99-03: A Review of Selected Cases Of Interest To Florida Law Enforcement (Opinions Issued 10/98 - 9/99)

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Florida Supreme Court Opinions

1. Double jeopardy - resisting arrest from multiple officers

If a defendant resists arrest from multiple officers during a single incident only one conviction may be obtained, the Florida Supreme Court held, resolving conflict among the district courts of appeal. Two officers responded to a call at Charlie Wallace's residence, and he threatened one officer with a rake and attempted to punch him. Wallace then resisted arrest from the second officer and punched that officer in the face. Wallace was convicted of two counts of resisting an officer with violence under section 843.01, F.S., as well as multiple counts of battery and assault. The 4th DCA affirmed Wallace's convictions but certified conflict with the 1st DCA's 1996 opinion in Pierce vs. State. Reversing the two "resisting an officer" convictions and approving the 1st DCA's conclusion in Pierce, the justices rejected the 4th DCA's conclusion that section 843.01 allows separate convictions for "resisting an officer" for each individual officer actually present and resisted at the scene. "While the defendant may have committed more than one offense in his altercation with the officers, including possibly multiple assaults or batteries, or both, on law enforcement officers as were separately charged here, we conclude that his continuous resistance to the ongoing attempt to effect his arrest constitutes a single instance of obstruction under section 843.01," the justices said.

[Wallace vs. State, 724 So.2d 1176 (Fla. 1998)]

2. Search & Seizure-No "Firearm Exception" To Need To Corroborate Anonymous Tip

An anonymous tip that a defendant carried a concealed firearm did not give officers reasonable suspicion to stop and frisk the defendant, the Florida Supreme Court held, refusing to recognize a "firearm exception" to the general rule that requires corroboration of an anonymous tip in order to provide police officers with a reasonable suspicion of criminal activity.

Officers received an anonymous telephone tip that a young male wearing a "plaid-looking" shirt was carrying a concealed firearm while he hung out at a bus stop with two other juveniles. J.L. was subsequently stopped, frisked and arrested after a firearm was found. The 3rd DCA affirmed the admission of the evidence, concluding that the officers had reasonable suspicion that J.L. was carrying a weapon.

Reversing, the justices concluded that the officers lacked reasonable suspicion because the tip only provided "innocent details" and not any criminal or suspicious behavior. "(T)he innocent details provided in the tip did not involve future action for which the police could verify whether or not such future action would occur ... the officers merely verified that the defendant was in fact standing by the bus stop and wearing a plaid shirt, neither of which is suspicious," the court explained. In a dissenting opinion, Justice Overton argued that the court should follow the majority of jurisdictions in recognizing a "firearm exception" to the general rule regarding the corroboration of anonymous tips. By not

following the majority of other jurisdictions, Justice Overton said, the court was setting "poor public policy" that threatens the safety of law enforcement officers and citizens.

[J.L. vs. State, 727 So.2d 204 (Fla. 1998)]

3. Deadly Force - No Duty To Retreat From Abusive Co-Occupant

Reversing its long-held position on the duty to avoid deadly force in domestic abuse cases, the Florida Supreme Court said a person does not have a duty to retreat from the residence before using deadly force in self-defense against a co-occupant.

Joining the majority of jurisdictions, the court receded from the view it has held since its 1982 holding in State vs. Bobbitt. In that case, the court held that the so-called "castle doctrine" - which says an individual is not required to retreat from his or her own residence before using deadly force in self-defense - did not apply where the aggressor was a co-occupant.

"(W)e hold that there is no duty to retreat from the residence before resorting to deadly force against a co-occupant or invitee if necessary to prevent death or great bodily harm, although there is a limited duty to retreat within the residence to the extent reasonably possible," Justice Pariente wrote for the court. The justices stipulated that the new standard applies to all future cases and those currently pending on direct review or not yet final, but will not apply retroactively to convictions that have become final. Justice Wells, joined by Justice Shaw, concurred in the position taken by the court but dissented as to jurisdiction. He argued that the majority ruling violates the court's own precedents because the 2nd DCA did not pass on the question certified in the case. "We cannot be selective and assume jurisdiction just because a majority finds it important to answer a question or simply wants to answer a question," Justice Wells wrote.

[Weiand vs. State, WL 125522 (Fla. 3/11/99)]

4. Restitution instead of imprisonment

A trial court may issue a downward departure sentence if it concludes that the need for restitution outweighs the need for imprisonment, the Florida Supreme Court held.

For causing permanent eye injury to his victim, Donald Banks received four years probation with the requirement that he complete anger management school and make restitution. The trial court departed from the recommended 68-month prison sentence, concluding that restitution outweighed the need for a prison sentence. The 2nd DCA reversed the departure sentence, focusing on the fact that both the victim and the prosecutor opposed the departure sentence and the trial court failed to determine whether the defendant had the ability to make restitution. The justices unanimously reversed, finding the departure sentence proper. "(W)hile a victim's (or a prosecutor's) wishes are relevant, they are simply one factor to be considered by the trial court," Justice Shaw wrote for the court. "(A) defendant's ability to pay restitution is a nonissue when the court is weighing the need for restitution versus the need for imprisonment."

[Banks vs. State, WL 215372 (Fla. 4/15/99)]

5. Public records - Attorney Notes

The Florida Attorney General's Office properly withheld a small number of documents when it complied with a prisoner's public records request because the documents were not subject to disclosure under the public records law, the Florida Supreme Court said.

Death row inmate Paul William Scott sought access to all of the Attorney General's Office files related to his case. The agency complied, but withheld a small number of documents it claimed were exempt from disclosure. A trial court denied Scott's request for disclosure of those documents, and the

Supreme Court agreed. "The documents consist almost entirely of handwritten notes and drafts of pleadings," the court said. "Competent substantial evidence supports the trial court's ruling on this matter. We find no error."

[Scott vs. Butterworth, WL 250157 (Fla. 4/29/99)]

6. Search & Seizure-"Fellow Officer Rule" Applies To Searches

An officer need not have personal knowledge of a confidential informant's veracity if another fellow officer had knowledge, the Florida Supreme Court held, concluding that the "fellow officer" rule applies to searches as well as arrests.

The defendant's residence was searched pursuant to a search warrant, and he was arrested when large amounts of narcotics were found. At a suppression hearing, the arresting officer testified that the confidential informant he relied upon had given him and his fellow officers reliable information in the past. The 1st DCA suppressed the evidence after concluding that the search warrant was invalid on its face and that the "good faith" exception was inapplicable. Reversing, the justices held that the "fellow officer" rule applies to searches as well as arrests. "In light of the need for efficient law enforcement, this finding is both practical and necessary, because it allows reliable informants to be utilized by more than one officer," Chief Justice Harding wrote for the court. "Under the First District's rule requiring personal knowledge, in order to establish veracity within an affidavit, a reliable informant can only give new information to an officer with whom he or she has previously dealt. If Officer A knows that Informant has provided reliable information to Officer B in the past, then Officer A should be able to consider Informant reliable and obtain a warrant if necessary. Under the First District's rule, if the police want to satisfy the veracity requirement, Officer B is the only officer who can submit the affidavit. This rule creates obvious pitfalls ... We find that this technicality is an unreasonable hindrance to the furtherance of police investigations."

[State vs. Peterson, WL 424382 (Fla. 6/17/99)]

7. Officer's Duty To Answer Question About Rights

Police officers questioning a suspect must respond to a clear question regarding the suspect's rights with a good-faith attempt to provide accurate information before they may continue the interrogation, the Florida Supreme Court held.

The court, in a 4-3 decision, reversed the murder conviction and vacated the death sentence Osvaldo Almeida received for the 1993 murder of Chiquita Counts in Fort Lauderdale. After Almeida confessed in preliminary questioning to the Counts murder and two others, officers began a recorded interview by asking Almeida - who had previously waived his Miranda rights - if he was willing to talk without a lawyer present. Almeida responded, "Well, what good is an attorney going to do?" The officers ignored the question and went on with the interrogation. The justices said Almeida's question was not rhetorical and required a good-faith response, and because it was not answered Almeida's confession should not have been admitted. "(W)e hold that if, at any point during custodial interrogation, a suspect asks a clear question concerning his or her rights, the officer must stop the interview and make a good-faith effort to give a simple and straightforward answer. To do otherwise - i.e., to give an evasive answer, or to skip over the question, or to override or "steamroll" the suspect - is to actively promote the very coercion that (case law) was intended to dispel. A suspect who has been ignored or overridden concerning a right will be reluctant to exercise that right freely. Once the officer properly answers the question, the officer may then resume the interview (provided of course that the defendant in the meantime has not invoked his or her rights). Any statement obtained in violation of this proscription violates the Florida Constitution and cannot be used by the State," the court said. The court in a separate opinion affirmed Almeida's conviction for the 1993 murder of Sunrise restaurant

manager Frank Ingangiola. The court reversed Almeida's death sentence and ordered a life sentence without parole for at least 25 years, citing extensive evidence of Almeida's brutal childhood and mental health problems and calling the case "one of the most mitigated murders the Court has reviewed."

[Almeida vs. State (Counts murder), WL 506965 (Fla. 7/8/99)]
[Almeida vs. State (Ingangiola murder), WL 506965 (Fla. 7/8/99)]

8. Execution of 16-Year-Old Killers Prohibited

Florida may not execute any convicted killer who was only 16 years old or younger at the time of the murder, the Florida Supreme Court ruled. The court said execution of someone who was younger than 17 at the time of the crime would violate case law and the Florida Constitution. In a 4-3 ruling, the court affirmed the conviction but reversed the death sentence of Keith Brennan, who was 16 when he and an 18-year-old co-defendant killed Tommy Owens in Cape Coral in order to take Owens' car. The court imposed a life sentence for Brennan with no hope of parole. Florida statutes set no minimum age for someone to be executed, but the court previously prohibited the execution of anyone who murdered at age 15. "While we have great respect for the legislative voice, it is the obligation of this Court to decide the question of whether a punishment proscribed by the legislature is unconstitutionally cruel or unusual by applying constitutional, not legislative, standards," the court said. "There is no doubt that the murder in this case is a deplorable crime and one for which the defendant should spend the rest of his life in prison. However, we cannot impose the death penalty on this defendant who was sixteen at the time of the crime, consistent with our case law and our Constitution."

[Brennan vs. State, WL 506966 (Fla. 7/8/99)]

9. Miranda - Custodial Situation And Interrogation of 17 Year Old

The Florida Supreme Court ordered a new trial for Nathan Ramirez, who was convicted with two other men for the 1995 murder of elderly widow Mildred Boroski in Pasco County. The court ruled that Ramirez, who had just turned 17 at the time of his arrest, was not given a proper Miranda warning before he was questioned by police. The state argued that Ramirez was not actually in custody when he was first questioned, but the court noted that he was interrogated in a small room in the police station by two detectives, he was never told he was free to leave, and all the questions indicated that the detectives considered Ramirez a suspect. "Short of being handcuffed and being told that he was under arrest, we cannot perceive of circumstances that would be more indicative of a custodial interrogation than the circumstances of the interrogation in this case," the court said.

[Ramirez vs. State, (Fla. 7/8/99)]

10. Attempted Second-Degree Murder - Unintended Victim

A defendant may be convicted of two counts of attempted second-degree murder for firing a shot that misses his intended target but instead hits an unintended victim, the Florida Supreme Court held. Bill Brady intended to kill Ricky Mack when by firing a single shot at him, but the bullet missed Mack and hit Toya Harrell in the hand. Brady was convicted of two counts of attempted second-degree murder, but the 5th DCA reduced the conviction involving Harrell to aggravated battery, concluding that Brady did not intend to kill her. Quashing the DCA's decision, the justices found that the doctrine of transferred intent did not apply to this case. "(B)y intentionally firing a deadly weapon in close proximity to both Mack and Harrell, the defendant intentionally committed an act that, had death resulted, would have constituted second-degree murder as to either Mack or Harrell," the court

explained.

[State vs. Brady, (Fla. 8/19/99)]

11. Street Gang Sentencing Enhancements Unconstitutional

The Florida law authorizing enhanced sentences for defendants who are members of criminal street gangs unconstitutionally violates a defendant's due process rights, the Florida Supreme Court held. The court unanimously held that the law, section 874.04, F.S., "punishes mere association by providing for an enhancement of the degree of a crime based on membership in a criminal gang, even where the membership had no connection with the crime for which the defendant had been found guilty." Because the statute punishes gang membership without requiring any nexus between the criminal activity and gang membership, it lacks a rational relationship to the legislative goal of reducing gang violence or activity, the justices said. The ruling came in the case of a juvenile whose battery sentence was enhanced after the trial court concluded he was a member of a criminal street gang. The 5th DCA concluded that the enhancement penalized "mere association" and is unconstitutional, and the Supreme Court agreed.

[State vs. O.C., (Fla. 9/16/99)]

12. Use of Electric Chair Upheld

The Florida Supreme Court narrowly approved the continued use of Florida's electric chair, but the majority of justices urged the Legislature to consider lethal injection as an alternative method of execution.

By a 4-3 majority, the court rejected claims that execution in the electric chair amounts to unconstitutional cruel and unusual punishment. This was the third time in the past decade that the Supreme Court has upheld the use of the electric chair, each time by 4-3 majorities. "The record in this case reveals abundant evidence that execution by electrocution renders an inmate instantaneously unconscious, thereby making it impossible to feel pain. The record also contains evidence that the electric chair is and has been functioning properly and that the electrical circuitry is being maintained," the unsigned court opinion says. The majority consisted of Chief Justice Harding and Justices Wells, Lewis and Quince.

[Provenzano vs. Moore, (Fla. 9/24/99)]

Survey Of District Courts of Appeal Opinions:

1. School Search

Because an assistant principal's search of a student was justified and reasonable in scope, a trial court erred in suppressing narcotics found during the search, the 2nd DCA held.

The DCA reversed a trial court's order suppressing drugs found during a search of a high school student on school grounds. The search was prompted by a female student's tip specifically identifying the suspect student and the drug he possessed. The DCA said the second student's tip gave the administrator sufficient grounds to search the suspect student, and the search was conducted in a reasonable manner. "We conclude that the female student's tip, specifically naming appellee and identifying the drug, justified the search at its inception," the DCA said, citing another case in which a school administrator's search was upheld after he received tips from four separate students. "Although there was only one tip here, we hesitate to draw a line between one tip and four tips because we believe that school officials must not be required to wait until a certain mechanical number of tips is received before taking action."

[State vs. Whorley, 720 So.2d 282 (2d DCA 1998)]

2. RICO Sentencing

Because there was no evidence that a defendant engaged in minor criminal conduct or that restitution to the victims would be more beneficial than incarceration, a trial court erred when it imposed a downward departure sentence for racketeering and organized fraud, the 4th DCA held. Following the defendant's plea to a scheme in which telemarketers offered callers non-existent overseas jobs for a fee, the trial court imposed a downward departure sentence based on defense arguments that the defendant's participation in the scheme was minor and that restitution to the victims was more important than incarceration. Reversing the downward departure sentence, the DCA concluded that defense counsel only presented legal arguments to support departure grounds and offered no evidence in support.

[State vs. Silver, 722 So.2d 222W (4th DCA 1998)]

3. "Fellow officer" rule--MDPD Vehicle Stop At INS Officer's Request

A defendant was properly stopped and searched by an officer who acted under the direction of a federal agent, the 3rd DCA held. A vehicle in which Winston Smith rode as a passenger was stopped by Metro-Dade Police officers under the request of an agent with the federal Immigration and Naturalization Service. The INS agent had information that Smith was involved in a pending deportation proceeding, was "always armed" and had previously been apprehended by INS. One of the Metro-Dade officers asked Smith to exit the vehicle and patted him down, and a gun was found. Smith was subsequently arrested. Affirming the admission of the firearm evidence, the DCA held that the information the INS agent possessed was "sufficient to establish the reasonable suspicion necessary to justify Smith's detention." The DCA also held that under the "fellow officer" rule, the Metro-Dade officer who searched Smith was entitled to assume that the INS agent had sufficient information to constitute a reasonable suspicion to stop Smith. Responding to Smith's argument that the pat-down was improper because the Metro-Dade officer lacked the founded suspicion that Smith was armed and dangerous, the DCA said the officer's actions were justified because the INS agent had probable cause and was "close in proximity" to the search.

[Smith vs. State, 719 So.2d 1018 (3d DCA 1998)]

4. Search & Seizure - 8 Hour Detention of Suspected Drug Carrier

The initial detention of a suspected internal drug carrier at an airport and his subsequent eight-day detention at a hospital were reasonable, the 3rd DCA held. A defendant was stopped by an airport customs agent who suspected him of carrying narcotics within his body. The defendant was taken to a hospital after he was read his Miranda rights and refused to submit to an x-ray. When the defendant was suspected of taking extraordinary steps to prevent officers from discovering narcotics in his body, he was handcuffed to a wheelchair for eight days until he excreted 38 pellets of heroin. A trial court found the initial detention reasonable but suppressed the heroin after concluding that the eight-day detention at the hospital was unreasonable. The DCA reversed the suppression order. "(T)he length and nature of defendant's eight-day detention resulted solely from the extreme evasive actions he took, the DCA said. ""While the length of the detention and the unsavory events that followed may be 'offensive,' as characterized by the trial court, it is equally apparent that the defendant alone was responsible for his situation and that he was, at all times, capable of ending the ordeal by consenting to an x-ray or by simply allowing nature to take its course."

