of the traffic citation without her being charged or brought to trial. The DCA disagreed. "All the traffic citation indicated was that 'summons to be sent.' There was no requirement that appellant respond in any way. Thus, for the purposes of Rule 3.191 she was not taken into custody, so speedy trial time had not expired when she filed her motion for discharge," the DCA concluded.

[Fothergill vs. State, 754 So. 2d 174 (5DCA 3/31/00)]

69) Battery in courthouse hallway on officer after testifying [1]

A slap on the shoulder of an officer outside a courtroom constitutes a battery upon an officer "engaged in the lawful performance of his duties," and the officer is therefore entitled to special protections provided by Florida law, the 1st DCA said. An angry defendant struck the officer outside the courtroom moments after the officer testified against him in a traffic case. Under section 784.07(2), F.S., battery on a law enforcement officer while the officer is "engaged in the lawful performance of his or her duties" is reclassified from a first-degree misdemeanor to a third-degree felony. The defendant argued that the officer was not entitled to greater protection than any other witness called to testify but the DCA disagreed, stating that the officer's court appearance stemmed from and was inseparably connected with his duties. "The trial court concluded that the jury could find that the officer was within the scope of his duties when he was struck immediately outside of the courtroom door after having testified. We decline to disturb the trial court's ruling," the DCA said.

[Lee vs. State, 745 So.2d 1036 (1DCA 10/25/99)]

70) Blue lights makes an investigatory stop, not consent encounter [1]

A police officer who flashed his blue lights as he approached a stopped vehicle displayed a show of authority and the encounter constituted an investigatory stop rather than a consensual police-citizen encounter, the 1st DCA said. Two motorists contended that the trial court should have suppressed evidence that was seized when they were unlawfully stopped. The DCA agreed, rejecting the state's argument that the officer approached the vehicle in a consensual police-citizen encounter and that Brooks and Bates were free to leave at any time. The DCA concluded that the trial court's finding of a consensual encounter was clearly erroneous because the officer activated his flashing blue lights when he pulled behind the stopped vehicle, even though he did not have a reasonable suspicion of criminal activity. "Based on the show of authority by (the officer's) use of the flashing blue lights, the encounter constituted an investigatory stop," the DCA said. "(A) reasonable person under such circumstances would not have believed he or she was free to leave and terminate the encounter."

[Brooks vs. State, 745 So.2d 1113 (1DCA 12/8/99)]

71) Aider and abettor - telling another "cop's coming, hide dope" [1]

An individual is guilty of possession of cannabis if he tells another person that the police are coming and advises him to hide the contraband, the 1st DCA said. J.V., a juvenile, appealed an order adjudicating him guilty of possession of cannabis. He and Clifford Riker were passengers in a car that was involved in an automobile accident. As Riker drifted on the verge of unconsciousness, J.V. warned him that police were approaching and said Riker should ""hide the weed," which Riker had shown to J.V. shortly before the accident. The DCA affirmed the trial court's conclusion that J.V. had aided and abetted Riker in the ongoing possession offense. Because J.V. helped Riker maintain possession of the cannabis, he is guilty of possession as a principal in the first degree, the DCA said.

[J.V. vs. State, 745 So.2d 1110 (1DCA 12/8/99)]

72) Observations 10 days earlier fail to provide PC for warrant [2]

A police officer's affidavit describing a limited drug buy 10 days earlier was insufficient evidence for a magistrate to issue a warrant to search everyone in a home, the 2nd DCA said. Alfred Szady was arrested for possession of cocaine and drug paraphernalia after police executed a search-all-persons-present-warrant at a home where a confidential informant had purchased cocaine 10 days before. "(T)he issuing magistrate reviewed a police officer's affidavit, which described a confidential informant's single buy of an undisclosed amount of cocaine within the previous ten days. The affidavit contained no additional facts. We do not believe the officer's affidavit supports a reasonable conclusion that it is probable that anyone in the described home is involved in criminal activity in such a way as to have evidence of the criminal activity on his or her person," the DCA said.

[Szady v. State, 745 So.2d 1041 (2DCA 10/27/99)]

73) Weaving + Driving 20 mph under limit = Founded suspicion [2]

A law enforcement officer was justified when he pulled over a motorist who was driving 20 mph and more below the speed limit and weaving across lanes, the 2nd DCA said in reversing an order suppressing cocaine found during the stop. A deputy sheriff testified that he pulled over the car driven

by Clifford Davidson when he saw it traveling on an interstate highway at a speed of between 40 and 48 mph in a 70 mph zone and continually drifting across lines on the road. The deputy testified that these actions were characteristic of an impaired driver, so he pulled the vehicle over. "As revealed by the deputy's testimony, the deputy's observations of Davidson's driving provided him with the founded suspicion necessary to conduct a stop of Davidson," the DCA said.

[State vs. Davidson, 744 So.2d 1180 (2DCA 11/3/99)]

74) Must see drugs or money exchanged for "drug deal" stop [2]

An officer is required to see an actual exchange of drugs or money in order to instigate a stop in a typical "drive-by" drug transaction, the 2nd DCA said. John Stiffler appealed the denial of his motion to suppress drug evidence seized when he was stopped by a police officer. The DCA concluded that the officer did not have reasonable suspicion that a crime was being committed when he witnessed two white males driving in a jeep through a black neighborhood known for drugs and crime. The officer testified that he observed the jeep remain at a stop sign for a long period of time and saw a passenger dig in his back pants pocket. "(W)hile these circumstances were certainly suspicious, they do not rise to the level required to instigate a stop," the DCA said. "Although the court may look to various other factors to justify the stop, if the officer has not seen an actual exchange, those additional factors are not sufficient."

[Stiffler v. Florida, 744 So.2d 1187 (2DCA 11/3/99)]

75) Must prove defendant knew substance was particular drug [2]

The state must prove that a defendant charged with possessing a specific drug knew that the illicit substance he or she had was the particular drug cited in the charges, the 2nd DCA held.
The court reversed the conviction of a woman who was charged with trafficking in methamphetamine. Helen Abbott was charged after she reluctantly turned over to police a latex glove containing 27.4 grams of methamphetamine, which she had been concealing for her son. Abbott conceded that she knew the glove contained some type of drugs, but did not know it contained methamphetamine. When jurors asked if she was required to know specifically which drug was in the glove, the trial court relied on Chicone vs. State to instruct them that she needed to be aware of the illicit nature of the drug. The DCA said the state must also prove that Abbot knew that the substance was the methamphetamine. "The erroneous instruction cannot be considered harmless since lack of knowledge was appellant's defense, and the State presented little or no evidence to establish that appellant knew that the rubber glove contained methamphetamine," the DCA said.