[State vs. Chiejina, 721 So.2d 748 (3d DCA 1998)]

5. Police Officer's "Citizen Arrest"

An officer who arrested a defendant outside his jurisdiction made a proper citizen's arrest, the 1st DCA held, reversing a trial court's conclusion. After receiving a dispatch to locate a man who was seen driving westbound in an eastbound lane, Gretna Police Officer Willie Mitchell stopped Jesse Furr for drunk driving. The officer was a half-mile outside the Gretna city limits when he made the stop. The trial court suppressed evidence related to the stop, concluding that Officer Mitchell lacked probable cause and could not make a valid citizen's arrest while in his patrol car. Reversing, the DCA concluded that the trial court "erred by holding that a citizens' arrest is void where the officer is in a patrol car and uses flashing lights to detain the arrestee. ... The trial court also erred by failing to recognize the legality of a citizen's arrest for a felony or a breach of the peace."

[State vs. Furr, 723 So.2d 842 (1st DCA 1998)]

6. Dog = Deadly Weapon When "Sicced" On Officer

A dog may be considered a deadly weapon in an aggravated battery case, the 1st DCA held.
At trial, an officer testified that Erika Morris' large dog bit him on the calf and thigh after she gave the dog a "sic" command. The trial court denied Morris' motion for judgment of acquittal on the charge of committing a battery using a deadly weapon. Morris was convicted and the DCA affirmed. "In Florida the definition of 'deadly weapon' is broad and does not preclude finding a dog to be a deadly weapon," the DCA said. "Here, there was evidence from which a jury could find that appellant's dog was a deadly weapon."

[Morris vs. State, 722 So.2d 849 (1st DCA 1998)]

7. Search & Seizure of Truant Child

Because an officer properly detained a child he suspected of skipping school, a trial court should not have suppressed cocaine evidence found on the child, the 3rd DCA held. The officer approached a young boy he believed should have been in school but who, instead, was standing on a lawn in a residential area. When the officer approached and asked the boy what he was doing, the boy admitted that he was skipping school. The officer noticed a bulge in the boy's jacket during the encounter, so he patted the boy down for weapons and found 12 bags of cocaine. The trial court suppressed the evidence, concluding that the officer lacked suspicion that a crime had or was about to occur. Reversing, the DCA found the stop proper under section 984.13(1)(b), F.S., which allows an officer to detain a truant child and transport him to school. The DCA also held that even if the officer erroneously believed he had probable cause to arrest the boy for loitering and prowling, the stop would still be valid. The DCA did not address the issue of the legality of the pat-down search.

[State vs. A.J., 720 So.2d 1156 (3d DCA 1998)]

8. Remission of Bail Bond Forfeiture

Although a bail bond company is not entitled to an extension of the statutory period during which a bond forfeiture may be discharged, the company is entitled to a remission of a forfeiture where a defendant was arrested in a foreign jurisdiction and the state declined to extradite, the 3rd DCA held. After a bail bond company posted a $15,000 bond to secure the presence of a defendant charged with grand theft, the defendant left the country and the bond was subsequently forfeited. When the company finally found the defendant and arrested her, the state declined to have her extradited. The trial court denied the company's request to discharge the forfeiture. The DCA affirmed, concluding that the bail bond company is not entitled to an extension of the 35-day statutory time period during which a trial court may discharge a bond forfeiture once a defendant is arrested. The DCA concluded, however, that the bond company is entitled to seek remission of the forfeiture under section 903.28,

F.S. "(The company) did exactly what the statute is designed to encourage," the DCA said. "The State had the prerogative to decline to extradite if it so chose, but under the current version of section 903.28, the refusal to extradite does not defeat an otherwise meritorious remission claim."

[County Bonding Agency vs. State, 724 So.2d 131 (3d DCA 1998)]

9. Search & Seizure -Questioning Of Suspected Thief

Because a defendant was properly stopped after being suspected of theft, a trial court erred in suppressing the defendant's confession, the 3rd DCA held. An officer observed the defendant in a high crime area peering into the windows of parked cars and looking over his shoulder. When the defendant later reappeared with three shovels, the officer stopped him; the defendant soon admitted to stealing the shovels from the open bed of a pick-up truck. The trial court suppressed the evidence after finding the investigatory stop improper. Reversing, the DCA found the stop and subsequent confession valid. "(T)he reappearance of the defendant with the three shovels, with no other rational explanation of where he might have gotten them, amply justified a reasonable belief that (as the defendant almost immediately acknowledged) he had stolen them," the DCA said.

[State vs. Mitchell, 722 So.2d 907 (3d DCA 1998)]

10. Search & Seizure Based On CI's "Tip"

Law enforcement's 4½ hour delay in acting on a confidential informant's tip did not render the tip "stale," the 4th DCA held.

An officer received a tip from an informant who said he had personally seen cocaine in Hosie Brown's vehicle. Because the officer was occupied executing a search warrant in an unrelated case, Brown was not stopped and searched until 4½ hours later. The trial court admitted the evidence and Brown was convicted. Affirming, the DCA concluded that the tip was sufficient and created a founded suspicion when the officer received it. Rejecting Brown's argument that the tip was stale, the DCA distinguished this case from the 2nd DCA's 1991 opinion in Jains vs. State, where the information conveyed to an officer was "stale on receipt."

[Brown vs. State, 721 So.2d 1201 (4th DCA 1998)]

11. Search & Seizure-Circumstantial Evidence Of Probable Cause

An officer lacked probable cause to seize items he believed were stolen, the 2nd DCA held.

The officer testified that when he approached a man standing by a stop sign around 1:30 in the morning, the man was furtively attempting to place several fishing rods in the grass. Suspecting that the rods may have been stolen, the officer seized the rods and placed them in his vehicle. While the officer waited for certain information, the defendant left the scene but was later arrested and charged. Suppressing the evidence, the DCA held that the rods were seized without probable cause because the officer testified that he was not aware of any recent burglaries or any criminal activity committed by the defendant. The DCA also held that because the defendant was not under arrest, the encounter was consensual and so the defendant was free to leave as he did.

[Cliett vs. State, 722 So.2d 916 (2d DCA 1998)]

12. Search & Seizure--"Improper" Charge As Felony Instead of Misdemeanor Makes Arrest Illegal

Because a defendant was improperly arrested, evidence found during a search incident to the arrest must be suppressed, the 2nd DCA held. After responding to a call, an officer was told by an

eyewitness that Jeffrey Nickell had broken the windows of an apartment laundry room with his head. The officer subsequently arrested Nickell for attempted burglary, and seized marijuana found on him during a search incident to the arrest. Nickell was later sentenced for marijuana possession and to a reduced charge of criminal mischief. Reversing the convictions, the DCA held that Nickell's conduct was consistent with a simple act of vandalism as well as attempted burglary. Because vandalism is a misdemeanor, the DCA concluded, the officer lacked probable cause to arrest Nickell for a felony. The DCA further held that the officer also lacked authority to arrest Nickell for a misdemeanor because the offense was committed outside of the officer's presence.

[Nickell vs. State, 722 So.2d 924 (2d DCA 1998)]

13. Search & Seizure-Consensual Encounter vs. "Seizure"

A consensual encounter between an officer and a juvenile defendant did not turn into a seizure simply because the defendant waited while the officer conducted a radio check for outstanding warrants, the 4th DCA said.

When the juvenile approached the scene of an ongoing traffic investigation during early morning hours, an officer asked him for identification and to explain what he was doing out at that hour. After the juvenile gave his name, the officer conducted a radio check for any outstanding warrants. The juvenile then consented to a search of his backpack, and the officer found a loaded firearm. The juvenile was convicted. The DCA affirmed, despite one of its member's dissenting argument that no reasonable person would feel free to simply walk away from the police while they were waiting to see if the person was wanted. "The dissent seeks to apply a per se rule that, when an officer uses available technology to check or verify a citizen's voluntary statements during a consensual encounter, the encounter has necessarily changed into a seizure," the majority held. "Under (the U.S. Supreme Court's 1991 decision in Florida vs. Bostick), judges are not free to use the kind of per se rule advocated by the dissent."

[O.A. vs. State, WL 870857 (4th DCA 12/9/1998)]

14. Labor--Court-Ordered Promotion of Police Officer Was Inappropriate

A trial court erroneously ordered a local government to promote a police officer who sued for breach of employment contract, the 4th DCA said, concluding that money damages would have been an adequate remedy.

The DCA reversed the Riviera Beach officer's retroactive promotion to sergeant, which the trial court ordered in response to the officer's complaint against the city. The DCA concluded that such relief is a grant of specific performance, which is not an appropriate remedy for breach of an employment contract. "The appropriate remedy in such cases is an action for damages for breach of contract. In this case, (the officer) had an adequate remedy of law, money damages, which were, in fact, awarded to him," the DCA said.

[City of Riviera Beach vs. Barber, WL 879027 (4th DCA 12/9/98)]

15. Search & Seizure-Confession After Illegal Home Entry Is Not Automatically Tainted

Although a defendant was illegally arrested in his home, a trial court erred in automatically suppressing his subsequent confession, the 5th DCA held. Damon Pullen was arrested in his home after the cousin with whom he lived allowed officers to enter. Pullen's subsequent confession at the police station was suppressed after the trial court determined that the cousin did not voluntarily allow officers to enter the home. Although the DCA agreed that the officers made a warrantless and

nonconsensual entry in violation of the U.S. Supreme Court's 1980 decision in Payton vs. New York, the DCA found the trial court's suppression order premised on the erroneous determination that Pullen's alleged illegal arrest tainted his confession. "Notwithstanding the Payton violation, Mr. Pullen's subsequent confession was not automatically subject to suppression because there was no nexus between the officers' improper entry into the house and Mr. Pullen's subsequent police station confession," the DCA said. Reversing the suppression order, the district court directed the trial court to determine whether Pullen's confession at the police station was freely and voluntarily given.

[State vs. Pullen, 722 So.2d 253 (5th DCA 1998)]

16. Search & Seizure-Giving False Name Insufficient Basis For Arrest

Because an officer improperly arrested a defendant for giving a false name, contraband found on the defendant must be suppressed, the 5th DCA held. Pursuant to a tip that Debra Burdess may have been involved in some thefts, an officer approached her during a consensual encounter and asked for her name. The defendant originally gave a false name but then followed with her correct name when a passerby recognized her. The officer arrested Burdess for resisting an officer without violence and subsequently found contraband during a search incident to the arrest. The DCA suppressed the evidence. "There was no testimony that the officer was impeded in any way by the giving of the original false information," the DCA said. "No reports were prepared based on it, nor was any action taken in reliance on it. The information was corrected before it did any harm, and appellant was not being legally detained."

[Burdess vs. State, 724 So.2d 604 (5th DCA 1998)]

17. No Workers' Comp For Off-Duty Police Officer

A municipal police officer is not entitled to workers' compensation benefits because he was not engaged in his primary duty as a police officer when he was injured in an accident following a barroom altercation with a potential suspect, the 1st DCA said. The North Bay Village sergeant was hurt in a car accident as he fled from two men following an after-hours confrontation with a suspected drug dealer. The sergeant had gone to the bar, and several others, for a night of socializing after he went off duty. The DCA noted that the sergeant did not go into the bar with the intention of speaking to the potential suspect, but only encountered him by chance. In addition, the court said, there was no evidence that the men who may have been pursuing the sergeant were connected to the altercation. "Evidence that a police officer was prepared to discharge a law enforcement duty is not alone sufficient to justify a finding that an injury arose in the course of the officer's employment. ... (T)he officer must be engaged in a primary law enforcement duty at the time of the event that caused the injury," the DCA said. "(T)he record plainly reveals that (the sergeant) went out for a night of social drinking. His activities throughout the course of the night were not transformed into a law enforcement mission simply because he got into an argument with a man who happened to be a potential suspect. In short, the encounter in the bar did not occur 'under circumstances reasonably consistent' with the manner in which an officer's primary responsibility would be discharged."

[City of North Bay Village, et al., vs. Millerick, 721 So.2d 1230 (1st DCA 1998)]

18. Cellmate Testimony-State's Involvement Too Much

A fellow inmate's testimony regarding a defendant's confession was improperly admitted because the state was an active participant in eliciting incriminating statements from the defendant, the 2nd DCA held.

During Eric Brown's trial for offenses including attempted first-degree murder of a law enforcement

officer, Brown's cellmate gave testimony about Brown's incriminating statements. The trial court refused to suppress the incriminating statements after concluding that the state remained passive in its dealings with the cellmate. Brown was subsequently convicted. Reversing and remanding for a new trial, the DCA found that Brown's incriminating statements to the cellmate were "a product of a stratagem deliberately designed to elicit an incriminating statement." The DCA concluded that state officials made promises to the cellmate and arranged to have him and Brown kept together in the same cell in order to obtain the incriminating statements.

[Brown vs. State, 725 So.2d 1164 (2d DCA 1998)]

19. Search & Seizure--Consensual Encounter

Because an encounter between an officer and two individuals did not involve circumstances that would prevent a reasonable person from feeling free to leave, narcotics found during the encounter need not be suppressed, the 4th DCA held. An officer approached two men on the street early one morning and asked them what they were doing and requested identification. As the officer reached for a notepad to write down the men's names to conduct a radio check, the defendant dropped a baggie containing crack cocaine. He was subsequently arrested and convicted. Affirming, the DCA distinguished this case from its 1994 opinion in Barna vs. State. "While in Barna the police officers informed Barna that they were suspicious, that they were going to do some investigating, and asked whether Barna had drugs, the encounter at issue in this case was much less extensive, and did not involve circumstances that would prevent a reasonable person from feeling free to leave," the DCA said.

[Fields vs. State, 722 So.2d 957 (4th DCA 1998)]

20. Search & Seizure - Ordinance Arrest Of Person In Car

Because officers had jurisdiction to arrest a defendant for violating a local ordinance prohibiting the consumption of alcohol on public premises, a trial court erred in suppressing narcotics found during the encounter, the 4th DCA held.

While the defendant sat in her parked vehicle at a public park, officers saw her drinking beer. A local ordinance prohibited drinking in a public place, so the officers approached the defendant and asked her to exit the vehicle. As the woman exited the vehicle, she dropped a rock of cocaine on the ground and was arrested for possession of narcotics. The trial court suppressed the evidence, agreeing with the defendant that the officers could not arrest her for violation of the ordinance because she was in her vehicle and thus, not in a "public" place. The DCA reversed. "The (trial) court erred as a matter of law in determining that appellee was in a private place when seated in her automobile parked in a public lot drinking a beer," the DCA said. The appellate court compared the case to others in which indecent exposure in a public place occurred while the defendant remained seated in a vehicle.

[State vs. Folks, 723 So.2d 369 (4th DCA 1998)]

21. Neglect Of Disabled Person - Constitutionality

The 4th DCA affirmed a defendant's conviction for neglect of a disabled person, rejecting constitutional challenges to the underlying statute. The defendant's conviction for neglect arose from the death of her mother. On appeal, the defendant challenged the constitutionality of sections 782.07(2) and 825.102(3) on the grounds that the statutes lacked a specific intent requirement, are unconstitutionally vague and violated her mother's right to privacy in refusing medical treatment. Affirming the defendant's conviction, the DCA found it within the Legislature's power to dispense with the intent element and said the statutes are not vague because the defendant's conduct fell squarely within the conduct proscribed by the statutes. As to the defendant's argument regarding her mother's right to refuse medical treatment, the DCA said "constitutional rights are personal in nature and

generally may not be asserted vicariously."

[Sieniarecki vs. State, 724 So.2d 626 (4th DCA 1998)]

22. Search & Seizure-Arrest--Presumptively Valid Ordinance

Because a local ordinance prohibiting the consumption of alcohol in a motor vehicle is presumptively valid, an arrest and subsequent search were valid, the 5th DCA held. The defendant was arrested after an officer observed him violating a local ordinance prohibiting the consumption of alcohol while in a motor vehicle where such consumption is open to public view. During a search following the defendant's arrest, the officer found narcotics, and this evidence was subsequently admitted. Although the defendant maintained that the ordinance is unconstitutional because it conflicts with a statute that makes possession of an open container of alcohol a non-criminal traffic infraction, the DCA affirmed, noting that the ordinance has not been declared invalid and the officer was thus enforcing a presumptively valid ordinance.

[Zaccardo vs. State, 723 So.2d 362 (5th DCA 1998)]

23. Search & Seizure - Patdown Improper

A search and seizure conducted during a valid traffic stop was improper, the 2nd DCA held, because the arresting officer observed no criminal activity and noticed nothing that would indicate the defendant was armed. An officer stopped Lorenza Coleman after observing a cracked windshield. Because Coleman appeared nervous and had his hand over his pocket, the officer conducted a patdown search and discovered crack cocaine. Coleman was eventually arrested and the evidence was admitted. Reversing and suppressing the evidence, the DCA concluded that although the stop was proper, the subsequent search was not because the officer observed nothing that would indicate the defendant was engaged in a crime and the officer saw no bulge in the defendant's clothing to indicate that he might have been carrying a weapon.

[Coleman vs. State, 723 So.2d 387 (2d DCA 1999)]

24. Manslaughter - Employer Not Culpable For Malpractice By Unlicensed Physician

Two non-physicians who employed an unlicensed physician cannot be guilty of manslaughter based on malpractice committed by the unlicensed physician, the 5th DCA held. A husband and wife team - neither of whom was a physician - operated a corporation that provided medical services to hotel guests. The defendants employed an individual who practiced medicine in another country but who was not licensed in the United States. A girl's death was attributed to the unlicensed physician's malpractice, and the husband and wife were convicted of practicing medicine without a license and manslaughter. The DCA reversed the manslaughter conviction. "(W)e are reluctant to say that one who employs another who has graduated from a foreign medical school and who has practiced medicine in such foreign country, may be guilty of manslaughter because of the other's malpractice merely because he had not yet completed the requirements for licensure in this country. Experience has taught us that license alone, whether it be in law or medicine, does not prevent malpractice," the DCA said. "Even though the (couple) made it possible for (the unlicensed physician) to come into contact with the patient by illegally practicing medicine without a license, they did not aid or abet his misdiagnosis of her."

[Villafana and Villafana vs. State, 728 So.2d 260 (5th DCA 1999)]

25. Search & Seizure--Bar Patrons At Arrest Warrant Execution

Marijuana found on a defendant must be suppressed because it was seized during an unlawful detention, the 2nd DCA held. Three individuals took part in a shootout with law enforcement officers, and a month later the officers carried out an arrest warrant for the suspects at the nightclub where the incident took place. While executing the arrest warrant, the officers ordered everyone in the area to lie on the ground. While the officers were searching for the suspects and doing pat-downs for weapons, they found marijuana on Nathaniel Wooden. The DCA suppressed the evidence, focusing on testimony from the officers that they did not believe Wooden was one of the suspects or that he was involved in any illegal activity or was armed. "We conclude that when the officers ordered Wooden to the ground, they effected a stop," the DCA said. "It is clear from the record that Wooden was ordered down on the ground solely because he was present in the area. In the absence of any suspicion directed at Wooden, we hold that he was unlawfully detained."

[Wooden vs. State, 724 So.2d 658 (2d DCA 1999)]

26. Incest Statute Applies To Half-Siblings

The incest statute applies to half-siblings, those who have in common only one parent, the 2nd DCA held in a case of first impression. Alonzo Carnes was convicted of incest under section 826.04, F.S. Because Carnes and the victim shared only the same father, he contended on appeal that the incest statute does not apply in his case because his actions involved his half-sister, not a full sister. Rejecting this argument, the DCA affirmed his conviction. "The obvious purpose of the incest statue is to address the evil of sexual intercourse between persons who are related to each other within specific degrees. A person's half-sister is as close a relative as an aunt or niece, both of which fall under the protection of the incest statute. Therefore, an interpretation of (the law) which would permit sexual intercourse with a person's half-sister but which would prohibit sexual intercourse with that person's niece or aunt would be an absurd interpretation and contrary to the legislature's intent," the DCA said.

[Carnes vs. State, 725 So.2d 417 (2d DCA 1999)

27. Criminal Street Gang - Proving Membership

Photographs and an officer's testimony were insufficient to prove that a defendant was a member of a criminal street gang, the 2nd DCA held. After A.K. was adjudicated for two counts of trespass, his sentence was enhanced under section 874.04, F.S., for his membership in a criminal street gang. Evidence consisted of a photograph of A.K. with several other people flashing "gang hand signs." The evidence also consisted of testimony from an officer that at least three individuals pictured with A.K. had been arrested for various offenses, including a drive-by shooting. Concluding that the state failed to show that there were at least two or more members who engaged in a pattern of criminal street gang activity, the DCA reversed A.K.'s sentence. In a footnote, the DCA declined to address the issue of whether evidence of mere arrests is sufficient to establish a pattern of criminal street gang activity.

[A.K. vs. State, 724 So.2d 660 (2d DCA 1999)]

28. Testimony Re: General Criminal Behavior Is Error

A defendant's drug charge must be reversed due to an officer's testimony about what occurs in other drug cases, the 4th DCA held. An officer posing as a drug buyer arranged to purchase drugs from an individual. The officer then observed the individual walk across the street and make an exchange with

Darion White. The individual returned with a rock of crack cocaine, which he sold to the undercover officer. White was charged with delivery of cocaine, and the officer testified that in many cases one individual will hold the drugs while another solicits the sale. White was convicted, but the DCA found the testimony to be harmful error and reversed.

[White vs. State, WL 18040 (4th DCA 1/20/99)]

29. Required "Possibility of Deportation" Advisory OK In Written Plea

Although a trial court did not specifically warn about the possibility of deportation, the defendant is not entitled to have his plea set aside because the deportation information was contained in the plea agreement he read and understood, the 5th DCA held. At a sentencing hearing following adjudication for numerous offenses, the trial judge asked Michael Hinds if he read his written plea form in its entirety and discussed the contents with his attorney. Under oath, the Jamaica native replied that he had done so, and also testified that he was in good health and was not receiving any medication or treatment for psychological disorders. On appeal, Hinds maintained that even though his plea agreement discusses the possibility of deportation, his plea was not voluntary and must be set aside because the trial judge failed to personally and orally warn him about the possibility of deportation. The DCA denied the appeal, concluding that Hinds was not prejudiced.

[Hinds vs. State, 726 So.2d 812 (5th DCA 1999)]

30. Comment On Defendant's Silence To Question Not Error

Because a defendant never invoked his right to remain silent, it was not error for an officer to testify that the defendant had no response to one question during a police interview, the 1st DCA held. Timothy Thomas maintained that the trial court erred in allowing an arresting officer to testify that, after waiving his Miranda rights during a police interview, Thomas had no response when he was told that his cousin had implicated him. Affirming Thomas' convictions, the DCA said the officer's comment on Thomas' failure to answer a single question did not violate the defendant's constitutional right when that right was not invoked.

[Thomas vs. State, 726 So.2d 357 (1st DCA 1999)]

31. 6th Amendment Right To Counsel Extended To Uncharged Crime

A defendant's constitutional right to counsel was violated when a trial court admitted statements the defendant made after he invoked his right to counsel, the 1st DCA held. Dennis Taylor was charged with dealing in stolen property after he broke into the victim's home, stole her jewelry and later pawned it. During a subsequent police investigation, an officer questioned Taylor only about the burglary, for which he had not yet been charged. Taylor waived his Miranda rights and told the officer he had never been to the victim's residence or the pawnshop. This statement was used at Taylor's trial, and he was convicted of dealing in stolen property. The DCA reversed. The DCA found that although Taylor waived his Fifth Amendment right to counsel by waiving his Miranda rights during the questioning for the uncharged burglary offense, his Sixth Amendment right to counsel - which attached when he was charged with dealing in stolen property - was still intact because the uncharged burglary offense and the dealing in stolen property offense are "inextricably intertwined." "We cannot logically perceive how the police disclaimer of any interest in the charge of dealing in stolen property could automatically terminate the Sixth Amendment right to counsel when the evidence against Taylor consisted of the pawn ticket and the fact that he had pawned four pieces of jewelry belonging to Ms. Curry within two hours of the burglary," the DCA said. "We find that the facts of the charged and

uncharged offense are inextricably intertwined and, therefore, Taylor's previously invoked right to counsel survived the police disclaimer concerning the dealing in stolen property charge."

[Taylor vs. State, 726 So.2d 841 (1st DCA 1999)]

32. No Trespass In Occupied Conveyance By Sleeping In Stolen Car

A defendant who was found in a stolen vehicle with companions was improperly adjudicated for trespass in an "occupied" structure or conveyance, the 4th DCA held. The juvenile was arrested after he was found sleeping in a stolen vehicle in which two of his friends were also sleeping. The juvenile was subsequently adjudicated for trespass in an occupied structure or conveyance under section 810.08(1)(2)(b), F.S. Reversing, the DCA agreed with the defense that the vehicle was not "occupied" because it held the juvenile's friends rather than the owners or innocent victims the statute was intended to protect.

[D.E. vs. State, 725 So.2d 1269 (4th DCA 1999)]

33. Plea Agreement Waiving "Can't Pay" Defense Is Illegal

A defendant's waiver of the defense of "inability to pay" was an illegal condition of probation, the 4th DCA held.

Pursuant to a plea agreement, a special condition of the defendant's probation required that she make restitution of $212,500 in monthly payments and that she waive her right to raise the defense of inability to pay. When the defendant failed to make the payments, the trial court revoked her probation and, concluding that she was able to pay, imposed a suspended sentence. Reversing the probation revocation, the DCA rejected the probation condition waiving the defendant's defense of inability to pay. The DCA withdrew an October 1998 decision in which it upheld the probation condition.

[Dirico vs. State, WL 68935 (4th DCA 2/10/99)]

34. Burglary Of Doorless Garage = Burglary Of Structure

A garage was still a "structure" even though it lacked a door because it was an integral part of a home, the 4th DCA held. A defendant was charged with burglary for attempting to steal a bicycle from the victim's garage. On appeal, the defendant maintained that the garage was not a "structure," based on the 4th DCA's conclusion in Small vs. State that a "carport" did not constitute a structure. Affirming the conviction, the DCA found the defendant's reliance on the Small decision misplaced. The DCA noted that the garage shared a roof with the victim's home and was surrounded by three walls.

[Bean vs. State, WL 89464 (4th DCA 2/24/99)]

35. Parents' Property Interest In Child's Body

Ruling in a case where police showed "callous indifference" in their efforts to notify parents that their adult child had died, the 4th DCA asked the Florida Supreme Court to revisit whether parents have a constitutionally protected property interest in their child's remains. The DCA said it was forced to rule against the parents because of the Supreme Court's 1986 decision in State vs. Powell, in which the court held that parents do not have such a protected property right. However the DCA noted that Powell involved the limited physical intrusion involved in removing the corneas from a body. "In contrast, the allegations in the present case are that the West Palm Beach police officer showed such a callous indifference to the rights of the (parents), whose name and address in Miami were known to him, as to constitute outrageous conduct and tortious interference with the right of burial," the DCA

said. "We conclude ... that our supreme court should determine whether Powell is limited to corneal removal or precludes section 1983 actions where the interference with burial is more egregious."

[Crocker vs. Pleasant and City of West Palm Beach, et al., 727 So.2d 1087 (4th DCA 1999)]

36. No Uninsured Motorist Coverage For Injured Rescue Attempt Officer

A police officer who was injured while trying to rescue the occupants of a submerged, overturned vehicle is not entitled to uninsured motorist insurance coverage because his injuries did not result from the use of the vehicle, the 4th DCA said.

The court ruled against Randall Oliver, an officer with the Seminole Tribe of Florida's Department of Law Enforcement. The officer sought benefits for injuries he sustained while diving into a canal in an attempt to rescue the occupants of a car he had been pursuing. The DCA agreed with the insurance company's argument that the officer is not entitled to coverage because his injuries did not result from the ownership, maintenance or use of the uninsured vehicle, as required by the law enforcement agency's insurance policy. "(W)e do not believe that the uninsured vehicle produced Oliver's injuries. Oliver was injured as a result of climbing in and out of the canal in his attempts to rescue the occupants of the uninsured vehicle. While the driver's negligent use of the vehicle may have contributed to the conditions necessitating Oliver's rescue efforts, it was the rescue efforts, not the vehicle itself or the conduct of the driver which produced the injury. Thus, since the uninsured vehicle only contributed to the conditions that produced Oliver's injuries, we conclude that Oliver's injuries did not result from the 'ownership, maintenance or use' of the uninsured motor vehicle," the DCA concluded.

[New Hampshire Insurance Company vs. Oliver, WL 104556 (4th DCA 1999)]

37. Forfeiture Action: 45 (60) Day Filing Window Begins From Seizure

A state agency failed to meet its statutory obligation to proceed promptly on the forfeiture of a vehicle, the 5th DCA held.

The Department of Highway Safety and Motor Vehicles seized Brad Webb's vehicle on June 3, 1997. More than eight months later, Webb received mailed notice of the forfeiture and his right to an adversarial preliminary hearing. The trial court concluded at a May 27, 1998, hearing that the department had probable cause to seize the vehicle, and ordered the department to file its forfeiture complaint within 20 days of its order. The department filed the complaint but Webb sought a writ of prohibition. Granting the writ, the DCA found the forfeiture complaint untimely under the Florida Contraband Forfeiture Act, found in section 932.704, F.S. Although the statute allows trial courts to extend the 45-day filing requirement to 60 days for good cause, the DCA explained, the time periods run from the date of the seizure.

[In re: Forfeiture of One (1) 1994 Honda Prelude Brad Webb vs. Department of Highway Safety, WL 111142 (5th DCA 3/5/99)]

38. DUI - Probable Cause For Blood Draw Of Multiple Suspects

An officer may have probable cause to order a blood draw from more than one defendant when he cannot be sure which suspect was behind the wheel in an alcohol-related fatal accident, the 2nd DCA held. The defendant and two other juveniles were in a vehicle involved in a car accident in which one of the juveniles was killed. The officer on the scene smelled alcohol on both the defendant and the

other juvenile and could not determine who was driving, so he ordered blood drawn from both individuals. The defendant was subsequently convicted of DUI manslaughter and vehicular homicide. Affirming, the DCA rejected the defendant's argument that the police were required to have probable cause that he was the only one who committed the crime before they could obtain his blood sample. "Law enforcement was not required to know without a doubt that appellant was the driver of the car in order to take the blood sample from him," the DCA explained. "Appellant's suggestion that law enforcement officers cannot have probable cause to search multiple suspects has been rejected by this court."

[Williams vs. State, WL 147307 (2d DCA 3/19/99)]

39. Field Sobriety Test Is "Nontestimonial" So No Miranda's Needed

Miranda warnings are not required for roadside sobriety tests of a motorist's physical coordination and officers need not warn a motorist of the right to refuse to perform the test, the 3rd DCA said.
A defendant failed a sobriety test while in custody following a traffic accident. Because Miranda warnings were not given and the defendant was not advised that he had the right to refuse to take the roadside sobriety test, the trial court suppressed the test results regarding the defendant's physical coordination and mental acuity. Reversing the suppression order, the DCA concluded that the test results that revealed the defendant's physical coordination are "nontestimonial" and do not require Miranda warnings. "(A) test of physical coordination generates a nontestimonial response and is not protected by the Fifth Amendment," the DCA held. The DCA also held that the Fourth Amendment does not require officers to give any warning of a right to refuse sobriety tests.

[State vs. Whelan, WL 123538 (3d DCA 3/10/99)]

40. RICO - Enterprise Element Does Not Require "Decision-Making"

The state is not required to prove the existence of a "decision-making" structure in order to satisfy the "enterprise" element under RICO, the 4th DCA held. A defendant was convicted of RICO and numerous felonies stemming from his criminal activity with various co-defendants who carried out home invasions. On appeal, the defendant maintained that the 3rd DCA's 1991 opinion in Boyd vs. State requires the state to prove that there was a "decision-making structure" that operated to control and direct the group. The DCA disagreed and affirmed the convictions, certifying conflict with Boyd on this issue.

[Gross vs. State, WL 141852 (4th DCA 3/17/99)]

41. Defendant's Entitled To Have All Of Recorded Statement Played

A defendant is entitled to a new trial because a judge improperly excluded an audio recording of his statements, the 5th DCA held.
Following his arrest for sexual battery, the defendant gave a statement to a sheriff's agent, who recorded it on tape. At trial, the agent was permitted to testify about the contents of the defendant's recorded statements. The trial court, however, denied the defendant's request to play certain portions of the statement for the jury. The defendant was convicted and sentenced to 12 years in prison followed by 10 years probation. Reversing the conviction and remanding for a new trial, the DCA found the trial court's exclusion of the defendant's audio-recorded statement improper under section 90.108(1), F.S. "This (rule of completeness) applies equally to a witness' recollection of a portion of a

statement as it does to a portion of a statement admitted verbatim," the DCA said.

[Layman vs. State, WL 128704 (5th DCA 3/12/99)]

42. Search & Seizure - Consent To Search Commonly Shared Premises

A trial court erred in suppressing cocaine evidence after wrongly concluding that police officers needed to obtain consent from the defendant even though they obtained consent from the defendant's housemate, the 1st DCA held. Officers arrived at James Purifoy's home after his housemate reported that Purifoy sexually assaulted her. Purifoy was arrested. While he remained in the patrol car, the woman consented to a search of the residence, where the officers found cocaine. The trial court suppressed the evidence after concluding that the officers needed Purifoy's consent. Reversing, the DCA held that because the housemate possessed common authority over the premises, she had authority to consent to the search and the police officers were not obligated to seek Purifoy's consent.

[State vs. Purifoy, WL 164020 (1st DCA 3/26/99)]

43. Burglary - Fenced Compound Not "Curtilage"

A defendant was improperly convicted of burglary where he entered into a fenced industrial park that contained many warehouses, the 3rd DCA held. The defendant was arrested at night after officers found him hiding under a truck inside a fenced industrial park. An air-conditioning unit had been moved into a Tri-Star warehouse, setting off an alarm. The defendant ultimately pled guilty to burglary, but on appeal maintained that because the fenced industrial park was common to many warehouses, it could not be considered the curtilage of Tri-Star. The DCA agreed, pursuant to the 1st DCA's recent opinion in Henry vs. State. "As in Henry, where the defendant was not guilty of burglary of the unentered sheds by his entry into the fenced compound, likewise (this defendant) was not guilty of burglary of the unentered Tri-Star warehouse by his entry into the fenced compound of this industrial park," the DCA said.

[Mejias vs. State, WL 156396 (3d DCA 3/24/99)]

44. Search & Seizure - Consent Limited By Defendant's Action

Cocaine evidence should have been suppressed because the defendant withdrew his consent to a search, the 4th DCA held. When police officers conducted a random check of bus passengers' luggage, the defendant consented to a search and unzipped his bag, saying, "See, there's nothing in here." Noticing that the defendant removed a pair of shorts containing an oblong object, the officers searched and found cocaine. Suppressing the evidence, the DCA concluded that the defendant's act of removing his shorts from the bag indicated his withdrawal of any prior consent to a search of his shorts.

[Jackson vs. State, WL 156034 (4th DCA 3/24/99)]

45. Recording Of Conversation Between Subject And Wife In Police Interview Room

A defendant lacked a reasonable expectation of privacy when police recorded a conversation he had with his wife while they were alone in a police interview room, the 5th DCA held. While the defendant and his wife spoke in the interview room, their conversation about his armed robbery crimes were recorded on tape. The trial court refused to suppress the recording, rejecting the defendant's

contention that it constituted an illegal search and seizure. The DCA affirmed, concluding that under the circumstances the couple had no expectation of privacy in the police interview room. In addition, the DCA said, even if the recording should have been suppressed the error was harmless in light of overwhelming evidence of the defendant's guilt.