[Abbott v. State, 744 So.2d 578 (2DCA 11/12/99)]

76) Confidential informant - probable cause for stop

Police did not have probable cause to stop a car and conduct a pat-down search of a passenger based solely on information that they received from a reliable confidential informant, the 2nd DCA said. Clifford was arrested after an informant told police he was going to drive Clifford to buy cocaine in a neighborhood known to be a source of drugs. Because the officers did not follow the car into the neighborhood, they were unable to observe any unlawful transaction involving Clifford. However, they stopped the vehicle anyhow and conducted a pat-down search of Clifford, which turned up a slab of cocaine. The DCA said the trial court should have suppressed the cocaine because the informant's information about his own behavior did not give the police a reasonable basis to conduct a Terry stop.

[Clifford vs. State, 750 So.2d 92 (2DCA 12/8/99)]

77) "Luring or enticing" statute is unconstitutionally vague [2]

The Florida criminal statute on luring or enticing a child is unconstitutionally vague because it does not define the term "other than a lawful purpose," the 2nd DCA said. James Brake challenged the judgment and sentence imposed after his no contest plea to luring or enticing a child under 787.025, F.S. Reversing Brake's conviction, the held the statutory section to be unconstitutionally vague because its prohibition on luring or enticing a child into a building or vehicle for "other than a lawful purpose" fails to give persons of common intelligence adequate notice of the proscribed conduct. "We note, however, one way that the legislature could cure this problem is by leaving out the offending language and making it illegal for a convicted sex offender over the age of eighteen, especially someone convicted of child sexual abuse, to lure or entice a child under twelve into a structure, dwelling, or conveyance without the permission of a parent or guardian," the DCA said.

[Brake vs. State, 746 So.2d 527 (2DCA 12/10/99)]

78) Admission made during plea negotiations [2]

A voluntary statement to a law enforcement officer in connection with plea negotiations is admissible if it was not made in violation of Miranda and is not inadmissible as a violation of the Florida Rules of Criminal Procedure and the Florida Statutes, the 2nd DCA said. Ivan Melendez challenged his convictions for first-degree murder, attempted murder, and attempted robbery. Melendez's convictions were based in part on a statement he made to police. Melendez argued on appeal that the statement was made in connection with plea negotiations and should be inadmissible as a violation of rule 3.172(h) and section 90.410. The DCA disagreed, concluding that Melendez demonstrated no reasonable subjective expectation of negotiating a plea at the time he made the statement, and there was no indication that the statement was anything other than an unsolicited, unilateral offer by Melendez.

[Melendez vs. State, 747 So.2d 1011 (2DCA12/10/99)]

79) Removing plastic bag from pants is not "strip search" [2]

A police officer conducts a seizure, but not a strip search, when he reaches into the top of a handcuffed suspect's pants, pulls the top of the pants toward him, and removes a plastic bag he saw the suspect place down the front of the pants, the 2nd DCA said. The defendant argued the evidence should be suppressed because they searched him within public view and failed to get written approval from the supervising officer. The DCA disagreed, distinguishing a "strip search" from a seizure of evidence. According to the DCA, the statute did not apply because the officers did not have Days remove or arrange his clothing to conduct an inspection or examination of his crotch area.

[State vs. Days, 751 So.2d 87 (2DCA 12/29/99)]

80) Ramming police car = Battery on law enforcement officers [2]

A defendant committed a battery on law enforcement officers when he rammed a police cruiser while officers were seated inside, the 2nd DCA said. The state alleged that Wingfield intentionally rammed a police cruiser with his pick-up truck. "We find that an 'intimate connection' existed because the officers rested their full weight on the cruiser's seats. Wingfield's intentional act of ramming his truck into the

cruiser with the force the officers described necessarily involved an impact, even if only slight, to the officers. A refusal to acknowledge this impact would deny the applicability of the law of physics regarding the transfer of energy. Whether the physical impact caused injury to the officers is irrelevant. Wingfield did, in fact, commit a battery against the officers, and, in the course of doing so, used a deadly weapon, that is, a motor vehicle," the DCA said.

[Wingfield vs. State, 751 So. 2d 134 (2DCA 1/19/00)]

81) Motel room search

A defendant has no legitimate expectation of privacy in a vacated motel room and relinquishes his interest in any property left there, the 2nd DCA said. The state appealed a trial court order suppressing a crack pipe containing cocaine residue, as well as a clean crack pipe, new and used steel wool pads, and George Williams' incriminating statements to police. The contraband was found in the motel room after Williams, responding to an officer's request, packed his bags and left the room, telling the officer he had not left anything behind. The DCA reversed the suppression, concluding that the officer entered Williams' room lawfully and asked him to leave. The DCA noted that Williams packed his belongings, turned in his key, and left in his truck, and the record contains no evidence that Williams was forced to abandon the contraband by any unlawful act of the officer.

[State vs. Williams, 751 So.2d 170 (2DCA 2/9/00)]

82) Driver and car entering premises being searched by warrant [2]

A defendant and his vehicle are subject to being searched if he drives onto premises identified in a warrant as the area to be searched, the 2nd DCA said. "(B)ecause the officers were legally entitled to search Lowe's vehicle pursuant to the warrant, the search of Lowe's person was transformed into a valid search pursuant to the 'inevitable discovery' doctrine. Evidence that is obtained pursuant to unconstitutional police procedures may still be admissible if it is shown that the evidence would ultimately have been discovered by legal means. Once the deputies searched Lowe's vehicle and found the cannabis, they were authorized to search Lowe's person pursuant to the 'search incident to arrest' exception. The methamphetamine would have then been discovered," the DCA said.

[Lowe vs. State, 751 So.2d 177 (2DCA 2/11/00)]

83) Withdrawal of consent to search

When an individual gives an officer consent to search his shirt pocket, he withdraws that consent when he informs the officer that there is nothing else in his pocket, and so the officer must then have probable cause to continue the search, the 2nd DCA said. "(W)e find nothing in this record demonstrating that the deputy had probable cause to seize the partially revealed cellophane wrapper (with crack cocaine inside) from Jacobs. This case did not involve a pat down search, and it is apparent that the cellophane did not suggest a weapon. Thus, the deputy had to have probable cause to believe that the cellophane wrapper contained illegal contraband," the DCA said.

[Jacobs vs. State, 753 So.2d 671 (2DCA 3/10/00)]

84) Forfeiting currency requires PC finding it was used illicitly [2]

No tie to a violation of the Florida Contraband Act dooms this forfeiture. Marlo Albury challenged a non-final order forfeiting currency discovered in his vehicle. Albury and his wife were traveling in a rented vehicle that was stopped for speeding. Albury's wife told the officer there was nothing in the car he should be aware of, but Albury and his wife gave conflicting statements about the amount of money in the car. A police dog failed to indicate the presence of narcotics. The officer subsequently found a package containing $55,045 in cash. The DCA concluded that while Albury and his wife gave conflicting statements about the money, there was nothing in those contradictions to indicate that the money was being used in violation of the Florida Contraband Act. The court reversed the forfeiture, noting that Albury provided receipts in support of his claim that he won the money gambling.

[Albury vs. City of North Port, 753 So.2d 735 (2DCA 3/22/00)]

85) Admissibility of roadside sobriety test [3]

Law enforcement officers are qualified to testify about a particular roadside sobriety test if they have been properly trained in how to administer the test, even if they are not certified Drug Recognition Evaluator, the 3rd DCA held. The court also pointed out that the case law in the district addresses any reliability concerns by holding that the driver's intoxication must be confirmed by a blood, breath or urine test before HGN evidence is admissible.

[Bowen vs. State, 745 So.2d 1108 (3DCA 12/8/99)]

86) Cost of statewide prosecutor's case to be borne by state [3]

The state, rather than individual counties, must bear the cost of actions brought by the Statewide Prosecutor, the 3rd DCA said, ruling on an issue never before addressed by a Florida court.
The Office of Statewide Prosecutor sought to have Dade County pay witness fees stemming from a multi-circuit Medicaid fraud case that was tried in Dade County Circuit Court. In a split 2-1 decision, the DCA said neither Florida statutes nor the Constitution expressly authorizes either the state or the county to pay such costs, and concluded the state must pay. The DCA said that conclusion comports with a 1998 constitutional amendment designed to shift the burden of funding the state court system from the counties to the state.

[Miami-Dade County vs. State of Florida, 754 So.2d 115 (3DCA 3/15/00)]

87) Constructive possession - coke taped to inside door panel [4]

The presence of eight packages of cocaine taped to the inside of a car door panel, when no other contraband was found anywhere else in the car or on the defendants, is not legally sufficient to prove that two defendants knew of the drugs, the 4th DCA said. George Earle and Brian Green appealed their cocaine trafficking convictions. The DCA noted that the cocaine was concealed and had no fingerprints, the defendants had no tools to suggest they were utilizing a hidden compartment, the men did nothing suspicious, and they both offered plausible explanations of their activities. The DCA ordered that the defendants be discharged, holding that the state's evidence was legally insufficient to establish that each defendant knowingly was in constructive possession of the cocaine. "(I)f contraband is found in joint, rather than exclusive, possession of a defendant, then knowledge of the contraband's presence and the ability to control it will not be inferred from the accused's ownership of the premises or presence near the contraband, but must be established by independent proof," the

DCA said.

[Earle vs. State, 745 So.2d 1087 (4DCA 11/24/99)]

88) Submission to show of authority [4]

Two police officers approaching a defendant from different directions and requesting identification is not a sufficient show of authority to constitute a stop for search and seizure purposes, the 4th DCA said. The defendant claimed that he was effectively stopped without founded suspicion when one officer approached him from the front and another came from the rear. He claimed he dropped the cocaine in submission to a show of authority, but the DCA disagreed. The DCA said Clemons did not actually stop, but moved to the side and dropped the cocaine. The DCA noted that the officers had merely asked Clemons for identification, which does not constitute a stop. "(T)here is no seizure if the defendant does not stop in submission to the show of authority. Here, the defendant did not stop, and the trial court correctly denied the motion to suppress," the DCA said.

[Clemons vs. State, 747 So.2d 454 (4DCA 12/15/99)]

89) Removal of hubcaps and lug nuts is not burglary [4]

The removal of hubcaps and lug nuts from the wheels of an automobile does not constitute burglary, the 4th DCA said. A police officer discovered Adam Jones in a used car lot at midnight, removing lug nuts from the wheels of a car. The hub caps that had covered the lug nuts had been removed and were found in a plastic bag nearby. The hood, trunk and interior of the car were locked, and there was no evidence of entry. The DCA reversed Jones' conviction, concluding that the acts did not constitute burglary. The removal of a wheel, tire, hub cap or lug nuts from outside of a conveyance cannot constitute burglary because there is no "intent to commit an offense therein," the DCA concluded.

[Jones vs. State, 763 So.2d 1101 (4DCA 12/15/99)]

90) Second set of Miranda warnings not needed. [4]

A defendant is not entitled to a second set of Miranda warnings before being questioned on unrelated cases, the 4th DCA said. "The failure of law enforcement officials to inform a suspect in custody of the subject matter of the interrogation, i.e., what offenses he or she will be questioned about, does not affect the suspect's decision to waive the Fifth Amendment privilege in any constitutionally significant manner. Thus, where a suspect is brought into custody on one criminal charge and waives his or her Miranda rights, police officials may question the suspect about unrelated crimes without readministering the Miranda rights," the DCA said.

[State vs. Jones, 763 So.2d 1180 (4DCA 1/26/00)]

91) Inquiry about counsel before giving recorded confession [4]

When a suspect waives his Miranda rights and gives an unrecorded confession, officers must give him a "straightforward" answer when he inquires about his need for counsel prior to giving a taped confession, the 4th DCA said. The DCA asked the Supreme Court to determine what is required of officers when a suspect asks if he should invoke his right to counsel. Brian Glatzmayer moved to suppress the recorded confession he gave police officers concerning a robbery and murder. Glatzmayer argued that the trial court should have granted his motion to suppress because his case is indistinguishable from the Florida Supreme Court's ruling last year in Almeida vs. State. The state argued that the admission of the recorded confession was harmless because Glatzmayer gave an

unrecorded confession before he ever asked the officers if they thought he needed counsel. The officers gave a vague response, and Glatzmayer then proceeded to give a taped confession. Reversing the trial court's decision to allow the taped confession, the DCA said, "Clearly, the only straightforward answer to appellant's question would have been some type of affirmative response. We therefore conclude that the confession must be suppressed." The DCA certified the question for a determination of what is required of officers under Almeida in such cases.