[Johnson vs. State, WL 162094 (5th DCA 3/26/99)]

46. Search & Seizure-False Answers Not Given After Legal Detention

Drug evidence found on a defendant must be suppressed because officers could not use her false answers to their questions to support her detention and arrest, the 2nd DCA held. Officers who observed the defendant standing in the parking lot of a closed gas station approached her and asked for identification. The defendant provided a false name, date of birth, age and address. She was subsequently arrested for resisting arrest without violence, and a search incident to the arrest uncovered drugs and paraphernalia. Suppressing the evidence, the DCA rejected the contention that the defendant's false answers to the officers' questions gave them probable cause to arrest her. The DCA held that although the defendant's false information can result in a violation for resisting arrest, her false information was not given after a legal detention. The DCA further held that because the arrest was unlawful, the search incident to the arrest was invalid.

[Fournier vs. State, WL 186871 (2d DCA 4/7/99)]

47. Search & Seizure--Illegal Stop Of Visitor To Crack House

Drugs found on a defendant must be suppressed because police lacked a founded suspicion to justify an investigtory stop, the 2nd DCA held. During a surveillance of a suspected crack house, officers stopped the defendant in his vehicle after he spent a brief time at the residence. The search turned up narcotics, and the defendant was arrested. The arresting officer testified that he did not observe the defendant engaging in any illegal activity when he was at the suspected crack house, and the DCA suppressed the evidence. In a concurring opinion, Chief Judge Altenbernd discussed how the police could have avoided suppression if they had better coordination between the narcotics and patrol units and if the police department followed the six guidelines suggested in the DCA's 1995 decision in Revels vs. State.

[Berard vs. State, 731 So.2d 768 (2d DCA 1999)]

48. Privacy - F.S. 794.05 Is Constitutionally Valid Protection Of Minors

A Florida statute designed to protect minors from sexual advances by adults is not unconstitutionally arbitrary just because it sets an age limit that some might disagree with, the 2nd DCA said.
The DCA reversed a lower court's conclusion that section 794.05, F.S., violated the equal protection rights of the female defendant. The statute makes it a second-degree felony for anyone who is at least 24 years old to have sexual activity with a 16- or 17-year-old. The woman argued that the law violated her privacy and equal protection rights; the DCA affirmed the lower court's denial of the privacy claim and reversed on the equal protection claim.
49. "While all may not agree with the age restrictions found in section 794.05, Florida Statutes (1997), that does not make the classification arbitrary or capricious. The Florida Legislature has consistently expressed a strong policy interest in protecting minors from harmful sexual contact. ... (T)he legislature decided to limit criminal responsibility to persons twenty-four years of age and over because the legislature felt that persons in this group were more likely than others to understand the

consequences of their actions and to cause harm to minors who cannot appreciate the seriousness of their activities. Therefore, the age limitation in section 794.05, is not arbitrary when balanced against the goals of protecting minors from sexual exploitation. Accordingly, we will not substitute our judgment for that of the legislature," the DCA said. [State of Florida vs. Walborn, (2d DCA 4/7/99)] Search & Seizure: Confession By "Witness" Who Voluntarily Appeared At Police Station Product Of Non-Custodial Interrogation

Because a defendant was not the subject of a custodial interrogation at the time he confessed to murder, the police were not required to Mirandize him and the confession was admissible, the 3rd DCA held.

Kenya Ramsey and a co-defendant voluntarily went to a police station as possible witnesses to a murder. Ramsey confessed to committing the murder after an officer confronted him with incriminating testimony from the co-defendant. Following his conviction for first-degree felony murder, Ramsey argued on appeal that his confession should have been suppressed because his voluntary police encounter became custodial when the officer confronted him with the incriminating evidence.

50. The DCA disagreed and affirmed the conviction, concluding that the Miranda safeguards were not triggered when Ramsey voluntarily went to the police station. "It is absolutely undisputed in this case that up until the time that the police confronted Ramsey with the details of his co-defendant's statements implicating him, Ramsey was not in custody and was at the police station voluntarily speaking to the police without any coercion or intimidating circumstances," the DCA said. [Ramsey vs. State, WL 187069 (3d DCA 4/7/99)] Search & Seizure - Improper Temp Tag Display As Basis For Stop

Evidence found on a defendant and in his vehicle should not have been suppressed because the stop and search were proper, the 2nd DCA held.

Officers stopped the defendant because his temporary license tag was affixed to the rear window of his pickup truck instead of the bumper and the tag was blocked by objects in the truck bed. The defendant consented to a search, and officers found a knife near the driver's seat and rock cocaine in the defendant's shirt pocket. The trial court suppressed the evidence after concluding that the stop was improper because the license tag could be affixed to the rear window and because the defendant's consent to search was a "mere acquiescence" to authority.

51. Reversing the suppression order, the DCA found the trial court's ruling on the temporary tag incorrect because it was based on a law that was repealed at the time of the stop, and because the trial court failed to apply the "visibility" requirement. The DCA also concluded that the trial court should have focused on whether the officers' actions conveyed to the defendant that he was not free to leave, not simply that the defendant "acquiesced to authority." [State vs. Parrish, WL 218411 (2d DCA 4/16/99)] Search & Seizure - Illegal Arrest For "Obstruction"

Because an officer improperly attempted to arrest a man for obstruction, the defendant was free to resist the arrest without violence, the 4th DCA held.

When officer conducting a sting operation solicited two women, Tyrone Jay told the women "don't get in the car, he's a cop." The women walked away and were not arrested. The officer tried to arrest Jay for obstructing him in the execution of his legal duty, but Jay fled. He was subsequently arrested and later convicted of resisting an officer and possession of a weapon by a convicted felon. The DCA reversed.

52. Because no criminal activity occurred with the women and there was no evidence the officer tried to detain them, the DCA said the officer was "merely on the job" and not engaged in the lawful execution of any legal duty. Consequently, the DCA concluded, the officer's attempted arrest for obstruction was illegal. "(T)here is no evidence that the two targeted women had committed any crime from which they escaped apprehension," the DCA said. [Jay vs. State, WL 212084 (4th DCA 4/14/99)] Search & Seizure - Scope Of Consent : "Quick Look Around"

An evidentiary hearing is needed to determine whether officers exceeded the scope of consent when they searched a defendant's closet, the 2nd DCA held.
The owner of a townhouse allowed officers to enter his home to "look around" for possible narcotics activity. James Jacobs, a tenant in the townhouse, also agreed to let officers take a "quick look around" in his room for possible narcotics. One officer found narcotics in a tin canister on the floor, and another officer found narcotics in a film container inside Jacobs' closet. The trial court refused to suppress the evidence.
The DCA concluded that because the officers specified that they were conducting a narcotics investigation and testified that tin canisters are known to contain narcotics, it was proper for the officers to open the tin canister that was in plain view. However, the film container inside Jacobs' closet was not in plain view so the DCA remanded for an evidentiary hearing to determine whether officers exceeded the scope of consent by searching the closet.
53. "The resolution of this issue depends upon the order and extent of the search in this case," the DCA explained. "If the deputies found the contraband in the canister before they searched the closet or any other area not in plain view, then the seized contraband in the canister established probable cause for the deputies to search the entire premises. However, if the search of the closet or any other area not in plain view preceded the search of the canister, the deputies exceeded the scope of consent to take a 'quick look around." [Jacobs vs. State, WL 228568 (2d DCA 4/21/99)] Search & Seizure - Consent: "Pat Down" or "Empty Your Pockets"

Drug convictions must be reversed because officers exceeded the scope of the defendant's consent when they conducted the search, the 1st DCA held.
After Tommie Lee Sanders agreed to a pat-down search, the officer asked Sanders whether he had any needles or other sharp objects that might prick the officer. Although Sanders responded that he had no such objects in his pockets, the officer instructed Sanders to take everything out of his pockets. This produced contraband, and Sanders was arrested and later convicted of possession of cocaine and paraphernalia. The DCA reversed.
54. "When a suspect empties his pockets in response to an officer's directive that he do so, the legal effect is the same as if the officer had himself searched the suspect's pockets," the DCA explained. "(I)n the absence of additional circumstances which would justify a more complete search, consent to a mere pat down does not include consent to reach into the pockets of a suspect and retrieve the contents." [Sanders vs. State, WL 242262 (1st DCA 4/27/99)] Multiple Counts - Single Episode In One Computer Transmission

A defendant's multiple counts on obscenity charges must be dismissed because the crimes occurred during a single episode, the 2nd DCA held.
55. The defendant had numerous discussions over the Internet with an individual he believed to be a 15-year-old boy, unaware that the "boy" was actually an undercover officer. The defendant sent sexually explicit photographs involving minors and agreed to meet the "boy" in order to engage in sexual activity. The defendant was arrested and charged with numerous crimes, including separate charges for each image sent over the Internet in violation of section 847.0133, Florida Statutes (1997). Although the DCA affirmed many of the defendant's convictions, it dismissed the counts regarding the sexually explicit images because they were sent in only one computer transmission. [Thibeault vs. State, WL 252661 (2d DCA 4/30/99)] Recording of Call of Out-Of-State Suspect - Other State's Law

A recorded telephone conversation between an out-of-state defendant and a child victim was properly admitted during a trial involving the defendant's sexual activities with the minor, the 5th DCA held.
With the permission of the victim and her mother, Titusville police recorded a telephone conversation between the defendant and the victim. In the conversation, the defendant made incriminating statements involving his sexual activity with the 11-year-old victim. At the time of the offenses, the

defendant was a minister in Titusville. Because he resided in Illinois at the time he made the phone call, the defendant moved to suppress the recording because the Titusville police failed to comply with Illinois law by notifying the Illinois State Attorney before making the recording. The trial court refused to suppress the recording and the defendant was convicted.
56. The DCA affirmed, finding the recording properly admitted because it did not involve the police intercepting a private conversation without consent of the parties. "(The defendant) did not have a right to privacy in his telephone conversation with the victim because a 'wrongdoer who voluntarily speaks to another of his wrongdoings, only has the hope or expectation, not a constitutionally protected right, that the other person will not breach his confidence," the DCA said. [Thompson vs. State, WL 252387 (5th DCA 4/30/99)] Illicit Nature Of Drug Paraphernalia Must Be Proven

A drug paraphernalia conviction must be reversed because there was no evidence the defendant knew or should have known that a glass tube he sold to an undercover agent was to be used for an illicit purpose, the 2nd DCA held.
While conducting an undercover investigation of a store suspected of selling glass pipes for smoking crack cocaine, agents purchased a glass pipe from one of the store's employees, Jamal Subuh. Subuh was convicted on a drug paraphernalia charge, but the DCA reversed.
57. The court noted that the statutes list "glass pipes" as drug paraphernalia, but found that there was no evidence Subuh knew or reasonably should have known that the paraphernalia was to be used for an illicit purpose. "Although we are hard pressed to think of a probable lawful use for this tube when purchased from this location, there are many lawful uses for glass tubing," the DCA said. [Subuh v. State, 732 So.2d 40 (2d DCA 1999)] Search & Seizure - Ordering Passenger Stay In/Return To A Vehicle

A police officer conducting a lawful traffic stop may not, as a matter of course, order a passenger who has left the stopped vehicle to return to the vehicle and remain inside until the stop is completed, the 4th DCA held.
An officer properly conducted a traffic stop, and passenger Jeff Wilson exited the vehicle and proceeded to a nearby bar. The officer instructed Wilson to return to the car and stay inside the vehicle until the traffic stop was completed. When the officer saw Wilson trying to conceal something, the officer searched Wilson found a plastic baggie of cocaine. Suppressing the evidence, the DCA held that an officer must have an articulable founded suspicion of criminal activity or a reasonable belief that the passenger poses a threat of safety before ordering the passenger to return to and remain in the vehicle.
58. "(T)he officer expressed a generalized safety concern because of the location of the traffic stop, i.e. the parking lot of a bar known for rowdy patrons, but he could not articulate any facts attributable to the appellant's behavior or appearance that created a suspicion of illegal activity or danger to his safety," the DCA explained. "(A) command preventing an innocent passenger from leaving the scene of a traffic stop to continue on his independent way is a greater intrusion upon personal liberty than an order simply directing a passenger out of the vehicle." [Wilson vs. State, WL 270419 (4th DCA 1999)] Miranda Warnings - Public Safety Exception

A defendant's pre-Miranda statement regarding a gun's location and his post-Miranda statement that he would still help the officers find the gun were admissible under the public safety exception, the 3rd DCA held.
59. When officers responded to the scene of a fatal shooting, the defendant was immediately handcuffed and gave a pre-Miranda statement indicating where the gun was located. After the defendant was Mirandized and said he did not want to answer more questions, he said "yes" when the officers asked if he would still help them find the gun. The trial court refused to suppress the statements. Affirming, the DCA found both statements admissible under the "public safety" exception. The DCA rejected the defendant's argument that the officers were precluded from further questioning

after Miranda warnings had been given. [Borrell vs. State, 733 So.2d 1087 (3d DCA 1999)] Unprepared Defense Attorney -Unobjected To Comment On Silence

Although a defendant's statement on a videotape amounted to a comment on his right to remain silent, its admission was harmless error, the 4th DCA held.
During a DUI trial, a videotape of the defendant's conversations with officers was admitted with no objection from the defense. However, when the tape showed the defendant requesting an attorney, defense counsel objected that the tape contained a comment on the defendant's right to remain silent.
60. Affirming the convictions, the DCA found the admission of the tape harmless in light of the other evidence against the defendant. The DCA also determined that defense counsel invited the error by raising no objection to jurors seeing the videotape. [Shingledecker vs. State, 734 So.2d 483 (4th DCA 1999)] Clerk's obligation to pay for evidence storage

A court clerk cannot be required to pay a costly bill for storage of a vehicle in a criminal case when it was the prosecutor's decision to hold onto the vehicle as evidence, the 4th DCA said.
At the request of the clerk of the Seventeenth Judicial Circuit, the DCA reversed a lower court order holding the clerk financially responsible for the commercial storage of the vehicle. The estimated tab for the storage is $50,000, and the DCA noted that the clerk's office was not a party to the case and the trial court's order did not involve the return of property to its rightful owner.
61. "The order imposed a civil obligation on the clerk to pay $50,000 to a non-party without a formal claim being made against the clerk. We note that neither (the storage garage) nor the county was involved in these proceedings, and any ultimate payment by the clerk pursuant to the order would, of necessity, fall on the unnoticed county," the DCA said. [Lockwood vs. Pierce, 730 So.2d 1281 (4th DCA 1999)] Whistle-Blower Reinstatement

Florida's whistle-blower's law requires that a fired prosecutor be temporarily reinstated to the job from which she was fired after she lodged numerous complaints with various state agencies, the 5th DCA said.
The court said the Ninth Circuit State Attorney's Office improperly refused to temporarily reinstate fired assistant state attorney Donna Lindamood. The court cited the conclusion of the Governor's Office of the Public Counsel that it was reasonable to believe Lindamood's employer had retaliated against her. Lindamood was fired without explanation less than three years after she was hired in the State Attorney's Office. During the course of her employment, she filed at least a half-dozen complaints of gender- and age-based employment discrimination. Under the Whistle-Blower's Act, the DCA noted, a fired worker who has received a determination like one issued by the Public Counsel is entitled to a temporary reinstatement while her complaint is pending.
62. "The relief spelled out in the statute mandates temporary reinstatement, where the employee complains of being discharged in retaliation for a protected disclosure, and the Office of the Public Counsel investigates and makes the required statutory findings," the DCA said. "The statutory language ... is not ambiguous and the plain meaning of the statute must prevail." [Lindamood vs. Office of the State Attorney, Ninth Judicial Circuit, 731 So.2d 829(5th DCA 5/7/99)] Entrapment - CI Was Not Closely Monitored

A defendant should have been acquitted of cocaine trafficking because of the egregious conduct by the government's confidential informant, the 4th DCA held.
63. The defendant was convicted of cocaine trafficking after agreeing to purchase cocaine from confidential informant Michael Martinez. Reversing, the DCA concluded that the government's actions constituted misconduct under the objective standard of entrapment. The DCA noted that law enforcement authorities failed to closely monitor Martinez's dealings with the defendant, effectively leaving Martinez to act as an undercover agent of law enforcement. The informant's actions constituted "egregious and offensive" entrapment, the DCA said. [Soohoo vs. State, WL 313270 (4th

DCA 5/19/99)] Summary Judgment - Forfeiture Case

Summary judgment against a sheriff seeking civil forfeiture must be reversed because a dispute still exists over whether there was a connection between money found in a vehicle and illegal drug activity, the 5th DCA held.
After an officer stopped a vehicle for speeding, passenger Carole Gay admitted that luggage containing more than $8,000 belonged to her. The Orange County Sheriff filed a complaint seeking forfeiture of the money, alleging that the money was contraband. At Gay's request, the trial court granted summary judgment against the sheriff.
64. Reversing, the DCA said, "Although the evidence before the trial court may have been insufficient to support a ruling in favor of the Sheriff at trial, the evidence was sufficient to overcome Ms. Gay's summary judgment motion because disputed issues of fact remain whether there is a nexus between the money and illegal drug activity." [Beary vs. Gay, 732 So.2d 478 (5th DCA 1999)] Search & Seizure - Consent To Search Car Doesn't Extend To Pack

An individual's consent to a search of her vehicle extended to a fanny pack she left on the seat of her car when she got out, the 2nd DCA held.
65. A trial court suppressed the contents of the fanny pack after concluding that the defendant's consent to a search of her vehicle did not extend to a search of the pack. Reversing, the DCA agreed with the state that the trial court's conclusion was erroneous under the U.S. Supreme Court's 1991 opinion in Florida vs. Jimeno. "We believe that it was objectively reasonable for the officer to conclude that (the defendant's) consent to search her car extended to her fanny pack because a reasonable person may be expected to know that a fanny pack is a container in which either narcotics or weapons can be carried," the DCA said. [State vs. McCance, WL 495512 (2d DCA 5/28/99)] Possession of Cocaine While Passing To Another Not Enough

The mere fact that a defendant passed cocaine from one party to another is insufficient to convict him of possession and sale of cocaine, the 2nd DCA held.
When an undercover officer and an informant arranged to purchase cocaine from a seller, the seller handed a baggie of cocaine to Bart Hamilton, who in turn gave it to the informant. Hamilton was convicted of possession and sale of cocaine.
66. Reversing, the DCA found Hamilton's actions to be incidental and said there was no other evidence from which to infer that Hamilton was otherwise involved in the transaction. "We conclude that the mere fact that Hamilton passed the cocaine from one party to another party, where he was sitting between the two, did not establish that he had dominion and control over the cocaine, and, therefore, did not support a conviction for possession of cocaine," the DCA explained. [Hamilton vs. State, WL 303406 (2d DCA 5/26/99)] Call Interception - Legitimate Ch. 934 Purpose

A trial court erred in suppressing law enforcement's interception of a telephone call because the interception was to obtain evidence of child abuse, the 5th DCA held.
67. With consent from a friend of the child victim, a law enforcement officer intercepted a telephone conversation between the friend and the defendant. This taped conversation formed the basis for criminal charges involving child abuse of the defendant's daughter and witness tampering based on the defendant's instruction to the friend to lie to police. The trial court suppressed the conversation after concluding that the officer was not seeking evidence of a crime but was merely trying to locate the child victim. The DCA disagreed and reversed, concluding that because the officer was trying to obtain evidence about child abuse, the interception was permissible under section 934.03(2)(c), F.S. [State vs. Sobel, WL 360180 (5th DCA 5/28/99)] Motion To Suppress - "Scrupulous Honor Of Miranda Invocation"

Officers validly honored a defendant's invocation of his right to remain silent, the 2nd DCA held.