[Glatzmayer vs. State, 754 So.2d 71 (4DCA 3/8/00)]

92) 4th Amendment no factor in search by a private individual [5]

An employee's Fourth Amendment rights were not violated when his employer conducted a search of his desk without consent and gave police evidence he found there indicating that the employee had been involved in an armed robbery, the 5th DCA said. Scott Olsen was charged with armed robbery with a firearm after his boss opened his desk to check the status of his work, discovered a weapon and called police. Olsen filed a motion to suppress the gun, arguing that the search of his desk violated his rights under the Fourth and Fourteenth Amendments. The trial court agreed and suppressed the firearm, but the DCA reversed. Noting the U.S. Supreme Court's 1984 holding in U.S. vs. Jacobsen, the DCA said government search that is prompted by a preceding private search, and does not exceed the scope of the private search, does not violate the Fourth Amendment because at that point the subject no longer has an expectation of privacy. The DCA concluded that the employer acted on his own when he opened the desk to check the status of Olsen's work, and the police search did not exceed the employer's private search.

[State v. Olsen, 745 So.2d 454 (5DCA 11/12/99)]

93) Determination of venue in email case [5]

Email should be considered the same as U.S. mail for determining venue, so venue is proper in either the county from which a message originated or the county in which it is received, the 5th DCA held. "(T)he use of an online service to solicit requires that the request be sent to another (jurisdiction)," the DCA said. "We see no reason to treat e-mail any differently than U.S. mail for venue purposes." The court also approved the decision by police to impound the defendant's vehicle and subsequently conduct an inventory search, which uncovered incriminating evidence. The DCA said there was no indication police acted in bad faith when they determined that leaving the vehicle in a restaurant parking lot after it closed would pose a risk to the vehicle.

[Hitchcock vs. State,746 So.2d 1143 11/12/99)]

94) Termination of at-will employee

A city manager's letter informing a police chief that he is entitled to all the rights of police officers does not change the chief's status from at-will to that of an employee protected by a collective bargaining agreement, the 5th DCA said. The court upheld the City of Cocoa's termination of its police chief, saying the letter did not offer the chief any additional protections. About five months after he was hired, the chief receive the letter stating that he was "entitled to all the rights of a police officer." After he was fired, the chief argued that this language entitled him to protection under the city's collective bargaining agreement with its police officers. The DCA disagreed. "(T)he supplemental letter does not contain an express reference to an agreement of a period of employment and therefore lacks the definiteness and certainty required to be an enforceable employment contract," the DCA concluded.

[Liff vs. City of Cocoa, 745 So.2d 441 (5DCA 11/5/99)]

95) Automobile used as weapon makes armed robbery [5]

An automobile that bumped a victim during a purse-snatching robbery can be classed as a weapon to enhance a strong-arm robbery to an armed robbery, the 5th DCA held. The defendant was seated in the passenger side of a vehicle that bumped the victim's hip as Jenkins reached through the window and grabbed her purse strap. Jenkins contended that as a matter of law the car was not used as a weapon, but the trial court disagreed. The DCA said the evidence was sufficient to show that the vehicle was used as a weapon and not just as a means of transportation.

[Jenkins vs. State, 747 So.2d 997 (5DCA 12/3/99)]

96) Validity of stop on Baker Act concern [5]

Officers acted properly when they stopped an incoherent blood-covered man and, while considering whether to Baker Act him, conducted a search that turned up cocaine after the man claimed to be carrying weapons, the 5th DCA said. Randy Thomas appealed his motion to suppress cocaine that was found when officers detained him while considering whether to Baker Act him. Thomas argued that his detention could not be sustained as a consensual encounter, an investigatory Terry stop, or an arrest supported by probable cause, nor was it supported by any well-founded suspicion of criminal activity. The DCA said Thomas' initial detention was unrelated to the suspicion of criminal activity, but after he claimed to have weapons the search was justified for the safety of the officers and of Thomas. Therefore, the DCA said, the trial court correctly declined to suppress the cocaine. The DCA agreed with the trial court that Thomas' initial detention was justified by the Florida Mental Health Act because at the time of his initial detention, he was covered in blood, had some type of head injury, and was speaking incoherently and flailing his arms in an irrational manner.

[Thomas vs. State, 748 So.2d 363 (5DCA 1/7/00)]

97) Need for Miranda warning [5]

An individual who makes inculpatory statements to a law enforcement officer is not entitled to Miranda warnings unless the officer says or does something that leads the person to believe he is in police custody, the 5th DCA said. The state appealed a trial court order suppressing statements by Randy Wilson, who was suspected in the theft of office equipment. After the deputy told Wilson he was investigating the theft, Wilson described how he committed the crime. The state argued that since Wilson was not in custody at the time the statements were made, Miranda warnings were not required. The DCA agreed. "No evidence was adduced indicating that, during his conversation with Mr. Wilson, the deputy used threatening or commanding language; brandished a weapon or made any threatening gestures; or that he touched or approached Mr. Wilson," the DCA said. "Since, at no time did the deputy do anything or say anything to indicate to Mr. Wilson that he was in police custody, Miranda warnings were not required."

[State vs. Wilson, 747 So.2d 1051 (5DCA1/7/00)]

98) Questions concerning right to counsel invokes Miranda rights [5]

A defendant's question concerning his right to a lawyer invokes his Miranda rights and any statements he makes from that point must be suppressed, the 5th DCA said. Kevin Bean appealed the denial of his motion to suppress. Bean was charged with six lewd and lascivious assaults on his five-year-old

stepdaughter. Bean asserted that his confession to an investigator should be suppressed because the Miranda warnings he had been given were negated by additional statements by the investigator. Bean also asserted that he never waived his Miranda rights and that he made a clear request for an attorney, which the investigator ignored. Reversing, the DCA held that even if Bean did not make an unequivocal request for counsel, the investigator failed to properly respond to questions that Bean might use in deciding whether to waive his rights.

[Bean vs. State, 752 So.2d 644 (5DCA 1/7/00)]

99) OK to charge each photo in bundled porn computer images [5]

It is not double jeopardy to charge a child pornography defendant for possessing both a bundled computer file and the many individual images stored within the bundle, the 5th DCA said Farnham contended that possession of the individual pictures did not fall within the statutory language of section 827.071(5), which prohibits the "possession of each such photograph, motion picture, exhibition, show, representation or presentation." The DCA disagreed, concluding that the state's charging decision fell properly within the legal parameters regarding units of prosecution since the language of section 827.071 relates to possession of "a" pornographic photograph or other representation. The DCA also concluded that the state's filing of separate charges against Farnham for his possession of both the full "zipped" file and the individual images contained within that large file was authorized because both offenses fell either within the definition of the term "presentation" or the term "representation" for purposes of the statute.

[State vs. Farnham, 752 So.2d 12 (5DCA 1/7/00)]

100) Parked car at closed business isn't reasonable susp'n to stop [5]

An officer who observes an individual parked late at night near a closed business does not have a well founded suspicion to conduct a Terry stop, the 5th DCA said. Gregory Baker was convicted of burglary, possession of burglary tools, and grand theft based on an officer discovering bolt cutters in the back of his van, as well as on certain incriminating statements Baker made. Baker appealed the trial court's failure to suppress the evidence, arguing that the officer had no well-founded suspicion to make a Terry stop. The DCA agreed, concluding that the officer had no reasonable grounds for suspicion that the closed business had been or was about to be burglarized. "If Baker's actions are sufficient to warrant a Terry stop, then anyone who parks in a business area late at night would be subject to a Terry stop," the DCA said.

[Baker vs. State, 754 So.2d 154 (5DCA 3/24/00)]

11th Circuit Court of Appeals Cases:

1) Child pornography - multiple victims

The primary victims of child pornography are the minors depicted in the images, so a trial court properly refused to group multiple images into a single count for sentencing purposes, the 11th U.S. Circuit Court of Appeals said. Willie Tillmon appealed his 87-month sentence for multiple counts of child pornography based on several young victims. Tillmon claimed that society in general was the actual victim of his crime, and therefore the various counts should have been grouped into a single offense at sentencing. Agreeing with the majority of circuit courts that have considered the issue, the 11th Circuit held that the primary victims of these offenses were the multiple minors depicted in the images, and so the trial court did not err when it refused to group Tillmon's offenses.

[United States vs. Tillmon, 195 F.3d 640 (11CA 11/10/99)]

2) Inmate's classification as sex offender

An inmate who has never been convicted of a sex crime is entitled to due process before the state declares him to be a sex offender, the 11th U.S. Circuit Court of Appeals held. The court said the "stigmatizing effect" of being classified as a sex offender constitutes a deprivation of liberty under the Due Process Clause. The court ordered further proceedings for an Alabama prison inmate who was classified as a sex offender based on two previous sex-related charges that did not result in convictions. The 11th Circuit agreed with Robert Edmond that he had a liberty interest in not being classified as a sex offender, but said the record in his case was insufficient to determine whether Edmond received due process in conjunction with the deprivation of that interest. "Edmond does have a liberty interest in not being branded a sex offender. The Supreme Court has held that when a change in the prisoner's conditions of confinement is so severe that it essentially exceeds the sentence imposed by the court, a prisoner is entitled to some procedural protections. Even after Edmond's conviction for attempted murder, he retains a 'residuum of liberty' that would be infringed by classification as a sex offender without complying with minimum requirements of due process," the court said.

[Kirby vs. Siegelman, 195 F.3d 1285 (11 CA 11/17/99)]

3) Convicted felon knowingly in possession of firearm

The federal law prohibiting a convicted felon from carrying a firearm does not apply to a defendant whose civil rights were completely restored by a state parole board with no limitations on his right to carry, possess, or purchase firearms, the 11th U.S. Circuit Court of Appeals said. Bob Fowler was indicted for firearm possession by a convicted felon. Fowler argued that he received a certificate granting restoration of his civil and political rights from the Alabama State Board of Pardons and Paroles. Relying on its earlier decision in U.S. vs. Swanson, the 11th Circuit held, "Fowler was granted a certificate restoring his civil and political rights without any reservations or prohibitions limiting his right to ship, transport, possess, or receive firearms." Thus, the court said, he cannot be convicted for possessing a firearm because the state "restored to him all civil and political rights and the certificate was not expressly limited in the manner contemplated and provided by Congress."

[U.S. vs. Fowler, 198 F.3d 808 (11 CA 12/17/99]

4) Reasonable expectation of privacy in hotel room

Criminal defendants do not have a reasonable expectation of privacy in a hotel room for which they neither paid nor registered, thus they lack standing to move to suppress evidence allegedly obtained in violation of the Fourth Amendment, the 11th U.S. Circuit Court of Appeals said. Two men were indicted on five narcotics-related counts, and appealed the denial of their motion to suppress all evidence found in the Orlando hotel room. The defendants asserted that the police searched the hotel room and seized the evidence without a warrant and absent exigent circumstances or consent, in violation of their Fourth Amendment rights. The 11th Circuit agreed with the trial court, holding that the defendants had not alleged sufficient facts to establish a "reasonable expectation of privacy" in the hotel room, and therefore the men did not have standing to challenge the search and seizure.

[United States vs. Cooper, 2/14/00]

5) Constitutionality of child porn law

The federal Child Pornography Prevention Act of 1996, which is designed to outlaw so-called "virtual" child pornography, is constitutional and does not violate the First Amendment, the 11th U.S. Circuit Court of Appeals said. Jack Acheson was convicted of knowingly receiving visual depictions of minors engaged in sexually explicit conduct transported in interstate commerce by means of the computer, as well as possession of material that contained three or more images of child pornography. Acheson appealed his conviction claiming that the law is unconstitutionally vague, overbroad, and generally violates the First Amendment. In particular, Acheson argued against language defining child pornography as including an visual depiction that "is, or appears to be," of a minor engaged in sexual activity. The law targets "virtual" pornography, or computer-altered images that are practically indistinguishable from actual photographs of minors in sexually explicit situations. Upholding the lower court's decision, the 11th Circuit noted that pedophiles often use images of children engaged in sexual activity to persuade other children to participate. "Not only does virtual pornography serve this end as effectively as the real thing, it also whets the appetite of child molesters just as much as child pornography created through the use of real children. Thus, defining child pornography in a manner which captures images that 'appear to be' minors engaged in sexually explicit activity serves the two goals of the Act which are 'the elimination of child pornography and the protection of children from sexual exploitation,'" the court said.

[United States vs. Acheson, 195 F.3d 645 (11CA 11/12/99)]

6) Constitutional right to 12-member jury

A Florida criminal defendant is not denied effective assistance of counsel simply because his attorney agreed, with the defendant present, to a trial before a six-person jury rather than a 12-person jury, the 11th U.S. Circuit Court of Appeals said. The 11th Circuit, like Florida courts before it, denied Cabberiza's claim that he had a right to a 12-person jury, and vigorously rejected his assertion that he was the victim of ineffective assistance of counsel. "If we were to take judicial notice that twelve jurors are always better than six - which we would need to do in order to provide petitioner relief - then we would be telling every attorney who practices in Florida that he is subjecting his client to prejudice (and himself to a claim of ineffective assistance) by choosing six jurors instead of twelve when the death penalty is not at issue. We would, in effect, be foreclosing the possibility that an intelligent attorney might look at the venire, the nature of the allegations against his client, and the strength of the evidence on both sides, and decide that his client would be better off with a jury of six. This we cannot do," the 11th Circuit said.