68. At a police station following his arrest for murder, Jessie Cruz was read his Miranda rights and signed a waiver form. When Cruz interrupted the interview to state that he did not want to talk further until his parents arrived, police questioning stopped. An officer later reread Cruz his Miranda rights and then interrogated him in the presence of his parents. Cruz's confession to the officer was eventually admitted and led to his conviction. Affirming, the DCA rejected Cruz's contention that the officers did not "scrupulously" honor his invocation of the right to remain silent, noting that the officers waited to begin their questioning until his parents were seated in the room, as he requested. [Cruz vs. State, WL 345471 (2d DCA 6/2/99)] Recording Holding Room Conversation After Invoking Right To Remain Silent

A trial court properly admitted a tape recording of a conversation between a criminal suspect and his sister-in-law in a police interrogation room, the 4th DCA held.
At the police station following his arrest, Floyd Boyer declined to waive his Miranda rights. After reminding Boyer that he had invoked the right, an officer told him about the incriminating evidence gathered against him. Boyer later questioned the officer about the evidence, and then spoke with his sister-in-law alone in the interrogation room. The conversation was recorded, and the trial court refused to suppress the recording. Boyer was convicted of attempted robbery.
69. Affirming, the DCA concluded that Boyer voluntarily relinquished his right to remain silent when he questioned the officer about the evidence, and had no expectation of privacy. The DCA compared this case to the Florida Supreme Court's 1994 opinion in Allen vs. State. "In this case, as in Allen, the surreptitious taping of the conversation was not employed to circumvent the exercise of (the defendant's) right to remain silent, which he had voluntarily relinquished during the conversation with the detectives at the police station," the DCA explained. [Boyer vs. State, WL 346030 (4th DCA 6/2/99)] Search & Seizure - Suppression Without Taking Testimony Is Error

A trial court erred when it failed to take any testimony on a suppression motion and simply reviewed the probable cause affidavit before ruling, the 4th DCA held.
According to the affidavit, an officer stopped Lawrence Wikso for having an improper license tag. When the officer noticed Wikso reaching behind his back, he ordered Wikso out of the vehicle and then arrested him when he saw cocaine in plain view. The trial court suppressed the evidence after reviewing only the affidavit.
70. "Because the only 'evidence' considered by the trial court entirely supported the stop, seizure and arrest in this case, the trial court erred in holding the seizure and arrest invalid," the DCA said. [State vs. Wikso, WL 415201 (4th DCA 6/23/99)] Entrapment Defense - Applies To Community Control Violation

Entrapment may be used as a defense to a charge of violating community control, the 5th DCA held.
71. While Richard Faulk was on community control for committing a lewd act against a child, an investigator arranged to have Faulk violate his community control and then arrested him. A trial court refused to allow Faulk to raise the entrapment defense. Reversing, the DCA said, "(W)e should not permit the police to encourage one on probation or community control to break the terms of his commitment when he otherwise would not have done so." [Faulk vs. State, WL 445797 (5th DCA 7/2/99)] Speedy Trial Violation - Four-Year Delay In Arrest

Speedy-trial violations occurred where law enforcement and prosecutors failed a look for a grand theft suspect and almost four years elapsed between the issuance of an arrest warrant and his actual arrest, the 2nd DCA said in reversing the conviction.
An arrest warrant was issued for Michael Seymour in August 1994, and a month later an information was filed charging him with grand theft. Seymour was arrested on unrelated charges in June 1998. He soon filed a motion to dismiss based on a violation of his right to a speedy trial on the grand theft charges, claiming he was prejudiced because an essential exculpatory defense witness had died since

the alleged offense took place. The trial court denied the motion and Seymour pleaded no contest.
72. The DCA reversed, noting noted that Seymour had lived in the same area the entire time and had his electricity and telephone listed in his name but law enforcement never tried to serve any warrant on him. The court called the lengthy delay between the filing of charges and Seymour's arrest "presumptively prejudicial," and said his defense was left "in tatters" by the witness' death. "The record allows us to conclude that the State negligently, at least, delayed this case," the DCA said. [Seymour vs. State, WL 462102 (2d DCA 7/9/99)] Entrapment - Lack of Predisposition

Defendants claiming entrapment are entitled to argue that their clean criminal background proves a lack of predisposition to commit a crime, just as prosecutors can try to show that a history of criminal acts shows such a predisposition, the 1st DCA said.
The DCA reversed the conviction of a drug defendant who claimed he was entrapped by a police defendant. The trial court, sustaining a prosecution objection, blocked the defendant's attempt to testify that he had no prior criminal record and was not predisposed to commit the crimes. The DCA disagreed with the trial court decision, noting that the Florida Supreme Court has held that prosecutors may offer evidence of an accused's prior criminal history to demonstrate a predisposition to commit the crime, even though that evidence would normally be inadmissible.
73. "If evidence of prior criminal history is admissible as relevant evidence going to the question of whether an accused is predisposed to commit a crime, it is only reasonable and logical that evidence of the absence of a prior criminal history is likewise relevant to the question and also admissible," the DCA said. [Sykes vs. State, WL 503472 (1st DCA 7/19/99)] Court Service Officers Are Not Deputies

Court service officers hired to serve process and writs of possession should not be treated as deputy sheriffs and are not entitled to be trained and paid as deputies, the 3rd DCA said.
The court, affirming a trial court order, rejected the request of six Miami-Dade court service officers for a declaratory judgment defining their legal status. The officers, who received badges designating them as deputy sheriffs, argued that because their duties are not enumerated in the Florida statute authorizing "special deputy sheriffs," they must necessarily be treated as regular deputy sheriffs. The DCA disagreed.
74. The DCA quoted the trial court's conclusion: "The Plaintiffs are court service officers and are treated differently from law enforcement officers because they are different from such officers. Unlike law enforcement officers, the Plaintiffs do not have the power to carry firearms and do not have the authority to make arrests. These critical distinctions in authority warrant their different treatment." [Masson, et al., vs. Miami-Dade County, WL 493014 (3d DCA 7/14/99)] Impact of Attorney Affair With Defendant's Wife

Likening the case to one involving "point shaving" by an athlete, the 3rd DCA ordered a new hearing for a former Miami city commissioner whose attorney carried on an affair with his wife during his trial. The DCA said the hearing will give Humberto Hernandez the opportunity to prove the alleged affair, which the court said would be presumptively prejudicial to his interests and justify a new trial. Hernandez was convicted of a misdemeanor vote fraud charge, although his attorney's work resulted in acquittal on one felony and one misdemeanor charge. The trial court declined to hold an evidentiary hearing regarding the affair, ruling that Hernandez had to allege and prove that his attorney's trial performance was reduced to some unacceptable level by the affair. The state will have the chance at the hearing to argue its contention that the affair was a ploy to establish a basis for reversal.
75. "Holding a significant place in our conclusion that prejudice or actual harm need not be proven is practical reasoning: it would be virtually impossible in most cases, as here, to prove concrete facts that demonstrate that the defense attorney's efforts were less than those demanded by the case. Just as a dishonest basketball player 'shaves' points so that the point spread is such as to win a placed bet for him or his associates, an attorney can shave his efforts, seeking to assure at least a partial loss for his client in order to continue his affair with his client's wife. It is difficult to prove point shaving. It is

even more difficult, if not generally impossible, to demonstrate the legal equivalent," the DCA said. "We cannot justify leaving defendants in Hernandez' position with no remedy, which we effectively do if we require evidence of concrete acts of betrayal (other than the sexual betrayal itself). In order to be certain that we are providing justice it must be presumed that Hernandez has been prejudiced because of the sexual relationship between his attorney and Esther Hernandez. ... Justice would not appear to be done if we saddled defendants in Hernandez' position with a burden of proof that cannot be carried." [Hernandez vs. State, WL 492587 (3d DCA 7/14/99)] Forfeiture - Lien Must Be Recorded To Have Priority

A sheriff's office is entitled to keep a vehicle it seized because the credit union that issued the loan on the vehicle never completed the paperwork requirements to record notice of its lien on the vehicle, the 1st DCA said.

The court rejected the credit union's argument that it put the state on constructive notice of its lien when it submitted documents to the Department of Highway Safety and Motor Vehicles shortly after it made a car loan. The department returned the documents because they were not accompanied by the required filing fees; those fees were not submitted until after the Bay County Sheriff's Office seized the vehicle because it had been used in the commission of a felony. The trial court found that the sheriff's ownership interest in the vehicle was subject to the credit union's security interest, but the DCA reversed.

76. "If the mere tender of a lien notice to DMV without the required fees is sufficient to obtain constructive notice, there would be no incentive for any party to pay the required fees, because the desired result would be the same with or without payment of the fees," the DCA observed. [Bay County Sheriff's Office vs. Tyndall Federal Credit Union, et al., WL 533706 (1st DCA 7/27/99)] Admissibility of Computer-Enhanced Photos

Computer enhancements of video surveillance tape may be admitted as evidence as long as a forensic video analyst explains how the enhancements were done and verifies that they accurately represent the images from the original tape, the 4th DCA said.

The court affirmed the conviction of a man who was caught by a lingerie shop's surveillance videotape when he entered the shop and sexually battered the store clerk. The videotape was admitted as evidence at the trial, as were still photographs of computer-enhanced images from the tape. Applying the same analysis as it would to photo enlargements, the DCA affirmed.

77. "Once the tape is authenticated and the forensic analyst explains the computer enhancement process and establishes that the images were not altered or edited, then the computer enhancements become admissible as a fair and accurate replicate of what is on the tape, provided the original tape is in evidence for comparison. The weight accorded to those computer-enhanced prints is determined by the jury. A jury possesses sufficient common sense to compare the images," the DCA said. [Dolan vs. State, WL 512093 (4th DCA 7/21/99)] Statutory Journalist's Privilege - Disclosure To 3rd Parties

A journalist's qualified privilege under a 1998 law is not waived by the reporter's pre-publication disclosure of information to other parties, the 5th DCA said.

Ruling on an issue of first impression in Florida, the court granted a television reporter's petition for certiorari, quashing a trial court order that sought to compel the reporter to identify his source of information for a news story on a dental service. The trial court held that the information was within the scope of the qualified journalist's privilege, but said the reporter waived the privilege by disclosing the information to other parties. The DCA disagreed, agreeing with the reporter that the privilege was not waived because the statutory privilege protects both confidential and non-confidential information, unlike privileges based on confidential communications such as husband-wife, physician-patient or attorney-client communications.

78. "(W)hile most privileges protect only those communications that are confidential, a reporter's statutory privilege is generally not conditioned upon a prior agreement of confidentiality. It follows

then, that disclosure of information to a third party should not constitute a waiver," the DCA said. [Ulrich vs. Coast Dental Services, Inc., WL 548973 (5th DCA 7/16/99)] Burglary In 'Open' Space - Hotel Check-In Desk

The state submitted sufficient evidence to prove that a defendant committed burglary when he stole cash from a hotel check-in desk, the 3rd DCA held.
After posing as a construction worker at the hotel, the defendant was able enter the manager's office, where he was caught attempting to steal from the manager's desk. It was later discovered that cash was missing from the cash drawer of the check-in desk. The defendant was convicted of burglary of an occupied structure. Affirming, the DCA rejected the defendant's argument that his actions only supported a conviction for theft because the area from which the money was taken was open to the public.
79. "(The defendant's) intent to commit an offense - theft - in the office was evidenced by his being caught with his hand in the manager's desk drawer. These facts alone support the burglary conviction," the DCA explained. "(T)hat the hotel lobby was 'open to the public' and that the money was actually taken from an area that might be considered 'open to the public' is immaterial." [Thomas vs. State, WL 542629 (3d DCA 7/28/99)] Burglary - Consent To Enter Or Remain On Premises

A defendant's conviction for armed burglary of an occupied structure must be reversed because the behavior of store employees was insufficient to show that they had withdrawn consent to remain on the premises, the 4th DCA held.
When the defendant and a companion entered a convenience store armed and masked, one employee told another that they were about to be robbed and they should give the defendants the money. The defendant was convicted of burglary of an occupied structure, robbery with a deadly weapon and resisting an officer without violence.
80. Reversing the burglary conviction, the DCA concluded that since the store was at the time open to the public, the defendant had consent to enter. The DCA rejected the contention that the store employees withdrew consent when they became aware that the defendant entered the store for the purposes of committing a crime. "(E)vidence must show more than an implicit or subjective state of mind on the part of the victim to prove that consent to remain on the premises has been withdrawn," the DCA explained. "Here, the statements and actions of the employees were insufficient for a jury to infer that consent to remain on the premises had been withdrawn." [Franklin vs. State, WL 543218 (4th DCA 7/28/99)] Disclaimers - Sale Of "Look-Alike" Counterfeit Goods

The use of disclaimers cannot be used as a defense in cases involving the sale of goods with counterfeit trademarks, the 4th DCA held.
Elizier Stern was tried for violating section 831.05(1)(a), F.S., by selling counterfeit designer sunglasses to the general public. Stern maintained that he had conspicuously displayed large disclaimer signs at his booth stating that his sunglasses were look-a-likes. The trial court declined to give Stern's requested jury instruction that the use of disclaimers could be used as a defense, and Stern was convicted. The DCA affirmed.
81. "Once the counterfeit sunglasses leave the booth, no disclaimer, no matter how prominently displayed at the booth, would give notice to the general public that the sunglasses were not the actual designer glasses," the DCA said. "(T)he instruction requested by Stern could have misled the jury into thinking that the crime did not occur if the jury concluded the direct purchasers of the counterfeit sunglasses sold by Stern knew that Stern's sunglasses were look-a-likes." [Stern vs. State, WL 565479 (4th DCA 8/4/99)] Admissibility Standards Are Lower In Administrative Proceeding

A state agency seeking to administratively suspend a driver's license is not required to meet the stringent admissibility standards necessary in a civil or criminal trial, the 2nd DCA said.
The DCA rejected a lower court's determination that a hearing officer improperly considered an

unsworn report of the driver's blood-alcohol test. While sworn affidavits may be necessary for the test results to be admissible at a civil or criminal trial stemming from the alleged drunk driving, no such requirement is necessary for an administrative proceeding, the DCA said.
82. "The circuit court misconstrued (applicable statutes and rules) when it required the Department to comply with the more stringent admissibility requirements for blood-alcohol results in a civil or criminal trial, rather than the more relaxed requirements for administrative review of license suspensions," the DCA said. [Department of Highway Safety and Motor Vehicles vs. Anthol, WL 597443 (2d DCA 8/11/99)] Worker's Time Sheet Falsification Not "Deceit"

A state employee who had a coworker fill in for him while he tended to a family emergency should not have been fired for submitting a falsified time sheet, the 3rd DCA said.
Melvin Johnson, a security specialist with the Department of Children and Families, arranged for a fellow guard to cover the last two hours of his shift at South Florida State Hospital and privately agreed to pay the coworker for his time. Johnson informed his supervisor about the arrangement shortly after it happened and before he turned in his time sheet, leading a hearing officer to conclude that Johnson was not attempting to deceive the department when he submitted his time sheet. Nonetheless, the hearing officer found that Johnson's actions were an "attempt to defraud" the agency, a finding that provided the basis for the department's decision to dismiss Johnson.
83. The DCA said it could find no distinction between an attempt to deceive and an attempt to defraud, and said the inconsistency called for reversal of the order firing Johnson. The court ordered Johnson reinstated to his job at the South Florida State Hospital with back pay and attorney's fees. [Johnson vs. Department of Children and Families, WL 597272 (3d DCA 8/11/99)] Search of Student By School Official

Because a school resource officer's involvement was minimal, school officials needed only a reasonable suspicion to justify a search of a high school student, the 5th DCA held.
A high school resource officer was approached by a student and told that another student, identified in court records only as R.L., possessed marijuana. The officer immediately relayed the information to the school's assistant principal, who searched R.L. and found marijuana. The DCA said the school official had sufficient reasonable suspicion to justify the search. The court rejected R.L.'s contention that the assistant principal needed to have probable cause - which carries a higher standard - because of the officer's involvement in the incident.
84. "We find the deputy's involvement to be minimal and that reasonable suspicion was the appropriate standard," the DCA said. "The fact that the allegation was first made to the resource officer who passed the information on to the school official does not, in our view, require a finding that the official 'acted at the behest of law enforcement." [R.L. vs. State, (5th 8/13/99)] Reasonable suspicion: Internet chat rooms - Reliability Of Leads

A lead police develop through the relative anonymity of any Internet chat room must meet the same standards of reliability as a customary anonymous tip before it can provide officers with reasonable suspicion for an investigatory stop, the 2nd DCA held.
A detective, conducting an anonymous conversation on Internet chat room, arranged a meeting purportedly to engage in illegal activity. The other participant in the discussion gave his age and hair color and identified the type of car he would be driving. Near the designated meeting site, officers stopped a man matching the general age and hair color but driving a different vehicle, and arrested him based on a search of the vehicle. The DCA suppressed the evidence, comparing the situation to more common anonymous tip cases.
85. "All the information on which the detective acted was from the chat room participant, but there is nothing in the record to indicate that the detective's chat room participant was a reliable source of information," the DCA said. "(T)he police lacked a founded suspicion to stop (the defendant) for two reasons. First, the innocent details were only partially verified because the car did not match the

description. Second, and more importantly, the police failed to observe any additional suspicious circumstances." [Travers vs. State, (2d DCA 8/20/99)] Suppression Issues To Be Heard At Forfeiture Preliminary Hearing

A trial court erred in refusing to consider alleged Fourth Amendment violations during an adversarial preliminary hearing, the 4th DCA held.
During a hearing to determine whether a sheriff had probable cause to forfeit a defendant's truck and video camera and a substantial amount of cash, the judge refused to consider whether any Fourth Amendment violations occurred. The judge said those issues were to be covered at another hearing on a motion to suppress, which would be heard by the judge who would later try the case.
86. The DCA reversed, concluding that longstanding precedent holds that evidence derived from a search in violation of the Fourth Amendment must be excluded at a hearing to determine whether the government has probable cause for forfeiture. In response to the sheriff's complaint that the defendant failed to file either a motion to suppress or some other pleading raising Fourth Amendment claims, the DCA held that the defendant is not required to do so. Nevertheless, the DCA said that where a written pleading or motion raising the Fourth Amendment claim is not filed prior to the probable cause hearing and the government requests an opportunity to develop the evidence to respond to the Fourth Amendment claim, the court should grant a continuance for "a reasonable amount of time." [Golon vs. Jenne, (4th DCA 8/18/99)] Waiver of Miranda rights - Misinformation Before Questioning

Police authority to continue the interrogation of a suspect who makes a potentially equivocal assertion of his Miranda rights applies only to suspects who have already waived those rights and does not apply where no waiver was made, the 4th DCA held.
The court reversed multiple sexual battery and lewd act convictions of Kelly Dooley, disagreeing with the trial judge over whether Dooley properly agreed to waive his Miranda right to remain silent. After a detective carefully made sure Dooley understood all his rights under Miranda, Dooley said, "Um, I don't wish to waive my rights." The detective then told Dooley that waiving his rights at that time didn't mean he had to waive them in the future and that he could receive an appointed attorney later. Dooley then agreed to talk, and confessed. The DCA noted that the U.S. and Florida Supreme Courts have allowed questioning when a suspect is equivocal in invoking his Miranda rights after previously waiving them, but said Dooley never validly waived his rights and the detective improperly attempted to deceive him about the consequences of such a waiver.
87. "The state cites no case, nor are we able to find any case, which holds that law enforcement officers may continue an in-custody interrogation on the basis of even an equivocal assertion of the suspect's Miranda rights, without first obtaining a valid waiver of those rights," the DCA said. The detective's follow-up comment, the court said, "indicated that the defendant could speak with the officer without risk, that his later invocation of rights would prevent the statement from being used in court. The police may not use misinformation about Miranda rights to nudge a hesitant suspect into initially waiving those rights and speaking with the police." [Dooley vs. State, (4th DCA 8/25/99)] Probable Cause During Bus Search

An implausible statement by a nervous suspect does not, by itself, give police probable cause to arrest the suspect during a routine bus boarding, the 1st DCA said in reversing a drug conviction.
The court said officers lacked probable cause when they arrested Miranda Ames following their discovery of possible cocaine in a carry-on bag above her bus seat. Ames was escorted off the bus and later arrested after she acted nervously and gave a vague explanation in response to police questions. The arrest of Ames was invalid, the DCA said, and therefore the evidence police obtained from her is inadmissible as a product of the unlawful arrest.
88. "Without more, an implausible statement by a nervous suspect does not amount to probable cause for an arrest," the DCA said. "Police officers often have good reason to suspect that a crime has been

committed but that is not enough to justify an arrest. ... (T)he facts known by the detectives amounted to no more than a suspicion of criminal activity." [Ames vs. State, (1st DCA 9/3/99)] Investigatory Stop Solely Based On Anonymous Tip

An anonymous informant's tip, even if it proves to be accurate, is not sufficient to justify an investigatory stop, the 2nd DCA said.
The court reversed drug, weapons and other charges against a man who was stopped by officers based solely on a tip from an information who was a stranger to both officers. The officers testified that they identified Cedric Woodson from the informant's description and did not see the defendant engaged in any suspicious activity when they first spotted him. A struggle ensued when the officers attempted to question Woodson, leading to charges of battery on a law enforcement officer and opposing a law enforcement officer with violence, in addition to charges of possession of cocaine and carrying a concealed weapon.
89. The DCA agreed with Woodson that the police did not have any independent information on which to base the stop, and therefore all evidence gathered as a result of the stop must be suppressed. "(T)he anonymous tip in this case was limited to a description of Woodson and his location, which without confirmation or an independent investigation was not sufficient to justify the stop," the DCA said. [Woodson vs. State, (2d DCA 9/3/99)] Waiver Of Attorney-Client Privilege

An attorney cannot be compelled to testify about lawyer-client conversations without the client having a right to be notified and to appear at a hearing on the matter, the 2nd DCA held.
The DCA granted certiorari to Fredrick Rogers, who sought to block a trial court order directing his former attorney, Nat White, to testify about a conversation he had with Rogers shortly after Rogers was arrested on criminal charges. Rogers insisted on having his brother and cousin present while he spoke to White, who had represented him in a previous case. Rogers ultimately hired another attorney to represent him in this case. The state served an investigatory subpoena on White, who refused to answer questions based on attorney-client privilege. The state then obtained an immediate hearing, which was conducted without a court reporter and with no notice to Rogers. The judge granted the order compelling White to testify, reasoning that the privilege was waived when Rogers allowed third parties to be present in his initial conversation with White. Reversing, the DCA said the lower court should not have granted the state's request without allowing Rogers to be present at the hearing.
90. "There would be serious due process issues created by a procedure through which the client lost the privilege without notice or an opportunity to be heard. We hold that when an attorney is sub-poenaed under section 27.04 and raises the lawyer-client privilege as an objection to testimony, the alleged client has a right to be notified and to appear at any hearing on a motion to compel testimony from the attorney," the DCA said. [Rogers vs. State, (2d DCA 9/3/99)] Police Reverse Sting Without Apartment Renter's Permission

Although the conduct of police was "highly improper and offensive," drug convictions may stand against two men whose apartment was used by police for a reverse sting operation without their permission.
The divided 4th DCA expressed concerns about the police tactics, but affirmed the convictions for marijuana possession and delivery. Police armed with a search warrant found a substantial supply of marijuana in the defendants' apartment. After arresting the men, officers set up a reverse sting operation and arrested almost two dozen people who came to the apartment to buy drugs. The officers did not get the defendants' consent to use their apartment for this purpose. However, the DCA distinguished this case from earlier cases involving entrapment or the use of illegal substances manufactured by police, and said the reverse sting operation was separate from the charges against the defendants.
91. "Notably, the sting operation in the instant case was not targeted at appellants, the police did not supply the instrumentalities of the crime for which appellants were charged, and appellants were not

charged with any offenses stemming, directly or indirectly, from the reverse-sting operation. Appellants were charged with possession of the marijuana which was discovered pursuant to the search warrant within minutes of the police's arrival," the DCA said. "We cannot say that the government's conduct in this case was so outrageous that it prejudiced appellants' ability to receive a fair trial or violated judicial notions of fairness and justice in relation to the prosecution of appellants for the crimes with which they were charged." Dissenting, Judge Stone called the police conduct an "unreasonable and abominable intrusion" on the defendants' rights. [McDonald and Bryan vs. State, (4th DCA 9/8/99)] Explicit Consent Needed To Search Groin

A search that produced cocaine was improper because officers failed to get explicit consent from the suspect to search his groin area for contraband, the 1st DCA said.
The court threw out charges against a man who was followed and then searched by a police officer after he got off an airplane at Tallahassee Municipal Airport. Officers searched a duffel bag and then conducted a pat-down search, without ever telling the suspect he was free to leave. The officers never received clear-cut permission to search the suspect's groin area, which is where they found a packet of cocaine.
92. The trial court concluded that the suspect gave unspoken consent to the search of his groin, but the DCA noted that even the arresting officer acknowledged the suspect's gestures were ambiguous. "Proof merely of acquiescence to authority does not meet constitutional requirements," the DCA said. [Sims vs. State, (1st DCA 9/14/99)] Sex Charges OK Where Deputy Poses As Minor

The fact that a supposed 14-year-old boy turned out to be an adult sheriff's deputy doesn't block a man from being charged with attempted lewd and lascivious acts because his intent to commit the crime was the same, the 2nd DCA said.
The court said the defendant, John Hudson, crossed the line from preparatory to overt acts when he mailed airline tickets and cash to the person he thought was a New Hampshire youth who had responded to a personal ad in an adult magazine. Hudson was arrested when he came outside his home to welcome his intended guest. "Mr. Hudson's act of bringing the minor to his home from such a distance, even without bringing the boy into the house, constituted an overt act sufficient to support the crime of attempted lewd and lascivious acts. The deputy sheriffs were not required to wait until Mr. Hudson actually tried to perform an illicit sexual act before they arrested him for an attempt," the DCA said.
93. On appeal, Hudson argued that it was legally impossible for him to commit the charged offense because it is a victim-specific crime and no boy under the age of 16 was actually involved. Affirming the conviction, the DCA noted that Florida has not adopted the defense of legal impossibility and so the issue was whether Hudson had the requisite intent and committed sufficient overt acts to carry out his intent. [Hudson vs. State, (2d DCA 9/10/99)] Officer Needn't Secure A Warrant To Search Car Upon P/C

A police officer was not required to go through the time-consuming process of obtaining a search warrant to "accomplish the inevitable" after he smelled marijuana coming from a possible stolen car, the 5th DCA said.
The officer, suspecting the car might be stolen, approached it in a parking lot. He determined that it was not stolen, but smelled marijuana through a slightly opened window and saw a small handgun inside the vehicle. Without obtaining a warrant, the officer broke into the car and seized the marijuana and some cocaine. The trial court granted a motion to suppress but the DCA reversed, saying the judge mistakenly focused on whether the car had, in fact, been stolen in order to give the officer probable cause. The DCA said probable cause was established when the officer smelled marijuana, so the only question was whether the officer was obligated to get a search warrant for the movable vehicle. There was no such requirement under the circumstances, the DCA said.
94. "It is not the convenience of the police which is being catered to, nor is it an aid to more

expeditious law enforcement which is being achieved. Rather, it is a recognition that occasionally circumstances render it virtually impossible, or certainly unreasonable, to require police to take excessive measures to accomplish the inevitable. For example, as here, the policeman knew there was an illegal drug in the car because he smelled it. His duty at that time was to take the drug. He could have had the car towed, impounded and secured while he got a search warrant and then broken into the car and seized the contraband. Short of that operation, or one similar, he could not have performed his duty given the movability of the car," the DCA said. [State vs. Williams, (5th DCA 9/10/99)] Warrantless Search In University Dormitory

University police were not entitled to enter the common area of a dormitory suite without a warrant, and so drug evidence discovered while in the suite cannot be used as evidence, the 2nd DCA said.
The court ruled in favor of a University of South Florida student who was arrested on drug charges after university police officers were summoned to his dormitory building because someone reported smelling marijuana. The student talked to officers in the hallway outside his suite and admitted having marijuana. He offered to go inside the suite to retrieve the marijuana for the officers, but refused their request to accompany him. Nevertheless, the officers entered the suite with him, explaining it was for reasons of officer safety. While in the suite, they observed numerous baggies of marijuana and drug paraphernalia inside the student's bedroom.
The state argued that the officers were entitled to enter the common room of the dormitory suite because the student had no expectation of privacy in that room. The DCA disagreed, saying the location was comparable to a motel room or a room in a boarding house. Because the officers did not have a warrant and had no right to enter the suite, nothing they saw in the adjoining bedroom could be considered as seen in plain view, the DCA said.
95. Assistant Attorney General Jonathan Hurley represented the state on appeal. [Beauchamp vs. State, (2d DCA 9/15/99)] Improper Testimony By Detective

A detective's testimony that he contacted a "robbery clearing house" to check on a criminal defendant's history could have tainted the jury against the defendant and requires a new trial, the 3rd DCA held.
The court also said the trial court erred when it repeatedly permitted the state to elicit out-of-court statements relating accusatory information about the defendant in order to establish the logical sequence of events. The DCA called the evidence of Lawrence Vincent Chambers' guilt "equivocal," and said the judge's decisions and the detective's improper testimony could have contributed to the jury's guilty verdict.
96. "The only obvious relevancy of (the detective's) evidence was to attack Chambers' character and to demonstrate his possible involvement in other uncharged robberies which is ... presumptively harmful," the DCA concluded. [Chambers vs. State, (3d DCA 9/13/99)] Sexual Contact - Female Breast Defined As Sexual Organ

The kissing or fondling of a female breast should be considered sexual contact within the meaning of sentencing statutes, and therefore a trial court correctly enhanced a criminal sentence involving those acts, the 5th DCA said.
The court said neither case law nor statutes expressly define sexual contact or answer the basic question of whether fondling or kissing a female breast constitutes "sexual contact." The court looked to related statutes and even to the practices of societies around the world to conclude that the Legislature, by implication, considers the female breast a sexual organ. The court affirmed an enhanced sentence given to a man who was convicted of kissing and fondling the breasts of a child under 16.
97. Writing in dissent, Judge Peterson said the DCA opinion "unwittingly" expands the meaning of sexual battery by holding that the female breast is a sexual organ. He noted that statutes define sexual battery to include oral penetration by or union with the sexual organ of another. "Thus, the

contact between the mouth of one person and the female breast of another person without consent has been elevated by the majority's opinion to a sexual battery. I have not found any reported cases that expand the definition of sexual battery to include the interpretation the majority gives it today," he wrote. [Kitts vs. State, (5th DCA 9/17/99)] Lien Against Serial Killer's Profits Upheld

Serial killer Danny Rolling and his former fiancee are not entitled to profit from the proceeds of selling Rolling's life story and personal property and a trial judge properly issued a lien against them, the 1st DCA held.
Rolling and Sondra London had challenged the lien on the grounds that Florida's "Son of Sam" law, which is designed to prohibit criminals from profiting from their crimes, is unconstitutional. The DCA, however, found the lien valid on other grounds and declined to address the constitutionality of the statute. The trial judge had concluded that Rolling's personal property - including his "art," autographs, and a book recounting his crimes - was being marketed for profit by London. The lower court concluded that Rolling and London had a "special relationship" and Rolling was trying to support London by assigning or transferring to her the profit from his crimes.
98. "The evidence of the agreements between London and Rolling regarding publishing and profit rights, their special relationship, and her sale of items of Rolling's personal property support the court's finding that London is receiving benefits on Rolling's behalf and thus the lien attaches to the proceeds she has garnered from sale of Rolling's property. In addition, Rolling could not transfer his property to London to avoid the lien," the DCA held. [Rolling and London vs. State, (1st DCA 9/28/99)] Sting Operations Using Counterfeit Drugs

Law enforcement's use of counterfeit cocaine in reverse-sting operations is illegal but does not "shock the conscience" enough to reverse a conviction, the 4th DCA said.
The court said Florida law does not provide an exemption for officers engaging in the sale of fake drugs the way it does for genuine illicit drugs. However, the court said the sale of counterfeit drugs by police - as opposed to the actual manufacture of drugs by law enforcement - was not so outrageous as to invalidate a conviction for attempted purchase of cocaine. The court strongly encouraged the Legislature to amend the law to provide an appropriate exemption.
"(B)ecause we believe that appellate courts all over the state will continue to face issues related to the sale of imitation substances by police during reverse-sting operations, the better alternative would have the legislature establishing a specific exemption in section 817.564 that would allow for such sales. It is ironic that had the officer sold (the defendant) cocaine that had been seized and not counterfeited, we would no doubt have had one less case on our dockets," the DCA said. [Hamon vs. State, (4th DCA 9/22/99)]

Attorney General Opinions

1. Detention of sexually violent predators pending civil commitment

2. In response to a request from the general counsel of the Department of Children and Families, the Attorney General issued an advisory opinion (98-66, 10/28/98) stating in sum: "1) When a person who has been adjudicated not guilty by reason of insanity of a sexually violent offense is in the custody of the Department of Children and Families, the department is responsible for the detention of the person during proceedings under the Jimmy Ryce Act to determine whether he or she is a sexually violent predator subject to involuntary civil commitment; 2) The Department of Children and Families may contract with the sheriff of each county to provide secure facilities for such persons during the proceedings for involuntary commitment." Sexual predators - Jimmy Ryce Act Requires "Recommendation"