[Cabberiza vs. Moore, 217 F.3d 1329 (11CA 7/11/00)]

7) Reverse discrimination in sheriff's promotions policy

The 11th U.S. Circuit Court of Appeals reinstated a lawsuit by two ranking Georgia sheriff's officers who claimed their agency's promotions policy violated their equal protection rights by reserving half of all annual promotions for black officers. The appeals court did not rule on whether the policy, adopted under a consent decree settling a black deputy's 1978 racial discrimination lawsuit, did in fact violate the Fourteenth Amendment rights of the two white officers. However, the court said the trial court incorrectly granted summary judgment in favor of the sheriff's department. The sheriff's department argued that an applicant's race is not dispositive of his or her ability to compete for any particular promotion, because the consent decree does not compel the sheriff to consider race when awarding individual promotions, only annual totals. The 11th Circuit disagreed. "The pattern in which the promotions are conferred is irrelevant, because the result is the same: fifty percent of the annual promotions must be awarded to black officers, effectively excluding white officers from consideration for those promotions. Although the (consent) Decree may not preordain the race of the officer receiving any one promotion, it does demand a racial allocation of the promotions conferred annually, thus potentially creating the constitutional infraction," the court said.

[Thigpen and Allen vs. Bibb County Sheriff's Department, 216 F.3d 1314 (11CA 7/7/00)]

8) Civil rights judgment - no monetary loss

A plaintiff may win a civil rights judgment stemming from police officers' conduct in arresting him even if cannot prove he suffered any monetary loss as a result of the officers' actions, the 11th U.S. Circuit Court of Appeals held. The court reversed a trial judge's order in favor of Georgia officers in a civil rights lawsuit alleging excessive force under 42 U.S.C. §1983. The lower court cited qualified immunity in ruling for the officers on an unlawful arrest claim, and the plaintiff did not challenge that ruling on appeal. The 11th Circuit said it has held that a plaintiff whose constitutional rights are violated is entitled to nominal damages even if he suffered no compensable injury, and ruled for the first time that a §1983 plaintiff alleging excessive use of force is entitled to nominal damages even if he fails to present evidence of compensability. "Because a §1983 plaintiff alleging excessive force may receive compensatory damages for such things as physical pain and suffering and mental and emotional anguish, and because a §1983 plaintiff whose constitutional rights are violated is entitled to receive nominal damages even if he fails to produce any evidence of compensatory damages, we hold that the district court erred in granting judgment as a matter of law," the 11th Circuit said in ordering further proceedings.

[Slicker vs. Jackson and Fulmer, 215 F.3d 1225 (11CA 6/21/00)]

9) First Amendment right to videotape police, officials

Citizens have a First Amendment right to photograph or videotape the conduct of police and other public officials on public property, subject only to reasonable time, manner and place restrictions, the 11th U.S. Circuit Court of Appeals said. The court said a lower court erred in concluding that two Cumming, Georgia, residents had no First Amendment right to videotape police actions. "The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest," the court said. However, the 11th Circuit affirmed the lower court's summary judgment in favor of the city, concluding that the couple failed to show that police officials violated that right by preventing them from videotaping police activities.

[Smith vs. City of Cumming, et al., 212 F.3d 1332 (11CA 5/31/00)]

10) Qualified immunity - Federal Wiretap Act

Public officials are entitled to qualified immunity as a defense when they are sued for violating a person's rights under the Federal Wiretap Act, the 11th U.S. Circuit Court of Appeals held. The court ruled against a Georgia Bureau of Investigation agent who sued the police chief, mayor and city manager of Vidalia, claiming they improperly listened to her private cordless telephone conversations without her consent or knowledge. The police chief intercepted the conversations while at home listening to his personal scanner; he typed notes about what he heard and then shared the information with the city manager, the mayor and the agent's supervisor, who then reassigned her to a different territory so she no longer had responsibility for Vidalia. The agent sued for violations of state and federal wiretap laws, adding invasion of privacy and civil rights counts. A federal trial court denied the officials' motion for summary judgment, holding that qualified immunity is not a defense to Federal Wiretap Act claims. The 11th Circuit disagreed and sent the case back to the trial court to determine whether the city officials are entitled to summary judgment on the basis of qualified immunity. "(T)he qualified immunity defense is so well-rooted in our jurisprudence that only a specific

and unequivocal statement of Congress can abolish the defense," the court said. "The Federal Wiretap Act lacks the specific, unequivocal language necessary to abrogate the qualified immunity defense."

[Tapley vs. Collins, et al., 211 F.3d 1210 (11CA 5/5/00)]

11) Qualified immunity - force used during arrest
A "minimal amount" of force used by a law enforcement officer to make an arrest will not defeat the officer's qualified immunity in a case where excessive force is alleged, the 11th U.S. Circuit Court of Appeals said. Reaffirming a position it has taken in the past, the court said a trial judge incorrectly denied an Alabama officer's qualified immunity defense when he was sued for excessive force in making an arrest. The plaintiff maintained that he suffered bruising during the arrest, but admitted the bruises disappeared quickly and he did not seek medical treatment. "(T)his Circuit has established the principle that the application of de minimis force, without more, will not support a claim for excessive force in violation of the Fourth Amendment. The district court disagreed, determining it should ignore the binding authority of three separate opinions of this Court based on its view that those opinions failed to follow an earlier, controlling case. In doing so, the district court erred," the 11th Circuit said.

[Nolin vs. Isbell, 207 F.3d 1253 (11CA 3/28/00)]

12) Contractors as "employees" of government

A determination of whether two private pilots hired by the government to fly a law enforcement flight were acting as agents of the federal government is an issue for a jury and not one on which summary judgment should have been granted, the 11th U.S. Circuit Court of Appeals said. Patterson & Wilder Construction Company appealed a trial court order granting summary judgment in favor of the federal government on the company's Federal Tort Claims Act action, which arose out of the destruction of an airplane leased from Patterson & Wilder for use during a covert narcotics operation in Colombia. Patterson & Wilder asserted that the government was responsible for the alleged misconduct of two private pilots who were hired by the government to lease the aircraft and carry out the mission. The company argued that during the mission, the pilots were acting as "employees" of the government. The trial court found that the government did not supervise and control the pilots' activities during the critical phases of the operation and therefore the pilots could not be deemed employees, but the 11th Circuit disagreed. Vacating the summary judgment order, the 11th Circuit said that when considering the mission as a whole, there was ample evidence that the Government supervised and controlled the pilots. "We do not mean to rule that the pilots unquestionably qualify as employees of the Government; the Government's supervision and control was more peripheral during the specific transactions that lie at the heart of P&W's case. ... Nevertheless, viewing the relationship in its totality, P&W has come forward with enough evidence for a reasonable factfinder to conclude that (the pilots)- having been retained not just to perform a particular task, but to perform it in a particular way at a particular location at a particular time in accordance with the Government's precise instructions - were sufficiently under the Government's control to be deemed employees," the 11th Circuit said.
[Patterson & Wilder Construction Company vs. United States, 13 FLW Fed. C1133 (9/15/00)]

13) Prosecutor's notes of witness statements

A trial court did not err when it refused to require the State of Florida to turn over non-verbatim, non-adopted witness statements taken by the prosecutor in a first-degree murder trial, the 11th U.S. Circuit Court of Appeals held. The court avoided the question of whether the prosecutor's notes of his mental impressions of the witness statements are protected as work product. The court concluded, however, that the notes in this case could not have led the defense to impeachment or exculpatory evidence. Convicted murderer Johnny Williamson argued that the notes could have led to exculpatory evidence, but the 11th Circuit disagreed. "These non-verbatim, non-adopted witness statements were

not admissible at trial as impeachment evidence," the court said. "Therefore, for prejudice to exist, we must find that the evidence - although itself inadmissible - would have led the defense to some admissible evidence. Petitioner never has pointed out what admissible impeachment or exculpatory evidence would have been discovered if these documents had been turned over." The 11th Circuit also rejected Williamson's argument that his trial attorney was ineffective for failing to pursue a self-defense argument. "(N)o absolute duty exists to investigate a particular line of defense. Counsel's decision not to conduct an investigation need only be reasonable," the court said.

[Williamson vs. Moore, 221 F.3d 1177 (11CA 8/8/00)]

14) Inmate's use of legal religious name

A federal court properly directed the Florida Department of Corrections to use an inmate's legally approved religious name along with his original name in the prisoner's identification records, the 11th U.S. Circuit Court of Appeals held. The appeals court rejected the department's contention that use of a dual-name policy would create confusion and possible security problems and would be costly. The court ruled in favor of a Florida inmate who said his right to practice his religion was being violated because his identification card - required for inmates to obtain canteen, notary and banking services - did not show his legal Muslin name. The court said the department may comply by affixing a computer-printed label to the back of an inmate's identification card, as long as the wording of the label does not appear to impose more severe restrictions any of the inmate's privileges when the religious name is used. Labels initially used by the department authorized use of the religious name only for notary purposes. "We conclude the addition of Hakim's religious name to the reverse of his identification card - so long as he can obtain all related services under the dual-name policy, as ordered by the district court - adequately protects ... Hakim's free exercise right regarding his religious name," the 11th Circuit said.

[Hakim vs. Hicks, et al., 223 F.3d 1244 (11CA 8/4/00)]

15) Qualified immunity - firing of police officer

A police chief should have been granted qualified immunity protection from a lawsuit by a former lieutenant who claimed his firing was improper retaliation for an incident between them four years earlier, the 11th U.S. Circuit Court of Appeals said. The appeals court ordered the trial judge to grant the chief's motion for on a First Amendment claim brought by the fired lieutenant. The lawsuit in the Georgia case was filed after the lieutenant, Jerry Stanley, was fired based on multiple incidents of misconduct over a several year period. Stanley, however, claimed in the lawsuit that the actual reason for the firing was his suggestion to investigators four years earlier that his superior may have been responsible for the theft of money from the evidence room. James Chadwick was deputy chief in charge of the evidence room at the time of the alleged theft, and was chief when Stanley was fired. The 11th Circuit concluded that the incidents of misconduct gave the chief grounds to fire Stanley, even if the circumstances of the termination did include a retaliatory motive stemming from the evidence room incident. Therefore, the 11th Circuit said, Chadwick's motion for summary judgment based on qualified immunity should have been granted. "Because .. a reasonable police chief could have lawfully terminated Stanley for his misconduct and thus could have considered Chadwick's termination proper, even if motivated in substantial part by an unlawful motive, Chadwick's termination of Stanley was objectively reasonable for the purposes of qualified immunity," the 11th Circuit said.

[Stanley vs. City of Dalton and Chadwick, 219 F.3d 1280 (11CA 7/26/00)]

Selected U.S. Supreme Court Rulings Of Impact:

1) Search and seizure - squeezing soft luggage

A law enforcement officer's physical manipulation of a bus passenger's carry-on bag violated the Fourth Amendment's proscription against unreasonable searches, the U.S. Supreme Court ruled. The justices ruled 7-2 in favor of a man convicted on drug charges after a "brick" of methamphetamine was found in his canvas bag during an immigration status check on a bus in Texas. A Border Patrol agent checked the immigration status and then felt the overhead carry-on luggage. The agent felt the methamphetamine brick in Steven Dewayne Bond's canvas bag, and Bond was arrested. Bond contended that the agent's actions in squeezing his canvas bag constituted an illegal search, and the Supreme Court agreed. "Physically invasive inspection is simply more intrusive than purely visual inspection," Chief Justice Rehnquist wrote for the court. "(Bond) sought to preserve privacy by using an opaque bag and placing that bag directly above his seat. ... When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another. Thus, a bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner. But this is exactly what the agent did here."

[Bond vs. United States,120 S. Ct. 1462 (4/17/00)]

2) Whistle-blowers' RICO suits limited

A whistle-blower who is harmed by an overt act done in furtherance of a RICO conspiracy does not have a cause of action under the racketeering law unless the overt act - such as firing - is itself an act of racketeering, the U.S. Supreme Court held. The court ruled against a Florida insurance executive who was fired after he told state insurance regulators about potential improprieties by other company officials. He filed lawsuit under RICO, claiming the officials who fired him had violated the RICO law's conspiracy provisions. Lower courts ruled against the executive, concluding that he had suffered an injury that was proximately caused by the other officials' racketeering activities. The Supreme Court, in a 7-2 opinion, agreed. "(C)onsistency with the common law requires that a RICO conspiracy plaintiff allege injury from an act that is analogous to an 'ac[t] of a tortious character,' meaning an act that is independently wrongful under RICO," Justice Thomas wrote for the court. "(The officials') alleged overt act in furtherance of their conspiracy is not independently wrongful under any substantive provision of the statute. Injury caused by such an act is not, therefore, sufficient to give rise to a cause of action."