3. In response to a request from the general counsel for the Florida Prosecuting Attorneys Association

for reconsideration or clarification of advisory opinion 98-64, the Attorney General issued an advisory opinion (98-73, 12/1/98) stating in sum: "A state attorney may not, under the Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act, file a petition for the involuntary civil commitment of persons scheduled to be released on or after January 1, 1999, independent of a recommendation from the multidisciplinary team." Public Records - School Criminal History Records

4. In response to a request from the attorney for the Flagler County School District, the Attorney General issued an advisory opinion (99-01, 1/6/99) stating in sum: "1) Criminal history record information shared with a public school district pursuant to section 231.02, Florida Statutes, by the Federal Bureau of Investigation retains its character as a federal record to which only limited access is provided by federal law and is not subject to inspection and copying under Florida's Public Records Law; 2) In light of the conclusion that these records are not subject to inspection and disclosure, and pursuant to a contract between the school district and the Florida Department of Law Enforcement, acting as the agent of the Federal Bureau of Investigation for this purpose, these federal records may not be commingled with other public records such as those in a personnel file. However, information developed by the school district from further inquiry into references in the federal criminal history record information is a public record which should be included in a school district employee's personnel file." No Lawful Use Of Blue Lights On Non-Law Enforcement Vehicles

5. In response to a request from the City of Orlando police legal advisor, the Attorney General issued an advisory opinion (99-11, 3/2/99) stating in sum: "1) Section 843.081(2), Florida Statutes, prohibits the presence of blue lights on any nongovernmentally owned vehicle, regardless of whether the blue lights are actually in use; 2) The exception in section 843.081(3), Florida Statutes, for salespersons, service representatives, and other employees of businesses licensed to sell or repair law enforcement equipment would not permit an employee of such a company to drive a vehicle equipped with a flashing or rotating blue light for the employee's personal use." Grand Jury Meeting Outside of County Seat

6. In response to a request from the State Attorney for the Eighteenth Judicial Circuit, the Attorney General issued an advisory opinion (99-17, 4/12/99) stating in sum: "The Grand Jury, with the approval of the court, may conduct its proceedings at locations other than the county seat, as designated by the chief judge." Informal - Officers' Bill of Rights

7. In response to a request from state Representative Frank Farkas regarding the release of information and the Law Enforcement Officers' Bill of Rights, the Attorney General on 5/5/99 issued an informal opinion concluding in part: "(D)epending on what is already known by the public about a case, (the law) could, for all practical purposes, result in the identification of the officer. Moreover, information regarding the identity of the officer might be obtained from other records, for example if an officer was involved in an incident for which an incident report or an arrest report is filed, and a complaint about the officer's action is later filed with the law enforcement agency. The incident report or arrest report would not be closed pursuant to section 112.533, Florida Statutes, since it was not the complaint nor was it derived from the investigation of the complaint." Correctional Officers - Right To Carry Firearms

8. In response to a request from the Collier County Sheriff, the Attorney General issued an advisory opinion (99-28, 5/18/99) stating in sum: "A correctional officer holding an active certification from the Criminal Justice Standards and Training Commission is entitled to carry a weapon, concealed or unconcealed, on-duty or off-duty, throughout the state, in his or her capacity as an appointee or employee of the sheriff's office when authorized by the officer's employing agency." Usury - Prosecution Of Title Loan Lenders

9. In response to a request from the Broward County Sheriff, the Attorney General issued an advisory opinion (99-38, 6/14/99) stating in sum: "A secondhand dealer engaging in a title loan transaction who knowingly charges a repossession fee or other fee in addition to the twenty-two percent maximum monthly interest provided in section 538.06, Florida Statutes, or retains any proceeds from the sale of such motor vehicle in excess of the amount due on the loan, is subject to criminal prosecution pursuant to section 538.07(1), Florida Statutes. In addition, the secondhand dealer may be subject to criminal prosecution for usury, theft and racketeering." Union Rep May Not Attend Portion Of Employee Investigative Interview During Which Matters Confidential By Law Are Discussed

10. In response to a request from the general counsels of the Department of Management Services and the Department of Children and Families, the Attorney General issued an advisory opinion (99-42, 7/8/99) stating in sum: "A union representative may not attend that portion of an investigatory interview between the agency inspector general and an employee requiring discussion of information taken from a child abuse investigation that is confidential under section 39.202, Florida Statutes (1998 Supplement)." Informal - Return Of Stolen Property To Police Does Not Waive Pawnbroker's Property Rights After Case Closes

11. In response to a request from the Umatilla Police Chief, the Attorney General's Office on 8/23/99 issued an informal opinion concluding: "While a hold order is in effect, the pawnbroker must, upon request, release the property subject to the hold order to the custody of the appropriate law enforcement official for use in a criminal investigation. The release of the property to the custody of the appropriate law enforcement official, however, is not considered a waiver or release of the pawnbroker's property rights or interest in the property and upon completion of the criminal proceeding, the property must be returned to the pawnbroker unless the court orders other disposition." County Authority To Provide Car For Prosecutors

12. In response to a request from the St. Johns County Clerk of the Circuit Court, the Attorney General issued an advisory opinion (99-54, 9/17/99) stating in sum: "1) St. Johns County is authorized to provide vehicles for official use by employees of the State Attorney's Office as 'transportation services' within the scope of section 27.34(2), Florida Statutes; 2) In light of the answer to Question One, St. Johns County is authorized by section 938.05(3), Florida Statutes, to use Local Government Criminal Justice Trust Fund moneys to pay for such vehicles." Mutual Aid Agreements To Address Potential "Y2K" Complications Are OK

In response to a request from Lee O'Brien, Orlando Police Legal Advisor (and FAPA member), the Attorney General issued Advisory Legal Opinion 99-62 on 9/30/99 stating in sum: "1) The governing body of the City of Orlando may approve a mutual aid agreement as proposed to address potential problems related to Y2K complications; 2) The governing body of the City of Orlando may delegate to the chief administrative officer of the city the authority to enter into a mutual aid agreement on behalf of the city's law enforcement agency."

U.S. Supreme Court

1. Home Search Involving Short-Term Visitor

Short-term visitors in someone's home generally do not enjoy the same Fourth Amendment protections against police searches as do the home's residents or overnight guests, the U.S. Supreme Court said.
In a 6-3 ruling, the court reinstated the drug convictions of two men who visited a woman's apartment only long enough to place cocaine into plastic baggies. A police officer acting on a tip observed the men's actions through gap in closed window blinds, and the men were arrested when they left the apartment after 2-1/2 hours. The men claimed the officer's actions violated their Fourth Amendment rights, but the Supreme Court said the men could not argue an expectation of privacy in the apartment, which they visited only briefly and for primarily commercial purposes.
2. "(A)n overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not," Chief Justice Rehnquist wrote for the court. "(T)he purely commercial nature of the transaction engaged in here, the relatively short period of time on the premises, and the lack of any previous connection between respondents and the householder, all lead us to conclude that respondents' situation is closer to that of one simply permitted on the premises." [Minnesota vs. Carter, 12/1/98] Car Search Based On Traffic Ticket

A police officer cannot search a driver or his car without consent based solely on a routine traffic infraction where the officer has no reason to believe his safety is in jeopardy, the U.S. Supreme Court said.
The court in 1973 said police can search motorists after arresting them in order to disarm suspects and preserve evidence, but the justices refused to extend that authority to include stops for speeding and other routine violations. The court ruled in favor of an Iowa man who was pulled over for speeding, but then sentenced to jail after a search of his vehicle found marijuana under the driver's seat. The State of Iowa was supported by a national police organization in defending the search.
Writing for the unanimous court, Chief Justice Rehnquist rejected prosecutors' arguments in favor of the search, saying, "Once (the driver) was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car."
3. The court acknowledged the bright-line rule it established in 1973 for searches after an arrest, but said, "Here we are asked to extend that 'bright line rule' to a situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of property is not present at all. We decline to do so." [Knowles vs. Iowa, 12/8/98] Standards For Use of Non-Scientific Expert Witnesses

The standards for determining whether scientific expert testimony is admissible also apply to non-scientific experts, the U.S. Supreme Court said.
In a case that attracted amicus briefs from groups ranging from manufacturers and business organizations on one side to trial lawyers on the other, the court expanded its 1993 holding in Daubert v. Merrell Dow Pharmaceuticals. In Daubert, the court set out several factors to be followed in allowing scientific expert testimony, including whether the theories behind the testimony had been tested and were generally accepted by the scientific community. Unanimously reversing the 11th U.S. Circuit Court of Appeals, the court said those guidelines also now apply to non-scientific evidence, giving trial judges great discretion in applying their "gatekeeping" function.
4. "(I)t would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge. There is no clear line that divides the one from the others," Justice Breyer wrote for the court. "The trial judge's effort to assure that the specialized testimony is reliable and relevant can help the jury evaluate that foreign experience, whether the testimony reflects

scientific, technical, or other specialized knowledge." [Kumho Tire Company vs. Carmichael, 3/23/99] Teen Curfews, Student Drug Tests, Violence Against Women Act

The U.S. Supreme Court, in orders that were not accompanied by written opinions, resolved a number of cases by refusing to hear the appeals. Among the actions, the court:

* Agreed that a teen curfew in a Virginia city may be enforced. The curfew generally requires children younger than 17 to be off the streets from midnight to 5 a.m. on weekdays and from 1-5 a.m. on weekends. The justices declined to review a lower court's determination that the curfew was a valid approach to reducing juvenile violence and crime.

* Refused to reinstate an Indiana school district's requirement that students take a drug test before they can be reinstated after a suspension for disciplinary reasons. A lower court said drug tests can only be required of specific students who are suspected of using drugs or alcohol, and that a broader requirement violates students' privacy rights.

* Rejected an appeal that claimed the federal Violence Against Women Act is invalid because Congress exceeded its authority to limit interstate commerce when it made it a crime to cross state lines to harm a spouse or partner.

1. Search Of Car Passengers' Belongings

Police officers may search a passenger's personal belongings inside an automobile that they have probable cause to believe contains contraband, the U.S. Supreme Court held.
David Young was stopped for speeding and was searched when Young admitted that he used a syringe seen in his pocket for taking drugs. Two female passengers were ordered to exit the vehicle, and one of them left her purse behind. An officer searched the purse and found drug paraphernalia. The passenger was convicted, but the Wyoming Supreme Court reversed after concluding that the officers lacked authority to search the purse.
2. The justices reinstated the conviction, concluding that officers with probable cause to search a car may inspect passengers' belongings found in the car if they are capable of concealing the object of the search. Writing for the court, Justice Scalia said, "When there is probable cause to search for contraband in a car, it is reasonable for police officers - like customs officials in the Founding era - to examine packages and containers without a showing of individualized probable cause for each one. A passenger's personal belongings, just like the driver's belongings or containers attached to the car like a glove compartment, are 'in' the car, and the officer has probable cause to search for contraband in the car." [Wyoming vs. Houghton, 4/5/99] Defendant Retains Right To Silence During Sentencing

Because a guilty plea in the federal criminal system is not a waiver of the Fifth Amendment privilege against self-incrimination at sentencing, a court may not draw an adverse inference from a defendant's silence during sentencing, the U.S. Supreme Court held.
Amanda Mitchell pleaded guilty to federal charges of conspiracy and distributing cocaine, but at sentencing declined to answer a judge's question about details of the criminal transaction. The judge noted Mitchell's refusal to discuss details of the crime in imposing a 10-year sentence.
3. Reversing, the Supreme Court found a violation of Mitchell's constitutional right against self-incrimination. "By holding petitioner's silence against her in determining the facts of the offense at the sentencing hearing, the District Court imposed an impermissible burden on the exercise of the constitutional right against compelled self-incrimination," Justice Kennedy wrote for the court. [Mitchell vs. United States, 4/5/99] Search Of Attorney For A Testifying Grand Jury Client

Prosecutors cannot be sued for having an attorney searched during the grand jury testimony of his client, the U.S. Supreme Court held.
A defense witness who testified in the trial of Lyle and Erik Menendez was called before a grand jury to testify whether she had received letters from Lyle Menendez instructing her to give false testimony. Because the defense witness admitted she had given Lyle's letters to her attorney, the prosecutors had the attorney searched while the witness testified. The attorney sued the prosecutors, claiming the search prevented him from consulting with his client during the grand jury proceeding. A federal trial court granted summary judgment in favor of the prosecutors on qualified immunity grounds, but the 9th U.S. Circuit Court of Appeals reversed.
4. In a unanimous ruling, the Supreme Court concluded that the prosecutors did not violate the attorney's constitutional right to practice his profession when they executed a search warrant while the witness testified before the grand jury. "We hold that the Fourteenth Amendment right to practice one's calling is not violated by the execution of a search warrant, whether calculated to annoy or even to prevent consultation with a grand jury witness," Chief Justice Rehnquist wrote for the court. [Conn et al. vs. Gabbert, 4/5/99] Warrant Not Required To Seize Vehicle For Forfeiture

The Fourth Amendment does not require officers to obtain a warrant before seizing an automobile from a public place when they have probable cause to believe it is forfeitable contraband, the U.S. Supreme Court ruled in a Florida case.
Two months after Tyvessel White was observed using his vehicle to deliver cocaine, he was arrested at his workplace on unrelated charges. Officers then seized his vehicle without a warrant pursuant to the Florida Contraband Forfeiture Act. During an inventory search of the vehicle, the officers found cocaine. White was ultimately convicted of possession but the Florida Supreme Court reversed, concluding that absent exigent circumstances, the warrantless seizure was unconstitutional. The nation's highest court disagreed.
5. Writing for the 7-2 majority, Justice Clarence Thomas said, "Although, as the Florida Supreme Court observed, the police lacked probable cause to believe that respondents car contained contraband, they certainly had probable cause to believe that the vehicle itself was contraband under Florida law." Because the police seized White's vehicle from a public area, the warrantless seizure did not involve any invasion of White's privacy, the court concluded. Justices Stevens and Ginsburg dissented. [Florida vs. White, 5/17/99] Media "Ride-Alongs" With Law Enforcement

Law enforcement agencies violate the Fourth Amendment when they let journalists go with them into a private home to observe an arrest or search, the U.S. Supreme Court held.
Such media "ride-alongs" that moved into private homes violate the privacy rights of individuals who may be caught on camera or otherwise observed during the police activities, the court said in two related rulings. However, the justices said the Montana and Maryland law enforcement agencies involved in the cases are immune from prosecution because the legal standard was not clearly established at the time they allowed TV cameras, photographers and other journalists to accompany them on raids in 1992 and 1993.
News media lawyers argued that allowing media access to arrests and searches provides a valuable public service by enabling citizens to observe how law enforcement activities are conducted. The justices, however, unanimously sided with individuals who were photographed or recorded by news crews who accompanied officers into their homes.
"We hold that it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant," Chief Justice Rehnquist wrote for the court. "Surely the possibility of good public relations for the police is simply not enough, standing alone, to justify the ride-along intrusion into a private home. And even the need for accurate reporting on police issues in general bears no direct relation to the constitutional justification for the police

intrusion into a home in order to execute a ... warrant." [Wilson vs. Layne, 5/24/99]
6. [Hanlon vs. Berger, 5/24/99] Criminal Enterprise - Jury Finding of Specific Violations

A jury must unanimously agree on which specific violations make up a "continuing series of violations" under a federal statute that criminalizes the act of engaging in a continuing criminal enterprise, the U.S. Supreme Court held.
7. After he was convicted of engaging in a "continuing criminal enterprise" in violation of federal law, the appellant argued that the judge should have instructed the jury that it must agree on which three specific acts constituted a "series of violations" under the statute. Instead, the judge instructed the jury that it only needed to find three violations without agreeing on the particular offenses. The 7th U.S. Circuit Court of Appeals affirmed but the U.S. Supreme Court reversed. Writing for the majority, Justice Breyer held that the jury must agree on which three specific violations made up the "continuing series of violations" under the federal statute. The court rejected the government's argument that the "continuing series" language of the statute refers to drug business and not on particular violations that constitute the business. The dissenting justices argued that the majority ruling will make it difficult for the government to convict under the federal statute. [Richardson vs. United States, 6/1/99] Search & Seizure - Auto Exception Does Not Require Exigency

Police do not need to obtain a warrant before searching a vehicle when they have probable cause to believe it contains illegal drugs, the U.S. Supreme Court held.
Pursuant to a tip that Kevin Dyson had purchased cocaine and was carrying it in his vehicle, an officer stopped Dyson and found cocaine in the trunk. The previous day a reliable confidential informant had given the officer a description of the vehicle, the license plate number and the approximate time Dyson would be arriving with the cocaine. Even though officers had time to obtain a search warrant, they did not do so. Dyson was ultimately convicted but a Maryland appeals court reversed, concluding that the police needed to obtain a search warrant.
Reversing, the Supreme Court said the state court had misinterpreted the automobile exception to the Fourth Amendment's warrant requirement. "The holding of the (state court) that the 'automobile exception' requires a separate finding of exigency in addition to a finding of probable cause is squarely contrary to our holdings," the justices held in a per curiam opinion. [Maryland vs. Dyson, 6/21/99]

11th U.S. Circuit Court of Appeals

1. Federal Prohibition Of Possession Of Firearm When Under Domestic Violence Injunction Is Constitutional--

Congress did not exceed its authority under the Commerce Clause when it enacted a federal statute which prohibits firearm possession for anyone under an injunction to refrain from domestic violence, the 11th U.S. Circuit Court of Appeals held.
Ivan Cunningham, who was ordered by a state trial court to refrain from committing domestic violence, was convicted of violating 18 U.S.C. section 922(g)(8) when a firearm was found in his vehicle. Cunningham challenged the statute under the United States Supreme Court's 1995 decision in United States vs. Lopez where the justices invalidated a related statute which had outlawed the

possession of guns in school zones.
2. Unlike the provision invalidated in Lopez, the 11th Circuit said, this law contains an explicit jurisdictional element limiting its proscriptive reach to possession of firearms "in or affecting commerce." The defendant here, the court noted, "concedes that the firearm that the Tallahassee Police Department found in his possession had traveled in interstate commerce. We have held that no more is required to satisfy the jurisdictional limitations." [United States vs. Cunningham, 12/4/98]
Seizure of property - Notice and Hearing Required

The government must provide notice and hearing before seizing real property even if it does not intend to assert physical control of the property, the 11th U.S. Circuit Court of Appeals held. The court also held that the government must return any proceeds received during an illegal seizure.
The government began a civil forfeiture proceeding against a piece of real property owned by Robert Richardson after it was suspected that Richardson bought the property with funds derived from drug trafficking activities, in violation of 18 U.S.C., section 981. Although the government executed an arrest warrant on the property by posting a copy of its notice of the forfeiture proceeding, it declined to physically take the property. A federal trial court later granted summary judgment in favor of the government and ordered the property forfeited.
3. Notwithstanding the government's decision against taking physical control of the property and allowing Richardson to remain on the premises, the 11th Circuit held that Richardson's due process rights were violated because he received no notice or hearing prior to the property being seized. "(E)ven when the Government chooses not to exert its rights under a seizure warrant, it still impairs the historically significant 'right to maintain control over (one's) home, and to be free from governmental interference," the court said. The court said the government must return any rents or proceeds received during the period of illegal seizure, but concluded that in this case Richardson had not been deprived of any rents or other proceeds. [United States vs. 408 Peyton Road, 12/8/98]
No Requirement To Advise How To Seek Return Of Seized Property

When law enforcement authorities seize property for a criminal investigation, they are not required by the Due Process Clause to provide the owner with details on how to get the property back under state law, the U.S. Supreme Court held.
The court unanimously ruled in favor of a California city whose police officers provided notice of their seizure but did not provide detailed notice of the state procedures for return of seized property. The 9th U.S. Circuit Court of Appeals held that due process required such notice, but the Supreme Court disagreed.
"The notice required by the Court of Appeals far exceeds that which the States and the Federal Government have traditionally required their law enforcement agencies to provide. Indeed, neither the Federal Government nor any State requires officers to provide individualized notice of the procedures for seeking return of seized property," Justice Kennedy wrote for the court.
4. "(W)hen law enforcement agents seize property pursuant to warrant, due process requires them to take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return. Individualized notice that the officers have taken the property is necessary ... because the property owner would have no other reasonable means of ascertaining who was responsible for his loss. No similar rationale justifies requiring individualized notice of state-law remedies which, like those at issue here, are established by published, generally available state statutes and case law. Once the property owner is informed that his property has been seized, he can turn to these public sources to learn about the remedial procedures available to him. The City need not take other steps to inform him of his options." [City of West Covina vs. Perkins, et al., 1/13/99]
Narcotics-No Actual Possession

Because a defendant was not in possession of cocaine, he cannot be convicted of possession with intent to distribute, the 11th U.S. Circuit Court of Appeals held.

5. Jonathan Edwards agreed to purchase a half kilogram of crack cocaine for $8,000, unaware that the seller was an undercover officer. Edwards picked up a manila envelope from the officer's car trunk, inspected its contents and returned the envelope to the trunk. Edwards was subsequently arrested and convicted of possession with intent to distribute crack cocaine. Reversing, the 11th Circuit concluded that Edwards did not have "actual" possession of the contraband because he merely inspected it. The court also concluded that Edwards lacked constructive possession because the contraband was located in the officer's trunk. [United States vs. Edwards, 2/11/99] No Constitutional Right To Outdoor Activities For Prisoners

The constitutional rights of two inmates were not violated when they were placed on a suspension list depriving them of all outdoor exercise, the 11th U.S. Circuit Court of Appeals held.
Inmate Frankie Bass was denied outdoor exercise on various occasions as a result of his possessing contraband, stabbing another inmate and attempting to escape from prison. Inmate Leonard Bean had also been denied outdoor exercise on various occasions for murdering a corrections officer, possessing contraband and attempting to escape with Bass. The inmates sued corrections officials, claiming that their placement on the "Yard Suspension List" (YSL) violated their constitutional rights against cruel and unusual punishment and their rights to Due Process and Equal Protection.
6. "(I)t is clear that the framers would not have considered the plaintiffs' fate to be cruel and unusual," the Eleventh Circuit said. The court dismissed the inmates' equal protection claim that death row inmates are given four hours of yard exercise while inmates placed on the Yard Suspension List have none. The court concluded that a rational basis exists for this discriminatory treatment because death row inmates "have not necessarily shown themselves to be a threat to the internal operations of the prison, while persons on the YSL have." [Bass & Bean vs. Perrin et al., 4/1/99] Labor: Firing of Deputy For Lying OK Even Though Deputy Had Filed Sex Harassment Complaint

A Florida sheriff acted reasonably when he fired a deputy who improperly obtained confidential criminal histories and then lied about it to investigators, even though the deputy previously had filed a sexual harassment complaint, the 11th U.S. Circuit Court of Appeals said.
The court said the former Santa Rosa County sheriff's deputy failed to show that she was fired as a result of sexual harassment or that she received a harsher punishment than male officers who committed similar misconduct. The court said her case was not sufficiently similar to those of other officers she cited regarding the severity of her punishment, and determined that job actions involving her were isolated and too far removed from her sexual harassment complaint to prove retaliation. The deputy was accused of several incidents of misconduct, including obtaining confidential driver's license information for an acquaintance, and then lying about them to investigators.
7. The appeals court said the repeated nature of the deputy's misconduct was more serious than the incidents she cited involving other deputies. "Confidentiality goes to the very heart of law enforcement, as well as any employment relationship. It is quite reasonable for (the sheriff) to respond to such a breach of trust with the most serious punishment available," the court said. [Maniccia vs. Brown, 4/9/99] Labor: Qualified Immunity - Suit Against Police Chief

A trial court should have granted qualified immunity to a police chief who was sued by an officer alleging he was fired because of his race, the 11th U.S. Circuit Court of Appeals said.
The appeals court, which previously had rejected summary judgment in the case, said evidence subsequently produced by the chief showed that the fired officer's job performance had been inadequate, establishing a reasonable, non-racial basis for the firing. As a result, the 11th Circuit said, the trial court should have dismissed based on qualified immunity. The allegations were lodged against the late Ron Cochran, who was Fort Lauderdale Police Chief when the officer was fired and later became Broward County Sheriff. After reviewing the complete record, the 11th Circuit concluded that Cochran's actions in the case were "objectively reasonable" and the fired officer did not establish a violation of any clearly-established constitutional right.

8. "While the general proposition that it is illegal to discriminate against a person on the basis of race is clearly established, whether the defendant violated clearly established law depends on the particular facts of each case. The district court, mistaken in its belief that our previous opinion bound it to examine only the undisputed facts set out at the pleadings stage, did not analyze the expanded fact-based record at the summary judgment stage," the court said. [Brown vs. Cochran, 4/8/99] Search & Seizure - Detention To Determine Warrant Status

Officers properly detained a defendant during a traffic stop in order to determine if he was the subject of an outstanding arrest warrant, the 11th U.S. Circuit Court of Appeals held.
Officers saw Bobby Gene Simmons run a stop sign and detained him when they suspected he was the subject of an outstanding arrest warrant. During the detention, a drug-detecting dog alerted to the presence of narcotics in the vehicle. Simmons was arrested when officers found 30 small bags of cocaine under the driver's seat and a loaded handgun in the center console. However, a federal judge suppressed the evidence.
9. Reversing the suppression order, the 11th Circuit rejected the argument that the 17- to 26-minute detention was beyond the time it normally takes to write a citation. The appellate court also disagreed with the contention that the officers lacked reasonable suspicion to believe Simmons was the subject of an arrest warrant for a "Bobby Simmons" from a different county who had a different date of birth. Refusing to "indulge in unrealistic second-guessing" of officers at the scene, the appellate court concluded that the officers acted reasonably in detaining Simmons even though their warrant investigation did not produce definitive results. [United States vs. Simmons, 4/14/99] Limited Ban On Begging - Constitutionality

Fort Lauderdale's attempt to ban begging along a five-mile strip of beach in a high-traffic tourist area does not violate the First Amendment rights of beggars, the 11th U.S. Circuit Court of Appeals held.
The court rejected a challenge by a class of homeless people, who claimed the city regulation was not narrowly tailored to serve the city's legitimate interests. The court noted that the city allows begging on streets, sidewalks and other areas of the city, and that the restriction in the five-mile area is narrowly tailored to provide a safe, pleasant environment and to eliminate nuisance activity on the beach.
10. "The City has made the discretionary determination that begging in this designated, limited beach area adversely impacts tourism. Without second-guessing that judgment, which lies well within the City's discretion, we cannot conclude that banning begging in this limited beach area burdens substantially more speech than is necessary to further the government's legitimate interest," the court said. [Smith, et al., vs. City of Fort Lauderdale, 6/2/99] Search & Seizure - Scope of Consent

A police officer searching a minivan for drugs after a traffic stop acted within his authority when he popped two plastic snaps in order to pry open an area behind a door panel, the 11th U.S. Circuit Court of Appeals held.
The court said the Georgia officer's search did not exceed the scope of consent given by the van's driver and passenger, and said the minimal effect on the vehicle was insufficient to render the search outside the scope of consent. After completing a routine traffic stop, Deputy Tony Phillips asked for and obtained permission to search the van after telling the men that authorities had significant problems with drugs and stolen property along that stretch of Interstate 95. During the search the officer noticed that the interior door panel did not fit properly on the sheet metal, and when he pried back the panel he discovered packages of cocaine.
11. "While we have held that a search exceeds the scope of consent when an officer destroys a vehicle, its parts, or its contents, a search does not exceed the scope of consent merely because an officer forces open a secured compartment that reasonably may contain the objects of the search," the court said. "Because Phillips could reasonably have found at least some of the objects of the search behind the minivan's interior door panels, he did not exceed the scope of (the passenger's)

consent when he searched these areas." [United States vs. Zapata and Lorenzo, 7/13/99] Sovereign Immunity - State Suit Against Seminole Tribe

Saying the case "demonstrates the continuing vitality of the venerable maxim that turnabout is fair play," the 11th U.S. Circuit Court of Appeals said the State of Florida cannot sue the Seminole Tribe of Florida to halt unauthorized gambling operations.

The appeals court said the tribe enjoys sovereign immunity for the state's lawsuit under the Eleventh Amendment, the same provision that led the court to block the tribe from suing Florida in 1994 over the state's alleged failure to negotiate in good faith regarding the gambling activities. The court also approved a lower court's dismissal of a count against the Tribe's chief for failure to state a claim upon which relief could be granted. The state had sought both a declaration that the Tribe is conducting unauthorized class III gaming operations and an injunction preventing those operations in the absence of a compact between the state and the Tribe.

12. "(W)e decline to modify the doctrine of tribal sovereign immunity absent an express command to the contrary from either Congress or a majority of the Supreme Court," the 11th Circuit said. [State of Florida vs. Seminole Tribe of Florida and Billie, 7/20/99] Government Liability For Injured Employees

U.S. Supreme Court precedents require a conclusion that there is no special relationship that guarantees government employees constitutional protection from unreasonable risks of harm in the workplace, the 11th U.S. Circuit Court of Appeals said.

As a result, the court affirmed a lower court decision dismissing a claim brought by two jail nurses who sued a Georgia sheriff and county after they were brutally attacked by an inmate being held on aggravated assault charges. The 11th Circuit abandoned its 1989 holding in Cornelius vs. Town of Highland Lake, in which it held that state and local governments could be held liable for substantive due process violations for their failure to protect victims from harm caused by third parties where the government put the victim in "special danger" of harm. Less than three years after Cornelius, the Supreme Court in Collins vs. City of Harker Heights rejected a claim that a government employer has a federal constitutional obligation to provide its employees with certain minimal levels of safety and security in the workplace. The court noted that the government may be liable for injuries suffered by someone who is in custody, but said consensual employment relationships are different.

13. "After Collins, it appears the only relationships that automatically give rise to a governmental duty to protect individuals from harm by third parties under the substantive due process clause are custodial relationships, such as those which arise from the incarceration of prisoners or other forms of involuntary confinement through which the government deprives individuals of their liberty and thus of their ability to take care of themselves. Collins makes it clear that the fact a government employee would risk losing her job if she did not submit to unsafe job conditions does not convert a voluntary employment relationship into a custodial relationship, and therefore does not entitle the employee to constitutional protection from workplace hazards, one of which can be harm caused by third parties," the court said. "While deliberate indifference to the safety of government employees in the workplace may constitute a tort under state law, it does not rise to the level of a substantive due process violation under the federal Constitution." [White, et al., vs. Lemacks, et al., 8/10/99] Bribery Charges Against Government Contractor

A contract manager for a private company may be charged with soliciting a gratuity as a public official if government decision-makers rely on his input before making official decisions, the 11th U.S. Circuit Court of Appeals held.

The court affirmed the federal conviction of a contract manager employed by a company that received an Air Force contract. The manager served as the primary liaison between the Air Force and a smaller company selected to provide specialized equipment to the Air Force. He was convicted after being caught on tape offering to help the smaller company gain approval for cost-savings changes in exchange for the company paying him half the savings. The manager argued on appeal that he was

not a "public official" as required by the applicable federal statute, but the 11th Circuit disagreed.
14. " (I)n order to be considered a public official a defendant need not be the final decision maker as to a federal program or policy. Rather, it appears to be sufficient that the defendant is in a position of providing information and making recommendations to decision makers as long as the defendant's input is given sufficient weight to influence the outcome of the decisions at issue," the court said. "(A)lthough Appellant did not exercise the final judgment on contracting decisions, the information and recommendations he provided served as the basis for many of those decisions. As a result, it is clear that, in the performance of his duties, Appellant had some official responsibility for the carrying out of a government program." [United States vs. Kenney, 8/26/99] Qualified Immunity For Surprise Alcohol Inspection

Local Georgia law enforcement officers and a state revenue agent are entitled to qualified immunity for investigating underage drinking and after-hours sales of alcohol in nightclubs, the 11th U.S. Circuit Court of Appeals ruled.
The enforcement personnel acted properly in conducting two surprise inspections of a suspected source of improper alcohol sales, the court said. The business owners filed a civil rights suit against the local sheriff, two of his deputies and a state revenue agent, claiming they should have obtained a warrant before raiding the nightclub and they used excessive force by having 40 deputies present to check the identification of several hundred patrons. A lower court partly denied the officers' motion for summary judgment based on qualified immunity, but the appeals court said the motion should have been granted.
15. The fact that a large number of law enforcement officers were involved in the operation did not by itself constitute excessive force in the absence of allegations of force lodged by individual victims, the 11th Circuit said. As for the claim that officers should have gotten a warrant, the court said, "Requiring inspectors or other law enforcement agents to obtain warrants before conducting an investigation might alert nightclub and bar owners to the impending inspection, which would defeat the purpose of the inspection to investigate for violations," the 11th Circuit said. "(S)pecific notice of the inspection would have frustrated the purpose of the administrative search because the (owners) would have been alerted to prevent underage sales of alcohol or to secrete evidence of after hours sales." [Crosby vs. Paulk, et al., 9/10/99] Segregation of HIV-Positive Inmates

States do not have to show that the AIDS virus has actually been transmitted from one prison inmate to another in order to justify a policy that segregates HIV-positive inmates from the general inmate population, the 11th U.S. Circuit Court of Appeals said.
The court, upholding an Alabama prison policy that provides separate and different programs and opportunities for HIV-positive inmates, also said a trial court may properly consider "legitimate penological interests" in determining whether to offer separate programs for HIV-positive inmates. "We ... hold that when transmitting a disease inevitably entails death, the evidence supports a finding of 'significant risk' if it shows both (1) that a certain event can occur and (2) that according to reliable medical opinion the event can transmit the disease. This is not an 'any risk' standard: the asserted danger of transfer must be rooted in sound medical opinion and not be speculative or fanciful. But this is not a 'somebody has to die first' standard, either: evidence of actual transmission of the fatal disease in the relevant context is not necessary to a finding of significant risk," the court said. [Onishea, et al., vs. Hopper, et al., 4/7/99]

16. Special Note: 9th CA's Opinion On Detention Of Foreign National's Right To Contact Consulate

Customs officers violate a foreign national's rights under the Vienna Convention when they fail to notify him of his right to contact his nation's consulate, the 9th U.S. Circuit Court of Appeals held.
Jose Lombera-Camorlinga, a Mexican national, was arrested when customs officers found marijuana in

his vehicle. Although the customs officers advised Lombera-Camorlinga of his Miranda rights, they failed to inform him that he had the right to contact the Mexican Consulate. A federal trial court denied Lombera-Camorlinga's motion to suppress incriminating statements he gave to the customs officers, and he ultimately pled guilty to importation. The case was then reviewed by the 9th Circuit, which has jurisdiction over California and eight other Western states.

The 9th Circuit reversed, concluding that the customs officers violated Article 36(1)(b) of the Vienna Convention by failing to notify Lombera-Camorlinga of his right to contact the Mexican Consulate. On remand, the 9th Circuit asked the trial court to determine whether Camorlinga was prejudiced by the violation of the Vienna Convention. "Despite the importance of the Vienna Convention, and its status as the supreme law of the land, law enforcement officials continue to overlook the rights Article 36(1)(b) establishes for foreign nationals who are 'arrested, in prison, custody, or detention,'" the appeals court said. [United States vs. Lombera-Camorlinga, ____F3d ___ (9th Cir. 3/25/99)]

END OF CASE SUMMARY

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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