[Beck vs. Prupis, 120 S. Ct. (4/26/00)]

3) Employer can mandate use of comp time

A government agency that awards comp time can require its employees to use the time off at a time chosen by the agency as long as there is no labor agreement that says otherwise, the U.S. Supreme Court said. The court ruled 6-3 against sheriff's deputies in Houston, Texas, who objected when their county ordered them to use compensatory time they had accumulated. The deputies argued that the federal Fair Labor Standards Act of 1938 does not authorize the government to compel the use of comp time in the absence of an agreement permitting the county to do so. The justices, however, agreed with an appeals court's conclusion that the law doesn't address the issue and thus does not prohibit the county from implementing its policy. "(N)othing in the FLSA or its implementing regulations prohibits an employer from compelling the use of compensatory time," Justice Thomas wrote for the court. "(U)nder the FLSA an employer is free to require an employee to take time off work, and an employer is also free to use the money it would have paid in wages to cash out accrued compensatory time. The compelled use of compensatory time challenged in this case merely involves

doing both of these steps at once. It would make little sense to interpret (the statute) to make the combination of the two steps unlawful when each independently is lawful." The court also rejected the deputies' argument that the courts were bound to follow an opinion letter from the Department of Labor, which said a public employer can compel the use of comp time only if the employee has agreed to it in advance. Because the language contained in regulations is clear, the agency's interpretation is not entitled to special deference, the court said. "To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation," the court said.

[Christensen vs. Harris County, 120 S. Ct. 1655 (5/1/00)]

4) Precedence of law enforcement over teacher's contract

The U.S. Supreme Court refused to disturb a ruling that a Georgia teacher's contract does not outweigh the authority of law enforcement to search her car after a drug-sniffing dog alerted to the vehicle during a drug sweep at her school. The court, without comment, let stand an 11th U.S. Circuit Court of Appeals ruling against teacher Sherry Hearn, who was fired for refusing to submit to a drug test after officers, alerted by the dog, found the remains of a marijuana cigarette in the ashtray of her car. Hearn claimed the search was illegal and therefore could not provide the reasonable suspicion required under her contract before school officials could demand the drug test. Hearn argued that she could not be fired for refusing to take a drug test for which reasonable suspicion was lacking. The 11th Circuit disagreed, saying the provisions of Hearn's teaching contract applied to intra-school activities but could not limit the activities of law enforcement personnel. The Supreme Court denied certiorari review, ending Hearn's appeal.

[Hearn vs. Savannah Board of Education, 120 S. Ct. 1962 (5/15/00)]

5) Officer's authority to detain vehicle passengers

The U.S. Supreme Court refused to hear an appeal in which the State of Florida argued that law enforcement officers should be allowed to determine the best way to conduct a traffic stop, including ordering passengers to remain in vehicles along with the driver. The court, without comment, refused to review a case in which an officer directed a passenger to remain in the vehicle during at traffic stop. A Florida appeals court suppressed drug evidence found in the car, concluding that the officer had a right to detain the driver for a traffic violation but did not have authority to detain a "blameless passenger." The Florida Supreme Court rejected the state's appeal last year, and the U.S. Supreme Court denied certiorari review. Just three years ago, the justices ruled that officers can order passengers and drivers out of vehicles during routine traffic stops.

[Florida vs. Wilson, 120 S. Ct. (5/15/00)]

Opinions of the Attorney General:

i) Enforcement of waterway speed limits by volunteers

In response to a request from the Punta Gorda City Attorney, the Attorney General issued an advisory opinion (2000-36, 6/22/00) stating in sum: "Volunteers may not issue citations for violations of the city's shoreline protection ordinance which establishes certain speed limits on the waterways within the city limits."

Opinion # 2000-36

ii) Municipal ordinance requiring gun locks

In response to a request from state Senator John Grant, the Attorney General issued an advisory opinion (2000-42, 7/11/00) stating in sum: "This office must presume the validity of a duly enacted ordinance until a court declares otherwise. Section 790.33, Florida Statutes, however, should be construed in view of the statute's purpose which is to preempt local regulations that interfere with an individual's right to bear arms. A requirement that gun owners secure their firearms with a gun lock would not appear to interfere with that right, nor does the existence of statutes requiring that firearms be secured necessarily preclude a municipality from adopting a more stringent standard."

Opinion # 2000-42

iii) Baker Act - federal law enforcement officers

In response to a request from an officer with the Veterans Affairs Police, the Attorney General issued an advisory opinion (99-68, 11/8/99) stating in sum: "Federal law enforcement officers do not constitute law enforcement officers for purposes of Florida's Baker Act, and thus possess no authority under the act to initiate the involuntary examination of a person or to transport such person as law enforcement officers."

Opinion # 99-68

iv) Baker Act - access to patient records

In response to a request from the chairperson of the Statewide Human Rights Advocacy Committee, the Attorney General issued an advisory opinion (99-69, 11/9/99) stating in sum: "The Statewide Human Rights Advocacy Committee or a district human rights advocacy committee may access clinical and legal records for patients committed to a designated Baker Act receiving or treatment facility, but does not have access to such records of patients admitted to other hospitals or facilities."

Opinion # 99-69

v) Informal - Local regulation of boat speed

In response to a request from state Representative Tom Feeny regarding the validity of a county ordinance imposing speed limits on a river, the Attorney General on 12/17/99 issued an informal opinion concluding: "(S)ection 327.22(1), Florida Statutes, states that there is no prohibition against local governments regulating boating related activities. In addition, section 327.60, Florida Statutes, acknowledges the authority of local governments to regulate the operation and equipment of vessels so long as the regulations are not in conflict with the statute."

vi) Informal - Disposition of unclaimed bodies

In response to a request from state Representative William F. Andrews regarding the procedures for the disposition of unclaimed bodies by a county, the Attorney General's Office on 12/21/99 issued an informal opinion concluding: "(E)xcept in certain specified instances, the determination as to whether to cremate or bury an unclaimed body or body required to be buried at public expense because of indigency would appear to rest with the individual county."

vii) Informal - needle exchange program

In response to a request from state Representative Tony Suarez, the Attorney General on 1/26/00 issued an informal opinion concluding: " The provisions of section 893.147(2), Florida Statutes,

making it unlawful to deliver or possess with intent to deliver drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to inject into the human body a controlled substance in violation of Chapter 893, Florida Statutes, would appear to be implicated by a program distributing needles to known illegal drug users."

viii) Expungement of criminal history records

In response to a request from the Sarasota County Sheriff, the Attorney General issued an advisory opinion (2000-16, 3/8/00) stating in sum: "Information formalizing the petitioner's criminal history, such as an arrest, detention, indictment, information, or other formal criminal charge and the disposition thereof, would be subject to expungement under section 943.0585, Florida Statutes."

NOTE: Do not rely solely upon this summary for your understanding of any case reported upon. The full opinion should be read. Law enforcement officers should discuss the impact of any case with their agency legal advisor, who can also assist in locating cases for which full citations were not available.

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